No. CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

CINEPLEX INC.

Respondent

BOOK OF AUTHORITIES
CLOSING ARGUMENT OF THE COMMISSIONER OF COMPETITION

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CASE **TAB**

LEGISLATION **TAB**

SECONDARY SOURCE **TAB**

1298417 Ontario Ltd. v. The Corporation of the Town of Lakeshore
[Indexed as: 1298417 Ontario Ltd. v. Lakeshore (Town)]

Ontario Reports

Court of Appeal for Ontario,
Feldman, MacFarland and Epstein JJ.A.
November 17, 2014

122 O.R. (3d) 401 | 2014 ONCA 802

Case Summary

Contracts — Interpretation and construction — Municipality and developer entering into subdivision agreement in which municipality undertook to provide capacity in its sewage system to proposed subdivision — Parties entering into supplementary agreement which stated in part that additional capacity was expressly reserved for developer's benefit and that municipality would not grant additional capacity for lands outside subdivision until subdivision was completed — Supplementary agreement properly interpreted as granting developer monopoly over sewer capacity — That part of supplementary agreement being ultra vires as it conflicted with municipality's obligation under s. 86(1) of Municipal Act to supply building lying along supply line with sewage public utility where there is sufficient capacity — Offending clause severed from supplementary agreement — Municipal Act, 2001, S.O. 2001, c. 25, s. 86(1).

The plaintiff, a developer, entered into an agreement with the defendant municipality in which the defendant undertook to provide capacity in its sewage system to the plaintiff's proposed subdivision. The parties subsequently entered into a supplementary agreement that provided for an enhancement to the town's sewage system that would increase the capacity available to the plaintiff's proposed subdivision. Article 3.1 of the supplementary agreement read, in part: "For greater certainty, said additional capacity shall be deemed to have been expressly reserved for the benefit of [the plaintiff's subdivision], and the Municipality shall not, prior to completion of full development and build out of residential and commercial buildings in [the subdivision], grant and/or approve additional capacity in the Existing System for lands outside of [the subdivision]". When the defendant provided another developer access to the enhanced sewage capacity prior to the completion of the plaintiff's subdivision, the plaintiff sued the defendant for breach of contract and claimed damages stemming from the loss of commercial tenancies to the competing developer. The trial judge found that the defendant had breached the supplementary agreement. He awarded the plaintiff damages of $2,423,860, based on the profits that the other developer purportedly realized from certain commercial tenancies. The defendant appealed.

Held, the appeal should be allowed.

Per Epstein J.A.: The trial judge properly interpreted art. 3.1 of the supplementary agreement as granting the plaintiff a monopoly over sewage capacity. Article 3.1 imposed a blanket restriction

on the defendant's ability to provide sewage capacity to others, regardless of the availability of unallocated capacity. Such a restriction conflicted with the defendant's statutory obligation under s. 86(1) of the *Municipal Act, 2001*, which provides that where there is sufficient capacity, a municipality shall, upon request, supply a building lying along a supply line with a sewage public utility. Under s. 86(1)(*c*) of the Act, a municipality, in assessing whether a sewage system's remaining capacity is sufficient to grant a request for supply, must take into account both capacity that is currently being [page402] used and capacity that has been reasonably allocated into the future. Article 3.1 was *ultra vires* the defendant's authority. The offending words should be severed from the supplementary agreement. The plaintiff failed to prove that the defendant breached art. 3.1, as revised.

Even if art. 3.1, as written, were enforceable and the defendant breached it, the damages claimed by the plaintiff were too remote. The plaintiff would only be entitled to nominal damages, fixed at $1.

Per Feldman J.A. (concurring in the result) (MacFarland J.A. concurring): If the trial judge's interpretation of art. 3.1 was correct, then art. 3.1 was *ultra vires* the defendant's authority because it conflicted with the defendant's obligation under s. 86(1) (*c*) of the *Municipal Act, 2001*. However, the trial judge made legal errors when interpreting art. 3.1, most importantly by reading the words that appeared to grant a monopoly in isolation, rather than construing the clause as a whole. Reading art. 3.1 as a whole, the proper interpretation that gave full effect to the words used, the surrounding circumstances and the intention of the parties was that art. 3.1 did not grant the plaintiff a complete monopoly over sewer capacity pending the completion of its development. Rather, the defendant contracted to provide the plaintiff with only sufficient sewer capacity required for the full development of the project, and promised not to grant another development any of the capacity required for the full development of the plaintiff's subdivision before that subdivision was completed. The defendant did not breach the contract. If that conclusion was wrong, the damages awarded by the trial judge were too remote.

Sattva Capital Corp. v. Creston Moly Corp., [2014] S.C.J. No. 53, 2014 SCC 53, 2014EXP-2369, J.E. 2014-1345, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 59 B.C.L.R. (5th) 1, 461 N.R. 335, 25 B.L.R. (5th) 1, 242 A.C.W.S. (3d) 266, **apld**

William E. Thomson Associates Inc. v. Carpenter (1989), 69 O.R. (2d) 545, [1989] O.J. No. 1459, 61 D.L.R. (4th) 1, 34 O.A.C. 365, 44 B.L.R. 125, 17 A.C.W.S. (3d) 209, 8 W.C.B. (2d) 527 [Leave to appeal to S.C.C. refused (1990), 71 O.R. (2d) x, [1989] S.C.C.A. No. 398, 65 D.L.R. (4th) viii, 105 N.R. 397*n*, 37 O.A.C. 398*n*], **consd**

Other cases referred to

Croplife Canada v. Toronto (City) (2005), 75 O.R. (3d) 357, [2005] O.J. No. 1896, 254 D.L.R. (4th) 40, 198 O.A.C. 35, 14 C.E.L.R. (3d) 207, 10 M.P.L.R. (4th) 1, 139 A.C.W.S. (3d) 368 (C.A.); *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, [1998] S.C.J. No. 59, 161 D.L.R. (4th) 1, 227 N.R. 201, J.E. 98-1562, 80 C.P.R. (3d) 321, 80 A.C.W.S. (3d) 871; *Hadley v. Baxendale* (1854), 156 E.R. 145, [1843-1860] All E.R. Rep. 461 (Exch. Ct.); *Holmberg v. Sault*

Ste. Marie Public Utilities Commission, [1966] 2 O.R. 675, [1966] O.J. No. 1034, 58 D.L.R. (2d) 125 (C.A.); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, J.E. 2002-617, 219 Sask. R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 112 A.C.W.S. (3d) 991; *Indian Molybdenum Ltd. v. The King*, [1951] 3 D.L.R. 497 (S.C.C.); *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36, 457 N.R. 40, 320 O.A.C. 135, 373 D.L.R. (4th) 601, 2014EXP-1471, J.E. 2014-826, EYB 2014-236837, 69 Admin. L.R. (5th) 289, 239 A.C.W.S. (3d) 1048; *McBride v. Johnson*, [1962] S.C.R. 202, [1962] S.C.J. No. 5, 31 D.L.R. (2d) 763, 37 W.W.R. 216, 1 R.F.L. (Rep.) 473; *Miller v. Convergys CMG Canada Ltd*., [2014] B.C.J. No. 1997, 2014 BCCA 311, [2014] 9 W.W.R. 641, 16 C.C.E.L. (4th) 49, 375 D.L.R. (4th) 171, 62 B.C.L.R. (5th) 72, 242 A.C.W.S. (3d) 336, 2014 CarswellBC 2260; [page403] *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, [2000] S.C.J. No. 64, 2000 SCC 64, 193 D.L.R. (4th) 385, 263 N.R. 1, [2001] 3 W.W.R. 1, J.E. 2001-64, 144 B.C.A.C. 203, 83 B.C.L.R. (3d) 207, 15 M.P.L.R. (3d) 1, REJB 2000-21473, 101 A.C.W.S. (3d) 818; *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd*., [2006] O.J. No. 1964, 270 D.L.R. (4th) 181, 211 O.A.C. 141, 18 B.L.R. (4th) 230, 46 R.P.R. (4th) 1, 148 A.C.W.S. (3d) 237 (C.A.); *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc*., [2008] 3 S.C.R. 79, [2008] S.C.J. No. 56, 2008 SCC 54, 298 D.L.R. (4th) 1, 68 C.P.R. (4th) 401, 48 B.L.R. (4th) 1, 260 B.C.A.C. 198, [2008] 12 W.W.R. 1, 69 C.C.E.L. (3d) 163, EYB 2008-148490, J.E. 2008-1919, [2008] CLLC Â210-042, 84 B.C.L.R. (4th) 1, 380 N.R. 166, 169 A.C.W.S. (3d) 790; *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] 1 S.C.R. 157, [2009] S.C.J. No. 6, 2009 SCC 6, 52 B.L.R. (4th) 165, [2009] 3 W.W.R. 577, 301 D.L.R. (4th) 522, 87 B.C.L.R. (4th) 1, 68 C.C.L.I. (4th) 161, 70 C.C.E.L. (3d) 157, 265 B.C.A.C. 1, EYB 2009-153214, J.E. 2009-241, [2009] CLLC Â210-010, 383 N.R. 217, 173 A.C.W.S. (3d) 151; *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675, [2012] S.C.J. No. 51, 2012 SCC 51, 296 O.A.C. 41, 435 N.R. 41, 2012EXP-3653, J.E. 2012-1952, 351 D.L.R. (4th) 476, 3 B.L.R. (5th) 1, 24 R.P.R. (5th) 1, 220 A.C.W.S. (3d) 348, affg (2010), 104 O.R. (3d) 784, [2010] O.J. No. 1772, 2010 ONCA 310, 93 R.P.R. (4th) 159, 319 D.L.R. (4th) 349, 261 O.A.C. 108, 71 B.L.R. (4th) 196; *St. Lawrence Rendering Co. v. Cornwall (City)*, [1951] O.R. 669, [1951] O.J. No. 495, [1951] 4 D.L.R. 790 (H.C.); *Standard Precast Ltd. v. Dywidag Fab Con Products Ltd*., [1989] B.C.J. No. 129, 56 D.L.R. (4th) 385, 42 B.L.R. 196, 33 C.L.R. 137, 13 A.C.W.S. (3d) 349 (C.A.); *Transport North American Express Inc. v. New Solutions Financial Corp*., [2004] 1 S.C.R. 249, [2004] S.C.J. No. 9, 2004 SCC 7, 235 D.L.R. (4th) 385, 316 N.R. 84, J.E. 2004-446, 183 O.A.C. 342, 40 B.L.R. (3d) 18, 18 C.R. (6th) 1, 17 R.P.R. (4th) 1, REJB 2004-53611, 128 A.C.W.S. (3d) 1002, 60 W.C.B. (2d) 90; *Unique Broadband Systems Inc. (Re)* (2014), 121 O.R. (3d) 81, [2014] O.J. No. 3253, 2014 ONCA 538, 13 C.B.R. (6th) 278; *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, 222 O.A.C. 102, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 156 A.C.W.S. (3d) 95

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APPEAL from the judgment of Grace J., [2013] O.J. No. 62, 2013 ONSC 99, 6 M.P.L.R. (5th) 227 (S.C.J.) for the plaintiff in an action for damages for breach of contract.

William V. Sasso, *Werner H. Keller* and *Jacqueline A. Horvat*, for appellant.

Claudio Martini, *Myron Shulgan* and *Maria Marusic*, for respondent.

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[1] **FELDMAN J.A.** (concurring) (MACFARLAND J.A. concurring): -- I have had the benefit of reading the reasons of Epstein J.A. I agree that the appeal should be allowed and the action dismissed because the damages claimed by the respondent, 1298417 Ontario Ltd. ("129"), the developer of the St. Clair Shores subdivision, and awarded by the trial judge, are too remote and not compensable for the breach of contract that was alleged.

[2] However, I would not uphold the trial judge's interpretation of the contract. I do not agree that the town entered into an *ultra vires* contract. In my view, the trial judge erred in interpreting the contract and finding that Lakeshore breached it.

A. *Article 3.1 does not Grant 129 a Monopoly over Sewer Capacity*

[3] The Supreme Court of Canada recently discussed the standard of review in cases involving the interpretation of contracts in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] S.C.J. No. 53, 2014 SCC 53, 373 D.L.R. (4th) 393. At para. 50, Rothstein J. began by stating that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix". To the extent that the process of contractual interpretation involves fact-finding and mixed questions of fact and law, the reasons that favour deference on such issues, set out in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, are applicable, particularly in cases where "[t]he legal obligations arising from [the] contract are . . . limited to the interest of the particular parties": *Sattva*, at para. 52.[1]

[4] However, "it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law", though courts should be cautious in doing so: *Sattva*, at paras. 53-54. Examples of extricable [page405] legal errors include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor", as well as the failure to construe the contract as a whole: *Sattva*, at paras. 53 and 64.

[5] The provision at issue is art. 3.1 of the supplementary agreement between Lakeshore and 129, which states:

> The Municipality hereby grants and approves the allocation of additional capacity in the Existing System so as to allow for full development of the St. Clair Shores Subdivision, in compliance with the existing zoning provisions for the said Subdivision. For greater certainty, said additional capacity shall be deemed to have been expressly reserved for the benefit of the St. Clair Shores Subdivision, and the Municipality shall not, prior to completion of full development and build out of residential and commercial buildings in the St. Clair Shores Subdivision, grant and/or approve additional capacity in the Existing System for lands outside of the St. Clair Shores Subdivision.

(Emphasis added)

[6] The trial judge read the second half of the second sentence (underlined above) as Lakeshore effectively granting 129 an exclusive right or monopoly over sewer capacity until the St. Clair Shores subdivision was completed. I agree with my colleague, that if the trial judge's interpretation of art. 3.1 is correct, then art. 3.1 is *ultra vires* the authority of Lakeshore because it conflicts with Lakeshore's obligation under s. 86(1)(c) of the *Municipal Act, 2001*, S.O. 2001, c. 25.

[7] In my view, however, the trial judge made extricable legal errors when interpreting art. 3.1, most importantly by reading the words that appear to grant a monopoly in isolation, rather than construing the clause as a whole. Reading art. 3.1 as a whole, the proper interpretation that gives full effect to the words used, the surrounding circumstances, and the intention of the parties is that art. 3.1 does not grant 129 a complete monopoly over sewer capacity pending the completion of the St. Clair Shores subdivision. Rather, Lakeshore contracted to provide 129 with only sufficient sewer capacity *required for the full development of the St. Clair Shores subdivision*. Lakeshore merely promised not to grant another development any of the capacity

required for the full development of the St. Clair Shores subdivision before that subdivision was completed.

[8] Read in isolation, the clause underlined above may well bear the meaning attributed to it by the trial judge. However, it is an extricable error of law to read a provision of a contract in isolation rather than construe the contract as a whole. In *Sattva*, Rothstein J. stated, at para. 64:

> I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). [page406] If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

[9] When reading art. 3.1 as a whole, one looks first at the first sentence, in which Lakeshore grants "the allocation of additional capacity in the Existing System so as to allow for full development of the St. Clair Shores Subdivision". In other words, the grant of sewer capacity is not unqualified or unlimited; it is a grant given for the stated purpose of allowing for the full development of the St. Clair Shores subdivision.

[10] The second sentence of art. 3.1 is a further explanation of the first sentence. It begins with the words "For greater certainty", indicating that it is intended to provide a fuller understanding of the first sentence. The second sentence refers to "said additional capacity", that is, the capacity that will "allow for full development of the St. Clair Shores Subdivision". That "said additional capacity" is deemed to be reserved for the benefit of the St. Clair Shores subdivision. Finally, the second half of the second sentence says that Lakeshore shall not grant "additional capacity in the Existing System" -- *i.e.*, the capacity referred to in the first sentence that is required for full development of the St. Clair Shores subdivision -- to other lands prior to completion of the buildings in the St. Clair Shores subdivision.

[11] When interpreting the second half of the second sentence, the trial judge failed to consider that the first sentence is the operative portion of the grant, and the second sentence is there only "[f]or greater certainty". Therefore, by its plain language, the second sentence cannot change the meaning and intent of the first sentence. The first sentence grants only the amount of additional capacity necessary for the full development of the St. Clair Shores subdivision, but not more. The disputed clause that appears to grant a monopoly must be interpreted in that context.

[12] The trial judge's interpretation also failed to give effect to the intent of the parties, which the Supreme Court has emphasized is the overriding concern in contractual interpretation. Rothstein J. wrote, at para. 47 of *Sattva*:

> . . . the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65 *per* Cromwell J.). [page407] To

> do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[13] One of the key surrounding circumstances was that any contract that Lakeshore entered into had to comply with the *Municipal Act, 2001*. The trial judge erred in law in his conclusion that granting the sewer capacity monopoly to 129, to the exclusion of all other developers, was not *ultra vires* an Ontario municipality, because it is contrary to s. 86 of the *Municipal Act, 2001*. Having made this error, he failed to take into account, in interpreting the second half of the second sentence, the fact that the interpretation he gave would result in an illegal, and therefore unenforceable, contract, which could not have been the intention of Lakeshore. Nor would 129 have intended that a provision granting it additional sewer capacity in fact be unenforceable.

[14] In addition, when interpreting contracts, courts prefer to give the contractual provisions a meaning that will make them legal, rather than illegal and unenforceable. As this court observed in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, at para. 57:

> It is well accepted that "where an agreement admits of two possible constructions, one of which renders the agreement lawful and the other of which renders it unlawful, courts will give preference to the former interpretation": John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at 729.

[15] Because the trial judge failed to recognize that his interpretation of the contract made art. 3.1 *ultra vires*, he failed to prefer an interpretation of art. 3.1 that rendered it legal and enforceable rather than illegal and unenforceable.

[16] To summarize, in art. 3.1, Lakeshore agreed to grant 129 sufficient sewer capacity to allow for the full development of the St. Clair Shores subdivision. To that end, Lakeshore also agreed not to grant any of the capacity that 129 needed to fully develop the St. Clair Shores subdivision to any other development before the St. Clair Shores subdivision was completed.

[17] This interpretation is the result of reading art. 3.1 as a whole. It recognizes that the phrases "additional capacity in the Existing System" and "additional capacity" are used in the first sentence and consistently and in the same way in the second sentence of art. 3.1, and are therefore both modified by the important qualification, "so as to allow for full development of the St. Clair Shores Subdivision". This interpretation recognizes [page408] the context of the municipality's obligations under s. 86(1) of the *Municipal Act, 2001*. It gives full effect to the intent of the parties and fully complies with the applicable principles of contract interpretation.

B. *Lakeshore did not Breach the Contract*

[18] The trial judge observed that the issue of breach "seems obvious". He interpreted art. 3.1 as giving 129 an effective monopoly over sewage capacity until the St. Clair Shores subdivision was completed. Lakeshore violated the monopoly by allocating sewage capacity to another developer before the St. Clair Shores subdivision was completed. The trial judge found that, therefore, Lakeshore "did the very thing it promised not to do".

[19] The trial judge nevertheless also examined whether there was sufficient capacity in the enhanced sewage system to accommodate full development of both the St. Clair Shores subdivision and the Tecumseh Golf lands and found that there was not. On that analysis, Lakeshore would have been in breach of the contract, even as properly interpreted.

[20] My colleague used the doctrine of severance to effectively reach the same result that I have regarding the proper interpretation of art. 3.1. Based on that interpretation, under Issue five, she discusses whether Lakeshore breached the agreement by allocating sewer capacity to the Tecumseh Golf lands development. I agree with her analysis and conclusion under Issue five that, on the record, the future sewer requirements of the developments could not be known in 2005, and consequently, there was no evidence of a breach of art. 3.1, properly interpreted.

C. *There Are No Damages*

[21] I also agree with my colleague that the damages claimed and awarded by the trial judge are too remote from the alleged breach and are not compensable. On that basis alone, the judgment would be set aside and the action dismissed.

D. *Conclusion*

[22] For these reasons, I would allow the appeal and grant judgment dismissing the action.

EPSTEIN J.A.: --

Introduction

[23] The appellant, the Town of Lakeshore, and the respondent, 1298417 Ontario Limited, a developer, entered into a subdivision [page409] agreement in which Lakeshore undertook to provide capacity in its sewage system to the respondent's proposed development. Subsequently, the parties entered into a supplementary agreement that provided for an enhancement to the town's sewage system that would increase the capacity available to the respondent's proposed development. When Lakeshore provided another developer access to the enhanced sewage capacity prior to the completion of the respondent's development, the respondent sued Lakeshore for breach of contract. The respondent claimed damages stemming from the loss of commercial tenancies to the competing developer.

[24] The trial judge found that by providing the other developer access to the sewer system, Lakeshore breached the supplementary agreement. He awarded the respondent damages of $2,423,860, based on the profits that the other developer purportedly realized from certain commercial tenancies.

[25] Lakeshore appeals. Lakeshore argues that the trial judge erred in interpreting the supplementary agreement, specifically art. 3.1, as prohibiting it from allocating sewage capacity to anyone else pending completion of the respondent's subdivision. Lakeshore's position is that, properly interpreted, art. 3.1 requires it to provide the respondent with sufficient capacity to complete its subdivision. Lakeshore argues that the respondent failed to prove any breach, since the evidence does not establish that the capacity in the system is insufficient to allow for the completion of the respondent's subdivision. Lakeshore submits in the alternative that, if the

trial judge's contractual interpretation is correct, the supplementary agreement is *ultra vires*. Lakeshore further contends that even if it did breach the supplementary agreement, the trial judge's assessment of damages cannot stand.

[26] For the reasons that follow, I would allow the appeal, set aside the judgment below and dismiss the action. In my view, the last portion of art. 3.1 is *ultra vires* as it imposes a blanket restriction on Lakeshore's ability to provide sewage capacity to others, regardless of the availability of unallocated capacity. Such a restriction conflicts with Lakeshore's statutory obligation under s. 86(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "Act"), which provides that where there is sufficient capacity, a municipality shall, upon request, supply a building lying along a supply line with a sewage public utility.

[27] My conclusion that a portion of art. 3.1 of the supplementary agreement is *ultra vires* does not end the analysis. In the circumstances, it is appropriate, in my view, to sever the *ultra vires* portion, particularly having regard to the fact that the supplementary agreement contains a "severability clause". [page410]

[28] In art. 3.1, as revised after severance, Lakeshore promises 129 sufficient sewage capacity to enable it to complete St. Clair Shores. This promise is enforceable. However, as of the trial date, the evidence does not establish that Lakeshore will be unable to honour that promise. As a result, the action must fail.

[29] For completeness, I have also considered Lakeshore's appeal with respect to damages. In my view, the trial judge erred in his determination of damages. The type of damages 129 sought was too remote.

The Facts

The subdivision agreement

[30] In 1998, 1298417 Ontario Limited ("129") purchased 170 acres of land (the "Lands") for $6.5 million. At the time, the Lands were vacant, undeveloped and unserviced. 129 proposed to build a subdivision known as St. Clair Shores on the Lands. To this end, on January 4, 2000, the parties entered into a subdivision agreement.

[31] Under the terms of the agreement, 129 promised to design and install, at its expense, all required services including sanitary sewers. In the subdivision agreement, Lakeshore stated its intention to construct a new trunk main. The subdivision agreement provided that, pending completion of the new trunk main, 129 would have access to a specified amount of capacity (0.8 cubic feet per second or "cfs") in the existing downstream system that serviced that part of the town in order to outlet St. Clair Shores' sewage. If it turned out that there were additional capacity in the downstream system, such capacity would be allotted to 129. 129 agreed to pay for any works necessary to take advantage of any additional capacity.

[32] 129's consulting engineers, Hanna, Ghobrial and Spencer Ltd. ("Spencer"), designed the sewer system for the new subdivision. The system, ultimately approved by the required public authorities, including Lakeshore, was designed to service St. Clair Shores and the existing uses on two neighbouring properties. The system would outlet into Lakeshore's existing downstream system, as set out in the subdivision agreement. One of the neighbouring properties was a golf

driving range on the Tecumseh Golf lands (the "TGL").

The supplementary agreement

[33] By 2003, the sewage system Spencer designed had been installed underneath the Lands and 129 had completed the first phases of commercial and residential development. 129 asked [page411] Lakeshore to approve further phases of development. However, Lakeshore had not constructed the new trunk main and became concerned about the sufficiency of sewer capacity as development of the subdivision progressed. 129 took the position that there was ample sewage capacity in the existing downstream system to permit further residential and commercial development. Lakeshore therefore asked its engineer, Stantec Consulting Ltd., to examine and report on the matter.

[34] In a report dated August 22, 2003, Stantec recommended that improvements be made to the downstream system to increase its capacity, such that 1.5 cfs of sewage capacity could be allocated to St. Clair Shores. In a further report, dated September 12, 2003, Stantec proposed that the improvements, estimated to cost $730,000, be shared roughly equally between Lakeshore and 129. 129 agreed. On September 22, 2003, Lakeshore's council approved the report's recommendations.

[35] During the next 12 months, 129 through its lawyer, Jeffrey Slopen, and Lakeshore through its planner, Cindy Prince, negotiated a supplement to the subdivision agreement in order to incorporate Stantec's recommendations. Following passage of an enacting by-law on October 25, 2004, the parties entered into a supplementary agreement. The supplementary agreement set out, among other things, the parties' responsibilities relating to the enhancement of the downstream system.

[36] Article 3.1 of the supplementary agreement, the interpretation of which is the focus of this appeal, reads as follows:

> The Municipality hereby grants and approves the allocation of additional capacity in the Existing System so as to allow for full development of the St. Clair Shores Subdivision, in compliance with the existing zoning provisions for the said Subdivision. For greater certainty, said additional capacity shall be deemed to have been expressly reserved for the benefit of the St. Clair Shores Subdivision, and the Municipality shall not, prior to completion of full development and build out of residential and commercial buildings in the St. Clair Shores Subdivision, grant and/or approve additional capacity in the Existing System for lands outside of the St. Clair Shores Subdivision.

The golf lands development

[37] In the summer of 2005, Manning Developments Inc. ("MDI") sought access to sewage capacity to develop a two-acre portion of the TGL. Counsel for Lakeshore advised MDI as follows:

> It is our understanding that you are concerned that the Supplementary Agreement . . . as amended . . . excludes [the TGL] from available sanitary sewage capacity. In our view, you[r] conclusion is not correct. [The TGL] are clearly described as [B]enefiting [L]ands in the

> Agreement and therefore will have access to additional sewage capacity not required by St. Clair [page412] Shores upon paying the costs as outlined in the agreement. Having regard to all of the circumstances, the agreement was not intended to prevent the [B]enefiting [L]ands from developing prior to the completion of St. Clair Estates but rather to ensure sufficient capacity for that development. We have been assured that there is sufficient capacity to complete St. Clair Estates as well as to service [the TGL].

[38] As part of the original design of the subdivision, 129 retained a one-foot reserve on the north side of the Lands. This one-foot reserve blocked TGL's access to the sewer line. To allow MDI to connect the TGL to the existing sewage system, Lakeshore asked 129 for a transfer of the one-foot reserve. Lakeshore took the position that it was entitled to the conveyance pursuant to the subdivision agreement. 129 refused.

[39] Mr. Slopen wrote a letter to Lakeshore's counsel dated November 3, 2005, asserting that Lakeshore had agreed that the TGL would not be serviced until 129 had completed St. Clair Shores. He indicated that Lakeshore granted this concession in consideration of 129's commitment to spend in excess of $10 million to service the subdivision and the resulting tax benefit to Lakeshore.

[40] Through its counsel, Lakeshore responded by confirming that it intended to comply with its contractual obligations. However, Lakeshore disagreed with 129's interpretation of the parties' obligations under the supplementary agreement. Lakeshore asserted that it could not withhold capacity from the TGL because sewage is a municipal service and there was sufficient capacity in the system to service both the TGL and St. Clair Shores. Lakeshore argued that it would be unreasonable to interpret the agreement as promising 129 a market advantage over others.

[41] In 2007, over 129's objection, Lakeshore expropriated the one-foot reserve. In the expropriation proceeding, 129 and Lakeshore filed an agreed statement of facts in which 129 took the position that there was adequate capacity in the system for St. Clair Shores and the two-acre portion of the TGL that was being developed by MDI.

[42] Ultimately, Lakeshore allowed MDI to connect to the sewage system that ran underneath the Lands. The TGL were developed. By March 2007, MDI had leased 17,265 square feet of commercial space to tenants including Boston Pizza, Pizza Pizza and Bulk Barn.

[43] In proceedings commenced in July 2007, 129 sued Lakeshore for breach of contract, claiming damages stemming from the loss of these commercial tenancies to MDI. [page413]

The Trial Decision

[44] In analyzing the "scope of the parties' agreement", at para. 133, the trial judge identified the issue as being "*when* [Lakeshore] was permitted to allocate sewage capacity to someone other than 129 in light of the provisions of the Supplementary Agreement" (emphasis in original).

[45] The determination of that issue rests on the interpretation of art. 3.1.

[46] The trial judge summarized the parties' positions. According to Lakeshore, while it promised that 129 would have sufficient sewage capacity to complete St. Clair Shores, it did not promise that 129 would have a monopoly, exclusivity or priority over development in that part of

the town until the subdivision was fully developed. According to 129, it was promised such a priority as Lakeshore had agreed not to allocate sewage capacity in the existing system to anyone else until St. Clair Shores was fully developed.

[47] The trial judge accepted 129's interpretation. It followed that by allocating sewage capacity to MDI prior to the completion of St. Clair Shores, Lakeshore did the very thing it promised not to do. Lakeshore was therefore in breach of the supplementary agreement.

[48] The trial judge went on to reject the reasons Lakeshore advanced for why it should not be found to have breached the supplementary agreement.

[49] The only issue relevant to this appeal is the trial judge's rejection of Lakeshore's *ultra vires* defence. Lakeshore argued that its statutory duty to supply sewage public utility, under s. 86(1) of the Act, prevented it from denying access to MDI: as a result, any agreement that purported to prevent it from honouring its statutory obligations is *ultra vires* and therefore unenforceable.

[50] Upon hearing expert evidence from both sides, the trial judge found that the sewage capacity that ultimately will be required for the full development of St. Clair Shores and the TGL will exceed 1.5 cfs, which was the capacity in the enhanced downstream system allocated to St. Clair Shores. As a result, the trial judge concluded that Lakeshore was not obligated to provide sewage capacity to MDI under s. 86(1) of the Act. In addition, he found that s. 86(1) "did not affect [Lakeshore's] contractual obligations to 129" (para. 198).

[51] In awarding 129 damages, the trial judge referred to the evidence as limited, but sufficient to support the following findings, at para. 222: [page414]

> [F]irst, if the Supplementary Agreement had not been breached, sewage capacity would not have been allocated to MDI; second, without the allotment, [the TGL] would not have been developed; third, there was precious little alternative commercial space in the vicinity of the Lands before completion of the MDI and Spidrock developments and fourth, income 129 otherwise would have generated was lost.

[52] Based on these findings, the trial judge was satisfied that there was a "reasonable probability" that 129 would have leased commercial space on the Lands had Lakeshore not breached the supplementary agreement and allowed MDI to develop. After considering the evidence relevant to the specific leases upon which 129 relied, as well as the costs of developing the commercial space, and then applying a contingency allowance to reflect a degree of uncertainty, the trial judge concluded that 129 sustained damages of $2,423,860 as a result of Lakeshore's breach.

[53] The trial judge dismissed 129's claim for punitive damages.

Issues on Appeal

[54] This appeal raises the following issues:

(1) Did the trial judge err in interpreting art. 3.1 of the supplementary agreement?

(2) What is the proper interpretation of s. 86(1) of the Act?

(3) Is art. 3.1, or a portion of the provision, *ultra vires* as a result of Lakeshore's obligations pursuant to s. 86(1)?

(4) If art. 3.1, or a portion of the provision, is *ultra vires*, should the offending words be severed?

(5) If severance is permitted, do the facts demonstrate that Lakeshore breached art. 3.1, as revised?

(6) If Lakeshore, in providing sewage capacity to MDI, breached an enforceable agreement, what remedy is 129 entitled to?

Analysis

Issue one -- Did the trial judge err in interpreting art. 3.1 of the supplementary agreement?

[55] The trial judge accepted 129's interpretation of art. 3.1 of the supplementary agreement. He found that Lakeshore had promised not to provide sewage capacity in the existing downstream system to anyone other than 129 until the completion of St. Clair Shores. [page415]

[56] The trial judge set out his reasons for accepting 129's interpretation, at para. 136:

I make this finding because:

a. First, 129 sought -- and was given -- priority from the outset of its relationship with [Lakeshore]. As noted previously, the existing system's known capacity (0.8 cfs) was allotted to 129 in its entirety in article D.4 of the Subdivision Agreement. If additional capacity was identified, 129 was to receive that allotment too;

b. Second, the reason for the inclusion of article D.4 in the Subdivision Agreement still existed. Capacity in the existing/downstream system was limited. Construction of a new trunk line would have eliminated the problem. However, that work had never been undertaken. While the existing/ downstream system was to be enhanced, capacity was still limited;

c. Third, the Supplementary Agreement was a product of discussions following delivery of Stantec's August 22, 2003 report. It identified 1.5 cfs of capacity in the existing system if enhancements were made. Stantec did not discuss the capacity needed to complete development of the Lands or [the TGL]. 129's plans for developing vacant parcels were not yet fully known. [Lakeshore] seeks to ascribe to Stantec an opinion it did not form. I should add here that the author of Stantec's report -- Mr. Manzon -- did not testify. He is no longer employed by Stantec. Donald Joudrey of Stantec did testify both as a fact and, ultimately with the consent of 129's counsel, expert witness. In cross-examination Mr. Joudrey fairly acknowledged that he assumed 1.5 cfs was sufficient to allow completion of development of 129's lands but could point to nothing as a foundation for it;

d. Fourth, sewage capacity was of continuing concern to 129. Article 3.1 included a qualification from the first draft: [Lakeshore] was prohibited from allocating sewage capacity to others *if* the downstream system would no longer be able to

accommodate full development of the Lands. [Lakeshore's] March 31, 2004 request for significant changes left the qualification untouched;

e. Fifth, the final version of article 3.1 reflected revisions made by Mr. Slopen to make 129's position -- and hence priority -- even more clear. The qualification was deleted. In its place was a prohibition: sewage capacity could not be allocated by [Lakeshore] to MDI or anyone else until 129's development was complete. [Lakeshore] signed the Supplementary Agreement in that form.

(Italics in original; underlining added)

[57] In *Sattva Capital Corp. v. Creston Moly Corp*., [2014] S.C.J. No. 53, 2014 SCC 53, 373 D.L.R. (4th) 393, Rothstein J. set out the standard of review for contractual interpretation. He wrote for the court, at para. 50:

> Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. [page416]

[58] *Sattva* directs that an appellate court should defer to a trial judge's contractual interpretation unless it was based on an extricable error of law.

[59] With respect, I am of the view that, in interpreting the supplementary agreement, the trial judge may have erroneously taken into account the factors found in parts of subparas. d. and e. in para. 136 (underlined above). These factors involve the subjective intentions of the parties when drafting the agreement, as largely inferred from the evolution of the drafts. The trial judge may have erred in taking these factors into account as the Supreme Court has held that (1) subjective intentions of the parties are not relevant to contractual interpretation: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, [1998] S.C.J. No. 59, at paras. 54, 58-59; and (2) prior drafts are inadmissible as evidence of subjective intentions: *Indian Molybdenum Ltd. v. The King*, [1951] 3 D.L.R. 497 (S.C.C.), at pp. 502-503 D.L.R.; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham, Ont.: LexisNexis, 2012), at pp. 64-65, 79-81. I also note that the supplementary agreement contains an "entire agreement clause" (art. 6.10) expressly stating that the written contract "supersedes all prior understandings, agreements, negotiations and discussions, whether oral or written, among the parties".

[60] I have somewhat qualified my assessment of whether, by taking the above-noted factors into account, the trial judge erred, as *Sattva* does not appear to limit what courts may look at to interpret a contract. At para. 47, Rothstein J. says:

> [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" . . . To do so, *a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances* known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning[.]

(Emphasis added)

[61] In *Sattva*, the Supreme Court appears to direct an appellate court to defer to the trial judge's findings concerning the relevant antecedent facts.

[62] In this regard, at para. 136 of his reasons, reproduced above, the trial judge sets out a number of different grounds, derived from the text of the agreement and the factual matrix, for reaching his conclusion as to how the supplementary agreement should be interpreted. With the guidance from *Sattva* in [page417] mind, the trial judge's interpretation is consistent with the "ordinary and grammatical meaning" of art. 3.1. Indeed, I am unable to read the second half of the second sentence of art. 3.1, underlined below, as promising anything less than a monopoly over the existing system pending the completion of St. Clair Shores. For convenience, I set out art. 3.1 again. It reads:

> The Municipality hereby grants and approves the allocation of additional capacity in the Existing System so as to allow for full development of the St. Clair Shores Subdivision, in compliance with the existing zoning provisions for the said Subdivision. For greater certainty, said additional capacity shall be deemed to have been expressly reserved for the benefit of the St. Clair Shores Subdivision, and the Municipality shall not, prior to completion of full development and build out of residential and commercial buildings in the St. Clair Shores Subdivision, grant and/or approve additional capacity in the Existing System for lands outside of the St. Clair Shores Subdivision.

(Emphasis added)

[63] Lakeshore submits that art. 3.1 contains no promise of a monopoly, but merely prescribes the terms and conditions for enhancement of the downstream system.

[64] With respect, Lakeshore has not persuaded me that the monopoly is contrary to sound commercial principles or the business purpose of the whole agreement. Further, such considerations cannot overcome the unambiguous words underlined above. The following passage from *Novopharm*, at para. 56, encapsulates my view on this issue:

> [I]t would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if *it is presumed that the parties intended the legal consequences of their words*.

(Emphasis added)

[65] I note that Lakeshore also stressed that the provisions in the supplementary agreement in which it promised to collect development charges from third parties and remit them to 129 to defray the upfront costs of the enhancements were not consistent with the trial judge's interpretation of art. 3.1. But, I also note that these terms could apply after the promised monopoly came to an end upon completion of St. Clair Shores.

[66] In short, I am not convinced that the trial judge's interpretation is so contrary to commercial sense that the parties must have intended something other than what is expressed by the plain words of art. 3.1. As stated by Hall, at p. 39:

> [S]eeking a commercially sensible interpretation is not a policy goal in and of itself. The purpose of the commercial efficacy principle is not to protect [page418] business people from absurd results of their own contracts. Instead, the commercial efficacy principle relates to the overall goal of contractual interpretation, which is to give an accurate meaning to the parties' intentions.

[67] Lakeshore also contends that the trial judge's interpretation of art. 3.1 made it *ultra vires*: thus, this court should reject his interpretation. I am aware that "[c]ourts will avoid a contractual interpretation which results in rendering the agreement unlawful": *Unique Broadband Systems Inc. (Re)* (2014), 121 O.R. (3d) 81, [2014] O.J. No. 3253, 2014 ONCA 538, at para. 87. But, there is no ambiguity in art. 3.1 to resolve by way of that principle.

[68] There were, however, two related aspects of the supplementary agreement that initially gave me some pause as they might be interpreted as demonstrating an intention to create sewage capacity sufficient to allow for the full development of St. Clair Shores *and* the TGL. First, in art. 2.1, the agreement gave effect to the cost-sharing arrangement set out in the September 12, 2003 Stantec report. Lakeshore's contribution was based on the premise that "[u]ltimate development in the service area *not including* St. Clair Shores would create peak flows higher than the existing pumping system can handle" (emphasis in original). Second, the supplementary agreement contains a recital stating that the enhancements "are necessary not only to accommodate the St. Clair Shores Subdivision, but in order to accommodate ultimate expected flows from the existing service area". The recital goes on to state that the enhancements will be to the benefit of the "Benefiting Lands", which included the TGL and undeveloped portions of St. Clair Shores. The entire recital reads:

> *AND WHEREAS* it has been determined by way of engineering studies and consultation between [Lakeshore and 129] that certain enhancements to [Lakeshore's] existing sanitary sewer system (the "*Existing System*") are necessary not only to accommodate the St. Clair Shores Subdivision, but in order to accommodate ultimate expected flows from the existing service area of the Existing System, and which enhancements will be to the benefit of the lands described in Schedule "B" attached hereto (the "*Benefiting Lands*"), being that portion of the St. Clair Shores Subdivision which is undeveloped as of the date of this Supplementary Agreement, as well as other lands abutting the St. Clair Shores Subdivision to the north[.]

(Emphasis in original)

[69] The trial judge interpreted the words "existing service area" in the first part of the recital as pertaining to parts of Lakeshore lying to the east of St. Clair Shores and the TGL. This interpretation is a finding of mixed fact and law to which deference must be given. It follows from this finding that Lakeshore's share of the enhancements in the cost-sharing [page419] arrangement was to provide, at least in part, for the ultimate development of areas of Lakeshore unrelated to the Lands. The trial judge went on to find that, although the TGL are included in the

Benefiting Lands, there was no representation in the recital that the enhancements would accommodate the "ultimate expected flows" from the TGL. All that was represented was that TGL would "benefit": the extent of that benefit was unstated and could have been anticipated as capacity's being available following full build-out of St. Clair Shores. Based on the trial judge's analysis, in which I detect no error, I do not think that the cost-sharing arrangement and the related recital are so contradictory to the plain words of art. 3.1 that effect should not be given to their ordinary meaning.

[70] In concluding my analysis of the issue of whether the trial judge erred in interpreting art. 3.1, I return to *Sattva*. Specifically, I note para. 55, where Rothstein J. reinforces the reviewing court's obligation to defer to the trial judge's interpretation of a contract by saying that "the circumstances in which a question of law can be extricated from the interpretation process will be rare".

[71] In the light of the clear direction in *Sattva*, and the trial judge's interpretive exercise, both reviewed above, I would not interfere with the trial judge's finding that, in art. 3.1 of the supplementary agreement, Lakeshore promised not to provide sewage capacity in the existing system to anyone other than 129 until full build-out of St. Clair Shores had been completed.

Issue two -- What is the proper interpretation of s. 86(1) of the Act?

[72] Lakeshore submits that art. 3.1, as interpreted by the trial judge, is *ultra vires*, because the provision would prevent Lakeshore from meeting its obligations under s. 86(1) of the Act. Before addressing the *ultra vires* argument, it is necessary to understand a municipality's obligations under that provision.

[73] Section 86(1) governs the municipality's obligation to supply water or sewage. It provides:[2]

> 86(1) Despite section 19, a municipality shall supply a
>
> building with a water or sewage public utility if, [page420]
>
> *(a)* the building lies along a supply line of the municipality for the public utility;
>
> *(b)* in the case of a water public utility, there is a sufficient supply of water for the building;
>
> *(c)* in the case of a sewage public utility, there is *sufficient capacity* for handling sewage from the building; and
>
> *(d)* the owner, occupant or other person in charge of the building requests the supply in writing.
>
> (2) Subsection (1) does not apply if the supply of the public utility to a building or to the land on which the building is located would contravene an official plan under the *Planning Act* that applies to the building, land or public utility.

(Emphasis added)

[74] The subsection at issue is s. 86(1)(*c*), specifically, what is meant by "sufficient capacity". The question is what a municipality is required to take into account in deciding whether there is "sufficient capacity" to trigger its obligation under s. 86(1). Must it take into account capacity currently being used or capacity currently being used as well as capacity that has been previously allocated into the future?

[75] In *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36, 373 D.L.R. (4th) 601, at para. 18, Rothstein J. repeated Driedger's modern principle that governs the approach to statutory interpretation:

> The modern approach to statutory interpretation requires the words of s. 13(1) to be read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[76] With respect to legislative intent, an overriding object of the Act was to provide "more authority, accountability and flexibility so that municipal governments would be able to deliver services as they saw fit": *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357, [2005] O.J. No. 1896 (C.A.), at para. 6. The Act moved away from the prescriptive approach of earlier municipal legislation, which had set out itemized lists of what municipalities could do, toward providing municipalities with greater flexibility and independence: John Mascarin and Christopher J. Williams, *Ontario Municipal Act & Commentary*, 2014 ed. (Markham, Ont.: LexisNexis, 2013), at pp. 6-13. Part II of the Act sets out general municipal powers, including natural person powers and the power to pass by-laws within broad spheres of jurisdiction: Mascarin and Williams, at p. 19. One of these spheres is public utilities: s. 11(3)4 of the Act. [page421]

[77] Section 8(1) of the Act expressly states that municipal powers are to be interpreted broadly:

> 8(1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues.

[78] I start from the premise, therefore, that s. 86(1) (*c*) should be interpreted broadly, meaning so as not to unnecessarily restrict a municipality from allocating and promising sewage capacity into the future.

[79] Policy considerations are also important here. In *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007), at pp. 218-19, Ruth Sullivan identifies policy analysis as "an essential and appropriate part of the interpretative process. . . . [I]t is a legitimate part of statutory interpretation in so far as the values and preferences relied on are rooted in legislation or the common law or in the evolving legal tradition."

[80] An interpretation of s. 86(1)(*c*) that prevents a municipality from allocating sewage capacity into the future has the potential to stymie development and to create unfairness. In

Lakeshore itself, the trial judge found that capacity allotted to one developer for future development would not ordinarily be given to another (para. 151). This is because, as the facts of this case demonstrate, municipal development is forward-looking. Providing for orderly development requires a municipality to be able to allocate public utilities going forward in order to prevent future shortages, avoid conflicts and facilitate growth. A developer would be far less willing to invest the resources necessary for a building project if access to sewage services were uncertain.

[81] It would follow from these considerations that s. 86(1) (*c*) should also be interpreted as allowing municipalities to contract with developers in a manner that allows allocations of future sewage supply.

[82] Furthermore, as the facts of this case demonstrate, such contracts provide municipalities with a means of funding the extension of services into a new development. This is a policy preference rooted in legislation. Through the Act and related legislation, the legislature has provided municipalities with tools to secure contributions from developers for the provision of services to new developments. For instance, under s. 51(25) and 51(26) of the *Planning Act*, R.S.O. 1990, c. P.13, subdivision of land can be made conditional on entry into an agreement with a municipality to provide services. Similarly, under ss. 44 and 45 of the *Development Charges Act, 1997*, S.O. 1997, c. 27, a municipality can enter into a "front-ending agreement" in which a developer [page422] that agrees to contribute to the upfront costs of providing certain services can be reimbursed by third parties who later develop land within the service area, as was contemplated in the supplementary agreement.

[83] Interpreting s. 86(1)(*c*) as providing that sufficiency of capacity be assessed without regard to any previous allocation of future supply, contractual or otherwise, has the potential of exposing developers who rely on the allocated capacity to be co-opted by another developer who finishes their building first. The resultant uncertainty risks interfering with a municipality's ability to secure contributions from developers for the upfront costs of sewage services. As I have noted, there is also an obvious potential for unfairness and conflict.

[84] These factors lead me to conclude that, properly interpreted, under s. 86(1)(*c*) a municipality, in assessing whether a sewage system's remaining capacity is sufficient to grant a request for supply, must take into account both capacity that is currently being used as well as capacity that has been reasonably allocated into the future.

[85] I say *reasonably* allocated into the future because it would be contrary to the intent of s. 86(1) for a municipality to be in a position to avoid its obligations under that provision by promising a favoured developer an unreasonable amount of future capacity.

[86] First and foremost, s. 86(1) creates a duty on the municipality. It obliges a municipality to supply a sewage public utility if three conditions are met: the building lies upon a supply line, there is "sufficient capacity" and a person in charge of the building makes a written request.

[87] The jurisprudence on s. 86(1), and its predecessor, s. 55 of the *Public Utilities Act*, R.S.O. 1990, c. P.52, is limited. But, the courts have interpreted these provisions generously so as to prevent a municipality from using its control over public utilities to pursue its objectives at the expense of those requesting supply. In *St. Lawrence Rendering Co. v. Cornwall (City)*, [1951] O.R. 669, [1951] O.J. No. 495 (H.C.), a city council passed a resolution that the water supply to

a rendering plant should be discontinued. Council members frankly admitted that the purpose of the resolution was to drive the plant out of Cornwall because of the foul odours it was emitting. The trial judge held that the resolution was contrary to the city's duty under s. 55. In *Holmberg v. Sault Ste. Marie Public Utilities Commission*, [1966] 2 O.R. 675, [1966] O.J. No. 1034 (C.A.), the commission refused to supply the applicants' house with water. The applicants had purchased land in a subdivision and built a home. The original developer of [page423] the subdivision had failed to test the water main it had installed, as required by a subdivision agreement. The commission demanded that the applicants pay for the testing of the water main before it would supply water to their home. Writing for this court, Laskin J.A., relying on s. 55, upheld the order for *mandamus* requiring the commission to supply water to the applicants.

Issue three -- Is art. 3.1, or a portion of the provision, ultra vires as a result of Lakeshore's obligations pursuant to s. 86(1)?

[88] In the words of Ian MacF. Rogers, *The Law of Canadian Municipal Corporations*, looseleaf, 2nd ed. (Toronto: Carswell, 2009) (2012, release 6), at p. 1049, "[i]t is clear that a municipality can set up the defence of *ultra vires* and is not debarred as an individual person would be from showing and relying on its incompetency to make the agreement in question" (footnote omitted). A person contracting with a municipality is bound at its peril to take notice of the limits within which the council has the power to contract: *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, [2000] S.C.J. No. 64, 2000 SCC 64, at para. 68; Rogers, at pp. 1035-36.

[89] Lakeshore submits that, as interpreted by the trial judge, art. 3.1 is *ultra vires*.

[90] The trial judge, based on his finding that the existing downstream system was inadequate to accommodate development of the TGL, rejected this argument, saying, at para. 198:

> For the purposes of this dispute, I am not satisfied that the Town was obligated to allocate sewage capacity to MDI under section 86 (1) of the *Municipal Act*. That section did not affect the Town's contractual obligations to 129. The Supplementary Agreement was not *ultra vires*. The Town was bound by and breached its terms.

[91] For the reasons that follow, I am of the view that the trial judge erred in concluding that art. 3.1 was *intra vires*. Properly interpreted, art. 3.1 of the supplementary agreement is *ultra vires*, as it requires Lakeshore to make a promise that is directly contrary to its obligations under s. 86(1) of the Act. Lakeshore does not have the jurisdiction to make such a promise.

[92] In explaining my reasoning on this issue, it may be best to start with what I have not concluded.

[93] First, it is not my opinion that any promise of future sewage capacity is *ultra vires*. Given my interpretation of s. 86(1), a contractual promise to reserve a specific and reasonable amount of sewage capacity for future development, to the exclusion of all others, may well be *intra vires*. [page424]

[94] Second, it is not my opinion that a promise of future sewage capacity is necessarily *ultra vires* if it has the effect of creating a *de facto* monopoly over development. Such a *de facto* monopoly may well be acceptable under s. 86(1), as interpreted, if the municipality promises a

specific and reasonable amount of future sewage capacity to a developer and that specific amount is equal to all of the remaining capacity in the sewage system.

[95] The offending portion of art. 3.1 is the wording at the end of the article -- wording, as found by the trial judge -- in which Lakeshore promises that, pending completion of St. Clair Shores, it will not allocate sewage capacity in the existing system to anyone else. The promise is absolute. It is not qualified. The promise ties Lakeshore's hands until some unknown date when St. Clair Shores is fully built out. Significantly, even if capacity becomes available before the completion of St. Clair Shores, Lakeshore is prevented from allocating it to building owners otherwise entitled to sewage supply under s. 86(1).

[96] What distinguishes the monopoly promised to 129 and the hypothetical *de facto* monopoly, set out above, is that the *de facto* monopoly would end in the event sufficient capacity becomes available for others, allowing the municipality to meet its obligations under s. 86(1). However, art. 3.1 does not allow for this.

[97] The parties disagreed over whether, at the time Lakeshore allocated capacity to MDI, there was capacity in the downstream system to enable St. Clair Shores to be fully developed and for the TGL. After an extensive analysis, the trial judge concluded, at paras. 194-97, that the full development of St. Clair Shores alone would require sewage capacity in excess of the 1.5 cfs the enhancements created in the downstream system. That is, there was insufficient capacity to grant MDI's request in 2005 because, at some point prior to the build-out of St. Clair Shores, the downstream system would run out of capacity. Although one may question whether this fact will prove to be accurate to the completion of St. Clair Shores, particularly given the expert evidence about how malleable the determination of available sewage capacity is, deference is owed to this finding and I would not interfere with it.

[98] However, I disagree with the trial judge's conclusion that this conclusion saves art. 3.1 from being *ultra vires*. I note that s. 86 is located in Part III of the Act. As Mascarin and Williams opine, at p. 33, "The structure of the *Municipal Act, 2001* requires that the general powers in Part II co-exist with and be supplemented, *or restricted by*, the specific powers in Part III" (emphasis added). [page425] In my view, s. 86(1) does not just require a municipality to provide sewage supply if certain conditions are met. By implication, the section also restricts a municipality's powers to enter into an agreement that would have the effect of preventing it from providing sewage supply if the conditions are met.

[99] Accepting that an agreement to exclude all others from a sewage system could be justified by proof that sufficient capacity for others never was (or never will be) available over the duration of the contract, such that an obligation under s. 86(1) never arises, would be contrary to the intention of s. 86(1), which is to provide fair and predictable access to public utilities. Such a holding would also create uncertainty because the enforceability of such an agreement would be contingent on the availability of sewage capacity, which is subject to constant change and which, at any given time in the life of the contract, may or may not be known to the parties. The agreement could flicker in and out of legal existence as the sewage system changed. With respect to subdivision agreements, which are publicly available documents upon which third parties rely for their own decision making, such uncertainty is particularly objectionable.

[100] Furthermore, the connection between a municipality's obligation to supply sewage under s. 86(1) and its lack of jurisdiction to make a promise to exclude all others from a sewage system is supported by the trial record. The evidence in this case was that a municipality cannot be completely certain when it makes such a promise that a s. 86(1) obligation will not arise in the future. Even if, at the time of contracting, there is only enough capacity in the system for the property owner who receives the promise to exclude all others, "sufficient capacity" to grant other requests may well arise.

[101] In saying that it may "well" turn out that additional capacity will become available, I rely on the expert evidence of both parties: Donald Joudrey, called by Lakeshore, and David Archer, called by 129. Their evidence demonstrates that, in any one or more of a number of ways, capacity may become available in Lakeshore's downstream system beyond that needed for the full build-out of St. Clair Shores.

[102] First, and most obviously, further enhancement of the downstream system might generate additional capacity. Lakeshore may still build the trunk main contemplated by the subdivision agreement.

[103] Second, different developments lying to the east of St. Clair Shores, also connected to the downstream system, might [page426] be completed without using all of their previously allocated capacity. Theoretical calculations form the basis for a municipality's allocation of future capacity to a developer. The experts agreed that it is difficult to compute, with precision, the amount of sewage capacity a development will ultimately require.

[104] Third, buildings connected to the downstream system might reduce or stop altogether their production of sewage, freeing up capacity for others. Businesses change. They also shutter and move.

[105] Fourth, the means by which a municipality determines if there is "sufficient capacity" in a sewage system is subject to change. The evidence revealed that determining whether a sewage system has available capacity is a question on which reasonable experts can disagree. For instance, a municipality may have guidelines for calculating capacity that are more or less stringent. In addition, as the evidence in this case demonstrates, experts differ on what indicates that a sewage system is overcapacity.

[106] The issue of surcharging (*i.e.*, overflow) provides an example. At para. 195 of his reasons, the trial judge appears to interpret s. 86(1) as providing that there will not be "sufficient capacity" in a sewage system if there is any level of surcharging. With respect, I see nothing in the Act that limits s. 86(1) to such a technical definition of "sufficient capacity". To the contrary, as discussed above, the Act was meant to empower municipalities to manage their own affairs. Mr. Joudrey testified that a small amount of surcharging in a sewer system would have no consequences (*e.g.*, no basement flooding). Thus, another means by which additional capacity can be found within a sewage system is if a municipality's standards are relaxed (*e.g.*, to allow for more surcharging).

[107] These examples, identified in the evidence, about how additional capacity might yet be found in Lakeshore's downstream system, are only meant to illustrate the many ways a conflict can arise between a contractual promise to exclude all others and a municipality's s. 86(1) obligation. However, my conclusion that art. 3.1 is *ultra vires* is not dependent on any of these

examples occurring. More generally, my conclusion that art. 3.1 is *ultra vires* is not dependent on whether or not additional capacity has been or ever will be found in Lakeshore's downstream system. Rather, it is dependent on the wording of s. 86(1) of the Act and its clear intention to restrict, in at least this one way, a municipality's power to contract. [page427]

Issue four -- If art. 3.1, or a portion of the provision, is ultra vires, should the offending words be severed?

[108] An *ultra vires* contract is void *ab initio*. But, based on the above analysis, I am of the view that only the words at the end of art. 3.1 are *ultra vires*, namely, ". . . and the Municipality shall not, prior to completion of full development and build out of residential and commercial buildings in the St. Clair Shores Subdivision, grant and/or approve additional capacity in the Existing System for lands outside of the St. Clair Shores Subdivision."

[109] This conclusion begs the following questions. What should be done about an agreement that contains a term that is void? Can severance be used to preserve the remainder of the parties' bargain?

[110] Under the common law doctrine of severance, a court can excise or even reword an illegal or *ultra vires* contractual term so as to give effect to the remainder of the agreement. By eliminating or rewording a contractual term, a court is making a new agreement: *Transport North American Express Inc. v. New Solutions Financial Corp*., [2004] 1 S.C.R. 249, [2004] S.C.J. No. 9, 2004 SCC 7, at para. 30. As a result, as stated by Rothstein J. in *Shafron v. KRG Insurance Brokers (Western) Inc*., [2009] 1 S.C.R. 157, [2009] S.C.J. No. 6, 2009 SCC 6, at para. 32, "courts will be restrained in their application of severance because of the right of parties to freely contract and to choose the words that determine their obligations and rights".

[111] Notwithstanding the courts' cautious approach to severance, I am of the view that, here, severance is appropriate and I would excise from art. 3.1 the above-quoted words in which Lakeshore promises 129 that it will not grant sewage capacity to any other lands until completion of St. Clair Shores.

[112] In concluding that severance is warranted, I start with the important observation that, in this case, the parties expressly put their minds to the possibility that a provision in the supplementary agreement may be unenforceable and agreed that severance could be used to remedy the problem. I refer to art. 6.5 that reads:

> If any provision of this Supplementary Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this Supplementary Agreement shall not in any way be affected or impaired thereby.

[113] The clause indicates the parties' clear intention that they did not want their rather complex agreement impaired by a finding that a specific provision is invalid. In determining whether [page428] the doctrine of severance should be applied, substantial weight should be given to a severability clause: see, *e.g.*, *Miller v. Convergys CMG Canada Ltd.*, [2014] B.C.J. No. 1997, 2014 BCCA 311, 2014 CarswellBC 2260, at para. 44.

[114] Turning to the jurisprudence surrounding the issue of severability, I note that courts typically conduct a two-step analysis: McCamus, p. 510. First, it is determined whether severance would radically change the purport and substance of the original contract. Here, in

The Law of Contract in Canada, 6th ed. (Toronto: Carswell, 2011), at pp. 412-13, G.H.L. Fridman describes the "true test" as being "whether the subtraction of the void part of a contract affects the meaning of the remainder, or merely the extent". Second, it is determined whether severance would be contrary to public policy, particularly that underlying the law infringed by the offending contractual term.

[115] No radical change is required here. All that is needed to remedy art. 3.1 is the deletion of the offending words. This application of the doctrine of severance would meet the traditional "blue-pencil test": McCamus, pp. 515-22. This revision renders art. 3.1 *intra vires* and enforceable. Under the article, as revised, Lakeshore promises to 129 a specific and reasonable amount of sewage capacity, namely, that amount required for full build-out of St. Clair Shores. Significantly, upon receiving a third party request for sewage supply, if there is sufficient capacity to meet both the promise to 129 and the third party request, Lakeshore will be able to meet its obligations under s. 86(1).

[116] Revising art. 3.1 in this manner does not offend public policy. In *New Solutions*, at paras. 42-46, a majority of the Supreme Court applied "four considerations relevant to the determination of whether public policy ought to allow an otherwise illegal agreement to be partially enforced rather than being declared void *ab initio*". These considerations were identified by this court in *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545, [1989] O.J. No. 1459 (C.A.), at para. 17, leave to appeal to S.C.C. refused (1990), 71 O.R. (2d) x, [1989] S.C.C.A. No. 398, as

> (1) whether that object and policy of the provision, in this case s. 86(1) of the Act, would be subverted by a partial performance of the agreement;
>
> (2) whether one or both parties intended to break the law;
>
> (3) whether the parties were in an equal bargaining position; and [page429]
>
> (4) whether one party would be unjustly enriched if the contract was not enforced.

[117] In my view, the *Thomson* considerations support severance. First, severing the offending words would not, in my view, subvert the purpose or policy of s. 86(1) of the Act -- as provision that, as previously indicated, governs a municipality's orderly allocation of water and sewage services. The essence of the parties' bargain is that 129 would benefit from its investment in the downstream sewage system and be in a position to complete St. Clair Shores. It is a bargain in keeping with the purpose of the Act. Severance would not subvert that purpose. Second, there is no evidence that supports a finding that either party intended to circumvent s. 86(1) of the Act. Third, both parties were sophisticated and had extensive resources. The trial judge's description of the bargaining process indicates that it was chaotic but not patently unfair. Fourth, voiding the entirety of art. 3.1 might create a windfall in that Lakeshore would no longer be liable if the development of St. Clair Shores is halted due to lack of sewage capacity.

[118] I am mindful of the fact that we received no submissions on severance. In my view, this is not an impediment to assist the parties by severing of what amounts to several lines of a lengthy agreement. It is clear that neither party would have reason to find severance objectionable. From 129's perspective, without severance, Lakeshore would have no obligations under art. 3.1. From Lakeshore's perspective, severance gives effect to its consistent

interpretation of art. 3.1, namely, that Lakeshore "guarantee[d] that [129] would have sufficient sewer capacity for full build-out of the Subdivision": see trial reasons, at paras. 114 and 132.

[119] Finally, I return to the fact that the parties expressly agreed to severance by including a severability provision in their agreement.

Issue five -- If severance is permitted, do the facts

demonstrate that Lakeshore breached art. 3.1, as revised?

[120] Following the decision to sever the offending portion of art. 3.1, the issue that must be addressed is whether Lakeshore breached the revised provision.

[121] The trial judge had no reason to turn his mind to this question. However, given the fullness of the record, this court is in a position to exercise its broad jurisdiction under s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, jurisdiction that [page430] includes drawing inferences of fact from the evidence and determining this issue.

[122] Based on the analysis that follows, I conclude that 129 has not proven that Lakeshore breached art. 3.1, as revised, when it allocated sewage capacity to MDI.

[123] Lakeshore has promised to provide enough sewage capacity to 129 to allow for full build-out of St. Clair Shores. As of the time of trial, St. Clair Shores remained only partially developed. There was no evidence that the amount of sewage capacity available to that point in time had had any negative impact on the development of St. Clair Shores.

[124] As discussed, in his reasoning on *ultra vires*, the trial judge found that full build-out of St. Clair Shores will require more than 1.5 cfs, which was the amount of additional capacity in the downstream system that was purportedly created by the enhancements. But, it does not follow that Lakeshore breached art. 3.1, as revised, by providing capacity to MDI. This is because the trial judge's finding is merely a prediction of future events that, as of the time of trial, had yet to be proven accurate.

[125] I would not find that the trial judge's prediction is inaccurate, only that it lacks sufficient certainty to prove breach on a balance of probabilities. I reiterate that the trial judge never had to consider whether breach of the revised art. 3.1 was proven by his prediction. The trial judge's prediction lacks sufficient certainty for at least two reasons.

[126] First, even as of the trial date, it was not known whether St. Clair Shores will ever be fully built-out or, if it is, whether the final flows will exceed 1.5 cfs. The trial judge himself acknowledged this uncertainty, writing, at para. 168, "*Ultimate flow would depend on the nature of the businesses occupying the Lands. The mix was -- and still is -- unknown*" [emphasis added].

[127] Second, even as of the trial date, it was not known whether St. Clair Shores would only have access to 1.5 cfs by the time of full build-out. As the four examples provided earlier in these reasons demonstrate, the available capacity in a sewage system is subject to change.

[128] It may be argued that Lakeshore's allocation to MDI amounted to an anticipatory repudiation of the revised art. 3.1, as the allocation would make performance impossible: McCamus, at p. 693.

[129] In my view, however, Lakeshore's allocation to MDI was not conduct that demonstrated an intention to repudiate the revised art. 3.1.

[130] In 2005, when 129 expressed concern over the town's plans to provide sewage access to the TGL, Lakeshore expressly [page431] confirmed its intention to adhere to the supplementary agreement, or at least its interpretation of the agreement, which, as discussed, is the promise remaining in the revised art. 3.1. As stated in *Standard Precast Ltd. v. Dywidag Fab Con Products Ltd*., [1989] B.C.J. No. 129, 56 D.L.R. (4th) 385 (C.A.), at p. 386 D.L.R., "[r]epudiation is not lightly to be inferred from a party's conduct, particularly where, as here, prior to the time for performance that party has repeated its intention to carry out the contract". See, also, *McBride v. Johnson*, [1962] S.C.R. 202, [1962] S.C.J. No. 5, at pp. 207-208 S.C.R.

[131] Furthermore, in my view, the allocation of capacity to MDI does not meet the test for anticipatory repudiation, namely, depriving 129 of "substantially the whole benefit" of the revised art. 3.1: McCamus, pp. 693-94; *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd*., [2006] O.J. No. 1964, 270 D.L.R. (4th) 181 (C.A.), at para. 51. For the reasons discussed above, it is impossible to know whether the allocation to MDI will have a major, minor or insignificant effect on when, in the development of St. Clair Shores, sewage capacity becomes limiting (assuming the trial judge's prediction comes true). As the effect of the allocation to MDI was highly uncertain at the time -- and, in fact, remains uncertain -- Lakeshore's conduct in 2005 could not have been reasonably interpreted as depriving 129 of "substantially the whole benefit" of art. 3.1, as revised.

[132] In summary, art. 3.1, as revised through severance, is enforceable. However, I conclude that the evidence does not support a finding that Lakeshore is in breach of its obligations or a finding that Lakeshore has repudiated its promise. As a result, 129's action for breach of contract must fail.

Issue six -- If Lakeshore, in providing sewage capacity to MDI, breached an enforceable agreement, what remedy is 129 entitled to?

[133] While my conclusion that the revised art. 3.1 has not been breached or repudiated disposes of the matter, for completeness, I will briefly explain why I am of the view that the trial judge erred in determining damages.

[134] The $2,423,860 that the trial judge awarded 129 for breach of contract was calculated based on lost profits arising out of certain leases that MDI was able to secure for commercial space on the TGL.

[135] In assessing whether this loss of income flowed from the breach of contract, the trial judge cited, at para. 202, the following passage in *Hadley v. Baxendale* (1854), 156 E.R. 145, [1843-1860] All E.R. Rep. 461 (Exch. Ct.), at p. 151 E.R.: [page432]

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[136] The trial judge accepted 129's claim that it was entitled to damages for rental income that was lost when prospective tenants chose to lease commercial space in MDI's new development on the TGL. The trial judge summarized his conclusions, at para. 222, which, for convenience, I will set out again:

> I recognize the evidence is limited. However, four things are clear: first, if the Supplementary Agreement had not been breached, sewage capacity would not have been allocated to MDI; second, without the allotment, [the TGL] would not have been developed; third, there was precious little alternative commercial space in the vicinity of the Lands before completion of the MDI and Spidrock developments and fourth, income 129 otherwise would have generated was lost.

[137] Although correctly noting at the start of the section on damages, at para. 202, that the relevant legal principle was remoteness, the trial judge provided no analysis as to whether the loss of commercial leases to otherwise lawful competition was the type of loss that fell within the parties' reasonable contemplation. Instead, his analysis is devoted to causation and quantifying the loss.

[138] In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc*., [2008] 3 S.C.R. 79, [2008] S.C.J. No. 56, 2008 SCC 54, at paras. 63-64, Abella J. (dissenting in part) summarized the test for remoteness of damages following a breach of contract:

> The defining explanation of the contractual breach principles of reasonable foreseeability and remoteness is found in *Hadley v. Baxendale* . . . *A court must therefore ask itself "what was in the reasonable contemplation of the parties at the time of contract formation*" (*Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30, at para. 54).
> The principle of remoteness "imposes on damage awards reasonable limits which are required by fairness" *(Matheson (D.W.) & Sons Contracting Ltd. v. Canada (Attorney General)* (2000), 187 N.S.R. (2d) 62, 2000 NSCA 44, at para. 69, per Cromwell J.A.). *It aims "to prevent unfair surprise to the defendant, to ensure a fair allocation of the risks of the transaction, and to avoid any overly chilling effects on useful activities by the threat of unlimited liability"* (Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages* (2nd ed. 2008), at p. 352). This principle will be informed by the nature and culture of the business in question, and the particular contractual relationship between the parties[.]

(Emphasis added) [page433]

[139] In Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis, 2012), at p. 480, the authors' helpfully frame the issue as "the determination of the extent of the risk that a promisor assumes when he makes a promise".

[140] In my view, the nature of the damages 129 claimed and the trial judge awarded was not in the reasonable contemplation of the parties when the contract was executed.

[141] The problem is not with rental income *per se* as a type of loss. The type of loss that was not reasonably contemplated is rental income that was lost as a result of ordinary, commercial competition. It only indirectly related to Lakeshore's purported breach: the actions of a third party

were also involved. It does not follow in the "usual course of things" that a grant of sewage capacity to a third party will result in a competing commercial development. Even if, as MDI did, a third party chose to compete with 129 for the same commercial tenancies, the loss of rental income depends on a myriad of commercial vagaries. Vacancy rates, profit margins, business relationships and the relative attractiveness of the lots must be factored in. For instance, Mr. Valente acknowledged under cross-examination that, at least for Bulk Barn, the location of MDI's development on the TGL was preferable to that of 129's proposed development.

[142] Significantly, 129 points to no evidence that, prior to execution of the supplementary agreement, it alerted Lakeshore that the town would be liable for rental income lost as a result of commercial competition stemming from a breach. Thus, the "second branch" of *Hadley v. Baxendale* does not come into play. To the contrary, the evidence was that there was risk to 129's success with commercial tenancies that was entirely independent of Lakeshore. The evidence was that 129 also lost tenancies to a commercial development across the road from St. Clair Shores in the Town of Tecumseh. Thus, at the time of executing the contract, the parties had knowledge that spoke against Lakeshore's liability for the loss of rental income to ordinary, commercial competition, namely, that this competition might arise in Tecumseh regardless of Lakeshore's decisions.

[143] I conclude that even if art. 3.1, as written, were enforceable and Lakeshore breached it, the damages 129 claimed in this proceeding are too remote.

[144] In such circumstances, 129 would be entitled only to nominal damages that I would have fixed at $1: see, *e.g.*, *Southcott Estates Inc. v. Toronto Catholic District School Board* (2010), 104 O.R. (3d) 784, [2010] O.J. No. 1772, 2010 ONCA 310, at para. 30, affd [2012] 2 S.C.R. 675, [2012] S.C.J. No. 51, 2012 SCC 51. [page434]

Disposition

[145] For these reasons, I would allow the appeal. I would set aside the judgment below and dismiss the action.

[146] Further to counsel's agreement, Lakeshore is entitled to its costs of the appeal fixed in the amount of $40,000, including disbursements and applicable taxes. Failing resolution of the issue of costs below, I would ask the parties to make submissions with respect to the costs of the trial within 15 days of the receipt of these reasons.

Appeal allowed.

Notes

1 I note that in this case, where one of the parties is a public body, that principle may have a somewhat more limited application.

2 Section 19 concerns the geographic application of a municipality's powers. For instance, s. 19(1) states: "By-laws and resolutions of a municipality apply only within its boundaries, except as provided in subsection (2) or in any other provisions of this or any other Act." There is no need to consider s. 19 here.

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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., MORDEN and ROSENBERG JJ.A.

BETWEEN:	**)**	
	)	**Ronald G. Slaght, Q.C. and**
APOTEX INC.	**)**	**Timothy H. Gilbert,**
	)	**for the appellant**
Plaintiff/	**)**	
Appellant	**)**	**William Vanveen, for the respondent**
	)	**Hoffmann La-Roche Limited**
- and -	**)**	
	)	**J. Scott Maidment and**
HOFFMANN LA-ROCHE LIMITED,	**)**	**Robert Wisner, for the respondent**
GLAXO WELLCOME INC.,	**)**	**AltiMed Pharmaceutical Company Inc.**
PHARMACIA & UPJOHN INC. and	**)**	
ALTIMED PHARMACEUTICAL	**)**	**Martin Sclisizzi, for the respondent**
COMPANY INC.	**)**	**Pharmacia & Upjohn Inc.**
	)	
Defendants/	**)**	**Robert Kwinter, for the respondent**
Respondents	**)**	**Glaxo Wellcome Inc.**
	)	
	)	**Heard: June 27, 2000**
	)	

On appeal from the order of Justice John R. Jennings dated October 22, 1999

ROSENBERG J.A.:

[1] This appeal from the order of Jennings J. striking out the plaintiff's amended statement of claim without leave to amend concerns principally the interpretation of the misleading advertising provision of the *Competition Act*, R.S.C. 1985, c. C-34. In the amended statement of claim, the plaintiff claims various remedies, including damages, because of violations of various federal and provincial statutes. Its claim is based on a civil remedy created by the *Competition Act* and on the torts of conspiracy and unlawful interference with economic relations. The issue at the root of these claims is whether the marketing

strategy adopted by the defendants infringes any of these statutes and is therefore unlawful. For the reasons that follow, I would allow the appeal in part.

THE FACTS

[2] The allegations in the amended statement of claim may be summarized as follows. The plaintiff company manufactures generic drug products. These generic drug products are therapeutically equivalent, but not identical, to the name-brand drug products that are manufactured by the name-brand defendants Hoffman La-Roche Limited, Glaxo Wellcome Inc., and Pharmacia & Upjohn Inc. Generic drugs are generally sold after the expiry of a patent. The name-brand defendants are holders of patents on drug products in Canada. The defendant AltiMed was a corporation originally incorporated and beneficially owned by the name-brand defendants to sell the name-brand defendants' drug products as generic products. It was formed as a result of the amalgamation of Kenral Incorporated and Syncare Pharmaceutical Incorporated. The name-brand defendants disposed of their beneficial ownership of AltiMed in March 1999.

[3] The plaintiff's claim centres on what it refers to as "pseudo-generic drug products". These products are manufactured on the same production lines and are identical in composition to the name-brand drug products, save for being labelled as originating from AltiMed. They are sold at much lower prices. The plaintiff claims that the name-brand defendants make these drug products available for distribution by AltiMed under agreements that only allow the pseudo-generic product to be sold immediately before a competing generic product is about to enter the market, thereby capturing critical market share and harming competition.

[4] The plaintiff claims that the name-brand defendants mislead consumers by

> (a) Marketing drug products at prices substantially in excess of identical products available in the same pharmacies across Canada; and
>
> (b) Failing to provide physicians, pharmacists and consumers with material information about the source of their products, and thereby permitting misleading representations to be made about their products and pseudo-generic drug products such that consumers pay premiums on name-brand products without receiving any corresponding benefit.

[5] The plaintiff claims that this practice violates various federal and provincial statutes. I will deal with each in turn. In dealing with these questions I

have applied the following principles as summarized by Moldaver J. in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at 469:

> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
>
> (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
>
> (c) The novelty of the cause of action will not militate against the plaintiffs; and
>
> (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

Competition Act

[6] Section 36(1) of the *Competition Act* provides a civil right of action for damages caused by conduct contrary to Part VI of the Act. The plaintiff claims that the defendants' conduct violates ss. 52 and 54 of the Act and that this conduct caused damage to them. Sections 52 and 54 are in Part VI of the Act.

Misleading Advertising, *Competition Act,* s. 52

[7] The relevant portions of s. 52 of the *Competition Act* are the following:

> 52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.
>
> (1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

(2) For the purposes of this section, a representation that is

> (a) expressed on an article offered or displayed for sale or its wrapper or container,
>
> (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
>
> (c) expressed on an in-store or other point-of-purchase display,
>
> (d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or
>
> (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as

> well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[8] The motions judge held that the amended statement of claim did not plead a false or misleading representation within the meaning of this provision. He read the statement of claim as pleading that the law imposed a positive obligation on the defendants to make an "allegation" that the pseudo-generic product was cheaper than but identical to the brand-name product. He also held that there was no allegation that the defendants "knowingly or recklessly" made a false or misleading statement or that they made "any" statement. In the result, he held that no facts were pleaded to engage the provisions of s. 52(1).

[9] In my view, the motions judge erred in so holding. The appellant's claim does not rest solely on a theory that the respondents were under a positive obligation to disclose that the pseudo-generic product was cheaper than but identical to the more expensive brand-name product. Rather, the core of the claim that the plaintiff says amounts to a violation of s. 52 is the positive representation that the drugs originate with AltiMed, when in fact they originate from the name-brand defendants. There are sufficient facts pleaded to support a finding that this representation is made knowingly. Further, under s. 52(1.2) making a representation includes permitting a representation to be made. The pleading, therefore, alleges that the name-brand defendants are liable because they permitted AltiMed to make the representation that the products originate with it. As well, in determining whether the representation is false, s. 52(4) of the Act directs the court to consider the "general impression" conveyed by the statement. The general impression created by the statement that the drugs originated with AltiMed is that it manufactured them; on the facts pleaded, this is false.

[10] The issues then are, whether the representation about the origin of the pseudo-generic drugs is a representation made "for the purpose of promoting, directly or indirectly, the supply or use of a product" or alternatively "for the purpose of promoting, directly or indirectly, any business interest" and whether the representation is false in a "material respect". I will deal with each of these issues in turn.

[11] The ordinary meaning of the word "promote" is to move forward or advance, or as was said by Darling Co. Ct. J. in *R. v. Garibaldi Lifts Ltd.* (1977), 35 C.C.C. (2d) 190 (B.C. Co. Ct.) at 197, "enhancing or increasing the volume of business for the company". The representation that is said to be false in this claim is not of that character. The theory expressed in the claim is that the statement about the origin of the pseudo-generic drugs discourages consumers from purchasing the pseudo-generics, not that it promotes their use or supply.

[12] If the plaintiff were correct in its application of this aspect of s. 52 to these facts, the effect would be to stigmatize as illegal conduct what most people would not consider unlawful. It would, for example, preclude a manufacturer from marketing food products under different brand names for different prices without disclosing the fact on the label of the lower-cost product that it is identical to the other. It would, in effect, impose an obligation on the manufacturer to label its products in a manner that ensured that the consumer was aware of the very best bargain obtainable. In my view, the allegedly false representation could not reasonably be said to be made for the purpose of promoting the supply of a product within the meaning of s. 52(1).

[13] I take a different view, however, of whether the conduct pleaded amounts to the alternative means of committing the offence, namely, “for the purpose of promoting, directly or indirectly, any business interest”. This court has held that this phrase must be given a very wide meaning and can include any business interest, not necessarily an interest with the persons who might be misled by the representation. Thus, in *R. v. Birchcliff Lincoln Mercury Sales Ltd.* (1987), 36 C.C.C. (3d) 1 (Ont. C.A.) the accused was convicted for posting a sign concerning the manner in which it charged for repairs. The company posted the sign to promote its business interests with the vehicle manufacturer, not with the public at large. Goodman J.A. held as follows at p. 7:

> It is clear from these remarks that the summary conviction appeal court judge was of the view that the Crown must prove not only that the respondent made a representation to the public at large but that the representation was made for the purpose of promoting the respondent's business interest with the public at large. In my opinion she was wrong in thus interpreting the provisions of s. 36(1)(a) [now s. 52(1)]. The words "any business interest" are not restricted in any such manner by the provisions of s. 36(1) (a).

[14] In my view, the term “any business interest” must be the business interests of the person or persons making the representation. That is what is pleaded in this case. The appellant claims that the brand-name manufacturers falsely represent the origin of the pseudo-generic drugs to promote their business interests, namely to promote the sale of the brand-name drugs. This is exactly what is pleaded in, for example, the following paragraphs of the amended statement of claim:

> 14. At a point unknown to the plaintiff, but known to the defendants, the Name Brand Defendants decided to incorporate subsidiary companies to market the

> Name Brand Defendants' products under generic labeling.
>
> 15. This allowed the Name Brand Defendants to continue selling name brand products at higher prices to uninformed consumers, while selling the same product at lower prices under generic labeling.
>
> 16. For example, the defendant Upjohn incorporated the subsidiary Kenral as part of a strategy designed to artificially maintain the price of its name brand products coming off patent protection by introducing generic versions of the same products. These two versions are sold at different prices. The name brand prices are significantly higher and any loss in their sales are off-set by returns received from the pseudo-generic version.

[15] In my view, the allegations, which must be taken as true at this stage of the proceedings, can support a finding that the false statement of origin was made to promote a business interest.

[16] It is also necessary to consider whether the representation is false or misleading in a "material" respect. A representation is material for the purposes of s. 52(1) if it is so pertinent, germane or essential that it could affect the decision to purchase. See for example *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.) (rev'd in part on other grounds 59 C.P.R. (2d) 34 (C.A.), *sub nom. R. v. Fell*. The appellant has pleaded facts that, read generously, support that allegation. In particular, they allege the following:

> 26. The majority of consumers are unaware that pseudo-generics exist and are identical to name brand products, and would choose the lower-priced version of a prescription drug if presented with the informed choice between two identical brands.

[17] Finally, the plaintiff claims that it has lost sales that it would have made throughout Canada if the name-brand defendants, "through the instrumentality of AltiMed were not able to sell identical products at two price points". It thus claims it has suffered loss or damage giving it the right to sue under s. 36 of the Act.

[18] Although I have some doubt that Parliament intended to prohibit the type of conduct alleged in this case, and appreciate that the causal connection between the false representation and loss or damage to the plaintiff is weak, I cannot say

that it is plain and obvious that the plaintiff's claim will fail given the broad wording of s. 52, and the strict test to be applied in striking out a claim. Accordingly, in my view, the motions judge erred in striking out the statement of claim as it related to a breach of s. 52 of the *Competition Act*.

Double ticketing: *Competition Act*, s. 54

[19] Section 54(1) of the *Competition Act* creates the offence of double ticketing as follows:

> 54. (1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,
>
> (a) on the product, its wrapper or container;
>
> (b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or
>
> (c) on an in-store or other point-of-purchase display or advertisement.

[20] The motions judge held that s. 54 had no application on the facts pleaded. I agree. The offence in s. 54 is directed at the practice of selling goods at the higher of two different prices that have been placed on the product or in anything attached to or accompanying the product. There is no allegation in the amended statement of claim that the pseudo-generic drugs supplied to the public had more than one price. That part of the claim was properly struck out.

Unlawful Interference with Economic Relations and Conspiracy

[21] The motions judge held that while allegations of unlawful conduct are made in the amended statement of claim "no factual underpinning is pleaded" to sustain the tort of unlawful interference with economic relations. Similarly, with respect to conspiracy, he held that the pleading is "devoid of facts supporting an allegation of unlawful purpose". With respect, I do not agree. It is open to the appellant to rely upon breach of s. 52 of the *Competition Act* as supplying the element of unlawful means for both unlawful interference with economic interests and conspiracy. See *Westfair Foods Ltd. v. Lippens Inc. et al.* (1989), 64 D.L.R.

(4th) 335 (Man. C.A.) at 338. I have already set out the factual basis for that allegation.

[22] With respect to conspiracy, the motions judge also held that the elements necessary to support the claim as required in *Pindoff Record Sales Ltd. v. CBS Music Products Ltd.* (1989), 44 C.P.C. (2d) 308 (Ont. H.C.J.) were not pleaded. He did not identify the elements that were not pleaded. In *Pindoff*, at p. 313, Montgomery J. adopted the following statement of the requirements of a pleading alleging conspiracy:

> Pleading. The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[23] The amended statement of claim contains all of those elements. In my view, the motions judge erred in striking out the claim as it related to conspiracy.

Business Practices Act* and *Food and Drugs Act

[24] The appellant also seeks to support the torts of conspiracy and unlawful interference with economic relations on the basis of alleged violations of the *Business Practices Act*, R.S.O. 1990, c. B.18 and s. 9 of the *Food and Drugs Act*, R.S.C. 1985, c. C-34.

[25] The basis for the former claim turns on the definition of "unfair practices" which includes the following:

> 2. For the purposes of this Act, the following shall be deemed to be unfair practices:
>
> 1. A false, misleading or deceptive consumer representation including, but without limiting the generality of the foregoing,
>
> …

> xiii a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive, [Emphasis added.]

[26] The appellant alleges in the statement of claim that the failure to state on the pseudo-generic drugs that they are identical in every way to the more expensive brand-name version constitutes the failure to state a material fact within clause (xiii). However, this Act only applies to deceptive "consumer" representations. "Consumer" is defined in s. 1 of the Act as a natural person "not … acting in the course of carrying on business". As the respondents point out, this legislation is directed primarily at transactions involving individual consumers. The amended statement of claim makes it clear that the representations by the defendants are not made to consumers but to physicians and pharmacists.

[27] The motions judge held that, "No facts are pleaded to support an allegation that any of the defendants made the required representation. Facts pleaded state the defendants sell to physicians and pharmacists, who do not fall within the definition of consumer." I agree. That portion of the amended statement of claim referring to the *Business Practices Act* was properly struck out.

[28] With respect to the *Food and Drugs Act*, the appellant relies upon s. 9, as follows:

> 9. (1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

[29] The amended statement of claim may fairly be read as alleging a violation of this section by AltiMed in that the pseudo-generic drugs are labeled as having originated with (i.e. manufactured by) AltiMed. The appellant argues that this labeling is misleading since the brand-name defendants manufacture the drugs. The appellant also argues that the labeling creates an erroneous impression as to the character of the drug because there is no disclosure that the AltiMed drugs are identical in all respects to the brand-name drugs.

[30] The motions judge held as follows:

> The evil to be prevented [by s. 9] is the purchase of something different than that which was bargained for. No facts were pleaded as to the making of a false or misleading representation, or to suggest the drugs

> purchased were different from the drugs intended to be purchased."

[31] In my view, the motions judge is probably correct as to the purpose of s. 9. However, it is not plain and obvious that with regard to AltiMed the allegations in the amended statement of claim do not fall within the very broad wording of s. 9.

DISPOSITION

[32] Accordingly, I would allow the appeal, set aside the order of Jennings J., and, in its place, make an order striking out only those allegations relating to the *Business Practices Act* and s. 54 of the *Competition Act.* The appellant has achieved substantial success on this appeal and is entitled to its costs of the appeal and of the motions.

(signed) "M. Rosenberg J.A."
(signed) "I agree R. McMurtry C.J.O."
(signed) "I agree J. W. Morden J.A."

RELEASED: December 14, 2000 "RMc."

CITATION: Bell Canada v. Cogeco Cable Canada, 2016 ONSC 6044
COURT FILE NO.: CV-16-558902
DATE: 20160926

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BELL CANADA, Plaintiff

AND: COGECO CABLE CANADA GP INC, Defendant

BEFORE: Justice W. Matheson

COUNSEL: *Ronald Foerster, Bevan Brooksbank*, for the Plaintiff

Benjamin Bathgate and Laura Brazil, for the Defendant

HEARD: September 20, 2016

ENDORSEMENT

[1] Bell Canada seeks an interlocutory injunction against Cogeco Cable Canada GP Inc. in connection with two aspects of a new advertising campaign that Cogeco launched on the Internet in early August 2016. Bell claims that two allegedly false and/or misleading representations give rise to a number of causes of action against Cogeco. These claims are denied by Cogeco.

[2] The first of the two issues raised by Bell relates to Cogeco's use of the phrase "the best Internet experience in your neighbourhood." For the reasons set out below, I am satisfied that there should be an interlocutory injunction with respect to the use of this phrase.

[3] The second of the two issues raised by Bell arises from Cogeco's rebranding of the packages it offers for Internet services. Although the packages themselves have not changed, they have been rebranded adding the prefix "Ultra" – for example, UltraFibre 15 or UltraFibre 250. For the reasons set out below, I am not granting an interlocutory injunction with respect to these new package names.

Ontario

[4] In this proceeding, Bell Canada is requesting an injunction with respect to Cogeco advertising in Ontario. Bell Canada and Cogeco both operate in Ontario, although Cogeco operates in only part of the province. These two Internet service providers directly compete for Internet customers in many Ontario communities, in a highly competitive marketplace.

[5] As of now, Internet service providers use three major types of technologies to provide Internet services to consumers:

(1) Cable providers such as Cogeco use technology within their cable television network to connect customers to the Internet, specifically hybrid fiber co-axial cable (or Cable/HFC).

(2) Traditionally, telecommunications providers such as Bell, have used Digital Subscriber Lines (or DSL) to connect customer computers to the Internet using existing telephone lines with additional hardware. DSL speeds exceed Cable/HFC in some but not all categories of DSL.

(3) The third major type of technology is called fiber-to-the-home (or FTTH). With a FTTH system, fiber optics extend all the way to a customer's home or business, providing a continuous optical path, which is not available with the other two major technologies. FTTH provides significantly higher speeds and performance over both Cable/HFC and DSL and requires a major infrastructure investment.

[6] In addition to using DSL, Bell has been progressively rolling out FTTH technology across Ontario at great expense. For the most part, Cogeco uses Cable/HFC and there is no indication that Cogeco is retrofitting its existing cable network. It is only deploying FTTH technology in new residential developments that meet certain criteria.

[7] The different technologies used by Bell and Cogeco are reflected in the Internet speeds advertised to consumers in the marketplace. Bell offers packages with Internet service download speeds of up to 940 megabytes per second (Mbps) where the highest download speed offered by Cogeco is 250 Mbps. Similarly, the highest upload speed offered by Bell is 100 Mbps, as compared to 20 Mbps for Cogeco.

[8] In March 2016, the Canadian Radio-Television and Telecommunications Commission (CRTC) released a Report that it commissioned to evaluate the performance of broadband services sold to Canadian consumers. Cogeco agrees that the CRTC Report represents the best publicly available recent comparison of Internet technologies.

[9] The CRTC Report concluded that FTTH outperforms Cable/HFC on download speed, upload throughput speed, latency and packet loss.

[10] Thus, in addition to outperforming on speed, FTTH outperformed on reliability. Packet loss measures the risk that data will not reach its intended destination. The level of packet loss for FTTH was 0.04% on average, significantly better than 0.11% for Cable/HFC. Similarly, FTTH had the lowest incidence of latency, that is the measure of how long it takes a data packet to travel between two points.

[11] The CRTC Report also compared DSL technology and Cable/HFC, concluding that DSL largely outperformed Cable/HFC in all but the lowest category of DSL.

[12] The CRTC Report made the unremarkable observation that higher speeds are more desirable and observed that it was common for providers to differentiate their product offerings by speed, which was a key part of their advertising.

[13] The superior performance offered by FTTH technology has been recognized by Cogeco in its 2015 Annual Report, speaking about its limited plan to deploy FTTH in new residential developments. The Annual Report indicates that FTTH "offers increased reliability, lower maintenance costs and is an excellent platform for the delivery of enhanced video services and higher-speed Internet services in the future."

[14] Consumers have access to FTTH through Bell in many areas in Ontario where Cogeco provides its services using Cable/HFC. However, the degree of FTTH availability varies widely. At the high end, there are eight areas where Bell makes FTTH available to more than 20% and up to 50% of the addresses where Cogeco Cable/HFC services are also available.

Advertising campaign

[15] Cogeco announced a new "brand identity" as part of its August 2016 "Back To School" marketing campaign. It rebranded its residential Internet services with the name "UltraFibre" and implemented a new homepage for its website. There was also an associated press release, but the argument before me focused on the Cogeco website.

[16] This action relates to two aspects of the new campaign. The main text on the first screen of the homepage comprises two sentences: "There's no limit to the things you can explore." and "Enjoy unlimited entertainment with the best Internet experience in your neighbourhood." The phrase "best Internet experience in your neighbourhood" is challenged by Bell.

[17] The new package names are also challenged. A hyperlink appears toward the top of the home page through which the consumer can go to another part of the website containing a description of all the Internet packages made available, newly branded as "UltraFibre" packages. Each package name also includes the maximum download speed, such as UltraFibre 250, offering the download speed of 250 Mbps.

[18] On or about August 9, 2016, Cogeco's new advertising campaign came to Bell's attention. After an unsuccessful attempt to work matters out between the parties, this action was commenced on August 19, 2016, followed by the motion for an interlocutory injunction.

[19] In this action, Bell asserts claims based on statutory causes of action arising from alleged breaches of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34 and s. 7 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, as well as the common-law causes of action of injurious falsehood and the unlawful means tort.

Analysis

[20] The test for an interlocutory injunction is not at issue. It is set out in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311, at para. 43, as follows:

(i) whether the moving party has demonstrated that there is a serious question to be tried (or, in certain circumstances not applicable here, a strong *prima facie* case);

(ii) whether the moving party will suffer irreparable harm if an injunction is not granted; and,

(iii) whether the balance of convenience favours granting the injunction.

[21] Bell has given the required undertaking as to damages.

(i) Serious question to be tried

[22] In determining whether there is a serious question to be tried, the Court is not required to engage in a prolonged assessment of the merits. As held in *RJR-MacDonald*, at para. 49, the threshold "is a low one." I am satisfied that there is a serious question to be tried regarding the representation at the top of the homepage that Cogeco provides the "best Internet experience in your neighbourhood."

[23] There is considerable overlap between the various causes of action. I find it sufficient to focus on the claim for breach of s. 52 of the *Competition Act*, which is actionable by virtue of s. 36 of that Act. Section 52 provides as follows, in relevant part:

> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
>
> (a) any person was deceived or misled;
>
> …
>
> (4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[24] As expressly provided for in subsection (4), the general impression conveyed by the advertisement must be considered. A representation is misleading in a material respect if an ordinary citizen would likely be influenced by that impression in deciding whether or not to purchase the product or service: *Canada (Commissioner of Competition) v. Yellow Page Marketing B.V.*, 2012 ONSC 927, 101 C.P.R. (4th) 286, at para. 34, aff'd 2013 ONCA 71, [2013] O.J. No. 455.

[25] The advertisement must be looked at as a whole, from the perspective of an average consumer. The consumer perspective must be that of a credulous and technologically inexperienced consumer of Internet services: *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, 288 C.R.R. (2d) 297, at paras. 128-132.

[26] In the Internet context, there is an issue regarding what constitutes looking at the advertisement as a whole. That question need not be finally resolved now. However, for the purpose of this motion, I do not accept Cogeco's submission that I should proceed on the basis that the entirety of what a consumer can scroll down to or link to should be considered. The Cogeco homepage consists of five pages of text, graphics and hyperlinks and two pages of terms and conditions in the seemingly inevitable fine print. Cogeco asks me to proceed on the basis that the consumer would or should view all of this material. As I indicated at the hearing, I have some difficulty with that proposition. This sort of Internet homepage is not comparable to an ad published within a single page of a print newspaper or magazine: e.g., *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265.

[27] It is at least arguable that, for the purposes of s. 52, the court should consider what the consumer would see on a single screen, including the labels on the hyperlinks on that screen. I recognize that the amount of content presented on the screen could depend to some extent on the size of the screen on the device chosen by the consumer. Even taking that into account, much of what Cogeco seeks to rely upon would not appear on that first screen.

[28] Cogeco takes the position that an "Internet experience" consists of multiple factors including not only speed and reliability, but also customer service and security among other things. It emphasizes its customer service, submitting that the campaign was inspired by its ability to deliver an "outstanding client experience." Some local customer service awards are shown a few screens down on the home page. Cogeco also relies on disclaimers and restrictions disclosed if a consumer clicks on various hyperlinks. If the consumer clicks the link to see the product offerings, and works his or her way through the content on the various packages, the consumer would find, at the bottom of the page, a block of fine print. That fine print says, in the last sentence, that Cogeco uses a combination of optical fibre and coaxial cable (in other words, Cable/HFC technology). It does not say what that means for speed or performance or for any other relevant measure. Cogeco relies on that disclosure.

[29] Bell agrees that there are multiple relevant factors involved in the customer experience, but submits that speed and performance are critical factors when speaking about "Internet experience". In short, Bell submits that it is simply not possible to provide the "best Internet experience" without being able to provide the best speed and performance. And it is clear on the evidence that Cogeco does not provide the best speed and performance in every neighbourhood.

[30] In support of its assertion that it provides the "best Internet experience in your neighbourhood", Cogeco relies on its own May 2016 customer study. In that study, customers ranked as their top "satisfaction driver" "overall Internet service satisfaction" which is obviously general and would include many factors including speed and performance. The isolated factor of upload and download speed was ranked sixth. However, in relation to the five key Internet

service "acquisition drivers", ranked first was better value for money, which would necessarily include speed and performance, ranked second was faster speed and ranked third was improved upload/download capacity.

[31] Cogeco concedes that it cannot claim that it provides the fastest Internet service in every neighbourhood it offers services in, or the highest Internet performance on other measures. However, it submits that its representations are qualitative only, rather than quantitative representations on matters such as speed, and bring to bear many factors other than speed such as customer service. I am not persuaded that the singular claim to providing "the best Internet experience" avoids consequences in this way: see, e.g., *Bell Aliant Regional Communications Ltd. v. Rogers Communications Inc.*, 2010 NBQB 166, 361 N.B.R. (2d) 140.

[32] The reference to "your neighbourhood" is also significant in that it brings the representation home to a specific area for each consumer, rather than a more generic reference.

[33] I am satisfied that there is a serious question to be tried regarding whether the representation of "best Internet experience in your neighbourhood" is false or misleading in a material respect. Further, I am satisfied based largely on the CTRC Report, of which Cogeco was obviously well aware, that there is a serious question to be tried regarding whether the alleged misrepresentation was made knowingly or recklessly.

[34] The various causes of action alleged also require that the claimant suffer economic loss. Given the very recent introduction of this campaign, I do not agree with Cogeco that Bell must come forward with definitive evidence of lost customers, for example, at this early stage. Given the purpose of the advertising campaign itself, and the materials before me, I am satisfied that there is a serious question to be tried.

[35] This is sufficient to meet the first requirement with respect to the representation on the homepage.

[36] I have a different view regarding the rebranded product names. I accept Bell's submission that the word "ultra" bears the definition "goes beyond others" or "extreme", but it is not a singular claim (like "the best") and is always used along with an actual speed commitment right in the package name. For example, one package is called UltraFibre 250, where 250 is an express reference to the download speed of 250 Mbps as highlighted in the package description. All of the package names follow this format. Whether it be under s. 52 or the other causes of action asserted, I have difficulty with the characterization of these names as false or misleading. The addition of the word "Ultra" strikes me as more in the category of puffery: *Telus Communications Co. v. Bell Mobility Inc.*, 2007 BCSC 518, at para. 19. I am therefore not persuaded that there is a serious question to be tried with respect to these new names.

(ii) Irreparable harm

[37] I am also satisfied that the plaintiff has established that there will be irreparable harm for which it cannot be compensated for in damages. It would be difficult, if not impossible, to determine with any certainty which potential or existing customers were misled by the claim that

Cogeco is the best, and which customers or potential customers made their choices for reasons unrelated to this advertising claim: *BC Tel Mobility Cellular Inc. v. Rogers Cantel Inc.*, [1995] 63 C.P.R. (3d) 464 (B.C.S.C), at para. 31; *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, [1994] O.J. No. 2165 (Gen. Div.), at para 12; *Church & Dwight Ltd. v. Sifto Canada Inc.*, [1994] O.J. No. 2139 (Gen. Div.), at para 18; *Bell Aliant Regional Communications Ltd. v. Rogers Communications Inc*.

(iii) Balance of convenience

[38] Cogeco argues that the balance of convenience favours it. In doing so, it relies primarily on two submissions. It first relies on the importance of the Fall "Back To School" marketing season. It describes it as a critical time for effective marketing and promotion of Internet services. It is apparently a key time period within which to attract new customers. In my view, this submission favours Bell at least as much as Cogeco. If this is a critical period for marketing to prospective Internet customers, Bell also could be significantly affected by the advertising campaign continuing during that period while Cogeco represents that it provides the "best Internet experience".

[39] Cogeco also relies upon the substantial expenditure it has made developing its ad campaign and the potential cost of investing in a new or replacement campaign. I accept that Cogeco incurred significant costs in developing its campaign. However, it could be compensated for those costs. Further, the cost of removing the word "best" or replacing it would ordinarily be insignificant. Leaving aside the press release, which has already gone out, the phrase appears in one place, on the opening screen of the homepage. On the evidence before me, it is not, for example, preprinted in expensive packaging. I recognize that there may be some impact on the campaign by removing or replacing that word, but I am not persuaded that it tips the balance of convenience in favour of Cogeco.

[40] I also have a general reluctance to intervene in what is a very competitive marketplace. However, Cogeco has altered that marketplace by claiming to be the "best", despite the fact that it is not providing the fastest or highest performing Internet service, in at least some of the areas in which these two companies compete. I am sufficiently concerned that the ordinary consumer may be misled by the representation that I factor in the public interest when considering the balance of convenience: *BC Tel Mobility Cellular Inc.*, at para. 24.

[41] Cogeco also submits that the evidence put forward by Bell is inadequate in some respects, submitting that the failure to put forward certain types of evidence in certain areas should be considered not only under balance of convenience but the other aspects of the injunction test as well. I have considered these submissions, but they do not persuade me to reach a different outcome.

[42] I conclude that the balance of convenience favours granting injunctive relief with respect to the phrase "the best Internet experience in your neighbourhood."

Order

[43] I therefore grant an interlocutory injunction restraining the defendant from stating, publishing or otherwise representing that it offers the "best Internet experience in your neighbourhood." If further terms are requested regarding the scope of this injunction, the parties may arrange a conference call through my office.

[44] If the parties are unable to agree on costs, Bell Canada shall make its submissions by delivering brief written submissions together with a costs outline by October 3, 2016. Cogeco may respond by delivering brief written submissions and any other material by October 11, 2016. Any reply may be made by brief written submissions to be delivered by October 14, 2016. This timetable may be modified on agreement between the parties provided that I am notified of the new timetable by October 3, 2016.

Justice W. Matheson

Date: September 26, 2016

A-476-08
2009 FCA 295

The Commissioner of Competition (*Appellant*)

v.

Premier Career Management Group Corp. and **Minto Roy** (*Respondents*)

Indexed as: Canada (Commissioner of Competition) v. Premier Career Management Group Corp.

Federal Court of Appeal, Létourneau, Sexton and Layden-Stevenson JJ.A.—Toronto, September 16; Ottawa, October 15, 2009.

Competition — Appeal from Competition Tribunal decision holding that, although respondents' representations to potential clients misleading, representations not made "to the public" within meaning of Competition Act, s. 74.01(1)(a) — Respondents operating career consulting business — Making number of allegedly misleading representations to potential clients regarding clients' prospects for success in job market if deciding to use respondents' services — Tribunal erring in law when holding respondents' representations not made "to the public" — Fact representations made in private not dictating representations not made to public — If communications reaching significant portion of public, made "to the public" — Respondents' misrepresentations playing key role in decisions of some customers to choose respondents over other agencies — Behaviour targeted falling squarely within ambit of Act — Tribunal correctly construing respondents' representations, not committing palpable, overriding error in analysing whether respondents' representations misleading — Appeal allowed.

This was an appeal from a decision of the Competition Tribunal holding that, although the respondents' representations to its potential clients were misleading, they were not made "to the public" within the meaning of paragraph 74.01(1)(*a*) of the *Competition Act* since they were made in the privacy of the respondents' office on a one-to-one basis.

A-476-08
2009 CAF 295

La Commissaire de la concurrence (*appelante*)

c.

Premier Career Management Group Corp. et **Minto Roy** (*intimés*)

Répertorié : Canada (Commissaire de la concurrence) c. Premier Career Management Group Corp.

Cour d'appel fédérale, juges Létourneau, Sexton et Layden-Stevenson, J.C.A.—Toronto, 16 septembre; Ottawa, 15 octobre 2009.

Concurrence — Appel d'une décision par laquelle le Tribunal de la concurrence a statué que même si les indications données par les intimés à leurs clients éventuels étaient trompeuses, elles n'avaient pas été données « au public » au sens de l'art. 74.01(1)a) de la Loi sur la concurrence — Les intimés exploitaient une entreprise de services d'orientation de carrière — Ils auraient donné à d'éventuels clients des indications trompeuses quant aux perspectives de réussite sur le marché du travail que ces services leur ouvriraient — Le Tribunal a commis une erreur de droit en statuant que les indications des intimés n'avaient pas été données « au public » — Le fait que les indications aient été formulées en privé ne voulait pas dire qu'elles n'aient pas été données au public — Si les indications sont communiquées à une partie appréciable du public, elles sont données « au public » — Les indications trompeuses données par les intimés ont joué un rôle clé dans la décision d'au moins certains clients de retenir les services des intimés plutôt que ceux d'autres agences — Le comportement s'inscrit donc tout à fait dans le champ d'application de la Loi — Le Tribunal a donné une interprétation juste des indications des intimés et n'a pas commis d'erreur manifeste et dominante dans son analyse de la question de savoir si les indications des intimés étaient trompeuses — Appel accueilli.

Il s'agissait d'un appel d'une décision par laquelle le Tribunal de la concurrence a statué que même si les indications données par les intimés à leurs clients éventuels étaient trompeuses, elles n'avaient pas été données « au public » au sens de l'alinéa 74.01(1)*a*) de la *Loi sur la concurrence*, au motif qu'elles avaient été communiquées au cours d'entretiens privés dans les bureaux des intimés, à une seule personne à la fois.

The respondents operated a career consulting business and, to stimulate business, they made a number of allegedly misleading representations to potential clients regarding their prospects for success in the job market if they were to use the respondents' services. The representations were made individually and in private. The respondent Minto Roy was the sole director and shareholder of the respondent Premier Career Management Group Corp. (PCMG). PCMG had three divisions, one of which was PCMG Canada. PCMG Canada solicited clients through various marketing means. The Tribunal found that the respondents made three types of representations to prospective customers: the "screening representation", the "contacts representation" and the "90-day/good job representation". In the screening representation, prospective clients were informed that only qualified applicants would be invited for a second meeting, and that the purpose of the first meeting was to ensure that prospective clients qualified for PCMG's services. In the contacts representation, prospective clients were informed that the respondent had a wide network of personal contacts with business executives at companies that were hiring. In the 90-day/good job representation, the respondents advised prospective clients that they would very likely find good jobs within 90 days if they hired PCMG's services. The Tribunal found the contacts representation and the 90-day/good job representation to be materially misleading. However, the Tribunal ruled that the phrase "to the public" in paragraph 74.01(1)(*a*) of the Act had to be understood not just as communication to individuals but rather "to the marketplace". The Tribunal therefore dismissed the application because of its findings that the misrepresentations were not made "to the public"

Les intimés exploitaient une entreprise de services d'orientation de carrière et, dans le but d'inciter d'éventuels clients à recourir à leurs services, ils auraient donné des indications trompeuses quant aux perspectives de réussite sur le marché du travail que ces services leur ouvriraient. Ces indications ont été données individuellement et en privé. L'intimé Minto Roy était l'unique administrateur et actionnaire de l'intimée Premier Career Management Group Corp. (PCMG). PCMG comprenait trois divisions, dont PCMG Canada. Cette dernière faisait sa prospection au moyen de divers moyens de commercialisation. Le Tribunal a constaté que les intimés donnaient trois sortes d'indications aux clients éventuels : des « indications sur la présélection », des « indications sur les personnes-ressources » et des « indications sur les 90 jours et le bon emploi ». En ce qui concerne les indications sur la présélection, on disait aux clients éventuels que le but du premier entretien était de vérifier s'ils remplissaient les conditions nécessaires pour bénéficier des services de PCMG et que seuls les candidats qualifiés seraient invités à un deuxième entretien. Concernant les indications sur les personnes-ressources, les clients éventuels étaient informés que les intimés disposaient d'un vaste réseau de relations parmi les dirigeants et les cadres des entreprises qui recrutaient. En ce qui a trait aux indications sur les 90 jours et le bon emploi, les intimés informaient leurs clients éventuels que, s'ils retenaient les services de PCMG, ils trouveraient très probablement un bon emploi dans les 90 jours. Le Tribunal a conclu que les indications sur les personnes-ressources et sur les 90 jours et le bon emploi étaient trompeuses sur un point important. Cependant, le Tribunal a conclu que l'expression « au public » à l'alinéa 74.01(1)*a*) de la Loi devait s'entendre non pas d'une communication seulement individuelle, mais d'une communication faite « sur le marché ». Le Tribunal a donc rejeté la demande en raison de sa conclusion portant que les indications trompeuses n'ont pas été données « au public ».

The issues were whether the Tribunal erred in interpreting the words "to the public" within the meaning of section 74.01 and in holding that the contacts representation and the 90-day/good job representation were misleading.

Il s'agissait de savoir si le Tribunal avait commis une erreur dans son interprétation des mots « au public » au sens de l'article 74.01 et en statuant que les indications sur les personnes-ressources et celles sur les 90 jours et le bon emploi étaient trompeuses.

Held, the appeal should be allowed.

Arrêt : l'appel doit être accueilli.

The Tribunal's decision that the respondents' representations, although misleading, were not made "to the public" constituted an error of law. The public did have access to the respondents' representations but just accessed them one at a time rather than collectively. The important question to ask in determining whether a representation was made to the public is "to whom were the representations made?" In this case, the representations were made to a significant section of the public who had been invited by advertising to

La conclusion du Tribunal selon laquelle les indications des intimés, bien que trompeuses, n'ont pas été données « au public » constituait une erreur de droit. Le public avait bel et bien accès aux indications des intimés; c'est seulement que les membres du public y avaient accès individuellement plutôt que collectivement. La question importante qu'il faut se poser pour établir si des indications ont été données au public est le point de savoir à qui elles ont été données. En l'occurrence, les indications ont été données à des personnes

attend at the offices of the respondent. The fact that representations were made in private does not dictate that they were not made to the public. All the circumstances of the communication must be looked at. If, as in this case, the communications reach a significant portion of the public, they are made "to the public". The "public" referred to can be a "subset of the public".

Given the purpose of the Act, which is to promote derivative economic objectives (section 1.1), it becomes clear that the objective of the deceptive marketing provisions in section 74.01 is to incite firms to compete based on lower prices and higher quality. When a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals. The proper focus of analysis in deceptive marketing cases is the consumer. Based on the evidence, the respondents' misrepresentations played a key role in the decisions of at least some customers to choose PCMG over other agencies. This is exactly the type of market distortion that the deceptive marketing provisions seek to prevent. The behaviour targeted in this case fell squarely within the ambit of the Act.

The Tribunal correctly construed the respondents' representations. While it found that the respondents did not guarantee specific interviews with specific contacts, it found that the respondents did guarantee interviews generally with high-ranking contacts. It did not matter that the respondents did not detail exactly which contacts prospective clients would meet.

The Tribunal also did not commit any palpable and overriding error in analysing whether the respondents' representations were misleading. There was no need for the Tribunal to make preliminary findings of fact regarding the respondents' network of contacts or the success rate of a typical PCMG customer. It was implicit from the Tribunal's decision that the respondents represented that they had a network of contacts and that the typical client did not find a job within 90 days as represented. Therefore, it was open to the Tribunal to conclude on the facts before it that the contacts representations and the 90-day/good job representations were materially misleading.

composant un sous-ensemble appréciable du public, que des annonces publicitaires avaient incitées à se rendre aux bureaux des intimés. Le fait que les indications aient été formulées en privé ne veut pas dire qu'elles n'aient pas été données au public. Il faut prendre en considération toutes les circonstances de la communication. Si, comme dans la présente affaire, les indications sont communiquées à une partie appréciable du public, elles sont bel et bien données « au public ». Le « public » dont il s'agit peut être « un sous-ensemble du public ».

Il ressort clairement de l'objet de la Loi (qui est de promouvoir les objectifs économiques (article 1.1)) que les dispositions relatives aux pratiques commerciales trompeuses de l'article 74.01 visent à inciter les entreprises à rivaliser sur la base des prix et de la qualité. Lorsqu'une entreprise donne des renseignements trompeurs aux consommateurs éventuels, elle porte nécessairement préjudice au bon fonctionnement du marché, de sorte qu'on est fondé à invoquer ici la Loi, étant donné ses objectifs explicites. C'est le consommateur qui doit former l'axe de l'analyse dans les affaires de pratiques commerciales trompeuses. Selon la preuve, les indications trompeuses données par les intimés ont joué un rôle clé dans la décision d'au moins certains clients de retenir les services de PCMG plutôt que ceux d'autres agences. C'est exactement là le genre de distorsion du marché que les dispositions relatives aux pratiques commerciales trompeuses visent à empêcher. Le comportement en cause dans la présente affaire s'inscrit donc tout à fait dans le champ d'application de la Loi.

Le Tribunal a donné une interprétation juste des indications en cause. Il est vrai que le Tribunal a conclu que les intimés n'avaient pas garanti d'entretiens déterminés avec des personnes-ressources précises, mais il est tout aussi vrai qu'il a conclu que les intimés avaient bel et bien garanti des entretiens en général avec des personnes-ressources de haut niveau. Il importait peu que les intimés n'aient pas fourni de détails précis sur les personnes que leurs clients éventuels rencontreraient.

En outre, le Tribunal n'a pas commis d'erreur manifeste et dominante dans son analyse de la question de savoir si les indications des intimés étaient trompeuses. Il n'incombait pas au Tribunal de formuler des conclusions de fait préalables sur le réseau de personnes-ressources des intimés ni sur le taux de réussite des clients typiques de PCMG. Il était sous-entendu dans la décision du Tribunal que les intimés avaient déclaré qu'ils disposaient d'un réseau de personnes-ressources et que le client typique n'avait pas trouvé un emploi dans les 90 jours, contrairement aux indications. Par conséquent, il était loisible au Tribunal de conclure des faits exposés devant lui que les indications sur les personnes-ressources et sur les 90 jours et le bon emploi étaient trompeuses sur un point important.

STATUTES AND REGULATIONS CITED

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Combines Investigation Act, R.S.C. 1970, c. C-23, s. 36 (as am. by S.C. 1974-75-76, c. 76, s. 18).
Competition Act, R.S.C., 1985, c. C-34, ss. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19), 1.1 (as enacted *idem*), 74.01 (as enacted by S.C. 1999, c. 2, s. 22), 74.02 (as enacted *idem*), 74.03 (as enacted *idem*; 2009, c. 2, s. 423), 74.1 (as enacted by S.C. 1999, c. 2, s. 22; 2009, c. 2, s. 424).
Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19, s. 13 (as am. by S.C. 2002, c. 8, s. 130).
Copyright Act, R.S.C., 1985, c. C-42, s. 3(1)(*f*) (as am. by S.C. 1988, c. 65, s. 62).
Human Rights Act, S.B.C. 1984, c. 22, s. 3.
Interpretation Act, R.S.C., 1985, c. I-21, s. 45(2).

LOIS ET RÈGLEMENTS CITÉS

Human Rights Act, S.B.C. 1984, ch. 22, art. 3.
Loi d'exécution du budget de 2009, L.C. 2009, ch. 2, art. 423.
Loi d'interprétation, L.R.C. (1985), ch. I-21, art. 45(2).
Loi relative aux enquêtes sur les coalitions, S.R.C. 1970, ch. C-23, art. 36 (mod. par S.C. 1974-75-76, ch. 76, art. 18).
Loi sur la concurrence, L.R.C. (1985), ch. C-34, art. 1 (mod. par L.R.C. (1985) (2e suppl.), ch. 19, art. 19), 1.1 (édicté, *idem*), 74.01 (édicté par L.C. 1999, ch. 2, art. 22), 74.02 (édicté, *idem*), 74.03 (édicté, *idem*; 2009, ch. 2, art. 423), 74.1 (édicté par L.C. 1999, ch. 2, art. 22; 2009, ch. 2, art. 424).
Loi sur le droit d'auteur, L.R.C. (1985), ch. C-42, art. 3(1)*f*) (mod. par L.C. 1988, ch. 65, art. 62).
Loi sur le Tribunal de la concurrence, L.R.C. (1985) (2e suppl.), ch. 19, art. 13 (mod. par L.C. 2002, ch. 8, art. 130).

CASES CITED

APPLIED:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, (1993), 102 D.L.R. (4th) 665, 79 B.C.L.R. (2d) 273, revg (1991), 81 D.L.R. (4th) 497, 1 B.C.A.C. 58, 56 B.C.L.R. (2d) 296 (B.C.C.A.), affg (1988), 10 C.H.R.R. D/6112 (B.C.S.C.); *Regina v. Kiefer* (1976), 70 D.L.R. (3d) 352, [1976] 4 W.W.R. 395, 31 C.C.C. (2d) 132 (B.C. Prov. Ct.), affd [1976] 6 W.W.R. 541 (B.C. Co. Ct.); *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395, 30 C.P.R. (4th) 1; *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, 290 D.L.R. (4th) 753, 64 C.P.R. (4th) 343; *Canadian Cable Television Assn. v. Canada (Copyright Board)*, [1993] 2 F.C. 138, (1993), 46 C.P.R. (3d) 359, 151 N.R. 59 (C.A.); *United States of America v. Dynar*, [1997] 2 S.C.R. 462, (1997), 33 O.R. (3d) 478, 147 D.L.R. (4th) 399.

CONSIDERED:

Apotex Inc. v. Hoffmann La-Roche Ltd. (2000), 195 D.L.R. (4th) 244, 9 C.P.R. (4th) 417, 139 O.A.C. 63 (Ont. C.A.); *R. v. Kenitex Canada Ltd. et al*. (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.).

REFERRED TO:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *R. v. Total*

JURISPRUDENCE CITÉE

DÉCISIONS APPLIQUÉES :

Housen c. Nikolaisen, 2002 CSC 33, [2002] 2 R.C.S. 235; *Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353, infirmant (1991), 81 D.L.R. (4th) 497, 1 B.C.A.C. 58, 56 B.C.L.R. (2d) 296 (C.A.C.-B.), confirmant (1988), 10 C.H.R.R. D/6112 (C. supr. C.-B.); *Regina v. Kiefer* (1976), 70 D.L.R. (3d) 352, [1976] 4 W.W.R. 395, 31 C.C.C. (2d) 132 (C. P. C.-B.), conf. par [1976] 6 W.W.R. 541 (C.c. C.-B.); *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339; *Assoc. canadienne des télécommunications sans fil c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2008 CAF 6, [2008] 3 R.C.F. 539; *Assoc. canadienne de télévision par câble c. Canada (Commission du droit d'auteur)*, [1993] 2 C.F. 138 (C.A.); *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462.

DÉCISIONS EXAMINÉES :

Apotex Inc. v. Hoffmann La-Roche Ltd. (2000), 195 D.L.R. (4th) 244, 9 C.P.R. (4th) 417, 139 O.A.C. 63 (C.A. Ont.); *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (C.c. Ont.).

DÉCISIONS CITÉES :

Dunsmuir c. Nouveau-Brunswick, 2008 CSC 9, [2008] 1 R.C.S. 190, 329 R.N.-B. (2e) 1; *R. v. Total Ford Sales Ltd.*

Ford Sales Ltd. (1987), 18 C.P.R. (3d) 404 (Ont. Dist. Ct.); *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 (Ont. C.A.); *Regina v. International Vacations Ltd.* (1980), 33 O.R. (2d) 327, 124 D.L.R. (3d) 319, 59 C.C.C. (2d) 557 (C.A.); *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163, 265 N.S.R. (2d) 369.

AUTHORS CITED

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis Canada, 2008.

APPEAL from a decision (2008 Comp. Trib. 18) of the Competition Tribunal holding that, although the respondents' representations to its potential clients were misleading, they were not made "to the public" within the meaning of paragraph 74.01(1)(*a*) of the *Competition Act* since they were made in the privacy of the respondents' office on a one-to-one basis. Appeal allowed.

APPEARANCES

John Syme for appellant.
W. Michael G. Osborne, *G. L. Sonny Ingram* and *Christian Farahat* for respondents.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.
Affleck Greene McMurtry LLP, Toronto, for respondents.

The following are the reasons for judgment rendered in English by

SEXTON J.A.:

I. Introduction

[1] The respondents operated a career consulting business in the Vancouver area. In their attempts to stimulate business, the respondents made a number of allegedly misleading representations to potential clients regarding their prospects for success in the job market should they use the respondents' services. The representations were

(1987), 18 C.P.R. (3d) 404 (C. dist. Ont.); *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 (C.A. Ont.); *Regina v. International Vacations Ltd.* (1980), 33 O.R. (2d) 327, 124 D.L.R. (3d) 319, 59 C.C.C. (2d) 557 (C.A.); *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163, 265 N.S.R. (2d) 369.

DOCTRINE CITÉE

Côté, Pierre-André. *Interprétation des lois*, 3e éd. Montréal : Thémis, 1999.
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5e éd. Markham, Ont. : LexisNexis Canada, 2008.

APPEL d'une décision (2008 Trib. concurr. 18) par laquelle le Tribunal de la concurrence a statué que même si les indications données par les intimés à leurs clients éventuels étaient trompeuses, elles n'avaient pas été données « au public » au sens de l'alinéa 74.01(1)*a*) de la *Loi sur la concurrence*, au motif qu'elles avaient été communiquées au cours d'entretiens privés dans les bureaux des intimés, à une seule personne à la fois. Appel accueilli.

ONT COMPARU

John Syme pour l'appelante.
W. Michael G. Osborne, *G. L. Sonny Ingram* et *Christian Farahat* pour les intimés.

AVOCATS INSCRITS AU DOSSIER

Le sous-procureur général du Canada pour l'appelante.
Affleck Greene McMurtry LLP, Toronto, pour les intimés.

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE SEXTON, J.C.A. :

I. Introduction

[1] Les intimés exploitaient une entreprise de services d'orientation de carrière dans la région vancouvéroise. Dans le but d'inciter d'éventuels clients à recourir à leurs services, ils auraient donné des indications trompeuses quant aux perspectives de réussite sur le marché du travail que ces services leur ouvriraient. Ces indications

made individually and in private to a number of potential clients. The appellant alleges these representations violate paragraph 74.01(1)(*a*) [as enacted by S.C. 1999, c. 2, s. 22] of the *Competition Act*, R.S.C., 1985, c. C-34 [s. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19)] (the Act), which prohibits false or misleading advertisements made to the public. The respondents contend that they were not misleading and were not made to the clients as members of the public, but rather as individuals. The Tribunal [*Commissioner of Competition v. Premier Career Management Group et al.*, 2008 Comp. Trib. 18] held that, although the representations were misleading, they were not made "to the public" because they were made in the privacy of the respondents' office on a one-to-one basis. The main issue in this appeal is whether the representations to certain individuals, though made individually and in private, were nevertheless made "to the public" within the meaning of the Act. The appeal also puts in question the character of these representations. I believe that the focus of the analysis should be on all the circumstances under which the representations were made. In particular it is important that the respondents solicited, by means of advertising, members of the public to utilize their services in order to obtain employment. Once members of the public sought help from the respondents, similar misleading representations were made to each of such members of the public. For the reasons that follow, I find that the representations in this case were misleading and were indeed made "to the public".

ont été données individuellement et en privé à un certain nombre de clients éventuels. L'appelante soutient que les indications ainsi communiquées l'ont été en violation de l'alinéa 74.01(1)*a*) [édicté par L.C. 1999, ch. 2, art. 22] de la *Loi sur la concurrence*, L.R.C. (1985), ch. C-34 [art. 1 (mod. par L.R.C. (1985) (2^{e} suppl.), ch. 19, art. 19)] (la Loi), qui interdit de donner au public des indications fausses ou trompeuses. Les intimés affirment quant à eux que les indications en question n'étaient pas trompeuses et n'ont pas été données aux clients en tant que membres du public, mais plutôt en tant qu'individus. Le Tribunal [*Tribunal de la concurrence c. Premier Career Management Group et al.*, 2008 Trib. concurr. 18] a conclu que les indications étaient effectivement trompeuses, mais qu'elles n'avaient pas été données « au public », au motif qu'elles avaient été communiquées au cours d'entretiens privés dans les bureaux des intimés, à une seule personne à la fois. La principale question en litige dans le présent appel est celle de savoir si les indications données à des personnes déterminées, bien qu'elles l'aient été individuellement et en privé, ont néanmoins été données « au public » au sens de la Loi. Le présent appel met aussi en litige la nature de ces indications. Je pense que l'analyse devrait être axée sur l'ensemble des circonstances dans lesquelles les indications ont été données. Il est en particulier important de se rappeler que les intimés incitaient d'abord, au moyen de la publicité, des membres du public à utiliser leurs services afin de se trouver un emploi. Ils donnaient ensuite des indications trompeuses d'une même nature à chacun des membres du public qui leur demandait leur aide. Pour les motifs qui suivent, je conclus que les indications en cause dans la présente affaire étaient trompeuses et qu'elles ont effectivement été données « au public ».

II. Facts

[2] The respondent Premier Career Management Group Corp. (PCMG) was an employment consulting business in the Vancouver area. The respondent Minto Roy was the sole director and sole shareholder of PCMG.

II. Les faits

[2] L'intimée Premier Career Management Group Corp. (PCMG) était une entreprise de services d'orientation de carrière sise dans la région vancouvéroise, et l'intimé Minto Roy en était l'unique administrateur et actionnaire.

[3] PCMG had three divisions:

A. "Careers Today" was a head-hunting and job posting Web site;

B. "PCMG Executive" was a human resources consulting and leadership management training service;

C. "PCMG Canada" is the focus of this appeal. It provided career coaching services to clients and accounted for 60 to 70 percent of overall PCMG revenue. It offered help with skills analysis and résumé preparation, among other services.

[4] PCMG Canada generally solicited clients through the Careers Today Web site, Mr. Roy's radio show, and newspaper and magazine advertising. When a prospective customer was identified, he or she would be offered a first meeting (the first meeting) with a senior career consultant. In the first meeting, the customer would explain his or her employment history and current job status. The consultant would then give an overview of PCMG Canada's services.

[5] Customers were almost always invited for a second meeting (the second meeting). The second meeting would include a discussion of PCMG services, as well as a discussion of fees and financing options. A PCMG employee would then present the customer with a contract for signature.

[6] The Tribunal found that the respondents made three types of representations to prospective customers: the "screening representation", the "contacts representation" and the "90-day/good job representation".

A. *The screening representation*

[7] In the screening representation, clients were told at the first meeting that only qualified applicants would be invited for a second meeting, and that the purpose of

[3] PCMG comprenait trois divisions :

A. « Careers Today », service de recrutement de cadres qui exploitait un site Web où étaient affichés des postes à pourvoir;

B. « PCMG Executive », service de consultation en ressources humaines et de formation en gestion et leadership;

C. « PCMG Canada », division sur laquelle porte le présent appel, qui représentait de 60 à 70 p. 100 du revenu total de PCMG et offrait des services d'accompagnement de carrière, notamment d'analyse des compétences et de rédaction de curriculum vitae.

[4] PCMG Canada faisait en général sa prospection au moyen du site Web de la division Careers Today, de l'émission de radio de M. Roy, ainsi que de publicité dans les journaux et magazines. Quand on trouvait un client éventuel, on lui offrait un premier entretien (le premier entretien) avec un conseiller principal en orientation de carrière. Au cours du premier entretien, le client éventuel exposait ses antécédents et sa situation actuelle sur le plan professionnel. Le conseiller lui donnait ensuite une vue d'ensemble des services de PCMG Canada.

[5] Les clients éventuels étaient presque toujours invités à un deuxième entretien (le deuxième entretien), où l'on parlait des services de PCMG, des honoraires et des options de financement. Un employé de PCMG présentait alors au client éventuel un contrat à signer.

[6] Le Tribunal a constaté que les intimés donnaient trois sortes d'indications aux clients éventuels : des « indications sur la présélection », des « indications sur les personnes-ressources » et des « indications sur les 90 jours et le bon emploi ».

A. *Les indications sur la présélection*

[7] En ce qui concerne les indications sur la présélection, on disait aux clients éventuels, au premier entretien, que le but de celui-ci était de vérifier s'ils

the first meeting was to ensure that prospective clients were qualified for PCMG's services.

[8] At the hearing before the Tribunal, the appellant introduced testimony from Mr. Steve Wills, a former PCMG senior career consultant. Mr. Wills testified that it was exceptionally rare for any prospective client to be denied a second meeting. Mr. Wills stated that, according to Mr. Roy, one of the key objectives of the first meeting was to determine the prospective customer's ability to pay and, if the customer did not have enough money, to find alternative sources of funding. Mr. Wills also testified that consultants were instructed to stress that the prospective customer should bring his or her spouse to the second meeting. He explained that if the spouse of a prospective customer had not listened to the PCMG sales pitch, the likelihood of the prospective customer signing the contract was reduced. Finally, Mr. Wills testified that consultants were instructed to follow a script, and that the script was intended to instil a sense of urgency in the prospective customer.

B. *The contacts representation*

[9] In the contacts representation, prospective clients were informed at the first and/or second meetings that the respondents had a wide network of personal contacts with leaders and business executives at companies that were hiring. Clients testified that they had been told, among other things, that PCMG had thousands of positions, that the jobs advertised on the Internet and in print represented only a fraction of the total number of jobs available, and that PCMG, through its contacts, had access to a "hidden job market" of otherwise unadvertised jobs.

C. *The 90-day/good job representation*

[10] In the 90-day/good job representation, the respondents advised prospective customers at the first

remplissaient les conditions nécessaires pour bénéficier des services de PCMG et que seuls les candidats qualifiés seraient invités à un deuxième entretien.

[8] À l'audience devant le Tribunal, l'appelante a cité comme témoin un ancien conseiller principal en orientation de carrière de PCMG, M. Steve Wills. M. Wills a déclaré qu'il était extrêmement rare qu'on refuse un deuxième entretien à un client éventuel. Il a expliqué que, selon M. Roy, l'un des principaux objectifs du premier entretien était d'établir la capacité de paiement du client éventuel et, si ce dernier n'avait pas suffisamment d'argent, de trouver d'autres sources de financement. M. Wills a aussi déclaré qu'il était demandé aux conseillers de faire comprendre au client éventuel l'importance de se faire accompagner de son conjoint au deuxième entretien. Selon ce qu'il a rapporté, si le conjoint n'avait pas entendu la présentation de PCMG, la probabilité que le client éventuel signe le contrat diminuait. Enfin, M. Wills a affirmé que les conseillers devaient suivre un argumentaire, qui était conçu pour communiquer au client éventuel un sentiment d'urgence.

B. *Les indications sur les personnes-ressources*

[9] Concernant les indications sur les personnes-ressources, les clients éventuels étaient informés au cours du premier ou du deuxième entretien, ou à ces deux occasions, que les intimés disposaient d'un vaste réseau de relations parmi les dirigeants et les cadres des entreprises qui recrutaient. Des clients de PCMG ont déclaré qu'on leur avait dit, entre autres, que PCMG avait des milliers de postes à offrir, que les offres d'emploi publiées sur Internet et dans les médias imprimés ne représentaient qu'une fraction des emplois disponibles, et que PCMG, grâce à son réseau de relations, avait accès à un « marché de l'emploi caché », où l'on pouvait trouver des emplois non annoncés ailleurs.

C. *Les indications sur les 90 jours et le bon emploi*

[10] En ce qui a trait aux indications sur les 90 jours et le bon emploi, les intimés informaient leurs clients

and/or second meetings that they would very likely find good jobs within 90 days should they engage PCMG's services. Prospective customers were further advised that these new positions would be at least as remunerative as their previous positions.

[11] One former client testified that she was advised by Mr. Roy that "there would be no problem" finding her a position paying $20 000 to $30 000 more than her previous position within 90 days. Another former client testified that Mr. Roy guaranteed that he would find a job with a minimum salary of $75 000 within 90 days. The client was then presented with a contract including a provision that PCMG had not induced him to sign the contract "by implication, representation or [guarantee of] … (b) any verbal promises that are not part of the written agreement".

III. Decision Below

[12] A Judge of the Federal Court sitting alone presided over the case for the Competition Tribunal and divided the analysis into five questions:

A. Were the representations made?

B. For what purpose were the representations made?

C. Were the representations false or misleading?

D. Were the representations material in nature?

E. Were the representations made to the public?

[13] The Tribunal found that the screening representation, the contacts representation, and the 90-day/good job representation were all misleading. It further found that the contacts representation and the 90-day/good job representation were misleading in a material respect. It did not find that the screening representation was materially misleading. In the end, however, the Tribunal dismissed the application, holding that the representations, though materially misleading, were not made "to the public" within the meaning of section 74.01.

éventuels au premier ou au deuxième entretien, ou à ces deux occasions, que, s'ils retenaient les services de PCMG, ils trouveraient très probablement un bon emploi dans les 90 jours, et que celui-ci serait au moins aussi rémunérateur que leurs emplois antérieurs.

[11] Selon le témoignage d'une ancienne cliente de PCMG, M. Roy l'avait informée qu'[TRADUCTION] « il ne serait pas difficile » de lui trouver, dans un délai de 90 jours, un poste payant de 20 000 à 30 000 $ de plus que son poste précédent. Un autre ancien client a déclaré que M. Roy lui avait garanti qu'il lui trouverait dans les 90 jours un emploi dont le salaire serait d'au moins 75 000 $. On lui avait ensuite présenté un contrat stipulant que PCMG ne l'avait pas incité à le signer [TRADUCTION] « par des sous-entendus ou des affirmations, ou en garantissant […] b) des avantages (décrits verbalement) qui ne font pas partie de l'entente écrite ».

III. La décision visée par l'appel

[12] Une juge de la Cour fédérale siégeant seule a présidé l'affaire pour le Tribunal de la concurrence. Elle a articulé son analyse en cinq questions :

A. Les indications ont-elles été données?

B. À quelle fin ont-elles été données?

C. Étaient-elles fausses ou trompeuses?

D. Portaient-elles sur un point important?

E. Ont-elles été données au public?

[13] Le Tribunal a conclu que les indications sur la présélection, sur les personnes-ressources, ainsi que sur les 90 jours et le bon emploi, étaient toutes trompeuses. Il a aussi estimé que les indications sur les personnes-ressources et sur les 90 jours et le bon emploi — mais pas celles concernant la présélection — étaient trompeuses sur un point important. En fin de compte, cependant, le Tribunal a rejeté la demande de la commissaire, au motif que les indications en cause, bien que trompeuses sur un point important, n'avaient pas été données « au public » au sens de l'article 74.01.

A. *Were the representations made?*

[14] In the proceedings before the Tribunal, the appellant introduced testimony from nine former clients of the respondents, all of whom claimed to have abandoned the respondents' programme because of unsatisfactory results, and all of whom claimed that they were misled by representations made by the respondents.

[15] The Tribunal accepted the evidence of the appellant's witnesses and found that representations were made to a number of prospective clients.

[16] The Tribunal dismissed the respondents' argument that no representations had been made. With respect to the contacts and 90-day/good job representations, it ruled that, while the respondents may not have made any representations regarding specific interviews or companies, they nevertheless made misleading representations regarding jobs and contracts generally. Furthermore, the respondents misrepresented themselves through flattery during the screening representation. Finally, the Tribunal found that testimony from the respondents denying the misrepresentation was not credible.

B. *For what purpose were the representations made?*

[17] There was little debate as to the purpose of the representations. The Tribunal [at paragraph 178] found that the purpose was to "persuad[e] prospective clients to purchase PCMG's services."

C. *Were the representations false or misleading?*

[18] In determining whether the representations were misleading, the Tribunal [at paragraph 208] asked "what could reasonably have been understood by the average prospective PCMG client who heard the Representations during the First and Second Meetings." Based on the facts before it, the Tribunal concluded [at paragraph 212] that "although average members of the intended

A. *Les indications ont-elles été données?*

[14] L'appelante a cité comme témoins devant le Tribunal neuf anciens clients des intimés, qui ont tous déclaré, d'une part, avoir abandonné le programme de PCMG parce qu'ils n'étaient pas satisfaits des résultats et, d'autre part, avoir été induits en erreur par les indications que leur avaient données les intimés.

[15] Le Tribunal a admis la preuve des témoins de l'appelante et a conclu que des indications avaient été données à un certain nombre de clients éventuels.

[16] Le Tribunal a rejeté le moyen des intimés selon lequel aucune indication n'avait été donnée. En ce qui concerne les indications sur les personnes-ressources, ainsi que celles relatives aux 90 jours et le bon emploi, il a conclu que, s'il est vrai que les intimés n'avaient peut-être pas donné d'indications sur des entreprises ou des entretiens d'embauche précis, ils avaient néanmoins donné des indications trompeuses concernant les emplois et les contrats en général. En outre, les intimés s'étaient présentés sous un faux jour en recourant à la flatterie lors de l'entrevue de présélection. Enfin, le Tribunal a conclu à la non-crédibilité du témoignage des intimés niant l'existence de fausses indications.

B. *À quelle fin les indications ont-elles été données?*

[17] La question de l'objet des indications n'a guère été contestée. Le Tribunal [au paragraphe 178] a conclu que les indications avaient été données « afin de persuader les clients potentiels de se procurer les services de PCMG ».

C. *Les indications étaient-elles fausses ou trompeuses?*

[18] Pour établir si les indications étaient trompeuses, le Tribunal [au paragraphe 208] s'est demandé « ce qu'un client potentiel moyen de PCMG ayant entendu les Indications pendant les Première et Seconde rencontres aurait raisonnablement pu comprendre ». Se fondant sur les faits exposés devant lui, le Tribunal a conclu [au paragraphe 212] que « même si les personnes

audience … were not normally gullible they were likely to accept what was reasonably implied without critical analysis because, to varying degrees, they were needy."

[19] Based on this standard, the Tribunal found that all three sets of representations were misleading. The screening representation would have led the average prospective client to conclude he or she had been measured against high standards when, in reality, no such standards existed. The contacts representation would have led the average prospective client to believe that the respondents had and would use significant business contacts to help find jobs when this was not the case. The 90-day/good job representation was misleading as the average prospective client would have been led to believe that typical clients found a job within 90 days and that he or she would have a similar experience.

D. *Were the representations material in nature?*

[20] To assess materiality, the Tribunal used the test from *Apotex Inc. v. Hoffmann La-Roche Ltd.* (2000), 195 D.L.R. (4th) 244 (Ont. C.A.), at paragraph 16: "A representation is material … if it is so pertinent, germane or essential that it could affect the decision to purchase." On the evidence, the Tribunal found that both the contacts representation and the 90-day/good job representation would have affected the average prospective customer's decision to purchase PCMG's services. Thus, they were material. With respect to the screening representation, the Tribunal found it was not material because there was no evidence that it had motivated any of the appellant's witnesses to procure the respondents' services.

moyennes faisant partie du public visé […] n'étaient généralement pas crédules, elles étaient susceptibles d'accepter ou de croire ce qu'on leur laissait entendre qui semblait raisonnable, sans en faire une analyse critique parce que, à des degrés divers, elles étaient dans une situation difficile ».

[19] Appliquant ce critère, le Tribunal a conclu que les trois catégories d'indications étaient trompeuses. Les indications sur la présélection donnaient à penser au client éventuel moyen qu'on l'avait évalué en fonction de normes rigoureuses, lesquelles, en réalité, n'existaient pas. Les indications sur les personnes-ressources induisaient le client éventuel moyen à croire que les intimés disposaient et feraient usage d'un vaste réseau de relations d'affaires pour les aider à trouver un emploi, alors que ce n'était pas le cas. Quant aux indications sur les 90 jours et le bon emploi, elles étaient trompeuses en ce qu'elles faisaient croire au client éventuel moyen que les clients typiques de PCMG trouvaient un emploi en moins de 90 jours et qu'il en obtiendrait un lui aussi dans le même délai.

D. *Les indications portaient-elles sur un point important?*

[20] Pour son examen de la question de l'importance, le Tribunal a utilisé le critère formulé au paragraphe 16 de l'arrêt *Apotex Inc. v. Hoffmann La-Roche Ltd.* (2000), 195 D.L.R. (4th) 244 (C.A. Ont.) : [TRADUCTION] « Une indication porte sur un point important si elle est assez pertinente, appropriée ou essentielle pour influer sur la décision d'achat. » Le Tribunal a conclu sur le fondement de la preuve que les indications tant sur les personnes-ressources que sur les 90 jours et le bon emploi étaient de nature à influer sur la décision du client éventuel moyen de retenir ou non les services de PCMG. Ces deux catégories d'indications portaient donc sur un point important. En ce qui concerne les indications sur la présélection, le Tribunal a conclu qu'elles ne portaient pas sur un point important parce que rien ne prouvait qu'elles avaient motivé l'un ou l'autre des témoins de l'appelante à retenir les services des intimés.

E. *Were the representations made to the public?*

[21] This was the most contentious issue of the decision. The Tribunal concluded that the phrase "to the public" was intended by Parliament to be interpreted in the plural sense. It found that the legislative history of the previous criminal provisions tended to show that Parliament had sometimes, but not always, chosen to use the phrase "a member of the public" instead of "to the public." Therefore, when Parliament retained the phrase "to the public" in paragraph 74.01(1)(*a*), it must have intended it to be interpreted in the plural sense.

[22] The Tribunal then addressed whether the representations were indeed made "to the public." It noted that the facts of this case were unlike previous cases under the *Copyright Act*, R.S.C., 1985, c. C-42 where the phrase "to the public" was interpreted as not necessarily excluding "one to one" communication. It focussed on the fact that in this case prospective customers conveyed personal details to the respondents at the meetings. Citing [at paragraph 188] a 1976 background paper from the Department of Consumer and Corporate Affairs, and [at paragraph 190] section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] of the Act, the Tribunal ruled that the phrase "to the public" must be understood not just as communication to individuals but rather "to the marketplace" [at paragraph 193].

[23] Finally, the Tribunal ruled that the deeming provision in paragraph 74.03(1)(*d*) [as enacted by S.C. 1999, c. 2, s. 22] cannot be used to interpret paragraph 74.01(1)(*a*). First, it noted that paragraph 74.03(1)(*d*) does not contain any express language such as the word "includes" to indicate it should be given a broader reading. Second, the Tribunal reasoned that in-store, door-to-door and telephone selling, captured by paragraph 74.03(1)(*d*) are examples of mass marketing and

E. *Les indications ont-elles été données au public?*

[21] C'était là la question la plus contestée de l'affaire. Le Tribunal a conclu que l'intention du législateur était que l'expression « au public » soit interprétée comme un pluriel. Il a estimé que le contexte législatif des dispositions pénales antérieures tendait à démontrer que le législateur avait parfois, mais pas toujours, décidé d'employer, dans la version anglaise de la Loi, l'expression *a member of the public* (littéralement : « un membre du public », mais correspond à « au public » dans le texte français) au lieu de *to the public* (« au public » dans le texte français). Par conséquent, lorsque le législateur a retenu l'expression *to the public* à l'alinéa 74.01(1)*a*), il ne pouvait qu'avoir l'intention qu'elle soit interprétée comme un pluriel.

[22] Le Tribunal a ensuite examiné le point de savoir si les indications avaient effectivement été données « au public ». Il a noté que les faits de la présente espèce n'étaient pas de même nature que ceux d'affaires précédentes relevant de la *Loi sur le droit d'auteur*, L.R.C. (1985), ch. C-42, où la communication « au public » avait été interprétée comme n'excluant pas nécessairement la communication « individuelle ». Il a concentré son attention sur le fait que, dans la présente espèce, les clients éventuels communiquaient des renseignements personnels aux intimés dans le cadre de leurs entretiens. Après avoir cité un document d'information du ministère de la Consommation et des Corporations daté de 1976 [au paragraphe 188] et [au paragraphe 190] l'article 1.1 [édicté par L.R.C. (1985) (2^{e} suppl.), ch. 19, art. 19] de la Loi, le Tribunal a conclu que l'expression « au public » devait s'entendre non pas d'une communication seulement individuelle, mais d'une communication faite « sur le marché » [au paragraphe 193].

[23] Enfin, le Tribunal a conclu que la disposition déterminative de l'alinéa 74.03(1)*d*) [édicté par L.C. 1999, ch. 2, art. 22] ne peut être utilisée pour interpréter l'alinéa 74.01(1)*a*). Premièrement, il a fait observer que l'alinéa 74.03(1)*d*) ne contient aucun terme explicite, tel que « notamment », qui indiquerait qu'il y a lieu de lui donner une interprétation plus large. Deuxièmement, il a ajouté que les opérations de vente en magasin, par démarchage et par téléphone, visées à

therefore different from the sales style used in the case at bar.

[24] The Tribunal dismissed the application because of its finding that the misrepresentations were not made "to the public".

IV. Issues on Appeal

[25] The appellant raises one issue on appeal: did the Tribunal err in interpreting the words "to the public"?

[26] The respondents raise a further issue: did the Tribunal err in holding that the contacts representation and the 90-day/good job representation were misleading?

V. Relevant Legislative Provisions

[27] The primary provision for the civil review of marketing practices is found in section 74.01(1) of the Act:

Misrepresentation to public

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(*a*) makes a representation to the public that is false or misleading in a material respect;

(*b*) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(*c*) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

l'alinéa 74.03(1)*d*), relèvent du marketing de masse, et donc d'une méthode de vente différente de celle utilisée dans la présente affaire.

[24] Le Tribunal a en fin de compte rejeté la demande de la commissaire au motif que les indications trompeuses n'avaient pas été données « au public ».

IV. Les questions en litige dans l'appel

[25] L'appelante soulève une seule question dans le présent appel, soit celle de savoir si le Tribunal a commis une erreur dans son interprétation des mots « au public ».

[26] Les intimés soulèvent une autre question, soit le point de savoir si le Tribunal a commis une erreur en statuant que les indications sur les personnes-ressources et celles sur les 90 jours et le bon emploi étaient trompeuses.

V. Les dispositions législatives applicables

[27] Les principales dispositions régissant la révision au civil des pratiques de commercialisation sont celles du paragraphe 74.01(1) de la Loi :

Indications trompeuses

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

a) ou bien des indications fausses ou trompeuses sur un point important;

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

c) ou bien des indications sous une forme qui fait croire qu'il s'agit :

(i) soit d'une garantie de produit,

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

[28] In turn, section 74.03 [as enacted *idem*] of the Act is a deeming provision, partially addressing the meaning of the phrase "to the public" in paragraphs 74.01(1)(*a*), (*b*), and (*c*). The deeming provision has since been amended. At the time of the decision, the deeming provision read as follows:

Representations accompanying products

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is

(*a*) expressed on an article offered or displayed for sale or its wrapper or container,

(*b*) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(*c*) expressed on an in-store or other point-of-purchase display,

(*d*) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(*e*) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).

Representations from outside Canada

(2) Where a person referred to in subsection (1) is outside Canada, a representation described in paragraph (1)(*a*), (*b*), (*c*) or (*e*) is, for the purposes of sections 74.01 and 74.02, deemed to

(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,

si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

[28] L'article 74.03 [édicté, *idem*] de la Loi est une disposition déterminative, portant en partie sur le sens à donner aux termes « au public » des alinéas 74.01(1)*a*), *b*) et *c*). Cette disposition déterminative, modifiée depuis, était libellée comme suit au moment de la décision visée par l'appel :

Indications accompagnant les produits

74.03 (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas:

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

Indications provenant de l'étranger

(2) Dans le cas où la personne visée au paragraphe (1) est à l'étranger, les indications visées aux alinéas (1)*a*), *b*), *c*) ou *e*) sont réputées, pour l'application des articles 74.01 et 74.02,

be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Deemed representation to public

(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.

[29] On March 12, 2009, after the Tribunal had rendered its decision, the *Budget Implementation Act, 2009*, S.C. 2009, c. 2 received Royal Assent, thereby amending [at section 423] section 74.03 to add subsections 4 and 5. Paragraph (4)(*c*) is especially germane to this case:

74.03 (1) …

Certain matters need not be established

(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that

(*a*) any person was deceived or misled;

(*b*) any member of the public to whom the representation was made was within Canada; or

(*c*) the representation was made in a place to which the public had access.

General impression to be considered

(5) In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

[30] The use to which this amendment may be put is governed, in part, by subsection 45(2) of the *Interpretation Act*, R.S.C., 1985, c. I-21:

45. (1) …

être données au public par la personne qui a importé au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Présomption d'indications données au public

(3) Sous réserve du paragraphe (1), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné à l'article 74.01 est réputé donner ces indications au public.

[29] Le 12 mars 2009, après que le Tribunal eut rendu sa décision, la *Loi d'exécution du budget de 2009*, L.C. 2009, ch. 2, qui modifiait [à l'article 423] l'article 74.03 de la Loi par adjonction des paragraphes 4 et 5, a reçu la sanction royale. L'alinéa 4*c*) se révèle particulièrement pertinent pour la présente espèce :

74.03 (1) […]

Preuve non nécessaire

(4) Il est entendu qu'il n'est pas nécessaire, dans toute poursuite intentée en vertu des articles 74.01 et 74.02, d'établir :

a) qu'une personne a été trompée ou induite en erreur;

b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;

c) que les indications ont été données à un endroit auquel le public avait accès.

Prise en compte de l'impression générale

(5) Dans toute poursuite intentée en vertu des articles 74.01 et 74.02, pour déterminer si le comportement est susceptible d'examen, il est tenu compte de l'impression générale donnée par les indications ainsi que du sens littéral de celles-ci.

[30] L'usage qui peut être fait de cette modification est régi en partie par le paragraphe 45(2) de la *Loi d'interprétation*, L.R.C. (1985), ch. I-21 :

45. (1) […]

Amendment does not imply change in law

(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

[31] Also of note, for the purpose of statutory interpretation, is section 1.1 of the Act:

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[32] The remedial provisions are found in section 74.1 [as enacted by S.C. 1999, c. 2, s. 22; 2009, c. 2, s. 424] of the Act:

Determination of reviewable conduct and judicial review

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(*a*) not to engage in the conduct or substantially similar reviewable conduct;

(*b*) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

Absence de présomption de droit nouveau

(2) La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles.

[31] Il faut aussi tenir compte, aux fins d'interprétation des dispositions applicables, de l'article 1.1 de la Loi :

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[32] Les dispositions réparatrices sont énoncées à l'article 74.1 [édicté par L.C. 1999, ch. 2, art. 22; 2009, ch. 2, art. 424] de la Loi :

Décision et ordonnance

74.1 (1) Le tribunal qui conclut, à la suite d'une demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(*c*) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, $750,000 and, for each subsequent order, $1,000,000, or

(ii) in the case of a corporation, $10,000,000 and, for each subsequent order, $15,000,000; and

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, de 750 000 $ pour la première ordonnance et de 1 000 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 10 000 000 $ pour la première ordonnance et de 15 000 000 $ pour toute ordonnance subséquente;

[33] Finally, a determination of the appropriate standard of review engages, in part, the *Competition Tribunal Act*, R.S.C., 1985 (2nd Supp.), c. 1 [section 13 (as am. by S.C. 2002, c. 8, s. 130)]:

Appeal

13. (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.

Questions of fact

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

[33] Enfin, la détermination de la norme de contrôle judiciaire applicable fait intervenir, en partie, la *Loi sur le Tribunal de la concurrence*, L.R.C. (1985) (2e suppl.), ch. 19 [article 13 (mod. par L.C. 2002, ch. 8, art. 130)] :

Appel

13. (1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale.

Questions de fait

(2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale.

VI. Meaning of the Words "To the Public"

A. *Standard of review*

[34] The parties are in agreement that the construction of the words "to the public" within the meaning of paragraph 74.01(1)(*a*) of the Act is a question of law subject to review on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 9).

B. *Construction of the words "to the public"*

VI. La signification des termes « au public »

A. *La norme de contrôle*

[34] Les parties conviennent que l'interprétation des termes « au public » sous le régime de l'alinéa 74.01(1)*a*) de la Loi est une question de droit susceptible de contrôle selon la norme de la décision correcte (voir *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, au paragraphe 9).

B. *L'interprétation des termes « au public »*

(1) Appellant's submissions

[35] The appellant submits that the Tribunal committed three errors in its interpretation of "to the public". First, the Tribunal incorrectly held that representations made *in private*—that is, where the potential clients had a reasonable expectation of privacy—could not have nevertheless been made *to the public*. Second, the appellant maintains that, contrary to the Tribunal's ruling, the phrase "to the public" does not mean that the representation must be made to more than one member of the public at a time or as the Tribunal put it, "to the marketplace". Finally, the appellant claims that the Tribunal should not have used the deeming provision to interpret paragraph 74.01(1)(*a*).

(2) Respondents' submissions

[36] The respondents make four submissions regarding the construction of the phrase "to the public".

(a) *Representations made in private are not made "to the public"*

[37] The respondents submit that by using the wording "to the public" and not "to a member of the public", Parliament intended to target publicly disseminated representations. They cite dictionary definitions in English and French, which state that the word "public" is a plural collective noun. The respondents also refer to case law which they say stands for the proposition that the phrase "to the public" requires that representations be made to a significant group of people, not on an individual basis.

(b) *The deeming provision serves as a valid interpretive aid*

[38] While the respondents agree with the appellant that the subsection 74.03(1) deeming provision does not

1) Les prétentions de l'appelante

[35] L'appelante soutient que le Tribunal a commis trois erreurs dans son interprétation des termes « au public ». Premièrement, il a conclu à tort qu'il n'était pas possible que les indications données *en privé* — c'est-à-dire dans un contexte où les clients éventuels avaient une attente raisonnable en matière de respect de la vie privée — puissent malgré tout avoir été données *au public*. Deuxièmement, l'appelante affirme que, contrairement à la conclusion du Tribunal, l'expression « au public » ne signifie pas que les indications doivent être données à plus d'un membre du public à la fois ou, pour reprendre l'expression du Tribunal, « sur le marché ». Enfin, selon l'appelante, le Tribunal n'aurait pas dû recourir à la disposition déterminative pour interpréter l'alinéa 74.01(1)*a*).

2) Les prétentions des intimés

[36] Les intimés font valoir quatre points concernant l'interprétation de l'expression « au public ».

a) *Les indications données en privé ne sont pas données « au public »*

[37] Les intimés soutiennent que l'emploi des termes *to the public* (« au public ») plutôt que de l'expression *to a member of the public* (littéralement : « à un membre du public », mais correspond à « au public » dans le texte français) montre que le législateur avait en vue les indications diffusées. Ils citent des définitions de dictionnaires anglais et français selon lesquelles le mot « public » est un collectif. Les intimés invoquent également la jurisprudence, qui confirme selon eux que, pour être données « au public », les indications doivent être données à un groupe appréciable de personnes et non pas individuellement.

b) *La disposition déterminative est un outil légitime d'interprétation*

[38] S'ils conviennent avec l'appelante que la disposition déterminative du paragraphe 74.03(1) ne

apply directly to paragraph 74.01(1)(*a*), the respondents nevertheless submit that the provision serves as a valuable interpretive aid. First, since subsection 74.03(1) begins with the phrase "For the purposes of sections 74.01 and 74.02," its purpose is to augment sections 74.01 and 74.02 [as enacted by S.C. 1999, c. 2, s. 22]. The specific purpose of paragraphs 74.03(1)(*d*) and (*e*) is in turn to deem "to the public" certain representations that would otherwise not have been so considered. Second, the respondents argue that ignoring the deeming provision, as is suggested by the appellants, would violate the rule against surplusage: if private communications could be considered "to the public", then Parliament would not have had to insert the deeming provision with respect to the communications outlined in paragraphs 74.03(1)(*d*) and (*e*). Further, the respondents submit that their interpretation is in accordance with the maxim of statutory interpretation *expressio unius est exclusio alterius*. Finally, they highlight the recent amendment to the deeming provision. They submit that this amendment was intended to overrule the Tribunal's decision in this case, leading to the conclusion that the provision, prior to its amendment, did not apply.

s'applique pas directement à l'alinéa 74.01(1)*a*), les intimés soutiennent néanmoins qu'elle constitue un précieux outil d'interprétation. Premièrement, comme le paragraphe 74.03(1) commence par les termes « Pour l'application des articles 74.01 et 74.02 », son objet est d'étoffer ces deux articles [article 74.02 (édicté par L.C. 1999, ch. 2, art. 22)]. Par ailleurs, les alinéas 74.03(1)*d*) et *e*) ont pour objet explicite d'assimiler à des indications données « au public » celles qui sont communiquées dans certains contextes qui ne seraient pas autrement considérés comme publics. Deuxièmement, les intimés affirment que le fait d'écarter la disposition déterminative de l'interprétation comme le voudrait l'appelante irait à l'encontre de la règle voulant qu'il n'y ait pas de redondance : s'il était vrai que les indications communiquées en privé peuvent être considérées comme données « au public », il n'aurait pas été nécessaire pour le législateur de spécifier dans la disposition déterminative les modes de communication visés aux alinéas 74.03(1)*d*) et *e*). Qui plus est, selon les intimés, leur interprétation est conforme à la maxime d'interprétation législative *expressio unius est exclusio alterius*. Enfin, ils invoquent la modification récente de la disposition déterminative. Ils font valoir qu'elle avait pour fin d'infirmer la décision rendue par le Tribunal dans la présente affaire, ce qui mène à la conclusion que la disposition, avant sa modification, ne s'appliquait pas.

(c) *Legislative history supports the Tribunal's interpretation*

[39] The respondents endorse the Tribunal's conclusions regarding the 1974 amendments, which inserted the deeming provision. The Tribunal noted that the amendment as passed changed the language from the draft bill: in paragraphs 36(2)(*d*) and (*e*) [*Combines Investigation Act*, R.S.C. 1970, c. C-23, as amended by S.C. 1974-75-76, c. 76, s. 18]. The amendment as passed used the singular phrase "a person as ultimate user" instead of the plural "persons as ultimate users," which was contained in the draft bill. The draft bill similarly contained the plural phrase "members of the public" and not the language in the amendment "a member of the public." However, these changes from plural to singular were not mirrored in paragraph 36(1)(*a*) [as am. *idem*],

c) *Le contexte législatif confirme l'interprétation du Tribunal*

[39] Les intimés souscrivent aux conclusions du Tribunal concernant les modifications de 1974, qui comprenaient l'adjonction de la disposition déterminative. Le Tribunal a fait remarquer que le libellé de la modification adoptée différait de celui de l'avant-projet de loi pour ce qui concerne les alinéas 36(2)*d*) et *e*) [*Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, modifiés par S.C. 1974-75-76, ch. 76, art. 18]. La modification adoptée utilisait les mots « à un utilisateur éventuel », un singulier donc, au lieu de l'expression plurielle « des personnes qui sont des utilisateurs éventuels » qu'on trouvait dans l'avant-projet. De même, l'avant-projet adopté contenait l'expression plurielle *members of the public* (« des

analogous to the current civil provisions in paragraph 74.01(1)(*a*). Parliament can be understood therefore to have intended that the phrase "to the public" require a group of people for the purposes of paragraph 74.01(1)(*a*).

éléments du public ») plutôt que l'expression *a member of the public* (« au public » dans le texte français) retenue dans la modification. Cependant, le texte de l'alinéa 36(1)*a*) [mod., *idem*], analogue aux dispositions civiles actuellement en vigueur de l'alinéa 74.01(1)*a*), n'a pas connu ces changements d'un pluriel à un singulier. Il faut donc en déduire que l'intention du législateur était que les termes « au public », pour l'application de l'alinéa 74.01(1)*a*), désignent un ensemble de personnes.

(d) *The purpose of the Act*

d) *L'objet de la Loi*

[40] Finally, the respondents agree with the Tribunal that the purpose of the Act is the protection of consumers and competitors in the marketplace. Based on this purpose, in order for paragraph 74.01(1)(*a*) to be triggered, misleading information must be fed into the marketplace through communication to other businesses and not just to consumers. Indeed, notes the respondent, the Act largely emphasizes competitors; the only mention of consumers in the purpose clause, section 1.1, is in relation to "competitive prices and product choices."

[40] Enfin, les intimés conviennent avec le Tribunal que l'objet de la Loi est la protection des consommateurs et des concurrents sur le marché. Il s'ensuit que, pour déclencher l'application de l'alinéa 74.01(1)*a*), les indications trompeuses doivent être données sur le marché, c'est-à-dire non seulement aux consommateurs, mais aussi aux autres entreprises. En fait, les intimés font observer que la Loi met l'accent sur les concurrents : la seule mention des consommateurs qu'on y trouve est celle de l'article 1.1, relativement aux « prix compétitifs » et au « choix dans les produits ».

(3) Analysis of the Tribunal's decision and the parties' submissions

3) Analyse de la décision du Tribunal et des prétentions des parties

(a) *Representations in the present case, although made in private were made "to the public"*

a) *Les indications en cause, bien que communiquées en privé, ont été données « au public »*

[41] In this case, the respondents addressed their advertisements to members of the public at large. The public was accordingly invited to seek the services of the respondents. Members of the public then accepted the invitation and made appointments with the respondents.

[41] Dans la présente affaire, les intimés ont adressé leurs annonces publicitaires au grand public, invitant par conséquent celui-ci à recourir à ses services. Certains membres du public ont accepté cette invitation et pris rendez-vous avec les intimés.

[42] The respondents, in oral argument, admitted that if these representations had been made to a group of prospective clients together, the representations would have been made "to the public". I cannot accept that because the representations were made to individuals of the public in a private place, this means that they were not made to the public.

[42] Lors des plaidoiries, les intimés ont reconnu que si les indications en cause avaient été données devant un groupe de clients éventuels, elles auraient été données « au public ». Je ne puis admettre que ces indications n'aient pas été données au public du simple fait qu'elles aient été communiquées à des membres du public en un lieu privé.

[43] The Tribunal stressed that personal matters were discussed at the first and second meetings. However, the personal matters discussed at these meetings were raised by the clients. The communications made by the prospective clients were not the subject of the false or misleading representations. These were made by the respondents. The Tribunal also ruled that the communications between the clients and the respondents at the first and second meetings were made with a reasonable expectation of privacy. Again, this expectation relates to the communications made by the clients, not to the representations made by the respondents. At issue in this case are the representations made *by* the respondents *to* the customers. Anything said by customers—however personal in nature—is irrelevant to a determination of whether the respondents' representations were misleading. The content of these representations was not at all private and was substantially the same for the members of the public who sought the services of the respondents.

[44] The respondents submit that the representations were not made "to the public" because they were made individually to clients and that there was therefore no public access. I disagree. The public did have access; it just accessed the representations one at a time rather than collectively. The important question to ask in determining whether a representation was made to the public is "to whom were the representations made?" Here, they were made to various members of the public seeking the services of the respondents.

[45] There is ample support for this interpretation in the jurisprudence of this Court and the Supreme Court. In *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, the Supreme Court addressed the meaning of "public" within the context of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, section 3. In that case, a student at the University of British Columbia alleged that the school violated her section 3 right against discrimination "with respect to any accommodation, service or facility customarily available to the

[43] Le Tribunal a insisté sur le fait que des questions personnelles étaient discutées au premier et au deuxième entretiens. Cependant, ce sont les clients qui soulevaient alors ces questions personnelles. Le contenu communiqué par les clients éventuels ne formait pas le sujet des indications fausses ou trompeuses : celles-ci étaient données par les intimés. Le Tribunal a aussi conclu que les propos échangés par les clients éventuels et les intimés lors du premier et du deuxième entretiens s'inscrivaient dans le contexte d'une attente raisonnable en matière de respect de la vie privée. Là encore, cette attente se rapportait aux renseignements communiqués par les clients, et non aux indications données par les intimés. La question en litige en l'espèce porte sur les indications données *aux* clients *par* les intimés. S'il est vrai que les propos des clients sont de nature personnelle, ils sont cependant dénués de pertinence lorsqu'il s'agit d'établir si les indications données par les intimés étaient trompeuses. Le contenu de ces indications n'avait absolument rien de privé et était en substance le même pour tous les membres du public qui demandaient les services des intimés.

[44] Les intimés soutiennent que les indications en cause n'ont pas été données « au public » parce qu'elles ont été communiquées individuellement aux clients éventuels et que le public n'y avait donc pas accès. Je ne suis pas de cet avis. Le public avait bel et bien accès aux indications; c'est seulement que les membres du public y avaient accès individuellement plutôt que collectivement. La question importante qu'il faut se poser pour établir si des indications ont été données au public est le point de savoir à qui elles ont été données. En l'occurrence, elles ont été données à divers membres du public désireux de retenir les services des intimés.

[45] Cette interprétation est abondamment étayée par la jurisprudence de notre Cour aussi bien que de la Cour suprême. Dans l'arrêt *Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353, par exemple, la Cour suprême a examiné la signification du terme [TRADUCTION] « public » (*public*) dans le contexte de l'article 3 de la *Human Rights Act* de la Colombie-Britannique, S.B.C. 1984, ch. 22. Dans cette affaire, une étudiante de l'Université de la Colombie-Britannique soutenait que cet établissement avait porté atteinte au

public" when it refused to fill out a rating sheet for her. In a decision later affirmed by the British Columbia Court of Appeal [(1991), 81 D.L.R. (4th) 497], the British Columbia Supreme Court [(1988), 10 C.H.R.R. D/6112] held that filling out a rating sheet was not a service "customarily available to the public." The Supreme Court concluded otherwise. Writing for the majority, Chief Justice Lamer explicitly rejected a quantitative approach to the definition of "public" (at page 382):

It appears to me that attention in the prior cases to the quantitative characteristics of the group to whom the service or facility is available does not focus adequately on other relevant factors. If the focus is purely quantitative, it is indeed hard to see how anything less than all citizens can be said to be the "public" of a given municipality, province, or country.

[46] Indeed, the Chief Justice stated, "I would reject any definition of 'public' which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public" (page 383). Chief Justice Lamer instead advocated "a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility" (page 384). As the appellant notes, nowhere in *Berg* did the Supreme Court address whether the services were of a personal nature, or whether they were provided one-on-one and in private.

[47] Other cases also stand for the proposition that communication to the public can take place in a private place. In *Regina v. Kiefer* (1976), 70 D.L.R. (3d) 352 (B.C. Prov. Ct.), affd [1976] 6 W.W.R. 541 (B.C. Co. Ct.), the accused was charged with selling securities without a prospectus. The accused relied on an exemption, which stated that no prospectus was required for

droit que lui garantissait ledit article 3 de ne pas faire l'objet de discrimination [TRADUCTION] « à l'égard d'un logement, de services ou d'installations habituellement offerts au public », en refusant de remplir un formulaire d'évaluation pour elle. Dans sa décision ultérieurement confirmée par la Cour d'appel de la Colombie-Britannique [(1991), 81 D.L.R. (4th) 497], la Cour suprême de cette province [(1988), 10 C.H.R.R. D/6112] a statué que le fait de remplir un formulaire d'évaluation ne constituait pas un service [TRADUCTION] « habituellement offert au public ». Cependant, la Cour suprême du Canada en a décidé autrement. Le juge en chef Lamer, écrivant au nom de la majorité, a expressément rejeté (à la page 382) l'approche quantitative de la définition du terme « public » :

Il me semble que l'attention prêtée dans les arrêts antérieurs aux caractéristiques quantitatives du groupe auquel sont offerts les services ou les installations ne porte pas suffisamment sur d'autres facteurs pertinents. Si l'accent mis est purement quantitatif, il est en fait difficile de voir comment on peut dire que quelque chose de moins que l'ensemble des citoyens constitue le «public» d'une municipalité, d'une province ou d'un pays donnés.

[46] En fait, le juge en chef formule la conclusion suivante à la page 383 : « Je rejetterais donc toute définition du mot "public" qui refuse de reconnaître qu'un logement, des services ou des installations ne seront toujours offerts qu'à un sous-ensemble du public. » Il préconise plutôt le « recours à une méthode fondée sur des principes qui tienne compte de la relation que les services ou les installations particuliers créent entre le fournisseur de services ou d'installations et l'usager des services ou des installations » (page 384). Comme le fait observer l'appelante, dans l'arrêt *Berg*, la Cour suprême du Canada ne traite nulle part de la question de savoir si les services étaient de nature personnelle ou s'ils étaient fournis individuellement et en privé.

[47] D'autres décisions viennent aussi étayer la thèse que la communication au public peut se faire en un lieu privé. Dans l'affaire *Regina c. Kiefer* (1976), 70 D.L.R. (3d) 352 (C. P. C.-B.), conf. par [1976] 6 W.W.R. 541 (C.c. C.-B.), l'inculpé était accusé d'avoir vendu des valeurs mobilières sans établir de prospectus d'émission. Il invoquait une dérogation selon laquelle il

sales not made to the public. Despite the fact that the accused had only sold securities individually, over the course of two years, and to only five clients for whom he had acted as a broker, the Court deemed the sales to the public and the accused was convicted.

[48] In *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, the appellant publishing company alleged that the respondent's custom photocopy service violated its copyright in reported court decisions. As part of its arguments, the appellant claimed that the respondent violated its copyright when the respondent faxed one copy to one of its members. Chief Justice McLachlin ruled that "[t]he fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright" (at paragraph 78).

[49] This Court offered a similar definition in *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539. In that case, the Copyright Board of Canada allowed the respondent, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) to collect a tariff on ringtones downloaded by mobile phone users from their service providers. The Copyright Board based its ruling on paragraph 3(1)(*f*) [as am. by S.C. 1988, c. 65, s. 62] of the *Copyright Act*, which accords a copyright holder the sole right "in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication … and to authorize any such acts." The respondent, which represented major telecommunications companies, argued that the transmission of a ringtone from a provider to a single customer did not constitute a transmission "to the public" and that SOCAN was therefore unable to collect a royalty on ringtone transmissions. Writing for the Court, Justice

n'était pas nécessaire d'établir un prospectus pour les ventes qui n'étaient pas faites au public. Or, malgré le fait que l'inculpé avait uniquement vendu des valeurs mobilières individuellement, sur une période de deux ans, et qu'il n'avait fourni des services de courtage qu'à cinq clients, la Cour a estimé qu'il avait vendu les valeurs en question au public et l'a déclaré coupable.

[48] Dans l'affaire *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339, l'une des parties appelantes, une maison d'édition, soutenait que l'une des parties intimées, un service de photocopie sur demande, avait porté atteinte à son droit d'auteur sur des décisions judiciaires publiées. L'appelante prétendait entre autres que l'intimée avait porté atteinte à son droit d'auteur en transmettant par télécopieur une copie d'une décision à l'un de ses membres. La juge en chef McLachlin a conclu, au paragraphe 78, que « [t]ransmettre une seule copie à une seule personne par télécopieur n'équivaut pas à communiquer l'œuvre au public. Cela dit, la transmission répétée d'une copie d'une même œuvre à de nombreux destinataires pourrait constituer une communication au public et violer le droit d'auteur. »

[49] Notre Cour a proposé une définition semblable dans l'arrêt *Assoc. canadienne des télécommunications sans fil c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2008 CAF 6, [2008] 3 R.C.F. 539. Dans cette affaire, la Commission du droit d'auteur du Canada avait autorisé l'intimée, la Société canadienne des auteurs, compositeurs et éditeurs de musique (la SOCAN), à percevoir des redevances sur la transmission sans fil de sonneries aux utilisateurs de téléphones cellulaires par leurs fournisseurs de services. La Commission du droit d'auteur avait fondé sa décision sur l'alinéa 3(1)*f*) [mod. par L.C. 1988, ch. 65, art. 62] de la *Loi sur le droit d'auteur*, qui confère au titulaire du droit d'auteur le droit exclusif « de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique », ainsi que « d'autoriser ces actes ». L'intimée, qui représentait les principales entreprises de télécommunications, soutenait que la transmission d'une sonnerie par un fournisseur à un unique client ne constituait pas une communication

Sharlow (at paragraph 35) held that the transmissions were made "to the public":

> … it is not enough to ask whether there is a one-to-one communication, or a one-to-one communication requested by the recipient. The answer to either of those questions would not necessarily be determinative because a series of transmissions of the same musical work to numerous different recipients may be a communication to the public if the recipients comprise the public, or a significant segment of the public.

[50] Explaining her conclusion, Justice Sharlow compared the act of downloading ringtones to watching television. While the act of watching television takes place in private in front of each viewer's television, the performance is nevertheless made to the public, since it is "made available to a sufficiently large and diverse group of people" (at paragraph 42). Justice Sharlow also addressed the absurdity that would result if a single transmission of a ringtone to a number of people were deemed to be made to the public, but the sequential transmission of the same ringtone were deemed not to be made to the public: "It would be illogical to reach a different result simply because the transmissions are done one by one, and thus at different times" (at paragraph 43). The same reasoning applies to the case at bar.

[51] In *Canadian Cable Television Assn. v. Canada (Copyright Board)*, [1993] 2 F.C. 138 (C.A.), this Court ruled that the transmission of musical works over television cable systems constituted dissemination within the meaning of paragraph 3(1)(*f*) of the *Copyright Act* even though the various subscribers might well be alone in the privacy of their home when receiving the transmission. There, Justice Létourneau surveyed English, Australian, and Indian authorities before defining "in public" as "openly, without concealment and to the knowledge of all" (at page 153). Justice Létourneau concluded that the "transmission of non-broadcast services by the appellant to its numerous subscribers, when it relates to musical works, is a

« au public » et que la SOCAN ne pouvait donc percevoir de redevances sur les transmissions de sonneries. Écrivant au nom de la Cour, la juge Sharlow a conclu, au paragraphe 35, que les transmissions en cause étaient faites « au public » :

> […] il ne suffit pas de se demander si l'on a affaire à une communication entre un expéditeur unique et un destinataire unique ou à une communication unique demandée par le destinataire. La réponse à l'une et l'autre de ces questions ne serait pas nécessairement déterminante parce qu'une série de transmissions de la même œuvre musicale à un grand nombre de destinataires différents peut constituer une communication au public si les destinataires constituent le public ou une partie importante du public.

[50] La juge Sharlow explique sa conclusion en comparant l'acte de télécharger des sonneries à celui de regarder la télévision. S'il est vrai qu'on regarde la télévision en privé, chacun devant son poste, la transmission d'une émission de télévision est néanmoins une exécution en public, puisque cette émission « est mise à la disposition d'un groupe de personnes suffisamment large et diversifié » (paragraphe 42). La juge Sharlow évoque également l'absurdité qu'il y aurait à considérer comme une communication au public la transmission simultanée d'une sonnerie à plusieurs abonnés, mais pas un ensemble de transmissions successives de la même sonnerie : « Il serait illogique d'en arriver à un résultat différent pour la simple raison que les transmissions sont effectuées une par une et qu'elles ont donc lieu à des moments différents » (paragraphe 43). Le même raisonnement s'applique en l'espèce.

[51] Dans l'arrêt *Assoc. canadienne de télévision par câble c. Canada (Commission du droit d'auteur)*, [1993] 2 C.F. 138 (C.A.), notre Cour a statué que la transmission d'œuvres musicales sur des réseaux de télévision par câble constitue une communication au public au sens de l'alinéa 3(1)*f*) de la *Loi sur le droit d'auteur*, même si chaque abonné peut fort bien se trouver seul dans l'intimité de son foyer lorsqu'il reçoit cette transmission. Le juge Létourneau, après avoir examiné des précédents anglais, australiens et indiens, définit, à la page 153, l'expression « en public » comme signifiant « de manière ouverte, sans dissimulation et au su de tous ». Il conclut, à la page 154, que « la transmission par l'appelante de services autres que de radiodiffusion à

performance in public within the meaning of subsection 3(1) of the *Copyright Act*" (at page 154).

[52] I therefore conclude that the fact that representations were made *in private* does not dictate that they were not made *to the public*. One must look at all the circumstances of the communication. If, as in this case, the communications reach a significant portion of the public, they are made "to the public. As suggested in *Berg* [at page 383], the "public" referred to can be a "subset of the public."

(b) *The deeming provision*

[53] The respondents assert that the deeming provision addresses specific situations that would ordinarily not fall under paragraph 74.01(1)(*a*) but that Parliament has nevertheless chosen to deem public. Since Parliament chose to include practices such as door-to-door selling and in-store representations but did not include in-office representations, the maxim *expressio unius est exclusio alterius* dictates that Parliament did not intend to include representations of the nature of those made in this case.

[54] This proposition does not assist the respondents in this case. The purpose of the deeming provision in section 74.03 is to bring specific representations made to only one person, such as when a salesman in a store speaks to a customer, within the meaning of "to the public". However, in our case, the representations were not made to only one person; rather, similar representations were made to a significant portion of the public. Accordingly, the deeming provision has no relevance to the present case.

[55] Furthermore, the focus of the deeming provision is on who is responsible for having made the representation to the public in situations such as envisioned by subsection 74.03(2). Subsection 74.03(2)

ses nombreux abonnés, pour ce qui est des œuvres musicales, constitue une exécution en public au sens du paragraphe 3(1) de la *Loi sur le droit d'auteur* ».

[52] Par conséquent, je conclus que le fait que les indications aient été formulées *en privé* ne veut pas dire qu'elles n'aient pas été données *au public*. Il faut prendre en considération toutes les circonstances de la communication. Si, comme dans la présente affaire, les indications sont communiquées à une partie appréciable du public, elles sont bel et bien données « au public ». Comme il est expliqué dans l'arrêt *Berg* [à la page 383], le « public » dont il s'agit peut être « un sous-ensemble du public ».

b) *La disposition déterminative*

[53] Les intimés font valoir que la disposition déterminative vise des situations déterminées qui n'entreraient pas normalement dans le champ d'application de l'alinéa 74.01(1)*a*), mais que le législateur a néanmoins décidé de considérer comme publiques. Or, comme le législateur a décidé de spécifier des activités telles que la vente par démarchage et la vente en magasin, mais pas les indications données dans un bureau, il faut déduire de la maxime *expressio unius est exclusio alterius* que le législateur n'avait pas en vue les indications de la nature de celles qui ont été données dans la présente espèce.

[54] Ce moyen n'aide pas les intimés. L'objet de la disposition déterminative de l'article 74.03 est de faire entrer dans la signification de l'expression « au public » des indications déterminées données à une seule personne, par exemple celles qu'un vendeur donne à un client dans un magasin. Cependant, dans la présente espèce, les indications n'ont pas été données à une seule personne : au contraire, des indications d'une même nature ont été données à un sous-ensemble appréciable du public. Par conséquent, la disposition déterminative est dénuée de pertinence en l'espèce.

[55] En outre, la disposition déterminative est axée sur le point de savoir qui est responsable des indications données au public dans des situations telles que celles visées au paragraphe 74.03(2). Ce paragraphe assigne la

identifies who is responsible when the person who made the representation is outside Canada. Specifically, the subsection contemplates that where false or misleading representations relate to a foreign product that is imported into Canada, the representations are deemed to have been made by the importer.

[56] Both parties also make submissions with respect to the recent amendment, which added subsections 74.03(4) and (5) to the deeming provision. The appellant submits that, since the amendment uses the phrase "For greater certainty," it should be considered declaratory of the previous state of the law. The respondents, however, submit that the amendment was in fact intended to overrule the Tribunal decision, and therefore indicates that Parliament did not initially intend for paragraph 74.01(1)(*a*) to apply to the case at bar.

[57] I have come to the conclusion that the amendments are of no assistance to either side. To begin, the *Interpretation Act* states that no amendment shall be deemed declaratory. Pierre-André Côté notes that the effect of this statement is not to statutorily ban the use of subsequent legislative history as an interpretive aid, but rather only "to eliminate any automatic presumption of legislative intent in this respect" (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at page 532). Nevertheless, there is good reason to exercise prudence in relying on subsequent legislative history. As Ruth Sullivan writes, "it is often difficult to distinguish amendments that are meant to clarify or confirm the law from amendments that are meant to change it" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada, 2008), at page 592).

[58] The Supreme Court has also weighed in on the issue. In *United States of America v. Dynar*, [1997] 2 S.C.R. 462 Justices Iacobucci and Cory signalled strong disapproval of the use of subsequent legal history to interpret past legislation (at paragraph 45):

responsabilité dans les cas où la personne qui a donné les indications se trouve à l'étranger. Plus précisément, le paragraphe 74.03(2) dispose que, dans les cas où les indications fausses ou trompeuses se rapportent à un produit étranger importé au Canada, c'est l'importateur qui est réputé les avoir données.

[56] Les deux parties ont également présenté des observations concernant la modification récente de la Loi par adjonction des paragraphes 74.03(4) et (5) à la disposition déterminative. L'appelante soutient que, puisqu'elle contient l'expression « Il est entendu que », la modification devrait être considérée comme déclaratoire de l'état antérieur du droit. Les intimés, quant à eux, affirment que la modification avait en fait pour objet d'infirmer la décision du Tribunal, de sorte qu'il faudrait en déduire que le législateur n'avait pas à l'origine l'intention que l'alinéa 74.01(1)*a*) s'applique à la présente affaire.

[57] Je suis arrivé à la conclusion que les modifications ne font pencher la balance ni d'un côté ni de l'autre. Pour commencer, la *Loi d'interprétation* dispose que la modification d'un texte ne doit pas être considérée comme une déclaration sur l'état antérieur du droit. Pierre-André Côté fait observer que cette disposition n'a pas pour effet d'interdire l'usage de l'évolution législative subséquente comme outil d'interprétation, mais a plutôt pour seul effet « de faire disparaître toute présomption à cet égard » (Pierre-André Côté, *Interprétation des lois*, 3e éd. Montréal : Thémis, 1999, page 672). Néanmoins, il y a de bonnes raisons d'être prudent lorsqu'on invoque l'évolution législative subséquente. En effet, comme le fait observer Ruth Sullivan, [TRADUCTION] « il est souvent difficile de distinguer les modifications qui ont pour but de clarifier ou de confirmer le droit existant de celles qui visent à le changer » (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5e éd., Markham, Ont. : LexisNexis Canada, 2008, à la page 592).

[58] La Cour suprême est elle aussi intervenue dans ce débat. Les juges Iacobucci et Cory ont exprimé, au paragraphe 45 de l'arrêt *États-Unis d'Amérique c. Dynar*, [1997] 2 R.C.S. 462, leur ferme désapprobation du recours à l'évolution législative subséquente pour interpréter d'anciennes dispositions :

What legal commentators call "subsequent legislative history" can cast no light on the intention of the enacting Parliament or Legislature. At most, subsequent enactments reveal the interpretation that the present Parliament places upon the work of a predecessor. And, in matters of legal interpretation, it is the judgment of the courts and not the lawmakers that matters. It is for judges to determine what the intention of the enacting Parliament was.

[59] Of note, the amendment in *Dynar* was a change to the *mens rea* requirement for a money laundering offence, and was not framed as a clarification, as is the case before us. Nevertheless, as the ruling in *Dynar* implies, the mere insertion of the phrase "for greater certainty" cannot change the reality that any legislative amendment—however declaratory in nature—represents the imputation by the current Parliament of its own interpretation upon the legislation of the previous Parliament. Accordingly, the amendments to the deeming provision are not helpful in interpreting paragraph 74.01(1)(*a*) for the purposes of this case.

(c) *The purpose of the Act*

[60] The purpose of the Act is set out in section 1.1. As this purpose clause makes clear, the goal of the Act is not to foster competition for its own sake, but rather to promote derivative economic objectives, such as efficiency, global participation, high quality products, and competitive prices.

[61] With the purpose clause in mind, it becomes clear that the objective of the deceptive marketing provisions in section 74.01 is to incite firms to compete based on lower prices and higher quality, in order "to provide consumers with competitive prices and product choices." Importantly, the deceptive marketing provisions—unlike many other provisions of the Act—do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the Act always seeks to prevent harm to competition, it is

Ce que les auteurs appellent l'« évolution législative subséquente » ne peut jeter aucune lumière sur l'intention du législateur, qu'il soit fédéral ou provincial. Tout au plus, les modifications législatives révèlent l'interprétation que le législateur actuel donne à l'œuvre d'un prédécesseur. Et, en matière d'interprétation de la loi, c'est le jugement des tribunaux, et non celui des législateurs, qui importe. Il appartient aux juges de déterminer quelle était l'intention du législateur qui a adopté la loi.

[59] Il est à noter que la modification en question dans *Dynar* portait sur la *mens rea* nécessaire pour qu'il y ait infraction de recyclage des produits de la criminalité et ne constituait pas un éclaircissement, contrairement à celle qui nous occupe dans la présente espèce. Néanmoins, comme l'implique l'arrêt *Dynar*, la simple insertion de l'expression « il est entendu que » ne peut changer le fait que toute modification législative — si déclaratoire qu'en soit la nature — représente l'application par le législateur actuel de sa propre interprétation des lois adoptées par le législateur antérieur. Par conséquent, les modifications apportées à la disposition déterminative ne sont pas utiles pour interpréter l'alinéa 74.01(1)*a*) aux fins de la présente affaire.

c) *L'objet de la Loi*

[60] L'objet de la Loi est énoncé à son article 1.1. Comme l'indique clairement cet article, la Loi n'a pas pour but de favoriser la concurrence pour la concurrence, mais plutôt de promouvoir les objectifs économiques qui en découlent, tels que l'efficience, la participation aux marchés mondiaux, la qualité des produits et la compétitivité des prix.

[61] Il ressort clairement de l'article déclarant l'objet de la Loi que les dispositions relatives aux pratiques commerciales trompeuses de l'article 74.01 visent à inciter les entreprises à rivaliser sur la base des prix et de la qualité, « dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits ». Il est important de remarquer que les dispositions relatives aux pratiques commerciales trompeuses — contrairement à bien d'autres dispositions de la Loi — ne spécifient pas le préjudice à la concurrence comme élément de l'infraction. Ce préjudice n'est donc

presumed that whenever the elements of paragraph 74.01(1)(*a*) are made out, there is *per se* harm to competition.

pas spécifié comme élément de l'infraction dans la présente espèce, mais il va sans dire que la Loi vise toujours à empêcher qu'il soit fait du tort à la concurrence, de sorte qu'on peut présumer que, chaque fois qu'est reconnue la présence des éléments de l'alinéa 74.01(1)*a*), il y a par définition préjudice à la concurrence.

[62] When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.

[62] S'il est permis à une entreprise de donner des indications trompeuses au public, il peut y avoir de plus fortes probabilités que les consommateurs éventuels préfèrent les produits inférieurs de cette entreprise aux produits supérieurs d'un concurrent honnête. Dans un contexte où les consommateurs se voient ainsi communiquer de faux renseignements, les entreprises se trouvent incitées à mentir sur leurs produits ou leurs services, au lieu de produire ou de fournir des biens ou des services de meilleure qualité et moins chers. Par conséquent, ainsi que le soutient l'appelante, lorsqu'une entreprise donne des renseignements trompeurs aux consommateurs éventuels, elle porte nécessairement préjudice au bon fonctionnement du marché, de sorte qu'on est fondé à invoquer ici la Loi, étant donné ses objectifs explicites.

[63] As the appellant submits, the proper focus of analysis in deceptive marketing cases is the consumer. While the respondents correctly state that the Act is not a consumer protection statute, they are wrong to suggest that this interpretation of the deceptive marketing provisions is tantamount to interpreting the Act as a consumer protection statute. On the contrary, as the foregoing analysis indicates, a focus on the consumer is not indicative of the objective of the scheme, but is a consideration antecedent to the ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality.

[63] Comme le fait valoir l'appelante, c'est le consommateur qui doit former l'axe de l'analyse dans les affaires de pratiques commerciales trompeuses. S'ils ont raison d'affirmer que la Loi n'est pas un texte de protection des consommateurs, les intimés ont tort de soutenir qu'interpréter de la manière susdite les dispositions relatives aux pratiques commerciales trompeuses revient à interpréter la Loi comme un texte visant la protection du consommateur. Au contraire, ainsi que l'indique l'analyse qui précède, la focalisation sur le consommateur n'est pas un signe de l'objectif de la Loi, mais une considération préalable à son objectif fondamental, à savoir le maintien du bon fonctionnement du marché afin de préserver un choix de produits et la qualité de ceux-ci.

[64] In this case, the evidence from ex-customers makes it clear that the respondents' clients were aware that the respondents operated in a competitive marketplace and that they indeed chose the respondents as a result of the misleading representations. For example:

[64] Dans la présente espèce, les témoignages d'anciens clients de PCMG indiquent clairement que les clients des intimés savaient que ceux-ci menaient leurs activités sur un marché concurrentiel et qu'ils ont en fait choisi leurs services par suite des indications trompeuses en question. Ainsi,

(a) Christopher Graham stated that Mr. Roy told him "that PCMG was helping people get into high-paying careers, and that was the reason why there was a fee associated with this. He [said] that the other free employment organizations were getting people low-paying jobs and he downplayed the type of services they were rendering" (evidence, statement of Christopher Graham, undated, Exhibit A-13, at paragraph 19).

a) Christopher Graham a déclaré que M. Roy lui avait dit [TRADUCTION] « que PCMG aidait les gens à entrer dans des carrières très lucratives et que c'était la raison pour laquelle ses services étaient rémunérés. Selon M. Roy, a ajouté M. Graham, les organismes de recherche d'emploi offrant des services gratuits ne trouvaient que des emplois mal rémunérés, et il a minimisé l'importance des services que fournissaient ces organismes » (dossier de preuve, déclaration de Christopher Graham, non datée, pièce A-13, au paragraphe 19).

(b) Tanya Threatful stated that "Minto Roy said PCMG was unlike any other company in the career management business because of his personal ties and contacts in the corporate world" (evidence, statement of Tanya Threatful, September 10, 2007, Exhibit A-57, at paragraph 9).

b) Tanya Threatful a déclaré que [TRADUCTION] « Minto Roy [lui avait] dit que PCMG ne ressemblait à aucune autre entreprise du secteur de la gestion de carrière à cause des relations personnelles qu'elle avait dans les milieux d'affaires » (dossier de preuve, déclaration de Tanya Threatful, datée du 10 septembre 2007, pièce A-57, au paragraphe 9).

(c) Johan de Vaal stated "I got the impression from PCMG's ad that the company was a head hunting company in the job recruitment industry. I assumed that, like those employment firms, PCMG already had a list of companies that were looking to have positions filled" (evidence, affidavit of Johan de Vaal, September 10, 2007, Exhibit A-1, at paragraph 6).

c) Johan de Vaal a déclaré : [TRADUCTION] « L'annonce de PCMG m'a donné l'impression qu'elle était une entreprise de recrutement de cadres, un « chasseur de têtes » comme on dit. J'ai supposé que, comme les entreprises de ce genre, PCMG disposait déjà d'une liste de sociétés à la recherche de candidats pour leurs postes vacants » (dossier de preuve, affidavit de Johan de Vaal, daté du 10 septembre 2007, pièce A-1, au paragraphe 6).

(d) Rafaelle Roca, also an ex-customer, expressed similar sentiment, reflecting on his interaction with PCMG employee Ravi Puri (evidence, affidavit of Rafaelle Roca, October 25, 2007, Exhibit R-53, at paragraph 22):

> Ravi Puri illustrated the following scenario on the white-board in his office. Even though PCMG charged more [than other firms], their contacts with decision makers coupled with the negotiating skills they would teach me would enable me to secure a higher salary. Would therefore end up paying less for PCMG's services, percentage wise, compared to what I would pay for other agencies' services.

d) Rafaelle Roca, aussi un ancien client, fait état d'impressions analogues en se remémorant un entretien avec un employé de PCMG dénommé Ravi Puri (dossier de preuve, affidavit de Rafaelle Roca, daté du 25 octobre 2007, pièce R-53, au paragraphe 22) :

> [TRADUCTION] Ravi Puri a illustré le scénario suivant sur le tableau blanc de son bureau. Il était vrai que PCMG demandait plus [que d'autres entreprises], mais ses relations avec des décideurs, ainsi que les techniques de négociation qu'elle m'enseignerait, me permettraient d'obtenir un salaire plus élevé. En fin de compte, donc, les services de PCMG me coûteraient moins cher, proportionnellement, que les services d'autres agences.

[65] As these statements demonstrate, the respondents' misrepresentations played a key role in the decisions of at least some customers to choose PCMG over other agencies. This is exactly the type of market distortion

[65] Comme le démontrent ces déclarations, les indications trompeuses données par les intimés ont joué un rôle clé dans la décision d'au moins certains clients éventuels de retenir les services de PCMG plutôt que

that the deceptive marketing provisions seek to prevent. The behaviour targeted in this case therefore falls squarely within the ambit of the Act.

C. *Conclusions on the meaning of "to the public"*

[66] I conclude that the representations made by the respondents in this case were made "to the public" within the meaning of paragraph 74.01(1)(*a*) of the Act. In the circumstances, it does not matter that the representations were made in private, that the representations were made one at a time, or that clients conveyed personal information to the respondents. As I stated above, the question to ask in determining whether a representation was made to the public is "to whom were the representations made, and under what circumstances?" The answer is as follows: the representations were made to a significant section of the public who had been invited by advertising to attend at the offices of the respondent.

VII. Were the representations misleading?

A. *Standard of review*

[67] The determination of standards of review for administrative tribunals is ordinarily governed by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In this case, however, the decision below was issued by a justice of the Federal Court, sitting alone as a judicial member of the Competition Tribunal. Furthermore, subsection 13(1) of the *Competition Tribunal Act* states that an appeal from the Tribunal to this Court is treated as if the original decision were a judgment of the Federal Court. As the respondents state in their factum, given the judicial nature of the proceedings and the fact that the case was heard before a justice of the Federal Court, it makes more sense to

ceux d'autres agences. C'est exactement là le genre de distorsion du marché que les dispositions relatives aux pratiques commerciales trompeuses visent à empêcher. Le comportement en cause dans la présente affaire s'inscrit donc tout à fait dans le champ d'application de la Loi.

C. *Conclusions de la Cour sur la signification des mots « au public »*

[66] Je conclus que les indications données par les intimés dans la présente espèce ont été données « au public » au sens de l'alinéa 74.01(1)*a*) de la Loi. Eu égard aux circonstances, peu importe que les indications aient été données en privé, qu'elles aient été données individuellement, ou que les clients éventuels aient communiqué des renseignements personnels aux intimés. Comme je l'ai indiqué précédemment, la question qu'il faut se poser pour établir si des indications ont été données au public est le point de savoir à qui elles ont été données et dans quelles circonstances. En l'espèce, la réponse est la suivante : les indications ont été données à des personnes composant un sous-ensemble appréciable du public, que des annonces publicitaires avaient incitées à se rendre aux bureaux des intimés.

VII. Les indications étaient-elles trompeuses?

A. *La norme de contrôle*

[67] On détermine normalement la norme de contrôle de la décision d'un tribunal administratif d'après l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190. Cependant, c'est une juge de la Cour fédérale, siégeant seule en tant que juge du Tribunal de la concurrence, qui a prononcé la décision visée par l'appel. En outre, selon le paragraphe 13(1) de la *Loi sur le Tribunal de la concurrence*, les décisions du Tribunal dont il est fait appel devant notre Cour doivent être considérées comme des jugements de la Cour fédérale. Comme le soutiennent les intimés dans leur mémoire, étant donné la nature judiciaire de l'instance et le fait que l'affaire ait été instruite par une juge de la Cour

apply the standard used to review decisions of lower courts rather than those used to review administrative tribunals. With this in mind, the Supreme Court's decision in *Housen* is determinative of the standard of review.

[68] The respondents submit that the analysis of whether the representations were misleading should be split into two questions: (1) What did the representations mean? (i.e., the construction of the representations), and (2) Were the representations misleading? I agree.

(A) Standard of review: construction of the representations

[69] The respondents submit that the construction of a representation is a question of law, and cite a number of cases to support this principle (*R. v. Total Ford Sales Ltd.* (1987), 18 C.P.R. (3d) 404 (Ont. Dist. Ct.); *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 (Ont. C.A.); *Regina v. International Vacations Ltd.* (1980), 33 O.R. (2d) 327 (C.A.)). The appellant attempts to distinguish this line of cases, noting that *Total Ford* and *Foresters* both relied on *International Vacations*, and that in *International Vacations* the Court noted specifically that the representations in question were written newspaper advertisements. While this is factually correct, the appellant offers no principled basis for why this rule should not apply to verbal representations as well. Therefore, I accept the respondents' submission that the construction of representations is a question of law. According to *Housen*, questions of law are reviewed on a standard of correctness (at paragraph 8).

(B) Standard of review: analysis of whether the representations were misleading

[70] The Tribunal found as fact that the alleged oral representations were made to the prospective clients.

fédérale, il paraît plus logique d'appliquer la norme de contrôle des décisions des tribunaux judiciaires inférieurs que celles utilisées pour contrôler les décisions des tribunaux administratifs. En conséquence, la norme de contrôle applicable en l'espèce sera déterminée selon l'arrêt *Housen* de la Cour suprême.

[68] Les intimés font valoir que l'analyse du point de savoir si les indications étaient trompeuses devrait s'articuler en deux questions : 1) que signifiaient les indications? (c'est-à-dire l'interprétation de celles-ci); 2) les indications étaient-elles trompeuses? Je suis d'accord avec eux.

A) La norme de contrôle applicable à l'interprétation des indications

[69] Les intimés soutiennent que l'interprétation d'indications est une question de droit et invoquent plusieurs précédents à l'appui de ce principe : *R. v. Total Ford Sales Ltd.* (1987), 18 C.P.R. (3d) 404 (C. dist. Ont.); *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 (C.A. Ont.); et *Regina v. International Vacations Ltd.*, [1980] 33 O.R. (2d) 327 (C.A.). L'appelante demande à la Cour d'écarter cette série de décisions, faisant observer que les décisions *Total Ford* et *Foresters* s'appuyaient sur l'arrêt *International Vacations*, et que la Cour d'appel de l'Ontario a explicitement noté dans ce dernier arrêt que les indications en question consistaient en annonces publicitaires de journaux. Le fait est exact, mais l'appelante ne dit pas selon quel principe la règle applicable à de telles annonces ne pourrait aussi valoir pour les indications données oralement. Par conséquent, j'accepte la prétention des intimés selon laquelle l'interprétation d'indications est une question de droit. Selon l'arrêt *Housen* (paragraphe 8), les questions de droit relèvent de la norme de la décision correcte.

B) La norme de contrôle applicable à l'analyse du point de savoir si les indications étaient trompeuses

[70] Le Tribunal a conclu que les indications orales en cause avaient été données à des clients éventuels. Il a

The Tribunal then proceeded to apply the law to this fact, in order to determine whether the oral representations were misleading and material. This involves a question of mixed fact and law.

[71] In *Housen*, a majority of the Court held that in cases of mixed fact and law, absent a readily extricable legal principle, the decision of the trier of fact should be overturned subject only to a palpable and overriding error (at paragraph 36). The question of whether the representations were misleading represents a direct application of paragraph 74.01(1)(*a*) of the Act to the facts of this case. As there is no extricable principle of law, the Tribunal's finding that the representations were misleading can only be overturned if the appellant demonstrates a palpable and overriding error in the Tribunal's decision.

B. *Construction of the representations*

[72] The respondents submit that the standard to be used in constructing representations is the perspective of an "ordinary citizen" possessing "ordinary reason and intelligence and common sense" (*R. v. Kenitex Canada Ltd et al.* (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.), at page 107). I agree.

[73] The respondents then allege that the Tribunal made two errors of law in constructing the representations. First, they allege that the Tribunal expressly found that the respondents made no specific promises and that vague representations cannot sustain a prosecution (*Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163, 265 N.S.R. (2d) 369, at paragraph 37). I reject this submission. The Tribunal indeed found that the respondents did not guarantee specific interviews with specific contacts. Equally, however, it found that the respondents did guarantee interviews generally with high-ranking contacts. It does not matter that the respondents did not detail exactly which contacts prospective clients would meet.

ensuite appliqué le droit à ce fait ainsi établi, afin de décider les points de savoir si ces indications orales étaient trompeuses et portaient sur un point important. Cette opération met en jeu une question mixte de fait et de droit.

[71] Dans l'arrêt *Housen*, la majorité de la Cour a conclu que, lorsqu'il s'agit d'une question mixte de fait et de droit, c'est-à-dire lorsque le principe juridique applicable n'est pas facilement isolable, la décision du juge de première instance ne doit être infirmée que s'il existe une erreur manifeste et dominante (paragraphe 36). Pour répondre à la question de savoir si les indications étaient trompeuses, il faut appliquer directement l'alinéa 74.01(1)*a*) de la Loi aux faits de la présente espèce. Comme aucun principe juridique n'est ici isolable, la conclusion du Tribunal selon laquelle les indications étaient trompeuses ne peut être infirmée que si l'appelante démontre la présence d'une erreur manifeste et dominante dans la décision du Tribunal.

B. *L'interprétation des indications*

[72] Les intimés soutiennent que la norme d'interprétation à appliquer aux indications de la nature qui nous occupe est le point de vue du [TRADUCTION] « citoyen ordinaire », possédant « un niveau moyen d'entendement, d'intelligence et de bon sens » : *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (C.c. Ont.), à la page 107. Je souscris à cette proposition.

[73] Les intimés affirment ensuite que le Tribunal a commis deux erreurs de droit dans l'interprétation des indications. Premièrement, ils font valoir que le Tribunal a explicitement conclu que les intimés n'avaient pas fait de promesses précises; or, des indications vagues ne peuvent motiver une poursuite : *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163, 265 N.S.R. (2d) 369, au paragraphe 37. Je rejette cette prétention. Il est vrai que le Tribunal a conclu que les intimés n'avaient pas garanti d'entretiens déterminés avec des personnes-ressources précises, mais il est tout aussi vrai qu'il a conclu que les intimés avaient bel et bien garanti des entretiens en général avec des personnes-ressources de haut niveau. Il importe peu que

[74] Second, the respondents submit that the *Kenitex* "ordinary person" would have understood that part of this representation depended on vague descriptions of "future contingent events" beyond the respondents' control, and that implicit in the representation were reservations that not every contact would be used for each client, and that the number of positions would vary from person to person and across time. I find this argument unconvincing. It is unclear that an ordinary person would not believe the representations despite their future and contingent nature. Indeed, many representations made to prospective customers are of future contingent events. If an airline advertises that a plane will arrive at 11:00 a.m. but it regularly arrives at 5:00 p.m. then the airline has almost certainly misled its customers, even if other events (for example, weather or traffic congestion) interfere occasionally. If a cellular phone company tells prospective customers that it offers unparalleled reception but the reception is almost always poor, then that company too has likely misled its customers, even though other factors, such as interference from electrical wires or tall buildings, can also affect reception.

[75] Accordingly, I find that the Tribunal was correct in its construction of the representations.

C. *Were the representations misleading?*

[76] The respondents claim that the Tribunal erred in concluding that the contacts representation was misleading for two reasons. First, the respondent submits that the Tribunal made no finding of fact that the respondents had an extensive network of contacts. Second, the respondent submits that a reasonable person would have understood that it was implicit in any such representation that not all of PCMG's representations would be relevant to each client, that the existence of

les intimés n'aient pas fourni de détails précis sur les personnes que leurs clients éventuels rencontreraient.

[74] Deuxièmement, les intimés font valoir que la [TRADUCTION] « personne ordinaire » de la décision *Kenitex* aurait compris que le contenu de cette catégorie d'indications dépendait en partie de descriptions vagues [TRADUCTION] « d'événements futurs aléatoires », indépendants de leur volonté, et qu'il était sous-entendu dans ces indications que chaque personne-ressource ne serait pas mobilisée pour chaque client, et que le nombre des postes disponibles varierait d'une personne à l'autre et dans le temps. Cet argument ne me convainc guère. Il n'est pas évident que la personne ordinaire n'ajouterait pas foi aux indications malgré le caractère futur et aléatoire des événements envisagés. En fait, les indications qu'on donne à des clients éventuels concernent dans bien des cas des événements futurs aléatoires. La compagnie aérienne qui déclare dans sa publicité que tel avion arrivera à 11 heures alors qu'il atterrit régulièrement à 17 heures a presque certainement induit ses clients en erreur, même si d'autres facteurs (par exemple les conditions météorologiques ou l'encombrement aéroportuaire) retardent à l'occasion l'heure d'arrivée. De même, l'entreprise de téléphonie cellulaire qui dit à ses clients éventuels qu'elle offre une qualité de réception sans égale, alors que la réception est presque toujours mauvaise, les a probablement aussi induits en erreur, même si d'autres facteurs, tels que les interférences dues aux fils électriques ou aux immeubles élevés, peuvent également faire obstacle à la réception.

[75] En conséquence, je conclus que le Tribunal a donné une interprétation juste des indications en cause.

C. *Les indications étaient-elles trompeuses?*

[76] Les intimés soutiennent que le Tribunal a commis une erreur en concluant que les indications sur les personnes-ressources étaient trompeuses et invoquent deux moyens à l'appui de cette prétention. Premièrement, ils font valoir que le Tribunal n'a pas formulé de conclusion de fait sur l'étendue de leur réseau de personnes-ressources. Deuxièmement, ils affirment que la personne raisonnable aurait compris qu'il était sous-entendu que ce n'étaient pas toutes les indications de cette nature

positions and interviews depends on factors outside the respondents' control, and that at any given time there may not be any relevant positions available.

[77] The respondents similarly claim that the Tribunal erred in concluding that the 90-day/good job representation was misleading because the Tribunal made no finding of fact that the typical PCMG client did not find a good job within 90 days, and because a reasonable person would have understood that, given that outcomes depend on third parties, not every client would achieve typical results.

[78] The appellant submits that the Tribunal's conclusions were reasonable and that the respondents' submissions in effect ask this Court to reweigh the evidence presented before the Tribunal.

[79] As stated above, these findings can only be overturned if the Tribunal committed a palpable and overriding error in its analysis. I do not believe it committed any such error. There was no need for the Tribunal to make preliminary findings of fact regarding the respondents' network of contacts or the success rate of a typical PCMG customer, nor do the respondents cite any legal authority to that effect. Indeed, it is implicit from the Tribunal's decision that the respondents represented that they had a network of contacts and that the typical client did not find a job within 90 days as represented. Therefore, the representations were misleading. The Tribunal was under no obligation to state a premise so obviously implied in its conclusion.

[80] The respondents' contention that the representations contained obvious and implicit limits is equally not indicative of a palpable and overriding error. Indeed, this submission amounts to little more than an attempt to re-argue the point about "future contingent events", which I have already rejected with respect to the

données par PCMG qui s'appliqueraient au cas de chaque client, que l'existence des postes et la possibilité d'entretiens d'embauche dépendaient de facteurs indépendants de la volonté des intimés et que, en tout temps, il pourrait arriver qu'il n'y ait aucun poste disponible pour tel client.

[77] De même, les intimés soutiennent que le Tribunal a commis une erreur en concluant que les indications sur les 90 jours et le bon emploi étaient trompeuses parce qu'il n'a pas formulé de conclusion de fait selon laquelle le client typique de PCMG n'avait pas trouvé un bon emploi dans un délai de 90 jours, et que la personne raisonnable aurait compris que, comme les résultats dépendaient de tiers, tous les clients n'obtiendraient pas nécessairement des résultats typiques.

[78] L'appelante soutient que les conclusions du Tribunal étaient raisonnables et que les intimés, par leurs observations, demandent en fait à notre Cour de réexaminer la preuve produite devant lui.

[79] Comme on l'a vu précédemment, ces conclusions du Tribunal ne peuvent être infirmées que s'il a commis une erreur manifeste et dominante dans son analyse. Or, je ne pense pas qu'il ait commis d'erreur de cette nature. Il n'incombait pas au Tribunal de formuler des conclusions de fait préalables sur le réseau de personnes-ressources des intimés ni sur le taux de réussite des clients typiques de PCMG, et les intimés ne citent aucun texte de jurisprudence ou de doctrine qui permettrait de le penser. En fait, il est sous-entendu dans la décision du Tribunal que les intimés avaient déclaré qu'ils disposaient d'un réseau de personnes-ressources et que le client typique n'avait pas trouvé un emploi dans les 90 jours, contrairement aux indications. Par conséquent, celles-ci étaient trompeuses. Le Tribunal n'était nullement tenu de formuler une prémisse si manifestement implicite dans sa conclusion.

[80] La prétention des intimés voulant que les indications comprenaient des limites évidentes et implicites ne permet pas non plus de conclure à une erreur manifeste et dominante. En fait, ce moyen n'est guère qu'une façon de resservir l'argument des [TRADUCTION] « événements futurs aléatoires », que j'ai déjà rejeté

construction of representations. Accordingly, I find that it was open to the Tribunal to conclude on the facts before it that the contacts representations and the 90-day/good job representations were materially misleading.

VIII. Disposition

[81] The decision of the Tribunal that the representations were not made "to the public" constitutes an error of law. There was no palpable and overriding error in the decision of the Tribunal that the representations were materially misleading. I would therefore allow this appeal with costs and set aside the decision of the Tribunal. Rendering the judgment that should have been rendered, I would grant with costs the appellant's application under section 74.1 of the *Competition Act*.

[82] The appellant seeks a number of specific remedies. However, the Tribunal is better positioned to determine the appropriate remedies than this Court. I therefore agree with the appellant's alternative submission that the matter be remitted to the Tribunal for the appropriate order which should be made under section 74.1 of the Act, in accordance with the findings of this Court.

LÉTOURNEAU J.A.: I agree.

LAYDEN-STEVENSON J.A.: I agree.

à propos de l'interprétation des indications. En conséquence, j'estime qu'il était loisible au Tribunal de conclure des faits exposés devant lui que les indications sur les personnes-ressources et sur les 90 jours et le bon emploi étaient trompeuses sur un point important.

VIII. Dispositif

[81] La conclusion du Tribunal selon laquelle les indications en cause n'ont pas été données « au public » constitue une erreur de droit. Quant à sa conclusion selon laquelle les indications en cause étaient trompeuses sur un point important, elle n'est entachée d'aucune erreur manifeste ou dominante. En conséquence, j'accueillerais le présent appel avec dépens et annulerais la décision du Tribunal. Rendant le jugement qui aurait dû être rendu, j'accueillerais avec dépens la demande présentée par l'appelante sous le régime de l'article 74.1 de la *Loi sur la concurrence*.

[82] L'appelante demande plusieurs mesures de réparation bien définies. Cependant, le Tribunal est mieux placé que notre Cour pour déterminer les mesures de réparation qui conviennent. Je fais donc droit à la demande subsidiaire de l'appelante visant à faire renvoyer l'affaire au Tribunal pour qu'il prononce une ordonnance conformément à l'article 74.1 de la *Loi sur la concurrence* et aux conclusions de notre Cour.

LE JUGE LÉTOURNEAU, J.C.A. : Je suis d'accord.

LA JUGE LAYDEN-STEVENSON, J.C.A. : Je suis d'accord.

CITATION: Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5315
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE COMMISSIONER OF COMPETITION	)	J. Thomas Curry, Jaan Lilles, Paul-Erik Veel, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	Kent E. Thomson, Anita Banicevic, James D. Bunting, Sean R. Campbell, Nicholas Van Exan, Andrew Carlson, for the Respondents
CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC.	)	
Respondents	)	
	)	
	)	**HEARD:** November 21, 22, 23, 24, 25, 28, 29, 2011 August 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 24, 27, 28, 29, 30, 2012 March 20, 21, 22, 25, 26, 27, 28, April 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17 May 13, 14, 15 & 16, 2013

MARROCCO J.

Contents

The nature of this Application

[1] The Commissioner of Competition commenced this Application on November 19, 2010. The original Application was amended on March 1, 2011.

[2] As amended, the Application requested:

- A declaration that Rogers Communications Inc. ("Rogers") and Chatr Wireless Inc. ("Chatr") had engaged in reviewable conduct contrary to paragraphs 74.01(1)(a) and 74.01(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34;
- An order that the respondents pay an administrative monetary penalty of $10 million;
- An order that the respondents stop making representations about dropped call performance for a period of 10 years;
- An order that the respondents stop making false or misleading representations to the public for the purpose of promoting the use of wireless telecommunication services for a period of 10 years;
- An order requiring the respondents to publish notices describing their reviewable conduct, including the geographic area to which the conduct related and a description of the manner in which the false and misleading representations were disseminated;
- A restitution order for the benefit of each Chatr customer for the period in which the offending representations were published;
- An order pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43 preserving the confidentiality of confidential information referred to during the hearing of the Application; and
- An order that the respondents pay the costs of the applicant's investigation as well as this Application.

[3] During closing argument all parties agreed that if this Application was successful a further hearing should be held concerning penalty.

[4] There were two responding parties named in the Application: Chatr Wireless Inc. and Rogers Communications Inc. It is not disputed that all shares of Chatr Wireless Inc. are owned or controlled by Rogers Communications Inc.

The grounds for this Application

[5] The Application set out the grounds upon which it was based. The grounds are important because the applicant did not serve affidavits with its Notice and Application. Therefore on November 19, 2010, when this Application was served and filed, the grounds for it were those set out in it.

[6] The grounds identified two offending representations:

- "Fewer dropped calls than new wireless carriers"; and
- After November 5, 2010, representations that Chatr subscribers would have "no worries about dropped calls."

[7] For convenience, I will refer to the two offending representations throughout as the fewer dropped calls claim.

[8] The applicant claimed that these two representations, which appeared in both French and English, created a false or misleading general impression regarding the service offered by Chatr as compared to the "new wireless carriers."

[9] When the Application was amended March 1, 2011, the applicant also claimed that the respondents made these two representations in the absence of adequate and proper testing.

[10] The grounds for the Application also set out that these two offending representations were part of an extensive social media and public relations campaign coincident with the launch of Chatr on July 28, 2010.

[11] The grounds for the Application assert that commencing August 9, 2010, there was a broad and nationwide public relations campaign composed of television, radio, digital, out of home and print advertising.

[12] The grounds set out that the two representations were sometimes accompanied by a disclaimer or explainer that stated: "Based on: cell site density; quality of indoor and underground reception; and seamless call transition when moving out of zone."

[13] The Application claims that the disclaimer was inaccurate and ineffective. It claims that the detail in the disclaimer was meaningless to the ordinary average consumer.

[14] The grounds set out that the "no worries about dropped calls" advertisements made after November 5, 2010, included images similar to the images that accompanied the "fewer dropped calls than new wireless carriers" ads, causing the offending conduct to continue.

The Application claims the contentious representations are false and misleading

[15] The Application asserts that the two representations were false because, in certain markets, Chatr had higher dropped call rates than at least one wireless carrier. Specifically, the Application asserts that the advertisements were false because:

- In Ottawa, Chatr's dropped call rate was higher than those of one new carrier on 84 of 92 days.
- In Toronto, Chatr's dropped call rate was higher than one new carrier on 53 of 92 days.

[16] The Application also maintains that the representations were misleading because they conveyed the general impression that there was an appreciable dropped call rate difference among carriers, whereas the truth was that the difference was not appreciable or significant between July 28, 2010, and October 27, 2010.

The Application claims the contentious claims are material

[17] The Application asserts that the claims were material because they were made for the purpose of promoting the purchase of wireless services from Chatr rather than the new carriers.

[18] The Application also asserts that network reliability, including dropped call rates, was a material aspect of wireless telecommunication services and a component of a consumer's decision to purchase a particular wireless telecommunication service.

[19] It is not disputed that dropped calls, and therefore claims concerning dropped calls, are material to consumers.

[20] It is not disputed that the fewer dropped calls claim was made to the public.

[21] It is not disputed that the fewer dropped calls claim was made to promote Chatr, which was a business interest of Rogers.

The Application claims automobile drive tests are not adequate and proper tests

[22] After March 1, 2011, the existence of adequate and proper tests for the fewer dropped calls claim was a live issue in this Application.

[23] The Application sets out that the respondents attempted to support the fewer dropped calls claim with automobile-based drive tests. The Application asserts that the drive tests do not constitute an adequate and proper test of the claim because:

- Given their purpose and limitations, drive tests cannot be used as the basis for market-wide conclusions about wireless network performance, including dropped call rates;
- Rogers' own drive test data in Vancouver, Calgary and Edmonton did not show a statistically significant difference between Chatr's dropped call rates and those of some or all of the new carriers;
- Rogers did not conduct any drive tests in Calgary or Edmonton before making the two offending representations; and
- Rogers' drive tests in the greater Toronto area prior to September 27, 2010, did not include all of the new entrants operating in the greater Toronto area.

The Issues

[24] The Application raised three issues:

- The fewer dropped calls claim was false;
- The fewer dropped calls claim was misleading; and
- The fewer dropped calls claim was not adequately and properly tested before it was made.

[25] The respondents added two issues:

- Section 74.01(1)(b) of the *Competition Act* is inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*; and
- The administrative monetary penalty provided for in 74.1(1)(c) of the *Competition Act* engages s. 11 of the *Charter*.

The commencement of proceedings

[26] I have set out the Application in detail because the respondents complained that they could not publicly respond to the initiation of this proceeding because supporting affidavits were not served with the Application. Specifically, the applicant failed to serve the affidavits of Andrew McAlpine, a Senior Competition Law Officer with the Competition Bureau; Ken Campbell, Chief Executive Officer of Globalive Wireless Management Corp. (Wind Mobile); and Aleks Krstajic, President and Chief Executive Officer of Public Mobile Inc.

[27] I attach no significance to the respondents' complaints. The respondents knew on November 19, 2010, from the Application, if nothing else, in reasonably specific terms, the reasons why the applicant maintained that the "fewer dropped calls than new wireless carriers" and "no worries about dropped calls" claims were false or misleading.

The Advanced Wireless Spectrum auction

[28] In 2007, as a result of studies it had undertaken, the Government of Canada concluded that Canadian consumers and businesses were paying more for wireless services than consumers in other countries.

[29] In an effort to increase competition, Industry Canada conducted an auction of bands of wireless services radiofrequency spectrum known as the Advanced Wireless Services spectrum.

[30] Radiofrequency spectrum is a finite public resource made available through the infrequent issuance of licences. Not surprisingly, these seldom-issued licences are valuable.

[31] The Government of Canada's stated goal in permitting this auction was lower prices, more choice and increased innovation for Canadian consumers of wireless services. Similar measures had been undertaken in the United States and the United Kingdom.

[32] At the time the auction was announced, the wireless sector of the Canadian telecommunications industry generated approximately $12.7 billion. At the time of the auction, Rogers, Bell Canada and TELUS dominated the wireless market with 94 per cent of the subscribers and 95 per cent of the revenues.

[33] Bell Canada and TELUS were never part of these proceedings.

[34] Industry Canada auctioned 105 MHz of Advanced Wireless Services spectrum: 40 MHz of this spectrum was reserved for persons with less than 10 per cent of Canada's wireless revenue; 65 MHz of spectrum was available to all bidders.

[35] Rogers was precluded from bidding on licences of the 40 MHz of spectrum. Rogers successfully purchased $1 billion worth of spectrum available to all bidders.

[36] The results of the auction were announced on or about July 21, 2008. New wireless carriers were created: Globalive Wireless Management Corp., carrying on business as Wind Mobile; Public Mobile Inc., carrying on business as Public Mobile; Data & Audio-Visual Enterprises Wireless Inc., carrying on business as Mobilicity; and Videotron S.E.N.C.

[37] Prior to the auction, Wind Mobile, Public Mobile and Mobilicity had not provided wireless telecommunication services in Canada. Videotron had a different history.

[38] The amounts paid for the auctioned spectrum licences were as follows:

- Videotron approximately $550 million
- Wind Mobile approximately $442 million
- Mobilicity approximately $243 million and
- Public Mobile approximately $52 million.

Videotron's History

[39] Videotron started in 1964 as a cable television network, and later broadened into other aspects of telecommunications. As far as wireless services were concerned, Videotron had been a reseller of those services in Québec. Specifically, in 2005 Videotron and Rogers began a strategic relationship. Videotron was able to offer Québec consumers Videotron branded mobile wireless services, in addition to its television, broadband Internet and cable telephone services.

[40] From 2005 and on, Videotron operated as a virtual mobile network operator, utilizing wireless voice and data services provided by Rogers. Videotron was responsible for acquiring, billing and technically supporting its customers.

[41] At the time of the events which concern us, Videotron had 1.8 million cable television subscribers, 1.2 million high-speed Internet subscribers, 1 million landline telephone subscribers and more than 80,000 wireless customers.

[42] Rogers' 2010 Leger Brandwatch Study showed that consumers in Québec had a high awareness of Videotron.

[43] I am satisfied by the evidence that, during the time frame with which we are concerned (July 28, 2010, to November 30, 2010), Videotron was an established brand in the Province of Québec.

The unlimited talk and text segment of the wireless services market

[44] Wireless cell phone service began in Canada in the mid-1980s. The evidence established that during the time period referenced in this Application, approximately 75 per cent of Canadians had a cell phone.

[45] Dr. Michael Pearce, a witness called by the respondents who was qualified as an expert to give opinion evidence concerning marketing to consumers, including consumers in the wireless industry in Canada, explained that as an industry matures, different segments of customers for that industry can emerge.

[46] As a result of the Advanced Wireless Spectrum auction in 2008, and the marketing decisions of the new wireless carriers who acquired spectrum in that auction, a zone-based unlimited use segment of the Canadian wireless market emerged. A similar segment had already emerged in the United States in the mid-1990s. This zone-based unlimited use segment differentiated itself in its approach to pricing and usage. This segment did not emerge as a result of a change in technology.

[47] Dr. Pearce explained that market segmentation in the wireless industry encourages innovation, competitive pricing, better products and service and the publication of informative advertising.

[48] Zone-based unlimited use customers were offered prepaid use monthly plans with no term contracts. These plans are different than postpaid use plans, which require the subscriber to sign a term contract for periods longer than one month.

[49] Videotron did not offer prepaid plans during the relevant period of this Application.

[50] Zone-based unlimited use customers were heavy users of wireless services. For example, Chatr customers averaged 1,364 minutes of use per month in 2010, compared to 453 minutes per month on average for customers using other Rogers brand services.

[51] I infer from the fact that zone-based unlimited use customers were heavy users of wireless services that they were also experienced users of those services.

Rogers' strategy for competing with the new carriers

[52] Based in part on the public statements of the new licensees, Rogers anticipated that the new licensees would try to appeal to the unlimited talking and texting segment of the wireless services market. Rogers took note of the US experience, which illustrated a significant demand for unlimited talking and texting services.

[53] Rogers concluded that the incumbent American carriers had waited too long to compete for this segment after it emerged, and resolved not to make the same mistake.

[54] In late 2008 or early 2009, Rogers began seriously considering the launch of a new brand. Mr. Garrick Tiplady, Senior Vice President of Chatr in the July 28, 2010, to November 30, 2010, time period testified that a small group was formed within Rogers to work on this project. The project was known internally as Project Columbia.

[55] The group produced a strategy brief entitled "Columbia the Brand Strategy Brief" dated October 22, 2009.

[56] This strategy brief identified the following problems for consumers:

- Wireless service plans were hard to understand;
- Devices may not work; and
- Discounts may change.

[57] The brief recorded that for customers, price was the dominant factor while network quality was next in importance.

[58] Significantly, the brief identified the challenges facing the new wireless carriers as follows:

- The spectrum that they had purchased had poor propagation qualities. It was harder for that spectrum to achieve in-building coverage and density of signal;
- The coverage offered by the new wireless providers would not be as good as Rogers';
- It would cost the new providers more to achieve parity with Rogers; and
- Although the new wireless service providers must be allowed to roam on the Rogers network, their customers who leave their coverage area while engaged in a call will experience a dropped call, and will have to redial and roam on the Rogers network in order to continue the call (the "hard handoff").

[59] The strategy brief stated that a new Rogers brand would compete head on with the new carriers using a zone-based unlimited talk and text offer. The new brand would offer a low monthly price, unlimited voice and short message service and a pay-in-advance approach.

[60] The brief identified Rogers' objectives as follows:

- Disrupt the new entrants' plan for easy market share steal;
- Take up shelf space, making distribution difficult for the new wireless carriers; and
- Insulate Rogers' existing brands from this competition.

[61] The brief identified the primary target subscribers as follows:

- Heavy users wanting cost-certainty in their monthly cell phone spend;
- Persons for whom their cell phone was an indispensable connection device;
- Users wanting to spend much less on a monthly basis than they are presently spending; and
- Existing wireless users who no longer need a landline.

[62] According to the strategy brief, Rogers' new brand would be different because it would provide low-priced unlimited usage that worked in more places than the new service providers. It was a service that did not drop calls and reliably connected you. The Rogers brand would not disconnect a user when the user moved out of zone (no "hard handoff"). It was worry-free wireless through certainty. It would provide brand-name and reliable devices at good prices, and it would be easy to manage because users could set up automatic payments with no surprises. Finally, there would be no term contract. If a user was not happy he or she could cancel.

[63] The brief noted that this strategy would likely catch the new wireless providers by surprise.

[64] The brief declared that the new brand would position itself as "unlimited wireless that works."

[65] Rogers retained both an advertising agency and a public relations firm to assist with the new brand. The advertising agency produced a November 6, 2009, document entitled "Brand Positioning Recommendations."

[66] The advertising agency suggested that Rogers name the new brand Chatr. The agency also suggested that coverage and reception were key advantages that Rogers had over the new wireless carriers, and that to exploit this advantage the communication strategy in part had to create doubt that the new carriers' service would work. It pointed out that the phrase which defined its approach, namely "unlimited wireless that actually works," suggested that others did not work. The agency suggested that Chatr should position itself on the side of heavy users who wanted cost certainty and suggested that Chatr differentiate itself on the basis that "it actually works."

[67] The agency described the target customers as "mainstreamers". They were persons who needed stability and valued authenticity. It speculated that the competition would be pursuing individualists. Ultimately, the brand positioning was defined as: "for mainstreamers who are heavy mobile phone users, Chatr is the unlimited wireless service that actually works."

[68] The advertising agency speculated that demographically, the market would consist of urbanite adults between the ages of 18 and 54 earning less than $60,000 per year.

[69] Significantly for our purposes, the advertising agency asked the question: "how do we support our claims?"

[70] The advertising agency made more than one presentation in this regard but the essence of its approach remained unchanged.

[71] A public relations firm was retained to disseminate the marketing message. A briefing provided to the public relations firm on February 4, 2010, outlined Rogers' strategy. This briefing added that the new Rogers brand would try to take customers from the new entrants and not from incumbent wireless providers. It would focus most heavily on Wind Mobile, while also considering Public Mobile and Mobilicity.

[72] Rogers decided that customers of the new brand (Chatr) would use the Rogers Network rather than a separate Chatr network. Chatr customers would use both the 850 MHz radio spectrum band and the 1900 MHz spectrum band to provide service. At all times, Chatr customers travelling within Canada would be on the Rogers Network whether or not the customers were within a Chatr zone.

[73] The briefing refers to Videotron on page 12, and records its prospective launch date along with the launch dates of Wind Mobile, Public Mobile and Mobilicity.

[74] I am satisfied that Rogers viewed Videotron as a new carrier. This is quite a separate question from how Videotron was viewed by consumers of wireless services in Québec.

Wind Mobile and Public Mobile enter the market

[75] While Rogers was preparing to compete with the new carriers, Wind Mobile and Public Mobile entered the market, albeit with considerable difficulty.

[76] Wind Mobile launched its services in Toronto and Calgary in December 2009. It launched in Edmonton and Ottawa on February 25 and March 26, 2010, respectively.

[77] Public Mobile launched in Toronto on May 26, 2010, and in Montréal on June 25, 2010.

[78] The evidence offered by the respondents established that Wind Mobile and Public Mobile were criticized in various publications and in the social media after their launch. I will offer four examples from the evidence.

[79] On January 22, 2010, TD Newcrest, a division of TD Securities Inc., published an article entitled: "Wind or just a light breeze?" The authors concluded as follows:

> So our overwhelming conclusion from a month of usage is that [Wind Mobile's] quality and coverage is significantly inferior to that offered by Rogers Wireless…One could argue that [Wind Mobile] will continue to add cell sites and improve its coverage over time, but this is something that customers will have to find out the hard way by enduring dropped calls and dead zones for an unknown period of time.

[80] On March 9, 2010, the Edmonton Journal reported that the Chairman of Wind Mobile acknowledged that Wind was experiencing weaknesses in the Toronto and Calgary networks, and that it was adding cell sites and towers to strengthen coverage.

[81] On July 6, 2010, the Globe and Mail published an article about Public Mobile that stated in part: "Public Mobile has admitted that several key areas in Montréal are without service and the company is refunding phone purchases and offering free service until the problems are resolved." An article to the same effect was published on September 16, 2010, in the Montréal Gazette.

[82] Mr. Brian O'Shaughnessy, the Chief Technology Officer for Public Mobile, testified in these proceedings and confirmed that Public Mobile customers were receiving poor service as late as December 2010, although Mr. O'Shaughnessy indicated that this was true of all networks.

[83] Mobilicity launched in Toronto on May 15, 2010. The respondents did not lead evidence concerning Mobilicity because, apart from complaining to the Competition Bureau, Mobilicity did not assist the Commissioner in these proceedings. Mobilicity declined to provide data derived from the operation of its network to the Commissioner.

[84] The evidence established that the respondents conducted drive tests in Toronto during the relevant period which, among other things, compared the performance of the Rogers and Mobilicity networks. The drive test results demonstrated that the Rogers network had fewer dropped calls than Mobilicity's network. I will elaborate further on the drive testing evidence elsewhere in these reasons.

[85] The inference I draw is that, if Mobilicity had produced the data requested by the applicant, it would have demonstrated that the respondents' network had fewer dropped calls than Mobilicity's network from July 28, 2010, to November 30, 2010. I will not seriously further consider Mobilicity in these reasons.

[86] I am satisfied that the well-publicized difficulties experienced by Wind Mobile and Public Mobile confirmed the respondents' view that their network, during the relevant period, was more reliable and would drop fewer calls than the Wind Mobile or Public Mobile networks.

The hard handoff

[87] As indicated, Rogers planned to compete with the new licensees by taking advantage of the "hard handoff."

[88] At the time of the spectrum auction in July 2008, Industry Canada required Rogers to permit the new licensees to roam on its network. This meant, for example, that Rogers was required to make its network available to a Wind Mobile subscriber who was outside a Wind coverage zone. Specifically, Wind Mobile paid Rogers a negotiated fee in accordance with the Industry Canada Policy Framework; Wind subscribers were permitted to use the Rogers network when outside a Wind Zone, and those subscribers paid Wind Mobile "roaming fees."

[89] A Wind Mobile subscriber who had a call underway within the Wind Zone would experience a dropped call if the subscriber left that zone. In order to complete the call, the Wind subscriber would have to reinitiate the call using the Rogers network.

[90] Mobilicity and Videotron subscribers were in a similar position.

[91] Public Mobile had no roaming agreement at all with Rogers. As a result, Public Mobile subscribers could not use their handsets outside of Public Mobile coverage zones in Toronto and Montréal.

[92] For a Chatr subscriber who had a call underway and who left a Chatr coverage zone, the call continued. It did not drop. The Chatr subscriber was, however, charged a roaming fee by Rogers. This was known as a "seamless handoff."

[93] The "hard handoff" created dropped calls for Wind Mobile, Mobilicity and Videotron subscribers, but not for Chatr customers.

[94] Precisely how the hard handoff affects the calculation of dropped calls is not obvious except to say it would increase dropped calls for Wind Mobile, Mobilicity and Videotron. The evidence established that Wind Mobile, Mobilicity and Videotron subscribers made 2.3 million calls roaming on the Rogers 2G network between August and November 2010. Because the location of the calls is not known, one cannot conclude that all of these calls occurred because customers left the Wind Mobile, Mobilicity or Videotron coverage areas, and therefore experienced a dropped call that they had to reinitiate. However, in some cases that is precisely what happened.

[95] It is also clear that Wind Mobile and Mobilicity complained to the Canadian Radio-television Telecommunications Commission ("CRTC") about the problems created by the dropped calls caused by the hard handoff, demonstrating that these dropped calls had their attention and were important to them.

Wind Mobile, Public Mobile and Mobilicity respond to the Chatr launch

[96] The respondents launched Chatr in Vancouver, Calgary, Edmonton, Toronto and Ottawa on July 28, 2010. The respondents launched Chatr in Montréal on September 16, 2010.

[97] Wind Mobile, Public Mobile and Mobilicity responded to the launch of Chatr by making three complaints to regulatory bodies.

[98] Videotron made no complaints to any regulator.

The abuse of dominance complaint

[99] I elaborate on this complaint because it is contemporaneous with, and provides context for, the Wind Mobile and Public Mobile complaint about false or misleading advertising with which we are concerned.

[100] Shortly after the July 28, 2010, launch of Chatr, Mobilicity made an "abuse of dominance" complaint with the Fair Business Practices Branch of the Competition Bureau. Rogers began responding to this complaint in August 2010.

[101] Mobilicity's complaint was that Rogers was exploiting its market power in the wireless services market to exclude or limit competition in that marketplace. Specifically, the complaint was that Rogers was using Chatr on a temporary basis to substantially lessen or prevent competition from Mobilicity.

[102] Public Mobile, in a September 2, 2010, letter to the Competition Bureau, also complained that Chatr's actions in the marketplace were an abuse of Rogers' dominant market position. Specifically, in an email dated September 24, 2010, Public Mobile complained that it had experienced difficulty in obtaining retail space at major malls because the space had been taken by Rogers and other incumbent carriers. Public

Mobile also complained that it had received "unofficial feedback" from unnamed major electronics retailers that Rogers and the other incumbent carriers had taken steps to prevent its products from being sold in those points of distribution.

The false advertising complaint

[103] On August 24, 2010, counsel for Wind Mobile complained to the Competition Bureau about the fewer dropped calls claim which led to this proceeding.

The hard handoff/undue preference complaint to the CRTC

[104] In October 2010, Wind Mobile and Mobilicity complained to the CRTC about Rogers' failure to permit "seamless handoffs." They argued that dropped calls caused by the lack of seamless handoffs conferred an "undue preference" on Rogers under s. 27(2) of the *Telecommunications Act*, S.C. 1993, c. 38.

[105] Wind Mobile told the CRTC that Chatr's fewer dropped calls claim created the false impression that the networks of the new wireless carriers were less reliable.

[106] Wind Mobile in part asked the CRTC to make an order directing Rogers to provide the same seamless call transition to Wind Mobile subscribers moving out of zone that it provided to Chatr customers. Wind claimed that the current situation was causing ongoing harm to competition in the marketplace and to itself. Wind acknowledged that Industry Canada had declined to make seamless handoffs a requirement when Rogers purchased additional spectrum during the July 2008 auction.

[107] Wind Mobile pointed out that when it began building its network, the only feasible out-of-territory roaming agreement was one with Rogers. Rogers was the only incumbent wireless service provider on whose network Wind subscribers could roam.

[108] Wind Mobile then made submissions concerning whether Rogers had engaged in conduct that was preferential. Wind Mobile complained that Chatr advertised using a tag line of: "fewer dropped calls than new wireless carriers," and in that advertisement relied upon "seamless call transition when moving out of zone." Wind objected to the fact that Rogers, through Chatr, relied upon "fewer dropped calls" as a differentiator while Rogers at the same time dropped its competitors' calls.

[109] Wind Mobile specified the injuries caused by Rogers' conduct as follows:

- Prospective Wind subscribers were offered identical commercial arrangements by Chatr except that Chatr subscribers were offered seamless handoffs while Rogers prevented Wind from making the same offer. As a result, Chatr subscribers were offered the opportunity to avoid the threat of dropped calls;

- Wind subscribers experienced degrading call quality followed by a dropped call as they moved out of a Wind Zone, but were not told why it had occurred. The dropped call was described as an annoyance on social calls, an acute disadvantage on business calls and possibly a matter of life or death on 911 calls; and

- Wind complained that Rogers' conduct put Wind at an undue and unreasonable disadvantage because it undermined potential Wind subscribers' confidence in Wind's ability to provide access to reliable communications.

[110] Pursuant to the CRTC's procedure, Rogers provided an Answer, and Wind Mobile was permitted a Reply.

[111] In its Answer, Rogers referenced that in submissions to the Competition Bureau in this Application, Wind had stated that calls dropped due to hard handoffs were "an extremely low statistical event."

[112] In its Reply, Wind Mobile made the following statement:

> Put simply, every dropped call matters. Prospective subscribers selecting a mobile provider and to whom Rogers Chatr now offers commercial arrangements that are virtually identical to those offered by Wind neither know nor need to know how often they will be affected by the threat of dropped calls. Instead prospective subscribers are offered an opportunity to avoid the problem altogether.

[113] Wind also stated that Rogers' Answer ignored "the reputational effects and basic consumer consequences of each dropped call".

[114] On March 31, 2011, Wind Mobile answered additional questions posed by the CRTC. In that submission, Wind Mobile asserted that by prominently advertising "fewer dropped calls than new wireless carriers," based in part on its seamless network, Rogers created the impression that the new networks were generally less reliable.

[115] On June 3, 2011, the CRTC declined the complaint concerning a preference on the basis that Wind Mobile had not negotiated seamless call transitioning with Rogers. In addition, the CRTC found that there was insufficient evidence to permit a decision mandating seamless roaming.

[116] It is helpful to consider the statements in these complaints. Regardless of their truth, they provide evidence that Wind Mobile and Public Mobile thought dropped calls, including those caused by hard handoffs, were a significant problem. They thought that dropped calls, including those caused by hard handoffs, negatively reflected on the reliability of their networks. Their statements prove to me that the leaders of Wind Mobile and Public Mobile thought that the public was concerned with the risk of dropped calls rather than their comparative frequency.

The nature of and context for the contentious advertisements

[117] A portion of this Application deals with the assertion that the fewer dropped calls claim is both false and misleading. As a result, the nature of the advertisements containing the claim, as well as the context in which the advertisements were relayed, is relevant.

The claims and expenditures of Wind Mobile, Public Mobile and Videotron

[118] Dr. Michael Pearce, called by the respondents as an expert to give opinion evidence concerning marketing to consumers, including consumers in the wireless industry in Canada, collected the advertisements of Chatr, Videotron, Wind Mobile, Public Mobile and Mobilicity during the period with which we are concerned. Copies of those advertisements were received into evidence. I am satisfied that Dr. Pearce collected a representative sample of those ads.

[119] Wind Mobile, Public Mobile and Mobilicity engaged in aggressive price competition with each other and with Chatr. Their ads provided little information concerning roaming costs or dropped calls resulting from a customer leaving their coverage zone.

[120] The evidence disclosed that in 2010, Wind Mobile spent $36.9 million on advertising while offering services in 5 cities. Mobilicity spent $6.1 million while offering services in 4 cities. Public Mobile spent $6.8 million while offering services in 2 cities. The evidence disclosed that in 2010, Chatr spent $7.1 million on advertising; Chatr was offering services in 6 cities.

[121] Videotron took a different approach. Videotron concentrated on bundling its wireless services with existing Internet, telephone and cable services. Mr. Aleks Krstajic, the President and Chief Executive Officer of Public Mobile during the relevant time period, testified that Videotron was trying to attract a different demographic than Public Mobile. He testified that Videotron was competing for a higher end customer than his company. His evidence in this regard was not contentious and I accept it.

[122] The evidence disclosed that in 2010, Videotron spent $5.3 million on advertising in the Province of Québec; Videotron offered wireless services, according to Tab 14 of Exhibit 37A, in three Québec cities.

Characterizing the consumer

[123] The applicant contends that the general impression conveyed by the advertisements in question is to be assessed from the perspective of a credulous and inexperienced consumer. The applicant describes this perspective as the average consumer who is "credulous and inexperienced and takes no more than the ordinary

care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement." The applicant cites *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at paras. 65-68, 71, as authority for its position.

[124] The *Richard v. Time Inc.* decision involved a representation by means of a direct mail campaign to the public at large, and not to a targeted group of consumers. Mr. Richard was convinced that he had been awarded a cash prize of $833,000, and that all he had to do was return a reply coupon to claim his prize. Time Inc. refused to pay. Mr. Richard commenced proceedings in the Québec Superior Court, alleging prohibited business practices contrary to Québec's *Consumer Protection Act*, R.S.Q. c. P-40.1. It is in this context that the Supreme Court of Canada determined that the average consumer contemplated by Québec's *Consumer Protection Act* was credulous and inexperienced.

[125] The respondents contend that in determining the general impression conveyed by the contentious advertisements, the court should consider the advertisements from the perspective of the average consumer to whom the statements were targeted.

[126] There is a difference between the purpose of Québec's *Consumer Protection Act* and the purpose of the *Competition Act*. The Québec legislation is intended to protect vulnerable persons from the dangers of certain advertising techniques: see *Richard v. Time Inc.*, at para. 72. The *Competition Act* is intended to maintain and encourage competition in Canada in order to "provide consumers with competitive prices and product choices": see s. 1.1 of the *Competition Act*.

[127] The difference in purpose between Québec's *Consumer Protection Act* and the *Competition Act* is a relevant consideration in determining the proper consumer perspective to be applied to the contentious representations.

[128] *Richard v. Time Inc.* defines the person considering the advertisement in three ways: credulous, inexperienced and a consumer. I take this as a starting point for determining the proper consumer perspective for the purposes of this Application.

[129] The consumer in *Richard v. Time Inc.* was less of a consideration because that case involved a representation made to the public at large. In this Application, a consideration of the mass media advertising leads to the conclusion that the consumer is a person wanting unlimited talking and texting wireless services, as well as cost certainty.

[130] Accepting that the consumer is credulous in the context of this Application means that the consumer is willing to believe the fewer dropped calls claim because it is contained in public representations to that effect.

[131] The requirement that the consumer be inexperienced is more difficult to apply. The consumer by definition resides in a segment of the wireless services market that wants unlimited talking and texting wireless services. Such a consumer cannot be

viewed as inexperienced with wireless talking and texting, otherwise the consumer would not reside in a segment of the wireless services market. For example, the consumer might know that he or she wants certainty in their wireless monthly bill due to a previous bad experience with unexpected cell phone fees. In addition, the consumer knows that he or she wants talking and texting wireless services and that he or she wants those services in an unlimited way. Accordingly, I am satisfied that the lack of experience relates to the technical information contained in the advertisements. For example, the advertisements claim that Chatr will drop fewer calls because of its cell site density. It is this aspect of the claim with which the consumer lacks experience.

[132] I am satisfied therefore that the consumer perspective in this case is that of a credulous and technically inexperienced consumer of wireless services.

The literal meaning of the contentious ads

[133] Section 74.03(5) of the *Competition Act* provides that in proceedings under s. 74.01, the literal meaning and the general impression conveyed by a representation must be taken into account in determining whether or not the person making the representation engaged in reviewable conduct.

[134] A literal read of the fewer dropped calls ads conveys the following to a prospective credulous and technically inexperienced consumer exposed to the claim:

- You will have no worries when talking on your cell phone (parle relax);
- You will have worry-free unlimited talk (appels illimités sans souci)(parle au max, parle relax);
- You will have fewer dropped calls than customers of the new wireless carriers (moins d'appels interrompus qu'avec les nouveaux opérateurs sans-fil);
- Your zone plan will be unlimited;
- You will pay a flat fee;
- You will not be asked to sign a term contract;
- You will have great coverage in and out of your zone;
- When you leave your zone, you get unlimited usage in any other Chatr zone;
- You can keep talking and texting as if you never left your zone;
- You will have great reception indoors and underground;

- You will be on a reliable network; and
- You will have a quality phone.

The visual images and sounds in the ads

[135] The visual images that accompany the wording are more general. They convey the sense that the person who is not a Chatr customer is having difficulty with his or her phone, which is obviously not working properly. This person has a cloud or fuzzy speech bubble over his or her head.

[136] The visual portion of the advertisements leaves open the possibility that the non-Chatr customer cannot place a call. The non-Chatr customer is pictured having difficulty in an open area, where there is no obvious obstruction to the wireless communication.

[137] The Chatr customer pictured in the ads is smiling, talking on his or her cell phone and unconcerned about communicating wirelessly. This person has a Chatr balloon over his or her head.

[138] The picture of the smiling unconcerned Chatr customer is usually the picture of someone talking on their cell phone in a covered space, a subway or underground where one might expect reception to be difficult.

[139] The radio ads are accompanied by the Bobby McFerrin song "Don't Worry, Be Happy."

[140] Despite the ambiguity in the visuals, I am satisfied that the visuals, in addition to the English or French words, create the general impression that the representation is in reference to dropped calls only.

[141] I am not satisfied that the "Don't Worry, Be Happy" song, when coupled with the words in the radio ads, broaden the literal reference to dropped calls to give the general impression that the Chatr subscriber will not only have no worries about dropped calls, but also no worries about accessing the Chatr network.

[142] However, I am also satisfied that the constant references to "worry free unlimited talk" and "no worries talk happy" (parle au max parle relax) (appels illimités sans souci) in the contentious ads give the general impression that the Chatr network is more reliable than the networks of the new wireless carriers.

[143] Professor Moorthy, who was called by the respondents and qualified as an expert to give opinion evidence in the areas of marketing and economics, testified that in his opinion, dropped calls were a proxy for the performance of the network. Professor

Moorthy, like the other expert witnesses, was well qualified. Where I have not accepted his evidence, it is because I have disagreed with his conclusion for reasons other than his credibility or reliability.

[144] Wind Mobile, in its hard handoff/undue preference complaint submissions to the CRTC, stated that Rogers undermined confidence in Wind's ability to provide access to reliable communications.

What is the relevant time period for the contentious ads?

[145] The relevant time period is not entirely straightforward. Although Chatr launched on July 28, 2010, its national advertising campaign did not begin until August 9, 2010.

[146] On July 28, Rogers began making the fewer dropped calls representation on its website, on social media, through public relations channels and on product packaging.

[147] Chatr commenced operations on July 28, 2010, in Toronto, Ottawa, Edmonton, Calgary and Vancouver. This meant that Chatr phones were available for purchase at Chatr retail kiosks, as well as through third-party retailers and distributors in each of these places on that date. In addition, the Chatr Wireless Call Centre was open and the Chatr website was operational on July 28, 2010.

[148] The "fewer dropped calls" representation was made between July 28, 2010, and November 30, 2010. The "no worries about dropped calls" representation was made in November 2010. I am satisfied that these two advertising campaigns had one central theme during the period of July 28, 2010 to November 30, 2010. This theme was that the Chatr network dropped fewer calls than the networks of the new wireless carriers, and was therefore a more reliable network.

[149] I am satisfied that, with the exception of Montréal, in order for the fewer dropped calls representation not to be false or misleading, the Rogers network would have to have had fewer dropped calls than the Wind Mobile and Public Mobile networks during the period of July 28, 2010, to November 30, 2010.

[150] Chatr launched in Montréal on September 16, 2010. Accordingly I am satisfied that in order for the fewer dropped calls representation not to be false or misleading, the Rogers network would have to have had fewer dropped calls than the Public Mobile network in Montréal during the period of September 16, 2010, to November 30, 2010.

[151] For the sake of completeness, while the "no worries network" (December 2010) representation did follow a continuous national media campaign about dropped calls that began in August 2010, and while there is a similarity in visual presentation, I am

satisfied that this version of the advertising was not comparative and did not literally or by general impression continue to convey the fewer dropped calls claim.

The general impression of the contentious ads

[152] As indicated elsewhere, Dr. Michael Pearce was called as an expert by the respondents. I will not review in detail Dr. Pearce's lengthy and impressive resume. I will simply point out that Dr. Pearce has a doctorate from the Harvard Business School in marketing. He has been a faculty member at the Ivey Business School for almost 40 years. He has consulted in consumer marketing in Canada, the United States, Europe, Asia and the Middle East.

[153] There were issues raised about the admissibility of Dr. Pearce's evidence; there was no attack upon his credibility. Dr. Pearce was an impressive and reliable witness. I have relied on portions of Dr. Pearce's evidence for the purposes of deciding this Application, and I will describe those portions in these reasons.

[154] Dr. Pearce testified that he was provided with copies of marketing communications for Chatr and the new wireless carriers, including Videotron, for the period with which we are concerned. Dr. Pearce included 153 pages of Chatr advertising as an Appendix to his report. I am satisfied that this appendix (Appendix 7) is representative of the marketing communications that the applicant characterizes as false or misleading.

[155] The evidence disclosed that in 2010, Chatr spent $7.1 million on advertising. During this period, Chatr was offering services in six cities: Vancouver, Calgary, Edmonton, Toronto, Ottawa and Montréal.

[156] Chatr's media communications programme consisted of: newspaper banner ads, newspaper display ads, third-party retailer ads, merchandising material, packaging, online ads, television ads, radio ads, outdoor ads and transit ads.

[157] During the relevant period, Chatr's ads were part of a national advertising campaign. There were no Chatr zones in Eastern Canada.

[158] Chatr used national media and national retailers to publicize itself.

[159] Dr. Pearce testified that during the relevant period, the Chatr communication programme comprised of the following three advertising campaigns: August 2010 to November 2010 ("fewer dropped calls"); November 2010 to December 2010 ("no worries about dropped calls"); and December 2010 ("no worries network").

[160] Chatr began to transition to its second campaign in the week of October 11, 2010. This transition was mostly completed by mid-November. The second campaign

put forward a broader proposition, namely "no worries about dropped calls." A Chatr balloon that had been pictured in the first campaign continued to be prominently pictured in the second campaign print ads.

[161] I am satisfied that the second campaign drew less of a comparison to the new wireless carriers. This can be seen from a comparison of the explanations for the claims that appeared in the ads. For example the first ad campaign contained this explanatory note: "Seamless Canadian network-no need to switch on to other networks when zipping in and out of your Chatr Zone, which means fewer dropped calls." The second campaign version of this explanatory note provided as follows: "[T]he Chatr no worries network has got you covered in over 94% of the Canadian population, whether you're in or out of a Chatr zone."

[162] After the commencement of this Application on November 19, 2010, Chatr began moving to the "no worries network" tagline. These ads were again less comparative than the ones they were replacing. For example, as indicated, the second ad campaign contained the note: "the Chatr no worries network has got you covered in over 94% of the Canadian population, whether you're in or out of a Chatr zone." The third ad campaign version of this explanatory note provided: "Coast-to-coast footprint that covers over 94% of the Canadian population." Finally, the third campaign version of the ads focused more on price, although Chatr did not claim to offer the lowest price for its wireless services. The central messages and taglines were: "No worries. Talk happy or Worry-free unlimited talk."

[163] All three versions of these ads were part of an extensive media campaign suggesting that a Chatr customer would have "fewer dropped calls", "no worries about dropped calls (oublie les appels interrompus)" and finally a "no worries network." While the "no worries network" representation followed a continuous national media campaign about dropped calls that began in August 2010, and while there is a similarity in visual presentation, I am satisfied that that version of the advertising was not comparative and did not literally or by impression continue to convey the fewer dropped calls claim.

[164] I am satisfied that the credulous and technically inexperienced consumer would have had the general impression from all of the "fewer dropped calls" and "no worries about dropped calls" versions of the ad campaigns that there were no worries about dropped calls on the Chatr network because there were fewer dropped calls on that network.

[165] I am satisfied that a credulous and technically inexperienced consumer would not have had the general impression from the "no worries network" campaign that a comparative dropped call claim was being made.

[166] I am satisfied that the credulous and technically inexperienced consumer would also have the general impression that the Chatr network was more reliable.

Must the fewer dropped call claim be true in each city?

[167] The applicant submits that the contentious ads are false unless the evidence proves that the fewer dropped calls claim is true in each of Vancouver, Calgary, Edmonton, Toronto, Ottawa and Montréal.

[168] The respondents take the position that consumers would have expected the fewer dropped calls claim to be true on average across all cities where Chatr operated.

[169] There were no Chatr zones in Eastern Canada during the relevant period, and so Chatr was not nationally available.

[170] There was no statement in the ads that suggested that the claim was based on a national average or national calculation.

[171] The $35 per month Chatr plan provided unlimited outgoing calls to anywhere in the province. I take this to mean the province where the Chatr customer is located. It was only the more expensive Chatr plan that offered unlimited outgoing calls to anywhere in Canada from a Chatr zone.

[172] It was suggested during the course of closing argument that Mr. G. McPhail, the Vice President and Associate General Counsel of Rogers at the relevant time, on behalf of Rogers, admitted in a letter dated October 8, 2010, that Rogers had to demonstrate dropped call superiority both at a national level and in each urban area in which the new entrants had launched. I do not read Mr. McPhail's letter as such an admission. Rather, I interpret his reference to "each urban area in which the new entrants have launched service" as a response to what he termed a specific concern of the Competition Bureau that "in some cities where Chatr and the new wireless carriers operate, the representations… are false."

[173] As indicated elsewhere, Dr. Michael Pearce, an expert witness called by the respondents, collected as many of the Chatr advertisements as possible for the period of July 28, 2010, to December 30, 2010. Copies of these advertisements were filed as an Appendix to a Slide Brief summarizing his expert report. There was no suggestion that Dr. Pearce's collection was deficient. I am satisfied that Dr. Pearce collected a representative and complete sampling of the contentious advertising claims.

[174] A perusal of Dr. Pearce's sampling is extremely helpful on this issue.

[175] When I consider the evidence, including the evidence to which I referred, I am satisfied that the fewer dropped calls claim represents to a credulous and technically inexperienced consumer that use of a Chatr phone within any Chatr zone will result in

fewer dropped calls than would be true for a Wind Mobile, Public Mobile or Mobilicity customer.

[176] Accordingly, I am satisfied that, in order for the fewer dropped calls claim to be neither false nor misleading, the Rogers network should have offered fewer dropped calls than Wind Mobile or Public Mobile in each of Montréal, Toronto, Ottawa, Edmonton, Calgary and Vancouver during the relevant time period.

[177] I have not mentioned Mobilicity because I have drawn an adverse inference concerning Mobilicity's dropped call rate due to its failure to produce information required by the applicant in this proceeding.

Is Videotron captured by the reference to "new wireless carriers"?

[178] There is an issue concerning whether a credulous and technically inexperienced consumer of wireless services in Québec who saw, heard or read the Chatr advertisements between September 24, 2010, and November 30, 2010, would have considered Videotron a new wireless carrier.

[179] At the relevant time Videotron was a wholly-owned subsidiary of Québecor Media Inc. It was also an integrated communications company engaged in cable television, interactive multimedia, Internet access, cable telephone and wireless telephone services.

[180] According to the evidence, Videotron started in Québec in 1964 as a cable television network with 66 subscribers. At the time of the events that concern us, Videotron had 1.8 million cable television subscribers, 1.2 million high-speed Internet subscribers, 1 million landline telephone subscribers and more than 80,000 wireless customers.

[181] The Videotron footprint of its services in Montréal was larger than the Rogers footprint. Unlike the other new wireless service networks, Videotron had a large footprint in Québec that was not limited to metropolitan areas.

[182] Videotron announced for the first time in a press release dated September 20, 2005, that it was providing wireless services in Québec. The press release stated in part that "Videotron plans to launch its mobile wireless offering in the first half of 2006". Videotron also stated in the release that it was offering "one stop shopping: one customer service number."

[183] From 2006 onward Videotron operated wireless services under its own brand name in the province of Québec. Prior to the Advanced Wireless Spectrum auction in July 2008, Videotron provided wireless services as a mobile virtual network operator, utilizing wireless voice and data services provided by Rogers. Videotron, under its own

brand name, was responsible for acquiring and billing customers, as well as providing technical support.

[184] Videotron was precluded by its agreement with Rogers from associating itself with Rogers in any way.

[185] Prior to acquiring its own spectrum, Videotron could not offer unlimited talking and texting because Rogers would not offer a low enough wholesale price per minute.

[186] Aleks Krstajic, the President and Chief Executive Officer of Public Mobile at the time he gave evidence, described Videotron as a "very powerful presence in the Québec market". This evidence was not contentious and I accept it.

[187] After acquiring spectrum in July 2008, Videotron marketed its wireless services by bringing all of its services, namely its cable television, Internet and wireless services, under one umbrella. It marketed one bundled set of services exclusively in Québec using the media tagline "The Infinite Power."

[188] In January 2010, Videotron announced in a press release that it would be soon rolling out its own Advanced Wireless Services network.

[189] Videotron offered competitive bundling arrangements and postpaid zone-based unlimited talking and texting.

[190] Public Mobile, Wind Mobile, Chatr and Mobilicity offered prepaid zone-based unlimited talking and texting.

[191] Mr. Garrick Tiplady, Senior Vice President of Chatr at the relevant time, testified that the prepaid segment of the wireless services market was markedly different than the postpaid segment. His evidence in this regard was not contentious and I accept it.

[192] Reference was made to the fact that Industry Canada referred to Videotron as a "new entrant" during the July 2008 auction. I do not view this as helpful when considering whether a credulous and technically inexperienced wireless services consumer in Québec, between September and November 2010, would have considered Videotron a new wireless carrier. Apart from the fact that the perspectives of a consumer and Industry Canada would be different, the Industry Canada definition of a new entrant included entities that held less than 10 per cent of the national wireless market based on revenue. This suggests that existing carriers could be new entrants for purposes of the Industry Canada July 2008 auction.

[193] The applicant also suggested that Videotron was defined as a new wireless carrier by the respondents in two affidavits that they filed in this Application. These references are not helpful. It is true that Mr. Berner and Mr. Garrick Tiplady, both

Rogers employees, referred to Videotron as a new carrier in their affidavits. Rogers may have considered Videotron a new carrier but the issue for me is whether a credulous and technically inexperienced wireless services consumer in Québec, between September and November 2010, would have considered Videotron a new wireless carrier. Mr. Berner and Mr. Garrick Tiplady hardly match the credulous and technically inexperienced description of the consumer with whom I am concerned.

[194] The applicant pointed out that in Montréal, Chatr was competing with Public Mobile and Videotron, and that the ads in French make the statement "moins d'appels interrompus qu'avec les nouveaux opérateurs sans-fil." The reference to operators in the plural at a time when the only competing operators were Public Mobile and Videotron, according to the applicant, is some evidence that a consumer in Québec would think that the ads referred to Videotron.

[195] It is true that Chatr was created to compete directly with Mobilicity, Wind Mobile, Public Mobile and Videotron. Mr. Garrick Tiplady testified that Chatr delayed its launch in Montréal to see if Videotron was going to go to market with a prepaid wireless services plan. Mr. Garrick Tiplady testified that Rogers wanted to make sure that Chatr was as competitive as possible with Videotron if Videotron made a prepaid wireless plan available.

[196] Videotron launched its network on September 9, 2010. The respondents launched Chatr service in Montréal on September 16, 2010. The respondents maintained that their advertising campaign did not begin until September 24, 2010. However, a press release dated September 8, 2010, was introduced and appended to the affidavit of Mr. McAlpine.

[197] When Videotron launched its network on September 9, its strategic relationship with Rogers ended. Videotron was no longer a mobile virtual network operator. Videotron's customers moved to the new Videotron network.

[198] The new Videotron network offered similar plans to those it had been operating as a mobile virtual network operator. Videotron did not, however, offer a prepaid plan when it launched. This created a situation in which Chatr had a prepaid offering and Videotron did not, while Videotron had a postpaid offering and Chatr did not. It is for this reason that I accept Mr. Garrick Tiplady's evidence that Rogers and Videotron were not competitors in the prepaid market. An October 22, 2008, press release issued by Québecor Media and Videotron is consistent with Mr. Tiplady's evidence. In that press release, Québecor Media and Videotron announced a $1 billion investment "to roll out their own advanced wireless network." They announced their intention to bring an unprecedented offering of advanced wireless telecommunications to consumers and small businesses. They announced that the project would create an additional 1000 jobs at Videotron. Québecor Media and Videotron announced that the creativity of the

members of the Québecor Media family would be their chief asset in facing the challenges of creating a new business model for Québecor Media and its subsidiaries.

[199] The October 22 press release contained a quote from the president and CEO of Videotron as follows: "True to its track record of bringing its customers the best in technology and entertainment, Videotron intends to launch an unprecedented offering of advanced wireless telecommunication services on the Québec market."

[200] The October 22 press release provided that 100 experts would be added to Videotron's engineering department staff of 800 engineers.

[201] The press release provided background about Québecor Media and Videotron. Québecor Media was described in part as a communications company with operations in North America, Europe and Asia. Videotron was described as a wholly-owned subsidiary engaged in cable television, interactive media development, Internet access services, cable and wireless telephone services. Videotron described itself as a leader in new technologies. Finally, the press release described Videotron as a leader in high-speed Internet access with over one million customers.

[202] This press release is quite dissimilar from the Chatr concept.

[203] There is a reference to Videotron being "new" in the October 22 press release. Specifically, Videotron claimed that, because it was a new entrant in the industry, its network would be designed using the latest technology.

[204] Public Mobile, on the other hand, was a new wireless carrier in the sense that it had no history of carrying on business in the Province of Québec. Further, by the time Videotron and Chatr launched in Québec in September 2010, Public Mobile had already launched there.

[205] I make two final observations. First, Videotron launched in Québec under its own name. It maintained a consistent brand image as demonstrated by the Videotron ads that were admitted into evidence. Second, from 2005 and onward, Videotron existed side-by-side with Rogers in the Province of Québec and had 80,000 wireless customers in its own name.

[206] After considering the evidence, including the evidence to which I have referred, I am satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would view Québecor Media and Videotron as companies in Québec with a proven track record who were rolling out their own advanced wireless network. I am satisfied that such a consumer in Québec would have considered Videotron an established presence in Québec, and a known service provider. In short, I am satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would not view Videotron as captured in the Chatr ads by references such as "les nouveaux opérateurs sans-fil."

Conclusions concerning the nature of and context for the contentious advertisements

[207] When I consider the evidence, including the evidence to which I have referred, I am satisfied that the fewer dropped calls and more reliable network general impressions represented to the credulous and technically inexperienced consumer of wireless services that these advantages were available to consumers in each Chatr zone (appels illimités sans souci dans ta zone chatr) (emphasis added).

[208] I am satisfied that the literal meaning of the contentious claims is consistent with this general impression.

[209] I am satisfied that the combined effect of the literal meaning of the contentious ads and their general impression is that the Chatr advantages of fewer dropped calls and network reliability represented in the ads were available to Chatr customers in each Chatr zone.

[210] Finally I am also satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would not view Videotron as captured by the references in the contentious ads to new wireless carriers (les nouveaux opérateurs sans-fil).

The use of switch generated data

[211] An issue arose during the proceedings concerning the use of "switch generated" data. The term switch comes from the fact that initial hardline telephone communication systems required a mechanical switch to connect the caller to the person called.

[212] At the time with which we are concerned, the switching function was performed by multitasking computers. These computers form the highly complex brain of a wireless network. The dialogue between network components is controlled, monitored and recorded by these multitasking computers.

[213] The development and manufacture of switches can occupy the time of thousands of engineers and software developers for a number of years. These multitasking computers operate 24 hours a day, 7 days a week and 365 days a year, and must perform reliably at all times.

[214] Mr. Harri Pietila, called as a witness by the respondents, was qualified to express opinions on the design and use of wireless network switches, switch generated data and the appropriateness of using switch generated data to compare the performance of wireless networks. Mr. Pietila characterized these multitasking computers as one of the most complicated software-controlled computer systems in the world.

[215] Mr. Pietila testified that the mobile switching centers used in the LM Ericsson wireless system utilized a software control logic that had been developed by thousands

of engineers over a period of more than 20 years. He testified that the system was still under development.

[216] Competing manufacturers of these multitasking computers do not share their hardware and software.

[217] Each switch collects data. This data describes and logs the operation of the switch. Switch generated data helps the network operator understand what happened on the network on a day-to-day basis. It can help the network operator understand what happened to a customer who experienced a particular issue during a call.

[218] A multitasking computer has thousands of software blocks, which are pieces of software that perform a dedicated task. The software blocks contain counters that track what happens during each call connected by the switch. The software endeavors to capture these "events" into a centralized database. A combination of events is used to calculate key performance indicators, such as the rate at which the network drops calls.

[219] Switch generated data is analyzed by performance management tools that constitute a computer system outside the switch. These computers collect raw data and produce reports. The nature of the reports produced is defined by the operator.

[220] Generally speaking, this switch generated data is used by network operators to modify and improve their network.

[221] Switch generated data is also proprietary. Competing operators do not share their switch generated data. In part, this is because doing so would disclose the improvements in their network.

[222] The applicant submits that regulators in different parts of the world rely on switch generated data. Specifically, the applicant referred to the Australian regulator and to OFCOM, the British telecommunications regulator.

[223] The applicant submitted that there are standards that define how dropped calls should be calculated on a wireless carrier's network. The 3rd Generation Partnership Project ("3GPP"), is an international standards body. It governs GSM and WCDMA technologies. It provides a high level definition for dropped call rates.

[224] Dr. Robert Ziegler, a witness called by the respondents, was qualified as an expert to give opinion evidence concerning the configuration and performance of wireless networks, and the measurement and evaluation of the performance of those networks. Dr. Ziegler testified that while the 3GPP dropped call definition was at a "very high level", there were no established standards for implementing the definition at the operational level.

[225] Rogers, Wind Mobile and Videotron complied with 3GPP at this "high level." Public Mobile had a different methodology, and was not a part of 3GPP.

[226] The applicant produced evidence that established that Ericsson publishes comparisons of different carriers using Ericsson switches. It provides each of those customers/carriers with that anonymized information so that the customers can see how they rank on a variety of metrics, including dropped call rates. The applicant submits that this means that Ericsson believes that the comparisons are meaningful, and points out that the respondents relied on one such report in a submission to the Competition Bureau.

[227] The applicant's position is that switch generated network data is helpful because it contains data about every call on the network. It is the applicant's position that network data can be used by the court to assess whether representations are false or misleading.

[228] The applicant takes the position that switch generated data, provided to the Competition Bureau by Wind Mobile, Public Mobile and the respondents, demonstrate that the fewer dropped calls claim is false with respect to Videotron and Wind Mobile in Montréal and Ottawa respectively. As indicated elsewhere, I am not satisfied Videotron would be viewed as a new wireless carrier in Québec. As a result, I will not comment further on Videotron.

[229] The applicant takes the position that the switch generated data demonstrates that the representations are misleading with respect to Wind Mobile in Toronto and Edmonton because the differences in drop call rates in those two locations are insignificant.

[230] It is the applicant's position that the dropped call statistics produced using switch generated data constitute real evidence of the dropped call rates of each network. Accordingly, it is the applicant's position that network generated data is admissible evidence capable of being used to prove and compare the dropped call rates of Chatr, Wind Mobile and Public Mobile during the relevant period.

[231] It is the applicant's position that the court can determine from the evidence whether the different networks have counted the same events.

[232] The applicant relied upon the fact that Wind Mobile compares dropped call rates on its own network, despite the fact that different portions of the network use switches manufactured by different manufacturers.

[233] The applicant called Dr. Raymond Nettleton. He was qualified as an expert witness entitled to give opinion evidence on electrical engineering and wireless telecommunications, including the collection and analysis of network key performance

indicator data, drive test results and the adequacy of drive tests undertaken by the respondents.

[234] Dr. Nettleton testified that the Rogers and Wind Mobile formulae for measuring dropped calls reflect the same data. Dr. Nettleton pointed out that the switch data provided by the carriers contained details of more than 3 billion calls, including over 23 million dropped calls. It was his view that this volume overrode minor differences that might introduce errors into switch-based data comparisons between carriers.

[235] Dr. Nettleton offered the opinion that differences in counting formulae used by different equipment vendors would be inconsequential. In his opinion, switch generated data was comparable across carriers.

[236] It was also Dr. Nettleton's view that even if a small amount of network generated data was lost, for example, due to network upgrades, the omission would not impact dropped call rates.

[237] The respondent's position is that switch generated data is not a fair or reliable basis for comparing the dropped call rate performance of one network with another. This view was supported by the evidence of Mr. Berner, the Chief Technology Officer for Rogers, Dr. Ziegler, Harri Pietila and Michael Tiplady. Mr. Michael Tiplady was qualified as an expert to give opinion evidence concerning the measurement and evaluation of the performance of wireless networks. He is no relation to Garrick Tiplady, Senior Vice President of Chatr at the relevant time, who also testified in this proceeding.

[238] I found Mr. Pietila's evidence quite helpful on this question. Mr. Pietila has a Master of Science degree in electrical engineering from the Technical University of Helsinki. Mr. Pietila was a switch engineer with Ericsson until he retired in 2010. During his 25 years with Ericsson, Mr. Pietila specialized in wireless switching-related products and solutions. He was responsible for Ericsson's GSM switching systems, including all research and development activities at one point in his career.

[239] Mr. Pietila's evidence that he was heavily involved in research and development activities for Ericsson switches was not contentious. I accept not only this aspect of his evidence, but I accept his evidence entirely. Of all the expert witnesses, Mr. Pietila had the most practical work experience with multitasking computers or switches. He designed software for GSM switches. He was responsible for the deployment and support of Ericsson cellular switching technology in northern Europe. He has Canadian work experience. He was the head of research and development at Ericsson's Research and Development Centre in Montréal; this facility employed approximately 2000 researchers when he was there.

[240] Mr. Pietila explained that there are several different suppliers of switches or multitasking computers. These different suppliers compete with each other. Each supplier develops, separately and independently, their own multitasking computers as well as the software that operates them.

[241] Mr. Pietila explained that the data recorded by switches is always used as a diagnostic tool within a single network. It assists the network operator in understanding how the network is performing, and what changes should be made to improve its performance.

[242] Mr. Pietila testified that different wireless networks use different technology, software and multitasking computers. He testified that there are no standards governing the design and manufacture of switches. Switches developed by different vendors are not the same. In his experience, every wireless network is configured differently, and each operator has the ability to adjust the results in numerous ways. It was Mr. Pietila's view that there is no way to assess the impact of any one factor on the results generated by each switch. Mr. Pietila testified that comparing switch generated data derived from different switches supplied by different manufacturers is exceedingly difficult. He testified that comparing the performance of one Ericsson-supplied wireless network to another Ericsson-supplied network is exceedingly difficult using switch generated data.

[243] Mr. Pietila testified that there are at least two parties who have an interest in manipulating switch generated data: the vendor of the switch and the network operator's personnel. Mr. Pietila indicated that there are financial and reputational incentives tied to switch generated network performance results.

[244] Mr. Pietila examined the switch data that was made available in this case. He reached the conclusion that it could not be used to perform a fair or reliable comparison between the performance of the wireless networks of Rogers, Wind Mobile and Public Mobile. Mr. Pietila noted that Rogers uses Ericsson switches, while Public Mobile and Wind Mobile do not. Mr. Pietila was concerned that the underlying data for each counter used to calculate the daily drop call rates provided to the Competition Bureau was not available. The underlying data was not available because it had been destroyed by Wind Mobile and Public Mobile after these proceedings were commenced as part of their routine destruction of such data.

[245] Mr. Pietila's concern about using switch generated data to compare networks was confirmed in this case. Public Mobile excludes seven counters from its dropped call formula. One of those counters captures "customer forced terminations." Rogers does not exclude "customer forced terminations" from its dropped call formula; Rogers counts such terminations as dropped calls. On the Public Mobile network, during the relevant time period, a customer forced termination occurred when the network lost contact with a handset during a call, the channel remained open and a new call was established on the network by that same handset within 18 seconds. Customer forced

terminations accounted for 35 to 38 per cent of the total monthly abnormal termination events captured on the Public Mobile network during the relevant time period.

[246] Public Mobile did not disclose these exclusions, including the very significant exclusion of customer forced terminations, to the Competition Bureau when Public Mobile provided its dropped call rates in 2010. These exclusions were not disclosed in the affidavits sworn by Public Mobile's representative in these proceedings. These terminations would have to be added to Public Mobile's dropped call rate calculation to fairly compare Rogers' and Public Mobile's dropped call rates. Adding customer forced terminations to Public Mobile's dropped call rate increases that rate significantly.

[247] It was not contentious that the software used to operate these multitasking computers is regularly upgraded. This means that two wireless networks using multitasking computers manufactured by the same source may be using different software versions to operate. For example, Wind Mobile's network in Eastern Canada, and Videotron's network in Montréal, both use Nokia switches. However, they use different versions of the operating software. The dropped call formulae are different. The more recent version of the Nokia software takes an event that was previously counted by one counter and splits that event into three different sub-events. These sub-events are counted by three different counters. Dr. Ziegler testified that he was unable to determine how this change affected a comparison of their dropped call rate calculations.

[248] Dr. Ziegler testified that had he been asked to verify the comparability of switch generated data in making key performance indicator comparisons, he would have declined because it was at odds with his professional experience. I accept Dr. Ziegler's evidence in this regard. Dr. Ziegler testified that this was the only time he had testified as an expert. Dr. Ziegler testified that Applied Communication Sciences, his employer, rarely provides opinion evidence in proceedings by deliberate choice.

[249] The European Telecommunications Standards Institute published a paper in April 2005 that dealt in part with two approaches to quality of service issues in the area of mobile communications. The two approaches were drive tests and measurements based on switch generated data.

[250] The paper set out the advantages of switch generated data as follows:

- It includes the effects of all calls and therefore provides better comparability of congestion and network failures;

- It takes into account changes in terminals and the actual performance achieved by real terminals used by real users; and

- Quality indicators are produced from the same database for the whole network as well as for different regions and periods.

[251] The paper set out disadvantages of switch generated data as follows:

- Call attempts made out of coverage are not taken into account because the network does not get that information; and

- Measurements based on network counters depend on software algorithms in the switches and base station controllers that implement the counters. The algorithms of different manufacturers may differ, and there may be differences in the algorithms in different versions of the same software.

[252] It is the latter disadvantage that is concerning. There is no evidence that persuades me that the software algorithms in the Rogers, Wind Mobile and Public Mobile switches are the same, or that explains the differences if there are any.

[253] I have not referred to Videotron in this portion of the reasons because, as indicated elsewhere, I am not satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would have viewed Videotron as a new wireless carrier.

[254] I also considered whether Rogers' switch generated data could be used to confirm or deny Rogers' drive test results for the Rogers network. Drive testing is discussed elsewhere in these reasons. Suffice it to say here that drive testing is a standardized and highly utilized method of comparing the performance of different wireless networks. Drive testing was undertaken at times between July 28, 2010, and November 30, 2010, and the results were introduced into evidence.

[255] Dr. Dippon was a witness called by the applicant. Dr. Dippon was qualified to give expert opinion evidence on the wireless telecommunications industry. He provided a statistical analysis of drive test results in Table 9 of his report. The analysis compared Rogers' drive test data of dropped call rates for Chatr, Wind Mobile and Public Mobile. It also addressed network dropped call rates produced by network generated data from the Rogers, Wind Mobile and Public Mobile networks.

[256] Dr. Dippon's Table 9 suggests that Rogers' drive test generated dropped call rates were lower than Rogers' switch generated dropped call rates in Calgary, Edmonton, Montréal, Ottawa and portions of Vancouver. Table 9 suggests that Rogers' drive test generated dropped call rates for portions of Vancouver were higher than Rogers' switch generated dropped call rates for those same areas of Vancouver.

[257] I am unable to conclude that there is any consistent correlation between Rogers' drive test generated dropped call rates and Rogers' switch generated dropped call rates.

[258] I disagree with Dr. Dippon's conclusion that the deviations between drive test generated dropped call rates and switch data generated dropped call rates mean that the

drive test data is unreliable. I prefer the conclusion that the deviations, which occur in both directions, make it impossible to safely use Rogers' switch generated dropped call results to confirm or deny Rogers' drive test generated drop call results.

Conclusions concerning the switch generated data

[259] I agree that switch generated data is admissible in this proceeding. However, I am satisfied, based on the evidence, that it is dangerous to place significant weight on a comparison of the Wind Mobile, Public Mobile and Chatr switch generated dropped call rates when determining whether the Chatr fewer dropped calls claim is false or misleading.

[260] The Commissioner bears the burden of proving that Rogers' fewer dropped calls claim is false.

[261] The applicant's assertion that the fewer dropped calls claim is false is based upon switch generated data.

[262] When I consider all of the evidence in this matter, as well as the fact that I consider switch generated data of little help for the purposes of comparing the dropped call performance of different wireless networks, I come to the conclusion that I am not satisfied that the applicant has proven on a balance of probabilities that the respondents' fewer dropped calls claim is false in Ottawa with respect to Wind Mobile.

[263] Similarly I am not prepared to conclude on the basis of switch generated data that the fewer dropped calls claim was misleading in Calgary, Edmonton and Toronto with respect to Wind Mobile.

Must the differences in dropped call rates be discernible?

[264] I do not accept the applicant's view that differences in drop call rates must be discernible.

[265] I indicated elsewhere that I am satisfied the ads gave the general impression that there were no worries about dropped calls on the Chatr network. They suggested there were fewer dropped calls on that network, and that the Chatr network was more reliable.

[266] I recognize that the Advertising Standards Canada Guidelines provide that comparative performance claims should not be made when the difference is barely discernible to consumers. Similarly, the Canadian Marketing Association's Code of Ethics and Standards of Practice provides that marketing communications should not stress insignificant differences designed to lead the consumer to draw a false conclusion.

[267] At the same time, it is true that there are many claims about products that are not discernible, and yet still important to consumers. Dr. Pearce offered the example of food safety claims or nutritional claims.

[268] On April 17, 2012, Rogers received a Port-Out Analysis that was designed to test the importance of dropped calls to customers who had left Rogers for another telecommunications provider. The customers whose accounts were examined were postpaid term contract customers. The analysis concluded that dropped calls have a statistically significant impact on postpaid customers who have decided to change wireless carriers.

[269] Further, this report identified that the precipice for port-outs (leaving Rogers for another telecommunication provider) and dropped calls in the postpaid long-term contract segment of the telecommunications market was between three and six dropped calls per month. The report concluded that targeting customers with five dropped calls would likely improve Rogers' port-out rate.

[270] The Chatr market was a prepaid services market with no term contracts. It is easier for a prepaid no term contract customer to move to another wireless provider than it is for a postpaid long-term contract customer. I conclude therefore that the precipice for port-outs and dropped calls in the prepaid no term contract segment of the market is likely lower than 3-6 dropped calls per month.

[271] In addition, during the relevant time period, no wireless service provider had a pricing advantage over the other. There was aggressive pricing prior to Chatr's launch in July 2010. Aleks Krystajic testified that from March to June 2010, price competition from other wireless carriers, particularly Mobilicity, forced Public Mobile to respond. Mr. Krystajic described the pricing plans offered by Wind Mobile and Mobilicity as "bordering on lunacy."

[272] In their hard handoff/undue preference complaint submission to the CRTC, Wind Mobile and Public Mobile emphasized the importance of dropped calls. Specifically, in its submissions to the CRTC, Wind Mobile stated:

> Put simply, every dropped call matters. Prospective subscribers selecting a mobile provider and to whom Rogers Chatr now offers commercial arrangements that are virtually identical to those offered by Wind neither know nor need to know how often they will be affected by the threat of dropped calls. Instead prospective subscribers are offered an opportunity to avoid the problem altogether.

[273] In an email to the Competition Bureau dated September 24, 2010, Public Mobile stated that a differential in drop call rates as small as 10 per cent would be significant.

[274] The statements made by Wind and Public to the CRTC provide, regardless of their truth, significant evidence that Wind Mobile and Public Mobile thought dropped calls, including those caused by hard handoffs, were a significant problem. The statements also prove that they thought that dropped calls, including those caused by hard handoffs, reflected badly on the public's perception of the reliability of their networks. Their statements prove that the leaders of Wind Mobile and Public Mobile thought that the public was concerned with the risk of dropped calls rather than their relative frequency.

[275] Michael Tiplady, whose qualifications are discussed elsewhere, testified that a dropped call can be quite significant if the customer is experiencing other problems with the network.

[276] Finally, as a matter of common sense, dropped calls can have a significance that is not quantitative. The customer is not making a comparative analysis to other carriers in that situation. This significance was captured by Wind Mobile in its submission to the CRTC, to which I have referred elsewhere. In that submission, Wind Mobile described a dropped call as an annoyance on social calls, an acute disadvantage on business calls and possibly a matter of life or death on 911 calls.

[277] When I consider the evidence, including the evidence to which I specifically referred, I am satisfied that the credulous and technically inexperienced wireless services consumer between July 28, 2010, and November 30, 2010, would be more inclined to be a customer of a network that offered fewer dropped calls. Where price is not a factor, I find it difficult to believe that a consumer would choose a network that offered only a few more dropped calls. Even if one network only had a few more dropped calls, one of those calls could be extremely important.

[278] This notion was captured by Wind Mobile in its Reply submission to the CRTC in its hard handoff/undue preference complaint. The Reply stated as follows:

> Prospective subscribers selecting a mobile provider and to whom Rogers Chatr now offers commercial arrangements that are virtually identical to those offered by Wind neither know nor need to know how often they will be affected by the threat of dropped calls. Instead prospective subscribers are offered an opportunity to avoid the problem altogether (emphasis added).

[279] I am satisfied that the credulous and technically inexperienced consumer would choose a network that offered fewer dropped calls to avoid the possibility of an important call being dropped.

[280] This is not a case where an indiscernible difference means that the services are indistinguishable.

[281] I am not satisfied that the credulous and technically inexperienced consumer viewing the Chatr ads expected the dropped call experience to be discernibly different.

[282] Accordingly I am not satisfied that the fewer dropped calls claim is misleading unless there is a discernible difference in drop call rates among the respondents, Wind Mobile and Public Mobile.

Is a one per cent dropped call rate a standard beyond which consumers are unconcerned?

[283] The applicant contends that the fewer dropped calls claim is misleading because the dropped call rates of Wind Mobile and Chatr are below one per cent in Calgary. It is the applicant's submission that a dropped call rate of one per cent is a standard below which consumers are unconcerned about dropped calls.

[284] Kenneth Campbell, Wind Mobile's CEO, and Aleks Krystajic, Public Mobile's CEO, testified that consumers are unlikely to consider dropped call rates discernible where the rates are below one per cent.

[285] I do not accept this evidence, nor do I accept the applicant's contention in this regard.

[286] Dr. Bekheit, the Vice-President of Access Network for Wind Mobile, testified that Wind Mobile continued to work and invest money to improve its dropped call rate in Toronto and Ottawa after the rate fell below one per cent in those cities.

[287] Dr. Bekheit testified that as a matter of general policy, Wind Mobile did not stop working to improve its dropped call rate when it fell below one per cent.

[288] In an email to the Competition Bureau dated September 24, 2010, Public Mobile stated that a 10 per cent differential in dropped call rates was significant.

[289] Wind Mobile submitted to the CRTC that "every dropped call matters."

[290] I do not accept the applicant's contention that the fewer dropped calls claim is misleading because the dropped call rates of Wind Mobile and Chatr in Calgary were, during the relevant period, below what it termed the one per cent threshold for dropped calls.

Adequate and proper testing

[291] As indicated earlier, the Application was amended on March 1, 2011. The amendment maintained that Rogers and Chatr made the "fewer dropped calls than new wireless carriers" and "no worries about dropped calls" performance claims in the absence of adequate and proper testing.

[292] The burden of proving adequate and proper testing lies upon the respondents by virtue of the express wording of s. 74.01(1)(b) of the *Competition Act*.

[293] The adequate and proper test must be made prior to the representation to the public: see *Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2008 Comp. Trib. 2, [2008] C.C.T.D. No. 2 (Canadian Competition Tribunal), at para. 125.

[294] The respondents do not dispute that they made the contentious claims about the performance of their wireless network to the public. They do not dispute that they did so for the purpose of promoting the use of wireless services provided by Chatr, and to the detriment of Wind Mobile, Public Mobile and Mobilicity.

[295] The phrase "adequate and proper test" is not defined in the *Competition Act*. Whether a particular test is "adequate and proper" will depend on the nature of the representation made and the meaning or impression conveyed by that representation. Subjectivity in the testing should be eliminated as much as possible. The test must establish the effect claimed. The testing need not be as exacting as would be required to publish the test in a scholarly journal. The test should demonstrate that the result claimed is not a chance result: see *Imperial Brush Co.*, at paras. 122, 124, 126, and 127.

[296] The respondents must show that adequate and proper testing supported the fewer dropped calls claim ("fewer dropped calls than new wireless carriers" and "no worries about dropped calls.")

No testing

[297] Chatr was launched in Calgary and Edmonton on July 28, 2010. Although at this time the fewer dropped calls claim was first made, the respondents had not conducted any tests of the performance of Wind Mobile in Calgary or Edmonton.

[298] With respect to Montréal, the respondents first made the fewer dropped calls claim in a press release issued on September 8, 2010, prior to the Chatr launch in that city. The respondents conducted their first set of drive tests in Montréal from September 15-19, 2010. The results of these drive tests were not available on either September 8 or 16, 2010, and therefore could not have formed the basis for the fewer dropped calls claim in relation to Public Mobile in Montréal.

Drive tests

[299] Drive testing involves placing simultaneous calls on competing wireless networks within a coverage area. These calls are placed at exactly the same location and contain exactly the same content.

[300] Wireless devices using competing wireless networks are attached to a vehicle equipped with an expensive and sophisticated drive test measuring system. The vehicle

travels a predetermined route that has been designed having regard to population density and traffic patterns. While the vehicles are traveling the predetermined routes, the wireless devices use both competitors' networks as well as Rogers' network. The devices automatically make calls to particular land lines. The results of these calls are monitored and evaluated.

[301] The respondents offered drive test results both as an adequate and proper test, as well as helpful evidence concerning the fewer dropped calls comparative claim. The applicant asserted that the drive tests did not constitute adequate and proper testing of the fewer dropped calls claim because:

- Given their purpose and limitations, drive tests could not be used as the basis for market-wide conclusions about wireless network performance, including dropped call rates;

- Rogers' own drive test data in Vancouver, Calgary and Edmonton did not show a statistically significant difference between Chatr's dropped call rates and those of some or all of the new carriers;

- Rogers did not conduct any drive tests in Calgary or Edmonton before making the claim there; and

- Rogers' drive tests in the greater Toronto area prior to September 27, 2010, did not include all of the new entrants operating in the greater Toronto area.

[302] There are three issues that I must consider:

- Are drive tests capable of adequately and properly testing the respondents' fewer dropped calls claim?;

- If drive tests are capable of adequately and properly testing the fewer dropped calls claim, did the drive tests actually conducted adequately and properly test it?; and

- If the drive tests conducted did in fact adequately and properly test the fewer dropped calls claim, do the results of those tests provide a basis for the claim?

[303] The burden of proving that the fewer dropped calls claim was adequately and properly tested lies upon the respondents. Furthermore, the reliability of a new network can change over time, and therefore it is necessary to consider whether the drive testing results were always sufficiently current.

[304] I recognize that drive tests do not actually provide a measure of all dropped calls experienced on a network. Drive tests estimate the actual dropped call rate. As well,

drive test results are results occurring in the particular conditions under which the drive test took place. These qualifications are counterbalanced by evidence that proved that benchmark drive testing is used all over the world to compare network performance.

[305] I also recognize that drive testing is conducted outdoors. According to the evidence, more than half of the cell phone calls with which we are concerned were likely made indoors. Indoor testing occurred after the fewer dropped calls claim was made. Mr. Michael Tiplady reviewed the indoor testing results and offered the opinion that the results of the indoor testing were consistent with Rogers' earlier drive test results. Mr. Tiplady's evidence, which as indicated earlier I accept, and the evidence that wireless networks improve with time, support the conclusion that the drive testing results are an adequate and proper basis for the fewer dropped calls claim both indoors and outdoors.

[306] The *Competition Act* requires an adequate and proper test of a performance claim. Significantly, benchmark drive testing is accepted universally as a way of comparing key performance indicators, including dropped call rates, on different networks. Drive testing does not have to be a perfect test to be an adequate and proper test.

[307] The demand of wireless operators for reliable drive test results has given rise to a $300 million per year industry. To state that billions of dollars have been invested world-wide in wireless networks is to state a well-known and easily confirmed fact. Some significance must be attached to evidence that the persons who invested these significant sums rely on benchmark drive testing.

[308] Evidence, which was not contentious, was introduced describing instances where wireless companies had sought to distinguish themselves in comparative advertising by claiming superior dropped call rates. These claims were based on drive test results.

[309] Rogers tendered two witnesses who were qualified to offer opinion evidence about drive testing. Michael Tiplady, who served as the Chief Technology Officer for O2, a large wireless service provider in the United Kingdom, was one of those witnesses. As Chief Technology Officer for O2, Mr. Tiplady was responsible for an annual budget of approximately £250 million. Mr. Tiplady has extensive experience with the actual operation of wireless networks.

[310] Mr. Tiplady testified that drive testing is globally recognized as the most accurate method of comparing different networks from the user's perspective. I accept Mr. Tiplady's evidence in this regard.

[311] Dr. Robert Ziegler was the second expert called by the respondents. Dr. Ziegler has a PhD in electrical engineering from Stanford University. He manages

approximately 250 people at Applied Communication Sciences. The Wireless Systems and Networks Research Department at Applied Communication Sciences provides research and engineering services to government and commercial customers. Applied Communication Sciences' clients include agencies of the United States government, including both defence and non-defence agencies. Its clients also include AT&T, Q West, Verizon, Sprint and other wireless network operators around the world.

[312] Applied Communication Sciences is a wholly-owned subsidiary of Telcordia Technologies, which is ultimately owned by LM Ericsson. I recognize that LM Ericsson manufactured the multitasking computers used by the respondents.

[313] Dr. Ziegler testified that drive testing is an established and well-thought-out industry-accepted practice for providing comparative assessments of the performance of wireless networks. I accept Dr. Ziegler's evidence in this regard.

[314] The evidence of Dr. Ziegler and Michael Tiplady is consistent with public submissions made by Verizon and AT&T to the United States Federal Communications Commission concerning drive testing. These submissions were to the effect that drive testing is an excellent way to compare the performance of wireless networks in respect of dropped calls.

[315] Vimplecom, Wind Mobile's parent company, uses drive testing to compare the performance of its networks with its competitors.

[316] I am satisfied by the evidence that drive testing is a standardized international method for comparing the performance of wireless networks.

[317] I am satisfied by the evidence that drive tests are capable of adequately and properly testing the respondents' fewer dropped calls claim.

Did Rogers' drive test programme adequately and properly test its fewer dropped call claims?

[318] Rogers began its drive test programme in 2005. Rogers has spent approximately $20 million on the development and implementation of its drive testing programme. Each year since 2005, Rogers has conducted drive tests across Canada four times per year in metropolitan areas.

[319] Rogers uses vehicles equipped with specially calibrated drive testing equipment provided by a company known as SwissQual AG. SwissQual AG is a Swiss company specializing in wireless network benchmarking and wireless network optimization. The evidence established that SwissQual AG is internationally known in this area, and is independent of Rogers.

[320] Rogers' drive test vehicles adhere to SwissQual AG's standards in hardware and software configuration. The test script, speech clips, sequence and frequency used during Rogers' drive tests are predetermined in accordance with established SwissQual protocols.

[321] The applicant submitted that Rogers' drive tests had to be carried out with third-party validation in order to be an adequate and proper test.

[322] There is no provision in the *Competition Act* that expressly provides that an adequate and proper test of a comparative performance claim must be validated by a third-party. Case law has established that courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test. It is not consistent with the notion of a flexible and contextual analysis to invariably insist on third-party validation of test results. I am satisfied that such validation is not a prerequisite to an adequate and proper test: see *Imperial Brush Co*., at para. 122.

[323] If I am wrong about this, I am satisfied also that Rogers' drive testing and drive test results have been independently validated. Specifically, Telcordia Technologies prepared an audit of Rogers' drive test methodology in 2005 and 2011. I recognize that Telcordia Technologies did not audit the methodology or the results of the specific drive tests relied upon in this Application. Rogers engaged Score Technologies and Nielsen Mobility to conduct drive tests to validate and supplement its own drive test results. Score Technologies and Nielsen Mobility are independent of Rogers. The evidence established that these two companies have specialized expertise in the field of drive testing, and that they are used by other wireless service providers for the same purpose. Score Technologies conducted four of the drive tests relied upon in this Application. Score and Neilsen conducted drive tests in the same area that Rogers conducted drive tests. Their results were compared with Rogers' results to provide a level of independent assurance concerning those results.

[324] The applicant submitted that handsets are an important element in a drive test. The applicant relied on the fact that the handsets used to conduct drive tests of Rogers 2G network and the networks of at least some of the new wireless carriers were not handsets purchased from those carriers, nor were they handsets that were commercially available from them.

[325] Specifically, for testing Wind Mobile and Rogers, Score Technologies used the Samsung T-819. The applicant suggested that there was no evidence that this handset was purchased from a Wind Mobile store. The evidence established that it was a common practice to purchase a Wind Mobile handset and then use that handset in the drive test to test the Wind Mobile network.

[326] Rogers' drive test programme uses equipment supplied by SwissQual, one of the leading drive test firms in the world. Evidence was adduced from SwissQual in the form of an email that suggested that Wind Mobile had informed SwissQual that it uses the Samsung T-819. Rogers provided the Competition Bureau on November 4, 2010, with an email from SwissQual confirming that the Samsung T-819 is compatible with its equipment.

[327] Dr. Ziegler testified that the Samsung T-819 uses a common chipset and was specifically validated by SwissQual for use with the drive test equipment used by Rogers in 2010. I accept Dr. Ziegler's evidence in this regard.

[328] The applicant also criticized the fact that Rogers used the Nokia N95 when drive testing its own network. The applicant claimed that this device was not sold by Chatr in 2010. Mr. Berner, the respondents' Chief Technology Officer at the relevant time, testified that this device was fully validated and tested for use on the Rogers GSM network, and that it was used by customers on the network.

[329] I accept this aspect of Mr. Berner's evidence. Mr. Berner was clearly concerned about the Rogers network. He arranged for Rogers' drive testing methodology to be audited by Telcordia Technologies. He arranged for independent testing by Score Technologies and Nielsen Mobility. It seems only reasonable that he would avoid handsets that invalidated or undermined the drive test results that he had otherwise made efforts to verify.

[330] Mr. Michael Tiplady testified that SwissQual tests handsets and recommends to its customers handsets that work well with SwissQual equipment. It was Mr. Tiplady's evidence that the important thing was to use a handset that was so recommended. I accept Mr. Tiplady's evidence in this regard.

[331] I am satisfied that the handsets used by Rogers during its drive tests were compatible with the SwissQual equipment used by the respondents. I am also satisfied that this was an important fact in terms of the validity and reliability of Rogers' drive test results.

[332] Mr. Berner testified that he had no direct knowledge of the conduct of the drive tests with which we are concerned. Mr. Berner's only knowledge about the drive test programme and methodology came through conversations with persons reporting to him. Mr. Berner could not be effectively cross-examined concerning the methodology used on the actual drive tests. This circumstance goes to the weight attached to the drive test results. Its negative effects, however, are offset by the fact that independent auditing of the tests with which we are concerned, was conducted by Mr. Michael Tiplady.

[333] Michael Tiplady conducted a full review of the Rogers drive tests referred to in this proceeding. He reviewed the information provided by Mr. Berner in his affidavit.

He reviewed the methodology and he examined the information from the subcontractors Score Technologies and Nielsen Mobility. He looked at information on the equipment used. Mr. Tiplady examined printouts of the drive test routes to see whether the routes were consistent with the area Rogers was purporting to test. Mr. Tiplady concluded that the drive tests were conducted according to the normal international standard. He concluded that the drive tests were well-thought-out and what you would expect from an operator of Rogers' standing. The tests were what you would expect from similar operators in other countries. I accept Mr. Tiplady's evidence in this regard.

[334] I am satisfied that Mr. Tiplady's validation offsets to a significant degree the fact that no persons were called with personal knowledge of the actual drive tests with which we are concerned.

[335] I reject the applicant's criticism of the Rogers benchmark drive testing.

Is belief in a technological fact an adequate and proper test?

[336] Rogers has invested billions of dollars in capital expenditures to develop and enhance its wireless network. Rogers has a national network that provides services to approximately 95 per cent of the Canadian population. When Wind Mobile and Public Mobile commenced operations, Rogers had been in business for over 25 years.

[337] It was not contentious that the deployment of a wireless network is an iterative process that requires the operator to make constant adjustments to optimize performance. Mr. Berner testified that "we're never done deploying a network". Mr. Berner explained that if a wireless service provider has a brand-new network, its objective is to get as much coverage as it can in order to have a competitive product. As a result, he explained a wireless service provider will not be able to immediately build all the infill sites needed to solve specific coverage problems within its coverage area. In short, it was his evidence that a network gets better over time.

[338] Dr. Ziegler testified that there was no way that a new entrant or any other operator could catch up to 25 years of experience in a few months.

[339] I accept the evidence of both Mr. Berner and Dr. Ziegler in this regard.

[340] I am satisfied that Mr. Berner honestly believed that it was impossible for Wind Mobile and Public Mobile to build and develop a wireless network to match the reliability and performance of the Rogers network in less than one year.

[341] Mr. Berner's belief in Rogers' technical superiority, which was also Rogers' belief, was based on the three components contained within the explainer or disclaimer in the contentious representation: greater cell density; quality of indoor and underground reception; and seamless call transition when moving out of a Chatr zone.

In addition, it was Mr. Berner's view that Rogers' use of lower frequency 850 MHz spectrum would also lead to fewer dropped calls.

[342] The applicant claims that knowledge or belief in a technological fact cannot constitute an adequate and proper test within the meaning of s. 74.01(1)(b) of the *Competition Act*.

[343] In my view, the matter is best given factually specific consideration. Lower frequency 850 MHz spectrum is said to have better propagation qualities, which means that the power of the radio waves decreases less quickly on this lower spectrum than it does on higher spectrum. Wind Mobile and Public Mobile both used higher spectrum than 850 MHz. If the applicant wished to question this principle, then the burden would be on the respondents to provide the applicant with references to the Friis Transmission Formula that was published in 1945, and which established the principle that lower frequency spectrum has better propagation qualities. The *Competition Act* does not require that the respondents duplicate the test but they must provide it.

[344] The respondents have made the fewer dropped calls comparative performance claim. The applicant has asked for the adequate and proper test of that claim. If the respondents rely upon lower frequency spectrum, they are required to show that they have adequately and properly tested whether their radio wave propagation advantage appears to have actually resulted in fewer dropped calls. The law permits a flexible and contextual analysis when assessing whether a claim has been adequately and properly tested, but there must be a test.

[345] Accepting for a moment that the respondents have greater cell site density, more indoor transmitters and other devices to improve indoor and underground reception and seamless call transition, it is still necessary for the respondents to adequately and properly test whether these technological advantages appear to have actually resulted in fewer dropped calls.

[346] The applicant sought to place in doubt the advantages of lower frequency spectrum in an urban environment. The applicant's position is undercut significantly by statements from the complainants themselves. The benefits of lower radio spectrum were acknowledged explicitly by Wind Mobile and Public Mobile in recent submissions to Industry Canada.

[347] Wind Mobile explicitly acknowledged that lower frequency spectrum is better able to penetrate structures than higher frequencies. It further explicitly admitted that it was at a substantial competitive disadvantage because lower frequency spectrum had superior propagation characteristics.

[348] Public Mobile made similar statements to Industry Canada.

[349] The applicant sought to place in doubt the respondents' assertion that they had greater cell site density than Wind Mobile or Public Mobile. Wind Mobile, through its chairman, explicitly acknowledged Rogers' cell site advantage during the relevant period. Specifically, on December 15, 2010, in an interview with the Globe and Mail, he stated: "[W]e have never made the claim nor will I make the claim today that we have greater coverage than Rogers. They have more sites than us in the greater Toronto area and that leads to better coverage in buildings…" Mr. Armeanca, the former Chief Technology Officer of Wind Mobile, confirmed that three of the four specific causes of dropped calls can be remedied by adding more cell sites.

[350] In addition, it appears that lower frequency spectrum also has to be accounted for when considering cell sites. In October 2010, Wind Mobile had 88 cell sites in Ottawa compared to Rogers' 91 sites. However, it turned out that 63 of the Rogers 91 sites were deployed at 850 MHz. Dr. Ziegler testified that this meant that Wind Mobile would require 3-4 times as many cell sites to match Rogers' signal quality.

[351] Mr. Berner testified that, despite having substantial cell site density, there are many locations inside buildings that are effectively dead zones. The only solution to this problem is to provide customized coverage.

[352] The evidence established that Rogers had invested tens of millions of dollars in purchasing and installing an extensive network of transmitters, signal repeaters and other devices in buildings and underground structures. Rogers deployed dedicated systems within buildings to pick up, amplify and redistribute signals inside the buildings. Rogers built specific cell sites and indoor antenna systems to deal with these coverage problems.

[353] Mr. Berner testified that Rogers also built and installed specific outdoor cell sites to solve specific indoor coverage problems.

[354] Indoor transmission systems have been tested extensively, and had the applicant challenged the effectiveness of those systems, the external testing done by others would have perhaps been a complete answer. However, this begs the question of whether the indoor transmission systems that were in place actually resulted in fewer dropped calls than Wind Mobile and Public Mobile.

[355] To the extent that actual testing of dropped call rates prior to making the fewer dropped calls claim occurred and supported that claim, the technological advantages previously mentioned would have to be capable of confirming the adequacy and propriety of that testing as well as the claims.

[356] The applicant suggested that the respondents' network was congested, and that this reduced or eliminated advantages that the respondents might have otherwise

derived from the maturity of their network, their superior spectrum, greater cell site density, superior indoor network and seamless handoffs.

[357] Dr. Nettleton reviewed the respondents' capacity utilization data and offered the opinion that the respondents' network was in fact congested during the relevant period, and that this congestion would have resulted in dropped calls.

[358] I do not accept Dr. Nettleton's evidence in this regard. In my view, Dr. Nettleton's conclusions are not supportable. In his first report, Dr. Nettleton failed to account for the fact that Rogers uses half-rate voice coders that essentially double Rogers' capacity. Dr. Nettleton addressed this in his Reply Report. However, in his Reply Report, Dr. Nettleton identified 300 half-rate congested cells in Toronto. Dr. Nettleton agreed when testifying that he had made a mistake in his capacity analysis, and that only 33 half-rate cells were congested.

[359] Dr. Ziegler undertook a detailed congestion analysis which I accept. Dr. Ziegler demonstrated that in September 2010, of the 33 individually half-rate congested cells, virtually all were co-located with 1900 MHz Rogers' cell sites. These cell sites were not congested. Rogers' network automatically transfers calls to an uncongested co-located or adjacent cell site when a cell site is at capacity.

[360] Dr. Nettleton also suggested that Rogers' 2G network was aging, and that as a result Rogers was dismantling it. I do not accept Dr. Nettleton's evidence in this regard. Instead, I accept the evidence of Mr. Berner that the Rogers 2G network was being demoted as a result of the normal course of Rogers' business. Rogers was gradually moving traffic to its third-generation or "3G" network.

[361] Dr. Nettleton also suggested that Rogers' network was experiencing co-channel interference or radio interference from adjacent cell sites. Dr. Nettleton agreed on cross-examination, however, that a properly designed network will minimize co-channel interference. He conceded that this was a basic principle in the design of cellular systems. I attach no weight to this aspect of Dr. Nettleton's evidence.

[362] I have elsewhere discussed seamless call transitioning or hard and soft handoffs. It is clear that the hard handoff results in actual dropped calls.

[363] I am satisfied that Rogers' network had the technical advantages that the respondents claimed that it had in the fewer dropped calls claim. These advantages, however, do not relieve the respondents of testing the comparative fewer dropped calls claim. The technological advantages are, however, capable of confirming the adequacy and propriety of a test that appears to substantiate the fewer dropped calls claim.

Were the Rogers drive tests conducted too early after the launch of Wind Mobile and Public Mobile?

[364] The applicant suggested that one of the drive tests was conducted immediately after Wind Mobile had launched, and that this was too soon to permit a meaningful comparison. Specifically, Rogers tested Wind Mobile in Vancouver from June 16-23, 2010. Wind Mobile launched in Vancouver on June 3, 2010.

[365] I do not accept this criticism. Wind Mobile was offering wireless services to the public from and after June 3, 2010. Rogers was under no obligation to wait before testing the wireless service that Wind Mobile was offering to the public.

[366] The idea that Wind Mobile's service would have improved over time, and that a later drive test would reflect that improvement does not change the results of the drive tests that were in fact conducted, and whether they provide for a time an adequate and proper basis for the fewer dropped calls claim.

[367] The applicant also argued that the fewer dropped calls claim became misleading because Rogers' advantage, if it had one, changed over time. The applicant used Vancouver as an example.

[368] As indicated, Rogers tested against Wind Mobile in Vancouver in the period June 16-23, 2010. It then tested against Wind Mobile in Vancouver in the period August 10, 2010, to September 3, 2010. During the June drive test, Chatr experienced 6 dropped calls, while Wind Mobile experienced 13 drop calls. During the August/September drive test, Chatr had eight dropped calls, while Wind Mobile experienced seven dropped calls. A third test was conducted in Vancouver during the period of October 1-14, 2010. During the October drive test, Chatr experienced six dropped calls, while Wind Mobile had nine dropped calls.

[369] I have concluded elsewhere that Rogers' decision to filter out hard handoffs after August 9, 2010, resulted in these drive test results understating Wind Mobile's and Public Mobile's dropped calls.

[370] It is the applicant's position that things changed between June and September, and therefore the fewer dropped calls claim had become misleading with the passage of time. In short, it was the applicant's position that the circumstances were changing, and therefore the advertising had to change. I agree in principle, however whether these ads were misleading is a more precise question.

[371] In the June 2010 drive test, Wind Mobile experienced slightly more than two times as many dropped calls as Chatr. In the October drive test, Wind Mobile had one and one half times as many dropped calls as Chatr. When I consider all three Vancouver drive tests, I am not satisfied that they demonstrate any comparative change between Wind Mobile and Chatr in the periods of June 16-23, 2010, and October 1-14, 2010.

[372] Such a conclusion is not inconsistent with statements made by representatives of the complainants. For example, Mr. Anthony Lacavera, Wind Mobile's chairman, said on September 13, 2011, "if there was a knock against us in the beginning it was [the quality of] our networks but the gap between us and the big guys is quickly going away." The events that concern us occurred in the period August to December 2010. It is clear that Mr. Lacavera thought that there was a gap between Wind Mobile and "the big guys" in September 2011, although it was also his view that the gap at that time was narrowing. Accordingly, there must have been a gap between Wind Mobile and "the big guys" during the period we are concerned. There is no reason why Mr. Lacavera would make a statement acknowledging the network superiority of competitors unless his information was that it was true. Mr. Lacavera's statement tends to confirm Rogers' interpretation of its 2010 drive test results against Wind Mobile.

[373] The applicant criticizes the fact that the drive testing conducted September 15-19, 2010, which tested Public Mobile in Montréal, was methodologically unsound because it was an expedited drive test. Specifically, the Public Mobile Montréal drive test was conducted over 4 days for 24 hours each day. Dr. Ziegler testified that the expedited drive test could not by itself be used as a basis for an unqualified comparison between Rogers and Public Mobile, and I accept his evidence in that regard.

[374] I am satisfied that the expedited Montréal drive test was not an adequate and proper test of the fewer dropped calls claim. Additionally, it is clear that Chatr launched in Montréal on September 16, 2010, and that these drive tests could not have substantiated the fewer dropped calls claim made at that time.

[375] There was an expedited drive test that tested Wind Mobile in Toronto from September 26, 2010, to October 2, 2010. This test could not, by itself, be used as a basis for an unqualified comparison between the Rogers and Wind Mobile networks in Toronto. However, this drive test was in addition to a normal drive test conducted August 20, 2010, to September 8, 2010, that compared those two networks in Toronto.

Conclusion concerning adequate and proper testing

[376] It is obvious that on July 28, 2010, when Rogers began making the fewer dropped calls representation on its website, in social media, through public relations channels and on product packaging, Rogers had only conducted drive tests against Wind Mobile in Vancouver, Toronto and Ottawa. However, as of July 28, 2010, Wind Mobile and Chatr offered services in Calgary and Edmonton. Rogers did not conduct tests in either of these markets prior to July 28, 2010.

[377] The idea that comparative performance claims had to be adequately and properly tested was well known to the respondents. Specifically, the advertising agency retained to promote Chatr asked in a November 6, 2009, document: "How do we support our claims?"

[378] Rogers began its extensive advertising campaign on August 9, 2010. By this time it had conducted a drive test in Calgary, but it had lost its 2G network benchmark drive test results.

[379] I accept the respondents' submission that drive testing is capable of adequately and properly testing the fewer dropped calls claim.

[380] I am satisfied that the Rogers drive testing with which we are concerned adequately and properly tested the fewer dropped calls claim when those drive tests were conducted prior to the claim being made.

[381] I am satisfied that the respondents failed to conduct an adequate and proper test in Calgary and Edmonton prior to July 28, 2010, when they began making the fewer dropped calls claim.

[382] The drive test conducted in Calgary on August 6, 2010, is not an adequate and proper test because the results were lost and are therefore not known and cannot be verified.

[383] No adequate and proper test against Public Mobile was conducted in Montréal prior to the respondents making the fewer dropped calls claim at the time of Chatr's launch on September 16, 2010.

[384] No adequate and proper test against Public Mobile was conducted in Toronto prior to July 28, 2010, when Chatr began making the fewer dropped calls claim in Toronto.

[385] I attach no significance to the fact that Rogers did not test against Videotron in Montréal before September 16, 2010, because I have concluded elsewhere in these reasons that a credulous and technically inexperienced wireless services consumer in Québec would not have considered Videotron a new wireless carrier.

Filtering out hard handoffs

[386] The evidence was that prior to August 9, 2010, Rogers' drive test results included dropped calls due to hard handoffs. Rogers' drive test results for Montréal from September 15-19, 2010, included dropped calls due to hard handoffs as well.

[387] Mr. Berner, Rogers' Chief Technology Officer, decided that he wanted to look at the drive test results with and without the hard handoffs. As a result, calls originating in the Wind Mobile, Public Mobile, Mobilicity and Videotron coverage zones or footprints that terminated outside those zones were removed from their dropped call totals.

[388] The applicant submits that when using drive test results to compare networks, the respondents' results should be those with hard handoffs removed.

[389] The applicant relies in part on the fact that Applied Communication Sciences (a.k.a. Telcordia Technologies) filtered out of its drive test audit results calls concluding outside a new wireless carrier's coverage area. Dr. Ziegler's concern was that if vehicles were driving in and out of the new carrier's coverage area, there would not be a proper comparison. While I agree with Dr. Ziegler's expressed concern, I do not agree that there was evidence that Rogers' drive test vehicles were inappropriately driving in and out of new carriers' coverage zones. The evidence of Michael Tiplady is to the contrary.

[390] Telcordia was performing a third-party evaluation of Rogers' use of quality measurements procedures, selected drive test measurements, data collection, processing and reporting procedures to compare Rogers' wireless voice and data services with those of other carriers. Performance of this exercise was obviously not hindered by the systematic removal of hard handoffs and the disclosure of that fact to Telcordia. Finally, both sets of drive test results were available to Applied Communication Sciences.

[391] Dr. Nettleton, in his expert report dated June 14, 2012, stated that filtering out hard handoffs was necessary to avoid "an artificial increase in dropped calls that does not reflect how the service is intended to be used by its subscribers."

[392] I do not accept this aspect of Dr. Nettleton's opinion. Some subscribers of Wind Mobile and Public Mobile will leave their coverage area while engaged in a call, their signal strength will degrade and eventually the Wind Mobile or Public Mobile network will drop the call. Wind Mobile and Public Mobile may not have intended that customers use the service in this way, but it is foreseeable that this type of dropped call would occur. Wind Mobile negotiated a roaming agreement with Rogers to allow customers to use their phones outside the Wind coverage zones.

[393] In somewhat of an about-face, Dr. Nettleton agreed on cross-examination that a fair comparison of the rates at issue in these proceedings would appropriately include hard handoff dropped calls.

[394] Mr. Michael Tiplady testified that he would not have filtered out hard handoffs when comparing the networks using drive test data because this filtering was inconsistent with the customer's experience. Mr. Tiplady testified that, in reviewing Rogers' drive testing, he saw no evidence of oversampling at coverage area borders.

[395] I prefer Mr. Tiplady's approach, although I view the matter somewhat differently.

[396] The fewer dropped calls claim stated that one reason Chatr had fewer dropped calls was because Chatr offered a seamless Canadian network, and therefore there was no need to switch to other networks when "zipping in and out of your Chatr zone." The

comparative nature of the fewer dropped calls claim invites consideration of calls dropped when Wind Mobile and Public Mobile customers are "zipping in and out" of their Wind Mobile and Public Mobile zones. Accordingly, filtering out such calls is not helpful for purposes of this Application.

[397] In addition, this Application carries serious reputational risks, as well as a significant administrative monetary penalty should it succeed. Accordingly, the claim should be somewhat strictly construed. The court should try to avoid altering genuine test results when trying to determine whether the representation is false or misleading.

[398] I am satisfied therefore that Rogers' drive test results after August 9, 2010, understated the difference between Rogers dropped call rate and the dropped call rates of Wind Mobile and Public Mobile during the drive tests because dropped calls due to hard handoffs were filtered out of the drive test results. This does not apply to the Montréal results for September 15-19, 2010, that included dropped calls resulting from hard handoffs.

[399] Mr. Berner testified that, if dropped calls attributed to hard handoffs are added back into the results for drive tests conducted after August 9, 2010, the respondents' network had fewer dropped calls than Wind Mobile and Public Mobile in every drive test conducted between June 16, 2010, and December 15, 2010. I accept his evidence in this regard. While the applicant challenged whether certain differences in dropped call rates were statistically significant, the mathematics of the exercise were not challenged.

[400] At the risk of belaboring the obvious, I have not referred to Videotron because, elsewhere in these reasons, I determined that Videotron would not be viewed by a credulous and technically inexperienced wireless services consumer in the Province of Québec as a new wireless carrier. I have not referred to Mobilicity because, elsewhere in these reasons, I have drawn an adverse inference concerning Mobilicity's dropped call rate during the relevant period. This inference is based on Mobilicity's refusal to cooperate with the Competition Bureau in this proceeding.

Are the drive test results statistically significant?

[401] The applicant also maintains that Rogers' drive test results do not show a statistically significant difference between Rogers' wireless network and the networks of the new wireless carriers. It is the applicant's position that, even if the court considers drive testing an adequate and proper test in principle, it is not sufficient for the court to look at raw drive test dropped call rates and determine that Chatr had the lower rate. It is submitted that the court must also determine whether the differences in dropped call rates are statistically significant.

[402] We are dealing with dropped calls in circumstances where there was no price differential among Chatr, Public Mobile and Wind Mobile services. There was also no evidence suggesting that changing wireless carriers meant the loss of one's phone number.

[403] I am satisfied that a credulous and technically inexperienced wireless services consumer would not analyze the problem from a statistical perspective. I am satisfied that such a consumer would not want an important call dropped, and would be influenced in his or her choice of a wireless carrier by the idea that one wireless carrier dropped fewer calls than another, regardless of the statistical significance of the difference. To put the matter differently, if price and cell number are not issues, why choose more dropped calls?

[404] Despite my view that no difference in dropped call rate is sufficiently small to be insignificant or immaterial, I propose to consider the dispute in the evidence about the statistical significance of the differences in dropped call rates of Chatr, Wind Mobile and Public Mobile.

[405] The applicant called Dr. Christian Dippon to testify in part on the statistical significance issue. Dr. Dippon is an economist. He is a Vice-President of National Economic Research Associates, which is a firm of economists. He specializes in the economics and business of telecommunications and other high-tech industries. Dr. Dippon holds a PhD in economics from Curtin University in Perth, Australia. Dr. Dippon has been qualified as an expert many times in the past by courts in the United States and Singapore.

[406] The respondents entered evidence from 16 drive tests. Dr. Dippon considered these drive test results without filtering out hard handoffs. These drive tests were performed in Vancouver, Calgary, Edmonton, Toronto and Montréal. Dr. Dippon used these tests to do hypothesis-testing.

[407] Dr. Ennis was called by the respondents. He was qualified in part to give expert opinion evidence on statistics, and in particular the statistical significance of the Rogers drive test results. Dr. Ennis testified that in hypothesis-testing, there are two hypotheses. A null hypothesis is considered true until proven false, while an alternative hypothesis contradicts the null hypothesis and is only accepted when there is sufficient statistical evidence. The null hypothesis is the hypothesis that the experimenter needs to reject in order to support the alternative hypothesis. The alternative hypothesis is the hypothesis that the experimenter wishes to establish.

[408] Dr. Dippon used as his null hypothesis the proposition that Rogers had statistically the same amount of dropped calls as the new wireless carriers. He used as the alternative hypothesis the proposition that Rogers did not have the same amount of dropped calls as the new wireless carriers. Dr. Dippon worked to a confidence level of

95 per cent, which meant that he wanted only a 5 per cent chance that the drive test was a chance comparison.

[409] Dr. Dippon concluded, after considering these 16 drive test results, that on 8 occasions, the drive test data accepted the null hypothesis, while the drive test data rejected the null hypothesis on 8 occasions.

[410] On the occasions where the drive test data accepted the null hypothesis, Dr. Dippon concluded that Rogers' sampled dropped call rate was not sufficiently lower than the sampled dropped call rate of the new carriers to permit the conclusion that Rogers had fewer dropped calls.

[411] Although not explicitly stated, Dr. Dippon's conclusion with respect to the eight sets of drive test data which rejected the null hypothesis must have been that Rogers' sampled dropped call rate was sufficiently lower than the sampled drop call rate of the new carriers to permit the conclusion that Rogers' dropped call rate was not the same as the new wireless carriers.

[412] Dr. Dippon did not explain what his conclusions would have been if he had chosen a confidence level of less than 95 per cent. Dr. Dippon offered no evidence concerning the confidence level that would equate to rejecting the null hypothesis on a balance of probabilities.

[413] As indicated earlier, eight sets of drive test data rejected the null hypothesis in. Dr. Dippon's analysis, and therefore must have rejected the null hypothesis using Dr. Dippon's confidence level of 95 per cent.

[414] Dr. Ennis has two doctorate degrees, one of which is in mathematical and statistical psychology. Dr. Ennis has published on statistical significance and statistical equivalents. Dr. Ennis also employed hypothesis-testing. Dr. Ennis chose as his null hypothesis the conclusion that Chatr's dropped call rate is equal to the dropped call rate of the new wireless carriers. His alternative hypothesis was that Chatr's dropped call rate was superior to the new wireless carriers' dropped call rates. Dr. Ennis tested these hypotheses using different statistical tools than those used by Dr. Dippon.

[415] Dr. Ennis testified that his review of the Rogers drive test results led him to the conclusion that those results are statistically valid, and establish that Chatr had fewer dropped calls than both Public Mobile and Wind Mobile during the relevant period. Once again I decline to refer to Mobilicity and Videotron.

[416] It was also Dr. Ennis' opinion that Chatr's dropped call rates were significantly better than the new wireless carriers. Dr. Ennis' confidence level in his results was 95 per cent.

[417] Dr. Ennis also created confidence interval charts. Dr. Ennis first calculated each carrier's mean dropped call rate. Next, Dr. Ennis calculated the 95 per cent confidence interval for each of Chatr and the new wireless carriers' mean dropped call rates. A 95 per cent confidence interval means that one can be 95 per cent confident that the carrier's true mean dropped call rate falls within that interval. Dr. Ennis produced a graphic illustration of the confidence intervals for the mean dropped call rates of Chatr and the new wireless carriers. He concluded that this exercise established that Chatr had statistically significant fewer dropped calls than each of the new wireless carriers during the period with which we are concerned.

[418] Dr. Ennis also performed a similar exercise with something he called the "call success rates" of Chatr and the new wireless carriers. This calculation measured calls that did not fail and were not dropped during drive testing. Dr. Ennis calculated mean successful call rates for Chatr and each of the new wireless carriers. Once again Dr. Ennis calculated 95 per cent confidence intervals for these mean successful call rates.

[419] After performing these two exercises, Dr. Ennis concluded that both demonstrated the statistically significant superiority of Chatr in respect of dropped calls and successful calls during the period with which we are concerned.

[420] Dr. Ennis testified that these exercises quantified the degree to which Chatr's mean dropped call rate and mean success rate were superior to the new wireless carriers during the period with which we are concerned.

[421] The second test performed by Dr. Ennis was the Wilcoxon Sign Test. This test assigns a "+" where a drive test recorded that Chatr had a lower dropped call rate than the new wireless carriers. The test assigns a "-" where the drive test recorded that Chatr had a higher dropped call rate. Chatr had a lower dropped call rate than the new wireless carriers in 15 out of 16 drive tests. Dr. Ennis then calculated the odds of Chatr having a lower dropped call rate in 15 out of 16 drive tests as a result of mere chance, and calculated that the likelihood of this happening by chance was less than 0.03 per cent.

[422] Dr. Dippon criticized the fact that in some of his testing, Dr. Ennis aggregated drive test results for the new wireless carriers across the cities in which they operated. The two exercises of Dr. Ennis to which I referred dealt with the drive test results on a disaggregated basis.

[423] Dr. Dippon made no attempt to attack the accuracy or legitimacy of Dr. Ennis' confidence interval calculations. Dr. Dippon did not refer to these confidence interval charts in his initial or reply reports.

[424] I prefer the evidence of Dr. Ennis. Dr. Ennis has a Doctor of Science degree in Mathematical and Statistical Psychology. He taught statistical quality control at the University of Guelph. He has experience designing and analyzing test data to determine

whether tests support claims made in advertisements. He has provided advice on a pro bono basis to the National Advertising Division of the Better Business Bureau Division, which conducts proceedings to resolve advertising claim disputes in the United States. Finally, he has published in the area of statistics.

[425] I find Dr. Ennis' dropped call rate and success rate calculations logically compelling and un-assailed.

[426] Finally, although not necessary for resolving a dispute concerning statistical analyses, but helpful when considering what constitutes a significant difference in dropped call rates for purposes of this Application, Public Mobile, in an email to the Competition Bureau dated September 24, 2010, stated that a differential in dropped call rates as small as 10 per cent was significant.

[427] Dr. Dippon and Dr. Ennis both used the 95 per cent confidence level standard in their analyses. As a result, I have not considered the appropriateness of that confidence level in deciding to accept the evidence of Dr. Ennis that Chatr's dropped call rate was superior to the new wireless carriers. However, I do not wish to leave this question without commenting that I am not persuaded that, in deciding whether the respondents have discharged the burden of proving that their fewer dropped calls claim was based upon an adequate and proper testing, a 95 per cent confidence level is consistent with a balance of probabilities standard of proof. The level of confidence required in the result of the test before it can be considered adequate and proper must be consistent with that standard of proof.

How long are the drive test results valid?

[428] The benchmark drive test results were collected and filed as Tab 14 of Exhibit 37A. These test results indicate that consistent with Mr. Berner's evidence, Rogers engaged in ongoing benchmark drive testing.

[429] Full market drive tests occurred in Vancouver in June, August to September and October, 2010. There were partial market drive tests in Vancouver in November 2010.

[430] Full market drive tests occurred in Calgary in September and December, 2010. There were no partial market drive tests in Calgary during the relevant period.

[431] Full market drive tests occurred in Edmonton in August and September, 2010. There were no partial market drive tests in Edmonton during the relevant period.

[432] Full market drive tests occurred in Toronto in June, August to September, September to October and November, 2010. No partial drive tests were conducted in Toronto. Indoor walk testing took place in Toronto in November to December, 2010.

[433] Full market drive tests occurred in Ottawa in July and November, 2010. Indoor walk testing took place in Ottawa in December 2010.

[434] Full market drive tests occurred in Montréal in September 2010. Partial market drive tests occurred in Montréal in October 2010. Three partial market drive tests occurred in different parts of Montréal in November 2010.

[435] It was Mr. Berner's evidence that the deployment of a wireless network is an ongoing iterative process. This means benchmark drive testing must be ongoing. I do not wish to imply that benchmark drive testing should be continuous. Nevertheless, the environment can change and benchmark drive testing must continue to occur to ensure that performance claims are always adequately and properly tested.

[436] Dr. Ziegler testified it was clear that Wind Mobile and Public Mobile operators were building out their networks, and that as a result he would expect changes at least every two months.

[437] Garrick Tiplady testified that removing the fewer dropped calls claim from the market started in October 2010. He testified that television ads, radio spots and print ads can be changed quickly; however, third-party distribution took longer because the respondents did not control the third-party distributors. It was his estimate that, depending on the medium, it would take from 2-6 weeks to remove the fewer dropped calls claim from the market.

[438] The respondents forwarded a timeline to the Competition Bureau that indicated that the fewer dropped calls claim would be showing in television and radio ads until October 11, in digital online ads until November 1, in mini posters until November 8, in brochures until November 11, in third-party retail flyers until November 14, on handset packaging until November 30 and in third-party retailer in-store magazines until November 30, 2010.

[439] Accepting these timelines, as well as Dr. Ziegler's suggestion that two months is about as long as drive test results could be considered current, I am satisfied that the drive tests conducted by the respondents were sufficiently contemporaneous with the fewer dropped calls claim with which we are concerned.

Conclusions concerning hard handoffs, statistical significance and timing of the drive tests

[440] I am satisfied that the Rogers drive test results with which we are concerned should be considered without filtering out hard handoffs.

[441] I am satisfied that the drive tests conducted by the respondents were sufficiently contemporaneous with the fewer dropped calls claim with which we are concerned.

[442] I do not accept the applicant's submission that the Rogers drive testing results support a finding that the fewer dropped calls claim is either false or misleading.

[443] I am satisfied that the Rogers drive testing results are an adequate and proper basis for subsequent claims by Chatr that its network will drop fewer calls than the networks of the new wireless carriers.

[444] I am also satisfied that the Rogers drive testing results that postdate the comparative fewer dropped calls claim are not an adequate and proper test for those claims because s. 74.01(1)(b) has been interpreted as requiring that the adequate and proper testing take place before the performance claim is made.

[445] I am satisfied that the Rogers drive testing results demonstrate that the Rogers 2G network, in a statistically significant way, dropped fewer calls during the relevant period than the networks of Wind Mobile and Public Mobile.

Indoor dropped call rates

[446] The applicant points out that networks may perform differently outdoors than they do indoors. The evidence established that the majority of wireless calls are made indoors. Drive testing is outdoor testing. It is the applicant's position that a claim concerning indoor wireless communications should have been qualified or not made at all.

[447] The applicant submits the fewer dropped calls claim conveyed the general impression that it applied to indoor calls. Having reviewed the ads in question, I agree that the ads with which we are concerned gave the impression to the credulous and technically inexperienced wireless services consumer that the fewer dropped calls claim applied to both indoor and outdoor calls. The applicant maintains that in giving that impression, the fewer dropped calls claim is misleading because Rogers did not conduct tests specifically comparing indoor dropped call rates prior to publicly making the fewer dropped calls claim.

[448] Mr. Michael Tiplady testified that in his experience, the level of radio signal inside a building, although attenuated as it passes through the structure, will generally be in proportion to the level outside. It was his opinion that if one operator had better results than another outdoors, that operator would most certainly have better results indoors at that location.

[449] Nextgen Innovation Labs LLC ("NIL") was retained by Rogers to carry out an independent comparative in-building benchmarking study. The study was meant to determine failed and successful call rates, as well as other key performance indicators on Rogers' 2G network and the networks of Wind Mobile, Public Mobile and others.

[450] The NIL indoor walk testing occurred in Ottawa and Toronto in November and December, 2010. It occurred in Montréal in February and March, 2011.

[451] None of this testing was conducted prior to the launch of Chatr.

[452] Mr. Sushil Chawla, a witness called by the respondents, was qualified to give opinion evidence on comparative in-building and walk testing of wireless network performance, including the testing done for the respondents. Mr. Chawla is Vice President-Innovative Engineering of NIL.

[453] The evidence established that in 2010, indoor testing emerged as a necessary adjunct to drive testing. Mr. Chawla testified that NIL had only begun this type of indoor walk testing in early 2010. He also testified that he was not aware of any other company that offered comparable indoor testing at that time. Michael Tiplady testified that the indoor testing offered by NIL was likely the first of its kind.

[454] The technology to conduct indoor walk testing was not commercially available prior to July 28, 2010, the date of Chatr's launch.

[455] The words adequate and proper have been held to be synonymous with sufficient and appropriate. Traditional or scientific testing is not required. Courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test: see *Imperial Brush Co*., at para. 122; *R.v Big Mac Investments Ltd*. (1988), 24 C. P. R. (3d) 39, at p. 45, [1988] M.J. No. 586 (Man. Q.B.).

[456] The evidence established that Rogers had an extensive indoor network in 2010. Mr. Berner testified that Rogers had invested tens of millions of dollars in purchasing, installing and maintaining a network of transmitters, signal repeaters and other such devices in buildings and underground structures to improve coverage. Mr. Berner also testified that for substantial buildings, Rogers deployed an in-building distributed antenna system to transmit signals throughout the building.

[457] Transmitters, signal repeaters and other such devices are not tests but they are capable of confirming an assertion that Rogers' superior outdoor performance, adequately and properly tested by drive tests, was duplicated indoors in the same geographic area. Of course, such confirmation is not possible until drive testing has occurred, because until that time there are no test results from which to extrapolate.

[458] The indoor walk testing results are not capable of being an adequate and proper test of the fewer dropped calls claim because the testing occurred after the performance claims had been made.

[459] The indoor walk testing results are capable of supporting an inference that the 2010 drive test results in Toronto, Ottawa and Montréal adequately and properly tested both outdoor and indoor dropped call performance.

[460] In addition, the evidence is that Wind Mobile and Public Mobile were constantly working to improve their networks. Therefore, any difference in indoor dropped call rates favoring the respondents, and measured in December 2010 or February to March, 2011, was likely to be less than it would have been between July 28 and November 30, 2010. No one suggested that the Wind Mobile or Public Mobile networks worsened over time.

[461] The indoor walk testing results are helpful in deciding whether the respondents' fewer dropped call claim in Ottawa in reference to Wind Mobile was false or misleading. Dr. Nettleton, who was called to give expert evidence by the applicant, testified that the performance of Wind Mobile and Public Mobile at the time of the NIL walk testing was likely better than it was earlier in 2010.

[462] I am satisfied that Rogers made use of indoor walk testing as soon as it was commercially available.

[463] Dr. Nettleton testified that Chatr had superior dropped call rates to Wind Mobile and Public Mobile on those indoor walk tests. I am satisfied that the indoor walk testing results indicated that Chatr had better in-building dropped call rates than Wind Mobile in Toronto and Ottawa, and better in-building dropped call rates than Public Mobile in Toronto and Montréal.

[464] The applicant urged caution with respect to the NIL study. The applicant pointed out that the Toronto study was organized and designed within a few days. The applicant also took the position that NIL did not conform to its methodological criteria.

[465] The applicant also points out that Dr. Ennis did not statistically analyze the NIL results.

[466] It is also clear that NIL used a Blackberry to test Rogers' 2G network in circumstances where Chatr did not offer a Blackberry for sale during the relevant period.

[467] One specific criticism concerns the choice of indoor sites. Prior to retaining NIL, Rogers had conducted its own informal indoor walk testing. NIL indicated that it chose its indoor sites using Google maps. A comparison shows that the sites used by Rogers in its own indoor testing and the sites chosen by NIL for its indoor testing were substantially similar and, in some cases, the sites were listed by both Rogers and NIL in the same order.

[468] Dr. Nettleton, called as an expert by the applicant, offered the opinion that the walk tests were well executed.

[469] I am satisfied that Rogers shared with NIL the locations that it informally tested, and that these locations in Toronto were adopted by NIL. This affects the weight

to be given to the indoor testing, because one of the requirements of the indoor walk testing methodology is that the indoor sites be selected randomly. At the same time, a review of the sites indicates that the testing was done in the major indoor locations in Toronto.

[470] The applicant asserts this demonstrates that the NIL indoor walk testing was not independent of the respondents. I do not draw this conclusion. I am satisfied that a shortcut was taken in choosing the locations. I am also satisfied that the appropriate indoor locations in Toronto were tested using well-executed indoor walk tests.

Conclusion concerning indoor walk tests

[471] I am satisfied that the NIL indoor walk tests indicate that Rogers' 2G or GSM network had better dropped call rates than Wind Mobile and Public Mobile in Toronto, Ottawa and Montréal when the indoor walk testing was conducted in December 2010 and early 2011.

[472] The indoor tests were not conducted prior to the fewer dropped calls claim and therefore are not an adequate and proper test of that claim. They do confirm its accuracy with respect to indoor calls at the time of the indoor tests. Because I am satisfied that the networks of Wind Mobile and Public Mobile improved with the passage of time, I am satisfied that the indoor walk tests also confirm that the fewer dropped calls claim was accurate indoors in Toronto, Ottawa and Montréal during the relevant time period.

[473] I do not accept the applicant's contention that the fewer dropped calls claim was misleading because it gave the impression that the claim was true indoors as well as outdoors.

[474] The indoor walk tests cannot be an adequate and proper test within the meaning of s. 74.01(1)(b) because those tests were conducted after the fewer dropped calls claim was published.

Is s. 74.01(1)(b) of the *Competition Act* inconsistent with the provisions of the *Charter*?

[475] The applicant accepts that s. 74.01(1)(b) of the *Competition Act* infringes s. 2(b) of the *Charter*.

[476] The applicant does not concede that s. 74.01(1)(b) infringes s. 11 of the. *Charter*.

Section 1 and s. 2(b) of the *Charter*

[477] As a result of the applicant's concession, the only issue to be decided with respect to the infringement of s. 2(b) is whether s. 74.01(1)(b) is a demonstrably

justifiable and reasonable limit on the freedom of expression guaranteed by s. 2(b) *Charter*. The applicant bears the burden of proof concerning this issue.

Does s. 74.01(1)(b) have a pressing and substantial objective?

[478] Sections 74.01(1)(a) and (b) are part of a scheme of protections against false or misleading advertising.

[479] False or misleading claims made intentionally or recklessly are addressed in s. 74.01(1)(a), as well as s. 52, of the *Competition Act*.

[480] Section 74.01(1)(b) protects against false or misleading performance claims made in the absence of prior adequate and proper testing. These claims may occur because the provider of the good or service is careless about the performance claim, or because the provider of the good or service overconfidently believes that the performance claim is true and therefore has not tested the claim before making it.

[481] The specific aim of s. 74.01(1)(b) is contained in the section itself, namely the prohibition of performance claims in the absence of prior adequate and proper testing. This specific purpose occurs in the context of the purpose of the *Competition Act* set out in s. 1.1. Section 1.1 provides that the purpose of the *Competition Act* is as follows:

> [T]o maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy…in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[482] Professor Kenneth Corts, a witness called by the applicant, was qualified as an expert to give opinion evidence on the subject of economics, competition policy, industrial organization economics and business strategy. He discussed the effect of false or misleading performance claims upon the consumer.

[483] Professor Corts explained that the consumer who takes false claims at face value may very well, before discovering that the claim is grossly exaggerated or outright false, misallocate resources by mistakenly purchasing the good or service, by mistakenly buying too much of the product or service or by mistakenly paying too high a price for it. The consumer will, as a result, divert resources from other products that he or she would have been better off buying.

[484] Professor Corts also said that there is harm to competing firms. One type of harm is direct in the sense that consumers divert their demand away from truthful firms providing a higher quality product.

[485] Professor Corts testified that a skeptical consumer will be harmed and will misallocate resources, but not to the same degree as a more naïve consumer. More skeptical consumers also lose confidence in advertising claims in general, which makes it harder for legitimate firms to communicate with them.

[486] In the longer run it becomes very hard for truthful firms to credibly convey the quality of their products, and to be rewarded for producing such products. One consequence of permitting false or misleading claims is that legitimate firms find it more difficult to survive.

[487] Dr. J. Howard Beales III, a witness called by the respondents, was qualified as an expert to give opinion evidence concerning the United States Federal Trade Commission's ("FTC") consumer protection regulation and enforcement. Dr. Beales testified that he had been involved with the FTC for over 25 years, and that during that period he had held a variety of senior positions.

[488] Dr. Beales testified that truthful information in the marketplace promotes market efficiency. It leads to lower prices for consumers. It leads to more product innovation. According to Dr. Beales, "[G]etting truthful information out there is the goal of both the prohibition on deceptive claims and a lot of what the FTC tries to do."

[489] Professor Michael Pearce, a witness called by the respondents, was qualified as an expert to give opinion evidence on marketing to consumers, including the wireless industry in Canada. He agreed that false or misleading representations are harmful to competition, consumers and competitive firms.

[490] Parliament is not required to provide scientific proof based on concrete evidence of the problem that it seeks to address. If the social science evidence relating the harm to Parliament's measures is inconclusive or conflicting, the court may rely on a reasoned apprehension of that harm. In *Thomson Newspapers Co. v. Canada*, [1998] 1 S.C.R. 877, evidence concerning the influence of polls on voters' choices was uncertain, nevertheless a majority of the Supreme Court of Canada concluded that the possible influence of polls on voters' choices was a legitimate harm that Parliament could seek to remedy, and thus was a pressing and substantial objective: see also *Harper v. Canada*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 77-78.

[491] No one suggested that the publication of false or misleading claims was a benefit.

[492] I am satisfied that the protection of consumers, competitive firms and competition from the harmful effects of false or misleading performance claims is the ultimate objective to which s. 74.01(1)(b) is directed. I am satisfied that it is a pressing and substantial objective.

The rational connection between s. 74.01(1)(b) and the protection of consumers, competitive firms and competition from the harmful effects of false or misleading performance claims

[493] It seems reasonable, and almost intuitive, to suppose that prohibiting the advertising of untested claims will reduce the publication of false or misleading claims and their attendant harmful effects.

[494] It seems reasonable to suppose that it will, for the most part, be impossible to adequately and properly substantiate a false claim.

[495] It is possible that a claim can be adequately and properly substantiated and later turn out to be false due to the availability of more accurate testing. The *Competition Act* addresses this possibility. It provides that in such a situation, the only remedy available to the applicant is an order that the false representation cease. No administrative monetary penalty can be imposed.

[496] The FTC introduced a substantiation policy in the United States in the mid-1970s. Two academic papers were introduced into evidence that considered the effect of the introduction of the policy on advertising claims. The papers were published in peer-reviewed journals. Both papers concluded that the introduction of a substantiation requirement resulted in an increase in the credibility of advertising. The John Healey and Harold Kassarjian paper, published in 1983, concluded that "[o]n overview it appears that advertisers were more conscientious about claims being made after being asked to provide substantiation."

[497] In Canada, it has been held in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48, that to establish a rational connection, "[t]he government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so."

[498] The Supreme Court of Canada has stressed the need for deference when considering the rational connection test. Specifically, in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 41, the court stated the following:

> Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems… may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.

[499] Section 74.01(1)(a), which prohibits false claims, will not deter a firm that overconfidently believes that a false performance claim about its product is true.

However, s. 74.01(1)(b) will prevent the overconfident firm from mistakenly making a false performance claim because it will require testing of the claim before it can be made.

[500] If the Competition Bureau was confronted with a performance claim that it believed to be false, it could demand the testing upon which the claim was based. In the absence of such testing, the Bureau could move to prevent the claim from being made. This would not be possible if only s. 74.01(1)(a) was available. If the only recourse was s. 74.01(1)(a), the Competition Bureau, in order to obtain an injunction, would require evidence proving that the claim was likely false.

[501] I am satisfied that there is a rational connection between s. 74.01(1)(b) and the protection of consumers, competitive firms and competition from the harmful effects of false or misleading performance claims.

Does s. 74.01(1)(b) interfere as little as possible with the right to freedom of expression?

[502] This case concerns the fewer dropped calls claim. There are three significant possibilities: the claim is true; the claim is false; and the applicant cannot prove the claim is false, while the respondents cannot prove the claim is true.

The claim is true

[503] Section 74.01(1)(b) of the *Competition Act* interferes with the freedom to express the true claim by first requiring substantiation. If the claim is tested properly, the testing will likely suggest that the claim is true, and the claim can be made publicly.

[504] Section 74.01(1)(b) can also interfere with the expression of this claim despite the fact that it is true. This could occur in circumstances where the cost of testing the claim appears to exceed the likely increase in revenues to be gained by publicizing the claim. Such a situation implies that the market for the product or service is either small or relatively unprofitable.

The claim is false

[505] Section 74.01(1)(b) interferes with the freedom to express the false claim by first requiring substantiation. The applicant is not required to demonstrate in a *prima facie* way that the claim is false before taking steps to prevent its continued publication.

[506] No one suggested that it was in the public interest to permit the public expression of false claims.

[507] Section 74.01(1)(a) of the *Competition Act* already prohibits the expression of false claims. Accordingly, s. 74.01(1)(b) does not further interfere with the freedom to express a false claim because such a freedom never existed.

The applicant cannot prove the claim is false and the respondents cannot prove the claim is true (the uncertain claim)

[508] Section 74.01(1)(b) prohibits the publication of the uncertain claim unless it is substantiated.

[509] The respondents urge that the uncertain claim be permitted to enter the marketplace until the applicant can demonstrate that it is false. The respondents argue that this is less impairing of freedom of expression than s. 74.01(1)(b).

[510] In putting this position forward, the respondents are urging a policy choice that is different than the one chosen by Parliament.

[511] The respondents' policy choice is less impairing of freedom of expression because it forces the marketplace to tolerate the risk that the uncertain claim is false. Parliament chose not to tolerate that risk by insisting that the uncertain claim be substantiated before it is made.

[512] Parliament decided not to permit the uncertain claim to enter the marketplace because it might be false. The respondents urge the court to permit the uncertain claim to enter the market place because it might be true.

[513] Professor Corts pointed out that if the law only contains a false claim penalty, a firm will reason that its exposure to that penalty is related to the probability of enforcement and whether they think the claim is false. The firm that is overconfident about the truth of the performance claim will discount a false claims penalty dramatically because it does not believe the claim is false. Such a firm would not discount a substantiation requirement or the penalty for the lack of substantiation because they know that they are subject to that penalty whether the untested claim is true or false.

[514] In *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, at para. 160, the Supreme Court of Canada made the following statement:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement…

[515] Similarly, the choice of a reasonable policy alternative from a range of reasonable policy alternatives is a matter in which the courts must accord some leeway to the legislator.

[516] The minimal impairment test under s. 1 of the *Charter* should not be used to force Parliament to adopt the policy decision that the marketplace will be better off with a higher tolerance for false performance claims.

[517] Section 74.01(1)(b) applies only to performance claims. In the United States, the FTC substantiation policy applies to "objective claims." The only claims exempted from the FTC substantiation requirement are subjective or immaterial claims. For example, the claim that Rogers used low frequency spectrum is an objective claim for which substantiation would be required in the United States but not in Canada. I refer to this in order to demonstrate that Parliament has narrowed the scope of s. 74.01(1)(b). This is relevant when applying the minimal impairment test.

[518] I recognize that s. 74.01(1)(b) is not restricted to performance claims that are "material," but rather applies to all performance claims, whereas the FTC regulatory regime focuses on material claims. However, this is not a differentiating characteristic because the evidence established that the FTC presumes performance claims to be material. Specifically the FTC presumes that performance claims might affect a consumer's decision in relation to the product. I agree with this presumption. It is impossible to believe that a performance claim would be immaterial to a consumer's decision in relation to a product. Accordingly, I am satisfied that limiting s. 74.01(1)(b) to performance claims incorporates the notion of materiality into the section. I do not view the absence of the word material in s. 74.01(1)(b) as indicative that the section is overbroad.

[519] Evidence was led that established that in the United States, the substantiation of a claim after it has been disseminated may inform the FTC's decision to commence proceedings. Obviously the applicant has the same discretion in Canada. However, the fact that the applicant, like all applicants, may elect not to proceed, is unhelpful as far as the minimal impairment test is concerned.

[520] The courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test.

[521] The applicant has suggested that in order for a test to be proper and adequate, testing must be done to a 95 per cent confidence level. I have not accepted that submission. The burden of proof is upon the respondents to prove adequate and proper testing on a balance of probabilities. No higher standard of proof can logically be required to prove a fact relevant to whether that standard of proof has been met.

[522] The applicant has suggested that the notion of a test requires elimination of the possibility that the result relied upon was a chance occurrence. This is simply consistent with the requirement that a claim be tested. I take the same view of the applicant's suggestion that the sample tested must be a representative one. These suggested requirements of s. 74.01(1)(b) do not additionally impair freedom of expression beyond

the impairment flowing from the use of the phrase "an adequate and proper test thereof."

[523] As stated elsewhere, the respondents urge that the uncertain claim be permitted to enter the marketplace until the applicant can demonstrate that it is false. While this may be less impairing, it does not address Parliament's conclusion that the harm resulting from false uncertain claims is so significant that it is better to prohibit all uncertain claims. Parliament is entitled to a measure of deference and I accept its conclusion in this regard.

[524] When I consider all of this, I come to the conclusion that s. 74.01(1)(b) only minimally impairs the fundamental freedom guaranteed by s. 2(b) of the *Charter*.

Do the benefits of s. 74.01(1)(b) outweigh its deleterious effects?

[525] At the risk of stating the obvious, a few preliminary observations are necessary. Section 74.01(1)(b) does not affect a truthful performance claim that can be tested in advance. Prohibiting a false claim from entering the marketplace is not a deleterious effect. Section 74.01(1)(b) requires substantiation of performance claims only. The reference to performance claims incorporates the notion of materiality because performance claims will always affect a consumer's decision with respect to a product or service.

[526] One deleterious effect of s. 74.01(1)(b) is that a truthful performance claim that cannot be proven true, or cannot be substantiated prior to publication, will be withheld from consumers. Related to this effect is the fact that post-publication substantiation is not a complete answer to an allegation of reviewable conduct.

[527] A second proposed deleterious effect is that a performance claim may be ambiguous. As a result, the provider may undertake a number of tests to cover all possible interpretations of the performance claim and pass those costs on to the consumer. Alternatively the provider may guess at the interpretation and face prosecution if the guess is wrong. Finally, the provider might decide to drop the claim.

[528] Professor Moorthy offered the opinion that if the provider chooses to perform all possible tests, this will delay the dissemination of the truthful information and increase the cost of the good or service.

[529] Obviously, guessing at the interpretation exposes the provider to the risk of proceedings and dropping the claim deprives the consumer of truthful information.

[530] Section 74.01(1)(b) is not ambiguous. Language in a performance claim, on the other hand, can always be ambiguous and require interpretation. In addition, disputes

can arise about whether a claim is a performance claim. This problem cannot be avoided. This is not a deleterious effect associated with s. 74.01(1)(b); it is a deleterious effect associated with language itself.

[531] One benefit of s. 74.01(1)(b) is that a performance claim that cannot be proven true or false prior to publication, but which is in fact false, will be withheld from the marketplace.

[532] Professor Moorthy expressed the opinion that by restricting the provision of information, the *Competition Act* makes it difficult for those who provide goods and services to make people aware of their product. In his opinion, it could hinder the ability of those persons to disseminate the truth about the strength of their product.

[533] However, it is also true that when a performance claim that cannot be proven in advance to be true or false, but which turns out to be false, is permitted to enter the marketplace, a negative effect on consumers' confidence in advertising will result. The provider of the good or service may be able to more readily convey information but the consumer is likely to be less willing to accept it. Preventing performance claims that cannot be proven in advance to be true or false will, at a minimum, maintain the current level of consumer confidence in advertising claims and presumably make it easier for providers of goods and services to communicate with consumers. I do not accept Professor Moorthy's opinion in this regard. I prefer the evidence of Dr. Corts.

[534] Dr. Corts testified that in his opinion, lowering the incidence of unsubstantiated claims increases consumer confidence and allows more truthful firms to more credibly and more reliably communicate their information to consumers.

[535] Dr. Beales testified that the FTC believes that an onerous substantiation requirement might deter truthful advertisements.

[536] Section 74.01(1)(b) does not impose an onerous substantiation requirement. The words adequate and proper have been held to be synonymous with sufficient and appropriate. Traditional or scientific testing is not required. I have stated elsewhere in these reasons that I do not accept the applicant's suggestion that 95 per cent testing certainty is required. Courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test.

[537] As a practical matter, this is not a case in which the respondents were prevented from making a truthful claim because they were unable to substantiate it in advance. The respondents did make the fewer dropped calls claim. The respondents claim that in the case of more than one city, they proved the fewer dropped calls claim in advance. This Application arises because the Competition Bureau has a contrary view. Even if s. 74.01(1)(b) was not in the *Competition Act*, the respondents would still be in court

because the Competition Bureau considers the fewer dropped calls claim to be both false and misleading.

[538] Professor Moorthy noted that due to the Internet, modern day consumers have much more product information available at their fingertips. He pointed out that there are many websites where consumers comment on products, and that there are review sites for products that are very easily accessible. Professor Moorthy expressed the opinion that the Internet has increased market efficiency because consumers have better information when making decisions. It was also his opinion that competitors could use the Internet to dispute comparative performance claims.

[539] Professor Corts was of the opinion that a substantiation requirement was necessary despite the advent of the Internet. He referred to a paper entitled: "Market Transparency via the Internet, A New Challenge for Consumer Policy." Professor Corts expressed the opinion that the Internet has provided much more information for consumers, but not necessarily better information. Professor Corts noted that the same problems concerning the source of information arise whether the information is disseminated on the Internet or traditionally. He pointed out that consumer sites on the Internet can be quite extreme, and can be manipulated by firms who have people posing as consumers and posting comments.

[540] It is undoubtedly correct that modern consumers have access to more information, and I am satisfied that this means that fewer people will be deceived by false ads because the false claims will be discovered sooner. I am not satisfied, however, that this addresses the loss of confidence in advertising that results when people realize that they have been duped by or exposed to false advertising claims.

[541] As noted earlier, Professor Moorthy suggested that one effect of s. 74.01(1)(b) and the related sections dealing with administrative monetary penalties might be to cause companies to avoid any risk of contravention of the *Competition Act* by not making even truthful claims, thereby depriving consumers of helpful information.

[542] It was Dr. Corts' opinion that imposing a penalty for an unsubstantiated claim would not suppress the communication of true information.

[543] Dr. Corts also expressed the opinion that monetary penalties reduce false, misleading and unsubstantiated representations because they raise the cost of making those representations, making such behavior less attractive. It was his opinion that this would also have the effect of making sure that market prices provide appropriate incentives for firms to invest in innovation and new products, and otherwise remain in the market.

[544] When I consider the conflicting social science evidence, as well as the other evidence tendered in this Application, I am satisfied that the benefit from protecting

consumers, competitive firms and competition from the harmful effects of false or misleading performance claims outweighs the deleterious effects of preventing a true claim that cannot be tested in advance from entering the marketplace.

[545] Accordingly, I am satisfied by the evidence that s. 74.01(1)(b) of the *Competition Act* is a demonstrably justified reasonable limit prescribed by law, to which the fundamental freedom described in paragraph 2(b) of the *Charter* is subject.

Does the $10 million administrative monetary penalty provided for in the *Competition Act* engage s. 11 of the *Charter*?

[546] Section 11 of the *Charter* provides certain enumerated rights for any person "charged with an offence." The respondents have not received the benefit of all of these rights. Accordingly the question is whether the respondents are "charged with an offence".

[547] In *Regina v. Wigglesworth* [1987] 2 S.C.R. 541, at pp. 558-559, the Supreme Court of Canada decided that matters which fell within the ambit of s. 11 were "criminal and penal matters." The court also stated more specifically that "criminal and penal matters" meant proceedings that were by their very nature criminal, or when a conviction in respect of the matter could lead to a "true penal consequence." In that same decision, the court stated in part at p. 561, that a "true penal consequence" attracting protection under s. 11 of the *Charter* could be a fine that, "by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."

[548] This Application does not carry with it the possibility that the respondents would be imprisoned. It was commenced as an Application pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in the Province of Ontario. These proceedings were regulatory in nature. This Application was initiated to further and encourage public confidence in advertising in the context of the *Competition Act's* purpose, as set out in s. 1.1 of the Act.

[549] The *Competition Act* has repeatedly been described as a regulatory statute: see *R. v. Wholesale Travel Group*, [1991] 3 S.C.R 154, at pp. 222-223. The legislative history of s. 74.01 makes it clear that the 1999 amendments to the *Competition Act*, which created the provisions in issue, were designed to remove the regulation of deceptive marketing practices from the realm of criminal law.

[550] When I consider the objectives of the *Competition Act* and the deceptive marketing practices provisions, the provisions of s. 74.1(4) of the *Competition Act* describing the purpose of the administrative monetary penalties with which this Application is concerned and the civil Application process leading to the imposition in

appropriate cases of administrative monetary penalties, I am satisfied that these proceedings are not by their nature "criminal."

[551] This Application does carry with it the possibility of an administrative monetary penalty of $10 million on a first finding of reviewable conduct, and $15 million on subsequent findings.

[552] Accordingly, the question is whether such an administrative monetary penalty is a fine "which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."

[553] Professor Corts offered the opinion that an administrative monetary penalty has to be large enough to offset the anticipated gains from making the false, misleading or unsubstantiated representations. Professor Corts was of the view that higher administrative monetary penalties are necessary when dealing with a larger market because a shift in consumer demand in a larger market leads to larger increases in profits.

[554] Professor Corts also considered that part of the incremental profit from false, misleading or unsubstantiated representations is that they induce competing firms to exit the market. This means that the firm making the representations will be more profitable in the long run. Professor Corts offered the opinion that this has to be considered when assessing the appropriate administrative monetary penalty. Professor Corts testified that this was especially true if the competitor firms had undertaken huge investments and were beginning to enter the market; such firms would be trying to pay back some of the capital that they had raised, develop a loyal customer base and establish their brand name. Dr. Corts testified that if demand was inappropriately diverted from them at such a time, they would find it much more difficult to become viable competitors of the offending firm.

[555] Finally, Professor Corts pointed out that firms with more resources will find monetary penalties less deterring because they can withstand the penalty. In this regard, the evidence established that at the time of the Advanced Wireless Spectrum auction, the wireless sector of the Canadian telecommunications industry generated approximately $12.7 billion. At that time, Rogers, Bell Canada and TELUS dominated the wireless market with 94 per cent of the subscribers and 95 per cent of the revenues.

[556] The *Competition Act* is quite specific concerning the purpose of the administrative monetary penalty. Section 74.1(4) provides that the terms of any order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the Deceptive Marketing Practices Part of the Act, and not with a view to punishment. This section of the *Competition Act* clearly informs any Application of the principle of proportionality at

the penalty-fixing stage of proceedings under s. 74.01(1)(b). Section 74.1(4) also overrides statements made when this Application was launched which suggested that the quantum of the administrative monetary penalty should reflect the "egregious activity" engaged in by the respondents.

[557] A consideration of these factors and the balance of the evidence satisfies me that the administrative monetary penalties provided for in s. 74.1(1)(c) are not "true penal consequences."

[558] Accordingly, I am satisfied that the $10 million administrative monetary penalty provided for in s. 74.1(1)(c) does not engage s. 11 of the *Charter*.

Final Conclusions

[559] I am satisfied that it is dangerous, based on the evidence in this Application, to place significant weight on switch generated dropped call rates when determining whether the Chatr fewer dropped calls comparative performance claim was false or misleading.

[560] Because the applicant's assertion that the fewer dropped calls claim is false is based to a significant degree upon switch generated data, I am not satisfied that the applicant has proven on a balance of probabilities that the respondents' fewer dropped calls claim was false in Ottawa with respect to Wind Mobile from July 28, 2010, to November 30, 2010. I would have come to a similar conclusion concerning Videotron in Montréal but for the fact that I have concluded elsewhere in these reasons that a credulous and technically inexperienced consumer in the Province of Québec would not have considered Videotron a new wireless carrier.

[561] I am not satisfied due to the applicant's reliance on switch generated data that the applicant has proven on a balance of probabilities that the respondents' fewer dropped calls claim was misleading in Calgary, Edmonton and Toronto with respect to Wind Mobile from July 28, 2010, to November 30, 2010.

[562] I am satisfied that had Mobilicity produced the data requested by the applicant, it would have demonstrated that the respondents' network dropped fewer calls than Mobilicity's network from July 28, 2010, to November 30, 2010.

[563] I am satisfied that a credulous and technically inexperienced consumer expected that dropped calls would be fewer on the Chatr network, and that he or she would have "no worries about dropped calls" on the Chatr network. I am not satisfied that a credulous and technically inexperienced consumer viewing the Chatr ads expected that the difference between the dropped call experience on the respondents' network and the dropped call experience on the Wind Mobile or Public Mobile networks would be so pronounced that it would be discernible.

[564] Accordingly, I am not satisfied with the applicant's assertion that the fewer dropped calls claim is misleading unless there is a discernible difference in dropped call rates among the respondents, Wind Mobile and Public Mobile.

[565] I do not accept the applicant's contention that the fewer dropped calls claim is misleading because the dropped call rates of Wind Mobile and Chatr in Calgary were, during the relevant period, below what it termed the one per cent threshold for dropped calls.

[566] I do not accept the applicant's contention that the fewer dropped calls claim was misleading because it gave the impression that the claim was true indoors as well as outdoors. I am satisfied that the networks of Wind Mobile and Public Mobile improved with the passage of time. I am therefore satisfied that the indoor walk test results confirmed that the fewer dropped calls claim was accurate in Toronto, Ottawa and Montréal, both indoors as well as outdoors, from July 28, 2010, to November 30, 2010.

[567] I am satisfied that the Rogers benchmark drive testing results provided an adequate and proper basis for the fewer dropped calls claim made subsequent to that drive testing.

[568] I am satisfied that the Rogers drive testing in fact adequately and properly tested the fewer dropped calls claim made subsequent to that drive testing.

[569] I do not accept the applicant's submission that the Rogers drive testing results support a finding that the fewer dropped calls claim is either false or misleading.

[570] I am satisfied that drive tests conducted after the fewer dropped calls claim was made are helpful in deciding whether the claim was true, false or misleading when it was made.

[571] I am satisfied by the evidence that, during the time frame with which we are concerned, Videotron was an established brand in the Province of Québec.

[572] I am satisfied that a credulous and technically inexperienced consumer of unlimited talk and text wireless services in Québec would not view Videotron as captured by the references to "les nouveaux opérateurs sans-fil" in the contentious ads.

[573] I am satisfied that the general impression given by the fewer dropped calls claim is that the advantages of fewer dropped calls and a more reliable network were available to consumers in each Chatr zone (appels illimités sans souci dans ta zone chatr) (emphasis added). I am also satisfied that the literal meaning of the contentious claims is consistent with this general impression.

[574] I am satisfied by the evidence that s. 74.01(1)(b) of the *Competition Act* is a demonstrably justified reasonable limit prescribed by law, to which the fundamental freedom described in paragraph 2(b) of the *Charter* is subject.

[575] The $10 million administrative monetary penalty provided for in s. 74.1(1)(c) does not engage s. 11 of the *Charter*.

[576] I am satisfied that the respondents failed to conduct an adequate and proper test in Calgary and Edmonton prior to making the fewer dropped calls claim at the time of Chatr's launch in those cities on July 28, 2010, and therefore engaged in reviewable conduct contrary to s. 74.01(1)(b) of the *Competition Act*.

[577] I am satisfied that the respondents failed to conduct an adequate and proper test in Toronto against Public Mobile prior making the fewer dropped calls claim at the time of Chatr's launch in Toronto on July 28, 2010, and thereby engaged in reviewable conduct contrary to s. 74.01(1)(b) of the *Competition Act*.

[578] I am satisfied that the respondents failed to conduct an adequate and proper test in Montréal against Public Mobile prior to making the fewer dropped calls claim at the time of Chatr's launch in Montréal on September 16, 2010, and thereby engaged in reviewable conduct contrary to s. 74.01(1)(b) of the *Competition Act*.

[579] Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43, information previously ruled confidential which was referred to during the hearing of the Application will remain confidential.

Marrocco J.

Released: August 19, 2013

CITATION: Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5315
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC.

Respondents

REASONS FOR JUDGMENT

Marrocco J

Released: August 19, 2013

PUBLIC

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2005 Comp. Trib. 2
File no.: CT2002004
Registry document no.: 0158b

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(*b*)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

Sears Canada Inc.
(respondent)

Dates of hearing: 20031020 to 20031024, 20031027 to 20031031, 20031103 to 20031107, 20031112 to 20031114, 20040116, 20040119 to 20040122, 20040202 to 20040203, 20040628 to 20040629, 20040819 to 20040820
Final written submissions filed: September 10, 2004; September 24, 2004 and October 1, 2004
Judicial Member: Dawson J. (presiding)
Date of Reasons: January 11, 2005

REASONS FOR ORDER

I. INTRODUCTION

[1] The Commissioner of Competition ("Commissioner") alleges that, during three sales events held in November and December of 1999, Sears Canada Inc. ("Sears") employed deceptive marketing practices in connection with price representations Sears made concerning five kinds, or lines, of all-season tires that Sears promoted and sold to the public. The Commissioner asserts that this constituted reviewable conduct contrary to subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act").

[2] Specifically at issue are representations made in advertisements about the regular selling price of the five lines of tires. The advertisements contained "save" and "percentage off" statements. For example, Sears advertised "Save 45% Our lowest prices of the year on Response RST Touring '2000' tires", and advertised comparisons between Sears' regular prices and its sale prices. The Commissioner asserts that the prices referred to by Sears as being its regular prices were inflated because: i) Sears did not sell a substantial volume of these tires at the regular price featured in the advertisements within a reasonable period of time before making the representations; and, ii) Sears did not offer these tires in good faith at the regular price featured in the advertisements for a substantial period of time recently before making the representations.

[3] The Commissioner states that Sears did not offer the tires at its regular prices in good faith because Sears had no expectation that it would sell a substantial volume of the tires at its regular prices, and because Sears' regular prices for the tires were not comparable to, and were much higher than, the regular prices for comparable tires offered by Sears competitors. The Commissioner says that the regular prices were set by Sears at inflated levels with the ulterior motive of attracting customers and generating sales by creating the impression that, when promoted as being "on sale", the tires represented a greater value than was really the case.

[4] The remedies sought by the Commissioner include an order prohibiting such reviewable conduct for a period of 10 years, the publication of corrective notices, and the payment of an administrative monetary penalty in the amount of $500,000.00.

[5] Sears contests the Commissioner's application with vigour. Sears asserts that the representations contained in its advertisements with respect to its regular or ordinary selling prices were not misleading in any, or in any material, respect. Sears says that the regular prices referred to in the advertisements were reasonably comparable to the prices being offered by many, if not most, of the principal tire retail outlets in each individual trade area where Sears competed. As well, Sears argues that the remedies sought by the Commissioner are unavailable at law and inappropriate. Finally, Sears says that subsection 74.01(3) of the Act is an unjustifiable infringement of Sears' fundamental freedom of commercial expression guaranteed by subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* ("Charter"). Sears seeks a determination that subsection 74.01(3) of the Act is inconsistent with the Charter and, therefore, of no force or effect.

[6] The Commissioner has conceded that subsection 74.01(3) of the Act ("impugned legislation") infringes Sears' constitutionally guaranteed right of commercial speech. The Commissioner submits, however, that this infringement is justified under section 1 of the Charter as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

[7] These reasons are lengthy. In them I find that: (i) subsection 74.01(3) of the Act is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society; (ii) Sears conceded that it failed to comply with the volume test ; (iii) Sears' regular prices for the Tires were not offered in good faith as required by the time test; (iv) Sears did not meet the frequency requirement of the time test for 4 of the 5 lines of tires; (v) Sears failed to establish that its OSP representations were not false or misleading in a material respect; (vi) a prohibition order should issue; and (vii) no order should issue requiring publication of a corrective notice. The issues of payment of an administrative monetary penalty and costs are reserved pending further submissions. The following is an index of the headings and sub-headings pursuant to which these reasons are organized, and the paragraph numbers where each section begins.

Index

II. BACKGROUND FACTS

[8] The parties agree that Sears is one of Canada's largest and most trusted retailers. It sells

general merchandise to the public through various business channels, including retail outlets located across Canada. In 1999, Sears supplied 28 lines of tires to the public through 67 Retail Automotive Centres located across Canada.

(i) The Tires

[9] At issue are the following five tire lines (together the "Tires"):

i) RoadHandler "T" Plus (manufactured by Michelin)

ii) BF Goodrich Plus (manufactured by BF Goodrich)

iii) Weatherwise R H Sport (manufactured by Michelin)

iv) Response RST Touring '2000' (manufactured by Cooper)

v) Silverguard Ultra IV (manufactured by Bridgestone)

[10] The Tires are all-season passenger tires. Together they represented approximately **[CONFIDENTIAL]** % of the all-season passenger tire sold by Sears in 1999 and about **[CONFIDENTIAL]** % of the passenger vehicle tires sold by Sears in 1999. In dollar terms, the Tires represented approximately **[CONFIDENTIAL]** % of the total sales generated by Sears with respect to the sale of all of its tires. No other retailer in Canada promoted the Tires or supplied the Tires to the public in 1999. Each line was exclusive to Sears.

(ii) Sears' pricing strategy

[11] Sears is an "off-price" (also called a "high-low") retailer, which means that Sears relies on discounting and promotions to build in-store traffic and generate sales. An off-price or high-low retailer typically charges a higher "regular" price for its merchandise and then, from time to time, offers merchandise "on-sale" at event-driven discount sales.

[12] During 1999, Sears offered the Tires for sale at the following four price points:

a) Sears' "regular" price was the price of a single unit of any Tire offered by Sears, when that particular tire was not promoted as being "on sale". This was the price used as the reference price in advertisements when the Tires were promoted as being "on sale" by Sears.

b) Sears' "2For" price was the price at which Sears would sell two or more of a given tire to consumers when that tire was not being offered at a "sale" price. In 1999, Sears' "2For" price for a given tire was always lower than its regular price for a single unit. Sears did not use its "2For" price as a reference price in any of the sales representations at issue

and did not advertise its "2For" price when promoting retail sales. The "2For" price came into effect when a customer bought more than one tire and the customer was only informed of the discount on a purchase of multiple tires by the sales associate at the store.

c) Sears' "normal promotional" price was the usual sale price advertised by Sears, which was a set percentage off the "regular" price for each tire. The amount of the discount depended on the line of tire. When "normal promotional" prices were advertised in 1999, they were always compared to the "regular" price for the relevant tire, and not to the "2For" price. These discounts were referred to by Sears as "Save Stories".

d) Sears' "Great Item", "Big News", "Lowest Prices of the Year" or other similar expressions refer to a further discounted promotional price where the discount consumers received was greater than the discount obtained with the "normal promotional" price. When "Great Item" style promotional prices were advertised in 1999, they were always compared to the "regular" price for a single relevant tire and not the "2For" price.

[13] The following illustrates the relationship between the four price levels. For the Response RST Touring '2000' tire (size P215/70R14), Sears' pricing in 1999 was as follows:

i) Regular (single unit) price - $133.99;

ii) 2For price - $87.99 (each);

iii) Normal promotional price - $79.99 (each, representing a 40 % discount off the regular single unit price);

iv) Great Item price - $72.99 (each, representing a 45 % discount off the regular single unit price).

[14] Sears' regular single unit prices for tires in 1999 were set in the Fall of 1998 and were not altered in 1999. Sears' 2For, normal promotional, and Great Item prices were also set in the Fall of 1998 and those prices remained largely unchanged in 1999. As a general rule, Sears' prices were set nationally so that the Tires sold for the same price at each Sears Retail Automotive Centre.

(iii) The promotion of the Tires

[15] Throughout 1999, Sears advertised the Tires through various media, including flyers (or "pre-prints"), newspapers, in-store leaflets, and corporate-wide, national events, which were advertised in various newspapers across Canada. Sears' advertisements contained representations of the price at which the Tires were ordinarily sold by Sears, compared with the sale prices on the Tires being promoted. The advertisements were placed in newspapers published across the country including, for example, the Vancouver Sun, the Montreal Gazette and the Calgary Sun.

[16] This application puts in issue the ordinary selling price representations made during three different national sales events in 1999, the first in effect between November 8 and November 14, the second in effect between November 22 and November 28, and the final event in effect on December 18 and 19.

[17] For the first sales event, Sears distributed nationally a flyer entitled "SEARS Shop Wish and Win" that advertised sale prices on the Response RST Touring '2000' and the Michelin RoadHandler "T" Plus tires. The following is an example of the advertisement found in the flyer promoting the sale:

> **MICHELIN®**
>
> **RoadHandler T Plus Tires**
>
> | **Size** | **Sears reg.** | **Sale, each** |
> |---|---|---|
> | P175/70R13 | 153.99 | 91.99 |
> | P185/70R14 | 168.99 | 99.99 |
> | P205/70R14 | 190.99 | 113.99 |
> | P205/70R15 | 203.99 | 121.99 |
> | P185/65R14 | 179.99 | 107.99 |
> | P195/65R15 | 188.99 | 112.99 |
> | P205/65R15 | 199.99 | 119.99 |
> | P225/60R16 | 219.99 | 131.99 |
>
> Other sizes also on sale
>
> **save 40%**
> **ALL MICHELIN ALL-SEASON PASSENGER TIRES**
> Shown: RoadHandler® T Plus tire is made for Sears by Michelin.
> Backed by a 6-year unlimited mileage Tread Wearout Warranty;
> details in store. #51000 series

[18] In support of the first sales event, Sears also published newspaper advertisements promoting the Michelin RoadHandler "T" Plus and/or the Response RST Touring '2000' in a number of large circulation newspapers across the country (including, for example, the Vancouver Sun and the Montreal Gazette). These newspaper advertisements were 5.625" x 9.625" in size or larger.

[19] The second sales event ran between November 22 and November 28, 1999. The event promoted a sale on Silverguard Ultra IV tires which was advertised in a weekly flyer, in newspaper advertisements and in leaflets distributed in-store at all Sears Retail Automotive Centres. The weekly flyer contained the following advertisement:

Silverguard Ultra IV Tires

Size	Sears reg.	Sale, each
P185/75R14	109.99	54.99
P195/75R14	116.99	58.49
P235/75R15XL	149.99	74.49
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99
P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Other sizes also on sale

½ PRICE

SILVERGUARD 'ULTRA IV' ALL-SEASON TIRES

Made for Sears by Bridgestone and backed by a 110,000 km Tread Wearout Warranty: details in store. #68000 ser. From **45**[**49**] each. P155/80R13. Sears reg. 90.99

[20] The third sales event was held on December 18 and 19, 1999. The BF Goodrich Plus and Weatherwise tires were promoted during this event. The event was advertised in a weekend flyer which was distributed nationally. The BF Goodrich Plus tire was advertised as "save 25%" while the flyer described the Weatherwise tire price as "save 40%".

(iv) Tire sales

[21] The parties agree that the following table represents the sales numbers and percentages of the Tires sold at Sears' regular selling price in the 12 month period preceding the relevant regular selling price representations:

Table 1: Summary of Sales volumes

		1	2	3	4	5
Line	Time-frame	Total number of the Tires sold by Sears in the year before the relevant Representation	Tires sold as "singles", that is, not as a part of a bundle of two or more	Percentage of the total number of Tires sold, which were sold singly (col. 2 as a % of col. 1)	Of all singles sold, the number sold at the Regular, Single Unit Selling Price	Percentage of the total Tires sold at the Regular, Single Unit Selling Price (col. 4 as a % of col. 1)
BF Goodrich Plus	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	6.53%	**[CONFIDENTIAL]**	**2.29%**
Michelin Roadhandler 'T' Plus	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.84%	**[CONFIDENTIAL]**	**1.30%**
Michelin Weatherwise RH Sport	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.81%	**[CONFIDENTIAL]**	**0.82%**
Response RST Touring 2000	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	2.19%	**[CONFIDENTIAL]**	**0.51%**
Silverguard Ultra IV	11/22/98 - 11/22/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.22%	**[CONFIDENTIAL]**	**1.21%**
Totals		**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	4.03%	**[CONFIDENTIAL]**	**1.28%**

[22] The following two tables show the number of days that the Tires were offered by Sears at

Sears' regular price, compared to the number of days the Tires were offered at a price below Sears' regular price. The first table reflects the six month period that preceded the representations, the second table reflects the prior twelve month period.

Table 2: Summary of Time Analysis
(For the Six Month Period Preceding the Relevant Representations)

	BF Goodrich Plus	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring '2000'	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 6 month period	June 18 to Dec. 17, 1999	May 9 to Nov.7, 1999	June 18 to Dec. 17, 1999	May 9 to Nov. 7, 1999	May 23 to Nov. 21, 1999
Total of Days	183	183	183	183	183
Number of days at reduced prices	100	113	148	99	73
% of days at reduced prices	**55%**	**62%**	**81%**	**54%* or 50.35%**	**40%**
Number of days at Regular Prices	83	70	35	84	110
% of Time at Regular Prices	**45%**	**38%**	**19%**	**46%* or 49.65%**	**60%**

* Sears argues that the correct figures are the second ones shown with respect to the Response RST Touring '2000'.

Table 3: Summary of Time Analysis
(For the Twelve Month Period Preceding the Relevant Representations)

	BF Goodrich	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring 2000	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 12 month period	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov.7, 1999	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov. 7, 1999	Nov. 23, 1998 to Nov. 21, 1999
Total of Days	365	365	365	365	365
Number of days at reduced prices	181	246	283	121	184
% of days at reduced prices	**49.59%**	**67.40%**	**77.53%**	**33.15%**	**50.41%**
Number of days at Regular Prices	184	119	82	244	181
% of Time at Regular Prices	**50.41%**	**32.60%**	**22.47%**	**66.85%**	**49.59%**

III. THE APPLICABLE LEGISLATION

[23] Subsection 74.01(3) of the Act is found in Part VII.1 of the Act which is entitled "Deceptive Marketing Practices". Part VII.1 of the Act permits the Commissioner to pursue administrative remedies, rather than criminal prosecution, in relation to deceptive marketing practices including misleading advertising.

[24] Under section 74.01 of the Act, a person engages in reviewable conduct where the person, for the purpose of promoting any product or business interest, makes a representation to the public that is false or misleading in a material respect. The general impression conveyed by a representation as well as its literal meaning is to be taken into account when determining whether or not the representation is false or misleading in a material respect.

[25] Subsection 74.01(3) of the Act deals with misleading representations with respect to a seller's own ordinary selling price. Subsection 74.01(3) reads as follows:

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or	74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit,

indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

[26] An ordinary selling price (“OSP”) representation will not constitute reviewable conduct under subsection 74.01(3) if either one of the following tests is satisfied:

(a) a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation (“volume test”); or

(b) the product was offered for sale, in good faith, at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation (“time test”).

In the present case, the period of time to be considered is the period before the making of the representations at issue because the representations relate to the price at which the Tires were previously sold (subsection 74.01(4) of the Act).

[27] The requirement that any false or misleading representation must be material is found in subsection 74.01(5) of the Act which provides:

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[28] The remedies available for a breach of subsection 74.01(3) of the Act are prescribed in section 74.1 of the Act. Subsection 74.1(1) provides that a court (defined to include the

Competition Tribunal ("Tribunal")) may, where it has determined that a person has engaged in reviewable conduct, order the person:

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish a corrective notice describing the reviewable conduct; and

(c) to pay an administrative monetary penalty.

[29] No order requiring the publication of a corrective notice or the payment of an administrative monetary penalty may be made where the person in question establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3) of the Act).

[30] Sections 74.01, 74.09 and 74.1 are set out in their entirety in the appendix to these reasons.

IV. THE CONSTITUTIONAL CHALLENGE

[31] As noted above, Sears alleges, and the Commissioner concedes, that subsection 74.01(3) of the Act infringes Sears' fundamental right of freedom of expression guaranteed under subsection 2(*b*) of the Charter. In my view, this is an appropriate concession.

[32] The Supreme Court of Canada has held with respect to the analysis of freedom of expression and its infringement that:

(i) The first step is to discover whether the activity which the affected entity wishes to pursue properly falls within "freedom of expression". Activity is expressive, and protected, if it attempts to convey meaning. If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the Charter guarantee (unless meaning is conveyed through a violent form of expression).

(ii) The second step in the inquiry is to determine whether the purpose or effect of the government action in question is to restrict freedom of expression.

See: *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, particularly at pages 967-979.

[33] Applying this analysis, the Supreme Court has previously held that prohibitions against engaging in commercial expression by advertising infringe subsection 2(*b*) of the Charter. See: *RJR Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 at paragraph 58.

[34] In the present case, Sears' OSP representations convey or attempt to convey meaning.

Those representations therefore have expressive content so as to fall, *prima facie*, within the sphere of conduct protected by subsection 2(*b*) of the Charter. The purpose of subsection 74.01(3) of the Act is to restrict or control attempts by Sears and others to convey a meaning by proscribing reviewable conduct and by imposing restrictions and controls in relation to OSP representations.

[35] It follows, as the Commissioner has conceded, that the impugned legislation limits the freedom of expression guaranteed to Sears by subsection 2(*b*) of the Charter. The next inquiry therefore becomes whether the impugned legislation is justified under section 1 of the Charter.

(i) Applicable principles of law

[36] To be justified under section 1 of the Charter, a limit on freedom of expression must be "prescribed by law". A limit is not prescribed by law within section 1 if it does not provide "an adequate basis for legal debate". See: *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606 at page 639. The onus of establishing that a limit is prescribed by law is on the state actor who claims that the limit is justified.

[37] The assessment of whether a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society is to be conducted in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Oakes,* [1986] 1 S.C.R. 103. There are two central criteria to be met:

1. The objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. To be characterized as sufficiently important, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

2. Assuming that a sufficiently important objective is established, the means chosen to achieve the objective must pass a proportionality test. To do so, the means must:

    a. Be rationally connected to the objective. This requires that the means chosen promote the asserted objective. The means must not be arbitrary, unfair or based on irrational considerations.

    b. Impair the right or freedom in question as little as possible. This requires that the measure goes no further than reasonably necessary in order to achieve the objective.

    c. Be such that the effects of the measure on the limitation of rights and freedoms are proportional to the objective. This requires that the overall benefits of the measure must outweigh the measure's

negative impact.

See also: *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519.

[38] Relevant considerations when conducting the analysis articulated in *Oakes, supra* are that:

1. The onus of proving that a limit on a right or freedom protected by the Charter is reasonable and demonstrably justified is borne by the party seeking to uphold the limitation. See: *Oakes* at page 137.

2. The standard of proof is the civil standard. Where evidence is required in order to prove the constituent elements of the section 1 analysis, the test for the existence of a balance of probabilities must be applied rigorously, recognizing, however, that within the civil standard of proof there exist different degrees of probability depending upon the case. See: *Oakes* at page 137.

3. The analysis taught in *Oakes* is not to be applied in a rigid or mechanical fashion. It is to be applied flexibly. See: *RJR Macdonald, supra,* at paragraph 63.

4. The analysis must be undertaken with close attention to the contextual factors. This is because the objective of the impugned measure can only be established by canvassing the nature of the problem it addresses, and the proportionality of the means used can only be evaluated in the context of the entire factual setting. See: *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877 at paragraph 87.

5. The context will also impact upon the nature of the proof required to justify the measure. While some matters are capable of empirical proof, others (for example, matters involving philosophical or social considerations) are not. In those latter cases, "it is sufficient to satisfy the reasonable person looking at all of the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has". Common sense and inferential reasoning may be applied to supplement the evidence. See: *Sauvé, supra,* at paragraph 18.

6. With respect to the minimal impairment test, where a legislative provision is challenged, the Supreme Court of Canada has held that Parliament need not choose the absolutely least intrusive means to attain its objectives, but rather must come within a range of means which impair guaranteed rights as little as reasonably possible.

(ii) A limit prescribed by law

[39] Turning to the application of these principles to the evidence which is before the Tribunal, I begin by considering whether the impugned legislation is a limit prescribed by law.

[40] Sears argues that the words used in subsection 74.01(3) of the Act are: i) excessively vague, uncertain and imprecise; ii) subject to unintelligible standards; and iii) subject to arbitrary application by the Commissioner. Particular reliance is placed on the fact that the Act provides no definition of the terms "substantial volume", "reasonable period of time", "substantial period of time" or "recently", which are all used in the impugned legislation. While subsection 74.01(3) provides that the nature of the product and the relevant geographic market are factors to be considered in determining whether a person engages in reviewable conduct, Sears argues that the Act does not define these factors, nor does the Act provide any assistance or direction as to what weight should be given to each of these factors, nor is guidance offered about how these factors affect the determination of whether a person has complied with the volume and time tests. In the result, Sears submits that it is not possible for the Tribunal to determine Parliament's intent by interpreting the words at issue using the ordinary tools of statutory interpretation.

[41] With respect to the Information Bulletin entitled "Ordinary Price Claims", published by the Commissioner to outline her approach to the enforcement of the ordinary price claims provisions of the Act ("Guidelines"), Sears states that, as non-legal and non-binding administrative guidelines, they may be amended or replaced at will by the Commissioner. As such, they are not criteria prescribed by law which can justify any limitation on expression. Indeed, Sears says that the existence and purpose of the Guidelines support Sears' contention that the impugned legislation is unconstitutionally vague and reflect the fact that subsection 74.01(3), standing alone, provides insufficient guidance.

[42] In short, Sears says that what is in issue is clarity; how much clarity should a statutory provision have and at what stage in the life of a statutory provision should clarity be evident?

[43] Two decisions of the Supreme Court of Canada provide significant assistance in dealing with Sears' submissions.

[44] In *Irwin Toy, supra,* at page 983, Chief Justice Dickson, writing for the majority, observed that absolute precision in the law exists rarely, "if at all". He said that the question to be asked is whether the legislation at issue provides an "intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies". However, where there is "no intelligible standard" and a "plenary discretion" has been given to do what "seems best", there is no limit prescribed by law.

[45] Subsequently, in *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court reviewed its jurisprudence on this point and, at pages 626 and 627, Mr. Justice Gonthier, for the

Court, set out the following propositions with respect to vagueness and its relevance to the Charter:

1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler, Irwin Toy* and the *Prostitution Reference*).

2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference* and *Committee for the Commonwealth of Canada*).

3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler, Irwin Toy, Prostitution Reference, Taylor* and *Osborne*).

4. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations (*Prostitution Reference* and *Committee for the Commonwealth of Canada*). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of over breadth (*Committee for the Commonwealth of Canada* and *Osborne*).

5. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 *in limine*, and will rather consider the scope of the disposition under the "minimal impairment" test (*Taylor* and *Osborne*).

[46] Justice Gonthier went on to confirm that the threshold for finding a law to be so vague that it does not qualify as a "law" is relatively high.

[47] With respect to the principles of fair notice to citizens and limitation of enforcement discretion referred to above at point 2, Justice Gonthier observed that fair notice comprises an understanding that certain conduct is the subject of legal restrictions (pages 633-635) and that limitation of enforcement discretion requires that a law must not be so devoid of precision that a conviction automatically follows from a decision to prosecute (pages 635-636).

[48] The Court concluded its comments about vagueness in the following terms at pages 638-640:

> Legal rules only provide a framework, a guide as to how one may behave, but certainty is

> only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.
>
> Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times, supra*, and especially the case of *Silver and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone, supra*, at pp.32-33.
>
> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law. [underlining added]

[49] With that direction, I now consider whether subsection 74.01(3) of the Act gives sufficient guidance for legal debate, bearing in mind the caution of the Supreme Court that a relatively high standard must be applied in order to find legislation to be impermissibly vague, and the stated reluctance of the Supreme Court to find a provision so vague as not to qualify as a "law". Rather, the Court will consider vagueness as it relates to minimal impairment and over breadth.

[50] As noted above, the main challenge to subsection 74.01(3) is based on the use of the undefined terms "substantial volume", "reasonable period of time", "substantial period of time" and "recently". While these terms are not defined in the Act, and they defy precise measurement, they are terms of common usage with a commonly understood meaning. The word "substantial" has been held in another context under the Act to carry its ordinary meaning so as to mean something more than just *de minimus*. (See: *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Tribunal); aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.)). As the Commissioner argues, there is no reason to conclude that the

Tribunal is not equally capable of interpreting and applying the meaning of "substantial" in the context of subsection 74.01.(3). The word "reasonable" is widely used in Canadian statutes and has an understood meaning at common law. Similarly, the word "recently" has, in the words of Mr. Justice Muldoon in *74712 Alberta Ltd. v. Canada (Minister of National Revenue)* (1994), 78 F.T.R. 259 at paragraph 12 "an inherently present tense connotation". It is defined in the Oxford English Dictionary to mean "at a recent date; not long before or ago; lately, newly". Thus, the terms about which Sears complains do carry commonly understood meanings.

[51] Further, the interpretation of subsection 74.01(3) is not constrained by a semantic inquiry into the meaning of each word used. In *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court considered whether paragraph 32(1)*(c)* of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (predecessor legislation to the Act) was a limit prescribed by law. That provision prohibited agreements to "prevent, or lessen, unduly, competition". The unanimous Court noted, at pages 647-648, that the interpretation of the provision was conditioned by the purposes of the legislation, by the rest of the section and the mode of inquiry adopted by the courts which had considered this provision.

[52] In the present case, the purpose of the impugned legislation is to prohibit deceptive ordinary price representations. This is a purpose within the general purpose of the Act. That general purpose, as stated in section 1.1 of the Act, is "to maintain and encourage competition in Canada" in order, among other things, "to provide consumers with competitive prices and product choices". Those policy objectives contribute to an understanding of whether, under the impugned legislation, a price qualifies as a legitimate OSP price.

[53] Subsection 74.01(3) also specifies two factors to be considered when applying the volume and time tests. Those factors are the nature of the product and the relevant geographic market. By providing factors which must be considered in applying the volume and time tests, the legislation provides further indication as to how the discretion it gives is to be exercised. Those two factors also provide needed flexibility. For example, the seasonal or perishable nature of a product may well require that a shorter time or smaller volume test be applied. Those factors ensure that the discretion contained in the impugned legislation is not unfettered with respect to application of the time and volume test.

[54] While Sears argues that neither the term "nature of the product" nor the term "relevant geographic market" are defined, and no guidance is given as to their application, it is my view that neither term could be defined too precisely because their meanings could vary depending upon the particular circumstances. I am confident, in the context of determining the reasonableness of an OSP representation, that the regard to be given to the nature of the product and the relevant geographic market contributes significantly to the adequacy of the basis for legal debate. It should be remembered that both the nature of a product and a geographic market are concepts which are commonly explored in the application of the Act.

[55] It follows, in my view, that the words used in the impugned legislation, when considered

in the context of the purpose of the impugned legislation and the purpose of the Act, are sufficiently precise as to constitute a limit prescribed by law. The Act provides a framework and an intelligible standard for legal debate and judicial interpretation. It does this by setting out, to paraphrase the words of the Supreme Court in *Nova Scotia Pharmaceutical Society*, *supra*, boundaries of permissible and non-permissible conduct which allow for discussion of their actualization. The boundaries limit enforcement discretion and sufficiently delineate an area of risk so as to give notice to potentially affected citizens. While providing a standard for legal debate, the legislation also provides flexibility in order to deal with the variety of circumstances which may arise (eg. seasonal goods, perishable goods) and evolving market practices.

[56] Confirmatory evidence that the impugned legislation provides an intelligible standard is, in my view, found in the "Report of the Consultative Panel on Amendments to the *Competition Act*" ("Consultative Panel") and in the legislation from other jurisdictions, put in evidence before the Tribunal.

[57] On June 28, 1995, the Minister of Industry announced the start of public consultations aimed at updating the *Competition Act*. As part of the consultation process, the Competition Bureau released a discussion paper which sought comments from interested parties on a number of potential amendments to the Act. Comment was specifically requested on misleading advertising and deceptive marketing practices, including the appropriate definition of an OSP for the purpose of assessing representations. A Consultative Panel, composed of eminent Canadian competition lawyers and academics, as well as representatives of Canadian consumer and retail associations, was established to review responses to the discussion paper. The recommendations of the Consultative Panel were set out in its report released on March 6, 1996 ("report").

[58] The report acknowledged that regular or ordinary price claims are common in the marketplace and that they can be a powerful and legitimate marketing tool because many consumers are attracted to promotions that promise a saving from the ordinary or regular price of a product. The Consultative Panel noted that the then current legislation prohibited materially misleading representations, but that most of those who commented on the discussion paper felt that the volume test applied by the Competition Bureau and the Attorney General under the existing legislation did not adequately reflect the reality of the marketplace. The Consultative Panel summarized the result of the public consultations on this point as follows at page 25 of its report:

> Some [commentators] asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.
>
> However, those supporting a time test generally were concerned that the offered price be *bona fide*. They believe a retailer should be required to demonstrate that it made *bona fide* efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a

> product.
>
> Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

[59] After discussion and consideration of several alternative proposals, the Consultative Panel concluded that revised legislative provisions "should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty". In its report, the Consultative Panel went on to say at page 26:

> Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.
>
> Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.
>
> [...]
>
> The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included "substantial volume", "good faith", "like products", "substantial time", "nature of the product" and "relevant market". Some Panel members cautioned against defining these terms too precisely, since their meanings could vary depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms. [underlining added]

[60] The following model provision was recommended by the Consultative Panel at page 28 of its report:

> (ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:
>
> > (A) recently sold a substantial volume of the product, or
> >
> > (B) recently offered the product for sale in good faith for a substantial period of time prior to the sale. [underlining added]

The model provided that, in making a determination under this test, regard should be had to the nature of the product and the relevant market.

[61] In the view of the expert Consultative Panel, salient terms, including the terms about which Sears now complains, could not be defined too precisely because their meaning could vary depending on the circumstances of each case. Clearly, the Consultative Panel was of the view

that the use of terms such as “recently”, “substantial volume”, and “substantial period of time” provided an intelligible standard for the exercise of discretion. It was the consensus of the Consultative Panel that existing and future jurisprudence could provide sufficient guidance regarding the meaning of the terms used. I take this to be recognition of: i) the need for flexibility and the interpretive role of the courts; and, ii) the impossibility of achieving absolute certainty. These are the factors to be considered in determining whether a law is too vague (*Nova Scotia Pharmaceutical Society*, *supra* at pages 626-627).

[62] With respect to comparable legislation from other jurisdictions, Sears called Mr. Stephen Mahinka, as an expert witness. Mr. Mahinka is a lawyer who is a partner in the law firm of Morgan, Lewis & Bockius LLP. There he manages the Antitrust Practice Group of the Washington, D.C. office. Mr. Mahinka has 28 years of experience advising clients with respect to pricing, marketing, advertising and consumer protection matters involving the U.S. Federal Trade Commission. He has advised clients regarding compliance with price comparison requirements under U.S. and state laws. He has defended clients whose pricing and advertising activities have been under investigation and he has acted as counsel in litigation asserting violations of state comparative pricing requirements. As well, he has published in the order of 60 articles concerning U.S. antitrust law and consumer protection issues.

[63] Over the Commissioner’s objection, the Tribunal ruled that Mr. Mahinka was qualified to opine upon comparative price advertising, consumer protection and antitrust law at the state level. The Tribunal also concluded that he was qualified to opine on U.S. federal comparative price advertising, consumer protection and antitrust law. The Commissioner conceded Mr. Mahinka’s expertise within the federal sphere.

[64] Mr. Mahinka testified as to his review of U.S. federal and state laws relating to the advertising of comparison prices. Included in his testimony was evidence that a number of U.S. jurisdictions have enacted legislation that contains broad general terms. For example, Florida’s Deceptive and Unfair Trade Practices Law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mr. Mahinka testified that regulations implementing these provisions were “repealed on the basis that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute”.

[65] New York’s General Business Law makes false advertising in the conduct of any business unlawful. “False advertising” is defined as advertising that is misleading in a material respect.

[66] Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a “substantial number of sales” were made in the “recent regular course of business”; (2) the former price was the price at which such goods or services or “substantially similar” goods or services were openly and actively offered for sale for a “reasonably substantial period of time” in the “recent regular course of business” honestly, in good faith and not for the

purpose of establishing a fictitious higher price on which a deceptive comparison might be based; (3) the former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services in the recent, regular course of business; or (4) the date on which "substantial sales" were made or the goods were openly and actively offered for sale is advertised in a clear and conspicuous manner. Mr. Mahinka testified that the term "substantial sales" is further defined in Virginia's statute as "a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison in the supplier's trade area" but that the other terms used are not further defined.

[67] I find this evidence to confirm that other legislators have recognized the need for flexibility in regulating deceptive trade practices in general and OSP representations in particular. This less specific legislation establishes general boundaries of non-permissible conduct which is adequate for enforcement purposes. The existence of such general legislation in my view supports the view that the impugned legislation is capable of adequately giving rise to legal debate.

[68] It is true that Mr. Mahinka's evidence included examples of very specific state legislation. However, the fact that some legislation attaches consequences to more precisely-defined acts does not lead to the conclusion that more general provisions are not capable of constituting a limit prescribed by law.

[69] In rejecting Sears' position that the legislation is not a limit prescribed by law, I have also considered its submission based on the existence of the Guidelines. In *Irwin Toy, supra at* page 983, the majority of the Supreme Court noted that one could not infer from the existence of guidelines, (in that case, promulgated by the Quebec Office of Consumer Protection in order to help advertisers comply with advertising restrictions) that there was no intelligible standard to apply. In the view of the majority, one could only infer that the Office of Consumer Protection found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism. Similarly, I do not infer from the existence of the Guidelines that there are no intelligible standards for a court or the Tribunal to apply. I note that the report of the Consultative Panel included a recommendation that the Competition Bureau issue enforcement guidelines in draft form at the same time as the new legislation was introduced. One can infer that the Commissioner considered this recommendation to be reasonable and the Guidelines helpful.

(iii) Is the infringement reasonable and demonstrably justified?

[70] Having found the impugned legislation to be a limit prescribed by law, the next step is to apply the principles articulated in *Oakes* to the evidence before the Tribunal.

(a) Contextual considerations

[71] As already noted, in *Oakes*, the Supreme Court noted that the analysis is to be conducted with close attention to the contextual factors. The contextual factors are relevant to establishing the objective of the impugned legislation and to evaluating the proportionality of the means used to fulfil the pressing and substantial objectives of the legislation. Characterizing the context of the impugned provision also touches upon the nature of the evidence required at each stage of the analysis in order to establish demonstrable justification.

[72] I believe that the relevant contextual considerations are as follows.

[73] First, it is relevant to consider the nature of the activity which is infringed. This is necessary because, where the right to expression is violated, the value of the expression that is limited affects the degree of constitutional protection (*Thomson Newspapers, supra* at paragraph 91).

[74] Here, what is restricted are representations by a seller of the seller's own ordinary selling prices where the representations do not satisfy either the volume or the time test, and where any false or misleading representation is material.

[75] The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: *RJR Macdonald, supra* at paragraph 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.

[76] In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values subsection 2(*b*) of the Charter is intended to protect. In the result, a lower a standard of justification is required.

[77] Second, it is a relevant contextual factor to consider the vulnerability of the group the legislation seeks to protect: *Thomson Newspapers*, at paragraphs 90 and 112.

[78] Both the Consultative Panel and the Guidelines recognize that OSP claims are a powerful and legitimate marketing tool. Sears, in its own document entitled "Guidelines for Savings Claims", notes that "[s]avings claims, properly used, are a powerful selling tool".

[79] Dr. Donald Lichtenstein testified as an expert for the Commissioner. He is a Professor of Marketing at the Leeds School of Business at the University of Colorado in Boulder. He holds a Ph. D. with a major in Marketing obtained in 1984 from the University of South Carolina. Dr. Lichtenstein has lectured extensively about Marketing at the graduate and undergraduate level. He has served on the Editorial Review Board of the Journal of Marketing, the Journal of Consumer Research, and the Journal of Business Research. He is a member of the Editorial Review Board for the Journal of Public Policy and Marketing. In 2001, he received the

Outstanding Reviewer Award from the Journal of Consumer Research. Dr. Lichtenstein continues to be an ad hoc reviewer for the Journal of Marketing and other publications. As well, has presented numerous papers relating to marketing at conferences, has applied research experience, and has been published extensively in refereed publications and nationally refereed proceedings.

[80] The Tribunal ruled that Dr. Lichtenstein was qualified to provide opinion evidence on two topics. The first was marketing matters, and particularly consumer behaviour as it relates to pricing and other stimuli. The second topic was research design and methodology within the social sciences. Dr. Lichtenstein provided two separate written opinions, one pertaining to the constitutional question, the other pertaining to the Commissioner's deceptive marketing allegations. He testified with respect to both issues.

[81] I was impressed by Dr. Lichtenstein's expertise. Much of his testimony with respect to marketing matters was unchallenged and I accept his testimony given with respect to the constitutional issue. Relevant to the contextual factors at issue was his evidence that:

- OSPs have a powerful influence on consumers.

- OSP advertising creates a general impression of savings for the average consumer, positively affects intentions to purchase from the advertiser and negatively affects intentions to search competitors for a lower price.

- The average consumer has low levels of price knowledge and engages in very little pre-purchase search to gain this knowledge,
  even for expensive items. Thus, the average consumer is vulnerable to deceptive OSP advertising.

- By signalling a temporary bargain, a seller's own OSP advertising affects not only consumers who are currently contemplating the purchase of a given product but, particularly for products where wear-out occurs on a visible continuum, may also pull some customers into the market sooner than otherwise would be the case.

- Misleading OSP advertising can lead consumers to believe that, by purchasing the advertised product, they will receive a quality level that is commensurate with the higher reference price, while only having to pay the lower sale price.

- The average consumer who purchases a product advertised with an inflated seller's own OSP is unlikely to become aware that he or she was mislead, and thus, he or she remains susceptible to subsequent reference price deceptions.

- Receiving a "good deal" in and of itself is a significant motivation for purchase

for many consumers who purchase OSP advertised items. This is referred to as "transaction utility".

- Retailers who misuse OSPs as a marketing tool capitalize on consumers who view OSP claims as "proxies" for a good deal.

- The deceptive OSP advertisements from one retailer can result in negative goodwill to competitors who advertise in a non-deceptive manner. In Dr. Lichtenstein's words:

> For consumers who do patronize a competitor and then encounter and encode a deceptive OSP from a high credibility source, they will be more prone to question the value from the retailer they patronized. They will be likely to experience cognitive dissonance and a loss of goodwill and future purchase intentions toward the retailer from [whom] they purchased.

- A retailer who uses inflated OSP advertising not only benefits from deceptive advertising on the products that are promoted in this manner, but the beneficial effect also extends to other non-promoted product/service categories. When the nature of the promoted price is misrepresented to consumers, for example, with an inflated seller's own OSP, retailers not only capture sales on the item that attracted consumers to the store, but also on other items consumers purchase once in the store. Thus, competitors operating in good faith lose the opportunity to compete on a level playing field not only for the promoted item, but for all items that the consumer purchases.

- When advertiser behaviour results in consumers purchasing products that provide less value for money, it motivates manufacturers to allocate factors of production to those items instead of to items that would otherwise be produced (i.e., those that "truly" provide higher value for money). This harms competition and distorts price signals which interfere with the optimal allocation of productive resources, so that total consumer welfare is decreased.

[82] A third related contextual factor, conceded in oral argument by Sears to be relevant, is the objective of the impugned legislation and the nature of the problem it seeks to address. The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.

[83] Sears argues that a centrally important contextual factor is that, prior to the enactment of the impugned legislation, stakeholders had "explicitly and forcefully lamented the vagueness and

lack of precision, certainty and understanding relating to the ordinary selling price legislation". I agree that clarity of legislation is relevant to considerations of vagueness (as that relates both to the "prescribed by law" and minimal impairment requirements) and, in that sense, clarity touches on the proportionality of the legislation. I am not satisfied on the evidence that clarity and certainty are otherwise relevant contextual factors, or that clarity is an over-arching contextual factor.

(b) Does the infringement achieve a constitutionally valid purpose or objective?

[84] Having set out the relevant contextual considerations, I move to the first step of the *Oakes* analysis. The question to be answered at this stage is whether the objective of the impugned legislation is sufficiently important that it is, in principle, capable of justifying a limitation on Sears' freedom of expression.

[85] Sears concedes that the objective is sufficiently important. Notwithstanding that concession, it is important at this stage to properly state, and not over-state, the objective of the impugned legislation. Improperly stating the objective of the legislation will compromise the analysis.

[86] Sears describes the objectives of the impugned legislation as follows:

> The evidence before the Tribunal in this proceeding has confirmed that the objectives of the Act include, *inter alia*, setting and making known the rules or parameters governing competition in Canada and, importantly, having the Act judicially enforced in a manner that is fair to all and in accordance with the rules previously established. Other objectives include the improvement of the quality and accuracy of marketplace information and discouraging deceptive marketing practices.

[87] In my view, the evidence of the legislative history of the provisions of the Act relating to ordinary price representations is relevant to determining the objectives of the impugned legislation. It is described below.

[88] In 1960, a criminal prohibition on the making of misleading ordinary price representations was added to what was then the *Combines Investigation Act*. The initial provision read as follows:

33C(1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence.

(2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

33c.(1) Quiconque, afin de favoriser la vente ou l'emploi d'un article fait au public un exposé essentiellement trompeur, de quelque façon que ce soit, en ce qui concerne le prix auquel ledit article ou des articles, semblables ont été, sont ou seront ordinairement vendus, est coupable d'une infraction punissable sur déclaration sommaire de culpabilité.

(2) Le paragraphe (1) ne s'applique pas à une personne qui fait paraître une annonce publicitaire qu'elle accepte de bonne foi en vue de la publication dans le cours de son entreprise.

[89] An explanation of the purpose of the criminal prohibition is found in remarks made to the House of Commons by the then Minister of Justice when he moved the second reading of the bill to amend the *Combines Investigation Act* to add the criminal prohibition. He said:

> The fourth and last amendment to which I wish to refer in this group is a new section forbidding anyone, for the purpose of promoting the sale or use of an article, to make a materially misleading representation to the public concerning the price at which the article is ordinarily sold. Quite a few instances have come to the attention of the combines branch, some of them occurring in the catalogues of so-called catalogue houses, but occurring in other places as well, where a merchant, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented to the public the price at which such article was ordinarily sold elsewhere. Besides being deceptive as far as the buying public is concerned this practice also constitutes an unfair method of competition with respect to other merchants.
>
> In summary, these amendments relating to discriminatory and predatory pricing and deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater honesty into all branches of trade. In some instances they also protect, or give a chance for protection, to merchants, usually the smaller merchants, against unfair competition which does not relate to competitive efficiency; they confirm to a manufacturer some right to prevent his product from being abused or used as a come-on device; and finally, but not least, they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself. [underlining added]

House of Commons Debates, Vol. IV (30 May 1960) at 4349 (Mr. Fulton).

[90] In 1976, the criminal prohibition was amended to read as follows:

36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

36.(1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques.

[...]	[...]
(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in a relevant market unless it is clearly specified to be the price at which the product has been sold by that person by whom or on whose behalf the representation is made.	(d) donner au public des indications notablement trompeuses sur le prix auquel un produit, ou des produits similaires ont été, sont ou seront habituellement vendus; aux fins du présent alinéa, les indications relatives au prix sont censées se référer au prix que les vendeurs ont généralement obtenu sur le marché correspondant, à moins qu'il ne soit nettement précisé qu'il s'agit du prix obtenu par la personne qui donne les indications ou au nom de laquelle elles sont données.

It was subsequently re-enacted as paragraph 52(1)(*d*) of the Act.

[91] As described in detail above, a discussion paper was released in 1995 seeking comments from interested persons with respect to amendments to the Act, including the appropriate definition of OSP. The Consultative Panel which was created to review the responses to the discussion paper made recommendations. Those recommendations are largely reflected in subsection 74.01(3) of the Act, which was originally contained in Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, 1st Sess., 36th Parl., 1997, (1st reading 20 November 1997). A dual track regime of civil and criminal enforcement procedures and remedies was created.

[92] The summary to Bill C-20 specifically provided that "[t]he enactment ... revises the treatment of claims made about regular selling prices to provide greater flexibility and clarity". The then Minister of Industry described the amendments in more detail in the following terms when he moved second reading to the bill:

> The regular price claims provisions of the Act will be amended for greater clarity and to better reflect what consumers and retailers understand by them. The legitimacy of regular price claims would be determined by an objective standard, a test based either on sales volume or the pricing of an article over time.
>
> Consumers will benefit from this clarification of the rules and merchants will have more freedom of choice in selecting pricing strategies and will be encouraged to innovate in ways beneficial to consumers and retailers alike.

House of Commons Debates, Edited Hansard, No. 074 (16 March 1998) (Hon. John Manley).

[93] On the basis of the legislative history and the evidence before the Tribunal, I am satisfied that the Commissioner has established, on a balance of probabilities, that the objectives of subsection 74.01(3) of the Act are to: i) protect consumers from deceptive ordinary selling price representations; ii) protect businesses from the anti-competitive effects of deceptive ordinary selling price representations; and, iii) protect competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations. These were the expressed objectives of the original criminal prohibitions and I am satisfied that the original

purpose remained pressing when the civil remedy was enacted. As Sears noted in its written argument, since the 1970's concerns were expressed about the inefficiencies associated with the criminal prosecution of misleading advertising. The Consultative Panel recommended that misleading advertising should normally be addressed through a civil regime but that a criminal regime should exist for egregious cases. Both regimes were directed at the same purpose.

[94] These legislative objectives are to be viewed in light of the evidence before the Tribunal concerning the significant harm caused to consumers, business and competition by deceptive OSP advertising (particularly the evidence of Dr. Lichtenstein described above).

[95] I conclude, on the totality of the evidence before the Tribunal, that Sears has fairly and properly conceded that the objectives of the impugned legislation are of sufficient importance that, in principle, they are capable of justifying a limitation on Sears' freedom of expression.

(c) The rational connection

[96] The next step in the inquiry is to question the proportionality of the measure. This analysis begins with consideration of the rationality of the measure at issue. The issue is whether there is a causal relationship between the objective of the impugned legislation and the measures enacted by the law. Direct proof of such causal relationship is not always required. In *RJR Macdonald, supra* at paragraphs 86, 156-158, and 184, the Supreme Court held that a causal relationship between advertising and tobacco consumption could be established based upon common sense, reason or logic.

[97] In *Irwin Toy, supra* at page 991, Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.

[98] In finding the impugned legislation to be rationally connected to the objectives of the legislation, I also rely upon the opinion of Dr. Lichtenstein. As noted above, I generally accept his testimony. I found him to be extremely knowledgeable on the subject of marketing and particularly consumer behaviour as it relates to pricing and other stimuli. I also found that he gave his testimony is an unhesitating, candid, clear and even-handed manner. His obvious enthusiasm for the subject matter left no suggestion of partisanship. His opinion, as it related to marketing in the context of the constitutional question, was not, in my view, effectively challenged or limited on cross-examination.

[99] Sears' expert, Mr. Mahinka, dealt with a review of the scope of U.S. legislation and the factors to be considered at law by sellers when making OSP representations. However, since Mr. Mahinka was not qualified to opine, and did not opine, on marketing matters, his evidence did not contradict that of Dr. Lichtenstein.

[100] The following evidence, taken from Dr. Lichtenstein's written expert report, is relevant to the issue of rational connection:

> 62. The heart of the problem with seller's own OSP advertising is that consumers believe that the OSP relates to the seller's own "ordinary" selling price. Consumer perceptions of what a seller's ordinary price [is] relate to two factors: (1) how long the product [has] been offered at the price (consistency over time), and (2) how many other consumers have purchased the product at that price (consensus). Consequently, in my opinion, there is definitely a rational [connection] between these two factors and consumer perceptions of a price as a bona fide OSP. Thus, any legislation that has the goal of addressing the potential for consumer deception with respect to OSP advertising necessarily must address time and volume considerations.
>
> 63. When thinking in terms of deception, it is helpful to ask the question, "what would consumers believe if they had full information?" If there is no difference between consumer perceptions with and without the full information, there is no problem with deception. In this case, consumer inferences from a seller's own OSPs would accurately reflect missing information. However, if consumers would respond differently if they had full information, then consumer inferences would not be accurate, and there would be a problem of deception. Consider the example of a consumer who encounters an OSP. If the consumers were provided with (a) the time schedule for when that product has been offered for sale at the OSP (time test criterion), and (b) the number of consumers who have purchased the product at the OSP (volume test criterion), would the consumer accept the encountered OSP as the real *bona fide* "ordinary" selling price? If the answer to this question is "no," then there is an issue of deception.
>
> 64. Because consumers will not have this information, legislation is required to institute time and volume standards to bring them in line with consumer expectations so that consumers will not be deceived. In essence, the legislation fills the consumer information void in that with the legislation, consumers will be better able to rely on OSPs as *bona fide* selling prices. That is, instituted in a good faith manner, meeting time or volume tests will bring retailer practices more in line with consumer expectations such that where retailers offer products at OSPs, consumers will be able to rely on the OSPs as representing either the ordinary price from a time or volume perspective. [footnotes omitted]

[101] In finding there to be a rational connection between the impugned legislation and its objectives, I reject Sears' submission that the impugned legislation fails the rational connection test because it is excessively vague, uncertain and imprecise, and has application to an unnecessary broad range of activity. In my view, those arguments are better considered when determining whether the legislation is over broad so that it does not minimally impair Sears' rights. Indeed, in oral argument, counsel for Sears dealt with the evidence that supported his submission that unclear legislation defeats the objective of accurate marketplace information (and so was not rationally connected to the legislative purpose) in the context of his submission on minimal impairment.

[102] I am satisfied that the impugned legislation, on its face, cannot be viewed as being so vague or arbitrary that it is not rationally connected to its objectives.

(d) Minimal impairment

[103] The next stage of the *Oakes* analysis requires consideration of whether the impugned legislation, while rationally connected to its objectives, impairs Sears' freedom of expression as little as reasonably possible in order to achieve the legislative objectives.

[104] The Supreme Court has recognized that legislative drafting is a difficult art and that Parliament cannot be held to a standard of perfection. See: *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 95. In *Sharpe*, the majority of the Court described the required analysis in the following terms:

> 96 The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see [...].
>
> 97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry – one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see [...]. [emphasis in original] [jurisprudence and citations omitted]

[105] Sears argues that the impugned legislation fails the minimal impairment test in two respects. First, Sears says that the legislation is over broad because it uses excessively vague, imprecise and broad terms (including "substantial volume", "reasonable period of time", "substantial period of time" and "recently"). Further, the legislation fails to include specific guidelines, standards, criteria or definitions concerning the volume of product sold or offered for sale, and the periods of time to be considered for the volume and time tests. The scope of the impugned legislation will, it is said, therefore frustrate or defeat its objectives. Second, Sears says that subsection 74.01(3) of the Act does not minimally impair its freedom of expression because there are practical legislative alternatives to the impugned legislation as it is now drafted. Those alternatives would, Sears argues, give greater clarity, advance the objectives of the legislation more effectively, and interfere less with Sears' right to commercial free speech.

[106] Turning to the first ground advanced by Sears in support of its argument that the

impugned legislation will frustrate or defeat the objectives sought to be achieved, Sears points to the evidence of the Commissioner's expert, Dr. Lichtenstein, that:

a) Placing the percentage requirement for sales and time tests at 51 % or higher (as the Guidelines do) is objectionable as a per se or equivalent per se rule;

b) Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some customers from receiving non-deceptive information that they may, in fact, value in making decisions. In turn, retailing efficiency would be adversely affected because retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers;

c) Requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to the price may deprive some customers of important information about both the product and the retailer;

d) If consumers believed that there was a time test at 51 % or higher, that test is objectionable;

e) Uncertain or unclear OSP advertising rules hinder OSP price advertising;

f) If the regulations are not clear, some retailers may choose not to engage in OSP advertising as much or at all;

g) If retailers chose not to engage in OSP advertising as much or at all, that could hinder price reduction;

h) If price reduction is hindered, that could result in competitors not having any pressure to lower their prices; and

i) If competitors do not lower their prices, the consumer will be harmed by higher prices.

[107] One legislative option available to deal with OSP claims is legislation that imposes specific per se standards, for example, the number of days a product must be on sale at a regular price, or the percentage of sales accepted as "substantial" for the volume test. Mr. Mahinka identified a number of state enactments in the U.S. which contained per se standards. It was Dr. Lichtenstein's opinion that such per se rules are not effective in addressing deception. He endorsed the following statement:

> "Per se rules relating to high-low pricing are not likely to detect all true deception nor exculpate all

> non-deceptive challenged pricing behavior. In the case of percentage of sales tests, few would argue with the presumption that if a retailer had 50% of its sales at the referenced price, that price had been set in good faith... A higher percentage test will certainly prevent deception, but at what cost? Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some consumers from receiving non-deceptive information that they may, in fact, value in making decisions. Retailing efficiency, in turn, would be affected adversely in that retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers... Similarly, percent of time tests can be thwarted easily by the manipulation of the pricing calendars of comparable brands within a store. If compliance with a set time at the regular price (even relatively long periods of time) demonstrates good faith, some deception will escape further scrutiny. On the other hand, requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to that price again may deprive some consumers of important information about both the product and the retailer. In either case, these per se tests seem to offer much more in terms of financial savings for the litigants (on both sides) than they do in terms of ensuring a balance between the direct consumer interest in good price information and the indirect consumer interest in efficient retail practice."

[108] Dr. Lichtenstein advanced a "Rule of Reason" analysis of a retailer's prices and advertising and effect on consumers, described as follows:

> "Such an approach requires the court to explore issues relating not only to the retailer's activities and consumer perceptions, but also to industry and product characteristics. It is informed by generic and case specific research in consumer behavior. Most important, it seeks to strike a balance between the direct interests of consumers in receiving clear, truthful information and the indirect interest in the lower prices derived from permitting retailers to operate efficiently. Evidentiary shortcuts such as percentage of sales made at the reference price or length of time the reference price was in effect are relevant but not dispositive".

[109] Dr. Lichtenstein went on to state:

> The situation at hand has direct correspondence to measurement issues that behavioral researchers deal with on a continual basis. From a measurement theory perspective, it is generally recognized to be poor measurement practice to equate a concept that is not directly observable (e.g., deception) with a single observable behavior (e.g., "if a seller does X, it is deception; if the seller does Y, it is not deception") (see Lichtenstein, Netemeyer, and Burton 1990). That is, when the concept construct of "deception" is reduced to terms of a per se time or volume test, the validity of just what is "deception" is sacrificed. As a result, there may be many situations where the following [of] per se rules leads to incorrect outcomes regarding determinations of deception that if the subjective factors (consistent with the "rule of reason" approach) were applied with its multiple criteria, this would not occur.

[110] Noting that, under the impugned legislation, the volume and time tests are not determined in a vacuum, but rather recognize both the market-based attributes of the product and the geographic market, Dr. Lichtenstein concluded that, in his opinion, subsection 74.01(3) of the Act could not be less burdensome and still be effective.

[111] In this context, I do not find that the portions of Dr. Lichtenstein's testimony relied upon by Sears fundamentally undermine his expert opinion that the legislation could not be less

burdensome and still be effective, or his opinion that clearer per se rules will neither detect all deception nor exculpate all non-deceptive OSP advertising. Because the impugned legislation is not per se legislation but rather requires consideration of good faith and materiality, I believe the impugned legislation meets the concerns of Dr. Lichtenstein articulated at points (a) through (d) in paragraph 106 above.

[112] Put another way, Sears relied on the portions of Dr. Lichtenstein's evidence which criticised the enactment of per se rules. However, his views do not support the conclusion that the impugned legislation, which is not per se legislation, is over broad.

[113] To the extent that Dr. Lichtenstein agreed that uncertain or unclear OSP advertising regulations hinder and discourage OSP advertising, the evidence before the Tribunal does not in my view establish that the impugned legislation has prevented or discouraged accurate OSP advertising.

[114] Turning to Sears' argument that there are other, more effective legislative options, Sears points to the legislation of 12 American states and argues orally as follows:

> Now, in terms of the 12 states that are highlighted here, it is set out, Your Honour - - I can tell you that, in terms of the criteria that are set out here, it really is a menu of alternative ways to enact a provision like the impugned legislation and, from that menu, Your Honour will note that there are various tests that are enunciated here, set out, which involve different volume tests, different time tests.
>
> You have got percentages that vary. You have got "reasonable" set at 5 per cent. You have got "reasonably substantial" set at 10 per cent. You have got time periods and volume periods anywhere from more than 10 per cent to - - well, it runs to 31.1 per cent, which is 28 out of 90 days in a few cases that is required to have it at that regular price.
>
> And you have got 51.6 per cent in the case of Ohio, which is 31 out of 60 days, and you have got South Dakota, for example, 7 out of 60 days, 11.6 per cent.
>
> The point of it is, is that I am not suggesting you have to pick a percentage here or a criteria that you feel should be imposed here. That is not your job and, frankly, it is not my job either.
>
> What the point here is is that there are other legislative alternatives which do provide for that certainty and clarity and that also provide for that flexibility that we are looking for here, in that there are also exceptions to these fixed criteria.
>
> There are exceptions for clearance sales, for example. There are exceptions for providing for rebuttable presumptions and that, therefore, Your Honour has before you clear evidence that Parliament could have done the same and that, had it done the same, Sears' rights would not have infringed as much as they have been.

[115] However, there was no evidence before the Tribunal that such legislation was either less intrusive or more effective in targeting OSP representations. With respect to whether more

precise legislation is less intrusive, it was Mr. Mahinka's evidence that it has been his experience (which has formed the basis of his advice to clients) that, where sellers carry on business in more than one jurisdiction, sellers will "commonly seek to comply with a more specific, relevant state statute or regulation governing price comparisons as this practice can be expected to result in compliance with more general state statutes". This evidence leads me to conclude that either the general and specific legislation are co-extensive, or the specific legislation is more intrusive. Otherwise, compliance with the specific legislation would not result in compliance with the more general legislation. Mr. Mahinka's evidence does not support Sears' contention that more specific legislation is less intrusive.

[116] With respect to the effectiveness of legislation regulating OSP claims, the following exchange in oral argument is illustrative. In response to a question from the Tribunal as to how the evidence of Mr. Mahinka, and particularly the state legislation he referenced, supports the submission that more precise legislation is more effective, counsel for Sears ultimately acknowledged that Mr. Mahinka's evidence did not say that precise legislation was more effective. The transcript on this point is as follows:

> **MR. M.J. HUBERMAN:** Well, if you are asking: Is that the approach he uses when he is dealing with a general statute only? He did not address that but, again, the general approach is illustrative and, I think, helpful in the sense that he is using precise standards and criteria to shape his advice to sellers who want to know what to do.
>
> The idea is that, if they know what to do, if they are going to comply with the specific standards, they are likely going to comply with the more general ones also.
>
> So to the extent that that advice would be appropriate in those circumstances, I take it that that is what the advice would be as well.
>
> **THE CHAIRPERSON:** But I don't recall his evidence to say that specific legislation is more effective than general legislation.
>
> **MR. M.J. HUBERMAN:** Well, it's more effective in letting the sellers know what to do in the sense of advertising. It is more effective in that sense.
>
> **THE CHAIRPERSON:** But he doesn't touch on whether it is more effective in discouraging objectionable advertising that is misleading with respect to ordinary selling price.
>
> **MR. M.J. HUBERMAN:** No.
> His point was a different point. His point was, I would suggest, the first branch of the unintelligible standard rationale, which is the fair notice part that we talked about yesterday.
>
> His point was, by looking at the more specific standards criteria tests, the citizen, i.e. the seller, would have greater guidance and knowledge of the law so that it could comply better with it. That was the gist of what he was saying and, in fact, that would, in my submission, show its effectiveness in accomplishing some of the objectives, certainly, of the Act that we talked about. [underlining added]

[117] Sears also complains that the Commissioner failed to explain why the model provision recommended by the Consultative Panel was not enacted. It is said by Sears to have been less intrusive and equally effective because of its "clarity and brevity".

[118] The model proposed by the Consultative Panel is set out at paragraph 60 above. The model provision proposed the use of terms such as "recently sold a substantial volume", "recently" and "substantial period of time". Regard was to be had to the nature of the product and the relevant market. I am not satisfied that the "clarity and brevity" of this model provision shows it to be less intrusive or more effective than the impugned legislation.

[119] Returning to the dicta of the Supreme Court of Canada in *Sharpe* quoted above, Parliament need not adopt the least restrictive measure. It is sufficient that the means adopted fall within a range of reasonable solutions, and the law must be reasonably tailored to its objectives.

[120] The evidence of Dr. Lichtenstein and the wording of the impugned legislation persuade me that the impugned legislation is reasonably tailored to its objectives. The legislation sets out time and volume tests which relate to consumer perceptions of a seller's ordinary price. An affirmative defence is provided whereby any representation that is not false or misleading in a material respect does not constitute reviewable conduct. There is a due diligence defence to most of the remedial measures.

[121] I am satisfied, on a balance of probabilities, that the impugned legislation falls within a range of reasonable alternatives. While the Act does not establish with precision whether any particular OSP representation will satisfy the time and volume test, the impugned legislation provides the necessary flexibility to ensure that it neither captures non-deceptive OSP advertising nor fails to capture deceptive OSP advertising.

(e) Proportionality of effects

[122] The final stage of the *Oakes* analysis requires:

> ... there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

See: *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at page 889; and *Thomson Newspapers*, *supra* at paragraph 59.

[123] I accept, based upon the report of the Consultative Panel, the evidence of Dr. Lichtenstein, and the existence of legislation in numerous American jurisdictions restricting OSP advertising, that subsection 74.01(3) of the Act addresses the pressing and substantial objective preventing of harm caused by deceptive ordinary price claims. False OSP claims, on the evidence of Dr. Lichtenstein, (unchallenged on this point) can harm consumers, business competitors and competition in general.

[124] In comparison, the negative effects of the restrictions which result from subsection 74.01(3) of the Act are not great. The speech that is restricted is commercial speech that is materially false or misleading.

[125] Sears points to its experience when it eliminated its "2-For" price as evidence of the deleterious effect of the impugned legislation. At that time, when Sears lowered and set its regular single unit price at the "2-For" price, sales declined. When Sears then increased its regular prices, its promotional sales substantially increased. I do not understand this to be evidence of a chill caused by the regulation of OSP claims, as Sears argues, particularly since Sears continued to use OSP claims.

[126] I therefore conclude that the negative effects of the restriction on commercial speech are outweighed by the benefits that ensue from sanctioning deceptive OSP representations.

(f) Conclusion

[127] For the reasons set out above, I have concluded that subsection 74.01(3) of the Act is: i) a limit "prescribed by law"; ii) addresses pressing and substantial objectives; iii) is rationally connected to its objectives; iv) restricts freedom of expression as little as is reasonably possible; and, v) carries salutary benefits that outweigh the restriction on freedom of expression.

[128] It follows that, while it is conceded that subsection 74.01(3) does infringe subsection 2(*b*) of the Charter, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society.

[129] Sears' request for constitutional remedies will, therefore, be dismissed.

V. THE ALLEGATION OF REVIEWABLE CONDUCT

(i) Standard of proof

[130] Having dismissed Sears' request for constitutional remedies, I now turn to consider whether the Commissioner has met the onus upon her to establish that Sears employed deceptive marketing practises which constitute reviewable conduct under subsection 74.01(3) of the Act.

[131] Neither party, in their written arguments, addressed submissions to the Tribunal with respect to the standard of proof. In oral argument, counsel agreed that the Commissioner must prove her case on a balance of probabilities, and acknowledged that within the civil standard of proof there exist different degrees of probability, depending upon the nature of the case. See also: *Oakes*, *supra*, at page 137. Counsel for the Commissioner agreed that, within the civil standard, the Commissioner would be obliged to prove her case at the higher end of the balance of probabilities.

[132] In light of the serious nature of the conduct alleged against Sears I am satisfied that, within the balance of probabilities, I should scrutinize the evidence with greater care and consider carefully the cogency of the evidence. See: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at page 170.

(ii) The elements of reviewable conduct and the issues to be determined

[133] For ease of reference, I repeat subsections 74.01(3) and 74.01(5) here :

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,	74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and	a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
(b) has not offered the product at that price or a higher price in good faith for a substantial period of	b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante

time recently before or immediately after the making of the representation, as the case may be.	précédant de peu ou suivant de peu la communication des indications.
[...]	[...]
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.	74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[134] Sears acknowledges that the evidence before the Tribunal establishes Sears to be: (i) a person; (ii) who, for the purpose of promoting, directly or indirectly, the supply or use of tires and for the purpose of promoting, directly or indirectly, its business interests generally; (iii) in 1999, made representations to the public as to tire prices that were clearly specified to be the prices at which the Tires were ordinarily supplied.

[135] Sears also acknowledges that the evidence establishes that Sears did not comply with the volume test contained in paragraph 74.01(3)(*a*) of the Act.

[136] Accordingly, the issues to be determined are:

i) Were Sears' regular prices for the Tires offered in good faith as required by the time test?

ii) Did Sears meet the frequency requirement of the time test?

iii) If Sears did not meet the good faith or frequency requirements of the time test, has Sears established that the representations were not false or misleading in a material respect?

iv) If Sears engaged in reviewable conduct, what administrative remedies should be ordered?

(iii) The witnesses

[137] Before turning to the substance of the deceptive marketing case, it will be helpful to introduce and describe briefly the witnesses who testified before the Tribunal.

(a) The expert witnesses

[138] Seven individuals testified as experts before the Tribunal, three on behalf of the Commissioner and four on behalf of Sears. The Commissioner's experts were Dr. Donald Lichtenstein, Dr. Sridhar Moorthy and Mr. Donald Gauthier.

[139] Dr. Lichtenstein's qualifications and area of expertise have already been described.

When Dr. Lichtenstein re-attended to give his opinion with respect to the deceptive marketing case, Sears agreed that he need not be re-qualified and that he could provide expert testimony with respect to "marketing and consumer behaviour and response to pricing advertised stimuli" and "research design and methodology within social sciences".

[140] Dr. Moorthy is the Manny Rotman Professor of Marketing at the Rotman School of Management, University of Toronto, and is a Research Associate at the Institute for Policy Analysis, University of Toronto. Sears did not challenge Dr. Moorthy's expertise to testify about "marketing and the use of economic principles and/or theory to understand marketing", "consumer response to marketing stimuli" and "marketing study design and implementation".

[141] Mr. Gauthier has worked in the tire industry in Canada since 1984 when he joined a company that was the predecessor corporation of Uniroyal Goodrich Canada Inc. He worked from 1984 to 1990 as its National Advertising Manager. In his later years with the company, he took on the additional role of Sales Manager for Atlantic Canada. From 1990 through 1995, Mr. Gauthier was with Michelin Tires Canada Inc. (after it acquired Uniroyal Goodrich), initially as National Advertising and Promotions Manager, then as Ontario Sales Manager for the Uniroyal Goodrich sales team, and finally as a Sales Manager in Ontario for the merged Michelin, Uniroyal and Goodrich lines. From 1995 to 2000, Mr. Gauthier was with Bridgestone/Firestone Canada Inc. successively as Director of Sales and Marketing, Vice-President Sales and Marketing, and Senior Vice-President Sales. From 2001, and at the time he testified before the Tribunal, Mr. Gauthier worked as the Sales and Marketing Manager/Vice-President of Retread Division of Al's Tire Service. Mr. Gauthier was found by the Tribunal to be qualified to provide opinion evidence touching upon "the practical application of marketing and retail strategies in the Canadian tire industry and Canadian tire market", "the marketing and sale of original equipment and replacement tires in Canada" and "the structure of the tire market in general in Canada", such expertise being recognized as being in existence as of 1999.

[142] While Sears did not challenge Mr. Gauthier's knowledge or expertise, it did object that Mr. Gauthier lacked the necessary independence because he now works for a company that sells tires in Ontario where Sears also sells tires.

[143] Without doubt, expert evidence must be seen as the independent product of an expert who is uninfluenced by the litigation, and an expert should provide independent assistance by objective, unbiased opinion. While Mr. Gauthier's employer does sell tires, Mr. Gauthier testified that he is paid a straight salary without performance bonuses, that he did not know where Sears Auto Centres were located, that, in his time with Al's Tires, no operator of any of its stores cited Sears as a competitor, and that, while he had dealt with some competitive situations (one example being competition from a Canadian Tire store), none of the competitive situations he had dealt with involved Sears.

[144] On that evidence, and on the basis of observing how Mr. Gauthier gave his evidence touching on his qualifications, I concluded that Mr. Gauthier had the required independence in

order to provide expert testimony. It was, and remains, my view that it is too tenuous for Sears to argue that Mr. Gauthier's testimony would be or was biased or coloured by the potential benefit to his employer of having Sears restricted in the content of its OSP advertising. My assessment of Mr. Gauthier's objectivity did not change, and was reinforced, as I observed his testimony in chief and his later testimony as a rebuttal witness.

[145] Sears' expert witnesses were Denis DesRosiers, John Winter, Dr. Kenneth Deal and Professor Michael Trebilcock.

[146] Mr. DesRosiers is the President of DesRosiers Automotive Consultants Inc. ("DAC"), an automotive market research and consulting group. The Commissioner argued that Mr. DesRosiers was not qualified to provide expert testimony. After hearing the examination and cross-examination of Mr. DesRosiers upon his qualifications, the Tribunal ordered that Mr. DesRosiers could testify and give opinion evidence touching upon "survey methodology and analysis relating to the Canadian after tire market", but that the Tribunal would reserve its decision as to whether he was properly qualified to give such testimony.

[147] In this regard, Mr. DesRosiers worked from 1974 to 1976 doing economic analysis for the Ontario Government related to the automotive sector. From 1976 to 1979, Mr. DesRosiers was the Senior Automotive Industry Analyst with the Economic Policy Branch of the Ministry of Treasury and Economics in Ontario. From 1979 to 1986, he was the Director of Research at the Automotive Parts Manufacturers Association of Canada. In 1985, Mr. DesRosiers started DAC. Since 1989, DAC has conducted annually a "Light Vehicle Study" in which 2,500 people across Canada are surveyed with respect to their automotive maintenance practices. Mr. DesRosiers wrote the original questionnaire used in this survey, with some professional advice as to how to properly ask a question for the purpose of a survey. Mr. DesRosiers testified that he understands the automotive industry "cold" so that he is able to design the "Light Vehicle Survey" and other surveys and to interpret the information collected. The interpretation he personally provides may include complex, strategic reports as to how a client company should respond to the market. Since its inception, DAC has conducted upwards of 200 surveys relating to the automotive sector, and every year, or second year, 3 or 4 tire companies buy tire survey data collected by DAC.

[148] Mr. DesRosiers initially provided an expert opinion for the Commissioner in this proceeding but, when the Commissioner decided not to call Mr. DesRosiers, Sears subpoenaed him and later commissioned a second expert report from him.

[149] I am satisfied that Mr. DesRosiers' involvement in the automotive sector, and specifically his involvement in the creation of surveys relevant to the automotive market and the interpretation of the results generated, allows Mr. DesRosiers to provide expert advice to the Tribunal based upon his own knowledge of Canadian consumers' buying habits and preferences, relating primarily to the Canadian after market for tires. I am satisfied that Mr. DesRosiers is, on the basis of his experience, a properly qualified expert to opine upon survey methodology and

analysis relating to the Canadian automotive industry, and specifically the after market for tires.

[150] John Winter is a retail consultant with expertise in advising retailers, institutions and governmental bodies on retail, development and commercial strategies. He has been previously qualified as an expert in these areas and has testified on at least 50 occasions before numerous tribunals, regulatory bodies and the Ontario Court of Justice. The Commissioner conceded that Mr. Winter's qualifications enabled him to provide expert evidence on "issues relating to retailing in Canada, including pricing strategies employed by retailers".

[151] Dr. Kenneth Deal is the Chairman of Marketing, Business Policy and International Business in the Michael G. DeGroote School of Business at McMaster University. He is also the President of marketPOWER research inc., a market research company. The Commissioner accepted the qualifications of Dr. Deal to provide expert testimony in the area of "the methodology and conduct of market research surveys and the analysis of data resulting from such surveys".

[152] Professor Michael Trebilcock is the Director of the Law and Economics Program, Professor of Law and cross-appointed to the Department of Economics at the University of Toronto. He has written extensively on competition policy, trade and economic regulation during his career. For the past 20 years, he has consulted widely to government and the private sector on matters of competition policy and economic and social regulations. The Commissioner accepted Professor Trebilcock to be qualified to give testimony as an expert on competition policy and economic regulation.

(b) The lay witnesses

[153] Each party called 3 lay witnesses. The Commissioner's lay witnesses were Mr. Christian Warren, Mr. Jim King and Mr. William Merkley. Sears called Mr. Paul Cathcart, Mr. Harry McKenna and Mr. William McMahon.

[154] Mr. Warren is a Competition Bureau Officer, through whom the Commissioner tendered documents gathered in her investigation.

[155] Mr. King was first employed by Bridgestone/Firestone Canada Inc. in October of 1997 as its Sales Manager for associate brands. In August of 1999, he became the Sales Manager for Corporate Accounts and Original Equipment. The corporate accounts he was responsible for were mass merchandisers such as Sears, Canadian Tire, Costco and Wal-Mart. Mr. King had provided an affidavit in response to an order obtained by the Commissioner under section 11 of the Act which was directed to Bridgestone/Firestone Canada Inc.

[156] Mr. Merkley has been employed by Michelin Canada since 1977, and in 1999, he was its National Director of Sales for the Corporate Accounts Group. Mr. Merkley provided an affidavit in response to a section 11 order obtained by the Commissioner directed to Michelin North

America (Canada) Inc.

[157] Mr. Cathcart has been employed by Sears since 1973. From 1997 through 2000, he served as the Retail Marketing Manager and 190 Service Operations Manager. As such, he was responsible for building a marketing plan for the Tires. At the time he testified, Mr. Cathcart was the Group Operations Manager and Process Improvement Manager for Sears Canada Home and Hardline.

[158] Mr. McKenna has been employed by Sears since 1981. From 1998 through to 2000, he was the Category Logistics Manager/Inventory Analyst for the Automotive Department. As such, he was responsible for supporting the buyer in visits to tire manufacturers and other vendors, and was responsible for ensuring the flow of merchandise to Sears Automotive Centres and the maintenance of proper inventory levels. When he testified, he was the Manager of Sales and Promotions for the off-mall channel of Sears.

[159] Mr. McMahon has been employed by Sears since 1977. In 1999, he was the Group Retail Marketing Manager of Group 700 - 2 at Sears. As such, he worked with the Corporate Marketing and Advertising Department and the Business Team in order to develop marketing strategies and events for merchandise which included the Tires at issue. At the time he testified, Mr. McMahon was the General Manager of Sears Automotive.

[160] Having introduced the witnesses, this may be the most convenient point to provide the Tribunal's reasons for its oral order, given during the course of the hearing, with respect to the Commissioner's request to adduce certain rebuttal evidence.

VI. RULING WITH RESPECT TO NON-EXPERT REBUTTAL EVIDENCE

[161] Near the conclusion of the evidence adduced by Sears in response to the Commissioner's allegations, the Commissioner advised Sears that, upon the close of Sears' case, she intended to introduce non-expert rebuttal evidence through Mr. Warren. Sears responded that it objected to such evidence being given and the Tribunal was advised of this dispute. In consequence, the Tribunal directed that the Commissioner serve Sears with a rebuttal will-say statement before Sears closed its case and advised that the Tribunal would hear argument on the issue of the admissibility of the proposed non-expert rebuttal evidence after Sears closed its case when the Commissioner endeavoured to call such evidence.

[162] The rebuttal will-say statement was served on Sears on January 27, 2004. On Monday, February 2, 2004 Sears closed its case and the Tribunal then heard submissions as to whether the proposed rebuttal evidence should be received. For reasons to be delivered later in writing, the Tribunal ruled during the hearing that a portion of the proposed rebuttal evidence could be admitted and a portion could not. What follows are the reasons for that ruling.

(i) The proposed rebuttal evidence

[163] The Commissioner sought to respond to two portions of the testimony of Mr. Cathcart.

[164] The first portion of Mr. Cathcart's testimony which the Commissioner sought to rebut was as follows ("the timing explanation"):

> MR. McNAMARA: Turning back to the checkerboards, there has been evidence before the Tribunal that some of the five tires that we are talking about were offered at regular prices for less than 50 per cent of the time, or were offered at sales prices for more than 50 per cent of the time.
>
> I am referring specifically to the RoadHandler T Plus and the Weatherwise tire.
>
> Can you offer any explanation as to why that would have been the case?
>
> And I am talking about 1999, of course.
>
> MR. CATHCART: Yes, I can.
>
> About mid-year of 1999 I began to receive communication from the field that when we advertised the Michelin T Plus it was not available in an 80 aspect ratio size. So beginning in about the third quarter, I chose to advertise the Weatherwise, not necessarily at the same price but at the same time as the T Plus.
>
> There were a number of customers who were coming in. We would advertise the Michelin tire, and in our advertising we could not indicate every size that was available in those tires. So they would come into our auto centres expecting to buy a Michelin tire, although if they had an 80 aspect ratio size requirement we were unable to sell them the AT Plus. It just was not available in that size.
>
> In a response to that, I offered the Weatherwise as a "go to" in the 80 aspect size for our sales associates and our customers.
>
> I knew very well that I would sell some. It certainly wasn't going to be the driving number of tires. Our T Plus would historically outsell the Weatherwise.
>
> What it did was it responded to the customer's request to have a Michelin tire in an 80 aspect ratio when we advertised it. That was my choice, and I did that for that reason.
>
> Second, there was in the fourth quarter of 1999 a situation around service and supply. What I mean by that is on snow tires we would place our orders and stagger our shipments, because on the Bridgestone snow tires they were made in the Orient. So we would have the first shipment arrive in August-September, a second shipment in October and a third shipment in November.
>
> In the fourth quarter of 1999 there were some labour issues in the Orient where we were unable to receive our third shipment, our promotional shipment -- because the deeper you get into that year obviously that is when the promotions start to happen of these snow tires.
>
> We found out very late in the year that we were not going to be able to get them because of labour issues in the Orient.

The problem was I had already booked space, newspaper space, preprint space. These were all completed programs in essence. So even in the preprints, if we were to pull out of there we would in essence be running a company-wide vehicle with a blank page.

What we did was I approached Stan and asked if he would approach Michelin, because they were the only other supplier that could give us a quantity of tires. That was our hope. They did respond and were able to switch the tires, the snow tire ads to Michelin.

What I mean when I say switch, when we advertise tires we would have a feature item on the page and then we would have sub-features. Historically the feature item, the lion's share of sales were created from that.

But because we had some snow tires in stock from our first and second shipment, we moved the feature item to a sub-feature, being the snow tire, and then featured the Michelin tires. That ran us over frequency in that fourth quarter.

It was purely in response to an offshore issue.

[165] The Commissioner proposed to rebut the timing explanation through testimony that the RoadHandler T Plus and the Weatherwise tires were on sale over 50 per cent of the time in each six-month period which preceded every day from July 3, 1999 to December 31, 1999. The Commissioner also sought to introduce into evidence a table entitled “Time Analysis-1999-Substantial Period” which illustrated this.

[166] The second portion of Mr. Cathcart’s testimony the Commissioner sought to rebut was as follows (“the third week of May advertising and promotions testimony”):

MR. McNAMARA: I would ask you to turn to Tab 9, to the checkerboard for the month of May.

MR. CATHCART: I am there, sir.

MR. McNAMARA: I would ask you to look at the Michelin T Plus tire and the Week 3 time column.

MR. CATHCART: Yes, sir.

MR. McNAMARA: Can you tell us what is going on there.

MR. CATHCART: In Week 3 the Michelin T Plus –

MR. McNAMARA: There is a reference there that says "NP" and then "ALB/BC" and the same thing for the Weatherwise.

MR. CATHCART: Yes. That was referring to a newspaper ad in Alberta and B.C. for those two lines of tires. But it was a newspaper ad only for those two provinces during that week.

MR. McNAMARA: Why was that?

MR. CATHCART: We would have promotions that would differ coast to coast

depending on the market and the seasons.

We would have snow tires running in Quebec in a newspaper ad in the fall, where we would have passenger tires in B.C. We wouldn't advertise snow tires in the Lower Mainland of B.C., although in northern B.C. and in Prince George we would have snow tires.

We called them alts. We would alt our advertising, depending on the geographics of the product and of the country, weather and that.

In this time frame we advertised these two tires only in Alberta and B.C. at these prices.

[167] The Commissioner proposed to rebut the third week of May advertising and promotions testimony by tendering, through the competition law officer, newspaper proofs and Sears pre-prints and flyers, all relating to the advertising and promotion of tires by Sears during the third week of May, 1999.

(ii) The objection to the rebuttal evidence

[168] Sears argued that the proposed rebuttal evidence should not be permitted because:

1. The Commissioner had failed to follow the procedure mandated by the rules of the Tribunal.

2. The proposed evidence was not proper rebuttal evidence.

3. The Commissioner had failed to cross-examine Mr. Cathcart upon that portion of his evidence which the Commissioner sought to rebut.

(iii) The ruling

[169] After hearing argument, the Tribunal ruled that the Commissioner would not be permitted to lead rebuttal evidence with respect to the timing explanation, but would be entitled to lead as rebuttal evidence Sears' newspaper proofs, pre-prints and flyers in order to rebut the third week of May advertising and promotions testimony.

(iv) The procedural objection

[170] Sears argued that before delivering the rebuttal will-say statement, which was in substance an amended will-say statement of the competition law officer, the Commissioner was obliged to bring a motion for leave to amend her disclosure statement. It was argued that, as the respondent, Sears puts in its case on the basis of the evidence adduced by the Commissioner as disclosed in her disclosure statement and in her rebuttal expert reports. Sears had adduced the bulk of its lay and expert evidence before it learned that the Commissioner sought to adduce rebuttal fact evidence. Requiring the Commissioner to move to amend her disclosure statement in this circumstance was said to be in accordance with the regulatory objectives of the Tribunal's rules, particularly the objective that the Commissioner's investigation be completed and her case be in final form at the time her application is filed with the Tribunal and the objective that the issues be clearly defined at the outset by having them set out in the parties' respective disclosure statements.

[171] In my view, the Commissioner was not obliged to move to amend her disclosure statement in order to adduce non-expert rebuttal evidence. The obligation of the Commissioner to file a disclosure statement is contained in section 4.1 of the *Competition Tribunal Rules*, SOR/94-290 which is as follows:

4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).

(2) The disclosure statement shall set out

(a) a list of the records on which the Commissioner intends to rely;

(b) the will-say statements of non-expert witnesses; and

(c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.

(3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).

(4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make

4.1 (1) Dans les quatorze jours suivant le dépôt de l'avis de demande autre qu'une demande d'ordonnance provisoire, le commissaire signifie la déclaration visée au paragraphe (2) à chacune des personnes contre lesquelles l'ordonnance est demandée.

(2) La déclaration relative à la communication de renseignements comporte :

a) la liste des documents sur lesquels le commissaire entend se fonder;

b) un sommaire de la déposition des témoins non experts;

c) un exposé concis de la théorie économique à l'appui de la demande, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.

(3) Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande.

copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.

(4) Le commissaire doit permettre à la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue.

[172] The obligation to apply for leave to amend the Commissioner's disclosure statement is contained in subsection 4.1(3) of the *Competition Tribunal Rules* which provides that leave shall be sought where "new information that is relevant to the issues in the application arises before the hearing" [underlining added].

[173] The parallel obligation upon a respondent to file a disclosure statement is contained in section 5.1 of the *Competition Tribunal Rules*, which similarly provides that the obligation to apply for leave to amend the disclosure statement arises when new information arises before the hearing.

[174] Together, these rules function to ensure that, prior to the commencement of the hearing, each side knows both the documents and the factual, non-expert testimony upon which the opposite side intends to rely. Section 47 of the *Competition Tribunal Rules* operates to ensure that, prior to the commencement of the hearing, each side knows the expert testimony the opposite party intends to rely upon, including any expert rebuttal evidence.

[175] With respect to non-expert rebuttal evidence, as discussed in more detail below, as a matter of law an applicant may only call rebuttal evidence after completion of the respondent's case where the respondent has raised some new matter which the applicant had no opportunity to deal with and which the applicant could not reasonably have anticipated. The fact that the need for rebuttal evidence becomes apparent only after the Commissioner has closed her case makes it inappropriate, in my view, to require amendment of the applicant Commissioner's disclosure statement.

[176] Instead, in my view, the right of the Commissioner to adduce rebuttal evidence is properly governed by application of the common-law rules governing rebuttal evidence.

[177] Further, in the present case the Tribunal's direction that the Commissioner serve Sears with a rebuttal will-say statement prior to Sears closing its case prevented any element of improper surprise or prejudice to Sears. In my view it does not follow, however, that in another case the failure to provide such a will-say statement on a timely basis would, by itself, preclude calling what would otherwise be proper rebuttal evidence.

(v) Applicable principles of law with respect to rebuttal evidence

[178] The general principles applicable to rebuttal evidence were set out by Mr. Justice McIntyre for the Supreme Court of Canada in *R. v. Krause*, [1986] 2 S.C.R. 466 at paragraphs 15, 16 and 17. There, Mr. Justice McIntyre wrote:

> 15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see R. v. Bruno (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd., [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page 74] the full case for the Crown so that it is known from the outset what must be met in response.
>
> 16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.
>
> 17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed. [underlining added]

[179] In *Halford v. Seed Hawk Inc.*, 2003 FCT 141; 24 C.P.R. (4th) 220 Mr. Justice Pelletier, then sitting in what was the Trial Division of the Federal Court, re-stated the principles governing the admissibility of rebuttal evidence. At paragraph 16, Mr. Justice Pelletier noted that evidence, which otherwise would be excluded because it should have been led as part of a plaintiff's case in chief, would nonetheless be examined in order to determine if it should be admitted in the exercise of the judge's discretion.

[180] Similarly, in *DRG v. Datafile Ltd.* (1987), 16 C.P.R. (3d) 155 (F.C.T.) Mr. Justice McNair observed that a judge has discretion to admit further confirmatory evidence in rebuttal either for the judge's own enlightenment or where the interests of justice require it.

(vi) Proposed rebuttal of the timing explanation

[181] Turning to the application of these principles to the proposed evidence, the nature of the proposed rebuttal evidence with respect to the timing explanation did not purport to contradict Mr. Cathcart's evidence that there was an issue in the last half of 1999 with respect to the availability of Michelin tires in an 80 aspect ratio size. Nor did it directly contradict his evidence that in the last quarter of 1999 there were labour issues which prevented Sears from receiving a promotional shipment. Rather, the Commissioner sought to adduce evidence with respect to the frequency with which RoadHandler T Plus and Weatherwise tires were on sale in the first two quarters of 1999 in order to attack Mr. Cathcart's conclusion that, in the last half of 1999, those tires were offered at sale prices for more than 50 per cent of the time because of the 80 aspect ratio size issue and the labour issues.

[182] With respect to the length of time tires were offered at sale prices, it is an essential element of the Commissioner's case to establish that Sears did not offer the Tires at the regular single unit price in good faith for substantial period of time recently before or immediately after making the representations in issue. The parties substantially agreed about the volume of tires sold by Sears both in the six months preceding the representations and in the 12 months preceding the representations. As part of her case the Commissioner adduced evidence (see for example Exhibits A-97 and CA98 - 102) with respect to the period of time each relevant tire was on sale.

[183] The evidence which the Commissioner wished to adduce in rebuttal was described by counsel for the Commissioner as an analysis of that data. Counsel further advised that there was "admittedly some overlap between what is on the record" and the proposed evidence, but stated that there "is added value [in the rebuttal evidence] in the sense that it explains and articulates in greater detail, significantly greater detail, what is, in a sense, beneath the documents that are now [in evidence]". Counsel for the Commissioner also noted that more evidence had not been adduced by the Commissioner in chief because of the agreement between the parties as to the volume of tires sold and the times the Tires were on promotion.

[184] In my view, the nature of the evidence which the Commissioner proposed to call to rebut the timing explanation is the type of evidence which should not be permitted as rebuttal evidence. When calling evidence in chief, the Commissioner was obliged to exhaust her evidence with respect to the length of time that the Tires were offered at sale prices. She ought not split her case by relying on some evidence with respect to when the Tires were on sale and closing her case, and then after Sears adduces evidence, seek to introduce further evidence confirming the time the Tires were offered for sale at sale prices.

[185] To the extent that there is, or may be, a discretion to allow confirmatory evidence in rebuttal, there is one significant factor which militates against the exercise of such discretion. That factor is the failure of the Commissioner to cross-examine Mr. Cathcart upon the evidence which the Commissioner sought to rebut. If the Commissioner sought to contradict Mr. Cathcart's testimony, fairness required that he be cross-examined on his testimony so that he could provide any available explanation.

(vii) Proposed rebuttal of the third week of May advertising and promotions testimony

[186] The representations at issue in this application were made in November and December of 1999. Whether two lines of tires were promoted as being on sale only in Alberta and British Columbia in the third week of May of 1999 is relevant to the issue of the appropriate geographic market. As noted below, the Commissioner asserts that Sears marketed its tires nationally, while Sears asserts that it marketed tires in local, geographic markets.

[187] In its pleading, Sears asserts that:

> 56. Sears Automotive distributed various advertising and promotional material to its customers with respect to the supply of the Tires in the local geographic market areas in which Sears Automotive Retail Centres competed during the Relevant Period.
>
> 57. Generally, there were no regional variations in the advertisements that Sears Automotive disseminated in both national and local newspapers across Canada during the Relevant Period with respect to the Tires.
>
> [...]
>
> 59. Sears Automotive offered the Tires for sale at the same prices in each specific market area in which a Retail Automotive Centre competed.

[188] I am satisfied that, on the state of its pleading where Sears admitted that generally there were no regional variations in its advertisements, it was not incumbent upon the Commissioner to lead evidence as part of her own case with respect to the advertisement and promotion of two specific lines of tires in the third week of May, 1999. Further, the Commissioner argued, and Sears did not dispute, that there was nothing in the will-say statement of Mr. Cathcart to suggest that the Commissioner ought to have reasonably anticipated that the advertising and promotion of two lines of tires in the third week of May would be disputatious. Thus, subject to one concern addressed in the next paragraph, I was satisfied that rebuttal evidence ought to be received on this issue in order to ensure that, at the end of the hearing, each party would have the same opportunity to hear and respond to the full case of the other.

[189] The one remaining concern arose from the failure of the Commissioner to cross-examine Mr. Cathcart upon his evidence that the two specific tire lines were only advertised on sale in

Alberta and British Columbia and that different promotions were offered during that week. This concern arose because the rule in *Browne v. Dunn* (1893), 6 R 67 at pages 70-71 requires that where a party intends to contradict an opponent's witness by presenting contradictory evidence, such evidence should be put to the witness. It is unfair to a witness for a court or tribunal to receive evidence that casts doubt on his or her veracity when the witness has not been given an opportunity to deal with the contradictory evidence and offer any explanation. Requiring that a witness be challenged with contradictory evidence also assists the trier of fact in the process of weighing the evidence.

[190] I have no doubt that the Commissioner ought to have put the newspaper proofs, pre-prints and flyers she sought leave to adduce as rebuttal evidence to Mr. Cathcart when he was cross-examined.

[191] Notwithstanding, the failure to comply with the rule in *Browne v. Dunn* is not necessarily determinative of the right to tender contradictory evidence. The extent and manner to which the rule is applied is to be determined by the trier of fact in light of all of the circumstances. See, for example, *Palmer v. R.*, [1980] 1 S.C.R. 759 at pp. 781-72.

[192] In the present case, the circumstances which I considered to be significant with respect to this rebuttal evidence are the nature of the rebuttal evidence (Sears' own advertising material) and the fact that the documents were disclosed in both parties' disclosure statements. In my view allowing Sears' own advertising documents, previously disclosed in this proceeding, to be tendered would not be prejudicial to Sears, would clarify testimony which was somewhat unclear, and would be in the interests of justice.

[193] For these reasons, the Commissioner was permitted to introduce into evidence the newspaper proofs, pre-prints and flyers relating to the third week of May, 1999.

VII. ANALYSIS OF THE ISSUES

[194] As discussed above, subsection 74.01(3) of the Act specifies two factors to be considered when applying the volume and the time tests. Therefore, before considering whether Sears' regular prices for the Tires were offered in good faith as required by the time test, one must consider the nature of the product and the relevant geographic market.

VIII. THE NATURE OF THE PRODUCT

[195] The Commissioner argues that the Tires have certain characteristics that are relevant to the analysis under subsection 74.01(3). Those characteristics are said to be:

i) Almost all tires are sold in multiples.

ii) Tire sales are fairly stable over time.

iii) Consumers do not spend much time searching for tires or evaluating alternative products.

iv) Consumers have a limited ability to evaluate the intrinsic qualities of tires.

v) Consumers engage in a passive search over time for tires.

[196] Each factor will be considered in turn.

(i) How tires are sold

[197] Tires are complementary goods in the sense that, for passenger cars, one tire must be used with three others. The following, in my view uncontroversial, facts flow from this:

- Tires are typically purchased in pairs, either one pair or two pairs at a time.
  Mr. DesRosiers expert report, paragraph 13
  Mr. Gauthier expert report, paragraph 38

- Survey data showed that in 1999, 89% of consumers purchased either two or four tires at the same time.
  Mr. DesRosiers expert report, paragraph 13

- Within the tire industry, at most, between 5% and 10% of tires are sold singly.
  Mr. Gauthier expert report, paragraph 38

- In 1999, Sears knew that it would sell between 5% and 10% of the Tires as single units.
  Mr. Cathcart, volume 14 at page 2486

- Consumers purchase a single tire for reasons that include tire failure (due to blow out, road hazard or defect) and the replacement of a space saver (or dummy) spare tire.
  Mr. DesRosiers expert report, paragraph 15
  Mr. McKenna, volume 19 page 3055
  Mr. Merkley, volume 10 page 1713

- Consumers who purchase single tires are typically constrained to purchase a model of tire that matches the tire which is on the same axle because, for safe handling, it is important to maintain the same traction capability on the axle.
  Dr. Lichtenstein expert report, paragraph 17
  Mr. Gauthier expert report, paragraph 38

- Where a tire is to be replaced due to a blow out or other damage, there may be a sense of urgency about replacing the tire.
  Mr. McKenna, volume 19, page 3055
  Dr. Lichtenstein expert report, paragraph 17.

(ii) Are tire sales stable over time?

[198] Dr. Lichtenstein testified that:

- by their nature, sales of "all-season" tires (such as those at issue) are less sensitive to seasonal variation.
  expert report paragraph 21

- tires are not a product category which people typically buy in advance to stockpile.
  expert report paragraphs 18 and 19

- while a sale price may pull a consumer into the market sooner than they would otherwise enter the market, a sale price will not lead to increased tire consumption.
  expert report paragraphs 18 and 19.

[199] This evidence was essentially unchallenged and I accept it.

[200] At the same time, as Dr. Lichtenstein acknowledged, there is an increase in tire sales in the Spring and Fall seasons. Mr. McKenna described this as a moderate increase in March, April and May, and a more dramatic shift in October and November.

[201] Mr. Winter also described a distinctive seasonal pattern based upon his analysis of Sears' retail daily tire sales data and from an analysis of a monthly retail trade survey conducted by Statistics Canada. It is important to note, however, that Mr. Winter's analysis of Sears' daily tire sales data included data with respect to the sale of winter tires, and that the Statistics Canada survey was based upon sales of tires, batteries, parts and accessories. Mr. Winter agreed that the sale of winter tires is more seasonal and he did not know if batteries exhibit a seasonal selling pattern. In consequence, while I accept Mr. Winter's evidence generally that tire sales increase in the Spring and Fall, I am concerned that his conclusion as to the magnitude of the fluctuation is flawed because it included data related to winter tires and non-tire products.

[202] On the whole, from all of this, I find that the sales of all-season tires are relatively stable

and predictable, with some predictable seasonal pattern.

(iii) Do consumers spend much time searching for tires or evaluating alternate products?

[203] In asserting that consumers do not spend much time searching for tires or evaluating alternatives, the Commissioner relies upon the evidence of Dr. Lichtenstein. Dr. Lichtenstein testified that consumers spend different amounts of time and effort searching for products, considering brand alternatives and comparing prices, depending on the nature of the item to be purchased. He said that items described as "convenience goods" are found at one end of a continuum and their purchases involve relatively little investigation. The purchase of "specialty goods", which are found at the other end of the continuum, involves a great deal of investigation. He describes tires as "shopping goods" and says that they fall at the mid-point of the continuum. This means, in his opinion, that many consumers of "shopping goods" have a pre-disposition for low levels of search and effort which means that a large number of consumers are not vigilant shoppers even when the shopping goods are expensive.

[204] Sears rejects this opinion and asserts that the best evidence on this point is that of Mr. DesRosiers and Dr. Deal. In Mr. DesRosiers' opinion, there is a significant opportunity for consumers to shop around for tire replacements. From August 27, 2003 to September 3, 2003, Dr. Deal surveyed Sears' customers who bought new replacement tires from Sears in 1999 in order to: survey their behaviour when buying tires in 1999 from Sears and when buying tires in general; determine their attitude toward purchasing tires; and, assess their perception of value of the 1999 tire purchases, their satisfaction with their purchases and their intention to consider Sears for future tire purchases. Dr. Deal's survey found that 57% of survey respondents said that they compared tire prices prior to purchasing their tires at Sears.

[205] I do not find Mr. DesRosiers' evidence to be of assistance on this point because the research he relied upon did not examine whether consumers actually exercised any opportunity available to them to shop around.

[206] When I compare the evidence of Drs. Lichtenstein and Deal, I am not satisfied that their evidence is that divergent. Dr. Lichtenstein does not quantify the proportion of consumers who, in his view, engage in a low level of search effort for goods such as tires. Dr. Deal's study would suggest that 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears.

[207] Dr. Deal's study results must, in my view, be approached with some caution for the following reasons. At the time Dr. Deal conducted his survey and swore his first expert affidavit, he believed that the persons surveyed were selected from among all the persons who bought the Tires in 1999. Put another way, the target population intended to be surveyed was consumers from all 67 Sears Retail Automotive Centres and Dr. Deal assumed that he had received data from all or almost all of the centres. By "all or almost all" of the centres, Dr. Deal

believed he had received data from 90 to 95% of the Sears stores that sold the Tires. Dr. Deal later became aware that he had only received data from the 28 stores that kept electronic records. Thus, the survey was not based upon a random probability sample of purchasers from all 67 Retail Automotive Centres.

[208] Dr. Deal agreed that results based upon non-probability sampling were less generalizable to the parent population but observed that sometimes one does obtain an accurate representation of the target population even when one does not abide by the strict rules of statistical inference and takes a non-random sample.

[209] In the present case, Dr. Deal did not undertake a formal analysis to determine whether the customers from the 28 stores were similar to or different from the customers of the other 39 stores (although such an analysis could have been performed). In his view, based upon a large number of other surveys he has done, there would not likely be significant differences between the customers. Thus, while, pursuant to principles of statistics, his survey would have to be limited to be representative of Sears' customers who bought tires in 1999 from the 28 stores for which he received records, in Dr. Deal's view, the findings between the 28 stores and the other 39 stores would not be significantly different.

[210] Obviously, the fact that the data provided to Dr. Deal emanated from only 28 of the 67 stores (and not from all or almost all of the stores) impairs the ability of Dr. Deal to scientifically generalize the survey results. I accept, however, his general expertise to provide an opinion as to whether it was more or less likely that the survey results would have been different had consumers from all, or almost all, of the Sears stores that sold the Tires been included as part of the target sample.

[211] Thus, while I approach Dr. Deal's survey results with caution, and am prepared to accept that the overall accuracy of the survey's findings may not be accurate within plus or minus four percentage points in 19 out of 20 samples, I do generally accept Dr. Deal's conclusions.

[212] I am therefore satisfied by the evidence of Drs. Lichtenstein and Deal that a very significant percentage of consumers, in the order of 42% (plus or minus at least 4%), do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores.

(iv) Do consumers have a limited ability to evaluate the intrinsic qualities of tires?

[213] The intrinsic attributes of tires are their physical attributes such as tread pattern and tire construction. It was Dr. Lichtenstein's opinion that most consumers do not have the ability to evaluate the quality of tires based on their intrinsic attributes. His opinion was based upon his experience with consumers in their evaluation of attributes for many categories of infrequently purchased shopping goods. He believed that he could reasonably generalize that experience to tires. His opinion was also supported, in his view, by reference to the evidence of both

Mr. Cathcart (given during his examination conducted under section 12 of the Act) and Mr. McMahon (given in his affidavit filed pursuant to section 11 of the Act).

[214] Mr. McMahon explained in his affidavit how Sears set its prices for its private label and flag brand tires. Flag brand tires are tires made by a manufacturer whose name appears on the sidewall of the tire (for example, the BF Goodrich Plus). A private label tire does not show the name of the manufacturer, but only shows the trade name owned by the retailer (for example, Silverguard Ultra IV and Response RST Touring). A tire is dual branded when it bears both the name of the manufacturer and the retailer's private name (for example, Michelin Weatherwise and Michelin RoadHandler T Plus). In the context of describing how private label prices were set, Mr. McMahon swore that:

> 251. For example, Sears Automotive compared its "BF Goodrich Plus" Relevant Product with **[CONFIDENTIAL]** "**[CONFIDENTIAL]**" tire. The BF Goodrich Plus tire was superior to the **[CONFIDENTIAL]** tire, however, consumers tended not to perceive the inherent value of the BF Goodrich Plus tire when Sears Automotive's opening price point was more than **[CONFIDENTIAL]** for the inferior **[CONFIDENTIAL]** tire. As a result, Sears Automotive set the price for its BF Goodrich tire in such a manner that consumers would compare the value of that tire against the value of **[CONFIDENTIAL]** tire.

[215] During Mr. Cathcart's examination, he confirmed that what had happened with the BF Goodrich Plus was that, even though Sears perceived, and he believed, the tire to be a superior tire to the comparable Canadian Tire offering, consumers were unable to perceive the qualities that justified the greater price for the superior tire.

[216] Mr. Cathcart also diminished the importance of needing to refresh Sears' tire product line, stating that people would not stop shopping because Sears was selling the same lines of tires. In Mr. Cathcart's words, "In tires, it – – you know, they are black and they are round, and there is not a lot of exciting tires". This is consistent with the view that consumers have a limited ability to evaluate tire's intrinsic qualities.

[217] In my view, Sears did not seriously impeach Dr. Lichtenstein's opinion as to the ability of consumers to evaluate tire quality for money based on the intrinsic qualities of the tire. Supported as it was by the evidence of Messrs. McMahon and Cathcart where they referred to Sears' own experience that consumers were unable to appreciate the intrinsic qualities of a specific tire and therefore compare true value for money, I accept Dr. Lichtenstein's opinion that consumers have a limited ability to evaluate the intrinsic attributes of tires.

[218] Before leaving this point, I also note that Sears tendered as an exhibit its Fall 2000 Automotive Review. When describing Sears' private label or brand structure, the Review described the assortment as "A quality private Brand structure that is totally Sears, allowing little comparison with competitor product". For this to be true, Sears must have been of the view that consumers lack the ability to assess the intrinsic qualities of non-identical tires.

(v) Do consumers engage in a passive search over time for tires?

[219] Dr. Lichtenstein opined that tires are usually replaced only when a consumer's existing tires become worn so that, except for the case of the purchase of a single tire, the timing of new tire purchases occurs on a continuum based on when the benefit of new tires exceeds the cost of obtaining them. Dr. Lichtenstein further opined that as consumers notice that their tires are becoming worn, they would likely go into a passive search mode during which they more readily perceive tire advertisements and are on the lookout for a good deal on tires.

[220] This opinion was not challenged and I accept it.

IX. RELEVANT GEOGRAPHIC MARKET

[221] Subsection 74.01(3) requires the Tribunal to have regard to the relevant geographic market when applying the time and volume tests. While the Commissioner asserts that the relevant geographic market for assessing the representation is Canada, Sears argues that, in the retail tire business, competition occurs at the local level so that the geographic market should be defined on no more than a regional basis.

[222] In support of this argument, Sears relies upon the evidence of a number of witnesses that, in 1999, the Canadian after tire market was highly competitive, with various channels of distribution, and the competitive nature of the after tire market varied across the country. Sears also relies upon the expert opinion of Professor Trebilcock to the effect that markets are more appropriately determined by considering the alternatives available to consumers, or by adopting a demand-side perspective. By asking what range of choices any given consumer would consider he or she had available to them, Professor Trebilcock concluded that the relevant geographic market for tires is a local, regional market. The analysis that led to this conclusion was based upon: a review of regional newspaper advertising that showed that the list of tire retailers is very different from one city to the next; a review of yellow pages listings for tire retailers in different regions which showed that retailers differed radically from one market to another; the DesRosiers' tire market study which showed that independent tire retailers are the most common source of tires and those retailers varied dramatically from one local market to the next; and information from Bridgestone/Firestone and Michelin that shows that the top dealers to vary significantly from one region to the next. Thus, the question of "where can I go to buy tires" is answered differently from one local market to the next.

[223] In considering the interpretation to be given to the term "relevant geographic market", I begin from the premise that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21).

[224] I have previously found, at paragraph 93, that the objectives of subsection 74.01(3) are:

to protect consumers from deceptive OSP representations; to protect businesses from the anti-competitive effects of such misrepresentations; and to protect competition from the anti-competitive effects and inefficiencies that result from such misrepresentations. The provision is designed to effect those objectives on the basis that, if acting in good faith, meeting the time or volume test will bring retailer practices in line with consumer expectations that an advertised OSP would relate to the seller's own ordinary selling price. The time and volume tests are to be applied having regard to the relevant geographic market.

[225] In light of the objectives of the provision, it is relevant to look at where Sears marketed the Tires and how Sears marketed the Tires in that geographic area so as to inform the view of whether an advertised OSP was really Sears' ordinary selling price. Because this is a misleading advertising case in which it is Sears' conduct that is at issue, I do not find, with respect, that Professor Trebilcock's traditional competition law approach to the definition of geographic market is relevant.

[226] In the traditional competition law context, geographic markets are defined as part of a determination about whether there has been a substantial lessening of competition. Dr. Trebilcock agreed, on cross-examination, that the concept of substantial lessening of competition is not relevant to the assessment of whether a representation is misleading.

[227] Turning to Sears' own conduct, I find the following to be relevant to the determination of the relevant geographic market:

- Sears' regular and promotional prices were set on a national basis without regional variation;

- Sears' internal documents, particularly its Spring and Fall Automotive Reviews, contained no discussion relating to local markets. These reviews were produced twice a year in order to present Sears' marketing strategy and tire product line to Sears' Chief Executive Officer and other executive officers;

- Sears did not produce or distribute separate marketing and promotional material for each region (with the exception of material relating to snow tires);

- The representations in issue were contained in flyers that were distributed nationally, without regional variation;

- Sears published advertisements in newspapers and there was no regional variation in the advertisements, except with respect to snow tires. The advertisements were distributed nationally through different newspapers;

- Sears tracked its pre-print distribution rates on a national basis; it could not track pre-prints on a regional basis;

- Sears determined what tires to offer for sale in a Sears' pre-print based upon factors which included "the current market trends and consumer preferences in Canada with respect to the sale of tires" [underlining added];

- Mr. Cathcart created "checkerboards" to, among other things, monitor the frequency with which tires were on promotion. Those checkerboards tracked sales volumes and promotional periods on a national basis only.

[228] In light of that evidence as to how Sears priced and marketed the Tires, and, in particular, that the regular prices for the Tires were set and advertised on a national basis, I find that it is most appropriate to consider Sears' compliance with the time test in the context of a geographic market that is Canada.

[229] This was also the conclusion reached by Drs. Lichtenstein and Moorthy.

[230] Having considered the nature of the product and the relevant geographic market, I turn to consider whether Sears' regular prices for the Tires were offered in good faith as required by the time test.

X. GOOD FAITH AS REQUIRED BY THE TIME TEST

[231] The Commissioner observes that the Act does not define "good faith", there are no other provisions in the Act that use the phrase, and there is no Canadian jurisprudence that has considered the concept of "good faith" in the context of OSP representations. There is, however, Canadian jurisprudence, which the Commissioner relies upon, which has considered the meaning of "good faith" in other legislative contexts.

(i) The subjective nature of "good faith"

[232] In *Dorman Timber Ltd. v. British Columbia* (1997), 152 D.L.R. (4th) 271, the British Columbia Court of Appeal considered whether a Crown employee was exempt from civil liability by virtue of legislation which exempted liability "for anything done or omitted to be done by a person acting reasonably and in good faith" while discharging certain responsibilities. The British Columbia Court of Appeal noted that the leading Supreme Court of Canada authority was *Chaput v. Romain*, [1955] S.C.R. 834 where the Supreme Court considered a provision that immunized police officers from liability where the officer exceeds his powers or jurisdiction but acts "in good faith in the execution of his duty". Mr. Justice Taschereau defined "good faith" to be "a state of mind consisting of the false belief that one's actions are in accordance with the law". Six judges of the Court adopted this definition. Mr. Justice Kellock, with Mr. Justice Rand concurring, wrote at page 856 that:

> What is required in order to bring a defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in

> acting as he did.

[233] Having reviewed this jurisprudence, the British Columbia Court of Appeal concluded, at paragraph 69, that:

> 69 Kellock J.'s formulation clearly tends towards a subjective understanding of honest belief, but Taschereau J.'s formulation removes all doubt. There is good faith when there is "a state of mind" that the acts are authorized. Kellock J.'s reasons give content to what this "state of mind" is: a "belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did." As was noted in Hermann, the reasonableness of the belief is a factor to consider in determining whether the belief was honestly held, but reasonableness is not the issue.

[234] To similar effect is the recent decision of the Saskatchewan Court of Queen's Bench in *Nelson v. Saskatchewan* (2003), 235 Sask. R. 250 at paragraphs 102-109.

[235] The principle that good faith is inherently subjective is consistent with its dictionary definition. Blacks Law Dictionary, 7th edition (St. Paul, Minn.: West Pub. Co., 1979) defines good faith as follows:

> **good faith,** *n.* A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. - Also termed *bona fides*. - **good-faith,** *adj.* Cf. BAD FAITH.

[236] A subjective view of good faith is also consistent with American jurisprudence that has considered legislative provisions similar to subsection 74.01(3) of the Act. In *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 76 F. Supp. 2d 868 (N.D. Ill. 1999) the U.S. District Court had before it a regulatory provision that provided:

> It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, [...] unless one of the following criteria is met:
>
> > (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or
> >
> > (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in good faith, with an intent to sell the product at that price(s). [underlining added]

[237] The Court found that the defendant Finlay did not, in good faith, intend to sell the relevant products at the regular price because:

> Finlay made little if any sales of the items at regular price over the course of several years at its Rockford stores. Finlay was obviously not concerned with the lack of sales at regular price, and in

> fact, intentionally chose not to monitor information of the number of gold jewelry items sold on a given day and at what price. Finlay calculates the regular and sale prices of its gold jewelry simultaneously with the objective that when an item is sold at a 50% discount it will yield the desired gross margin. Finlay monitors only whether a store is meeting its gross margin goal.

[238] Implicit in that finding is that the existence of a good faith intent to sell product is determined subjectively.

[239] I conclude therefore that good faith is to be determined on a subjective basis. In this case, the question to be asked is whether Sears truly believed that its regular prices were genuine and *bona fide* prices, set with the expectation that the market would validate those regular prices. As noted by the Court in *Dorman*, *supra*, the reasonableness of a belief is a factor to be considered in determining whether a belief is honestly held. I therefore also accept that other external, objective factors such as whether the reference price was comparable to prices offered by other competitors, and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether Sears truly believed its regular prices were genuine and *bona fide*.

[240] I believe this conclusion to be consistent with the description found in the Commissioner's Guidelines concerning the assessment of good faith in the context of the time test.

[241] I also understand Sears generally to accept that good faith is subjective. In oral argument, counsel for Sears observed that:

> The bottom line is that the Competition Bureau's Guidelines, the Commissioner's Guidelines, tell us that the analysis of good faith is going to be broadly based and will have regard for market conditions, not only those things perhaps, but those things will certainly be part of the mix. And the reason for that, in my submission, is - - the reason for that approach, I think, is obvious. <u>If there is no direct evidence of a subjective belief or ambivalent evidence of a subjective belief, or unclear evidence of a subjective belief, the Court will obviously refer to objective factors, or extrinsic factors which constitute evidence or can constitute evidence of the reasonableness of a subjective belief.</u> [volume 30, page 4811 line 23 to page 4812 line 10, underlining added]

[242] Counsel for Sears framed the question to be determined as follows:

> The only issue, in our submission, for Your Honour to decide is whether Sears reasonably expected to sell single tires at its regular single tire price and whether [it set] those prices in an intelligent manner, having regard to the regular prices of similar tires in the marketplace.

[243] However, the latter part of counsel's formulation is more objective. Shortly thereafter, counsel for Sears argued:

> In our submission, at the end of the day a good faith regular price is one which is reasonably credible and by that I mean looked at through the eyes of a reasonable person, is

credible given market conditions and is recognized as such by the market. And we submit that the Sears regular price clearly meets this definition.

[244] Sears cited no jurisprudence relevant to determining the nature of good faith.

[245] I remain satisfied, however, inspite of Sears' submissions about the reasonable person, that good faith is to be assessed on a subjective basis. I now move to consider the relevant evidence.

(ii) Sears' internal documents

[246] The Commissioner placed into evidence a number of documents provided by Sears to the Commissioner in response to a section 11 order. Documents that are particularly relevant to the assessment of good faith are:

a) Sears' competitive profiles for each of the Tires in issue; and

b) Sears' Automotive Reviews for the Spring and Fall of 1999.

[247] Section 69 of the Act provides that:

69(1) In this section, "agent of a participant" means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

69(1) "participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

69(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received,

69(1) Les définitions qui suivent s'appliquent au présent article. «agent d'un participant» Personne qui, selon un document admis en preuve en application du présent article, paraît être, ou qui, aux termes d'une preuve dont elle fait autrement l'objet, est identifiée comme étant un fonctionnaire, un agent, un préposé, un employé ou un représentant d'un participant.
69(1) «participant» Toute personne contre laquelle des procédures ont été intentées en vertu de la présente loi et, dans le cas d'une poursuite, un accusé et toute personne qui, bien que non accusée, aurait, selon les termes de l'inculpation ou de l'acte d'accusation, été l'une des parties au complot ayant donné lieu à l'infraction imputée ou aurait autrement pris part ou concouru à cette infraction.
69(2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :
a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce

as the case may be, with the authority of that participant; and
(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
(i) that the participant had knowledge of the record and its contents,
(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant. [underlining added]

participant;

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :
(i) que le participant connaissait le document et son contenu,
(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,
(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant. [Le souligné est de moi.]

[248] Sears concedes that all of the elements of subsection 69(2) of the Act are met but argues, correctly, that section 69 creates a limited, and rebuttable presumption to be applied to its documents and, in the case of paragraph 69(2)(*c*), the reference to *prima facie* proof speaks to proof absent credible evidence to the contrary.

[249] I accept that, as submitted by Sears, it is for the Tribunal to interpret Sears' documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.

[250] This means, I believe, that Sears' documents tendered in evidence are properly before the Tribunal and are *prima facie* proof that Sears said, did and agreed to the matters set out in the documents. For example, to the extent the automotive review sets out marketing strategies prepared by Mr. Cathcart and Sears' tire buyer, Mr. Keith, to be presented to Sears' chief executive officer for approval or ratification, the document is *prima facie* proof that such strategies were agreed upon to be presented to Sears' chief executive officer and that the Spring and Fall 1999 automotive reviews set out Sears' assessment of its significant competition and its responsive marketing strategy.

[251] To further illustrate, the Commissioner relies upon the buying plans prepared by the late Stan Keith, Sears' tire buyer, for the relevant period. The Commissioner argues that the year

2000 buying plans, created on June 19, 2000, and based on 1999 data for the Tires, did not forecast any sales at Sears' regular prices.

[252] It is true that the documents appear to be premised on the assumption that (based upon 1999 sales data) 10% of the Tires in each tire line would be sold at the 2For price and 90% would be sold on promotion. However, the Tribunal received credible evidence from Mr. McKenna that touched upon the interpretation to be given to the buying plans.

[253] Mr. McKenna identified "R & P Reports" which reported upon the regular and promotional sales of each line of a tire by month for 1999. The documents were tendered and received as exhibit CR-133 without objection. Mr. McKenna advised that he would receive this type of report on a monthly basis, as would Mr. Keith. Reviewing exhibit CR-133, Mr. McKenna testified that the breakdown between regular sales and 2For sales on the one hand, and promotional sales on the other, was as follows:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
BF Goodrich Plus	20-25%	75-80%
Michelin RoadHandler T Plus	25%	75%

The R & P Reports (to the extent they are wholly legible) reflect the following percentages for the remaining three tire lines:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
Michelin Weatherwise	13%	87%
Response RST Touring	20%	80%
Silverguard Ultra IV	23%	77%

[254] Turning then to the buying plans relied upon by the Commissioner, Mr. McKenna testified that he considered the buying plans with Mr. Keith in 2000 and that they were prepared in June 2000 as Mr. Keith prepared for the Fall presentation to Sears' chief executive officer. The buying plans, according to Mr. McKenna, were used to generate a conservative estimate of margin because "Stanley certainly was not one to want to position himself on being unable to deliver so he wouldn't [...] pigeon-hole himself on promising or committing to a margin that he wouldn't be able to deliver".

[255] Considering Mr. McKenna's explanation of the purpose of the buying plans, supported by the "R & P Reports" that showed the buying plans not to be based upon actual prior sales data, I am satisfied that Sears has provided credible evidence to displace any *prima facie* proof

based upon the buying plans that Sears was not forecasting sales at its regular, single unit, prices.

(iii) The competitive profiles

[256] Mr. Keith was acknowledged within Sears as "the expert" with respect to the tire market in Canada and tire pricing. Mr. Cathcart acknowledged that Mr. Keith "most certainly" knew the tire market better than he did and that, arguably, Mr. Keith knew the tire market better than the manufacturer's representatives from whom he bought tires. As the tire buyer, Mr. Keith was responsible for building Sears' tire line structure and for, in the first instance, setting Sears' tire prices.

[257] One document prepared for each tire line was a "competitive profile" which compared, for each tire, Sears' pricing at the 2For, normal promotional and great item prices, with a competitive tire offering identified by Mr. Keith. No comparison was made in these competitive profiles to Sears regular prices. To illustrate, the competitive profile for the Silverguard Ultra IV compared it with Canadian Tire's Motomaster Touring LXR tire. For tire size P185/75R14, Canadian Tire's every day low price was $67.99. Sears' prices and the percentage comparisons with the competitive offering were as follows for this tire size:

Price		**Percentage price comparison to competitive tire**
Regular	$109.99	no comparison
2For	$ 72.99	107.35%
Promotional	$ 65.99	97.06%
Great Item	$ 59.99	88.23%

[258] The Commissioner argues that Mr. Keith created these competitive profiles as he built Sears' tire line structure and that they evinced Sears' competitive response to what it identified as its major competitor. Because Sears' regular, single unit, price formed no part of the competitive response, the Commissioner submits that Sears could not have in good faith believed that the market would validate its regular, single unit, prices.

[259] In response, Sears argues that the competitive profiles are contained in a document entitled "1999 Automotive Training Program" and that the program and the competitive profiles contained therein were prepared by Mr. Keith to explain to Sears' field associates Sears' tire lines and its pricing strategies. The competitive profiles were not intended to show how the regular price stood up against the broad range of retailers, but rather to show how Sears would respond to competition from both EDLP and hi-low retailers.

[260] I do not accept Sears' submission that the competitive profiles were simply training tools on the basis of this excerpt from the cross-examination of Mr. Cathcart wherein he was speaking about the competitive profiles:

> We have some comparisons where he has shown the AW+ to a Sears brand, and he would

compare. The comparison was built to inform the associates how to respond to the Canadian Tire pricing.

So he would pick a Canadian Tire tire - - he could use one of their tires - - as a compare to say we are at this price in our tire, with a far better warranty package. And this is what Canadian Tire will be offering for the tire that closely resembles our tire.

These documents were his documents that he used as a response to our field people to inform them on how to respond to the competition, be it Canadian Tire, be it dealers, whomever.

He would never reference regular price in them, because they already knew the regular prices. They would have that information.

2:30 p.m.

MR. SYME: So is it your evidence, sir, that these were prepared solely to take on training missions, these cross-Canada training missions?

MR. CATHCART: Well, they are his documents, Mr. Syme. I recall them being in this cross-country package, but Stan - - Stan would create these documents as part of his own comparer during his line structure building and he would use these documents as part of the training package.

He would take those - - he would build these documents as he would build his lines because we would have to have - - he would have to have some sort of strategy in response to what the competition is doing. Canadian Tire, by sheer volumes, was our largest competitor - -

MR. SYME: Right.

MR. CATHCART: - - so he would build them for that. He would take them on the training mission, but I can't for sure say - - no, I would say he didn't build them specifically just for that reason.

MR. SYME: He built them as a competitive analysis to position Sears pricing and Sears product opposite the comparable Canadian Tire product. I think you have just said it.

MR. CATHCART: Right. He would build it to compare our product to Canadian Tire's product, but we know the pricing - - and the pricing would reflect that.

MR. SYME: Right. And he would come to you with a proposal with respect to a tire and he would show you these profiles, wouldn't he?

MR. CATHCART: Not usually. He would just provide me with the buying plan.

[underlining added]

[261] From this, I conclude that the competitive profiles were used by Mr. Keith when building Sears' tire line structure. At the least, the competitive profiles indicate Sears' knowledge that:

i) With respect to the BF Goodrich Plus, Silverguard Ultra IV, and RST Touring 2000 (which were compared with competitive Canadian Tire offerings), the regular price was not competitive

with the prices of Sears' largest competitor; and

ii) With respect to the Weatherwise and RoadHandler T Plus, the regular price was not competitive with the comparable competitive offerings selected by Mr. Keith.

[262] I also note, in passing, that the competitive profiles for the two tires manufactured by Michelin were in its possession and were produced in response to a section 11 order. The competitive profiles were produced as being documentation exchanged with Sears in relation to the development and establishment of retail prices. This, in my view, lends credence to the conclusion that the competitive profiles were strategic, competitive documents.

[263] Sears' beliefs about the nature of its competition and its competitive response are more clearly found in the Spring and Fall Automotive Reviews for 1999.

(iv) Automotive reviews

[264] The 1999 automotive reviews were prepared by Mr. Keith and Mr. Vince Power, the national business manager, for the purpose of presenting, twice yearly, Sears' strategies and product line to Sears' chief executive officer. In Mr. Cathcart's words:

> "Basically this whole communication to the CEO was to detail [...] what we were going to introduce as new commodities possibly and how we were going to address the competition".

[265] Contained in the Spring 1999 review were separate strategies for private label tires and national brand tires. Identical wording is found in the Fall 1999 review with respect to the strategies. Oral evidence confirmed that the reviews were presented to Sears' executives. There was no evidence that the strategies contained in the reviews were rejected.

[266] Sears argues that the Commissioner's reliance upon the 1999 automotive reviews is misplaced and points to Mr. Cathcart's evidence that he found more than one portion of the reviews to be confusing, and that, in places, he could not understand why Mr. Keith wrote what he did.

[267] I found such testimony to be incredible and unpersuasive when it was given, and remain unpersuaded by Mr. Cathcart's testimony as it touched on the automotive reviews for 1999. I so conclude because it is to be remembered that the automotive reviews formed part of a large and important presentation to Sears' chief executive officer (and others) about how Sears was to address the competition. In the past, some who had made presentations to the chief executive officer were summarily reassigned or let go if their presentations were found wanting. Mr. Keith was acknowledged to have a compendious knowledge of the tire market. Language contained in the Spring 1999 automotive review was repeated in the Fall 1999 automotive review. Weighing those facts against Mr. Cathcart's testimony that certain aspects of the automotive reviews were

confusing or incomprehensible, I reject Mr. Cathcart's testimony. I accept, as discussed below, that the 1999 automotive reviews set out Sears' assessment of its significant competition in the tire market and Sears' responsive marketing strategies for private label tires and national brand tires.

[268] I will deal first with Sears' strategy with respect to private label tires.

(a) Private label strategy

[269] Sears' strategy was expressed to be:

> "To increase our market share in Private Brand tires which represents almost 50% of the replacement tires sales in Canada. To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

[270] Among the tactics listed to implement this strategy was the following:

> "Index our every day pricing to **[CONFIDENTIAL]** (**[CONFIDENTIAL]** Private Brand retailer) to be equal to or within **[CONFIDENTIAL]** % of their every day low price with a better warranty package. On sale we will be lower than the equivalent tire at **[CONFIDENTIAL]**."

[271] **[CONFIDENTIAL]**, the competitive profiles built by Mr. Keith for the Silverguard Ultra IV and Response RST Touring compared each with Canadian Tire's comparable competitive offering. So too did the competitive profile for the BF Goodrich Plus. This was an entry-level tire, exclusive to Sears, that Mr. Keith compared to the Motomaster AW+. I accept, therefore, that while the BF Goodrich Plus was a flag brand tire, Sears chose internally to market it as if it were a private label tire.

[272] Mr. Cathcart admitted that Sears' "every day" strategy (**[CONFIDENTIAL]**) involved its 2For price, and not its regular price, because Sears' regular price was not competitive with Canadian Tire. Sears' 2For price was generally within 10% of Canadian Tire's pricing. Mr. Cathcart also confirmed that the "plan to sell price" referred to in the automotive review (for example at pages 1485-1488 and at page 1493) was the 2For price.

(b) National brand strategy

[273] The national brand strategy was expressed as follows:

> "To increase our market share in National Brands which represents over 50% of the Canadian replacement tire sales.
>
> To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

[274] The tactics to implement this strategy included:

> "Continue to index our every day pricing to be 90 to 95% of the equivalent National Brand normal discounted price. When on sale indexed to be **[CONFIDENTIAL]** to **[CONFIDENTIAL]** % of the National Brand price. In the case of **[CONFIDENTIAL]** [**[CONFIDENTIAL]**] equivalent items we will match price".

[275] Mr. Cathcart admitted that:

- Sears' dual branded tires (including the Weatherwise and RoadHandler T Plus) were marketed under the national brand strategy;
- the competitive profiles for each of these tires reflect the national brand strategy in terms of pricing;
- Sears' regular prices were close to or lower than the relevant manufacturer's suggested list price ("MSLP");
- with respect to the competitive profile for the Weatherwise that referenced the competitive offering to be the Michelin RainForce MXA and that showed a comparison price described as "35% off list 9/1/97": Sears' regular prices for tire size P155/80R13 would be in the order of 147.92% of the comparison price; and
- the 2For price was 95.53% of the comparison price. Thus the 2For price was how Sears responded to a dealer who was selling at 35% off the MSLP.

(c) Sears' view of the pricing structure of its competitors

[276] Mr. Keith, in the automotive review, described the pricing structure of Canadian Tire and the independent tire stores as follows:

Canadian Tire:	"Value priced every day with occasional off price promos"
Tire Stores:	"Value priced off list with off price promo and gimmick promos"

[277] Sears' pricing strategy was described in the same document to be "**[CONFIDENTIAL]**".

(d) The MSLP

[278] Sears relies heavily upon the existence of MSLPs as constituting an objective, independent mechanism to verify the *bona fides* of its regular prices for the Michelin Weatherwise, Michelin RoadHandler T Plus, and the BF Goodrich Plus tire. However, on the basis of the following evidence, I find as a fact that, in 1999, MSLPs were not widely or commonly used by tire dealers as their regular selling price.

[279] First, Mr. Gauthier testified that:

- tire retailers set their own prices in the marketplace and, based on his experience, they tended to establish this price as a percentage of the MSLP;
- dealer prices so set represented a typical everyday selling price;
- tire retail selling prices in 1999 were not at the list price level;
- MSLPs were used to establish the tire dealer's acquisition price from the manufacturer and then by the dealer to set the dealer's retail price;
- in his experience, transactions did not occur at or close to MSLP.

[280] Second, Mr. King testified that:

- the MSLP would serve as the starting point, or the starting price, that independent tire retailers would use in selling tires to individual consumers;
- in 1999, dealers typically sold for 35% off list;
- that 35% discount was arrived at either because it was the dealer's offering price or because it was the finally negotiated price;
- to his knowledge, tires were not sold to consumers at MSLP.

[281] Third, Mr. Merkley testified that:

- various dealers would use the MSLP in different ways;
- in 1999 the norm, within Michelin's dealer channel, was to sell tires 30% to 35% off Michelin's list price.

[282] Fourth, as noted above, in the Spring Automotive Review Mr. Keith described the pricing strategy of "Tire Stores" to be "Value priced off list with off price promo and gimmick promotions". The competitive profile for the Weatherwise tire compared that tire with the Michelin RainForce at a price described to be "35% off list 9/1/97" and the competitive profile for the RoadHandler T Plus compared that tire with the Michelin X One at a price described to be "New List less disc 40%". Mr. Cathcart confirmed these references to "list" in the competitive profiles to be to Michelin's MSLP. I take the Spring Automotive Review to evidence Mr. Keith's knowledge or belief that tire stores generally sold tires at a percentage off the MSLP. For the two Michelin tires it would appear that Sears' pricing, to be competitive, must compete with pricing 35% and 40% off Michelin's MSLP.

[283] Professor Trebilcock's expert report sheds some light on the use of the MSLP by tire dealers as well. At paragraph 37, he notes that:

> The *Toronto Star* article also suggests that discounting off the manufacturers' suggested retail prices was common practice in tire retailing. The retailers referred to in the *Toronto Star* article discounted off manufacturers' suggested retail prices by about 30-35%.

[284] Professor Trebilcock also appends to his expert report an article dated January 17, 2000 written by Chris Collins and published in "Tire Business". The article quoted the following statement by John Goodwin, the Executive Director of the Ontario Tire Dealers Association ("OTDA"):

> Mr. Goodwin said the OTDA has a committee investigating the ads auto makers and mass merchandisers are running. Some ads claim to sell tires at 50 percent off list price, but he asks rhetorically, "Who sells at list?"

[285] In my view, the weight of the evidence leads to the conclusion that MSLPs were not commonly used by tire dealers as a selling price, and that in 1999, tire dealers typically sold national brand tires at a price in the order of 35% off the MSLP.

[286] Sears argues that Mr. King's evidence should be discounted because neither he nor his employer sold tires at the retail level so that his evidence is "anecdotal at best". Mr. Gauthier's evidence is also discounted by Sears as being "anecdotal, overly broad, unsubstantiated and [...] not credible". Sears also argues that Mr. Gauthier is not truly an independent expert and, in oral argument, took great exception to his evidence, on cross-examination, that he disagreed with Mr. Winter when Mr. Winter concluded that Canadian Tire did not dominate the marketplace. In Mr. Gauthier's view, Canadian Tire is the dominant influence in the tire market in Canada.

[287] I have previously described, generally, the background of these gentlemen in the tire industry. Mr. Gauthier has extensive experience dating since 1984 with respect to the promotion and wholesale sale of tires to tire retailers and I reject the suggestion that his testimony was partial or biased. Mr. King has two years of experience as Bridgestone's sales manager for associate brands and, since 1999, he has worked as its sales manager for Corporate Accounts and

Original Equipment. He was responsible for the sale of tires to merchandisers such as Sears, Canadian Tire and Costco. In my view, their knowledge of the use dealers make of an MSLP can not be dismissed as anecdotal. Their evidence is confirmed to a significant extent by Mr. Merkley, and by Mr. Keith's description of the manner in which tire dealers priced tires and by the use he made of the MSLP in the two competitive profiles referred to above.

[288] To the extent it was argued that Mr. Gauthier's view that Canadian Tire was the dominant influence in the tire market was not credible, I note that, at paragraph 83 of Sears' responding statement of grounds and material facts, Sears asserted that "Canadian Tire was a dominant tire retailer in Canada (enjoying approximately a twenty-two per cent share of tire sales in Canada during the Relevant Period)".

(v) Conclusion: Good faith - private label tires

[289] Did Sears truly believe that its regular price for the Silverguard Ultra IV, Response RST Touring and BF Goodrich tires were genuine and *bona fide* prices set with the expectation that the market would validate them? The following evidence touches on Sears' belief:

i) Mr. Cathcart admitted that, going into 1999, Sears would have expected that it would only sell between 5 and 10% of the Tires at their regular price. This was because between 90 to 95% of the Tires would be sold as multiples. This made the regular price irrelevant to 90 to 95% of the Tires Sears expected to sell because, when a tire was not on promotion, a purchaser would be offered, without requesting it, the 2For price.

ii) Sears viewed Canadian Tire as its main competitor in the private label segment. The competitive profiles prepared for these three tires only compared Sears' 2For, normal promotional and great item pricing to the Canadian Tire pricing. Sears' regular price was known not to be competitive with Canadian Tire and fell well outside the range of price which Sears believed to be competitive with its main competitor in the private label market.

iii) Sears' 2For prices were described as its "every day pricing" in Sears' private label strategy. The Sears regular price was not.

iv) Sears did not and could not track the number of tires it sold at the regular price.

v) With respect to the 5 to 10% of tires that Sears expected to sell singly, if the distribution of single unit tire sales was constant over time, Sears could expect to sell a percentage of single tires on promotion equal to the percentage of time the Tires were offered on promotion. For example, if a tire was on sale 25% of the time, Sears could expect 25% of the single tires to be sold at a promotional price.

For the six month period preceding the representations at issue, the following tires were offered for sale at regular single unit prices for the indicated percentage of time:

Response RST Touring	46%
Silverguard Ultra IV	60%
BF Goodrich Plus	45%

Thus, Sears could only have expected to sell the following:

Response RST Touring	between 2.3 and 4.6% at its regular price
Silverguard Ultra IV	between 3 and 6% at its regular price
BF Goodrich Plus	between 2.25 and 4.5% at its regular price.

[290] On the basis of that evidence, I find that Sears could not have truly believed that its regular prices for the Response RST Touring, Silverguard Ultra IV, and BF Goodrich Plus tires were genuine and *bona fide* prices that the market would validate.

[291] Turning to the objective factor of actual sales at their regular prices, for each of these three tires respectively, for the 12 month period preceding the representations at issue, only 0.51%, 1.21% and 2.29% of the Tires sold were sold at their regular prices.

[292] On the whole of the evidence, I find that Sears' private label tires were not offered for sale at Sears' regular prices in good faith.

(vi) Conclusion: Good faith - national brands

[293] Did Sears truly believe that the regular prices for the Michelin Weatherwise and RoadHandler T Plus were genuine *bona fide* prices set with the expectation that the market would validate them? The following is relevant evidence:

i) Again, 90 to 95% of these tires were expected to be sold as multiples and so the regular price would be expected to be irrelevant to 90 to 95% of these tires sold by Sears.

ii) I have found that, in 1999, flag brand tires were typically being sold by tire dealers at 35% off the MSLP and were not generally being sold at list price. Sears knew this, as evidenced by Mr. Keith's description of tire store pricing. Sears' competitive pricing was its 2For price which was referred to as its "every day pricing" in its national brand strategy. Sears' regular prices were greatly in excess of what it knew to be the competitive price range.

iii) Sears did not and could not track the number of tires it sold at the regular price.

iv) In the six month period preceding the representations at issue, the Weatherwise and RoadHandler T Plus tires were offered for sale at their regular prices respectively at 19% and 38% of the time. It follows that, knowing that only 5 to 10% of the Tires would be sold singly, Sears could only have expected to sell (if single tire sales were constant over time)

- between 0.95 and 1.9% of the Weatherwise tire at its regular price
- between 1.9% and 3.8% of the RoadHandler T Plus at its regular price.

[294] On the basis of that evidence, I similarly find that Sears could not have truly believed that its regular prices for the Weatherwise and RoadHandler T Plus were genuine and *bona fide* prices that the market would validate.

[295] Turning again to actual sales, in the 12 month period preceding the representations, only 1.3% and 0.82% respectively of sales by Sears of the RoadHandler T Plus and the Weatherwise tire were made at their regular price.

[296] On the whole of the evidence I find that Sears' national brand tires were not offered for sale at Sears' regular prices in good faith.

(vii) The opposing view

[297] In concluding that neither Sears' private label nor national brand tires were offered for sale at Sears' regular prices in good faith, I have had regard to the expert evidence of Professor Trebilcock, noting that he was not qualified as an expert in marketing. It was his opinion that:

> The information available on regular prices in 1999 indicates that Sears' regular prices were similar to or less than the regular prices of some [not all] of its competitors for comparable tires. At least some of Sears' regular prices were also similar to or less than manufacturers' suggested retail prices for comparable tires. Such observations are not consistent with a claim that Sears' regular prices did not make economic sense.

[298] In Professor Trebilcock's view, comparison between Sears' regular prices and those of its competitors should include Sears' regular 2For prices. This is because the 2For price was always available on all multiple sales of regular priced tires; it was not a sale price.

[299] For the following reasons, I have not found Professor Trebilcock's opinion to be of assistance.

[300] To the extent Professor Trebilcock opined that Sears' regular prices were similar to or less than the regular prices of some, not all, of its competitors, he acknowledged that limited data was available. No data was available to him for either the Response RST Touring or the

Michelin RoadHandler Plus tires. For the other three tire lines at issue, for only one tire (the BF Goodrich Plus) was Sears' regular single unit price lower than that of its competitors. For both the Michelin Weatherwise and Silverguard Ultra IV, Sears' regular single unit prices were significantly higher than its competitors' prices for comparable tires (eg. for the Weatherwise, Sears' regular price of $181.99 compared to competitive offerings of $110, $98 and $99; for the Silverguard Ultra IV, Sears' regular price of $133.99 compared with a competitive offering of $105). The reference prices quoted by Professor Trebilcock were all prices that were discounted off the MSLP by 30% or more.

[301] Professor Trebilcock acknowledged that Canadian Tire's regular prices were consistently lower than Sears' regular prices, but referred to add-ons that Sears' included in its prices. However, he did not have any information that would allow him to quantify how much consumers might be prepared to pay for those add-ons.

[302] Professor Trebilcock concluded that Sears' regular prices were genuine in that approximately 21% of all of its tire sales took place at regular prices; such calculation included sales at both Sears' regular and 2For prices. However, subsection 74.01(3) of the Act is concerned only with the reference price. In this case, the reference price was Sears' regular single unit price.

[303] With respect to the absence of consumer harm referred to by Professor Trebilcock, as noted below, consumer harm is not relevant to the consideration of the materiality of any misrepresentations and hence is not relevant to the existence of reviewable conduct.

XI. DID SEARS MEET THE FREQUENCY REQUIREMENTS OF THE TIME TEST?

[304] There are two elements contained in the time test: the goods must be offered at the alleged OSP (or a higher price) in "good faith" for "a substantial period of time recently before" the making of the representation as to price. Both elements of the test must be met.

[305] My finding that the Tires were not offered at Sears' regular single unit price in good faith is, therefore, dispositive of the time test. However, for completeness, and in the event that I am in error in my conclusion as to good faith, I will deal briefly with the frequency requirements of the time test.

[306] The parties agree, I believe, that the first step in the application of the time test is to select the time frame within which to examine Sears' conduct. Sears says that the appropriate time frame is 12 months. The Commissioner argues that the appropriate period is six months. Once the appropriate time frame is selected, the next step is to determine within that time frame whether Sears offered the Tires at their regular prices for a substantial period of time.

(i) The reference period

[307] For the following reasons, I accept the submission of the Commissioner that the appropriate reference period is six months.

[308] First, paragraph 74.01(3)(*b*) of the Act requires the good faith offering to have occurred "recently" before the representation at issue. This means that there must be, as the Commissioner argues, reasonable temporal proximity between the impugned representations and the offering of the Tires at regular prices.

[309] The word "recent" is commonly understood to mean "that has lately happened or taken place" (The Shorter Oxford English Dictionary, 3rd ed. vol. II) or "not long passed" (The Concise Oxford Dictionary, 7th ed.). A 12 month time frame would not, in my view, be in accordance with the requirement that the reference period be in reasonable temporal proximity to the making of the representation.

[310] Second, after subsection 74.01(3) of the Act came into effect, Sears' legal department circulated a memorandum dated May 11, 1999 to all Sears vice presidents which described amendments to the Act. The memorandum advised that, with respect to the time test, in general "the time period to be considered will be the six months prior to [...] the making of the representation (this time period can be shorter if the product is seasonal in nature)". Thus, Sears did not posit internally the need for a 12 month reference period. Further, Mr. McMahon confirmed that, when he applied the policy set out in the May 11, 1999 memorandum, he looked to see whether the Tires were on sale at or above the comparison price more than 50% of the time in the six month period that pre-dated the representations at issue. While Sears now argues that a 12 month reference period is more appropriate in order to capture the seasonal nature of tire sales, in my view, its own internal practice of monitoring sale frequency over a six month period belies this argument.

[311] Finally, I accept the opinion of Dr. Lichtenstein that six months is an appropriate reference period as it provides an accurate picture of Sears' OSP behaviour. In his view, the substantial period of time provision relates to the amount of time a product should be offered at an OSP such that it has the opportunity to be verified by the market as the "regular price". A six month period would provide such opportunity, in Dr. Lichtenstein's view, because:

i) there is not much seasonal variation with respect to all-season tires;

ii) to the extent there are sales increases in the Spring and the Fall, any contiguous six month period would capture some of the higher and lower periods; and

iii) there is little reason to expect month-to-month variation in the percentage of tires sold at the OSP.

[312] I do not find Dr. Lichtenstein's opinion on this point to have been impaired in cross-examination.

(ii) The frequency with which the Tires were not on promotion.

[313] Having concluded that a six month reference period is appropriate, Table 2, which follows paragraph 22 above, depicts that, for the six month period preceding the relevant representations, the Tires were offered for sale at their regular single unit price as follows:

Tire	Percentage of time offered at Regular Prices
BF Goodrich Plus	45%
RoadHandler T Plus	38%
Weatherwise RH Sport	19%
Response RST Touring	46 or 49.65%
Silverguard Ultra IV	60%

[314] With respect to the Response RST Touring tire and the dispute with respect to the percentage of time that the tire was not on promotion, Sears' planning documents (that is the checkerboard and monthly pocket planners) show that the Response RST Touring tire was offered at regular prices 49.65% of the time. However, Sears' actual sales reports show that the Response RST Touring tire was sold at sale prices for one additional week. This would reduce the time the tire was offered at its regular price to 46% of the time. Mr. McKenna was unable to explain the discrepancy in these Sears' documents. Given his testimony that if Sears sold the product at promotional prices the product was on promotion, I find the information contained in the sales reports to provide the most accurate evidence as to when the Tires were actually on sale. It follows that the Response RST Touring tire was offered at regular prices 46% of the time.

(iii) "Substantial Period of Time"

[315] In order to determine what is meant by the phrase "substantial period of time", regard must be had to the statutory context. The time test functions to assess whether a specified price actually constitutes a price at which a product was "ordinarily supplied" by the person making the representation for a "substantial period of time".

[316] In this context, it seems to me that if a product is on sale half, or more than half, of the time, it can not be said that the product has been offered at its regular price for a substantial period of time. This conclusion is consistent with the decision of the Ontario County Court in *Regina v. T. Eaton Co. Ltd.* (1973), 11 C.C.C. (2d) 74. In the context of a prosecution under paragraph 33(*C*)(1) of the *Combines Investigation Act*, the Court there observed that, if a product was on sale 50% of the time, or thereabouts, the product could not be said to be ordinarily sold

for a regular, or any other price.

[317] In the present case, the following four lines of tires were on sale more than 50% of the time in the 6 month period pre-dating the relevant representations:

Tire	Percentage of time on sale
Weatherwise RH Sport	81%
RoadHandler T Plus	62%
BF Goodrich Plus	55%
Response RST Touring	54%

[318] I find, therefore, that Sears failed to offer those tires to the public at the regular price for a substantial period of time recently before making the representations.

[319] Having found that Sears did not meet the good faith requirement for all of the Tires, and did not meet the frequency requirements of the time test for four of the five tire lines, it is necessary to consider whether Sears has established that the representations were not false or misleading in a material respect.

XII. WERE THE REPRESENTATIONS FALSE OR MISLEADING IN A MATERIAL RESPECT?

[320] As an alternative to its position that it complied with the time test, Sears relies upon subsection 74.01(5) of the Act which relieves a person from liability under subsection 74.01(3) where the person establishes, in the circumstances, that a representation as to price is not false or misleading in a material respect. Subsection 74.01(5) must be read in conjunction with subsection 74.01(6) which requires that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect".

(i) What were the representations?

[321] Sears argues that subsection 74.01(3) deals only with a representation as to price so that the general impression conveyed by a representation must be confined to a representation as to price. I agree. This means that any aspect of the advertisements at issue not related to price, for example warranty information, is not relevant.

[322] Sears argues as well that the savings messages, or save stories, are also irrelevant because they are not representations as to price. I disagree. In my view, representations such as "save 40%" and "½ price" are properly characterized as representations as to price.

(ii) Were the representations false or misleading?

[323] Sears asserts that the representations as to price were neither false nor misleading. Therefore, it is necessary to first determine what impression the representations at issue created. This is consistent with the approach taken by the Court in *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (Ontario County Court). In *Kenitex*, the accused was charged under paragraph 36(1)(*a*) of the *Combines Investigation Act* which made it an offence to make any representation to the public that was false or misleading in a material respect. Subsection 36(4) of the *Combines Investigation Act* provided that:

36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.	36(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[324] Thus, the legislation considered by the Court in *Kenitex* is substantially the same as that now before the Tribunal.

[325] At page 107 of *Kenitex*, the Court considered the elements of the offence and wrote:

> In my view [...] the representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

[326] As to the concept of "ordinary citizen", the Court wrote:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

[327] Turning to the representations in this case, I find that the general impression conveyed by them to an ordinary citizen is that consumers who purchased the Tires at Sears' promotional prices would realize substantial savings over what they would have paid for the Tires had they not been on promotion. This impression is consistent with the literal meaning conveyed by the representations. For example, turning to the advertisement set out at paragraph 17 above, the advertisement stated that one could "save 40%" on Michelin RoadHandler T Plus tires. For the smallest size shown, Sears' regular price of $153.99 was compared with the promotional price of $91.99. For the largest size, the regular price of $219.99 was compared with the promotional price of $131.99.

[328] As to whether that impression was false or misleading, it is necessary to remember that:

- when the Tires were not on promotion, Sears' 2For price was always available if more than one tire was purchased;

- Sears' 2For price was always substantially lower than the regular (single unit) price;

- 90% to 95% of tires were sold in multiples; and

- Sears' regular (single unit) price would never have applied to sales of multiple tires.

[329] It follows, as conceded by Mr. Cathcart in cross-examination, that for tires purchased in multiples at Sears' promotional events, the savings realized by customers would not have been the difference between Sears' regular price and the promotional price. Rather, the savings would be the difference between the 2For price and the promotional price.

[330] Sears bears the onus under subsection 74.01(5) of the Act. It says that its representations as to price were not false or misleading because:

1. The representations accurately set out Sears' prices for a single unit of the Tires, and those were prices at which genuine sales took place.

2. The representations as to price were available to, and benefited, customers who purchased a single tire.

3. Averaged over the five Tires, 11% of purchasers would buy only one tire.

4. Any tire consumer to whom the representations were directed might choose to buy a single tire, so that the representations were true for 100% of the intended readers of the representations.

5. The representations as to price reflected prices that Sears used as a basis for calculating warranty adjustments and refunds.

[331] All of these points are literally correct. However, the general impression conveyed by the representations is that consumers (not just 11% of consumers) who purchased the Tires at Sears at promotional prices would realize substantial savings. For 89% of consumers and 90 to 95% of the Tires sold, this was not correct. I find, therefore, that representations as to price contained in both the regular/promotional price comparison and in the save stories were false or misleading.

[332] Before leaving this point, I note that a similar conclusion was reached in somewhat similar circumstances in *R. v. Simpsons Ltd.* (1988), 25 C.P.R. (3d) 34 (Ontario District Court).

There, Simpsons caused a number of "mini casino" cards to be printed and distributed. The cards advertised "you could save 10% to 25%" on practically everything in the store, and that the possible discounts were 10%, 15%, 20% or 25%. The mini casino cards each contained four tabs, under each tab was printed a symbol. When a tab was lifted, the symbol was revealed. There were four symbols, corresponding to each of the four percentage discounts available. Each card instructed a customer to lift one tab only in order to reveal the discount level available to them. Of the cards printed, 90% had the 10% discount symbol printed under all four tabs. The remaining 10% of the cards each contained all four symbols. On those facts, the Court found that the representation "you could save 10% to 25% on practically everything in the store" was
manifestly false and misleading. The Court wrote at pages 37-38:

> The cards had been printed in such a way as to ensure that 9 out of 10 of the recipients of the cards had no chance to obtain other than the minimum discount of 10%. Each card displayed all four discount symbols, and it is obvious from the get-up of the card that it was designed to leave the impression that a different symbol lay concealed under each of the four tabs. As a consequence of the design of the promotion, the representation that "you could save 10% to 25%" was false as to nine tenths of the cards. The recipients of those cards were misled and intentionally so.
>
> To make out the offence, it would be sufficient if a false or misleading representation had been made to one member of the public. Here, on the acknowledged facts, the misleading representation was made to 927,000 people, or 90% of the recipients. Of those, most were among the 750,000 Simpsons credit card holders who were the addressees of the mailing.
>
> The fact that the representation was true as to one-tenth of the recipients of the randomly distributed cards does nothing more than reduce the magnitude of the deception.

(iii) Were the representations as to price false or misleading in a material respect?

[333] Prior jurisprudence in the context of criminal prosecutions under the Act or its predecessor has interpreted what is meant by "misleading in a material respect". As noted above, in *Kenitex*, the Court found that a materially false or misleading impression would be conveyed if the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."

[334] In *R. v. Tege Investments Ltd.* (1978), 51 C.P.R. (2d) 216 (Alberta Provincial Court), the Court applied the dictionary meaning of "material" which was "much consequence or important or pertinent or germane or essential to the matter". The Court noted that it was not necessary to establish that any person was actually mislead by a representation. It was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

[335] Finally, in *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 (Vancouver Magistrate's

Court, B.C.), the Court concluded that the word "material" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase. Whether or not a consumer in fact obtained a bargain and may have paid less than he would ordinarily have paid was not the relevant criteria.

[336] The question to be determined, therefore, is whether the impression created by the price comparisons and/or the save stories would constitute a material influence in the mind of a consumer. Put another way, I accept the submission of Sears that the relevant inquiry is not whether the type of representation is a material one, but whether the element of misrepresentation is material.

[337] I believe that the following are relevant considerations.

[338] First, the magnitude of the exaggerated savings. Returning to the Michelin RoadHandler T Plus advertisement set out at paragraph 17 above, for the smallest tire size advertised, an ordinary citizen considering the purchase of four tires would reasonably believe, in my view, their savings to be $248.00 or ($153.99 - $91.99) x 4. In fact, the 2For price for each tire was $94.99. Accordingly, the actual savings would be $12.00 or ($94.99 - $91.99) x 4. In this example, the savings were substantially exaggerated. Because Sears' 2For price was always substantially lower than its regular price, it follows that the savings were similarly substantially overstated in every OSP representation made concerning the Tires.

[339] In my view, that magnitude of advertised savings would be a material influence or consideration upon a consumer.

[340] Second, I look to Sears' experience when it eliminated its 2For pricing on January 1, 2001 and lowered its regular prices for tires. Sears' Great Item and normal promotional prices remained unchanged. Following the reduction of its regular prices, Sears' sales volumes at promotional prices decreased. Mr. McMahon acknowledged in cross-examination that it was probably true that promotional sales decreased because Sears could not use as favourable save stories. As Sears argued, if savings are represented at all, consumers expect them to be of a certain magnitude and if the represented savings are incongruous with consumers' expectations concerning the deals typically offered, or typically offered by the particular retailer, the promotion will be less effective. In the circumstances where Sears was recognized to be a high-low retailer, where tires were sold in a competitive market, and where national brand tires were typically sold by tire dealers at a price 35% off the MSLP, I find that Sears' misrepresentation of the extent of the savings to be realized by purchasing the Tires on promotion was, more probably than not, likely to influence a consumer. This means that Sears' misrepresentation of the extent of the savings to be realized was misleading in a material respect.

[341] Finally, I have found that consumers have a limited ability to evaluate the intrinsic attributes of tires, and it is admitted that the five lines of Tires were exclusive to Sears. In those circumstances, the following evidence from Dr. Lichtenstein's expert report is germane:

45. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Consumers seek to maximize value (i.e., the quality they get for the price they pay) in purchase situations. When consumers need a product where there are several brand alternatives, there are various purchase strategies they may employ to maximize value. First, for product categories where intrinsic attributes are easy for the consumer to evaluate (i.e., those physical attributes that comprise the brand), consumers can simply evaluate brand alternatives within and across merchants on a "quality for the money" criterion and select that brand from that merchant that offers the best value.

46. However, where intrinsic product attributes are difficult for consumes to evaluate, consumers can at least turn to a second strategy that encompasses comparing prices for like brands across merchants. By doing so, they can at least purchase a brand that represents the lowest price for that brand across merchants. In this manner, while consumers would not explicitly know how much quality they received for their dollar, they would at least know that they received the most for their dollar for that particular brand. However, when consumers lack the ability to evaluate products on intrinsic attributes *and* competing retailers carry brands unique to them, neither of these strategies is open to consumers.

47. What strategy is left for consumers? Research shows that in cases where consumers cannot evaluate product quality based on intrinsic attributes, they will take "shortcuts", i.e., rely on "decision heuristics" in making quality assessments. Most commonly, they will rely on "extrinsic cues" to signal product quality and a good deal (e.g., OSP claim, store name, brand name). Thus, the likelihood increases that they would respond to a merchant advertising "exceptional values," and especially if the merchant is perceived to be credible. As noted by Kaufmann et al. (1994), there is widespread recognition that OSP representations are likely to be more impactful for product categories where intrinsic attributes are hard for consumers to assess.

[342] Having regard to those circumstances, as required by subsection 74.01(5) of the Act, I accept that Sears' OSP representations are more likely to be relied upon to reflect quality or value so misrepresentation of the OSP is more likely to impact upon or influence a consumer.

[343] Similarly, I have found that a very significant percentage of consumers do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores. Dr. Deal's study suggested that approximately 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears. This evidence also supports the conclusion that Sears' OSP representations and save stories were more likely to influence consumers.

[344] Thus, on the whole of the evidence, Sears has failed to establish that its OSP representations were not false or misleading in a material respect.

(iv) Sears' arguments about materiality

[345] In so concluding, I have had regard to Sears' submissions that the representations as to price were not false or misleading in a material respect because:

a) consumers are recognized to consistently discount OSP representations by about

25%;

b) Sears is a promotional retailer, and because its reference price is identified as "Sears reg.", consumers would interpret the reference price differently than OSP representations made by an EDLP marketer or suppliers generally;

c) Sears' ads that did not feature Sears' regular price representations produced more of an uplift in sales levels from non-promotional periods;

d) Mr. Winter testified that, in 1999, tires were sold in a highly competitive and highly promotional context which included a variety of pricing frameworks in which no single pricing framework or competitor dominated the market. Further, Dr. Deal found approximately 63% of consumers comparison shop even where they see ads that indicate reduced tire prices;

e) factors such as warranties, roadside assistance and the provision of a "satisfaction guaranteed or your money refunded" guarantee could enhance a consumer's perception of value and positively impact the decision to purchase a tire; and

f) Dr. Deal found that 78% of survey respondents were satisfied with the value they received and 93% were satisfied with their tire purchase.

[346] I will deal with each item in turn.

(a) Consumers consistently discount OSP representation by about 25%

[347] It is correct that it was Dr. Lichtenstein's opinion that consumers mentally discount advertised reference prices and that one study found that consumers consistently discount OSP offerings by about 25%. However, it remained Dr. Lichtenstein's opinion that:

> 33. However, even though knowledgeable/skeptical consumers appear to "discount the discount" more than the average consumer, they tend to perceive that some portion of advertised discount may be bona fide. That is, research findings show that even for consumer populations that are more knowledgeable about the product category (see Grewal et al. 1998), and even for consumers who are more skeptical of OSP claims (see Blair and Landon 1981; Urbany et al. 1988; Urbany and Bearden 1989), they are still influenced by OSP claims. For example, based on their findings, Urbany and Bearden (1989, p. 48) conclude "Our subject's perceptions were influenced significantly by the exaggerated reference price ... even though, on the whole, they were skeptical of its validity... Even though it is discounted, the reference price still apparently increases subject estimates of (the advertiser's normal selling price) over those who are presented with no reference price." Also, Urbany et al. (1988) found that although consumers mentally discount higher advertised reference prices at higher rates, the positive impact of the higher absolute level of the advertised reference price on consumer perceptions more than offsets the higher rate of mental discounting such that the outcome is that consumers perceive more savings for higher levels of advertised reference prices.

> 34. Moreover, given the value consumers place on their time, "if the advertised sale represents a large enough reduction from the retailer's regular price, the consumer might infer that another similar retailer...could not afford to put the item on sale with a noticeably greater discount" (Kaufmann et al. 1994, p. 121). From the consumer's point of view, the "worst case" is that although the reference price may not be a bona fide price, "it does assure that the consumer has not paid too much... and (thus) the consumer may use the limited information contained in high-low (reference price) sale advertising in an informed effort to find a satisfactory price for the product" (Kaufmann et al. 1994, p. 122). But even in cases where this occurs, a non-advertising competitor retailer offering the same product at the same purchase price would be injured in that a deceptive reference price was used to attract the customer to the advertiser's store. Moreover, the consumer's perceptions of transaction utility, which may actually be a significant influence in the decision to purchase, would not be based on bona fide perceptions. [underlining added]

[348] Moreover, on cross-examination it was Dr. Lichtenstein's evidence that there would be less discounting of a reference price where the OSP representation is made by a credible retailer such as Sears.

[349] Thus, I do not find Dr. Lichtenstein's evidence with respect to discounting of OSP representations establishes that Sears' OSP representations were not material.

(b) Sears' regular price representations must be seen in the context of consumers' knowledge that Sears is a promotional retailer

[350] Sears says that because it is known to be a promotional retailer, its customers would interpret its OSP representations in a different fashion from their interpretation of OSP representations made by ordinary suppliers or EDLP retailers. No evidence was cited to support this submission.

[351] It would seem to be equally likely that if influenced by Sears' reputation as a promotional retailer, a consumer would be influenced by its OSP representations and find them to be very material as signalling an appropriate time to purchase in order to obtain substantial savings from the price consumers would ordinarily pay at Sears if the Tires were not on promotion.

(c) Sears' ads that did not feature OSP representations

[352] Sears argues that:

> 172. Moreover, with respect to the relative regard paid by consumers to the advertised savings and the final transaction price, Mr. McKenna's evidence demonstrated the comparative success of Sears' tire advertisements, published during the Relevant Period, that did *not* feature "Sears reg." representations; that is, which informed the potential consumer of the selling price only. These advertisements produced more of an uplift in sales levels from non-promotional periods than did the "Sears reg." advertisements, even though the tires featured in them were not the lowest-priced tires offered by Sears.
>
> 173. Mr. McKenna's reasonable conclusion was:
>
> > *That the consumer or the customer recognized value when it was shown them. They recognized value without a price point or a comparative regular and certainly without a save story.*
>
> 174. The same or a similar point can be made from the "Tireland" advertisement that was the focus of an exchange between Sears and Michelin in 1999. As Mr. Merkley acknowledged in cross-examination, this advertisement relied on consumers' ability to discern value, without reference to a "save story" or a "percentage off".

[353] Mr. McKenna testified that, with respect to the Michelin Weatherwise and the Silverguard ST (not one of the tires at issue), he compared sales for those tires when they were not on promotion to their sales during a period when they were on promotion. The Silverguard ST had no regular price, it was simply priced based on rim size, starting at $44.99. Thus, the Silverguard ST was advertised with no regular comparison price or save story. The Michelin Weatherwise was advertised with its regular price shown together with a 40% save story.

[354] When the Michelin Weatherwise was advertised, its unit sales increased by approximately **[CONFIDENTIAL]** times over sales when it was not advertised. Sales volumes of the Silverguard ST, when advertised, increased by **[CONFIDENTIAL]** times over sales when not advertised. In this context, Mr. McKenna concluded that customers recognized value.

[355] This evidence is anecdotal, relating to a tire that had no regular price, and is in conflict with Mr. McMahon's evidence and Mr. Cathcart's evidence about Sears' experience with the BF Goodrich Plus tire set out at paragraphs 214 and 215 above.

[356] For this reason, I do not find the evidence relating to the Silverguard ST establishes that Sears' OSP representations were not material.

[357] To the extent that Sears relies on Mr. Merkley's acknowledgement in cross-examination that a "Tireland" advertisement relied upon a consumer's ability to discern value without reference to a save story, Mr. Merkley simply responded "I guess, yes" to the suggestion that the retailer in question assumed that his potential customers would recognize value. Further, the

particular price advertised by Tireland was sufficiently low that it caused Sears to write to Michelin expressing its concern and caused Michelin to respond to Sears that it shared Sears' concern at the pricing. However, Michelin said that it found this to be an isolated case where the dealer intended to have a weekend sale for the fifth consecutive year.

[358] This evidence does not establish that Sears' OSP representations were immaterial.

(d) Mr. Winter's and Dr. Deal's evidence

[359] Sears relies upon Mr. Winter's evidence that, in 1999, tires were sold in a highly competitive and promotional context and Dr. Deal's evidence that his survey found that 63% of consumers comparison shop even when they see ads that show reduced tire prices.

[360] However, comparison shopping would seem to be directed to final transaction prices, and not necessarily the materiality of OSP representations. For those consumers who say they comparison shop, the OSP representations could nonetheless have: drawn the consumer into the market; attracted the consumer to Sears; and caused the consumer to purchase from Sears if no lower final transaction price was located in the consumer's search.

(e) The consumers' perception of value based upon factors such as warranties and the guarantee of satisfaction

[361] Sears relies upon Dr. Lichtenstein's acknowledgement that factors such as warranties, roadside assistance programs, and Sears' guarantee could enhance consumers' perception of value and positively impact upon the decision to purchase a tire. This is said to reduce the effect of Sears' OSP representations because response to price is context dependent.

[362] Given Professor Trebilcock's acknowledgement that he did not have information that would allow him to quantify how much consumers might be willing to pay for add-ons provided by Sears relative to add-ons provided by Canadian Tire, and the rather amorphous nature of Dr. Lichtenstein's acknowledgement, I am not persuaded that the value consumers attach to add-ons is sufficient to make Sears' OSP representations immaterial. Even with add-ons, the extent of the savings misrepresentation could still be influential to the consumer's decision to purchase.

(f) Sears' consumer satisfaction

[363] Sears says that even if consumers purchased their tires from Sears solely upon the strength of the representations at issue, 78% of respondents to Dr. Deal's survey indicated that they had received good value for their money.

[364] There are, I believe, two responses to this.

[365] First, harm is not a necessary element of reviewable conduct. As the Court noted in *Kellys on Seymour, supra*, at page 26, the "criteria is, did in fact the person think that what he was buying was, to the ordinary purchaser, in the ordinary market, worth the price it is purported to be worth, and from which it is reduced". Whether or not a consumer in fact got a bargain or paid less than what the consumer would ordinarily have paid is not the criteria. See also: *R. v. J. Pascal Hardware Co. Ltd.* (1972), 8 C.P.R. (2d) 155 at page 159 (Ont. Co. Crt).

[366] Second, I accept Dr. Lichtenstein's evidence, which I find was not substantially challenged on the point, that:

> 39. When consumers are deceived by an inflated OSP, the level of harm could be limited if they became aware of the deception. With a liberal return policy, the injury may be limited to the time, effort, and aggravation of returning the product to the store (assuming the store would accept the used product on return). However, in my opinion, most consumers are unlikely to recognize that they were deceived by an OSP representation. The reason for this is that for them to become aware of deception, they must become aware that the OSP price is, in the case of a seller's own OSP representation, not in truth the seller's own bona fide OSP.
>
> 40. Several factors work against consumers becoming price aware. First, as the research evidence (cited above in paragraph 29) strongly suggests that consumers are not willing to engage in much pre-purchase search, it is reasonable to conclude that most consumers are unwilling to expend time/effort necessary to engage in post-purchase price search. Thus, they are unlikely to monitor that seller's prices after the fact. Second, consumers have a built-in desire to maintain "cognitive consistency" and thus, they avoid encountering price information that indicates that they were duped, thereby creating cognitive inconsistency (called "cognitive dissonance," or "buyer's remorse/regret" in this specific domain). Since this mental state creates discomfort for the consumer, they are motivated to engage in "selective exposure to information" by actively avoiding information that would suggest that they did not receive the value represented by the OSP (Eagly and Chaiken 1993, p. 478; Engel, Blackwell, Miniard, 1995). [underlining added]

[367] Thus, for all these reasons, Sears failed to establish that its OSP representations were not false or misleading to a material extent.

(v) Conclusion

[368] Sears admitted that it did not meet the requirements of the volume test and I have found that the Tires were not offered at Sears' regular price in good faith and that Sears failed to meet requirements of the time test for four of the five tire lines. I have also found that Sears failed to establish that the representations at issue were not false or misleading in a material respect. It follows that the allegations of reviewable conduct have been made out and the Tribunal finds Sears to have engaged in reviewable conduct. It is therefore necessary to consider what administrative remedies should be ordered.

XIII. WHAT ADMINISTRATIVE REMEDIES SHOULD BE ORDERED?

[369] Section 74.1 of the Act sets out the range of remedies available and the circumstances in which the remedies may be ordered. Section 74.1 of the Act is as follows:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and
(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.
74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.
74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.
74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

74.1 (1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement susceptible d'examen,
(ii) la période et le secteur géographique auxquels le comportement est afférent,
(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;
c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :
(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,
(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.
74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.
74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.
74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.
74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

(a) the reach of the conduct within the relevant geographic market;
(b) the frequency and duration of the conduct;
(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
(d) the materiality of any representation;
(e) the likelihood of self-correction in the relevant geographic market;
(f) injury to competition in the relevant geographic market;
(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.
74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or
(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part. [underlining added]

a) la portée du comportement sur le marché géographique pertinent;
b) la fréquence et la durée du comportement;
c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
d) l'importance des indications;
e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
f) le tort causé à la concurrence sur le marché géographique pertinent;
g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
h) toute autre circonstance pertinente.
74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :
a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;
b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;
c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;
d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie. [Le souligné est de moi.]

[370] Each of the three available remedies shall be considered in turn.

(i) An order not to engage in the conduct or substantially similar reviewable conduct

[371] The Commissioner seeks an order prohibiting Sears and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns, or any other person or corporation acting on its behalf, from engaging in conduct contrary to subsection 74.01(3) of the Act for a period of 10 years.

[372] In support of this submission, the Commissioner relies upon:

- Sears' admission that it is primarily a hi-low retailer which relies extensively on OSP representations in its advertising;

- Sears used hi-low marketing for 27 of the 28 lines of tires it sold in 1999 and continues to use hi-low marketing techniques to sell automotive products;

- Sears continues to use hi-low marketing techniques generally throughout its business;

- Sears has engaged in deceptive marketing behaviour in the past as reflected in the following decisions:

  R. v. Simpsons-Sears Ltd. (1969), 58 C.P.R. 56 (Ont. Prov. Ct. (Crim. Div.));
  R. v. Simpsons-Sears Ltd. (1976), 28 C.P.R. (2d) 249 (Ont. County Ct. (Crim. Div.)); and
  R. v. Simpsons-Sears Limited and H. Forth and Co. Limited (1983), unreported (Ont. County Ct.).

[373] Sears argues that no administrative remedy is warranted. It points to the following:

- The representations at issue were made in November and December of 1999. Section 74.01 of the Act came into force in March of that year. The Guidelines were not published until late September, 1999, and there was no interpretive jurisprudence relating to the time and volume tests.

- OSP advertising is a legitimate practice and Sears should not be punished for depending upon promotional events to market its products.

- Sears turned its mind to complying with subsection 74.01(3) of the Act. It created and distributed a written policy and Mr. Cathcart maintained a checkerboard for planning and promoting the sale of the Tires.

- The convictions the Commissioner relies upon are old, going back 21, 28 and 35 years. The last two mentioned convictions relate to a catalogue advertisement for multi-vitamins and to the advertisement of a particular refrigerator in Ottawa.

- It is reasonable to assume that there have been significant changes in Sears' ownership, management and control since the early 1980's when the most recent conviction was entered.

[374] In the alternative, Sears says that any cease and desist order should relate only to tires. Sears points to the Tribunal's decision in *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (2002), 19 C.P.R. (4th) 129; aff'd (2004), 31 C.P.R. (4th) 331 (F.C.A.) wherein the order prohibited the making of misrepresentations related to "PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device".

[375] In light of the false or misleading impression given by Sears in its advertisements with respect to the OSP representations at issue concerning the Tires, I have concluded that it is appropriate to issue an order pursuant to paragraph 74.1(1)(*a*) of the Act. Such an order will address the harm subsection 74.01(3) was created to address. As the order will be directed only to OSP representations which do not conform with the Act, and will not be directed to all OSP representations, it cannot be said that such an order "punishes" Sears for depending upon promotional events.

[376] I am satisfied by virtue of Sears' internal memorandum of May 11, 1999 to its vice-presidents concerning the amendments to the Act that the timing of the enactment of the relevant statutory provision and the issuance of the Guidelines gave sufficient notice to Sears' employees of the requirements of the Act. Therefore, it is not inappropriate to make an order under paragraph 74.1(1)(*a*).

[377] As to the duration of the order, I see no reason to depart from the general provision found

in subsection 74.1(2) of the Act that an order under paragraph 74.1(1)(*a*) applies for a period of 10 years unless otherwise specified. That 10 year period will commence when an order is issued. In this regard see paragraph 389 of these reasons.

[378] As to the scope of the order, I believe that it construes the intent of the Act too narrowly to limit any order so as to apply only to Sears' promotion of tires. The scope of the order issued by the Tribunal in *P.V.I., supra,* is distinguishable, in my view, because there misrepresentations as to the performance of a product relating to fuel savings, emission reduction and government approval were at issue. There was no basis on which the order should have applied to any other product other than an allegedly similar gas-saving, emission-reducing and/or performance-enhancing device (as the orders provided).

[379] Equally, however, I have not been persuaded that it is necessary that the order to apply to all goods marketed by Sears through its various business channels. In this regard, I note the relatively long period of time that has elapsed since Sears was last convicted of deceptive marketing behaviour.

[380] Here Sears has stated in its responding statement of grounds and material facts, at paragraph 39, that Sears automotive is the business division of Sears responsible for the supply of the Tires and other automotive-related products and services and for the operation of Sears' retail automotive centres. From this I conclude that it is appropriate for the order to be directed to the business division which was responsible for the misrepresentations at issue. Therefore, the order will apply only to tires and other automotive-related products and services.

(ii) A corrective notice

[381] The Commissioner requests an order requiring Sears to publish or otherwise disseminate a corrective notice or notices that shall:

a. bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the Respondent carries on business and the determination made by the Tribunal with respect to the Application, including:

   i. a description of the reviewable conduct,
   ii. the time period and geographical area to which it relates, and
   iii. a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.

b. be published in the following media:

   i. <u>in flyers</u> ("pre-prints") by the Respondent as follows:

      (1) in two weekly ("core") flyers as ordinarily distributed by the Respondent and in one weekend flyer as ordinarily distributed by the Respondent.

   (2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in a manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:
      (a) 84% to be distributed through newspapers;
      (b) 15% to be distributed door-to-door; and
      (c) 1% to be distributed in-store.

   (3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches X 9.5 inches in size.

   ii. <u>in newspapers</u> by the Respondent as follows:

      (1) in the language appropriate to the newspaper;
      (2) within the first nine pages of the Wednesday edition of each of the newspapers listed in paras. 26 and 27 of ***Exhibit CA-9***, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said

newspaper;

(3) the newsprint advertisements shall be no less than 5.625 inches X 9.625 inches in size.

[382] Sears submits that temporal concerns alone mitigate against the publication of a written notice. Sears also points to the evidence of Dr. Trebilcock that consumers who purchased the Tires at Sears during the sales events at issue received very good deals. Finally, Sears submits that it exercised due diligence in order to prevent the reviewable conduct from occurring.

[383] In *PVI, supra*, the Federal Court of Appeal, at paragraph 26, considered that the time elapsed from the making of false or misleading representations was a relevant factor to consider when assessing the appropriateness of a corrective notice.

[384] In the present case, five years have elapsed since the representations at issue were made. In my view, that length of time alone militates against the issuance of a corrective notice.

[385] The report of the Consultative Panel contemplated that the purpose of a corrective notice was to inform marketplace participants about deceptive practices where those practices may have left residual mistaken impressions in the marketplace. I do not accept that, after 5 years, any residual mistaken impression exists which arises from the representations at issue. To require a corrective notice in that circumstance would, in my view, be punitive and not remedial.

[386] In view of this conclusion, it is not necessary for me to consider, and I do not consider, whether Sears has established that it exercised due diligence in order to prevent the reviewable conduct from occurring.

(iii) An administrative monetary penalty

[387] By its reasons for order and order dated August 5, 2004, the Tribunal ordered that, if it determined that Sears had engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act, Sears was given leave to present evidence and make submissions at a future hearing relating to the factors to be taken into account pursuant to subsection 74.1(5) of the Act. Accordingly, the issues of whether an administrative monetary penalty should be imposed, and if so, its amount are reserved. See in this regard, paragraph 390 of these reasons.

XIV. COSTS

[388] The issue of costs is also reserved.

XV. ORDER

[389] Once the issues of administrative monetary penalty and costs are finally decided by the

Tribunal, an order will issue reflecting these reasons together with the Tribunal's rulings with respect to an administrative monetary penalty and costs.

XVI. DIRECTIONS TO THE PARTIES

[390] In light of these confidential reasons for order, the parties are directed as follows:

1) To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Wednesday, January 19, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

2) If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from the reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 21, 2005.

3) Following the issuance of these reasons the Registry will contact counsel to set a date for a case management conference to address the following:

   i) The time required for the further hearing concerning the factors relevant to subsection 74.1(5) of the Act.

   ii) The number of any proposed witnesses to be called.

   iii) The provision of any required will-say statements and or expert reports.

   iv) The extent of the Commissioner's participation in this further hearing.

   v) Potential dates for such hearing.

   vi) The manner, nature and timing of the submissions as to costs.

   DATED at Edmonton, this 11th day of January 2005.

   SIGNED on behalf of the Tribunal by the presiding judicial member.

Public

XVII. APPENDIX

[391] Sections 74.01, 74.09 and 74.1 are as follows:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
(a) makes a representation to the public that is false or misleading in a material respect;
(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or
(c) makes a representation to the public in a form that purports to be
(i) a warranty or guarantee of a product, or
(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,
if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

74.01(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
a) ou bien des indications fausses ou trompeuses sur un point important;
b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, don’t la preuve incombe à la personne qui donne les indications;
c) ou bien des indications sous une forme qui fait croire qu'il s'agit :
(i) soit d'une garantie de produit,
(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,
si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.
74.01(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :
a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au

representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
74.01(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to
(a) the price at which products have been or are supplied; or
(b) the price at which products will be supplied.
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.
74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[...]

74.09 In sections 74.1 to 74.14 and 74.18, "court" means the Tribunal, the Federal Court or the superior court of a province.

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,

public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.
74.01(6) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important, il est tenu compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[...]

74.09 Dans les articles 74.1 à 74.14 et 74.18, « tribunal » s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

74.1(1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) injury to competition in the relevant geographic market;

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.

74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.

74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

a) la portée du comportement sur le marché géographique pertinent;

b) la fréquence et la durée du comportement;

c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

d) l'importance des indications;

e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;

f) le tort causé à la concurrence sur le marché géographique pertinent;

g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;

h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02,

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

APPEARANCES:

For the applicant:

The Commissioner of Competition

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For the respondent:

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Susan Rothfels

THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2006 SKCA 21 Date: 20060206

Between: Docket: 1222

Shelley Lynn Dorval (Goodine)

(Respondent) Appellant

- and –

Victor Arthur Dorval

(Petitioner) Respondent

Coram:
Cameron, Vancise, and Gerwing JJ.A.

Counsel:
Jeremy A. Caissie for the Appellant
Gregory M. Kuse for the Respondent

Appeal:

From:	DIV 437/99, J.C. of Saskatoon
Heard:	February 6, 2006
Disposition:	Dismissed (orally)
By:	The Honourable Mr. Justice Cameron
In concurrence:	The Honourable Mr. Justice Vancise
	The Honourable Madam Justice Gerwing

CAMERON J.A.

[1] This appeal arose out of an application in the Court of Queen's Bench to vary a child custody/access order pursuant to subsection 17(1)(b) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The order granted the mother and father joint custody of the child, gave the mother the day to day care of the child, and allowed the father liberal access. Some two years later the father assumed the day to day care of the child by agreement between the parties, and a year or so afterwards he applied to have the order varied to confirm that arrangement.

[2] The application came to rest on affidavits filed by each of the father and mother. The affidavits were at odds here and there, prompting the judge to direct: (i) that the application be tried, commencing with a pre-trial conference; (ii) that in the meantime the father have the day to day care of the child, subject to liberal access by the mother; and (iii) that the child not be removed from the jurisdiction except by order of the Court or agreement between the parties.

[3] The mother then appealed, saying the judge had erred in two respects:

1. He mistakenly assumed he was empowered to make an interim order temporarily varying the existing custody/access order pending the determination of the application to vary.
2. Alternatively, he mistakenly exercised his power, having made an interim order varying the existing order without adequate attention to

> the need for a material change of circumstance in the meantime, and without sufficient regard for the best interests of the child.

[4] We dismissed the appeal after hearing from counsel for the appellant, not having been convinced the judge may have erred in either respect. We did so for the reasons we then expressed, saying we would reduce them to writing and urging the parties to get on with the matter in dispute without further delay.

[5] Turning to the first of the grounds on which the mother appealed, we held that the judge did not err in assuming he was empowered to make what amounted to an interim order either varying or partially suspending the existing order pending the determination of the father's application. In our view it was open to the judge to make that interim order in light of the power conferred by subsection 17(1)(b) of the *Divorce Act* on the Court of Queen's Bench and of the power derived from the *parens patriae* jurisdiction of the Court.

[6] As noted at the outset, the father applied to vary the existing order on the authority of subsection 17(1)(b) of the *Act.* This subsection, along with those associated with it, provides as follows:

> 17 (1) A court of competent jurisdiction may make an order varying, rescinding, or suspending, prospectively or retroactively
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> ….

> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> ….
>
> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child, and for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[7] The administration of these provisions is committed in this Province to the Court of Queen's Bench as a superior court of law and "a court of competent jurisdiction" within the meaning of the *Act*.

[8] Ordinarily the power conferred on the Court of Queen's Bench by subsection 17(1)(b) to vary or suspend an existing child custody/access order would be taken to extend to the grant of interim relief of this nature. The word "order", as it pertains to the power "to make an order" varying or suspending an existing custody order, would be seen to encompass an interim as well as a final order so as to allow the Court to discharge its function under subsection 17(1)(b) in a regular, orderly, and effective manner. Otherwise the Court would not always be able to do so, first because an application under this subsection may require a hearing and therefore take several weeks to determine, even when advanced on an expedited basis; and second because the circumstances may be such, having regard for the best interests of the child, as to call for immediate but temporary relief pending the hearing.

[9] To illustrate the point, let us suppose an application is made to vary or suspend an existing custody/access order on the basis of a sworn allegation that the child is being subjected to physical abuse, abuse facilitated by the existing order. If contested, the allegation is just that: a statement of fact which, while made on oath, may nevertheless remain to be proved by means of *viva voce* evidence. Still, the allegation may be such as to raise a reasonable and urgent concern for the well being of the child. If so, it is difficult to think of the Court of Queen's Bench as being powerless to act pending the hearing and determination of the application. Indeed, that is unthinkable, which is to say it is unthinkable that the Court, no matter the circumstances, is powerless to make an interim order temporarily varying or suspending a child custody/access order pending the determination of an application under subsection 17(1)(b)of the *Act*.

[10] It seems equally unthinkable that Parliament should have so intended. Yet, there is no provision in section 17 expressly empowering the Court to make an interim order varying or suspending an existing custody/access order. That is so even though each of section 15 (empowering the Court to make child and spousal *support* orders) and section 16 (empowering the Court to make child *custody/access* orders), contain express provisions empowering the Court to make interim orders. This may be seen to suggest that no such power exists under section 17, for it suggests that Parliament, by expressly *including* such power in each of sections 15 and 16, impliedly *excluded* it from section 17. The suggestion is grounded in the guide to statutory interpretation known

as *expressio unius est exclusio alterius*: to express one thing is to exclude another.

[11] As explained in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. by Ruth Sullivan (Markham: Butterworths Canada Ltd., 2002):

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature. [at pp.186-87]

[12] With this in mind, the express reference to the thing in issue in this case (the power to make interim orders) in each of sections 15 and 16 of the *Act*, may fairly be said to give rise to an expectation of express reference in section 17. This is so because the latter fails to follow the pattern of expression of the former. And what this suggests is that Parliament implicitly intended to exclude the power to make interim orders when enacting section 17.

[13] Still, the maxim *expressio unius est exclusio alterius* is only an aid to statutory construction. As Laskin C.J. noted in *Jones* v. *A.G. of New Brunswick*, [1975] 2 S.C.R. 182, "This maxim provides at the most merely a guide to interpretation; it does not pre-ordain conclusions." And its application calls for a considerable measure of caution lest too much be made of it, a point developed in detail in P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000) at pp. 337-339. As Côté observes at p. 337:

> A *contrario* [reasoning], especially in the form *expressio unius est exclusio alterius*, is widely used. But of all the interpretive arguments, it is among those which must be used with the utmost caution. The courts have often declared it an unreliable tool, and, as we shall see, it is frequently rejected.

[14] In significant part, these observations are grounded in what was said of *expressio unius* in *Turgeon* v. *Dominion Bank* [1930] S.C.R. 67, per Newcombe J. at pp.70-71, and *Alliance des Professeurs Catholiques de Montréal v. Québec Labour Relations Board*, [1953] 2 S.C.R. 140, per Rinfret C.J. at pp. 154, citing Farwell L.J. in *Re Lowe v. Darling & Son*, [1906] 2 K.B. 772. What was there said of this guide to interpretation is that caution is required in its application and that, while it can be a valuable servant, it can be a dangerous master to follow for a number of reasons. First, much depends on context, including the particular subject-matter. Second, express reference to a matter may have been unnecessary and been made only out of abundant caution. Third, the lack of express reference may have been the product of inadvertence. Fourth, the express and the tacit, incongruous as they may be, must still be such as to make it clear they were not intended to coexist. And, finally, the indiscriminate application of *expressio unius* to the particular subject-matter may lead to inconsistency or injustice.

[15] In the light of considerations such as these, Côté, goes on to observe at p. 339:

> Since it is only a guide to the legislature's intent, *a contrario* reasoning should certainly be set aside if other indications reveal that its consequences go against the statute's purpose, are manifestly absurd, or lead to incoherence and injustice. [footnotes omitted].

[16] Having regard for these constraints and the subject matter at hand, it becomes difficult to apply the maxim *expressio unius est exclusio alterius* to the construction of those provisions of section 17 relating to child custody and access, namely those of subsections 17(1)(b), (5) and (9). Applying the maxim would serve to blunt the purpose of subsection 17(1)(b) by blunting the ability of the Court of Queen's Bench to effectively fulfil its function of protecting the interests of those for whose benefit these provisions were enacted. The beneficiaries of these provisions are children—the children of divorced parents—and the Court is charged with the responsibility of protecting their interests in inherently fluid situations, situations which may change from time to time to the detriment of those interests.

[17] That being so, it is difficult to suppose, based only on implication arising from the application of *expressio unius*, that Parliament intended to deny power to the Court, no matter the circumstances, to make a temporary order varying or suspending an existing child custody/access order pending the hearing and determination of an application brought pursuant to subsection 17(1)(b) of the *Act*. To suppose Parliament so intended is to expect implication to carry the burden of that intention. This is a lot to expect.

[18] Nor would that be the end of the expectation, for implication would have to shoulder the further burden of implicitly negating the Court's *parens patriae* jurisdiction, a venerable common jurisdiction under which superior courts are empowered to act in the interests of children.

[19] This jurisdiction is founded on necessity, which is to say the need to act for the protection of those who cannot care for themselves, especially children. This a broad jurisdiction of undefined scope, one which empowers superior courts to act in many and varied situations, and to act in the face of apprehended as well as actual threat to the best interests of a child. Moreover, this is a carefully guarded jurisdiction, one which the courts will not assume is abrogated by legislation. And the jurisdiction is sufficiently broad to allow for the interim variation of a child custody/access order in appropriate circumstances. (See, generally, *E.(Mrs.)* v. *Eve*, [1986] 2 S.C.R. 388, and *Ramsay* v. *Ramsay and Innes* (1976), 23 R.F.L.147 (Ont. C.A.)).

[20] Having regard for all of this, we are of the view that to suppose Parliament intended by implication to deny the power to make an interim order in exercise of the power conferred on the Court by subsection 17(1)(b), or to negate the Court's power to do so in exercise of its *parens patriae* jurisdiction, is to suppose too much. It is to expect more of *expressio unius* than this aid to interpretation is capable of bearing. Hence, we cannot accept the idea that the Court of Queen's Bench is unable on an application under subsection 17(1)(b) to make an interim order temporarily varying or suspending a final custody/access order pending the hearing and determination of the application.

[21] True, the power of the courts to make interim orders on applications under subsection 17(a)—to vary existing *support* orders—is a controversial subject as demonstrated, for example, in *Keogan* v. *Weekes* (2005), 13

R.F.L.(6th) 203 (Sask. Q.B.) and *Daher* v. *Daher* [2002] O.J. No. 3671 (Ont. S.C.J.). We do not intend to weigh in on that controversy, the subject-matter of which is beyond the scope of this appeal. However, we do note that, even in those cases in which it has been held that the courts are not empowered to make interim orders on applications under section 17 or its equivalent, allowance is consistently made for the *parens patriae* jurisdiction of the courts when it comes to children and their interests.

[22] No matter the view, then, that one may take of the powers of the Court on an application to vary or suspend an existing child custody/access order under subsection 17(1)(b) of the *Divorce Act,* those powers may be seen to extend to the making of an interim order.

[23] Now the existence of power is one thing, the basis for its exercise another. It is customary for the superior courts, when called upon to exercise their powers to grant interlocutory or interim relief pending the hearing and final determination of a claim, to require of the applicant that a *prima facie* case for the sought-after relief be made out. This is a familiar standard, well understood in its application, and there seems no good reason to depart from it when it comes to a request for an interim order temporarily varying or suspending a final custody/access order pending the hearing and determination of an application under subsection 17(1)(b) of the *Act.*

[24] That being so, and since the application to vary an existing child custody/access order will have been made on the basis of a change of

circumstances since the order was made, it follows that the applicant will have to make out a *prima facie* case pointing to a change of circumstance of sufficient import as may well result in variation on the conclusion of the hearing of the application. The corollary is that it is incumbent upon the Court, before making an interim order, to be satisfied (i) that a *prima facie* case to that effect has been made out; and (ii) that the best interests of the child lie in making an interim order of the nature of that being contemplated. It is also incumbent upon the Court, before making such an order, to have regard for the principle that a child should have as much contact with each of the spouses as is consistent with the best interests of the child.

[25] In addition, the Court should exercise its power sparingly, and only in the best interests of the child, bearing in mind that it has been called upon to alter a final order of the Court, with its settling effects, and that even a temporary variation can be unsettling. And, as always, the hearing should be expedited to the fullest extent reasonably possible when making an interim order. Expedition is of particular importance in this context.

[26] This, then, is the basis of principle upon the power under consideration falls to be exercised. And that brings us to the second of the grounds upon which the mother appealed, namely that the judge, Mr. Justice Maher, made the interim order varying the earlier order without adequate attention to the need for a material change of circumstance in the meantime, and without sufficient regard for the best interests of the child.

[27] We could see no merit in this ground. To begin with Justice Maher cannot be said to have overlooked the need, before making an interim order, to be satisfied on a *prima facie* basis that there had been a change of circumstances sufficient to warrant interim variation or partial suspension of the existing order. Nor can he be said to have overlooked the need, before making the order, to have regard for the best interest of the child. His fiat makes this clear.

[28] Furthermore, there is no tenable basis for interfering with his decision in light of the evidence before him and the considerable measure of deference we customarily accord decisions of this nature. He explained his decision, first referring to the history of the proceedings concerning the child (a ten year old boy), and then referring to an agreement the parties had entered into in March of 2004 giving the day to day care of the boy to the father for a period of fourteen to fifteen months ending in June of 2005. The ostensible purpose was to determine if the boy would take to living with his father in Big River, as he had said he wanted to do, instead of living with his mother in Saskatoon, or with his mother and her family in the United States for which she had been pressing.

[29] In July of 2005, after the boy had completed his school term in Big River, his mother took him to the United States for a while and then returned to Saskatoon in August. She was then a student living in a one room apartment over a Bank. Under the terms of her lease she was not to have a child living with her. In consequence, the boy was having to hide from the caretaker. Near the end of August he returned to his father and was again enrolled in school in

Big River. That lead to a dispute between mother and father, which blew up in a confrontation at the school when the mother arrived to take the boy back to Saskatoon, having in the meantime secured a two bedroom basement suite. As a result of the blow up, the father launched an application to vary the existing order, made in January of 2002, and obtained an *ex parte* order directing the boy remain where he was until the father's application was dealt with.

[30] The application to vary came before Justice Maher in October of 2005. Having mentioned the experience of the preceeding months, he went on to observe that the mother's affidavit chronicled a series of efforts by her to relocate the boy as she pursued her career and extended family contact. He then said he must consider the best interests of the boy, which he found to lie in the continuity of his attendance at school and of his residence with his father in Big River, pending the hearing of the application. The mother, he said, appeared to have been living here and there over the past number of months, including stints in the United States, whereas the father appeared to have a stable home and family. At that he concluded by saying:

> I am satisfied on balance that it is in the interest of [the boy] that he primarily reside with [the father] in Big River, Saskatchewan, with liberal access to the [mother], until conclusion of these proceedings.

[31] From there he went on to direct, first, that the child not be removed from Saskatchewan except by order of the Court or agreement of the parties and, second, that the Local Registrar fix a pre-trial conference date in consultation with counsel.

[32] In light of the foregoing, he cannot be said to have acted on an insufficient foundation in making the impugned order. He had before him a sufficient change of circumstances, sufficiently established and sufficiently compelling, to warrant the making of the order, and he clearly acted on what appear to have been the best interests of the child in doing so, recognizing that it was in the interests of the child to continue to have a healthy measure of contact with his mother.

[33] In sum, we could see no tenable basis for interfering with Justice Maher's decision and, accordingly, we dismissed the appeal. In doing so, we again expressed the view that appeals of this nature, challenging interim orders of comparatively short duration, should be rare. A right of appeal exists but, as has been said on previous occasions, the Court will exercise its powers sparingly and only in extraordinary circumstances.

[34] The reasons for this are obvious but bear repeating. These appeals are necessarily attended by a good deal of expense and no little delay, even though they are heard on an expedited basis. This case affords a good example, for the application to vary was launched five months ago and has yet to advance to the stage of the pre-trial conference directed by Justice Maher. Generally speaking these are fluid situations and the Court is being asked to act on the situation as it existed months earlier, not at present, which makes for obvious difficulty. In short, it is usually in everyone's best interest to get on with the proceedings in the Court of Queen's Bench without delay, bearing in mind that at the conclusion thereof there exists a right of appeal to this Court from the final order.

[35] The appeal is dismissed with costs to the respondent, such costs to be taxed as usual on the basis of double Column 5 of the Tariff of Costs.

654 F.Supp.3d 892
United States District Court, N.D. California,
San Jose Division.

FEDERAL TRADE COMMISSION, Plaintiff,

v.

META PLATFORMS INC., et al., Defendants.

Case No. 5:22-cv-04325-EJD
|
Signed January 31, 2023
|
Filed February 3, 2023

Synopsis

Background: Federal Trade Commission (FTC) filed enforcement action to block merger between virtual reality (VR) device provider and VR software developer for VR dedicated fitness application, as alleged antitrust violation of Clayton Act. FTC moved for preliminary injunction to prevent consummation of merger pending outcome of administrative proceedings, and provider and developer moved to dismiss for failure to state claim and to strike expert opinion.

Holdings: The District Court, Edward J. Davila, J., held that:

VR dedicated fitness applications constituted relevant market;

FTC established prima facie case that relevant market was substantially concentrated;

in matter of first impression, reasonable probability standard of proof applied under actual potential competition theory;

FTC was not likely to succeed on merits of claim based on merger substantially lessening actual potential competition; and

FTC was not likely to succeed on merits of claim based on merger substantially lessening perceived potential competition.

Motions denied.

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ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Re: ECF Nos. 108, 164, 470

EDWARD J. DAVILA, United States District Judge

****1** ***903** This action was brought by Plaintiff Federal Trade Commission ("FTC") to block the merger between a virtual reality ("VR") device provider and a VR software developer. Defendant Meta Platforms Inc. ("Meta") has agreed to acquire all shares of Within Unlimited, Inc. ("Within," collectively with Meta, "Defendants"). The FTC has come before the Court to seek preliminary injunctive relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), to enjoin Defendants from consummating their proposed merger (the "Acquisition") pending the outcome of ongoing administrative proceedings before the FTC. ECF Nos. 101, 164.

In addition to the FTC's motion for preliminary injunction, Defendants have filed a motion to dismiss the Amended Complaint ("FAC") and a motion to strike the opinion of the FTC's expert, Dr. Hal J. Singer, regarding the relevant product market definition. ECF Nos. 108, 470.

Over the course of a seven-day evidentiary hearing, the Court heard the parties' arguments and evidence. The Court has also received briefing on all pending motions, as well as pre-hearing and post-hearing submissions of the parties' proposed findings of fact. Having considered the parties' submissions and evidence, the Court DENIES Defendants' motion to dismiss, DENIES the Defendants' motion to strike, and DENIES the FTC's motion for preliminary injunction.

I. FACTUAL FINDINGS

A. Defendant Meta Platforms, Inc.

1. Defendant Meta Platforms, Inc. is a publicly traded corporation organized under Delaware law and headquartered in Menlo Park, California. DX1237, at 11. Meta operates a collection of social networking platforms referred to as its "Family of Apps," which includes Facebook, Instagram, Messenger, and WhatsApp. PX0937, at 51. Meta also manufactures VR devices, such as the Quest 2 and the Quest Pro headsets, through its Reality Labs division. Stojsavljevic Hr'g Tr. 71:2–13; 74:10–19.

2. VR technology enables users to experience and interact with a digitally generated three-dimensional environment by wearing a headset with stereoscopic displays in front of each eye. Stojsavljevic Hr'g Tr. 72:25–74:9. Users can download a wide variety of VR software applications ("apps") from digital marketplaces, or app stores, for use on their personal VR devices. Pruett Hr'g Tr. 219:19–25. Quest headsets are designed so that a user's geolocation determines what content is available and at what price. Stojsavljevic Hr'g Tr. 79:23–80:6.

3. In 2020, 2021, and 2022, Meta spent several billion dollars each year on its VR Reality Labs division. Zuckerberg Hr'g Tr. 1280:9–1282:15.

4. Meta operates an app store called the Quest Store, previously known as the Oculus Store. Third-party app developers can request to have their app distributed in the Quest Store, and Meta also actively seeks out and invites developers to bring apps to the Quest Store. Stojsavljevic Hr'g Tr. 79:16–22; Pruett Hr'g Tr. 220:8–13. Apps must meet several content, technical, and ***904** asset requirements before they may be considered for listing on the Quest Store; however, Meta may still reject an app that meets all the requirements pursuant to the Quest Store's curation policy. Pruett Hr'g Tr. 220:25–223:16. Apart from the Quest Store, Meta also operates App Lab, an app distribution service for VR applications that meet basic technical and content requirements but is otherwise free from any editorial curating by Meta. Pruett Hr'g Tr. 260:16–22. Quest users can also download VR apps from other app stores on VR platforms that Meta does not own, such as SideQuest and Steam VR Store. Pruett Hr'g Tr. 274:8–21.

**2 5. The content and apps that are available for a particular VR system plays an important role in the widespread adoption of that system, and many users may purchase a VR system for specific content they want to experience. Zuckerberg Hr'g Tr. 1294:16–125:2; Stojsavljevic Hr'g Tr. 101:6–13, 101:21–27. As a result, high quality and popular VR apps—dubbed as "system sellers"—can drive adoption and sales of the specific headsets for which they are available. Stojsavljevic Hr'g Tr. 107:23–108:5. Broad adoption of a specific VR system, in turn, will attract third-party app developers to create more VR content for that system, a phenomenon referred to as a "flywheel" effect. PX0100, at 2–3; Bosworth Hr'g Tr. 1048:21–1049:3.

6. When a VR app is developed wholly by a developer unaffiliated with Meta, Meta refers to that as third-party ("3P") development. When Meta funds all or most of a VR app's development, Meta refers to that as second-party ("2P") development. When a VR app is developed in-house at Meta, either by acquired VR studios or Meta employees themselves, Meta refers to that as first-party ("1P") development. Stojsavljevic Hr'g Tr. 72:12–16; 106:16–21.

7. Meta encourages third-party VR app developers to build apps for the Quest platform by providing funding and technical VR engineering assistance to those developers. Stojsavljevic Hr'g Tr. 106:5–15. Specifically, Meta provides grants that are designed to improve existing VR software or incentivize the development of software on Quest that may only exist on another platform. Meta also maintains a developer relations engineering team consisting of veteran engineers who work directly with developers to improve software quality, fix bugs, or polish the experience they are building. Pruett Hr'g Tr. 285:19–286:12. Meta's VR content organization spends approximately [Redacted]. PX0066 ("Rubin Dep.") 24:5–25:8.

8. In addition to providing funding or engineering support to third-party VR app developers, Meta has also sought to increase the VR app content available on its platform by acquiring third-party app developers and developing its own apps internally. PX0055 ("Verdu Dep.") 117:5–118:12.

9. Although decisions may be made on a case-by-case basis, Meta typically will seek to acquire or build its own VR app if: [Redacted] PX0127, at 4–5.

10. Similarly, Meta is more inclined to build its own VR app instead of acquiring an existing third-party developer [Redacted] PX0127, at 5.

11. In the past three years, Meta has acquired at least nine VR app studios: Beat Games, Sanzaru Games, Ready at Dawn Studios, Downpour Interactive, BigBox VR, Unit 2 Games, Twisted Pixel, Armature Studio, and Camouflaj. Stojsavljevic Hr'g Tr. 87:5–88:2.

12. The VR apps that Meta has independently developed and released include Horizon Worlds (world building), Horizon Workrooms (productivity), Horizon Venues (live events), and Horizon Home (social networking). Meta's Answer and Affirmative *905 Defenses ¶ 35, ECF No. 84. Meta's background and emphasis has been on communication and social VR apps. Zuckerberg Hr'g Tr. 1273:15–1274:22. That said, Meta has also developed and released Dead and Buried, a multiplayer shooter game. Bosworth Hr'g Tr. 1051:18–20.

B. Defendant Within Unlimited, Inc.

13. Defendant Within Unlimited, Inc. is a privately held corporation organized under the laws of Delaware with headquarters in Los Angeles, California. PX0006, at 1, 161. Within is a software development company founded by Chris Milk and Aaron Koblin, who were experienced visual artists. Milk Hr'g Tr. 669:25–670:6; Koblin Hr'g Tr. 649:9–13.

14. Within's flagship product is Supernatural, a subscription VR fitness service launched in April 2020 on the Quest Store. PX0005, at 77. Supernatural releases new workouts daily and continues to add new modalities (*e.g.*, aerobic boxing, meditation) to its lineup of workouts. Koblin Hr'g Tr. 605:15–606:4; Milk Hr'g Tr. 734:1–11. Users access Supernatural's workouts by paying a monthly subscription fee of $18.99 or an annual subscription fee of $179.99. FAC ¶ 24, ECF No. 101-1; Within's Answer and Affirmative Defense ¶ 25, ECF No. 83. [Redacted] Koblin Hr'g Tr. 636:15–22; Milk Hr'g Tr. 735:17–21. Within has never changed Supernatural's prices. Carlton Report ¶ 77. At present, [Redacted] Milk Hr'g Tr. 735:20–21.

C. The Alleged "VR Dedicated Fitness App" Market

**3 15. The FTC alleges that the relevant market consists of VR dedicated fitness apps in the United States. Mot. 13, ECF No. 164. The government defines "VR dedicated fitness apps" as VR apps that are "designed so users can exercise through a structured physical workout in a virtual

setting anywhere they choose to use their highly portable VR headset." *Id.*

16. Both Meta and Within have repeatedly referred to VR apps intended to provide immersive at-home structured physical exercise as "deliberate" or "dedicated" fitness apps. *E.g.*, Rabkin Hr'g Tr. 831:12-24; PX0001, at 5; PX0286, at 1; Milk Hr'g Tr. 681:19-21; PX487, at 4; Pruett Hr'g Tr. 263:6–264:2; PX0004, at 169. Meta now describes these apps as "trainer workout apps." PX0060 ("Paynter Dep.") 24:2–12, 56:14–23. VR dedicated fitness apps are sometimes called "VR deliberate fitness apps" or "trainer workout apps." The Court will use the phrase "VR dedicated fitness apps" throughout.

17. VR dedicated fitness apps are marketed to customers for the purpose of exercise. Pruett Hr'g Tr. 263:6–18. Some other VR apps, often called "incidental" or "accidental" fitness apps, may include mechanics that may allow users to exercise as a byproduct but have a primary focus other than fitness (such as gaming). PX0001, at 5 n.10; PX0529, at 2; Carmack Hr'g Tr. 562:12–18. Unlike VR incidental fitness apps, VR dedicated fitness apps often have features like trackable progress goals, heart rate tracking, and motion calibration. PX0001, at 5 n.10; Milk Hr'g Tr. 683:8–21. Additionally, VR dedicated fitness apps generally require the producing company to have expertise and assets that allow them to create exercise content, *e.g.*, workout coaches, green screen studios, stereoscopic capture, post processing pipelines. PX0111; PX0251, at 2–3; PX0127, at 7; Koblin Hr'g Tr. 650:3–12; Garcia Hr'g Tr. 1079:16–24. And because VR dedicated fitness apps create content on an ongoing basis to avoid user boredom, they are better suited than most other VR apps to be priced using a subscription model (although not all VR dedicated fitness apps follow this model). Pruett Hr'g Tr. 269:9–270:17; Singer Hr'g Tr. 359:2–18; Vickey Report ¶ 47.

***906** 18. The user base for VR dedicated fitness apps differs from that of VR overall. VR users generally skew younger and male, but VR dedicated fitness app users tend to have an older and more female set of users. PX0003, at 17; PX0004, at 167; Rubin Dep. 131:19–132:14; PX0127, at 1, 6; Bosworth Hr'g Tr. 1035:18–22. In addition to the diverse appeal of VR dedicated fitness apps, they have strong user retention and rapid growth. Carlton Report ¶¶ 33–35; PX0386, at 12. [Redacted]. PX0003, at 9, 44. [Redacted] PX0386, at 12. [Redacted] Carlton Report ¶ 67, Table 10.

19. Multiple companies that make VR dedicated fitness apps consider their products to compete with the extensive range of methods by which an individual can seek to exercise. According to Within, Supernatural "compete[s] with every product or service or offering that offers fitness or wellness," ranging from connected fitness devices like Peloton equipment to gyms to YouTube videos intended to be mimicked by a viewer. Milk Hr'g Tr. 724:15–25. Within does not, however, consider a VR incidental fitness app to constitute a fitness offering. Koblin Hr'g Tr. 606:5–8. The founder of VirZoom, another VR company with a dedicated fitness app (VZfit), made similar claims, and added that VZfit even "compete[s] with somebody who wants to just jump on their bike and go for a bike ride." Janszen Hr'g Tr. 1143:8–12; DX1290 ("Janszen Decl.") ¶ 23. However, Odders Lab, another VR company that makes not only a dedicated fitness app but also a rhythm game app and a chess app, stated that its fitness app competed most directly with other fitness dedicated apps, such as Supernatural and FitXR, and that the launch of its fitness app had not diminished sales of its rhythm game app. Garcia Hr'g Tr. 1105:18–1106:21.

****4** 20. [Redacted] Apple provides Fitness+, a paid subscription app, and [Redacted] but it does not currently offer its own headset. DX1257, at 3, 24–28; Bosworth Hr'g Tr. 1022:13–16.

21. The customers for more established fitness offerings are perceived to be more likely to have long-term or well-developed fitness routines, while VR dedicated fitness app users are targeted more toward "[Redacted]" who have less fitness experience. PX0051 ("Cibula Dep.") 84:20–25; PX0318, at 1; PX0563, at 1; DX1081, at 1–2. No record evidence suggests that these firms possess VR engineering expertise. PX0118, at 1; Singer Report ¶ 82. As such, these fitness offerings do not create the 360-degree embodiment in a virtual environment provided by VR dedicated fitness apps. *See, e.g.*, Zuckerberg Hr'g Tr. 1298:5–6; Rabkin Hr'g Tr. 835:24–836:3. Although some fitness offerings may display videos of various locations around the world, those videos are displayed on a flat screen. Vickey Hr'g Tr. 1184:12–21.

22. Connected fitness devices are generally stationary and larger than the portable and relatively small VR headset equipment required to use a VR dedicated fitness app. *See, e.g.*, Milk Hr'g Tr. 689:17–25. The upfront device cost can be over $1,000, and users pay a monthly subscription fee to access fitness content; for example, Peloton and Tonal are connected fitness device companies, and cost, respectively

$1,445 plus $44 per month and $3,495 plus $49 per month. Singer Report ¶¶ 68–69. There are also more affordable alternatives outside of VR, such as a Peloton mobile app-only subscription, which costs $12.99 per month. *Id.* ¶ 65; DX1081, at 1–2. The subscription model is common in the overall fitness industry—in addition to the examples above, traditional gyms and Fitness+ charge monthly subscriptions. PX0001, at 2; DX1081, at 1–2; DX1257, at 3, 24–28.

23. Within's VR app Supernatural is a dedicated fitness app: it was designed specifically ***907** for fitness and offers "daily personalized full-body workouts and expert coaching from real-world trainers." PX0906, at 1. Within began developing Supernatural in February 2019, and launched it in the Quest Store on April 23, 2020. PX0005, at 77; PX0906, at 1. Supernatural now offers over 800 fully immersive video workouts set to music in various photorealistic landscapes, such as the Galapagos Islands and the Great Wall of China. FAC ¶ 24, ECF No. 101-1; Koblin Hr'g Tr. 604:18–605:19; ECF No. 83 ¶ 25; PX0906, at 1; *see id.* at 3–4, 6, 8. Through deals with major music studios, Supernatural sets each workout to songs from A-list artists like Katy Perry, Imagine Dragons, Lady Gaga, and Coldplay. FAC ¶ 24, ECF No. 101-1. Within optimized the exercise movements in Supernatural through consultations with experts holding PhDs in kinesiology and biomechanics; the workouts are led by personal trainers, calibrated to users' range of motion, mapped out in VR by dance choreographers, and filmed at Within's studio in Los Angeles. PX0712, at 18–20, 27–29. Within's founders are experienced directors of interactive music videos. *Id.* at 3–4. [Redacted] Supernatural is only available to Quest headset users in the United States and Canada. Milk Hr'g Tr. 671:4–9.

****5** 24. Other VR dedicated fitness apps include FitXR, Les Mills Bodycombat, VZfit, VZfit Premium, PowerBeats VR, RealFit, Holofit, Liteboxer, Liteboxer Premium VR, and VRWorkout. Singer Report ¶ 39. Like Supernatural, Liteboxer Premium VR costs $18.99 per month. *Id.* Les Mills Bodycombat, PowerBeatsVR, and RealFit have respective one-time costs of $29.99, $22.99, and $19.99; Liteboxer and VRWorkout are free; and the other VR dedicated fitness apps charge monthly subscription prices ranging from about $9 to $12. *Id.* Companies producing VR dedicated fitness apps generally pursue business strategies optimized for growth and market penetration, [Redacted]. Milk Hr'g Tr. 736:15–21; Garcia Hr'g Tr. 1111:8–1112:14; Janszen Hr'g Tr. 1147:22–1148:1. These companies expect that high growth and penetration metrics will render them attractive acquisition targets. *Id.*; Zyda Hr'g Tr. 1227:18–22, 1228:15–18.

25. All of these apps, including Supernatural, were launched within the past five years. Carlton Report ¶ 125. New VR dedicated fitness apps are expected to launch in the near future. *Id.* Supernatural currently possesses an 82.4% share of market revenue among the existing VR dedicated fitness apps (or a 77.6% share of VR apps in the Quest Store's "Fitness and Wellness" category). Singer Report ¶ 75, Tables 2-A, 2-B. [Redacted] Singer Rebuttal Report ¶¶ 124–25, Tables 1-A, 1-B.

26. The FTC's economics expert, Dr. Singer, analyzed the concentration of the VR dedicated fitness app market using the Herfindahl-Hirschman Index ("HHI"). Singer Report ¶ 76. Dr. Singer performed the HHI calculation multiple times to account for different conceptions of the firms contained within the VR dedicated fitness app market. *Id.* Using a set of firms based off a list of Supernatural competitors provided by Meta to the FTC, Dr. Singer calculated an HHI of 6,917 by measuring each firm's market share of revenue. *Id.* ¶¶ 46, 76, Table 2-A. Then, to capture broader potential set of firms within the VR dedicated fitness app market, Dr. Singer analyzed all apps listed in Meta's Quest Store under its "Fitness & Wellness" category and calculated an HHI of 6,148 (again, based on revenue). *Id.* ¶¶ 48, 76, Table 2-A. Dr. Singer also calculated HHI using market share of total hours spent and identified outputs 6,307 for the set of firms based off Meta's list and 4,863 for the broader set of "Fitness & Wellness firms." Singer Rebuttal Report ¶¶ 124–25, Table 1-A. Lastly, Dr. Singer calculated ***908** HHI using market share of monthly active users and identified outputs of 3,377 and 2,098 for the two respective sets of firms. *Id.* ¶¶ 124–25, Table 1-B. Markets are generally considered "highly concentrated" when the HHI is above 2,500 and "moderately concentrated" when the HHI is between 1,500 and 2,500. Singer Report ¶ 76 & n.129.

D. The Challenged Acquisition

27. Meta and Zuckerberg first expressed interest in acquiring Within as early as February 22, 2021. PX0170, at 1–2.

28. After Zuckerberg showed some interest in [Redacted], Michael Verdu (Vice President of VR Content) investigated and [Redacted]. PX0118, at 2, Mar. 4, 2022; Verdu Dep. 7:22–8:02.

29. On March 11, 2021, Meta employees met to discuss potential VR fitness investments with Mark Rabkin, the head of VR technology at Meta and one of the final decision makers to approve any VR investment. PX0179, at 2; Rabkin Hr'g Tr. 800:7–11; Stojsavljevic Hr'g Tr. 189:24–190:12. In advance of this meeting, Ananda Dass (Meta's director of non-gaming VR content) and Jane Chiao (business-side employee) prepared a pre-read document analyzing five potential investment options. PX0127, Mar. 10, 2021; Stojsavljevic Hr'g Tr. 69:18–24, 138:11–18, 140:23–141:1, 149:16–151:12. Shortly before this meeting, on March 4, 2021, Jane Chiao had also prepared a document titled, [Redacted]. PX0492, at 7, Mar. 9, 2021. During the meeting, the attendees decided [Redacted]. PX0179.

****6** 30. On March 17, 2021, Dass and Chiao summarized the advantages and disadvantages of acquiring Supernatural [Redacted]. At this time, they proposed spending the next few months inquiring into [Redacted]. PX0284, Mar. 17, 2021.

31. On April 20, 2021, Melissa Brown (Head of Developer Relations) prepared an executive summary pre-read in advance of Meta's meeting with Within, which was circulated to Verdu and Dass. The executive summary contains [Redacted] PX0565, Apr. 20, 2021.

32. On April 26, 2021, Brown circulated a [Redacted] PX0253, Apr. 26, 2021.

33. On May 26, 2021, Anand Dass [Redacted] DX1012, at 1, 3, May 26, 2021. [Redacted] *Id.*; *see also* PX0123, at 2. [Redacted] PX0117, June 10, 2021.

34. Frank Casanova (Apple's senior director of augmented reality product marketing) testified that Apple [Redacted]. Casanova's personal recollection was that [Redacted]. DX1219 ("Casanova Dep.") 90:20–93:15.

35. In mid-July 2021, Meta and Within entered into a non-binding term sheet regarding a potential acquisition. PX0062 ("Milk Dep.") 129:2–14; Milk Hr'g Tr. 720:12–15. Meta and Within executed the Merger Agreement on October 22, 2021. DX1072, Oct. 22, 2021.

E. Beat Saber Expansion Proposal

36. Beat Saber is a VR rhythm game in which players use virtual swords to slash oncoming blocks timed to music. FAC ¶ 30; Meta's Answer and Affirmative Defenses ¶ 33. Beat Saber is the most popular and best-selling VR app of all time. Stojsavljevic Hr'g Tr. 82:23–83:8; Rabkin Hr'g Tr. 820:9–11.

37. Meta acquired Beat Games, the studio that produces Beat Saber, in late 2019. Meta's Answer and Affirmative Defenses ¶ 4.

38. At the time it acquired Beat Games, Meta viewed Beat Saber as a potential "vector into fitness as a game-adjacent use case." PX0342, at 2, Sept. 27, 2019. There was a continuing internal dialogue at Meta regarding a potential fitness version of Beat Saber, which was referred to as the ***909** "perpetual white whale quest to get ... Beat Games to build a fitness version of Beat Saber." Verdu Dep. 112:04–112:12, 178:12–20. The founders of Beat Games were "warm to the idea" and released a "FitBeat" song for Beat Saber, but the idea otherwise did not gain traction. Verdu Dep. 178:12–20; see also PX0123 [Redacted] Sept. 15, 2021.

39. On February 16, 2021, Rade Stojsavljevic (director of Meta's first party studios) was riding his Peloton bike on a workout with a live DJ spinning music when he came up with the idea of a Peloton partnership with Beat Saber. Stojsavljevic Hr'g Tr. 127:20–128:24.

40. Shortly thereafter, Stojsavljevic collaborated on a presentation called "Operation Twinkie," in which he proposed repositioning Beat Saber as a fitness app in a partnership with Peloton. The same presentation recommended [Redacted] PX0527, at 5, 8.

41. On March 4, 2021, Chiao responded to comments regarding partnering with Peloton to create VR content, [Redacted] PX0251, at 2–3, Mar. 4, 2021.

42. On March 11, 2021, Stojsavljevic attended the VR fitness investment meeting with Mark Rabkin. PX0179, at 2; *see also supra* ¶ 31. Alongside the acquisitions of [Redacted] Supernatural, the March 11 meeting concluded that Stojsavljevic was to prepare a presentation to Rabkin to expand Beat Saber to dedicated fitness. PX0179, at 2.

****7** 43. On March 15, 2021, Stojsavljevic queried a group chat and solicited feedback on his proposal for a Beat Saber–Peloton partnership. PX0407, at 1, Mar. 15, 2021. The group members discussed different forms the partnership could take. *Id.*

44. On March 25, 2021, Stojsavljevic received a presentation from a consultant, [Redacted], titled "Beat Saber x Peloton Opportunity Identification." PX0121, at 2. The presentation provided a quote for [Redacted] to investigate the Beat Saber and Peloton opportunity, which was to take about 8 weeks and cost $23,500. *Id.* at 8. [Redacted]'s proposed research approach included nine action items, as follows: (1) analyze the home fitness market; (2) analyze the Peloton market; (3) assess the Peloton bike capabilities; (4) analyze the current XR[1] fitness market; (5) analyze Beat Saber's current strategy and its Fitbeat song; (6) identify Beat Saber x Peloton opportunities; (7) identify XR fitness opportunities; (8) define the go-to-market approach; and (9) define how to approach Peloton with the partnership. *Id.* at 5–6. Stojsavljevic ultimately did not engage [Redacted] to undertake this research project. PX0052 ("Stojsavljevic Dep.") 219:23–220:1.

45. Based on the parties' representations and to the best of the Court's review of the evidence, the next reference to the Beat Saber–Peloton proposal was on June 11, 2021, after Meta began pursuing Within as an acquisition target. PX0341, at 2, June 11, 2021. In a chat, Stojsavljevic briefly mentioned that Chiao and Dass had disagreed with his Beat Saber–Peloton proposal and had wanted to [Redacted]. *Id.* At the evidentiary hearing, Stojsavljevic testified that his enthusiasm for the Beat Saber–Peloton proposal had "slowed down" before Meta's decision to acquire Within. Stojsavljevic Hr'g Tr. 165:12–17. He also testified that he had not undertaken the research project that he had promised Rabkin because he had been busy working ***910** on another Meta acquisition. *Id.*; *see also supra* ¶ 44.

46. On September 15, 2021, [Redacted] Jason Rubin—who had just transitioned into his role as the vice president of Metaverse content on August 1, 2021—made comments about Beat Saber in response to [Redacted]PX0123, at 2, Sept. 15, 2021; *see also* Rubin Dep. 28:8–15. Rubin suggested that [Redacted] PX0123, at 2. He subsequently remarked that [Redacted] *Id.*

II. PROCEDURAL HISTORY

Defendants signed an Agreement and Plan of Merger for a proposed acquisition of Within by Meta (the "Acquisition") on October 22, 2021. ECF No. 101-1 ("FAC") ¶ 24; PX0004, at 161. On July 27, 2022, the FTC filed a complaint for a temporary restraining order and preliminary injunction enjoining the Acquisition. *See* Compl., ECF No. 1. At the time of the FTC's filing, Defendants would have been free to consummate the Acquisition after July 31, 2022. *Id.* ¶ 27. On July 29, 2022, the Court granted the parties' stipulated order preventing Defendants from consummating the Acquisition until after August 6, 2022. ECF No. 19. On August 5, 2022, the Court granted the parties' second stipulated order and entered a temporary restraining order enjoining the Acquisition until after December 31, 2022. ECF No. 56. The FTC filed its amended complaint on October 7, 2022, *see* FAC, and Defendants moved to dismiss the amended complaint on October 13, 2022, ECF No. 108 ("MTD"). The Court took the MTD under submission without oral argument on December 2, 2022. ECF No. 388.

****8** On October 31, 2022, pursuant to the parties' stipulated order, the FTC filed its memorandum in support of its motion for a preliminary injunction (the "Motion"). ECF Nos. 86, 164. The evidentiary hearing on the Motion began on December 8, 2022. *See* ECF No. 441. Following the in-Court testimony of the FTC's economics expert, Dr. Hal J. Singer, on December 13, 2022, Defendants orally moved the Court to strike Dr. Singer's testimony. *See* ECF No. 464. Defendants subsequently filed a motion to strike Dr. Singer's opinion regarding the definition of the relevant product market. ECF No. 470. The evidentiary hearing concluded on December 20, 2022, *see* ECF No. 492, and the Court granted the parties' stipulated order extending the temporary restraining order to enjoin the Acquisition until January 31, 2023, ECF No. 508.

On January 31, 2023, the FTC filed an emergency motion requesting an extension of the temporary restraining order if the Court either was not prepared to rule on the Motion until after that date or denied the Motion. ECF No. 543 ("Emergency Motion"). The Court's ruling on the Emergency Motion will be filed in a separate order.

The Court now rules on the Motion, the MTD, and the motion to strike Dr. Singer's opinion on the relevant product market definition. *See* ECF Nos. 108, 164, 470.

III. LEGAL CONCLUSIONS

A. Legal Standard

Section 13(b) of the FTC Act provides that "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond." 15 U.S.C. § 53(b)

(2). In evaluating a motion for preliminary injunction brought under Section 13(b), courts must "1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) (emphasis added) (citing ***911** *F.T.C. v. Simeon Mgmt. Corp.*, 532 F.2d 708, 713–14 (9th Cir. 1976)).

The federal court is not tasked with "mak[ing] a final determination on whether the proposed merger violates Section 7, but rather [with making] only a preliminary assessment of the merger's impact on competition." *Warner Commc'ns Inc.*, 742 F.2d at 1162. To obtain a preliminary injunction, the FTC must "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id.* (citations omitted); *see also FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) ("the FTC [must] 'raise questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.' "). Although a district court may not "require the FTC to prove the merits, ... it must 'exercise independent judgment' about the questions § 53(b) commits to it." *Whole Foods Market, Inc.*, 548 F.3d at 1035 (citations omitted). The FTC is therefore required to provide more than mere questions or speculations supporting its likelihood of success on the merits, and the district court must decide the motion based on "all the evidence before it, from the defendants as well as from the FTC." *Id.* (citations omitted); *see United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) (noting that "the Government must do far more than merely raise sufficiently serious questions with respect to the merits" in demonstrating a "reasonable probability" of a Section 7 violation.).

B. Relevant Market Definition

The first step in analyzing a merger challenge under Section 7 of the Clayton Act is to determine the relevant market. *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 619, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (citing *E.I. Du Pont*, 353 U.S. 586, 593, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957)); *see FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) ("A threshold step in any antitrust case is to accurately define the relevant market, which refers to 'the area of effective competition.' "). The relevant market for antitrust purposes is determined by (1) the relevant product market and (2) the relevant geographic market. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 324, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

1. Product Market

****9** "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. "Within a general product market, 'well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.' " *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1121 (9th Cir. 2018) (quoting *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502); *see also Newcal Indus., Inc. v. Ikon Office Sol'n*, 513 F.3d 1038, 1045 (9th Cir. 2008) ("[A]lthough the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket."). The definition of the relevant market is "basically a fact question dependent upon the special characteristics of the industry involved." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1299 (9th Cir. 1982). Products need not be fungible to be included in a relevant market, but a relevant market "cannot meaningfully encompass th[e] infinite range" of substitutes for a product. *Id.* at 1271 (quoting ***912** *Times–Picayune Publishing Co. v. United States*, 345 U.S. 594, 611, 612 n. 31, 73 S.Ct. 872, 97 L.Ed. 1277, (1953)). The overarching goal of market definition is to "recognize competition where, in fact, competition exists." *Brown Shoe*, 370 U.S. at 326, 82 S.Ct. 1502; *see also U.S. v. Continental Can Co.*, 378 U.S. 441, 449, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964) ("In defining the product market between these terminal extremes [of fungibility and infinite substitution], we must recognize meaningful competition where it is found to exist."); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008) ("As always in defining a market, we must 'take into account the realities of competition.' ") (citations omitted).

Courts have used both qualitative and quantitative tools to aid their determinations of relevant markets. A qualitative analysis of the relevant antitrust market, including submarkets, involves "examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502; *see also, e.g., Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 766–68 (N.D. Cal. 2022) (applying *Brown Shoe* factors). A

common quantitative metric used by parties and courts to determine relevant markets is the Hypothetical Monopolist Test ("HMT"), as described in the U.S. Department of Justice and the FTC's 2010 Merger Guidelines. U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* ("2010 Merger Guidelines") § 4 (2010); *see also, e.g., U.S. v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) ("An analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products. If so, those products may constitute a relevant market.").

There is "no requirement to use any specific methodology in defining the relevant market." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., Ltd.*, 20 F.4th 466, 482 (9th Cir. 2021). As such, courts have determined relevant antitrust markets using, for example, only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and the HMT. *See, e.g., Lucas Auto. Eng., Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766–68 (9th Cir. 2001) (relying on *Brown Shoe* factors alone in review of district court's determination of relevant market); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20–21 (D.D.C. 2017) (using HMT and *Brown Shoe* factors to analyze relevant market). The Ninth Circuit has "repeatedly noted that the *Brown Shoe* indicia are practical aids for identifying the areas of actual or potential competition and that their presence or absence does not decide automatically the submarket issue." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1375 (9th Cir. 1989) (citations omitted). The suitability of a submarket as a relevant antitrust market "turns ultimately upon whether the factors used to define the submarket are 'economically significant.' " *Id.*

****10** The FTC proposes a relevant product market consisting of VR dedicated fitness apps, meaning VR apps "designed so users can exercise through a structured physical workout in a virtual setting." Mot. 13. According to the FTC, VR dedicated fitness apps are distinct from (1) other VR apps and (2) other fitness offerings. *Id.* 14. To differentiate their proposed market from other VR app markets, the FTC claims that VR dedicated fitness apps have distinct customers and pricing strategies. *Id.* The FTC further argues that VR dedicated fitness apps are in a separate market from other fitness offerings (*e.g.*, gyms, at-home fitness equipment) because they provide users with "fully immersive, 360-degree ***913** environments," are fully portable, save space, cost less, and target a different type of consumer. *Id.* 14–15. The FTC claims that these qualitative product differences satisfy the *Brown Shoe* practical indicia of a relevant market, and that the Hypothetical Monopolist Test conducted by the FTC's economics expert further confirms the relevant product market definition. *Id.* 15.

Unsurprisingly, Defendants disagree. They claim that the FTC's proposed market is impermissibly narrow because it excludes "scores of products, services, and apps" that are "reasonably interchangeable" with VR dedicated fitness apps, including dozens of VR apps categorized as "fitness" apps on the Quest platform, fitness apps on gaming consoles and other VR platforms, and non-VR connected fitness products and services. Opp. 8, ECF No. 216. Defendants argue that members of the FTC's proposed market subjectively consider other VR apps and other fitness offerings to be competing products, and that several such products also possess the very features—portability, immersion, and pricing models—that the FTC highlights as distinguishing or unique to its proposed market. *Id.* 8–10. Defendants also contend that Dr. Singer's HMT analysis is fatally flawed due to methodological errors in the survey underlying the test. *Id.* 11.

In this case, the Court finds the FTC has made a sufficient evidentiary showing that there exists a well-defined relevant product market consisting of VR dedicated fitness apps.

a. *Brown Shoe* Analysis

The Court first examines in turn each of the *Brown Shoe* factors, *i.e.*, "practical indicia [such] as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325, 82 S.Ct. 1502.

i. Industry or Public Recognition

The evidence indicates that Defendants and other VR dedicated fitness app makers viewed VR dedicated fitness apps as an economic submarket of VR apps. For example, [Redacted] PX0003, at 44. [Redacted] *Id.* at 9. Within's contemporaneous view of untapped market segments indicates that a "fitness first" app paired with a VR headset—*i.e.*, a VR dedicated fitness app—would be in a distinct segment of the overall VR market. *See id.* at 31. Likewise, as explained in greater detail in the sections below, Meta repeatedly stated that VR dedicated fitness

apps constituted a distinct market opportunity within the VR ecosystem due to their unique uses, distinct customers, and distinct prices. *See infra* Sections III.B.1.a.ii., iv., v. And a representative the VR app company Odders Lab testified that the launch of its VR dedicated fitness app did not diminish sales of its VR rhythm app, acknowledging that its VR fitness app "compete[d] more directly with fitness dedicated applications than gaming applications." Garcia Hr'g Tr. 1105:18–1106:21. Industry companies' internal communications showing frequent distinctions between various categories of applications is "strong[ ] support" of a distinct submarket. *Klein*, 580 F. Supp. 3d at 758.

Participants in the broader fitness industry also recognized VR fitness as a "separate economic entity." [Redacted] *See United States v. Microsoft Corp.*, 253 F.3d 34, 53 (D.C. Cir. 2001) (rejecting inclusion of middleware products in the relevant market where middleware was a potential, rather than current, competitor).

****11** Defendants claim that members of the VR dedicated fitness app industry understood the market in which they operated to ***914** consist of "[s]cores of products, services, and apps available to consumers who want to exercise." Opp. 8; Milk Hr'g Tr. 724:15–25 ("[Redacted]"); *id.* 779:7–8 ("We have thousands of competitors."); *see also* Janszen Hr'g Tr. 1143:8–12 (VR dedicated fitness app VirZoom "compete[s] with somebody who wants to just jump on their bike and go for a bike ride"). Defendants also contend that "[e]stablished fitness and technology firms ... view VR fitness as competitive with off-VR products," and point as an example to Apple's inclusion of Supernatural and the Peloton Guide in the "competitive landscape" when it [Redacted].[2] Opp. 9; DX1257, at 3, 24–28.

Defendants' evidence shows that there is a broad fitness market that includes everything from VR apps to bicycles. This in no way precludes the existence of a submarket constituting a relevant product market for antitrust purposes. *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502; *Newcal Indus.*, 513 F.3d at 1045. As the Ninth Circuit has noted, a relevant antitrust market "cannot meaningfully encompass th[e] infinite range" of substitutes for a product—yet this is exactly how Defendants propose to define the market. *Twin City Sportservice, Inc. v. Charles O'Finley & Co., Inc.*, 512 F.2d 1264, 1271 (9th Cir. 1975). The Court therefore acknowledges that VR dedicated fitness apps compete for consumers with every manner of exercise (including gyms, bike rides, and connected fitness), but finds that Defendants and the broader fitness industry recognized VR dedicated fitness apps as an economically distinct submarket.

ii. Peculiar Characteristics and Uses

The evidence indicates that VR dedicated fitness apps have several "peculiar characteristics and uses" in comparison to both other VR apps and non-VR fitness offerings. *Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502. Even assuming "[a]lmost all VR applications require body movement," Pruett Hr'g Tr. 264:16, VR dedicated fitness apps are "specifically marketed to customers for the purpose of exercise," *id.* 263:6–18. To support that marketing, VR dedicated fitness apps (unlike other VR apps) are often characterized by their fitness-specific features, such as trainer-led workout regimens, calorie tracking, and the ability to set and track progress toward fitness goals. *See, e.g., id.* 263:14–23; Paynter Dep. 24:2–12 ("what [Meta] used to call [dedicated] fitness apps now correspond to a category ... call[ed] ... trainer workout apps"); PX0487, at 4 (VR dedicated fitness apps are "[d]esigned to allow a player to deliberately set and attain fitness goals, with fitness-specific features i.e. coaching, trackable progress"); PX0001, at 5 n.10 ("Meta draws a distinction between apps designed to allow users to set and attain fitness goals, with features like coaching and trackable progress (called 'deliberate' or 'dedicated' fitness apps) and games whose primary focus is not fitness that allow users to get a workout as a byproduct (sometimes called 'incidental' or 'accidental' fitness apps).").

The most "peculiar characteristic" of VR dedicated fitness apps in comparison to non-VR fitness offerings is, of course, the VR technology itself. A VR user is "embodied" in a virtual environment. Zuckerberg Hr'g Tr. 1298:5–6. She is "teleported to a different place, feeling like when you move your head and look around, you're in a new space and seeing virtual things as if they are real, which is virtual reality." Rabkin Hr'g Tr. 835:24–836:3. Defendants' fitness industry expert, Dr. Vickey, submitted that non-VR fitness options could also be immersive, describing the non-VR Hydrow rowing machine as an "immersive exercise piece of equipment" because the ***915** Hydrow displayed video footage of various locations on a touchscreen the user viewed while rowing.[3] Vickey Hr'g Tr. 1184:12–21. The Court finds that no matter how crisp or accurate a video may be, a two-dimensional screen display is inherently far less immersive than a 360-degree environment. The evidence does not suggest—and the Court is not aware of—any other at-home

fitness offering that can transport the user in this way. That a user of a VR dedicated fitness app can exercise in a VR setting is, therefore, a "distinct core functionality" indicative of a submarket. *Klein*, 580 F. Supp. 3d at 767 (quoting *Datel Holdings, Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 997 (N.D. Cal. 2010)).

****12** The FTC puts forth other hallmarks of VR dedicated fitness apps that generally differ from characteristics of non-VR fitness offerings. For example, the FTC argues that "VR headsets are fully portable and take up little space." Mot. 14. These appear to be distinguishing features in relation to bulky connected fitness devices, such as the Peloton Bike or Hydrow rowing machine, but Defendants persuasively argue that mobile fitness apps can offer these same functionalities.[4] Opp. 10. Nonetheless, the virtual reality fitness experience created by VR dedicated fitness apps appears to be vastly different from a workout conducted on a large and stationary device or based off a mobile phone screen.

With respect to "peculiar ... uses," Defendants have shown that consumers use non-VR fitness offerings for exercise. *See supra* Section III.B.1.a.i. Defendants have additionally shown that consumers may use other VR apps for fitness. *See, e.g.*, Carmack Hr'g Tr. 562:12–18 ("You can work up a pretty good sweat in Beat Saber."); PX0529, at 2 ("UXR reports that many users have fitness intent among these [incidental fitness] apps"). As explained above, the existence of a broader fitness market does not mean a relevant submarket does not exist. *Supra* Section III.B.1.a.i. Defendants have themselves recognized the characteristics that distinguish VR dedicated fitness apps from other VR apps. *E.g.*, PX0001, at 5 n.10 ("Meta draws a distinction between apps designed to allow users to set and attain fitness goals, with features like coaching and trackable progress (called 'deliberate' or 'dedicated' fitness apps) and games whose primary focus is not fitness that allow users to get a workout as a byproduct (sometimes called 'incidental' or 'accidental' fitness apps)."); Milk Hr'g Tr. 683:8–21 (Supernatural, unlike Beat Saber, "employed experts in movement and fitness[;] built companion apps for the phones and for heart rate tracking integration[; and] calibrate[d to a] range of motion so that [it would not] injury anybody."); *see also* Koblin Hr'g Tr. 606:5–8 ("VR games that require some incidental physical exertion" are not a fitness offering). The Court therefore finds that the "peculiar characteristics and uses" factor of the *Brown Shoe* analysis supports the finding that VR dedicated fitness apps constitute a relevant antitrust product market. *See, e.g., SC Innovations, Inc. v. Uber Techs., Inc.*, 434 F. Supp. 3d 782, 792 (N.D. Cal. 2020) (finding plaintiffs alleged a submarket for ride-sharing services excluding taxis, in part due to distinguishing features such as ability ***916** to rate and review drivers and share rides).

iii. Unique Production Facilities

The parties did not explicitly develop arguments regarding unique production facilities in support of their positions regarding the relevant product market. *See* Mot. 13–16; Opp. 7–11. The Court notes, however, that VR dedicated fitness apps require a unique combination of production inputs. [Redacted] *See* Singer Report ¶ 82 ("[T]he talent needed to create true triple-A VR experiences is going to be scarce and really valuable in a few years.") (citing PX0118, at 1); Pruett Hr'g Tr. 286:6–8 ("I have an engineering team ... [who] are a group of veteran engineers who are particular experts in our VR technology and our hardware."). Similarly, most VR companies are unlikely to have the fitness expertise and equipment necessary to create content for VR dedicated fitness apps. *See* Singer Report ¶ 84 ("[Redacted]") (citing PX0251, at 2–3). Koblin Hr'g Tr. 650:3–12 ("[I]t seemed highly unlikely to me that [Meta] would get into virtual reality fitness ... honestly at that level of depth, it just seemed extremely unlikely that they would hire coaches and build a green screen studio and dive deep into the psychology of what makes fitness fitness."); Garcia Hr'g Tr. 1079:16–24 ("[One of the things that we have done in Odders Lab whenever developing any of our apps has always been looking into — been looking at the experts.... And for our fitness app, we also started reaching out to local experts.").

****13** Although relevant markets are generally defined by demand-side substitutability, supply-side substitution also informs whether alternative products may be counted in the relevant market. *Twin City Sportservice, Inc.*, 512 F.2d at 1271 ("While the majority of the decided cases in which the rule of reasonable interchangeability is employed deal with the 'use' side of the market, the courts have not been unaware of the importance of substitutability on the 'production' side as well."); *see also Brown Shoe*, 370 U.S. at 325 n.42, 82 S.Ct. 1502 ("The cross-elasticity of production facilities may also be an important factor in defining a product market."); Julian von Kalinowski et al., 2 Antitrust Laws & Trade Regulation § 24.02[1][c], at 24–55 (2d ed. 2012) ("Another important factor in defining a product market is the ability of existing companies to alter their facilities to produce the defendant's product.... The Supreme Court has long recognized the

significance of this factor, often referred to as cross-elasticity of supply.") (footnote omitted); 2010 Merger Guidelines, § 5.1 & n.8 (high supply side substitutability may be used to aggregate products into a market description).

Supply-side substitution focuses on suppliers' "responsiveness to price increases and their ability to constrain anticompetitive pricing by readily shifting what they produce." *Federal Trade Commission v. RAG-Stiftung*, 436 F. Supp. 3d 278, 293 (D.D.C. 2020) (citing *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) ("reasonable market definition must also be based on 'supply elasticity' "), *cert. denied*, 516 U.S. 987, 116 S.Ct. 515, 133 L.Ed.2d 424 (1995)). Here, as explained above, the evidence indicates that neither general fitness firms nor general VR firms have the production facilities to readily produce a substitute VR dedicated fitness app product, even if VR dedicated fitness apps were to raise prices and make market entry more attractive. *See also* Singer Report, Section F ("Would-Be Suppliers of VR Dedicated Fitness Apps Face Significant Barriers to Entry"). That existing companies are not easily able to alter their facilities to produce VR dedicated fitness apps is additional evidence that ***917** such apps constitute a distinct product market.[5]

iv. Distinct Customers

The FTC proffered evidence showing that users of VR dedicated fitness apps differ from those of other VR apps along multiple axes. Internal evaluations by Meta and Within found that although overall users of VR apps skewed younger and male, users of VR dedicated fitness apps tended to have an older and more female user base. For example, Meta claimed in its response to the FTC's Second Request regarding the Meta-Within transaction that the overall Quest user base was about [Redacted] *See* PX0004, at 167, May 2, 2022. VR fitness apps, on the other hand, drew far more women. *Id.* [Redacted]; PX0003, at 17 [Redacted] Apr. 23, 2021; PX0127, at 1 [Redacted] Mar. 10, 2021. Meta expected that VR dedicated fitness apps would expand the reach of virtual reality to new customer segments. To that end, Meta's Vice President of Metaverse Content informed the company's board of directors that "Supernatural, FitXR, and ... other fitness applications, ... unlike our gaming population ... had tended to be more successful with on average an older person, on average more women. It was a very different demographic, and ... we had always been in search of expanding VR beyond gaming into more of a general computing platform." PX0066 ("Rubin Dep.") 131:19–132:14; *see also* PX0127, at 6 ("[g]rowing [dedicated] fitness will broaden and diversify our user base, and bring on a disproportionate % of women").

Defendants acknowledge that VR fitness appeals to different user demographics than other VR apps. Opp. 5 ("Fitness is one such use case that can expand VR's audience beyond gamers (who tend to be younger males) to a broader population (including older and female users)."); *see also* Bosworth Hr'g Tr. 1035:18–22 (Meta perceived that "users of VR fitness apps represent[ed] a distinct category of customer compared to overall users of other VR apps on its platform"). Defendants do, however, dispute that VR dedicated fitness apps have a customer base that is distinct from that of non-VR fitness offerings. Opp. 9 n.1. The evidence indicates that VR dedicated fitness apps are targeted more toward "[Redacted]" who have less fitness experience and more difficulty finding motivating fitness products (rather than to individuals who have long-term or well-developed fitness routines.) As stated by Within's executive vice president of business development and finance, it was "Within's understanding that Supernatural appeals to [Redacted] in a way that other existing fitness products do not." PX0051 ("Cibula Dep.") 84:20–25. Within insiders also compared Supernatural to [Redacted] DX1081, at 1–2, Apr. 13, 2020. And in summer 2021—when Meta was in negotiations regarding the acquisition of Supernatural —a Meta employee described Within's business model as "encouraging users who don't think about fitness much as well as users with a light routine, not the fitness buff who is better served by the likes of Peloton cycling or Crossfit classes." PX0318, at 1, June 22, 2021; [Redacted] The Court finds the VR dedicated fitness apps have a customer base that is distinct from those of both other VR apps and several other fitness offerings—[Redacted] *See, e.g., FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 29–30 (D.D.C. 2015) (finding relevant product market in part based on erstwhile ***918** competitors' inability to serve certain types of customers).

v. Distinct Prices

****14** The pricing of VR dedicated fitness apps likewise differs in at least one key respect from other VR apps and non-VR fitness offerings. The main difference in comparison to the former category is that VR dedicated fitness apps are more likely to have a subscription-based pricing model. As one of Within's founders testified, Within's daily release of new workout content requires ongoing revenue, which is supported by a subscription membership. Milk

Hr'g Tr. 671:10–19. Likewise, Meta's Director of Content Ecosystem testified that "subscriptions are particularly good monetization strategies for [fitness] applications" because "fitness applications need to produce content on an ongoing basis ... in order to not get boring." Pruett Hr'g Tr. 269:9–23. However, subscription pricing does not provide a clear basis for delineating between VR dedicated fitness apps and other VR apps. Some VR dedicated fitness apps do not charge subscription fees, Vickey Report ¶ 47, and other VR apps may also be a good fit for subscription pricing, *see* Pruett Hr'g Tr. 268:22–269:4 (the "fitness, productivity, and social genres ... all seem to be trending towards subscriptions as a default monetization method"). Nonetheless, the evidence indicates that "the majority of the video game applications on the Quest platform are not a good fit for subscriptions" including because "most of them don't have [an] ongoing content pipeline." Pruett Hr'g Tr. 270:12–17.

Many fitness offerings, whether virtual or physical, use subscription models. As Meta noted in its June 2022 white paper to the FTC, Supernatural's "monthly subscription model ... is similar in structure to other connected fitness solutions included specialized equipment solutions (*e.g.*, Peloton, Mirror, Tonal), paid apps (*e.g.*, Apple Fitness+), and other VR fitness apps (*e.g.*, FitXR, Holofit, VZfit), as well as in-person gym memberships (*e.g.*, Equinox, CrossFit, 24 Hour Fitness)." PX0001, at 2; *see also* DX1081, at 1–2 (listing subscription prices for "leading fitness offering[s]"). The FTC argues that despite sharing a subscription pricing model, VR dedicated fitness apps tend to be "far less expensive" than "other at-home smart fitness devices." Mot. 14. The evidence supports this assertion with respect to several connected fitness devices—Supernatural, the most expensive VR dedicated fitness app,[6] costs $399 plus $18.99 per month, while Peloton costs $1,445 plus $44 per month and Tonal costs $3,495 plus $49 per month. Singer Report ¶¶ 68–69. There are, however, digital fitness options—generally mobile phone apps—with subscriptions "in the sort of $8 to $12 range." Milk Hr'g Tr. 732:22–733:1; *see also* DX1081, at 1–2 (noting $12.99 Peloton app-only monthly subscription); Singer Report ¶ 65 (same).

The Court finds that the VR app and non-VR pricing evidence tilts slightly in favor of the existence of a VR dedicated fitness app market. *See, e.g., FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 200–01 (D.D.C. 2018) ("The existence of distinct prices ... are 'not what one would expect if North American customers were willing and able to substitute one type of titanium dioxide for another in response to a change in their relative prices.' ") (citations omitted). Testimony from both Within and Meta indicate a practical reason for VR fitness apps to be generally best served by ***919** a subscription pricing model, which is in line with broader non-VR fitness offerings. And VR dedicated fitness apps are much more affordable than the non-VR fitness products that come closest to offering the level of immersion available in VR. *See* Vickey Hr'g Tr. 1184:12–21 (opining that touchscreen on Hydrow rowing machine provides immersive experience). However, in light of the evidence that there exist both other VR apps that can strategically employ a subscription model and non-VR fitness offerings that are comparably priced to VR fitness apps, the overall weight of this factor is lessened.

vi. Sensitivity to Price Changes

The sixth *Brown Shoe* factor evaluates the change in sales of a possible substitute product given a change in the price of products within the relevant market. Because this is in essence the same question posed by the HMT, *see FTC v. Staples*, 970 F. Supp. 1066, 1075 (D.D.C. 1997), the Court will not duplicate its analysis here. Drawing from that analysis, *see infra*, Section III.B.1.b., the Court finds this factor to be neutral as to the existence of a VR dedicated fitness app market.

vii. Specialized Vendors

****15** The final *Brown Shoe* factor considers whether a product's distribution requires vendors with specialized knowledge or practices. *See Brown Shoe*, 370 U.S. at 325, 82 S.Ct. 1502; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 120–21 (D.D.C. 2016) (defining product market in part due to necessity that vendors have distinguishing capabilities such as sophisticated IT systems, personalized and high-quality service, and next-day delivery). The FTC has not presented evidence that the VR dedicated fitness app market requires specialized vendors.

* * *

For the reasons explained above, the Court finds that the following *Brown Shoe* "practical indicia" support the FTC's assertion that VR dedicated fitness apps constitute the relevant product market: industry or public recognition; peculiar characteristics and uses; unique production facilities; distinct customers; and (to a lesser degree) distinct prices.

These factors indicate that VR dedicated fitness apps present in-market firms with an economic opportunity that is distinct from both other VR apps and other fitness offerings. *See Thurman Indus., Inc.*, 875 F.2d at 1375. The Court therefore finds that the FTC has met its burden of showing that VR dedicated fitness apps constitute a relevant antitrust product market. *Brown Shoe*, 370 U.S. at 325–28, 82 S.Ct. 1502; *see also Lucas Auto. Eng.*, 275 F.3d at 766–68 (relying on *Brown Shoe* factors alone in review of relevant market); *Klein*, 580 F. Supp. 3d at 766–73 (same); *Newcal Indus.*, 513 F.3d at 1051 ("Even when a submarket is an *Eastman Kodak* submarket, though, it must bear the 'practical indicia' of an independent economic entity in order to qualify as a cognizable submarket under *Brown Shoe*.").

b. Hypothetical Monopolist Test (HMT)

In the interests of thoroughness, the Court also addresses the parties' HMT arguments. The HMT is a quantitative tool used by courts to help define a relevant market by determining reasonably interchangeable products. *Optronic Techs., Inc.*, 20 F.4th at 482 n.1. The test asks whether a "hypothetical monopolist that owns a given set of products likely would impose at least a small but significant and nontransitory increase in price (SSNIP) on at least one product in the market, including at least one product sold by one of the merging firms." Singer Report ¶ 32; *see* 2010 Merger Guidelines § 4.1.1. If enough consumers would respond to a SSNIP—often calculated as a five percent increase in price—by making ***920** purchases outside the proposed market definition so as to make the SSNIP not profitable, then the proposed market is defined too narrowly. Singer Report ¶ 32; *Optronic Techs., Inc.*, 20 F.4th at 482 n.1.

The FTC's economics expert, Dr. Singer, conducted a hypothetical monopolist test on the VR dedicated fitness app market. Singer Report ¶¶ 49–68. To inform his analysis of the response to a SSNIP in the VR dedicated fitness app market, Dr. Singer commissioned Qualtrics to conduct "a survey of Supernatural users to determine what fitness apps they perceive to be a reasonably close substitutes to Supernatural and to VR dedicated fitness products generally." *Id.* ¶ 60. Dr. Singer testified that although an economist's natural path would be to collect data about Supernatural customers' transactions and reactions to any price increases, such data was unavailable here because Supernatural has never changed its price from $18.99 per month. Singer Hr'g Tr. 365:2–13. The survey was his "next best" option, and the approach is supported by the 2010 Merger Guidelines. *Id.* 365:16–18; Singer Report ¶¶ 60–61; 2010 Merger Guidelines § 4.1.3. Based on his analysis of the survey, Dr. Singer determined that VR dedicated fitness apps constituted a relevant market. Singer Hr'g Tr. 360:7–8.

****16** Defendants deride Dr. Singer's survey as "junk science" and urge this Court not to rely on it. Opp. 11; Meta Closing Hr'g Tr. 1508:22–1509:3. In support of their arguments, Defendants relied on the expert reports and testimony of Dr. Dube and Dr. Carlton, who the Court found qualified as experts in the design and implementation of surveys and the economics of consumer demand for branded goods, *see* Dube Hr'g Tr. 872:16–873:19, and industrial organizations and microeconomics, *see* Carlton Hr'g Tr. 1355:15–20. Based on the testimony elicited by Defendants from Dr. Singer, Dr. Dube, and Dr. Carlton, the Court is troubled by various apparent flaws in the survey underlying Dr. Singer's HMT. Most pertinently, there appear to be several indications that a high fraction of the 150 surveyed individuals, on whose answers Dr. Singer's analysis necessarily relied, were untruthful in one or more responses. *See, e.g.*, Dube Hr'g Tr. 895:12–25 (respondents claimed to own multiple pieces of bulky, expensive equipment); Carlton Report ¶ 93 (over two dozen respondents claimed to regularly use all 27 fitness products listed on survey). Another facet of concern is the survey's apparent inclusion of a non-VR product in the question designed to capture a hypothetical monopolist's pricing power in a VR-only market. Carlton Hr'g Tr. 1428:21–1429:9. These questions, among others, suggest that the survey data underlying Dr. Singer's HMT analysis may not be reliable, which in turn casts doubt on the conclusions to be drawn from the HMT.

The Court's reservations about the survey do not change its finding that VR dedicated fitness apps constitute a relevant antitrust product market. Because the Court bases its determination of the relevant product market on its *Brown Shoe* analysis, *see supra* Section III.B.1.a., rather than the HMT, it need not determine the validity of Dr. Singer's survey methodology. *See, e.g.*, Singer Hr'g Tr. 450:25–452:17. The *Brown Shoe* factors are sufficient to inform the Court's understanding of the "business reality" of the VR dedicated fitness app market. *Lucas Auto. Eng.*, 275 F.3d at 766–68; *see also United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, (D.D.C. 2017) (noting *Brown Shoe* factors supported the "business reality" of the government's relevant market despite defense argument of "[in]sufficient economic rigor"); *RAG-Stiftung*, 436 F. Supp. 3d at 293 n.3 ("The *Brown*

Shoe practical indicia may indeed be old school, ***921** and its analytical framework relegated 'to the jurisprudential sidelines.' But *Brown Shoe* remains the law, and this court cannot ignore its dictates.") (citations omitted). Because the Court does not rely on the challenged portions of Dr. Singer's report, the Court DENIES AS MOOT Defendants' motion to strike Dr. Singer's opinion that VR dedicated fitness apps constitute a relevant product market.[7] ECF No. 470.

2. Geographic Market

"The relevant geographic market is the 'area of effective competition where buyers can turn for alternate sources of supply.' " *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015) (citations omitted). "[I]n a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor." *Marine Bancorporation*, 418 U.S. at 622, 94 S.Ct. 2856. That is, the geographic market must "correspond to the commercial realities of the industry." *Brown Shoe*, 370 U.S. at 336, 82 S.Ct. 1502; *see also Staples*, 970 F. Supp. at 1073 (relevant geographic market is region where "consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition").

The FTC asserts that the United States is the relevant geographic market, and Defendants do not argue to the contrary. Mot. 15; *see generally* Opp. The Court agrees. As one of Within's founders testified, Supernatural is only available to Quest headset users in the United States and Canada mainly [Redacted]. Milk Hr'g Tr. 671:4–9. More broadly, Quest headsets are designed so that a user's geolocation determines the availability and prices of content. Stojsavljevic Hr'g Tr. 79:23–80:6. Because content developed in other countries may not be available in the United States, and because Supernatural is not available outside of the United States and Canada, the Court finds that the United States is an appropriate relevant geographic market. *See Staples*, 970 F. Supp. at 1073.

****17** Accordingly, the relevant antitrust market for the analysis of the competitive impacts of Meta's acquisition of Within is VR dedicated fitness apps in the United States.

C. Substantial Market Concentration

The FTC has challenged Meta's acquisition of Within on the basis that the merger would substantially lessen potential competition. The Supreme Court has taken note of two species of potential competition theories: actual potential competition and perceived potential competition. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974). Although the two theories have different elements and are grounded in different presumptions about the market, they share a common requirement: they have "meaning only as applied to concentrated markets." *Marine Bancorporation*, 418 U.S. at 630–31, 94 S.Ct. 2856. Because both doctrines posit that potential competitors can or will soon impact the market, there would be no need for concern if the market is already genuinely competitive. *Id.*

***922** In assessing whether the relevant market is "substantially concentrated," the Supreme Court sets forth a burden-shifting framework. First, the FTC may establish a prima facie case that the relevant market is substantially concentrated by introducing evidence of concentration ratios. *Id.* at 631, 94 S.Ct. 2856. Once established, the burden shifts to the merging companies to "show that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the [relevant] market." *Id.* If the prima facie case is not rebutted, then the market is suitable for the potential competition doctrines. *See United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 755 (D. Md. 1976).

1. Market Concentration Ratios

The Court finds that the FTC has sufficiently presented evidence using concentration ratios as permitted by *Marine Bancorporation.* Here, the FTC has provided the Herfindahl-Hirschman Index ("HHI")—a widely accepted measure of industry concentration frequently used by courts considering antitrust merger and acquisition actions—for the relevant market. FTC Proposed Post-Hearing Findings of Fact ("FTC's Findings") ¶¶ 80–83, ECF No. 516; *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 414 F. Supp. 3d 1256, 1263 (N.D. Cal. 2019), *aff'd*, 20 F.4th 466 (9th Cir. 2021). The FTC's 2010 Merger Guidelines provide that a market is considered "moderately concentrated" when the HHI exceeds 1500 and "highly concentrated" when it exceeds 2500. 2010 Merger Guidelines § 5.3.

The FTC's expert, Dr. Singer, calculated the HHI multiple times, accounting for different market definitions and stipulations. Dr. Singer first calculated the HHI by measuring each firm's market share using revenue. Singer Report ¶ 75, Table 2-A. This yielded an HHI of 6,917, [Redacted] *Id.* Dr. Singer also calculated the market's HHI using "total hours spent" and "average monthly active users" as metrics and data collected from the Quest Store. Singer Rebuttal Report ¶¶ 124–25, Tables 1-A, 1-B. The HHI for "total hours spent" was 6,307; and for "monthly active users" was 3,377. *Id.*

The Court finds that—regardless of the metrics used—every one of these ratios reflect a market concentration well above what the Merger Guidelines have designated as "highly concentrated." Accordingly, the FTC have made their prima facie showing, and the burden shifts to Defendants to "show that the concentration ratios ... did not accurately depict the economic characteristics of the [relevant] market." *Marine Bancorporation*, 418 U.S. at 631, 94 S.Ct. 2856.

2. Defendants' Pleading Challenges

****18** Before continuing to Defendants' substantive arguments seeking to rebut the FTC's prima facie case, the Court first turns to the Defendants' legal attacks on the FTC's pleadings. Defendants argue that the FTC's case stumbles right out of the blocks because the complaint does not allege oligopolistic or "interdependent or parallel behavior." Mot. Dismiss FAC ("MTD") 10–13, ECF No. 108. Defendants' position arises from the following language in *Marine Bancorporation*:

> The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services.

418 U.S. at 631, 94 S.Ct. 2856.

Defendants' argument is unpersuasive. Their fidelity to a stilted and strained reading of the Supreme Court's commentary conveniently dodges the actual burden-shifting ***923** framework that *Marine Bancorporation* set forth and applied. *Id.* at 631–32, 94 S.Ct. 2856. In fact, the Supreme Court held that the district court had erred by taking the precise course of action that Defendants urge the Court takes here, *i.e.*, requiring the FTC to allege parallel behavior when it is Defendants' burden to present the absence. *Id.* ("In our view, *appellees did not carry this burden*, and the District Court erred in holding to the contrary. Appellees introduced no significant evidence of the absence of parallel behavior in the pricing or providing of commercial bank services in [the relevant market].") (emphasis added). A similar attempt to stretch the language from *Marine Bancorporation* to pin the burden on the government was likewise unsuccessful. *Black & Decker*, 430 F. Supp. at 750 n.41 (rejecting argument that "the government has failed to produce evidence of any interdependent or parallel behavior in the market or of the market firms' capacity to determine price and total output"). Defendants also are unable to identify any authority that has adopted its proposed inversed framework, not even the one Fifth Circuit decision they cited. *See* MTD 6; *Republic of Texas Corp. v. Bd. of Governors*, 649 F.2d 1026, 1045–46 (5th Cir. 1981) ("Concentration ratios of this magnitude establish here ... a prima facie case that the [ ] market is a candidate for the potential competition doctrine, and *shift to Republic the burden to show that the concentration ratios ... do not accurately depict the economic characteristics of the* [ ] *market.*") (emphasis added).

For all the reasons discussed, Defendants' theory that the FTC was required to plead oligopolistic, interdependent, or parallel behavior is without merit. To the extent Defendants' motion to dismiss the FAC is premised on this theory, the Court DENIES Defendants' motion.

3. Economic Characteristics of the "VR Dedicated Fitness App" Market

The FTC having established a prima facie case of "substantial concentration" using concentration ratios, the burden now shifts to Defendants to rebut that showing that "the concentration ratios ... did not accurately depict the economic characteristics of the [relevant] market." *Marine Bancorporation*, 418 U.S. at 631, 94 S.Ct. 2856. The touchstone inquiry, however, appears to be whether the relevant market "is in fact genuinely competitive." *Marine Bancorporation*, 418 U.S. at 631, 94 S.Ct. 2856; *Tenneco, Inc. v. FTC*, 689 F.2d 346, 353 (2d Cir. 1982) (finding the FTC was "fully justified in concluding that the [ ] market was not genuinely competitive"); *Republic of Texas*, 649 F.2d at 1046 (finding that rebuttal evidence did not "establish that the overall competition from the thrift institutions was sufficient"); *Black & Decker*, 430 F. Supp. at 755 (noting that "various facets of competitive performance in the gasoline

powered chain saw market offer conflicting indications"). The Court addresses each argument that Defendants have raised in rebuttal.

****19** The Court first makes an opening observation that there appear to be at least some characteristics of the market that may be difficult to express with concentration ratios. If nothing else, both parties seem to agree that the VR dedicated fitness app market is a nascent and emerging market, which would be an economic characteristic of the market not fully captured by the concentration ratios. *See* FTC's Findings ¶¶ 68–69; Singer Report ¶ 92. However, the Court must consider whether those characteristics indicate that the market is genuinely competitive.

Nascency. The Court has received conflicting expert evidence from both parties as to whether nascent markets are more or less vulnerable to coordinated oligopolistic ***924** behaviors. Dr. Carlton submits that a nascent market with rapidly evolving products is more difficult to coordinate behaviors, while Dr. Singer has asserted that there is no accepted economic theory to support the segmentation of nascent, adolescent, or mature markets. *Compare* Carlton Report ¶¶ 127–29, *with* Singer Rebuttal Report ¶¶ 130-33.

The evidence presented suggests that companies in the VR dedicated fitness market do not exhibit revenue or profit-maximizing behaviors, such as price competition. Koblin Hr'g Tr. 636:11–14; Milk Hr'g Tr. 736:6–8. Instead, their strategies appear to be optimized for growth and penetration —[Redacted]—with the expectation that those qualities will render them an attractive acquisition target. *See, e.g.*, Milk Hr'g Tr. 736:15–21 ("[Redacted]."); Zyda Hr'g Tr. 1227:18–22, 1228:15–18 ("[S]tartups that work in the VR space can get acquired, and that's pretty much the dream of almost every startup."); Garcia Hr'g Tr. 1111:8–1112:14; Janszen Hr'g Tr. 1147:22–1148:1. It is unclear to the Court how this departure from conventional profit-maximization strategies —an assumption often made in defining antitrust markets, *see* 2010 Merger Guidelines § 4.1.1 (noting that the HMT "requires [ ] a hypothetical profit-maximizing firm")—should affect the assessment of genuine competition in this market.[8]

Notwithstanding the experts' robust economics discussions, neither party has presented the Court with a working definition of "nascency," such that it can distinguish a nascent market from a more mature market. Rather, the parties appear to use the "nascency" label—however the lines are drawn —as a proxy for other more observable market descriptions, such as highly differentiated products, unstable market shares, and new entrants. Carlton Report ¶¶ 127–29. Accordingly, the Court will give limited weight to the fact that the VR dedicated fitness market may be characterized as a nascent market and focus instead on the underlying market indicators.

Market Share Volatility. Dr. Carlton claims that the VR dedicated fitness market exhibits changing market shares, but he does not provide any historical data or evidence that the market shares have changed over time. Carlton Report ¶¶ 124–25. Instead, Dr. Carlton relies on the fact that none of the apps were in existence five years ago, that new entries are occurring, and on Dr. Singer's data on changes in *other* VR app markets. *Id.* ¶ 125. But new entrants do not necessarily result in shifting or deconcentrating market shares, and Defendants have not presented evidence of actual historical shifts in shares for the relevant market here. Moreover, [Redacted] *Id.* ¶ 67, Table 10.

****20** New Entrants. Defendants and Dr. Carlton have made much ado about the incoming entrants and the fact that the FTC's relevant market has effectively doubled since the initiated this litigation. *See, e.g.*, Opp. 14. Although the "introduction of new firms and fluid condition of market entry and exit can indicate competitive behavior," the bottom line is that these new entrants have not significantly deconcentrated the market, nor do they suggest a trend towards such deconcentration. *Black & Decker*, 430 F. Supp. at 751; *see also* Singer Rebuttal Report ¶¶ 124–25, Tables 1-A, 1-B (indicating *de minimis* shares of new entrants).

Barriers to Entry. Defendants rely on the new entrants into the market as evidence that barriers to entry are low. Opp. ***925** 13. However, the number of new entrants "does not belie the substantial entry barriers characteristic of the [relevant] market." *Black & Decker*, 430 F. Supp. at 751. The evidence presented suggest that barriers to entry are existent but are not insurmountable. As the Court discusses further in this order, there are several ingredients required for a potential entrant considering entry into the VR dedicated fitness app entrant, including financial resources, VR engineering resources, fitness experience and content creation, and studio production capabilities. *See infra* Section III.D.2.a. On the other hand, for most potential entrants into any VR app market, Meta provides grants, software development kits, infrastructure code, and even engineering support to third-party VR app developers. Pruett Hr'g Tr. 284:18–285:18.

Having considered the VR dedicated fitness app market's nascency, volatility, new entrants, barriers to entry, and price competition, the Court is inclined to find that Defendants have not rebutted the FTC's prima facie case. The Court certainly appreciates that a nascent market with an emerging technology may have some features and market incentives that are not captured by concentration ratios. However, the evidence does not support a finding that the VR dedicated fitness app market exhibits the characteristics or desirable behaviors of a competitive market. And as the Supreme Court noted in *Falstaff Brewing*, the absence of "blatantly anti-competitive effects" may not necessarily preclude the propriety of potential competition theories, because the high degree of market concentration indicates that the "seeds of anti-competitive conduct are present." 410 U.S. 526, 550, 93 S.Ct. 1096; *see also id.* n.15 ("[A] market might be so concentrated that even though it is presently competitive, there is a serious risk that parallel pricing policies might emerge sometime in the near future.").

That said, because the Court finds *infra* that the FTC has not satisfied the other elements of the potential competition theories they have brought, the Court need—and does not—decide whether the Defendants' showing here is sufficient to rebut the FTC's prima facie case on substantial concentration. *See United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980).

D. Actual Potential Competition

The FTC first argues that the Acquisition would substantially lessen competition because it deprives the VR dedicated fitness app market of the competition that would have arisen from Meta's independent entry into the market, a theory known as the "actual potential competition" or "actual potential entrant" doctrine. *See, e.g., United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 633, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974). Although the Supreme Court has twice declined to resolve the doctrine's validity when presented, it has nonetheless identified two essential preconditions before the theory can be applied: (1) the alleged potential entrant must have "available feasible means for entering the [relevant] market other than by acquiring [the target company]"; and (2) those "means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." *Id.* The doctrine has since been applied by Courts of Appeal and district courts alike, though the Ninth Circuit has not yet had an opportunity to provide guidance on the actual potential competition theory.

****21** Although "available feasible means" for entry may be established either by *de novo* entry or a toehold acquisition, the FTC has not argued that Meta could have entered the relevant market through a toehold acquisition, nor does it identify any company ***926** in the relevant market that could have served as such a target. *See, e.g.*, FAC ¶ 57; Mot. 19. "Since the [FTC] offered no evidence of a toe-hold purchase that was available and attractive to [Meta], any such theory must be rejected for lack of proof." *United States v. Siemens Corp.*, 621 F.2d 499, 508 (2d Cir. 1980). Accordingly, the Court will only consider whether Meta had "available feasible means" for entering the relevant market *de novo*.

1. Threshold Issues

Before discussing the evidence, the Court first turns to three threshold disputes of law between the parties, which are: (1) the continued vitality of the actual potential competition theory; (2) the standard of proof the FTC must meet; and (3) the roles and consideration of objective and subjective evidence.

a. Doctrinal Validity

Throughout this litigation, Defendants have sought to cast doubt as to the very existence of the actual potential competition theory because it has never been fully endorsed by the Supreme Court. *See, e.g.*, Opp. 2; MTD, at 2, 16–17. Notwithstanding Defendants' doubts, this doctrine has been applied by multiple Circuit Courts of Appeal, *e.g., Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980); *FTC v. Atl. Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); the Federal Trade Commission itself, *Altria Group, Inc.*, 2022 WL 622476 (Feb. 23, 2022); *B.A.T. Industries*, 1984 WL 565384 (Dec. 17, 1984); and various district courts, including one that ordered divestiture upon a finding of actual potential competition and whose judgment was affirmed by the Supreme Court. *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd sub nom. Tidewater Oil Co. v. United States*, 418 U.S. 906, 94 S.Ct. 3199, 41 L.Ed.2d 1154 (1974), and *aff'd*, 418 U.S. 906, 94 S.Ct. 3199, 41 L.Ed.2d 1154 (1974). Given the actual potential competition doctrine's consistent, albeit distant, history of judicial recognition, the Court declines to reject the theory outright and will apply the doctrine as developed. *See FTC v. Steris Corp.*, 133 F. Supp. 3d 962,

966 (N.D. Ohio 2015) ("[T]he FTC has clearly endorsed this theory by filing this case, and the administrative law judge will be employing it during the proceeding .... Accordingly, in deciding the likelihood of success on the merits, the Court will assume the validity of this doctrine.").

To the extent Defendants' motion to dismiss sought dismissal of the FTC's actual potential competition claim on the basis that it is a "dead-letter doctrine," ECF No. 108, at 2, Defendants' motion is DENIED.

b. Standard of Proof

There is less consistency among courts as to the proper standard of proof by which the FTC must prove its case on actual potential competition, and it is an issue of first impression within the Ninth Circuit. The Fourth Circuit has held that the FTC must establish its case with "strict proof." *Atl. Richfield*, 549 F.2d at 295. The Second Circuit has asked whether a defendant "*would likely have* entered the market in the near future." *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (emphasis added). The Fifth Circuit adopted the "reasonable probability" standard, which it remarked "signifies that an event has a better than fifty percent chance of occurring [with a] 'reasonable' probability represent[ing] an even greater likelihood of the event's occurrence." *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1268–69 (5th Cir. 1981). The Eighth Circuit also appeared to adopt the "reasonable probability." *Yamaha Motor*, 657 F.2d at 977 (defining the inquiry as "would [defendant], absent the joint venture, *probably* have entered the [relevant] market independently") (emphasis added). ***927** Finally, the FTC itself has unambiguously adopted a "clear proof" standard. *B.A.T. Industries*, 1984 WL 565384, at *10.

****22** In the absence of guiding Ninth Circuit law, the Court begins with *Brown Shoe*'s teaching that Section 7 deals with neither certainties nor ephemeral possibilities but rather "probabilities." *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 323, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). In the context of an actual potential competition claim, however, the Court must not only consider the effects of future scenarios where the Acquisition occurs and where it is blocked, but it must also gauge the likelihood—in the second scenario—that the blocked would-be acquirer would enter the relevant market independently. Furthermore, the harm to competition the doctrine aims to prevent is not the loss of *present* competition but rather the potential loss of a *future* competitor (the acquiring company). Given the many *a priori* inferences required by the doctrine, the Court is wary of any inquiry that strays too close to the specters of ephemeral possibilities, yet it must nonetheless ensure the standard does not require the FTC to operate on certainties. The Court accordingly holds that the "reasonable probability" standard—as clarified by the Fifth Circuit to suggest a likelihood noticeably greater than fifty percent—is the standard of proof that the FTC must present.

To the extent Defendants' motion to dismiss is based on the assertion that the correct standard of proof is "clear proof," the Court DENIES Defendants' motion.

c. Objective vs. Subjective Evidence

Finally, the Court reaches the parties' disagreement as to the roles of objective and subjective evidence. The FTC asserts that it may meet its burden using solely objective evidence regarding Meta's "overall size, resources, capability, and motivation." Mot. 18–19; *see also* FTC Closing Hr'g Tr. 1494:12–18. Defendants, meanwhile, strenuously emphasize subjective evidence that Meta never had any plan to enter the Relevant Market *de novo* and would not do so if the Acquisition is blocked. Opp. 15.

Courts have uniformly recognized the highly probative value of objective evidence in evaluating whether a potential entrant is reasonably probable to enter the market *de novo*; the disagreement only arises as to whether plaintiffs can satisfy their burden using only objective evidence and whether subjective evidence should warrant any consideration. *Compare Mercantile Texas*, 638 F.2d at 1270 ("Not only is objective evidence undeniably probative, but subjective evidence is not required to establish a violation of the Clayton Act standard. On remand, the Board may rely exclusively on objective evidence if that evidence is sufficient to support the findings we require.") (internal citation omitted), *with B.A.T. Industries*, 1984 WL 565384, at *26 (noting that "the inherent limitations of economic evidence mean that, standing alone," purely objective evidence could not "establish liability under the actual potential entrant theory") (Bailey, Comm'r, concurring). Many courts have also consulted both objective and subjective evidence in reaching their conclusions. *See, e.g., Siemens*, 621 F.2d at 507; *Yamaha Motor*, 657 F.2d at 979; *Phillips Petroleum*, 367 F. Supp. at 1239 (recognizing that subjective evidence is "relevant and entitled to consideration, [but] cannot be determinative").

Here, the Court will first consider whether the objective evidence presented by the FTC supports the findings and conclusions necessary to satisfy the actual potential competition doctrine. If the objective evidence is weak, inconclusive, or conflicting, the Court will consult subjective evidence to illuminate the ambiguities left by the objective evidence, with the ***928** understanding that the subjective evidence cannot overcome any directly conflicting objective evidence. *See Falstaff Brewing*, 410 U.S. at 570, 93 S.Ct. 1096 ("[T]he subjective evidence may serve as a counterweight to weak or inconclusive objective data. But when the district court can point to no compelling reason why the subjective testimony should be believed or when the objective evidence strongly points to the feasibility of entry de novo ... it is error for the court to rely in any way upon management's subjective statements.").

2. Objective Evidence

Having disposed of the threshold questions, the Court now proceeds to apply the doctrine. The inquiry can be stated as follows: "Is it reasonably probable that Meta would have entered the VR dedicated fitness app market *de novo* if it was not able to acquire Within?"[9]

****23** "In exploring the feasible means of entry alternative to the challenged acquisition, the court must analyze the incentive and capability of the acquiring firm to enter the relevant market." *Black & Decker*, 430 F. Supp. at 755. The Court thus considers in turn the objective evidence on Meta's capabilities and incentives to enter the VR dedicated fitness app market.

a. Capabilities of Entry

There can be no serious dispute that Meta possesses the financial resources to undertake a *de novo* entry. Meta has spent over $12.4 billion in the most recent fiscal year on its VR business, and it anticipates investing more in the VR space. *See, e.g.*, DX1237, at 51, Dec. 31, 2021; ECF No. 514, Defs.' Proposed Post-Hearing Findings of Fact ("Defs.' Findings") ¶¶ 44–47. Unsurprisingly, Meta also enjoys a deep and talented pool of engineers in its Reality Labs Division, who could provide the technical VR expertise to develop a VR dedicated fitness app should Meta so choose. *See* ECF No. 516, FTC Proposed Post-Hearing Findings of Fact ("FTC's Findings") ¶¶ 32–33. In fact, Meta maintains a team of "veteran engineers who are particular experts in [Meta's] VR technology and hardware" and who work directly with third-party VR app developers to "improve the quality of their software or help them fix bugs or [ ] polish the experience that the developer is building." Pruett Hr'g Tr. 286:4–12. The Court finds that the objective evidence establishes that Meta has the financial resources and ready access to qualified VR engineers to enter the VR dedicated fitness app market *de novo*.

But financial and engineering capabilities alone are insufficient to conclude it was "reasonably probable" that Meta would enter the VR dedicated fitness app market. Indeed, Meta seems willing to concede—as is supported by the evidence—that it "does not take a large team or substantial resources to make a successful VR app." Defs.' Findings ¶ 53. Instead, courts often counterbalance undisputed financial capabilities with those capabilities unique to the relevant market, rarely relying solely on the potential entrant's substantial wherewithal. *Siemens*, 621 F.2d at 507 (finding no evidence that potential entrant could "transfer its acknowledged capability with respect to other types of equipment to *nuclear medical equipment*") (emphasis added); *Atl. Richfield*, 549 F.2d at 295 ("[Potential entrant] has no technological skills readily transferrable to the *copper markets*; it has no channels of distribution which may be utilized to distribute copper.") (emphasis added); *cf. Yamaha Motor*, 657 F.2d at 978 (noting that ***929** the potential entrant had "requisite experience in the production and marketing of *outboard motors* in areas of the world other than Japan.") (emphasis added). The Court here finds that Meta lacked certain capabilities that are unique and critical to the VR dedicated fitness app market. *See* PX0127, at 7 (noting that Meta "will need to build 4 new [fitness] functions that are not part of Facebook's pipelines; Content development, instructors, studio production ..., music rights & technology.").

First and foremost, although Meta has an abundance of VR personnel on hand, it lacks the capability to create fitness and workout content, a necessity for any fitness product or market. *See* PX0111 ("The answer is content creation.... You need that content variety to serve different ability levels, musical tastes, instructor personalities, etc."), Feb. 23, 2021. As a comparison, Supernatural's VR workouts are led by personal trainers and are optimized for VR activity through consultations with experts holding PhDs in kinesiology and biomechanics. PX0712, at 18, 27. Certainly, this absence is not an insurmountable obstacle; Meta could conceivably

circumvent it by partnering with an established fitness brand to provide the fitness content, as Odders Lab did with Les Mills.[10] FTC's Findings ¶¶ 123, 148; *see also* Garcia Hr'g Tr. 1072:18–1073:1. [Redacted] *see also Tenneco*, 689 F.2d at 354 (rejecting as "unsupported speculation" the FTC's suggestion that the potential entrant would have entered the market *de novo* "with the aid of a license" for necessary technology). Regardless of any potential workarounds, the objective fact that Meta presently lacks the capability to create fitness content is, at the very least, probative as to the reasonable probability that Meta would enter the VR dedicated fitness app market *de novo.*

****24** In addition to fitness content, the evidence also indicates that Meta lacked the necessary studio production capabilities to create and film VR workouts. Once again comparing to Supernatural, Within records daily workout classes in its Los Angeles studio, and its founders have directed several interactive music videos. PX0712, at 3–4, 29. When Meta employees were strategizing VR fitness investments, they recognized that "studio production (e.g. green screen ops, stereoscopic capture, post processing pipelines)" was a new function that was "not part of Facebook's pipelines."[11] PX0127, at 7, Mar. 10, 2021. Contrary to the FTC's suggestion, the Court finds that Meta's acquisition of Armature Studio—a third-party VR studio with expertise in co-developing VR apps—does not provide the necessary studio production capabilities to develop a VR dedicated fitness app. *See* FTC's Findings ¶¶ 125, 290. The evidence indicates that Armature is very much a *game* studio, not a *production* studio [Redacted] PX0527, at 6 (listing Armature's [Redacted] The FTC highlights an internal Meta presentation that presented Armature as an acquisition target who could "build a fitness-first product based on Beat Saber x their sports experience.") *Id.* However, the basis for this suggestion comes not from any prior production studio experience but rather Armature's experience developing the rendered VR video game, Sports Scramble. *Id.* As with ***930** Meta's fitness expertise, its lack of production studio capabilities to film a VR fitness workout is a relevant—though less compelling—factor for the Court's "reasonably probable" consideration.

b. Incentives to Enter

In addition to the objective evidence presented of Meta's capabilities of entering the VR dedicated fitness app market, the Court also considers the objective evidence of Meta's incentives and motivations for entering this market.

Users and Growth. The record is replete with evidence supporting Meta's interest in the VR fitness space. Defs.' Findings ¶ 280 ("[E]mployees at Reality Labs were interested in fitness as a promising VR use case"). First, fitness is a use for VR that appeals to a more diverse population, specifically consumers that are female and older. *Id.* ¶ 280 (citing testimony). This demographic is notably distinct from the typical VR demographic, which tends to skew younger and more male. *Id.*; *see also Black & Decker*, 430 F. Supp. at 756 ("[C]ommitment to diversification is an important factor to be considered in analyzing [ ] desire to enter a particular market."). Fitness is also "retentive," meaning that users will tend to regularly use the product or app. PX0386, at 12 (fitness apps had a "strong [Redacted] retention"), Apr. 12, 2022; *see* Stojsavljevic Hr'g Tr. 108:19–25. Meta's internal data also indicated that "deliberate fitness apps" were the "fastest growing segment" with [Redacted] year-over-year growth. PX0386, at 12. These promising demographic, use, and growth metrics are especially important to Meta, because it has "bet[ ] on VR technology as a general computing platform to join today's PCs, laptops, smartphones, and tablets." Defs.' Findings ¶ 44.

Although they undergird Meta's undisputed interest in VR fitness, the aforementioned factors provide limited probative value in assessing Meta's likelihood to enter the VR dedicated fitness app market itself. As the Court established earlier in this section, the relevant inquiry is whether it is "reasonably probable" that Meta would have entered the VR dedicated fitness app market *de novo*, not whether Meta was excited about or interested in more generally investing in VR fitness. Meta's interest in the promising VR fitness app metrics—diverse appeal, strong user retention, rapid growth—stems from the potential for broader VR adoption and market penetration. *See* Carlton Report ¶¶ 33–35. And Meta, as a competitor in the VR headset market, benefits from that growth so long as high-quality VR fitness apps exist in the VR ecosystem; Meta need not itself be a player in that ecosystem. *See* Defs.' Findings ¶ 49. This mutually beneficial relationship between the VR platform and third-party VR apps distinguishes this case from other potential competition cases where potential entrants are typically incentivized to enter the relevant market because they are not capturing any of the neighboring market's growth or profitability. *See, e.g., Black & Decker*, 430 F. Supp. at 755 (electric saw manufacturer entering the gasoline-powered chain saw

market); *Phillips Petroleum*, 367 F. Supp. at 1245 (non-California oil company entering the California market for gasoline sales); *Yamaha Motor*, 657 F.2d at 974 (Japanese motor company entering the U.S. outboard motor market). The Court accordingly does not find that these specific features of the VR dedicated fitness app market increase the probability that Meta would enter the market *de novo*, because Meta would enjoy those incentives even if it remained outside the relevant market and provided funding or technical support for in-market VR fitness app developers, as it already does.[12] *See supra* ¶ 7.

****25** ***931** Hardware Integration. Apart from the incentives arising from the VR fitness market itself, the evidence also reflects one other incentive that arises from Meta's direct participation in the relevant market. Specifically, entering the VR dedicated fitness app market with its own app would facilitate Meta's subsequent development of fitness-related VR hardware. This is an incentive to "first-party" entry that is acknowledge across multiple instances of internal contemporaneous correspondence at Meta. *See, e.g.*, PX0127, at 7 [Redacted], Mar. 10, 2021; PX0146, at 10 ("[First-party] will allow us to test and iterate tools in our Fitness platform that we can then surface to other 3P"), June 18, 2021; PX0487, at 5 ("We believe that increasing [headcount] for 1P investment (Option 3) is worth the tradeoffs in order to: 1. Develop a cohesive fitness ecosystem faster by enabling developers and building platform features."), May 14, 2021. That said, the evidence also suggests that *de novo* entry is not strictly necessary to develop fitness hardware, *see* FTC's Findings ¶ 185 (indicating that Meta has also already produced "wipeable interface, wrist straps, and adjustable knuckle straps"), though independent entry into the market could streamline that development.

Profitability. Finally, there is some evidence of the relevant market's profitability and that it [Redacted] PX0386, at 12. The profitability of the relevant market is unsurprisingly a relevant incentive that many courts consider. *See, e.g.*, *Phillips Petroleum*, 367 F. Supp. at 1245; *Black & Decker*, 430 F. Supp. at 755. While this factor is often quite salient in other potential competition cases, it is somewhat muted here, [Redacted]. PX0062 ("Milk Dep.") 19:8–12. Of course, a market's current profitability does not reflect its future profitability, especially if that market is exhibiting rapid growth as the VR dedicated fitness app market does here. Nonetheless, the fact that [Redacted] would indicate that the profitability of the relevant market warrants less consideration than it otherwise would.[13]

* * *

Having reviewed and considered the objective evidence of Meta's capabilities and incentives, the Court is not persuaded that this evidence establishes that it was "reasonably probable" Meta would enter the relevant market. Meta's undisputed financial resources and engineering manpower are counterbalanced by its necessary reliance on external fitness companies or experts to provide the actual workout content and a production studio for filming and post-production. Furthermore, the record is inconclusive as to Meta's incentives to enter the relevant market. There are certainly some incentives for Meta to enter the market *de novo*, such as a deeper integration between the VR fitness hardware and software. However, it is not clear that Meta's readily apparent excitement about fitness as a core VR use case would necessarily translate to an intent to build its own dedicated fitness app market if it could enter by acquisition.

***932** On balance, the objective evidence does not so "strongly point to the feasibility of entry de novo" that the Court should decline to consider subjective evidence of intent. *Falstaff Brewing*, 410 U.S. at 570, 93 S.Ct. 1096.

3. Subjective Evidence

The Court first notes that it will accord little weight to subjective evidence and statements provided by Meta employees during the course of this litigation. Although they are relevant, entitled to some weight, and no doubt offered by persons of character, the bias affiliated with such *ex post facto* testimony is widely recognized and unavoidable. *See, e.g.*, *Falstaff Brewing*, 410 U.S. at 565, 570, 93 S.Ct. 1096 (Marshall, J., concurring). In reviewing the subjective evidence in the record, the Court will refer primarily to contemporaneous statements made by Meta employees.

****26** The record reveals certain documents created contemporaneously by Meta employees that appear to set forth Meta's overall third-party VR investment strategy, along with individualized analyses of various VR fitness investment options. PX0492 ("Quick Fitness / M&A Thoughts"), Mar. 9, 2021; PX0127 ("VR Fitness Content investment thesis v2"), Mar. 10, 2021; PX0146 ("FB Inc. Fitness Strategy Working Draft"), June 18, 2021. The FTC has represented that these documents were sponsored by Meta employees: Rade Stojsavljevic, who oversaw all of Meta's first-party

VR gaming studios (Stojsavljevic Hr'g Tr. 69:18–24); Anand Dass, Meta's director of non-gaming VR content (*id.* 138:11–18); and Jane Chiao, a business-side employee who reported directly to Mark Rabkin, the head of VR technology at Meta (*id.* 140:23–141:1, Rabkin Hr'g Tr. 800:7–11). Furthermore, exhibit PX0127 was a "pre-read" circulated in advance of a meeting with Mark Rabkin, *see* Stojsavljevic Hr'g Tr. 149:16–151:12, who would have been one of the decisionmakers needed to sign off on any significant VR fitness investment. *Id.* 189:24–190:12. These are not "memoranda of lower echelon [ ] employees." *Siemens*, 621 F.2d at 508; *see* also *Atl. Richfield*, 549 F.2d at 297 n.9. Accordingly, the Court finds that the statements in these documents reflect the thoughts and impressions of relatively significant stakeholders, as the authors were generally one or two people away from the final decisionmaker.

The evidence contained in these strategy documents is consistent—Meta's subjective motivations to enter the relevant market were primarily to (1) better develop VR fitness hardware or (2) ensure the continued existence of a high-quality VR fitness app in the market. The Court notes that these incentives would apply to both entry by acquisition and entry *de novo*, though perhaps not with equal force.

First, this subjective evidence corroborates the objective evidence that Meta primarily wanted to be a first-party firm in the VR dedicated fitness market so it could improve its VR fitness hardware (*e.g.*, headsets, heart monitor, wrist straps). *See* PX0492, at 2 ("Deep integration with hardware and software to create best in class experience that other devs can follow"); PX0127, at 7 ([Redacted]); PX0146 ("1P content is not a goal in itself – *it is only in the service of broader platform objectives* (e.g., help accelerate progress of market phases).") (emphasis added). The importance of this incentive is supported by internal Meta communications. *See* PX0179, at 2 (noting that "strategic rationale already exists" to pursue VR fitness, which was to "[c]reate option value for [Meta's device], software platform and hand tracking"), Mar. 11, 2021.

Second, the evidence also indicates that Meta would want to enter the VR dedicated fitness app market if the availability of ***933** VR fitness apps was at risk of becoming constrained and, therefore, Meta could ensure that at least one high-quality VR fitness app remained in the market. Specifically, as early as March 2021, Meta employees were expecting Apple to "lock in" VR fitness content to be exclusive with Apple's VR hardware. *See* PX0492, at 2 [Redacted] Mar. 9, 2021; PX0127, at 6 [Redacted], Mar. 10, 2021. This incentive was also corroborated by contemporaneous communications. DX1012, at 1 [Redacted], May 26, 2021. The evidence also suggests that this incentive was the primary animating factor that ultimately compelled Meta to pursue Within as an acquisition. *See, e.g.*, PX0117 [Redacted].

Meta's prior ventures into other VR app markets also do not support a subjective intention or proclivity to build its own apps as opposed to an acquisition. Courts have considered a potential entrant's history of acquisitions and expansions in determining its likelihood of *de novo* entry. *See Black & Decker*, 430 F. Supp. at 756 (potential entrant had previously "diversified almost exclusively through internal expansion [and] had a definite, if unwritten, policy known to its employees of discouraging growth by acquisition"); *Phillips Petroleum*, 367 F. Supp. at 1240 ("At no time prior to the [ ] acquisition did [the potential entrant] ever enter a new marketing area by acquiring a major company in that market."). The evidence indicates that Meta has tended to build its own VR app where the experience did not call for specialized or substantive content, *e.g.*, Horizon Worlds (a world-building app where other users can create worlds in VR), Horizon Workrooms (a productivity app), Horizon Venues (a live-events app), Horizon Home (social networking app). Meta's Answer and Affirmative Defenses ¶ 35; *see also* PX0056 ("Carmack Dep.") 101:15–23 (indicating Meta does not have "anything internally developed that was a hit outside of our browser application"). Meanwhile, Meta has acquired other VR developers where the experience requires content creation from the developer, such as VR video games, as opposed to an app that hosts content created by others. Stojsavljevic Hr'g Tr. 87:5–88:2. With respect to fitness, the Court finds that VR dedicated fitness is more akin to a gaming app—where the emphasis is on the content created or provided by the developer—than a browser or world-building app, where the value is derived from the users' own creativity rather than the developers'. Accordingly, based on Meta's past entries into VR app markets, the evidence would suggest an interest in entry by acquisition instead of entry *de novo*.

****27** But even more pertinent than the record of Meta's past entries into VR app markets is the evidence that Meta had consciously considered and appeared doubtful of the proposition to build its own independent VR fitness app. The pre-read strategy document prepared for Mark Rabkin's attention contains a separate section that "[i]t will be hard to build Fitness from scratch." PX0127, at 7. Specifically, a VR fitness app would require Meta to [Redacted] *Id.*

The document also recognized that Meta would have to "build new kinds of expertise at the intersection of software, instructor-led fitness, music, media." *Id.* The decision not to build Meta's own VR fitness app is corroborated by the lack of any other contemporaneous discussion on the topic. The record does, however, indicate that Meta attempted to gauge whether it could expand Beat Saber together with a fitness partner, a prospect the Court delves into further below.

In sum, the subjective evidence indicates that Meta was subjectively interested in entering the VR dedicated fitness app market itself, either for hardware development or defensive market purposes. However, the Court again notes that these ***934** incentives would support both market entry by acquisition and *de novo*, but the Court's inquiry is only concerned with the feasibility of *de novo* entry. For instance, even though Meta's concern about [Redacted] was an incentive to acquire Within, that incentive does not apply with equal force [Redacted] PX0127, at 1. And, as the Court elaborates below, the evidence shows that all these factors—Meta's capabilities and incentives, both objective and subjective—did not result in Meta ever seriously contemplating a *de novo* entry, *i.e.*, building its own VR fitness app.

4. Identified Means of Entry

Up to this point, the Court has only addressed Meta's capabilities, incentives, and intent to enter the VR dedicated fitness app market in the abstract. However, an assessment of the probability and feasibility of a hypothetical *de novo* entry would not be complete without addressing the *actual* means of entry that Meta considered. *See Black & Decker*, 430 F. Supp. at 757 ("Three avenues of entry into the gas lawn mower field were explored...."); *Siemens*, 621 F.2d at 502–03 (summarizing multiple possibilities that other acquiring company had considered); *Phillips Petroleum*, 367 F. Supp. at 1243–44 (same).

Nevertheless, the FTC has implied that the Court may infer that Meta would have entered the market *de novo*—irrespective of its actual plans for entry—using "available feasible means" unbeknownst to the parties or the Court. *See* FTC Closing Hr'g Tr. 1494:16–18 ("We don't have to show that Meta actually had a subjective intention to enter the market."). To the extent the FTC implies that—based solely on the objective evidence of Meta's resources and its excitement for VR fitness—it would have inevitably found and implemented some unspecified means to enter the market, the Court finds such a theory to be impermissibly speculative.

The FTC made a similar argument in *BOC International*, where it argued that "[s]imply because no entry had been effectuated at the time the [acquisition] presented itself did not mean that BOC would not have *eventually realized* its 'long-term objectives' of entering the [relevant] market by growth rather than by this major acquisition." *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977) (emphasis added). The Second Circuit rejected this "eventual entry" theory as "uncabined speculation," holding that "it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future." *Id.* The FTC recently reaffirmed this holding in *Altria Group, Inc.*, 2022 WL 622476, at *70 ("Complaint Counsel is arguing that due to Altria's resources as a large company, and economic incentives to participate in the e-cigarette market, Altria would have eventually had a product competing in that market. *This is precisely the position rejected by the court in* BOC.") (emphasis added). Additionally, insofar as the FTC implies Meta could overcome its lack of fitness experience and content creation by hiring experts or partnering with a fitness brand, the suggestion reflects "the kind of unsupported speculation" rejected in *Tenneco,* 689 F.2d at 354 (rejecting the FTC's "conclusion that [potential entrant] would have entered the market de novo with the aid of a license" for the necessary technology).

****28** The Court here does not hold that every case of actual potential competition will require consideration of a potential entrant's actual and subjective plans for entry. *See Falstaff Brewing*, 410 U.S. at 565, 93 S.Ct. 1096 ("We have certainly never suggested that subjective evidence of likely future entry is required to make out a § 7 case.") (Marshall, J., concurring). Nor does the Court suggest that a particular ***935** entry strategy can only be "reasonably probable" and "feasible" if it has reached a certain inflection point in the firm's decision-making process. Such a conclusion would incentivize corporate gamesmanship and reward decisionmakers for reaching merger decisions hastily without exploring non-merger alternatives. *See generally id.* at 563–71, 93 S.Ct. 1096 (Marshall, J., concurring). However, where the objective evidence is "weak or inconclusive" and does not "strongly point[ ] to the feasibility of entry de novo," *id.* at 570, 93 S.Ct. 1096, it is incumbent on the Court to consider the potential entrant's actual plans of entry for the purposes of ensuring that Section 7 enforcement does not veer into the realm of ephemeral possibilities. As applied

here, the Court holds that the FTC may not rest solely on evidence of Meta's considerable resources and the company's clear zeal for the VR dedicated fitness app market as a whole; the evidence must show that Meta had *some* feasible and reasonably probable path to *de novo* entry.

Turning then to the evidence, the record indicates that Meta would only have entered by acquisition or a Beat Saber collaboration with a fitness content creator; the Court is unaware of any evidence that Meta considered building a VR fitness app on its own. In the strategy document that was prepared for the meeting with Mark Rabkin, Meta personnel had outlined and analyzed five options for investing in VR fitness: (1) acquire Within and Supernatural; (2) acquire [Redacted]; (3) expand Beat Saber into deliberate fitness, likely by partnering with Peloton; (4) increase funding for development of third-party VR fitness apps; and (5) do nothing and maintain the status quo. PX0127, at 2–4. The record reflects that, although Meta initially pursued the first three options in parallel, the frontrunner was the [Redacted] acquisition until approximately June 2021 when Meta pivoted to acquire Within. *See, e.g.*, PX0179, at 1–2 (indicating that action items included pursuing due diligence for both Supernatural and [Redacted] and having Stojsavljevic "present a proposal to Rabkin on expanding Beat Saber to deliberate fitness"), Mar. 11, 2021; PX0284, at 1 (drafting email to Michael Verdu summarizing the "pros/cons of [Redacted] vs. Supernatural"), Mar. 18, 2021; DX1012, at 1, 3 ("[Zuckerberg] asked if we were engaged with [Within].... [Bosworth] responded that our focus has been on [Redacted]."), May 26, 2021. Notably, even though Meta personnel had considered the option to increase third-party funding without entering the market and an option to do nothing as comparison, there was never an option for Meta to build its own VR dedicated fitness app to enter the market *de novo*.

Given the degree of analysis evident from these strategy documents, the Court finds that Meta had only considered the acquisition of Within, the acquisition of [Redacted], and the partnership of Beat Saber with Peloton as feasible means to enter the relevant market. These three options, therefore, comprise the universe of "available feasible means" that the Court will consider for the purposes of the FTC's actual potential competition claim.

a. Entry by Acquisition

Meta's first two means of entry into the relevant market were both entries by acquisitions, either [Redacted]. The evidentiary record indicates that these two options were both among the earliest proposals presented to Mark Zuckerberg, as well as the last two considered before Meta decided to acquire Within. *See, e.g., supra* Section I.D.

The evidence supports a finding that, but for its pursuit of Within as an acquisition, there was a reasonably probability that [Redacted] However, the inquiry before the Court is not whether it was reasonably probable that Meta [Redacted] ***936** The FTC has argued almost exclusively that Meta's "available feasible means" of entering the relevant market is by *de novo* entry, not acquisition. The FTC also does not take the position [Redacted] that could have also conceivably had procompetitive effects. *See, e.g.*, Mot. 21 (noting that Meta's entry into the market would have "introduc[ed] a strong, well-established new rival to Supernatural and FitXR"); *see also Marine Bancorporation*, 418 U.S. at 625, 94 S.Ct. 2856 (defining a toehold acquisition as a "small existing entrant").

****29** Accordingly, the Court does not consider the "reasonable probability" that Meta could have entered the VR dedicated fitness market [Redacted] as an "available feasible means" for the purposes of the actual potential competition analysis.

b. Entry by Beat Saber–Peloton Partnership

This brings us to the final means—and the FTC's main theory—by which Meta could have entered the VR dedicated fitness market: expanding its existing rhythm game app Beat Saber into dedicated fitness and partnering with a fitness brand. The FTC claims that Meta scrapped this Beat Saber proposal once it learned that Within was at risk of being acquired by Apple. Mot. 10, 20–21. However, this theory is neither supported by the contemporaneous remarks regarding the Beat Saber proposal nor the timing of the subsequent investigation into this proposal.

First, the evidentiary record is unclear as to what exactly the widely referenced Beat Saber–Peloton proposal would even look like. On some occasions, Stojsavljevic—the proposal's primary advocate—refers to it as a "brand licensing w/ Peloton" or a "co-branding ... Peloton mode inside Beat Saber." PX0144, at 1, Mar. 8, 2021; PX0407, at 1, Mar. 15, 2021. On other occasions, Stojsavljevic considers whether the proposal would be a separate Quest Store

app. PX0407, at 2. Michael Verdu—another proponent of expanding Beat Saber into fitness—also recalled that the proposal never reached a point of "understanding what that partnership would look like." Verdu Dep. 201:14–23 ("[I]s it a Peloton-branded headset? Is it Peloton-branded content inside of our headset? Like we didn't even get to the point where we were exploring at that level of detail."). This uncertainty is consistent with the March 2021 "Beat Saber x Peloton Opportunity Identification" presentation that [Redacted] prepared at Stojsavljevic's request, which indicated that part of [Redacted] task would be to define the partnership opportunity and determine how to present the proposal to Peloton. PX0121, at 5–6, Mar. 25, 2021. Ultimately, Stojsavljevic did not even engage [Redacted] to proceed with her proposed research into the Beat Saber proposal. PX0052 ("Stojsavljevic Dep.") 219:23–220:1.

Second, the Beat Saber–Peloton proposal did not enjoy uniform or even widespread support among the Meta personnel who were researching VR fitness opportunities. *See* PX341, at 2 ("Jane and Anand were arguing with me [Stojsavljevic] when I was proposing Beat Saber x Peloton and thought we should buy [Redacted] or Supernatural instead."), June 11, 2021. Particularly, Jane Chiao had consistently and contemporaneously expressed doubts regarding the feasibility of repositioning Beat Saber to fitness. *See* PX0492, at 1, 7 ("Jane's quick thoughts" included a section titled "Why not Beat Saber?" setting forth reasons against pivoting Beat Saber to fitness), Mar. 9, 2021. In one exchange, Chiao commented that [Redacted]." PX0251, at 2, Mar. 4, 2021. Chiao's opinion was informed by the previous difficulties she had in attempting to reposition Meta's social functions for other uses. *Id.* at 2–3 ([Redacted]).

***937** Third, the timeline and dearth of contemporaneous internal discussions on the Beat Games–Peloton proposal is inconsistent with the FTC's narrative that the Within acquisition derailed an otherwise full-speed effort to explore the Beat Games proposal. *See generally* DDX07 (Defendants' timeline demonstrative), at 31. In short, the idea was raised and endorsed by Stojsavljevic on March 11, 2021 (PX0179); he solicited feedback from his peers a few days later (PX0407); and on March 25, 2021, he received a quote for a contractor to look into the proposal, but did not proceed with it (PX0121). After this initial scramble, the record reflects no further discussion about expanding Beat Saber into fitness before June 2021, when Meta began pursuing Within as an acquisition. Although the FTC argues that there is no direct evidence that Meta had deliberately dropped the Beat Saber proposal, the absence of active discussions could just as reasonably—and the Court finds that it does—support Meta's explanation that the Beat Saber proposal had lost momentum after March 2021. The proposal's main driver, Stojsavljevic, testified that he had already "slowed down before [Meta's decision to pursue Within]," because he was busy with another Meta acquisition. Stojsavljevic Hr'g Tr. 165:12–17. Although subjective corporate testimony is generally deemed self-serving and entitled to low weight, Stojsavljevic's lack of bandwidth is corroborated by his contemporaneous decision to outsource the research for the Beat Games proposal. *See* PX0121, at 1; *see also* Stojsavljevic Hr'g Tr. 163:25–165:11.

****30** Moreover, when viewed alongside Meta's history with Beat Saber, these two months of inactivity between March and June 2021 appear to have been the norm rather than the exception. Although Meta employees like Verdu were excited about Beat Saber's potential as a vector into fitness, Meta has never been able to execute on that excitement in any of the years since they acquired Beat Saber. Verdu Dep. 178:12–20 ("[I]t was the perpetual white whale quest to get ... Beat Games to build a fitness version of Beat Saber, which was like pushing on a string. We tried and tried and tried, and they never picked it up."); *see* PX0123 ("[[Redacted]] was on the goal list for the [beat] saber acquisition.... But that goal was never followed up on."), Sept. 15, 2021.

Finally, the FTC cites two instances of contemporaneous Meta communications that suggest the Beat Saber proposal had not died on the vine when Meta pivoted to acquiring Within. *See* FTC Closing Hr'g Tr. 1495:10–24. The first is Verdu's comment on June 20, 2021, that Meta was "in the *midst of a strategy exercise to decide between our alternatives* when Supernatural became in play (supposedly pursued by Apple), which accelerated everything." PX0117, June 10, 2021 (emphasis added). The FTC asserts that the referenced "alternatives" included the Beat Saber–Peloton proposal; however, this theory is inconsistent with the fact that there had been no internal discussion of the proposal in the preceding two months. The more likely interpretation is that "alternatives" referred to [Redacted] *See* PX0253, at 1.

The second communication arose in the context of [Redacted] requested a sale price of [Redacted]. PX0123, at 2, Sept. 15, 2021. In discussing alternatives to the Within acquisition, Jason Rubin suggested that another [Redacted] *Id.* He also suggested, "We might be able to buy [Redacted], rebrand and redesign to Beat aesthetics." *Id.* In assessing the weight of these statements, the Court makes a few contextual

observations. At the time Rubin made his comments, he had only been in his role for about six weeks; Verdu (an employee with extensive knowledge of Meta's history with VR fitness) previously held the role. PX0066 ("Rubin Dep.") 28:8–15 ("On August ***938** 1st, I took or was handed the role that I have right now ... and inherited [the Meta–Within] acquisition in full swing."). Rubin also testified that, before switching roles, he "was not aware of anything having to do with fitness at all in the VR world" and had no knowledge of "how the company had come to its decision making to acquire [Within]." *Id.* 126:9–127:11. Perhaps on a record with more corroborating evidence, Rubin's remarks may warrant more substantial weight towards the FTC's theory that the Beat Saber fitness proposal remained a live proposition. However, given that Ruben's remarks appeared to have been made off the cuff, are inconsistent with the overall weight of the evidence, and were made at a time when he was likely still unfamiliar with VR fitness and Meta's history, the Court is disinclined to accord any significant weight to Rubin's comments.

For all these reasons, the Court finds that it was not "reasonably probable" that Meta would have repositioned their top-selling VR app, Beat Saber, into a dedicated fitness app, even assuming that it could have identified a partner willing to provide VR fitness content.

* * *

After reviewing the evidentiary record and the parties' arguments, the Court concludes that it is not "reasonably probable" that Meta would enter the market for VR dedicated fitness apps if it could not consummate the Acquisition. Though Meta boasts considerable financial and VR engineering resources, it did not possess the capabilities unique to VR dedicated fitness apps, specifically fitness content creation and studio production facilities. As a VR platform developer, Meta can enjoy many of the promising benefits of VR fitness growth without itself intervening in the VR fitness app market. Finally, the proposal for Meta to expand Beat Saber into fitness was not "reasonably probable" for a whole host of reasons, in addition to the aforementioned obstacles to Meta's *de novo* entry.

****31** Accordingly, the Court finds that Meta did not have the "available feasible means" to enter the relevant market other than by acquisition. Because the FTC has not met its burden on this element, the Court does not proceed to the issue of whether Meta's *de novo* entry was substantially likely to deconcentrate or result in other procompetitive effects in the relevant market.

In so finding, the Court concludes that the FTC has failed to establish a likelihood that it would ultimately succeed on the merits as to its Section 7 claim based on the actual potential competition theory.

E. Perceived Potential Competition

In addition to its claim that the Acquisition would lessen competition pursuant to the actual potential competition theory, the FTC also claims that the Acquisition violates Section 7 under the perceived potential competition theory. FAC ¶¶ 97–102. Under this theory, the FTC argues that the Acquisition would eliminate the competitive influence that Meta exerts on firms within the relevant market by virtue of its presence on the fringes of the market. *See, e.g., United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559–60, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973).

To prevail on a claim that the Acquisition would have eliminate perceived potential competition, the FTC must establish—in addition to showing a highly concentrated market, *see* Section III.C—the following: (1) Meta possessed the "characteristics, capabilities, and economic incentive to render it a perceived potential de novo entrant"; and (2) Meta's "premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market." ***939** *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 625, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974). The same objective facts regarding Meta's capability of entering the market under an actual potential competition theory are also "probative of violation of § 7 through loss of a procompetitive on-the-fringe influence." *Falstaff Brewing*, 410 U.S. at 534 n.13, 93 S.Ct. 1096; *see also Black & Decker*, 430 F. Supp. at 770. However, whereas a claim for actual potential competition may consider the potential entrant's intent to enter the market, a perceived potential competition claim ignores the potential entrant's subjective intent to enter the market and instead focuses on the subjective perceptions of the in-market firms. *See Falstaff Brewing*, 410 U.S. at 533–36, 93 S.Ct. 1096.

1. Potential Entrant Characteristics

In evaluating the FTC's perceived potential competition claim, the Court considers the same objective evidence

regarding Meta's capabilities and incentives to enter the relevant market. Unsurprisingly, and for the same reasons explained above, the objective evidence in the record is insufficient to support a finding that it was "reasonably probable" Meta would enter the relevant market for purposes of the perceived potential competition doctrine. *See supra*, Section III.D.2.

Nor does the subjective evidence of the in-market firms' perceptions move the needle on this point. Although the FTC produced some evidence that Within co-founders and employees had expressed concern that Beat Saber or its fans could create a fitness version to compete with Supernatural, these statements are mostly stale with some significantly preceding the relevant time period. The FTC's strongest evidence that [Redacted] were statements made [Redacted] before Supernatural even entered the VR market in April 2020. *See, e.g.*, PX0627, at 2 [Redacted] The FTC has only produced one document that post-dates Supernatural's launch, which is a June 2020 "Supernatural Product Strategy" presentation that noted [Redacted] PX0615, at 8. However, even this document's weight is undercut by the fact that it was created nearly a year before Meta began pursuing Within as an acquisition target.[14]

****32** Furthermore, subsequent but still contemporaneous evidence indicated that Within eventually came to [Redacted]" DX1083, at 10, Sept. 22, 2020. In a September 2020 text conversation with a Within investor, Within's co-founder Chris Milk explained that [Redacted] *Id.* at 7. In the same conversation, Milk [Redacted] *Id.* at 67–68.

In summary, the evidentiary record indicates that [Redacted] This finding, in addition to the overall absence of testimony from other in-market firms, would suggest that the FTC has failed to demonstrate that it was "reasonably probable" that Meta was perceived as a potential competitor into the relevant market. However, even if the FTC had prevailed on this element, the Court is convinced that it did not satisfy the second required showing for a perceived potential competition claim.

2. Tempering Effect

Under the second element of the perceived potential competition claim, the ***940** FTC must establish that Meta's "premerger presence on the fringe of the target market *in fact* tempered oligopolistic behavior on the part of existing participants in that market." *Marine Bancorporation*, 418 U.S. at 624–25, 94 S.Ct. 2856 (emphasis added). In other words, the FTC must present evidence that it was "reasonably probable" that Meta's presence as a potential competitor had a direct effect on the firms in the VR Dedicated Fitness market.

In setting forth this standard, the Court rejects the FTC's suggestion that it need only provide "[p]robabilistic proof of 'likely influence' on existing competitors." Mot. 21. This interpretation arises from the language used by the Supreme Court in a footnote from *Falstaff Brewing*, specifically "[t]he Government did not produce *direct evidence* of how members of the [relevant] market reacted to potential competition from [the potential entrant], but *circumstantial evidence* is the lifeblood of antitrust law." 410 U.S. at 534 n.13, 93 S.Ct. 1096 (emphasis added). The Court reads this language to mean the FTC need not provide *direct evidence* of Within adopting its conduct to account for Meta's presence (*e.g.*, a hypothetical internal email at Within expressly communicating fear of Meta's imminent entry and taking actions in anticipation). Direct evidence, however, is distinguishable from evidence of a *direct effect* experienced within the relevant market (*e.g.*, circumstantial evidence that Within reduced prices shortly after Meta's hypothetical public announcement that it was looking into the VR Dedicated Fitness market). This interpretation is supported by the Supreme Court's statement of the law in *Marine Bancorporation*, 418 U.S. at 624–25, 94 S.Ct. 2856 (requiring "presence ... in fact tempered oligopolistic behavior") and the Second Circuit's interpretation in *Tenneco, Inc. v. FTC*, 689 F.2d 346, at 358 ("The Commission is correct that it need not produce direct evidence that [acquired company] altered its actions in response to a perception of [potential entrant] 'in the wings.' However, it must produce at least circumstantial evidence that [potential entrant's] presence probably *directly affected* competitive activity in the market.") (emphasis added). Accordingly, the FTC must produce *some* evidence —direct or circumstantial—that Meta's presence had a direct effect on the firms in the relevant market.

Under this standard, the FTC's evidence on this element is insufficient. The only evidence that suggests any kind of effect in the relevant market is that Within cited, as reasons not to reduce headcount at Within shortly before launching Supernatural, [Redacted] PX0620, at 36, Mar. 8, 2020. As noted above, Within and Supernatural had not even entered the relevant market at the time of this presentation. Consequently, this cannot be evidence of a direct effect within the VR dedicated fitness app market; rather, they are the

preemptive considerations of a firm contemplating entry into the market. Moreover, the evidence indicates that Within had [Redacted]. *See supra* Section III.E.1. Other than this presentation, the FTC suggests that [Redacted]" PX0621, at 2, Dec. 8, 2020. Although this is circumstantial evidence that Within was concerned about hypothetical potential entrants, absent further evidence, this email is no basis to infer the critical nexus, *i.e.*, that Meta was one such potential entrant.

****33** The Court recognizes that its interpretation of the "effect" requirement sides with Defendants' position set forth in their Motion to Dismiss. ECF No. 108, at 15–16; ECF No. 162, at 10–12. Although the Court ultimately determines that the FTC's evidence has not established that Meta's presence had a direct effect on Within's behavior, it finds that the FTC's *pleadings* are sufficient. The FTC had alleged ***941** that Within was "concerned about making any moves that would hurt its ability to compete against Meta as a potential entrant" and provided an example. FAC ¶ 101. At the pleadings stage, this satisfies their burden. Accordingly, the Court DENIES Defendants' motion to dismiss the perceived potential competition claim.

In summary, the Court finds that the objective evidence does not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant. Even if it did, the Court finds that there is no direct or circumstantial evidence to suggest that Meta's presence did in fact temper oligopolistic behavior or result in any other procompetitive benefits. Accordingly, the FTC has not demonstrated a likelihood of ultimate success as to its Section 7 claim arising from perceived potential competition.

F. Balancing of Equities

Because the FTC has not demonstrated a likelihood of ultimate success on the merits per the first § 13(b) element, the Court need not proceed to the balance the equities in the second portion of the § 13(b) inquiry.

IV. CONCLUSION

Based on the foregoing reasons, the Court ORDERS as follows:

1. Defendants' Motion to Dismiss is DENIED;
2. Defendants' Motion to Strike is DENIED AS MOOT; and
3. Plaintiff's Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

All Citations

654 F.Supp.3d 892, 2023 WL 2346238

Footnotes

1 The Court understands "XR" to refer generally to virtual reality, augmented reality, and mixed reality.

2 Apple does not currently offer a VR headset. *See, e.g.*, Bosworth Hr'g Tr. 1022:13–16.

3 Dr. Vickey later testified that he had not used a Hydrow, and that he "would have" evaluated the machine by reviewing the company's website and watching its videos. Vickey Hr'g Tr. 1202:8–18.

4 The Court is not persuaded by Defendants' argument that the Peloton Guide is similarly portable to a VR headset. *See* Opp. 10. [Redacted] Vickey Report ¶ 43 ("[T]he Peloton Guide uses augmented reality features to track the user's motions and a camera to position the user visually near an on-screen instructor.").

5 This supply-side analysis of whether other firms would be able to switch production to VR dedicated fitness apps is independent of the demand-side inquiry (and main focus of the market definition analysis) of whether users would switch consumption to other products in the event of a price increase in VR dedicated fitness apps.

6 Some VR dedicated fitness apps charge a one-time price over $18.99, and another VR dedicated fitness app has a free version as well as a premium version priced equally to Supernatural at $18.99 per month. All other VR dedicated fitness apps charge subscriptions lower than $18.99 per month, and one is free. Singer Report ¶ 39.

7 Having independently reached the same conclusion as Dr. Singer regarding the relevant product market definition, the Court will rely on his subsequent analyses regarding the structure and characteristics of the defined market, which Defendants do not challenge. *See* ECF No. 470.

8 Indeed, the many novel questions of law presented by this case may signal an ill fit between these long-standing antitrust doctrines and the structures of modern technology markets.

9 As noted above, because the FTC has not argued that Meta could have entered the relevant market through a toehold acquisition, the Court considers only the question of *de novo* entry.

10 The Court can imagine more scenarios, *e.g.*, where Meta contracts independent fitness instructors or employs a team of regular fitness instructions, but they would require further speculation.

11 To clarify, the Court cites this internal Meta strategy document for its identification of functions that are *objectively* absent from Meta's capabilities, and not for any probative value in determining Meta's *subjective* intention, such as whether those absences are sufficient to deter it from entering the VR dedicated fitness app market de novo.

12 To be sure, there is incentive for any company to enter a market that has stable consumers and is experiencing high growth, and the Court considers these incentives in assessing reasonable probability of Meta's entry. However, those incentives are of a different type and on a different scale from Meta's interest in VR dedicated fitness apps as a VR platform developer.

13 As discussed in the "Users and Growth" analysis above, the record reflects that Meta's interest in the VR dedicated fitness market stems from the market's potential contribution to broader VR adoption and corresponding headset sales. The Court recognizes that a thriving VR fitness market may contribute to Meta's future profitability in headset sales. But that potential profitability in a different market is both too divorced from the likelihood of Meta's *de novo* entry in the relevant market, and too speculative to evaluate under this factor.

14 The FTC also produces an April 2021 internal communication from *Meta*, where a Meta employee remarked that Within "very much worry that [Meta] will create a fitness first app internally that takes their market share." PX0514, at 2, Apr. 23, 2021. The Court is doubtful of the probative value of this hearsay statement, and the FTC has not produced any evidence to corroborate this statement. FTC Closing Hr'g Tr. 1498:2–9 ("[W]e heard from Ms. Brown, and you may recall that she did not remember much, if anything at all, about this document.... It's up to this court to judge her credibility on that store. But she did say that she was being truthful when she wrote this.").

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United States District Court,
N.D. Georgia.

FEDERAL TRADE COMMISSION, Plaintiff,

v.

WINDWARD MARKETING, LTD.; Genisis Marketing & Administration, Inc.; Crestwood Enterprises, Inc.; Wholesale Capital Corporation; Mega Magazines, Inc.; All of the above-named corporations doing business as: Wholesale Magazine; Premium Magazine; Magazine Express; Magazines Unlimited; Magazines of America; Magazines Limited; Magazine Distributors of America; Ronald "Ronny" Jay Pepper; Philip Edward Dill; Matthew Corbitt Mizell, Jr.; Sarfraz A. Tariq; and Sabir Saleem, Defendants.

No. Civ.A. 1:96–CV–615F.
|
Sept. 30, 1997.

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FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

HULL, J.

***1** Plaintiff Federal Trade Commission brings this action under the Federal Trade Commission Act ("FTC Act"). This matter is before the Court on Plaintiff's Motion for Summary Judgment [145–1] on its claims against corporate Defendant Wholesale Capital Corporation and individual Defendants Sarfraz Tariq and Sabir Saleem.

I. *FACTS*[1]

This case involves the telemarketing of magazine subscriptions to consumers throughout the United States. Plaintiff Federal Trade Commission ("FTC") brings this action seeking permanent injunctive and other relief in this matter, pursuant to sections 5, 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"). 15 U.S.C. §§ 45, 53 & 57b. Plaintiff FTC presents evidence showing that Defendants conducted a nationwide telemarketing and banking scheme designed to obtain consumers' bank account numbers and then deposited unsigned demand drafts against the consumers' bank accounts without the consumers' authorization. Plaintiff FTC contends that Defendants' telemarketing and banking practices were false, deceptive, misleading, and unfair in violation of Section 5(a) of the FTC Act. 15 U.S.C. § 45(a).

A. *Defendants' Telemarketing Scheme*

Defendants' scheme required the cooperation of numerous parties. Each corporate Defendant and individual Defendant played an integral role in the telemarketing transactions in issue in this case.

1. *The Selling Defendants*

Defendant Genisis Marketing & Administration, Inc. ("Genisis"), whose owner and sole officer is Defendant Phillip Edward Dill, initiated the telemarketing transactions by making unsolicited telephone calls or "cold calls" to consumers. Defendant Genisis's role was to sell the magazines and obtain the consumers' bank account numbers. Defendant Genisis obtained the consumers' bank account numbers

through making misrepresentations which were, at best, misleading, and, at worst, deceptive.

First, the Genisis telemarketers would congratulate the consumers on being "winners" or "finalists" in a sweepstakes. The telemarketers offered the consumers various awards, such as diamond watches, Bahamas vacations, and three-piece leather luggage sets. In addition, the telemarketers offered the consumers cash certificates for groceries, usually valued at $250, which the telemarketers claimed could be used "like cash" for groceries. Often, the Genisis telemarketers told the consumers that the cash certificate for groceries would pay virtually for the consumers' magazine subscriptions. The grocery certificates turned out to be numerous "cents off" coupons (for various products) that could be obtained in any Sunday newspaper.

The Genisis telemarketers offered the consumers two free one-year subscriptions to monthly magazines, such as *Life* or *Good Housekeeping,* if the consumers would agree to subscribe to weekly magazines, such as *Time* or *Newsweek.* The telemarketers offered multi-year subscription terms at various rates, typically $1 .89 or $1.91 per week (which translates to a range of $282.12 to $297 .96 for the three-year subscriptions the telemarketers pushed). Generally, the telemarketers did not tell the consumers the total prices for the subscriptions.

***2** Further, during these initial sales calls, the Genisis telemarketers usually failed to discuss a method of payment. Instead, they obtained the consumers' checking account numbers using one or more of several ruses. In some instances, the telemarketers told consumers that their account numbers were needed so that the sweepstakes winnings could be deposited directly into the consumers' accounts. In other cases, the telemarketers told consumers that their account numbers were needed for verification or identification purposes in order to receive the promised awards or to enter the sweepstakes. Still, in other cases, the telemarketers stated affirmatively that they could not withdraw money from the consumers' checking accounts without the consumers' permission. In fact, many consumers told the telemarketers outright that no money was to be withdrawn from their bank accounts.

In some instances, Genisis telemarketers disclosed the fact that money would be withdrawn from the consumers' bank accounts. But even in these instances, the telemarketers never told consumers that the withdrawals would be in one large lump sum. In those situations, consumers provided their account numbers with the mistaken understanding that they would be paying only $1.89 or $1.91 each week or month, rather than an immediate sum of $282.12 or $297.96.

2. *The Verifying Defendants*

After Defendant Genisis obtained the consumers' magazine orders and bank account numbers, Defendant Windward Marketing, Ltd. ("Windward") made follow-up "verification" calls to consumers, usually between one hour and two days after the initial calls from Genisis. These verification calls lasted approximately thirty seconds. During these second calls, Defendant Windward's telemarketers mentioned the sweepstakes and then reviewed and misrepresented again the "prizes" that the consumers were to receive. The Windward telemarketers then used the ruse of telling the consumers that the consumers' banks were a "billing agents." This deflated the consumers' concerns about the callers' having the consumers' bank account numbers.

These verification calls were the first occasion that many of the consumers learned that they somehow had unknowingly authorized Defendants to debit money from the consumers' bank accounts. During the verification calls, Defendant Windward's callers would tell consumers that when they gave out their bank account numbers, they authorized Defendants to debit their accounts to pay for the magazine subscriptions. However, the callers did not express this matter clearly, but rather stated that, "when you gave us the checking account information, you authorized us to deduct *that* under the name Magazine Distributors of America" or the name of some other company. After stating that "you authorized us to deduct that," the callers quickly changed the subject to distract the consumers' attention by giving out the telemarketers' first names and customer service numbers. Through this process, Defendants Genisis and Windward contend that Defendant Windward "verified" that the consumers previously had authorized lump sum deductions of $297.96.

***3** However, in many of the transcribed "verification" calls, the consumers told the "verifiers" that the consumers understood that they were authorizing only $1.91 a week and not authorizing lump sum payments for three years. Other consumers explained that they were to receive billings and never authorized any direct withdrawals out of their bank accounts. During numerous other "verification" calls, the consumers stated that they never understood that any money was to come out of their bank accounts and either hung up or instructed the "verifiers" to cancel the whole thing.

Additionally, in some cases, the verifiers misrepresented the situation, asserting that no money was to be withdrawn from the consumers' accounts. In any event, the verifiers never asked consumers for express authorization to prepare bank drafts without the consumers' signatures and to debit their bank accounts by those bank drafts. The verifiers also never asked the consumers whether the consumers previously had authorized other callers to do so. Instead, the verifiers *told* consumers that when they provided their bank account information to the initial telemarketers, they "authorized us to deduct it."

Finally, while the Court recognizes that on some occasions, some consumers did appear to understand during the "verification" calls that they had bought a magazine subscription for thirty-six months for $297.96, even then the "verification" callers made it appear that the consumers had been billed the $297.96 through their banks as their billing agents and that, in any event, the costs were offset by free grocery shopping or grocery shopping "on us." Again, however, the free grocery shopping amounted to $250 worth of cents off coupons that could have been obtained in any Sunday newspaper.

Even interpreting the most favorable "verification" calls in the manner most favorable to Defendants, the "verification" calls, at most, attempted to verify something that never occurred. The evidence shows that the consumers never authorized Defendant Genisis to prepare demand drafts on their bank accounts or to debit immediately the consumers' bank accounts for $297.96 based on demand drafts without the consumers' signatures. Because there were no authorizations to begin with, there were no authorizations being "verified" in these calls. Even Defendant Windward admitted that in making these calls, Defendant Windward found that at least 37% of the consumers had not authorized anything.

3. *The Debiting Defendants*

After conducting this "verification" process, Defendant Windward, over Dill or Pepper's signature, sent Defendants Wholesale Capital Corporation ("Wholesale") and Crestwood Enterprises ("Crestwood")[2] a list of "verified" orders and bank drafts on the consumer accounts. Defendant Windward sent the bank drafts by Federal Express to expedite collection on the consumers' accounts. These bank drafts listed as payee one of multiple d/b/a's discussed below used by Defendants Wholesale and Crestwood. The bank drafts did not contain the signatures of the consumers, but instead asserted that an authorized signature was on file or audio recorded by depositor and guaranteed by the named payee listed on the check, as follows:

> ***4** Authorized signature on file and/or audio recorded by depositor and guaranteed by above named company. For questions regarding this draft please call [a toll-free number].

(*See, e.g.,* Pla. Exh. 58 at 5.).[3] In fact, the payee listed on the bank draft did not answer at the toll-free number. Selling Defendant Windward answered at the toll-free number.

During 1994–96, Defendant Crestwood maintained commercial bank accounts in the names of "Magazines Unlimited" and "Magazine Distributors of America" and handled banking transactions through the accounts in those names. Likewise, Defendant Wholesale established bank accounts under the names "Wholesale Magazine," "Premium Magazine," and "Magazine Express." Theses were the names listed as payees on the consumers' bank drafts, and Defendants Crestwood and Wholesale deposited demand drafts drawn against consumers' accounts into these commercial bank accounts. Without access to these commercial bank accounts, Defendants Genisis, Mega, and Windward would not have been able to debit monies from the consumers' accounts and would not have been able to obtain the consumers' money. Thus, Defendants Wholesale and Crestwood were integral parts of Defendants Genisis, Mega, and Windward's overall scheme. Defendant Crestwood and individual Defendants Holbrook and Mizell have entered into stipulated final orders with Plaintiff FTC. Accordingly, the Court does not discuss their actions any further.

The evidence also shows that the individuals responsible for the day-to-day operations of Defendant Wholesale participated in this process. Defendant Sarfraz A. Tariq ("Tariq") is the president and sole owner of Wholesale. Defendant Tariq opened the bank accounts in New York and New Jersey that Defendant Wholesale used to process the bank drafts on consumers' accounts received from Defendant Windward. Defendant Tariq has signed other papers on behalf of Wholesale, including UCC financing statements and legal representation consent forms.

Plaintiff FTC also contends that Defendant Sabir Saleem ("Saleem") handles the day-to-day activities of Defendant Wholesale. Defendants Windward and Genisis contacted Saleem almost daily. In fact, Defendant Pepper always

dealt with Defendant Saleem on business matters, between Defendant Windward and Defendant Wholesale. Defendant Tariq explains that "since the start of business of Wholesale Capital Corporation in 1994, Mr. Saleem has rendered functions that of a Controller for Wholesale Capital Corporation and performed the services of Bookkeeping, Accounting and Data Management." (Tariq aff., exh. B.) Defendant Tariq also testifies that Defendant Saleem handled all the records for Defendant Wholesale and was responsible for sending out all the money. Defendant Wholesale paid Defendant Saleem a retainer of $18,000 per year for these services. Defendant Saleem admits performing bookkeeping and accounting services for Defendant Wholesale and receiving $ 18,000 for these services.

***5** Plaintiff FTC's undisputed evidence also shows that Defendant Saleem was the individual who received the unsigned bank drafts from Defendant Windward and deposited them into Defendant Wholesale's bank accounts. Defendant Saleem does not dispute that Defendant Windward sent the unsigned bank drafts via Federal Express to Defendant Wholesale in care of Defendant Saleem at Defendant Saleem's business in Connecticut, and does not dispute that he was the individual who received the bank drafts without the consumers' signatures. Further, Defendant Saleem admits that he physically deposited checks written by consumers on behalf of Defendant Wholesale.

It is important to note at this juncture that Defendant Wholesale was established for the purpose of factoring accounts. In other words, Defendant Wholesale's whole business was collecting on invoices or "bank checks" for a fee and remitting funds it collected (minus its fee) to its client. Thus, as the person responsible for maintaining Defendant Wholesale's records, depositing its checks (signed or unsigned), and sending money to Defendant Wholesale's clients (here, Defendants Windward and Genisis), Defendant Saleem clearly controlled the day-to-day activities of Defendant Wholesale.

Defendant Saleem contends that he had no control over Defendant Wholesale's activities. Defendant Saleem's sole position is that he was not an employee of Defendant Wholesale and thus cannot be said to have controlled Defendant Wholesale's activities. However, Defendant Saleem fails to present any evidence that supports this contention with his Response to Plaintiff FTC's Motion for Summary Judgment. Defendant Saleem also does not cite to any evidence in the record that supports this contention. Further, during his deposition, Defendant Saleem continually invoked his Fifth Amendment privilege and declined to answer any questions about his activities with Defendant Wholesale. The only evidentiary support in the entire record for Defendant Saleem's contention that he was not an employee of Defendant Wholesale is a lone averment contained in a affidavit presented in 1996 in opposition to Plaintiff FTC's Motion for Preliminary Injunction.

Arguably, the Court does not need to consider this affidavit filed in opposition to Plaintiff FTC's Motion for Preliminary Injunction for purposes of Plaintiff FTC's Motion for Summary Judgment. However, even considering Defendant Saleem's earlier affidavit, he testifies only that he was not an employee of Defendant Wholesale. Even accepting this conclusory averment as true, Defendant Saleem's affidavit does not refute the fact that Defendant Saleem was a direct agent for Defendant Wholesale with full power and authority to handle all of Defendant Wholesale's financial matters.

Control over activities can be accomplished in a number of ways; and in determining whether a person has control over activities, the Court does not look solely to a person's position, but also considers the control that a person actually exercises over given activities. Defendant Saleem did not have to be Defendant Wholesale's employee, or even an officer, to control Defendant Wholesale's activities. The evidence shows, without dispute, that Defendant Saleem was given full authority, responsibility, and control in whatever capacity he chooses to classify himself, to handle all the financial matters relating to Defendant Wholesale's transactions with Defendant Windward. Indeed, Defendant Saleem specifically had the authority to control all of the precise actions which comprised the unfair practices for which Plaintiff FTC contends that Defendant Wholesale should be held liable.

B. *The Culpability Of Defendants Wholesale, Tariq, and Saleem*

***6** Again, Defendant Wholesale processed printed bank drafts on consumers' accounts for Defendant Windward–but just used different fictitious magazine names as payees. In return, Defendant Wholesale received six to eight percent of the sums collected on the bank drafts. During January 21, 1994 through January 11, 1996, Defendant Wholesale deposited approximately $15,573,978 in bank drafts drawn on consumers' accounts for Defendant Windward. Defendant Wholesale received over $1 million in fees for providing this substantial assistance and for facilitating these telemarketing transactions.

Defendant Wholesale was incorporated in New Jersey and is wholly owned by Defendant Safraz A. Tariq. However, according to Plaintiff FTC, Defendant Tariq hired Defendant Sabir Saleem to handle the transactions between Defendant Windward and Defendant Wholesale. Defendant Tariq testifies that Defendant Saleem handled all the records for Defendant Wholesale and controlled the day to day activities of Defendant Wholesale. (Tariq dep. at 67–68.) Defendant Windward sent the bank drafts by Federal Express to Defendant Wholesale in care of Defendant Saleem at Saleem's business in Connecticut.

Defendant Saleem operates a business known as Cotton Fair Uniform ("Cotton Fair") in Coscob, Connecticut, which provides linens, physician and nursing uniforms, and towels to hospitals and other businesses. According to Saleem, Cotton Fair has over seventy active customers. President Tariq completed banking forms so that Defendant Wholesale's bank statements would be sent to Cotton Fair's address in Connecticut and not to Defendant Wholesale's office in New Jersey.

Defendant Saleem performed bookkeeping and accounting services for Defendant Wholesale and, according to Plaintiff FTC, deposited the bank drafts into Defendant Wholesale's accounts at the National Bank of Pakistan in New York under one of the three d/b/a's mentioned earlier–namely, "Magazine Express," "Premium Magazine," and "Wholesale Magazine." However, Defendant Wholesale experienced an average 40% return rate on the bank drafts received from Defendant Windward–that is, 40% of the checks were returned as unauthorized. *Both Defendants Tariq and Saleem were aware that at least 40% of the unsigned consumer bank drafts sent by Defendant Windward were being returned as unauthorized.*

In fact, the National Bank of Pakistan wrote Defendant Wholesale a letter, dated January 20, 1995, advising that it was closing Defendant Wholesale's bank accounts because of numerous consumer complaints that Defendant Wholesale was submitting for clearing drafts drawn on consumers' accounts without authorization. The letter stated as follows:

> It has come to our attention that the activities of the two corporations captioned above have resulted in numerous consumer complaints with respect to the operation of such accounts maintained with National Bank of Pakistan, New York Branch. We have been contacted by the office of the Attorney General of the State of West Virginia who is presently investigating this matter. Among the allegations made are claims that the corporations have, without authorization, submitted to National Bank of Pakistan, for clearing, various sight drafts drawn on accounts on your prospective customers. These allegations are deemed serious, and in light of the fact that National Bank of Pakistan is listed as the address through whom your corporations may be contacted, we have determined to close both of the above referred two accounts thirty (30) days from the date of this letter.

***7** (Exh. 123 at 4). Other records of Defendant Wholesale show consumer complaints about unauthorized bank drafts as early as 1994. Despite the National Bank of Pakistan's warning that the bank drafts were not authorized by consumers and that the allegations were serious, Defendants Wholesale, Tariq, and Saleem continued to collect of the bank drafts received from Defendant Windward.

Investigators with the Georgia Governor's Office of Consumer Affairs conducted a telephone interview with Sabir Saleem on May 3, 1995 and explained to him all of the consumer complaints about Defendants Genisis and Windward, including the misrepresentations about the Bahamas vacations, the $250 in grocery certificates, the purportedly valuable diamond watches that are worth only $5–10, and the unauthorized withdrawals from consumers' bank accounts for magazine subscriptions. Defendant Saleem responded that Defendants Windward and Genisis had sold over 30,000 invoices and that he knew about only forty-three complaints. During that May 3, 1995 interview, the Georgia investigators told Defendant Saleem about the problems with Defendants Windward and Genisis's activities as follows:

> JB Well, see, you fail to understand what we are handling here is the Fair Business Practices Act; and we don't even need the volume that we have here to recognize there's a problem and there's a violation of the law.

(Exhibit 103, at 15.) The investigator also told Defendant Saleem:

> DH I think one of the things, too, that you're not hearing is that even though you're dealing with our office right now, I have had inquiries from over twenty other states that want to take some type of administrative action [against] either Windward or Wholesale, whoever they can get a hold to or whoever they can figure out is at the bottom of this. So it's not just this state agency. We just finally got to you, because there was a web that was hiding who was involved with this.

(Exh. 103 at 16.) Later in the interview, Defendant Saleem responded as follows:

> SS Well, I'm sorry to hear that, and just all I need to know from you is if they are not doing proper business, then we have just to, we have to conclude that they are not a good customer and stop doing business with them.... I mean that is what I have to really be certain if they are really doing bad practices, then we don't want to do business with them.

(Exhibit 103, at 17.) Despite the 40% check return rate, the information from the National Bank of Pakistan, and the Georgia Governor's Office of Consumer Affairs' investigation, *Defendants Wholesale, Tariq, and Saleem continued unabated to deposit the unauthorized and unsigned bank drafts on the consumer accounts received from Defendant Windward and to facilitate the telemarketing transactions for Defendants Genisis and Windward.*

C. *Procedural History*

On March 12, 1996, Plaintiff FTC brought this action against Defendants and moved for an ex parte temporary restraining order ("TRO") to halt Defendants from continuing unfair and deceptive practices. On the same day, this Court entered a TRO freezing Defendants' assets, appointing a temporary receiver, and setting a hearing on Plaintiff FTC's Motion for Preliminary Injunction on March 14, 1996. The hearing was continued to March 19, 1996, and further continued to March 27, 1996. On March 27, 28, and 29, 1996, the Court conducted an evidentiary hearing on heard oral arguments from counsel. On April 3, 1996, the Court entered. a Preliminary Injunction enjoining Defendants' telemarketing activities, continuing the asset freeze as to most of Defendants' assets, and appointing a permanent receiver. On April 18, 1996, the Court vacated its April 3, 1996 Preliminary Injunction but reissued the same with minor corrections.

***8** By December 13, 1996, all Defendants, except for corporate Defendants Windward, Mega, and Wholesale and individual Defendants Pepper, Tariq, and Saleem, had settled with Plaintiff FTC and entered into Stipulated Final Orders for Permanent Injunction. On December 13, 1996, Plaintiff FTC filed its Motion for Summary Judgment against all the remaining Defendants. Subsequently, On February 20, 1997, Plaintiff FTC and Defendants Windward and Pepper entered into Stipulated Final Judgment and Order for Permanent Injunction. On April 22, 1997, the Court entered a Final Judgment and Order for Permanent Injunction against Defendant Mega based on Plaintiff FTC's unopposed Motion for Default Judgment.

Thus, the only remaining Defendants in this case are corporate Defendant Wholesale and individual Defendants Tariq and Saleem.

II. *DISCUSSION*

A. *Summary Judgment Standard*

Federal Rule of Civil Procedure 56(c) defines the standard for summary judgment as follows: courts should grant summary judgment when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The general rule of summary judgment in the Eleventh Circuit states that the moving party must show the court that no genuine issue of material fact should be decided at trial. *Haves v.. City of Miami,* 52 F.3d 918, 920 (11th Cir.1995); *Clark v. Coats & Clark. Inc.,* 929 F.2d 604, 606–09 (11th Cir.1991). Unless the movant for summary judgment meets its burden under Federal Rule of Civil Procedure 56, the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion. *Clark,* 929 F.2d at 607–08.

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, *Rollins v. TechSouth, Inc.,* 833 F.2d 1525, 1529 (11th Cir.1987); *Everett v. Napper,* 833 F.2d 1507, 1510 (11th Cir.1987), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 250; *see also Haves,* 52 F.3d at 920 ("[A] genuine issue of material fact does not exist unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict in its favor."). A mere scintilla of evidence is insufficient to create a jury question; rather, there must be conflict in substantial evidence to create question for jury. *Anderson;* 477 U.S. at 252; *Gordon v. E.L. Hamm & Associates, Inc.,* 100 F.3d 907, 910 (11th Cir.1996). Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id.* at 248.

***9** Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant

meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In *Celotex,* the Supreme Court interpreted Federal Rule of Civil, Procedure 56(c) to require the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is "discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.*

B. *Corporate Defendant Wholesale*

Plaintiff FTC contends that Defendant Wholesale violated section 5 of the FTC Act by debiting consumers' bank accounts without the consumers' authorization. The FTC Act provides in relevant part that "unfair or deceptive acts or practices in or affecting commerce are declared unlawful." 15 U.S.C. § 45(a). Defendants' telemarketing scheme (the initial sales of magazine subscriptions and the subsequent use of demand drafts to debit customers' bank accounts) is commerce or affects commerce as the word "commerce" is defined in the Act. 15 U.S.C. § 44. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes this Court to enter a preliminary and permanent injunction and order consumer redress, disgorgement, and restitution to prevent or remedy any violation of any provision of law enforced by the FTC, as follows.

> Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond ... [and] in proper cases the Commission may seek, and after proper proof, the Court may issue, a permanent injunction.

15 U.S.C. § 53(b); *See also FTC v. GEM Merchandising Corp.,* 87 F.3d 466, 468 (11th Cir.1996); *FTC v. United States Oil & Gas Corp.,* 748 F.2d 1431, 1434 (11th Cir.1984); *FTC v. H.N. Singer, Inc.,* 668 F.2d 1107, 1113 (9th Cir.1982).

1. *Liability for Deceptive Practices under the FTC Act*

An act or practice is *deceptive* under section 5 if it involves a material representation or omission that is likely to mislead consumers acting reasonably under the circumstances. *FTC v.. Jordan Ashley, Inc.,* No. 93–2257, 1994 WL 200775, at *2 (S.D.Fla. Apr.5, 1994) (citing *FTC v. Amy Travel Serv., Inc.,* 875 F.2d 564, 573 (7th Cir.1989)); *FTC v. Atlantex Assocs.,* No. 87–45, 1987 WL 20384, at *9 (S.D.Fla. Nov.25, 1987), *aff'd,* 872 F.2d 966 (11th Cir.1989). A representation or omission is material if it is of the kind usually relied on by a reasonably prudent person. *Id.* The FTC, however, need not present proof of subjective reliance by each victim.

> In an FTC Act Section 13(b) enforcement action in which the government seeks restitution to compensate thousands of individual victims of unlawful practices, in contrast to a private action for fraud, such representative proof of injury suffered is sufficient to justify the requested relief ... Requiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the section.

***10** *FTC v. U.S. Oil & Gas Corp.,* 1987 U.S. Dist. LEXIS 16137 at *68 (S.D.Fla. July 10, 1987). "A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *FTC v. Figgie Int'l. Inc.,* 994 F.2d 595, 605 (9th Cir.1993).

Express claims, or deliberately-made implied claims, used to induce the purchase of a particular product or service are presumed to be material. In re *Thompson Medical Co., Inc.,* 104 F.T.C. 648, 816 (1984), *aff'd,* 791 F.2d 189 (D.C.Cir.1986). Moreover, any representations concerning the price of a product or service are presumptively material. In re *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988), *aff'd,* 884 F.2d 1489 (1st Cir.1989) (citing *Thompson Medical,* 104 F.T.C. at 817). "Deception may be accomplished by innuendo rather than by outright false statements." *Regina Corp. v. FTC,* 322 F.2d 765, 768 (3d Cir.1963).

Proof of intent to deceive is not required under section 5. "A company that deceives consumers through reckless even simply negligent disregard of the truth may do just as much harm as one that deceives consumers knowingly." *Sears Roebuck & Co. v. FTC,* 95 F.T.C. 406, 517 n. 9 (1980). In other words, Plaintiff FTC is required to show only that Defendants, here Defendant Wholesale, had or should have had knowledge or awareness of any relevant misrepresentations. *Amy Travel,* 875 F.2d at 574. This knowledge requirement may be satisfied by showing that Defendant Wholesale had either (1) actual knowledge of material misrepresentations, (2) reckless indifference to the truth or falsity of such representations, or (3) awareness of a high probability of fraud along with an intentional avoidance of the truth. *Id.*

2. *Liability for Unfair Practices under the FTC Act*

An act or practice is *unfair* under section 5 if it results in substantial consumer injury that is not reasonably avoidable and is not outweighed by any countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n); *see also Orkin Exterminating Co. v. FTC,* 849 F.2d 1354, 1364 (11th Cir.1988) (citing Letter from the FTC to Senators Danforth and Ford (December 17, 1980)); *American Financial Services v. FTC,* 767 F.2d 957, 971 (D.C.Cir.1985), *cert. denied,* 475 U.S. 1011 (1986).

In 1980, the Commission promulgated a policy statement containing an abstract definition of "unfairness" which focuses on unjustified customer injury. *See American Fin. Servs.,* 767 F.2d at 971. Under the standard enunciated in this policy statement, to justify a finding of unfairness, the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and, it must be an injury that consumers themselves could not reasonably have avoided. *Orkin Exterminating Co.,* 849 F.2d at 1364 (citing Letter from the FTC to Senators Danforth and Ford dated December 17, 1980).

***11** Congress has not enacted any more particularized definition of unfairness to limit the Commission's discretion. Indeed, the most significant Congressional responses to the Policy Statement have not been criticisms or rejections, but proposals to enact the Commission's three-part consumer injury standard into law. *American Fin. Servs.,* 767 F.2d at 982 (citation omitted). Nevertheless, as the ultimate authority charged with the construction of federal statutes, the courts must set aside Commission orders that are inconsistent with the Commission's statutory mandate or Congressional intent. *FTC v. Colgate–Palmolive Co.,* 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). However, in deciding whether Defendants Wholesale, Tariq, and Saleem's conduct was "unfair," the Court owes "some deference" to the Commission's express position on the issue. *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 454, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986).

The first prong of the unfairness standard requires a finding of substantial injury to consumers. Plaintiff FTC can make this showing by, among other things, establishing that the consumers here were injured by a practice for which they did not bargain. *Cf. Orkin Exterminating Co.,* 849 F.2d at 1364–65. Further, although the actual injury to individual customers may be small, this does not mean that such injury is not "substantial." *See American Fin. Servs.,* 767 F.2d at 972 (Commission's Policy Statement makes clear that injury may be, sufficiently substantial if it causes small harm to a large class of people). The large number of consumers was injured here is sufficient to establish substantial injury. *Id.*

As for the second prong of the unfairness standard, certain practices can create a mixture of both beneficial and adverse consequences. However, when a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition, the unfairness of the practice is not outweighed. *Cf. Orkin Exterminating Co.,* 849 F.2d at 1365.

Finally, as to the third prong of the unfairness standard–that is, whether consumers reasonably could have avoided any injury–the Court focuses on whether the consumers had a free and informed choice that would have enabled them to avoid the unfair practice. *American Fin. Servs.,* 767 F.2d at 976; *see also International Harvester,* 104 F.T.C. at 1061. "Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end." *Orkin Exterminating Co.,* 849 F.2d at 1365 (quoting *FTC v. Orkin Exterminating Co.,* 108 F.T.C. 341, 366 (1986)).

3. *Defendant Wholesale is Liable for Its Own Unfair Practices Committed during Defendants' Telemarketing Scheme*

While the facts of this case would permit Plaintiff FTC to seek to hold corporate Defendant Wholesale and individual Defendants Tariq and Saleem liable for the deceptive practices of the other Defendants in this case on a theory of accomplice liability, that is not the basis of liability on which Plaintiff FTC relies. Rather, Plaintiff FTC contends that Defendants Wholesale, Tariq, and Saleem engaged in *unfair* practices that resulted in substantial injury to the consumers at issue in this case.

***12** The facts that Defendant Wholesale and Tariq are deemed to have admitted are outlined in detail above. However, numerous facts bear repeating. The evidence shows that Defendant Wholesale facilitated and provided substantial assistance to Defendants Genisis and Windward's deceptive scheme by depositing unauthorized bank drafts on consumers' accounts into bank accounts opened by Defendant Wholesale in the names of various fictitious magazines. The magazine

names under which Defendant Wholesale opened the bank accounts were the same magazines that Defendant Windward used as payees on the unauthorized checks. Further, while it was Defendant Wholesale that opened the bank accounts in the names of the fictitious magazines, the telephone number on the check to which consumers' banks were to refer if they had any questions was answered by Defendant Windward's employees.

Defendant Wholesale does not dispute that it opened bank accounts for the selling Defendants. Nor does Defendant Wholesale dispute that many of the bank drafts deposited into the bank accounts proved to be unauthorized. However, Defendant Wholesale contends that the selling Defendants informed Defendant Wholesale that all of the bank drafts were authorized and that it had no reason to believe otherwise. The evidence shows the contrary.

First, approximately 40% of the bank drafts were returned unauthorized; this amount includes checks returned for insufficient funds and checks returned because of stop-payment requests.[4] Despite this 40% return rate, Defendant Wholesale continued to deposit bank drafts on consumer accounts. Defendant Wholesale contends that a 40% return rate on checks is not uncommon in telemarketing. Defendant Wholesale argues that consumers often experience “buyer's remorse” and “lie” to their banks that the drafts were unauthorized. However, Defendant Wholesale fails to present any evidence of buyer's remorse here or any evidence that any consumers “lied” to their banks. In other words, Defendant Wholesale's speculation regarding buyer's remorse is not supported by any evidence in the record.[5]

Second, as stated earlier, the National Bank of Pakistan wrote Defendant Wholesale a letter, dated January 20, 1995, advising that it was closing Defendant Wholesale's bank accounts because of numerous consumer complaints that Defendant Wholesale was submitting for clearing drafts drawn on consumers' accounts without authorization. Other records of Defendant Wholesale show consumer complaints about unauthorized bank drafts as early as 1994. Despite the National Bank of Pakistan's warning that the bank drafts were not authorized by consumers and that the allegations were serious, Defendant Wholesale continued unabated its collection of the bank drafts received from Defendant Windward.

Finally, also noted earlier, investigators with the Georgia Governor's Office of Consumer Affairs conducted a telephone interview with Sabir Saleem on May 3, 1995 and explained to him all of the consumer complaints about Defendants Genisis and Windward, including the misrepresentations about the Bahamas vacations, the $ 250 in grocery certificates, the purported valuable diamond watches that are worth only $5–10, and the unauthorized withdrawals from consumers' bank accounts for magazine subscriptions. Defendant Saleem responded that Defendants Windward/Genisis had sold over 30,000 invoices and that he knew about only forty-three complaints. To Saleem, Windward and Genisis were the same. Despite the 40% check return rate, the information from the National Bank of Pakistan, and the Georgia Governor's Office of Consumer Affairs' investigation, Defendant Wholesale continued unabated to deposit the unauthorized bank drafts on the consumer accounts received from Defendant Windward and to facilitate the telemarketing transactions for Defendants Genisis and Windward.

***13** Based on the above undisputed facts (and facts that Defendant Wholesale is deemed to have admitted) the Court finds as a matter of law (a) that Defendant Wholesale engaged in the unfair practice of issuing bank drafts on consumers' accounts without the consumers' authorization, (b) that such practice resulted in substantial injury, and (c) that the practice was not outweighed by any benefits to consumers or competition. The Court also finds that Defendant Wholesale knew that the bank drafts sent by Defendant Windward for collection were not authorized by the consumers, or, at the very least, that Defendant Wholesale was on notice of a high probability of fraud and/or unfairness and consciously avoided learning the truth. Accordingly, the Court GRANTS Plaintiffs' Motion for Summary Judgment against Defendant Wholesale.

C. *Individual Defendants Tariq And Saleem*

In a case brought by the FTC, individual defendants are directly liable for their own violations of section 5 of the FTC Act. They also are liable for the corporate defendant's violations if the FTC demonstrates that: (1) the corporate defendant violated the FTC Act; (2) the individual defendants participated directly in the wrongful acts or practices *or* the individual defendants had authority to control the corporate defendants; and (3) the individual defendants had some knowledge of the wrongful acts or practices. *FTC v. GEM Merchandising Corp.,* 87 F.3d 466, 470 (11th Cir.1996); *Jordan Ashley,* 1994 WL 200775, at *3 (citing *Amy Travel,* 875 F.2d at 573).

An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation. "A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception." *Standard Educations, Inc. v. FTC,* 475 F.2d 401, 403 (D.C.Cir.1973).

Regarding section 5's knowledge requirement, the FTC "need not demonstrate ... that the individual defendants possessed the intent to defraud." *Jordan Ashley,* 1994 WL 200775, at *3 (citing *Amy Travel,* 875 F.2d at 573–74). In addition, "direct participation in the fraudulent practices is not a requirement for liability. Awareness of fraudulent practices and failure to act within one's authority to control such practices is sufficient to establish liability." *Atlantex Assocs.,* 1987 WL 20384, at *11. An individual defendant's participation in corporate affairs is probative of knowledge. *FTC v. Kitco of Nevada, Inc.,* 612 F.Supp. 1282, 1292 (D.Minn.1985) (citing *FTC v. International Diamond Corp.,* No. 82–878, 1983 WL 1911, at *5 (N.D.Cal. Nov. 8, 1983)).

Plaintiff FTC's evidence, which proves facts deemed admitted by Defendant Tariq, shows that both Defendants Tariq and Saleem were on notice of unfair practices and that Defendant Tariq was in a position to control the activities in issue in which Defendant Wholesale engaged. Indeed, Defendant Tariq was Defendant Wholesale's owner and CEO. The evidence also shows that neither Defendant Tariq nor Defendant Saleem ceased doing business with the selling Defendants, or even questioned their practices. Rather, Defendants Tariq and Saleem allowed Defendant Wholesale to continue issuing unauthorized bank drafts on consumers' banks accounts.

***14** The evidence also shows without dispute that Defendant Saleem personally participated in and controlled the unfair practice of depositing the unauthorized and unsigned bank drafts into Defendant Wholesale's bank accounts and that Defendant Saleem not only had the authority to control Defendant Wholesale's activities, but was the sole person performing these unfair practices on behalf of Defendant Wholesale. In fact, Defendant Tariq hired Defendant Saleem to handle all the transactions between Defendant Windward and Defendant Wholesale. Further, it was Defendant Saleem whom both the National Bank of Pakistan and the Georgia Governor's Office of Consumer Affairs contacted regarding consumer complaints about the bank drafts that Defendant Wholesale deposited; and it was Defendant Saleem whom Defendant Pepper dealt with on behalf of Defendant Windward on matters relating to Defendant Wholesale.

In his affidavit presented in support of Defendant Tariq's Response to Plaintiff FTC's Motion for Summary Judgment, Defendant Saleem admits that he handled transactions between Defendant Windward and Defendant Wholesale, stating that he "physically deposited hundreds of checks written by consumers" for magazine subscriptions. (Saleem aff. ¶ 4.) Thus, Defendant Saleem admits that he performs more than bookkeeping and accounting services and that he also deposits checks on behalf of Defendant Wholesale. Coupled with the undisputed fact that Defendant Windward sent the unsigned bank drafts on the consumers' accounts directly to Defendant Saleem, Defendant Saleem's admission shows that it was Defendant Saleem who also deposited the unauthorized bank drafts into Defendant Wholesale's accounts. As Defendant Tariq testifies, "[Defendant Saleem] was keeping all the records and sending the money—keeping all the records, you know, for Wholesale.... [H]e was doing everything.... [H]e had control, but he was telling me that we had this thing and that thing; but, he had all the control." (Tariq dep. at 67–68.)

In sum, the undisputed facts in the record show that Defendant Saleem participated in and controlled the day-to-day activities of Defendant Wholesale regarding the unfair practices at issue in this case.

For the foregoing reasons, and for the reasons stated regarding Defendant Wholesale, the Court GRANTS Plaintiff FTC's Motion for Summary Judgment against individual Defendants Tariq and Saleem.

D. *Remedies*

The FTC Act authorizes the Court to issue preliminary and permanent injunctions and to order consumer redress, disgorgement of profits, restitution, and other equitable and legal remedies. 15 U.S .C. §§ 53(b), 57b; *GEM Merchandising Corp.,* 87 F.3d at 468; *F.T .C. v. U.S. Oil & Gas Corp.,* 748 F.2d 1431, 1432–34 (11th Cir.1984). Here, Plaintiff FTC pursues remedies under §§ 53(b) and 57b, seeking disgorgement of profits and a restitutionary refund of the money consumers spent as part of any final equitable relief. Disgorgement of profits and restitution are equitable remedies. Plaintiff FTC also seeks to cabin the debiting Defendants' practices regarding telemarketing activities. *Waldrop v. Southern Co. Services, Inc.,* 24 F.3d 152,

157 (11th Cir.1994); *First Nat'l Life Ins. v. Sunshine–Jr. Food Stores,* 960 F.2d 1546, 1553 (11th Cir.1992).

***15** Defendants Wholesale and Tariq contend that Plaintiff FTC's proposed remedy to ban Defendants Wholesale and Tariq from engaging in any future telemarketing activities is too broad. However, Plaintiff FTC does not seek such a remedy. Rather, Plaintiff FTC's proposed permanent injunction seeks only to enjoin permanently Defendants Wholesale, Tariq, and Saleem from:

> obtaining, submitting for payment, or assisting others to obtain or submit for payment a check, draft, or other form of negotiable instrument drawn on a person's checking, savings share or similar account without obtaining that person's express written authorization, in the form of that person's signature on the negotiable instrument.

(Proposed Order and Perm. Inj. at 7.)

It is well settled that those caught violating the FTC Act can expect some "fencing in." *FTC v. National Lead Co.,* 352 U.S. 419, 431, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957). "These 'fencing in' provisions are needed to prevent similar and related violations from occurring in the future." *Trans World Accounts, Inc. v. FTC,* 549 F.2d 212, 215 (9th Cir.1979). Moreover, those who violate the law "call for repression by sterner measures than where the steps could reasonably have been thought permissible." *National Lead Co.,* 352 U.S. at 429. Here, Plaintiff FTC's proposed relief does not place a ban on the debiting Defendants' future telemarketing activities. Rather, it seeks to ensure that any future activities are less likely to violate the law in the manner accomplished via the practices at issue in this case. This "fencing in" provision of Plaintiff FTC's Proposed Permanent Injunction is not legally objectionable.

The debiting Defendants also contend that any disgorgement of profits directed at them must be limited to the amount of profits they earned. This position is incorrect. Defendants Wholesale, Tariq, Saleem, and all the other Defendants can be held jointly and severally liable for their violations of the Act. *E.g., F.T.C. v. Magui Publishers, Inc.,* No. 89–3818, 1991 WL 90895, slip op. at *15–17 (C.D.Calif.Mar. 28, 1991); *F.T.C. v. Atlantex Assocs.,* No. 87–0045, 1987 WL 20384, slip op. at *13 (S.D.Fla. Nov. 25, 1987), *aff'd,* 872 F.2d 966 (11th Cir.1989). Thus, any Defendant's liability may exceed the amount that particular Defendant received from his participation in the scheme, and, instead, a Defendant may be liable for all the money Defendants received from the telemarketing scheme. *See Magui,* slip op. at *16; *F.T.C. v. International Diamond Corp.,* No. 82–0878, 1983 WL 1911, at *7 (N.D.Cal. Nov.8, 1983).

For the foregoing reasons, the Court GRANTS Plaintiff FTC's Motion for Summary Judgment regarding Defendants' challenges to the remedies Plaintiff FTC seeks in this case.

III. *CONCLUSION*

For the foregoing reasons, the Court GRANTS Plaintiff FTC's Motion for Summary Judgment [145–1] against Defendants Wholesale, Tariq, and Saleem.

In connection with the marketing and sale of magazine subscriptions, Defendants Wholesale, Tariq, and Saleem violated the unfairness prohibition of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by participating in a scheme to obtain consumers' bank account information and to deposit into the banking system demand drafts against consumers' bank accounts without the consumers' authorization.

***16** By violating Section 5 of the FTC Act, Defendants Wholesale, Tariq, and Saleem have caused substantial monetary injury of $12,693,401 to the public. A restitutionary refund of the full amount paid by consumers to the Defendants is a proper permanent equitable remedy. Moreover, consumers redress in the form of a restitutionary refund also will insure that all the Defendants disgorge their ill-gotten gains.

Defendants Wholesale, Tariq, and Saleem are likely to violate the FTC act unless they are permanently enjoined from obtaining, submitting for payment, or assisting others to obtain or submit for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account without obtaining that person's express written authorization, in the form of that person's signature on the negotiable instrument.

The appointment of a liquidating receiver for Defendant Wholesale is necessary to collect the restitution for the injured consumers in this matter by collecting any monies owed to the receivership Defendant, including but not limited to instituting any and all appropriate legal actions, if necessary. Entry of the Permanent Injunction is in the public interest.

DEFINITIONS

For purposes of this Final Judgment and Order for Permanent Injunction, the following definitions shall apply:

(1) "Defendants" shall mean Wholesale Capital Corporation, Sarfraz A. Tariq, and Sabir Saleem.

(2) "Receiver" shall mean Robert L. Coley, Esquire, of Ragsdale, Beals, Hooper & Siegler, Atlanta Georgia.

(3) "Telemarketing" shall mean a plan, program, campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.

I.

IT IS THEREFORE ORDERED that Defendants Wholesale, Tariq, and Saleem are hereby permanently restrained and enjoined from obtaining, submitting for payment, or assisting others to obtain or submit for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account without obtaining that person's express written authorization, in the form of that person's signature on the negotiable instrument.

II.

IT IS FURTHER ORDERED that Defendants Wholesale, Tariq, and Saleem are hereby permanently restrained and enjoined from providing to any person, except agents of the Commission, the receiver, or other law enforcement authorities, the name, address, telephone number, or credit card or bank account number of any person who engaged in these telemarketing and banking transactions with any of Defendants Wholesale, Tariq, and Saleem, or any other Co-defendants in this case.

III.

IT IS FURTHER ORDERED that Judgment in the amount of $12,693,401 is entered in favor of the Federal Trade Commission against Defendants Wholesale, Tariq, and Saleem, jointly and severally. The receiver appointed pursuant to this Final Order is also appointed as agent of the Commission for the sole purpose of assisting in the collection of this Judgment and for assisting in the formulation and implementation of a redress plan. Any monies collected pursuant to this Judgment shall be used to provide restitution to consumers who made a purchase from the Defendants, and to pay any attendant expenses of administering the receivership estate or distribution of funds. If the Commission determines, in its sole discretion, that restitution to consumers is wholly or partially impracticable, any funds not so used shall be deposited into the United States Treasury. No portion of the payments as herein provided shall be deem payments of any fine, penalty, forfeiture, or punitive assessment.

IV.

***17** IT IS FURTHER ORDERED that Robert L. Coley, Esquire shall continue as permanent receiver, with the full power of an equity receiver, for Defendant Wholesale, and all of the funds, properties, premises, accounts, and other assets directly or indirectly owned, beneficially or otherwise, by Defendant Wholesale, with directions and authority to accomplish the following:

A. Assume full control of Defendant Wholesale by removing Defendants Tariq and Saleem and any other officer, independent contractor, employee, or agent of Defendant Wholesale from control and management of the affairs of said Defendant;

B. Take custody, control, and possession of all funds, property, premises, accounts, mail, and other assets of, or in the possession or under the control of, Defendant Wholesale, wherever situated, the income and profits therefrom, and all sums of money now or hereafter due or owing to Defendant Wholesale, with full power to: collect, receive, and take possession of all goods, chattels, rights, credits, monies, effects, lands, leases, books and records, work papers, and records of accounts, including computer-maintained information, contracts, financial records, monies on hand in banks and other financial institutions, and other papers and documents of Defendant Wholesale and consumers whose interests are now held by or under the direction, possession, custody, or control of Defendant Wholesale;

C. Conserve, hold, manage all receivership assets, and perform all acts necessary to preserve the value of those assets, in order to prevent any irreparable loss, damage,

or injury to consumers, and all acts incidental thereto, including the suspension of operations;

D. Enter into such agreements in connection with administration of the receivership, including, but not limited to: (1) the retention and employment of investigators, attorneys, or accountants of the receiver's choice, including without limitation members and employees of the receiver's firm, to assist, advise, and represent the receiver, and (2) the movement and storage of any equipment, furniture, records, files, or other physical property of Defendant Wholesale;

E. Institute, prosecute, compromise, adjust, intervene in, or become party to such actions or proceedings in state, federal, or foreign courts that the receiver deems necessary and advisable to preserve or augment the value of the properties of Defendant Wholesale or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Final Order, and likewise to defend, compromise, adjust, or otherwise dispose of any or all actions or proceedings instituted against the receiver or Defendant Wholesale that the receiver deems necessary and advisable to preserve the properties of Defendant Wholesale or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Final Order. The receiver has the authority to bring suit for recovery of assets of the receivership estate against all parties to whom assets may have been fraudulently transferred;

***18** F. Institute, prosecute, compromise, adjust, intervene in, or become party to such actions in state, federal, or foreign courts, as the receiver deems necessary and advisable, against any and all individuals or entities who may be liable for or who assisted Defendant Wholesale in the activities set forth in the Commissions Complaint;

G. Disburse funds that the receiver deems necessary and advisable to preserve the properties of Defendant Wholesale or that the receiver deems necessary and advisable to carry out the receiver's mandate under this Final Order;

H. Collect any monies owed to Defendant Wholesale;

I. Liquidate all assets of Defendant Wholesale, and all assets transferred to the receiver in accordance with the terms of this Final Order;

J. Execute all bills of sale and deeds to personal and real property belonging to or coming into possession of Defendant Wholesale; and

K. Assist the Federal Trade Commission or its agents, when necessary, in the formulation and implementation of a redress plan for distribution of the assets of the receivership Defendant, pursuant to Paragraph III of this Final Order.

V.

IT IS FURTHER ORDERED that, immediately upon service of this Final Order upon them, if they have not already done so, Defendants Wholesale, Tariq, and Saleem shall deliver over to the receiver:

A. Possession and custody of all funds, assets, property owned beneficially or otherwise, and all other assets, wherever situated, of Defendant Wholesale;

B. Possession and custody of all books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), client lists, title documents, and other papers of Defendant Wholesale;

C. Possession and custody of all funds and other assets belonging to members of the public now held by Defendant Wholesale;

D. All keys, computer passwords, entry codes, combinations to locks required to open or gain access to any of the property or effects, and all monies in any bank deposited to the credit, of Defendant Wholesale, wherever situated; and

E. Information identifying the accounts, employees, properties, or other assets or obligations of Defendant Wholesale.

VI.

IT IS FURTHER ORDERED that the receiver and all personnel hired by the receiver as herein authorized, including counsel to the receiver and accountants, are entitled to reasonable compensation for the performance of duties pursuant to this Final Order and for the cost of actual out-of-

pocket expenses incurred by them, from the assets held by, or in the possession or control of, or which may be received by, Defendant Wholesale. Prior to paying any compensation, the receiver shall file a request with the Court, outlining the services rendered and the related fees and expenses.

VII.

IT IS FURTHER ORDERED that the receiver shall maintain the bond previously filed with the Clerk of this Court in the sum of $5,000.00 with sureties approved by the Court, conditioned that the receiver will well and truly perform the duties of the office and abide by and perform all acts the Court directs.

VIII.

***19** IT IS FURTHER ORDERED that Defendants Wholesale, Tariq, and Saleem shall fully cooperate with and assist the receiver appointed in this action. Defendants Wholesale, Tariq, and Saleem are hereby permanently restrained and enjoined from, directly or indirectly, hindering or obstructing the receiver in any manner.

IX.

IT IS FURTHER ORDERED that all banks, brokers, savings and loans, escrow agents, title companies, other financial institutions, or any other persons or entities which are served with a copy of this Final Order shall cooperate with all reasonable requests of the permanent receiver relating to implementation of this Order, including transferring funds of Defendant Wholesale at the receiver's direction, allowing the receiver access to safe deposit boxes of Defendant Wholesale, and producing records related to the accounts of Defendant Wholesale.

X.

IT IS FURTHER ORDERED that except by leave of this Court, during the pendency of the receivership ordered herein, the Defendants and all customers, principals, investors, creditors, stockholders, lessors, and other persons seeking to establish or enforce any claim, right, or interest against or on behalf of Defendant Wholesale, and all others acting for or on behalf of such persons, including attorneys, trustees, agents, sheriffs, constables, marshals, and other officers and their deputies, and their respective attorneys, servants, agents, and employees be and are hereby stayed from:

A. Commencing, prosecuting, continuing, or enforcing any suit or proceeding against Defendant Wholesale, except that such actions may be filed to toll any applicable statute of limitations;

B. Commencing, prosecuting, continuing, or entering any suit or proceeding in the name or on behalf of Defendant Wholesale;

C. Accelerating the due date of any obligation or claimed obligation, enforcing any lien upon, or taking or attempting to take possession of, or retaining possession of, property of Defendant Wholesale, or any property claimed by it, or attempting to foreclose, forfeit, alter, or terminate any of Defendant Wholesale's interests in property, whether such acts are part of a judicial proceeding or otherwise;

D. Using self-help or executing or issuing, or causing the execution or issuance of, any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of, interfering with, or creating or enforcing a lien upon, any property, wheresoever located, owned by or in the possession of Defendant Wholesale or the receiver appointed pursuant to this Order or any agent appointed by such receiver; and

E. Doing any act or thing whatsoever to interfere with the receiver taking control, possession, or management of the property subject to this receivership, or in any way to interfere with the receiver, or to harass or interfere with the duties of the receiver; or to interfere in any manner with the exclusive jurisdiction of this Court over the property and assets of Defendant Wholesale, including the filing of a petition for relief under the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.,* against Defendant Wholesale, without prior permission from this Court.

***20** *Provided, however,* nothing in this Paragraph shall prohibit any federal or state law enforcement or regulatory authority from commencing or prosecuting an action against Defendant Wholesale.

XI.

IT IS FURTHER ORDERED that, in order to facilitate the Commission's monitoring of compliance with the provisions of this Permanent Injunction, Defendants Tariq and Saleem shall each, for a period of five (5) years commencing with the date of entry of this Final Order:

A. Notify the Commission and the receiver in writing of any change in their residential address within ten (10) days of such change;

B. Notify the Commission and the receiver in writing of any change in their employment status within ten (10) days of such change. Such notice shall include the name and address of each business that Defendants Tariq and Saleem are employed by, a statement of the nature of the business, and a statement of their duties and responsibilities in connection with the business;

C. Notify the Commission and the receiver in writing at least thirty (30) days prior to the effective date of any proposed change in the structure of any business entity owned or controlled by Defendants Tariq and Saleem, such as the creation, incorporation, dissolution, assignment, or sale, of subsidiaries, or any other changes that may affect compliance obligations arising out of this Final Order;

D. After receiving reasonable notice from the Commission, permit duly authorized representatives of the Commission access during normal business hours to the offices of any business owned or controlled in whole or in part by Defendants Tariq and Saleem to inspect and copy all documents relating in any way to any conduct subject to this Final Order;

E. Refrain from interfering with duly authorized representatives of the Commission who wish to interview the officers, directors, or employees of any business owned or controlled in whole or in part by Defendants Tariq and Saleem with respect to any conduct subject to this Final Order;

F. Upon written request by any duly authorized representative of the Commission, submit written reports (under oath, if requested) and produce documents on thirty (30) days notice with respect to any conduct subject to this Final Order; and

G. Appear on fifteen (15) days notice for deposition with respect to any conduct subject to this Final Order.

XII.

IT IS FURTHER ORDERED that, within sixty (60) days after the date of entry of this Final Order, Defendant Tariq and Saleem shall each file a report with the Commission and the receiver setting forth in detail the manner and form in which they have complied with this Final Order. This report shall include the current residence address for Defendants Tariq and Saleem, and their employment status, including the name and business address of their current employer(s), if any, a statement of the nature of the business, and a statement of their duties and responsibilities in connection with the business.

XIII.

***21** IT IS FURTHER ORDERED that all notices required of Defendants Tariq and Saleem by this Final Order shall be mailed to the following addresses:

Associate Director

Division of Marketing Practices

Federal Trade Commission

Room 238

6th Street & Pennsylvania Ave., N.W.

Washington, D.C. 20580

Robert L. Coley, Esq.

Ragsdale, Beals, Hooper & Siegler

2400 Cain Tower Peachtree Center

229 Peachtree Street, N.E.

Atlanta, Georgia 30303–1629

XIV.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes, including but not limited to the enforcement of compliance therewith, or the punishment of violations thereof.

It is SO ORDERED.

All Citations

Not Reported in F.Supp., 1997 WL 33642380

Footnotes

1 In support of its Motion for Summary Judgment, Plaintiff FTC filed a "Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried," in compliance with Local Rule 56.1.B(1) (formerly LR 220–5(b) NDGa). Defendants Wholesale and Tariq failed to file a Statement Of Material Facts To Which There Exists An Issue To Be Tried and thus failed to controvert specifically Plaintiff FTC's Statement Of Material Facts in the manner prescribed by the Local Rules of this Court. Thus, the material facts contained in Plaintiff FTC's "Statement Of Undisputed Material Facts" are deemed admitted as to Defendants Wholesale and Tariq. *See* LR 56.1.B(2) NDGa (formerly LR 220–5(b) NDGa); *see also Jones v. Gerwens,* 874 F.2d 1534, 1537 n. 3 (applying rule on appeal). Further, Defendant Saleem presents evidence relating only to his actual knowledge regarding the selling Defendants' practices and his relationship with corporate Defendant Wholesale. Defendant Saleem fails to present any evidence creating any genuine issues as to any other material facts.

2 Defendant Crestwood was one of two corporations that received the bank drafts from Defendant Windward. Defendant Crestwood was responsible for debiting consumers' bank accounts to complete the telemarketing transactions begun by Defendants Genisis, Mega, and Windward. Defendant Corbitt Mizell ("Mizell") incorporated Crestwood on March 16, 1992 and was the sole owner and officer of Crestwood from 1992 until 1996. Crestwood had only one full-time employee, secretary Deborah Alston. In June, 1995, Kent Holbrook, an accountant, became a consultant to Defendant Crestwood. Subsequently, on January 11, 1996, Holbrook became president of Defendant Crestwood.

3 In addition to evidence filed along with its Motion for Summary Judgment, Plaintiff FTC relies on evidence already submitted in support of its Motion for Preliminary Injunction. Unless otherwise noted, all exhibits referred to herein are exhibits presented in connection with Plaintiff FTC's Motion for Preliminary Injunction.

4 The Court notes that several consumers notified the selling Defendants' telemarketers that they did not have the requisite funds available in their accounts.

5 Certainly buyers' remorse exists in general; however, there is no evidence that 40% of the consumers "lied" to their banks when 40% of the checks were returned as unauthorized. In fact, the checks were sent by Federal Express to Defendants Crestwood and Wholesale for collection, so that they could be deposited and cleared as soon as possible–before the so-called buyer's remorse would set in and the buyers could call and "lie" to the banks.

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252

Dianna Janzen and Tracy Govereau Appellants

v.

Platy Enterprises Ltd., and Platy Enterprises Ltd., carrying on business under the firm name and style of Pharos Restaurant, and Tommy Grammas Respondents

and

Women's Legal Education and Action Fund (LEAF) Intervener

indexed as: janzen v. platy enterprises ltd.

File No.: 20241.

1988: June 15; 1989: May 4.

Present: Dickson C.J. and Beetz, McIntyre, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the court of appeal for manitoba

Civil rights -- Employment -- Sex discrimination -- Sexual harassment -- Whether sexual harassment in the workplace is discrimination on the basis of sex -- Whether employer liable for employee's actions -- Quantum of damages -- The Human Rights Act, S.M. 1974, c. 65, s. 6(1).

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* Le Dain J. took no part in the judgment.

Costs -- Manitoba Human Rights Commission -- Costs should only be ordered against the Commission in exceptional circumstances.

The appellants were employed as waitresses at Pharos Restaurant during the fall of 1982. The restaurant was owned and operated by Platy Enterprises Ltd. and the president of the corporation was the manager of the restaurant. J, during the course of her employment, was sexually harassed by another employee who touched various part of her body and made sexual advances towards her. The offending employee was in charge of the cooking during the evening shift and had no actual disciplinary authority over the waitresses. He nevertheless was represented by himself and by the manager as having control over firing employees. Despite J's objections, this course of conduct persisted for over a month. When the overtly sexual conduct ceased, the employee continued to make the work environment difficult for J by a pattern of uncooperative and threatening behaviour. He was unjustifiably critical of her work and generally treated her in an unpleasant manner. The manager, when informed of the situation, did nothing to put an end to the harassment and J terminated her employment shortly thereafter.

G was the victim of similar behaviour by the same employee. Following a conversation with the manager, the physical harassment ended but it was replaced by a general pattern of verbal abuse by both the manager and the employee who would unjustly criticize her in front of the staff. The harassment culminated with the manager terminating G's employment.

The appellants filed a complaint with the Manitoba Human Rights Commission against Platy Enterprises Ltd., its owners, agents and servants, Pharos Restaurant. The adjudicator found that the appellants had been subjected to persistent and abusive sexual harassment and had been the victims of sex discrimination contrary to s. 6(1) of the Human Rights Act. He awarded exemplary damages and damages for loss of wages and found the employee and the employer, Platy

Enterprises Ltd., jointly and severally liable. With the exception of the quantum of damages, the Court of Queen's Bench upheld the adjudicator's decision. The Court of Appeal reversed the judgment of the Court of Queen's Bench. The Court held that sexual harassment of the type to which the appellants were subjected was not discrimination on the basis of sex and that the employer could not be held liable for the sexual harassment perpetrated by its employee.

Held: The appeal should be allowed.

Sexual harassment is a form of sex discrimination. Sexual harassment in the workplace is unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. By requiring an employee, male or female, to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. Here, the sexual harassment suffered by the appellants constituted sex discrimination for it was a practice or attitude which had the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.

The fact that only some, and not all, female employees at the restaurant were subject to sexual harassment is not a valid reason to conclude that sexual harassment could not amount to discrimination on the basis of sex. Sex discrimination does not exist only where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that the ascribing of a group characteristic to an individual is a factor in the treatment of

that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action. To deny a finding of discrimination in the present circumstances would be to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive. The crucial fact in this case is that it was only female employees who ran the risk of sexual harassment. Indeed, only a woman could be subject to sexual harassment by a heterosexual male, such as the offending employee. A man would not have been subjected to this treatment.

It strains credulity to argue that the sole factor underlying the discriminatory action was appellants' sexual attractiveness -- a personal characteristic -- and that gender was accordingly irrelevant. Sexual attractiveness cannot be separated from gender. These women were subject to a disadvantage because of their being women; no male employee in these circumstances would have been subject to the same disadvantage. Any female considering employment at the restaurant was a potential victim and as such was disadvantaged because of her sex.

The respondent Platy Enterprises Ltd. must be held liable for the actions of its employee given this Court's decision in Robichaud. The offending employee was acting in respect of his employment when he sexually harassed the appellants. His actions were clearly work related. His authority, which had been accorded to him by the respondent, and which derived from his control in running the restaurant and his purported ability to fire waitresses, gave him power over the waitresses. Respondent did not meet its responsibility to ensure that this power was not abused, even after the appellants made specific complaints.

The Court of Queen's Bench should not have reduced the award of damages given to the appellants. The amounts were not inordinate in light of the seriousness of the complaints.

Cases Cited

Applied: Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84, rev'g [1984] 2 F.C. 799 (C.A.), rev'g (1983), 4 C.H.R.R. D/1272 (H.R. Rev. Trib.), rev'g (1982), 3 C.H.R.R. D/977 (H.R. Trib.); Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 000; **referred to**: Hufnagel v. Osama Enterprises Ltd. (1982), 3 C.H.R.R. D/922; Torres v. Royalty Kitchenware Ltd. (1982), 3 C.H.R.R. D/858; Olarte v. DeFilippis (1983), 4 C.H.R.R. D/1705; Giouvanoudis v. Golden Fleece Restaurant (1984), 5 C.H.R.R. D/1967; Bell v. Ladas (1980), 1 C.H.R.R. D/155; Re Dakota Ojibway Tribal Council and Bewza (1985), 24 D.L.R. (4th) 374; Kotyk v. Canadian Employment and Immigration Commission (1983), 4 C.H.R.R. D/1416; Phillips v. Hermiz (1984), 5 C.H.R.R. D/2450; Doherty v. Lodger's International Ltd. (1981), 3 C.H.R.R. D/628; Coutroubis v. Sklavos Printing (1981), 2 C.H.R.R. D/457; Hughes v. Dollar Snack Bar (1981), 3 C.H.R.R. D/1014; Cox v. Jagbritte Inc. (1981), 3 C.H.R.R. D/609; Mitchell v. Traveller Inn (Sudbury) Ltd. (1981), 2 C.H.R.R. D/590; Deisting v. Dollar Pizza (1978) Ltd. (1982), 3 C.H.R.R. D/898; McPherson v. Mary's Donuts (1982), 3 C.H.R.R. D/961; Johnstone v. Zarankin (1985), 6 C.H.R.R. D/2651 (B.C.S.C.), aff'g (1984), 5 C.H.R.R. D/2274 (B.C. Bd.); Foisy v. Bell Canada (1984), 6 C.H.R.R. D/2817; Commodore Business Machines Ltd. v. Ontario Minister of Labour (1984), 6 C.H.R.R. D/2833; Re Mehta and MacKinnon (1985), 19 D.L.R. (4th) 148; Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; Barnes v. Costle, 561 F.2d 983 (1977); Bundy v. Jackson, 641 F.2d 934 (1981); Henson v. Dundee, 682 F.2d 897 (1982); Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986); Porcelli v. Strathclyde Regional Council, [1985] I.C.R. 177 (E.A.T. (Scot.)), aff'd [1986] I.C.R. 564 (Ct. of Session).

Statutes and Regulations Cited

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Civil Rights Act of 1964, 78 Stat. 241, {SS} 703.

Human Rights Act, S.M. 1974, c. 65, s. 6(1) [am. 1976, c. 48, s. 6; am. 1977, c. 46, ss. 2, 3; am. 1982, c. 23, s. 9], 19(4) [en. 1978, c. 43, s. 4], 20 [am. 1976, c. 48, s. 14], 28 [rep. & subs. 1976, c. 48, s. 18; am. 1982, c. 23, s. 24].

Human Rights Code, 1981, S.O. 1981, c. 53, s. 6.

Human Rights Code, S.M. 1987-88, c. 45, s. 19.

Newfoundland Human Rights Code, R.S.N. 1970, c. 262, s. 10.1 [en. 1983, c. 62, s. 3].

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Hickling, M. A. "Employer's Liability for Sexual Harassment" (1988), 17 Man. L.J. 124.

MacKinnon, Catharine. Sexual Harassment of Working Women: A Case of Sex Discrimination. London: Yale University Press, 1979.

United States. Equal Employment Opportunity Commission. Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11(a) (1985).

APPEAL from a judgment of the Manitoba Court of Appeal (1986), 43 Man. R. (2d) 293, 33 D.L.R. (4th) 32, [1987] 1 W.W.R. 385, 87 CLLC {PP} 17,014, 8 C.H.R.R. D/3831, setting aside the judgment of Monnin J. (1985), 38 Man. R. (2d) 20, 24 D.L.R. (4th) 31, [1986] 2 W.W.R. 273, 86 CLLC {PP} 16,009, 7 C.H.R.R. D/3309, which affirmed in part the decision of a Board of Adjudication (1985), 6 C.H.R.R. D/2735. Appeal allowed.

Aaron L. Berg and G. Hannon, for the appellants.

No one appeared for the respondents.

Louise Lamb, for the intervener.

//The Chief Justice//

The judgment of the Court was delivered by

THE CHIEF JUSTICE -- On January 24, 1983, Dianna Janzen made a complaint to the Human Rights Commission of Manitoba against Platy Enterprises Ltd., its owners, agents and servants, Pharos Restaurant. The complaint reads:

> I am a female resident of Manitoba.
>
> I was employed as a waitress at the Pharos Restaurant, located at 9 St. Mary's Road, from August to October, 1982. I was hired by Phillip Anastasiadis, who I believe is part owner of the restaurant.
>
> During my period of employment at the restaurant, I was continuously sexually harassed by Tommy, the cook. On many occasions Tommy grabbed my legs and touched my knee, bum and crotch area. When I resisted his sexual advances, he told me to shut up or he would fire me. He began to yell at me in front of staff and criticize my work.
>
> During the second week of October 1982 I spoke to Phillip about Tommy's behaviour. He told me he couldn't do anything about it. Under the circumstances I felt I had no alternative but to quit my job effective October 31st, 1982.
>
> I believe I have been subjected to discriminatory terms and conditions of employment and that I have been discriminated against because of my sex contrary to Section 6 of The Human Rights Act.

Five days later, on January 29, 1983, Tracy Govereau made a complaint of a similar nature against the same parties, alleging sexual harassment by "Tommy, the cook".

The main issue in this appeal is whether sexual harassment in the workplace is discrimination on the basis of sex, and therefore prohibited by s. 6(1) of the Manitoba Human Rights Act, S.M. 1974, c. 65.

I

Facts

The appellants, Dianna Janzen and Tracy Govereau, were employed as waitresses at Pharos Restaurant in Winnipeg, during the fall of 1982. The restaurant and two others of like name were owned and operated by the corporate respondent Platy Enterprises Ltd. The president of the corporation, Eleftherois (also known as Phillip) Anastasiadis, was the manager of the restaurant and the cook at the restaurant on the first shift. The respondent, Tommy Grammas, was the cook during evening shifts. He did not have an ownership interest in the restaurant, nor was he an officer of the corporation. Although Grammas had no actual disciplinary authority over the waitresses, he was represented by himself and by Anastasiadis as having control over firing employees.

The appellant Janzen was employed at the restaurant from August 21, 1982 until October 31, 1982. Approximately two to three weeks after she commenced her employment, the respondent Grammas began engaging in unwelcome conduct of a sexual nature. He began to make sexual advances towards her. Often this touching occurred when Janzen was burdened with duties as a waitress and unable to defend herself. Despite Janzen's clear and repeated objections to Grammas' behaviour, this course of conduct persisted for over a month.

Dianna Janzen's troubles did not end when the overtly sexual conduct ceased. Grammas continued to make the work environment difficult for her by a pattern of uncooperative and threatening behaviour. He was unjustifiably critical of her work, refused to respond co-operatively to her food orders and generally treated her in an unpleasant manner. Towards the middle of October, Janzen endeavoured to speak to Anastasiadis about Grammas' behaviour. Anastasiadis was unable to talk to her at the time, but according to Janzen's testimony, he said "If it is about Tommy, I can't do anything about it." At a second meeting in late October, Janzen described to Anastasiadis in detail the conduct to which she had been subjected. His reaction was unsympathetic. Janzen's evidence was that Anastasiadis treated the matter lightly and insinuated she was responsible for Grammas' conduct. Anastasiadis admits to telling Janzen she was over-reacting. Anastasiadis made no attempt to put an end to the harassment and, shortly after her discussion with him, Janzen terminated her employment. She was out of work for one month before finding employment at another restaurant. She gave evidence, accepted by the adjudicator, that the physical and emotional consequences of the harassment she endured included insomnia, vomiting and inability to concentrate.

The appellant Govereau was a waitress at Pharos restaurant from October 13, 1982 to December 11, 1982. At the end of her first week of employment, Grammas approached her and kissed her on the mouth. From that point onwards, Grammas repeatedly grabbed Govereau and attempted to kiss her. He constantly touched various parts of her body, including her stomach and breasts. On one occasion, when Govereau was washing dishes in the kitchen, Grammas came up behind her, put his hands under her sweater and attempted to fondle her breasts. Grammas also harassed Govereau verbally, commenting frequently and inappropriately on her appearance. Grammas' conduct persisted despite forceful objections.

As a result of conversations with another waitress at the restaurant, Carol Enns, Govereau decided to raise the matter with Anastasiadis. In mid-November she met with Anastasiadis and discussed Grammas' behaviour for approximately fifteen minutes. According to Govereau's testimony, Anastasiadis did not seem particularly surprised or perturbed by the situation. At one point during the conversation he asked Govereau why she let Grammas treat her that way. After Govereau's discussion with Anastasiadis, the physical harassment of her by Grammas came to an end. It was replaced, however, by a general pattern of verbal abuse by both Grammas and Anastasiadis. Govereau maintained that she was unjustly criticized by the two men and that both of them would yell at her in front of the other staff for no reason. There had been no criticism of her work prior to her decision to complain about Grammas. Govereau's testimony was supported by Carol Enns. The harassment culminated with Anastasiadis terminating Govereau's employment on December 8, 1982, ostensibly as a result of a customer complaint. Govereau worked three additional days, until December 11. She was unable to find alternative employment until August 1983. Govereau testified that as a result of the harassment by Grammas and Anastasiadis she "felt dirty, wasn't relaxed, couldn't sleep or concentrate in class".

As I have mentioned, both Janzen and Govereau filed complaints with the Manitoba Human Rights Commission alleging that they had been victims of discrimination on the basis of sex contrary to s. 6(1) of the Human Rights Act.

Grammas' employment at Pharos Restaurant was terminated before the hearing of the complaints and he did not participate in any of the proceedings.

II

Legislation

The Human Rights Act, S.M. 1974, c. 65, as amended, reads:

6 (1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment or in respect of training for employment, or in respect of an intended occupation, employment, advancement or promotion, and in respect of his membership or intended membership in a trade union, employers' organization or occupational association; and, without limiting the generality of the foregoing

> (a) no employer or person acting on behalf of an employer shall refuse to employ, or to continue to employ or to train the person for employment or to advance or promote that person, or discriminate against that person in respect of employment or any term or condition of employment;
>
> (b) no employment agency shall refuse to refer a person for employment; or for training for employment; and
>
> (c) no trade union, employers' organization or occupational association shall refuse membership to, expel, suspend or otherwise discriminate against that person; or negotiate, on behalf of that person, an agreement that would discriminate against him;

because of the race, nationality, religion, colour, sex, age, marital status, physical or mental handicap, ethnic or national origin, or political beliefs or family status of that person.

28 (1) Where the board of adjudication decides that there has been no contravention of the Act by any party, it shall dismiss the complaint.

28 (2) Where the board of adjudication decides that a party has contravened any provision of the Act, it may do one or more of the following things:

. . .

> (b) Make an order requiring the party who contravened the Act to compensate the person discriminated against for all, or such part as a board may determine, of any wages or salary lost or expenses incurred by reason of the contravention of this Act;
>
> (c) Order the person who contravened the Act to pay to the person discriminated against, a penalty or exemplary damages in such amount as the board may determine, if the board is of the opinion that the person discriminated against suffered damages in respect of his feelings, or self-respect.

In 1987, subsequent to the adjudication of the complaints of Janzen and Govereau, the Manitoba Human Rights Act was repealed and replaced with The Human Rights Code, S.M. 1987-88, c. 45. Section 19 of the new Human Rights Code expressly prohibits sexual discrimination in the workplace:

> **19 (1)** No person who is responsible for an activity or undertaking to which this Code applies shall
>
> (a) harass any person who is participating in the activity or undertaking; or
>
> (b) knowingly permit, or fail to take reasonable steps to terminate, harassment of one person who is participating in the activity or undertaking by another person who is participating in the activity or undertaking.
>
> **19 (2)** In this section "harassment" means
>
> (a) a course of abusive or unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or
>
> (b) a series of objectionable and unwelcome sexual solicitations or advances; or
>
> (c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
>
> (d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.

III

Judgments Below

1. The Adjudication Board

The complaints were heard by Adjudicator Henteleff. In a comprehensive decision of some 144 pages, rendered April 26, 1985 and reported at (1985), 6 C.H.R.R. D/2735, the adjudicator found

that both Janzen and Govereau had been victims of sex discrimination. Much of the decision is devoted to preliminary matters which are not at issue in this Court. Adjudicator Henteleff conducted a thorough review of the evidence and concluded that the appellants had been subjected to persistent and abusive sexual harassment. He made the following finding in respect of Janzen, at p. D/2768:

> Further, I find that the cumulative effect of the physical and mental harassment that she had been subjected to created an intolerable work environment for her. She was justified in coming to the conclusion, as she did following her conversation with Phillip immediately prior to her terminating her employment, that there was very little likelihood, if any, that the situation would be rectified. Accordingly, I further find that the cumulative effect of such acts of harassment, sexual as well as mental, and the attitude of the employer as above described amounted to constructive dismissal (see Cox and Cowell v. Jagbritte Inc. et al. (1982) 3 C.H.R.R. D/609 (Peter A. Cumming) at paras. 5593 and 5594).

and in respect of Govereau, at p. D/2768:

> Based on all of the evidence I have no doubt in concluding that the individual respondent, Tommy, was guilty of sexual harassment of Tracy Govereau. The specific acts, of which she complained, consisted of unwanted sexual acts of a persistent and abusive nature. Her evidence, which I accept, also clearly established that Tommy knew or ought to have known that such acts were unwanted. It is clear from the evidence that Tommy made a variety of sexual advances including touching the complainant for sexual reasons, and that he persisted in this conduct even though it is obvious from her evidence that she forcibly rejected his actions. She impressed me as a truthful witness. Moreover, her evidence was corroborated in all essential respects by her co-worker, Carol Elizabeth Enns. Furthermore, I find that there was additional corroboration of Ms. Govereau's evidence as to Tommy by virtue of the similar acts committed by Tommy on the complainant, Dianna Janzen.

The question of whether sexual harassment could amount to sex discrimination prohibited by the Manitoba statute was not raised before the arbitrator by either counsel. As there was no dispute on the point, the adjudicator was content to cite six authorities for holding that sexual harassment is sex discrimination; Hufnagel v. Osama Enterprises Ltd. (1982), 3 C.H.R.R. D/922 (Man. Bd.); Torres v. Royalty Kitchenware Ltd. (1982), 3 C.H.R.R. D/858 (Ont. Bd.); Olarte v. DeFilippis (1983), 4 C.H.R.R. D/1705 (Ont. Bd.); Giouvanoudis v. Golden Fleece Restaurant (1984), 5

C.H.R.R. D/1967 (Ont. Bd.); and Robichaud v. Brennan (1982), 3 C.H.R.R. D/977; Review Tribunal (1983), 4 C.H.R.R. D/1272, and on appeal to the Federal Court of Appeal which gave its judgment dated 18th day of February, 1985, [1984] 2 F.C. 799. The adjudicator accepted the definition of sexual harassment quoted by Professor Cumming in Giouvanoudis v. Golden Fleece Restaurant, supra, at para. 16819, as follows:

> From a factual standpoint, sexual harassment can be considered to include:
>
> Unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted:
>
> ... or
>
> Implied or expressed threat or reprisal, in the form either of actual reprisal or the denial of opportunity for refusal to comply with a sexually oriented required;
>
> ... or
>
> Sexually oriented remarks and behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work.

Adjudicator Henteleff concluded that Grammas' conduct violated s. 6(1) of the Human Rights Act.

The adjudicator made a number of findings of fact with respect to the position and responsibilities of Grammas at the restaurant and to Anastasiadis' knowledge of the existence of the harassment. He found: (1) that Grammas decided which of the waitresses went home early or stayed at work depending on the amount of business in the restaurant; (2) that in the absence of Anastasiadis, Grammas handled any problems with food quality or service; (3) that the staff had the clear and justifiable impression that Grammas was next in line in authority to Anastasiadis, and that he was in charge when Anastasiadis was absent; (4) that Grammas could clear cash from the till; and (5) that Grammas had advised both of the appellants that he could fire them and that even though this was not the case, his authority to terminate the appellants' employment was confirmed

by Anastasiadis. Anastasiadis testified that he had told the waitresses Grammas had firing authority because (at p. D/2758) "the girls had to have somebody to be kind of afraid of or respect or whatever". The adjudicator also found that Anastasiadis was aware of the harassment of the appellants, that he failed to take any reasonable steps to ensure that the workplace was free from sexual harassment, and that he actively participated in the verbal harassment of the appellant Govereau.

The adjudicator also considered the liability of the corporate respondent, Platy Enterprises Ltd., for breaches of the Human Rights Act committed by Grammas. Adjudicator Henteleff reviewed earlier decisions of human rights tribunals, as well as the decision of the Federal Court of Appeal in Robichaud, before concluding that the corporate respondent was liable for the violations. The adjudicator appears to have found Platy Enterprises Ltd. liable both on the principle of vicarious liability and on the organic theory of corporate liability. He remarked (at p. D/2753):

> The clear intent of Sec. 6(1), in respect of areas of discrimination arising therefrom, is not only to make the employer liable for any acts of sexual harassment directly committed by such employer, but also makes him responsible for any such acts committed by a person in authority during the course of his employment.

The adjudicator stated at p. D/2768:

> After consideration of all of the evidence, it is my conclusion that Tommy was a person in such authority that his acts became those of his employer, Platy. The complainant Janzen was made aware of this to the extent that Tommy was in such a preferred position, that if she subjected herself to sexual harassment, she was to blame for it. Accordingly such harassment had become a condition of her continued employment since Phillip either couldn't or wouldn't do anything about it. (See McPherson et al v. Mary's Donuts and Doschoian (1982) 3 C.H.R.R. D/961 (Peter A. Cumming) and particularly at paras. 8549 to 8558, both inclusive.)

The adjudicator did not consider himself to be bound by the decision of the Federal Court of Appeal in Robichaud which restricted vicarious liability of a corporation to acts of sexual

harassment committed by the corporation's directors or officers. Adjudicator Henteleff interpreted the majority judgment as dealing solely with the question of vicarious liability in a complaint against the Crown and as having no application to private employers. The decision of the Federal Court of Appeal on the issue of liability was later reversed on appeal to this Court (Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84).

Adjudicator Henteleff found Grammas and Platy Enterprises Ltd. jointly and severally liable to the complainants. He awarded Janzen the sum of $480 for lost wages and $3,500 in exemplary damages, and Govereau the sum of $3,000 for lost wages and $3,000 exemplary damages. In arriving at the quantum of exemplary damages, the adjudicator noted that both Janzen and Govereau had been subjected to physical and mental harassment of a severe nature and that the harassment had had a substantial psychological impact on both women. With respect to Janzen he said, at p. D/2771:

> I further find that she was subject to physical and mental harassment which was of a most severe nature. I further find that the harassment was close to being constant throughout her period of employment. I find also that by virtue of her age (21) and her particular situation (including trying to be self-supporting for the first time), she was particularly vulnerable with the result that the cumulative effect of the harassment had a very substantial psychological impact upon her, and suffered damage in respect of feelings and self-respect.

and with respect to Govereau, also at p. D/2771:

> I further find that she was subject to physical and mental harassment which although severe and frequent, was not of the same degree as that suffered by Ms. Janzen. I find that by virtue of her situation (including attending University and her particular need of this part-time job) that the cumulative effect of the harassment had a substantial psychological impact upon her and she suffered damages in respect of feelings and self-respect.

The award to Janzen was greater than the award to Govereau, as the harassment Janzen endured was more severe.

The decision concluded, at p. D/2772 by directing Platy Enterprises Ltd.:

> Further and under the direction of the Manitoba Human Rights Commission, and within such time as the Commission determines, to establish and maintain in all of its restaurant premises such program as will reasonably assure such restaurant premises will remain free of sexual harassment.

2. The Manitoba Court of Queen's Bench

Platy Enterprises Ltd. appealed the decision of Adjudicator Henteleff. With the exception of the quantum of damages, Monnin J. upheld the adjudicator's decision: (1985), 38 Man. R. (2d) 20, 24 D.L.R. (4th) 31, [1986] 2 W.W.R. 273, 86 CLLC {PP} 16,009, 7 C.H.R.R. D/3309 (hereinafter cited to C.H.R.R.) Monnin J. began by noting that the question whether Janzen and Govereau had been sexually harassed was not before the court, counsel for the appellant having admitted that Grammas was guilty of sexual harassment. He then turned to consider whether sexual harassment is a form of sex discrimination prohibited by s. 6(1) of the Human Rights Act. Monnin J. rejected Platy Enterprises Ltd's argument that the term sex discrimination as used in the Manitoba statute was not intended to apply to activities of an individual directed against a particular individual, rather than against an entire identifiable group. Instead, he accepted the result and the reasoning of Adjudicator Shime in Bell v. Ladas (1980), 1 C.H.R.R. D/155 (Ont. Bd.), who held that sexual harassment did amount to discrimination on the basis of sex.

Monnin J. also rejected Platy Enterprises Ltd.'s argument that the amendments enacted by some provinces to prohibit specifically sexual harassment in their human rights legislation was to be construed as an indication that the term sex discrimination did not encompass sexual harassment.

Monnin J. next considered the liability of Platy Enterprises Ltd. for the actions of its employee, Grammas. He began by absolving Anastasiadis from any participation in the sexual harassment

of Janzen and Govereau and from condoning Grammas' behaviour. In spite of his conclusion that Anastasiadis was not personally responsible for Grammas' conduct, Monnin J. continued to find Platy Enterprises Ltd. liable for sexual harassment (at p. D/3314):

> . . . I have no hesitation in finding, as did the adjudicator, that whether or not, in reality, Grammas had any power over the staff of the restaurant, the staff was purposefully led to believe by Anastasiadis that he did. In point of fact, Grammas might well not have been a directing mind of respondents [sic] but the perception given to the employees is what must be a determining factor ...
>
> By the admission of Anastasiadis, respondents [sic] have placed Grammas in a position of authority over the staff and therefore the complainants. By seemingly proffering this authority upon Grammas, respondents [sic] must be and are bound by his actions. Liability for Grammas' sexual harassment of complainants therefore extends to respondents [sic].

On the issue of damages, Monnin J. said, at pp. D/3314-15:

> Section 28(2) of the Act empowers a board of adjudication to compensate a person who has been discriminated against for any wages or salary lost as a result of a contravention of the Act as well as ordering payments of a penalty or exemplary damages if a person who has been discriminated against has suffered damages in respect of feelings or self-respect.
>
> In this particular case the board of adjudication found that complainant Janzen suffered a one month loss of income and awarded her $480.00 in lost wages. I have little difficulty in upholding this finding. As to complainant Govereau however, the board of adjudication found a loss of income of approximately 6 months and awarded damages in the amount of $3,000.00 for such loss. I am not satisfied that the evidence warrants this finding. There is little evidence of what if any attempts complainant Govereau made to secure other employment. There is evidence that she was embarrassed by her firing from Pharos and that this caused her some difficulties in seeking out employment. I do not question this, but an award of damages and not compensation for loss of wages is the proper remedy for this state of affairs. Even by giving complainant Govereau every benefit of the doubt, I cannot justify an award for loss of wages in excess of one month or $500.
>
> I am now left with the issue of punitive or exemplary damages. This is a difficult concept with which to deal because the court must attempt to quantify feelings or self-respect. The concept itself is difficult to rationalize and even more so when it is of a nature with which courts do not normally deal with. Notwithstanding that human rights legislation is a new and specialized area of law, awards of damages in one area of law must maintain a certain balance with fines meted out in criminal or quasi criminal matters and damages awarded in general civil cases. Not to maintain this general balance will too easily bring into question the principle of equal justice for all. I fully realize and accept that the conduct of Grammas was demeaning and traumatic for both complainants. What must be realized however is that victims of criminal acts

> or persons wrongfully dismissed from their employment or injured by the conduct of others also have their feelings and self-respect attacked. This type of loss is not the sole preserve and domain of persons who have suffered discrimination. A loss based on discrimination cannot be assessed in a vacuum. Such a loss must be looked at in the context of damages in law as a whole.
>
> Bearing those comments in mind, I find the complainant Janzen is entitled under s. 28(2)(c) of the Act to an award of $1,000.00 while complainant Govereau is entitled to an award of $1,500.00. I have awarded Govereau an amount greater than Janzen because the evidence has convinced me that her feelings and self-respect were dealt a more severe attack by the actions of Grammas than were the feelings and self-respect of Janzen.

Thus Monnin J. reduced the award for lost wages to Govereau from $3,000 to $500 because of insufficient evidence of her efforts to secure alternative employment and reduced the exemplary damage awards to Janzen and Govereau to $1,000 and $1,500 respectively.

3. The Manitoba Court of Appeal

Platy Enterprises Ltd. appealed the decision of Monnin J. and Janzen and Govereau cross-appealed on the quantum of damages. The Manitoba Court of Appeal (Matas, Huband and Twaddle JJ.A.) allowed the appeal: (1986), 43 Man. R. (2d) 293, 33 D.L.R. (4th) 32, [1987] 1 W.W.R. 385, 87 CLLC {PP} 17,014, 8 C.H.R.R. D/3831 (hereinafter cited to C.H.R.R.) Huband J.A. and Twaddle J.A. rendered comprehensive separate reasons which I will review at some length because, with the greatest respect, I do not agree with them. Both held that sexual harassment could not constitute discrimination on the basis of sex. Due to his untimely death, Matas J.A. did not participate in the reasons for judgment.

Huband J.A. began by expressing his amazement that sexual harassment had been equated with discrimination on the basis of sex, and that an employer could be held vicariously responsible for the harassing conduct of an employee. He stated (at p. D/3832):

> I am amazed to think that sexual harassment has been equated with discrimination on the basis of sex. I think they are entirely different concepts. But adjudicators under human rights legislation, legal scholars and writers, and jurists have said that the one is included in the other.
>
> Assuming sexual harassment to be a form of sexual discrimination, I am amazed to think that an employer could be held vicariously responsible for that form of discrimination on the part of an employee, or that a corporate employer could be found "personally responsible" for a sexually malevolent employee, except under the rarest of circumstances. Yet adjudicators, legal scholars, and judges have said otherwise.

Huband J.A. noted the line of cases in which both judges and adjudicators had found sexual harassment to be a form of sex discrimination but stated that these decisions were wrong.

Huband J.A. adopted two of the three meanings assigned to the word "discriminate" in The Shorter Oxford English Dictionary (3rd ed.): "**1.** To make or constitute a difference in or between; to differentiate . . .; **3.** To make a distinction"; and concluded, "In this Act discrimination is a violation of the law. The word `discriminate' used in a pejorative sense, means an unjustified differentiation or distinction."

Sexual harassment, in the view of Huband J.A., embraced an entirely different concept, stating (at p. D/3834):

> The word "harass" is given several definitions in The Shorter Oxford English Dictionary, the most pertinent for our purposes being to harry, or to trouble or vex by repeated attacks. Sexual harassment involves vexing or troubling a person with respect to sexual matters such as repeatedly touching or making suggestions, or threats.
>
> Sexual harassment is not socially acceptable conduct. Depending on the nature of it, it might constitute a criminal offence or a civil wrong under the common law. But I cannot understand how it can be equated with sexual discrimination.

Although he recognized that sexual harassment was not socially acceptable conduct, Huband J.A. cited the following example to illustrate how it could not be viewed as sex discrimination (at p. D/3834):

> When a schoolboy steals kisses from a female classmate, one might well say that he is harassing her. He is troubling her; vexing her; harrying her -- but he surely is not discriminating against her.

Huband J.A. next examined the meaning of discrimination in s. 6(1) of the Human Rights Act. He discussed each of the clauses of s. 6(1) and concluded that the section as a whole was aimed at discrimination in a generic sense. He gave the following examples of generic discrimination: discriminating against Blacks as a group, Jehovah's Witnesses as a group, or women as a group. In Huband J.A.'s view, discrimination in the generic sense could not include sexual harassment, presumably because not all women were the victims of sexual harassment.

Even though his finding on the issue of sex discrimination rendered consideration of corporate liability unnecessary, Huband J.A. examined this issue. He noted that he did not believe Grammas could be held liable under the Human Rights Act, as he interpreted the statute to apply only to employers and not to fellow employees. Unlike Adjudicator Henteleff, Huband J.A. considered himself bound by the decision of the Federal Court of Appeal in Robichaud, supra, where the court held that absent a provision in the relevant human rights statute for the imposition of vicarious or strict liability, an employer could not be held vicariously liable for the actions of an employee, except where an employee was acting on behalf of an employer. No such foundation for vicarious liability could be found in the Manitoba Human Rights Act. Huband J.A. was firmly of the view that Platy Enterprises Ltd. could not be held liable for Grammas' conduct as Grammas was not acting on behalf of the employer corporation.

Huband J.A. proceeded to examine the second ground on which the adjudicator held Platy Enterprises Ltd. liable, the organic theory of corporate responsibility. On this theory, a corporation could be liable for wrongful acts of an employee where the corporation adopts or approves of the employee's wrongful acts or where an officer or official of the corporation is given the authority to originate the corporation's policies and to implement them. Huband J.A. was of the view that liability could not be founded on the organic theory for two reasons. First, Grammas was not the directing mind of the corporation. Second, Grammas did not commit the acts of harassment in the course of employment. In Huband J.A.'s view, an employer could only be held liable for the acts of negligent employees where the employees were acting within their authorized capacity. In the case of a cook, Huband J.A. explained that this authority would extend to the preparation of food and the maintenance of safe conditions in the kitchen, but would not encompass acts of sexual harassment (at p. D/3841):

> If the cook dumped too much pepper in the soup, he would clearly be acting in the course of his employment, trying, albeit negligently, to prepare and present a decent meal. If the cook, contrary to instruction, was smoking on the job, and as a result negligently caused a gas explosion in the kitchen, it would be arguable that he was still acting in the course of his employment in the sense that he was trying to fulfil his responsibilities as a cook. But what has patting the buttocks of a waitress to do with fulfilling the responsibilities as a cook?

Huband J.A. concluded that even if Grammas' actions did violate the Human Rights Act, Platy Enterprises Ltd. could not be held liable on either theory of corporate liability.

Finally, Huband J.A. briefly discussed the issue of damages. He stated that Monnin J. was correct in reducing the damage awards of the adjudicator in keeping with the decision of the Manitoba Court of Appeal in Re Dakota Ojibway Tribal Council and Bewza (1985), 24 D.L.R. (4th) 374.

Like Huband J.A., Twaddle J.A. was emphatic in his view that sexual harassment was not sex discrimination. To assert a claim of discrimination by reason of sex under s. 6(1) of the Human Rights Act, Twaddle J.A. held that three elements must be present: (1) discrimination; (2) because of sex; and (3) in respect of employment. He proceeded to examine each of these elements in turn. With respect to the element of discrimination, Twaddle J.A. held that the intent of the Manitoba legislature was to prohibit differentiation on the basis of categorical grouping. It was not to prevent differentiation between people on the basis of individual characteristics or qualifications. Twaddle J.A. explained his understanding of categorical grouping as (at p. D/3844): "a distinction which results in people being dealt with on account of group characteristics, unrelated to merit, rather than individual ability and qualifications". In his view, harassment could not be seen to constitute differentiation on a categorical basis (at p. D/3845):

> Harassment is as different from discrimination as assault is from random selection. The victim of assault may be chosen at random just as the victim of harassment may be chosen because of categorical distinction, but it is nonsense to say that assault is random selection just as it is nonsense to say that harassment is discrimination. The introduction of a sexual element, be it the nature of the conduct or the gender of the victim, does not alter the basic fact that harassment and assault are acts, whilst discrimination and random selection are methods of choice.
>
> The fact that harassment is sexual in form does not determine the reason why the victim was chosen. Only if the woman was chosen on a categorical basis, without regard to individual characteristics, can the harassment be a manifestation of discrimination. [Emphasis added.]

Twaddle J.A. next considered the second element, whether sexual harassment was differentiation based on sex. He began by providing the following definition of the word "sex" in the Manitoba Human Rights Act (at p. D/3845):

> Gender, as distinct from the physical attraction of the victim or the manner in which the discrimination is carried out, is in my view the meaning to be given to "sex" as it is used in s. 6 of the Act. Only in that sense does it constitute a category of persons as distinct from a personal quality.

Twaddle J.A. contrasted this meaning of the word sex with a different definition concerned with physical attractiveness (at pp. D/3845-46):

> "Sex" can also refer to that aura which attracts one person to another, particularly a person of one gender to a person of the other. In this meaning the word is frequently used in combination with another word, as in "sex appeal"... The word in this sense, however, is not categorical in that the degree to which a person has it is determinable on a decidedly subjective basis.

Twaddle J.A. concluded that sexual harassment based on the "sex appeal" of the victim could not constitute sex discrimination (at p. D/3846):

> Where the conduct of an employer is directed at some but not all persons of one category, it must not be assumed that membership in the category is the reason for the distinction having been made. The distinction may have been based on another factor. Thus in Bliss v. Attorney-General of Canada (1978), 92 D.L.R. (3d) 417 it was held that statutory conditions applicable only at pregnant women did not discriminate against them as women . . . .
>
> The gender of a woman is unquestionably a factor in most cases of sexual harassment. If she were not a woman, the harassment would not have occurred. That, however, is not decisive. Only a woman can become pregnant, but that does not mean that she becomes pregnant because she is a woman. We are concerned with the effective cause of the harassment, be it a random selection, the conduct, or a particular characteristic of the victim, a wish on the part of the aggressor to discourage women from seeking or continuing in a position of employment or a contempt for women generally. Only in the last two instances is the harassment a manifestation of discrimination.

Twaddle J.A. then turned to the final issue, whether the discrimination occurred in respect of employment. He was of the view that if discriminatory conduct occurred in a way that directly prejudiced the employment opportunity, the conduct would be said to arise in respect of employment. He was also of the view that the Manitoba Human Rights Act only prohibited actions perpetrated by or on behalf of an employer. Co-employment of the discriminator and the victim was not, in Twaddle J.A.'s opinion, sufficient unless the discriminatory behaviour was authorized by the employer.

Applying these principles to the case, Twaddle J.A. concluded there had been no violation of s. 6 of the Human Rights Act. He dismissed the argument that the sexual harassment that occurred amounted to sex discrimination (at p. D/3847):

> This is not a case in which an employer adopted a practice whereby women as a class were treated differently from men. Nor is it a case in which a rule of general application adversely affected the complainants because they were women. For the harassment to amount to discrimination, it must have occurred by reason of the categorical selection of the complainants because they were women.
>
> Although not conclusive, the sex of the victims and the sexual nature of the harassment is some evidence of the basis of their selection. There is, on the other hand, no evidence that women as a class were not welcome as employees or were subject to adverse treatment. On the contrary, the evidence discloses that at the restaurant in question women were the only employees other than the cook and the corporate officer. Another female employee testified that the cook touched her a lot by putting his arm around her or touching her neck, but she interpreted that as him being friendly... This evidence suggests that the complainants were chosen for the harassment because of characteristics peculiar to them rather than because of their sex. That is not discrimination no matter how objectionable the conduct. [Emphasis added.]

Twaddle J.A. also dismissed the argument that the discrimination, if any, occurred in respect of employment. In his view, there was not a sufficient connection between the employer and the allegedly discriminatory conduct (at p. D/3847):

> Finally, because of the personal nature of the conduct and the fact that the employer could not gain by it, even in the achievement of a discriminatory goal, I do not consider that the victims were affected directly in respect of their employment. The board held that the employer condoned the cook's conduct. That is not, in my view, enough. Adoption of his conduct by the employer, not forgiveness, would be required at the very least to bring the cook's conduct within the meaning of the words "on behalf of the employer".

Twaddle J.A. also concluded that the Manitoba Human Rights Act did not impose upon employers the duty to provide a workplace free from sexual harassment.

IV

Issues

In this Court the appellants raise four grounds of appeal. The first and central ground of appeal is that the Manitoba Court of Appeal erred in holding that sexual harassment of the type to which the appellants were subjected was not discrimination on the basis of sex. Second, the appellants challenge the appellate court's holding that the employer could not be held liable for the sexual harassment perpetrated by Grammas. The liability of an employer for harassment of this nature is no longer in issue following the decision of this Court in Robichaud v. Canada (Treasury Board), supra. Third, the appellants allege that the Court of Appeal erred in confirming the decision of Monnin J. to reduce the damages awarded by the adjudicator. Finally, the appellants submit that the Court of Appeal erred by ordering costs against the Human Rights Commission in respect of the hearing before the adjudication board.

The respondent, Platy Enterprises Ltd., did not participate in this appeal either through written submission or oral argument. As I noted earlier, Grammas did not participate in any of the proceedings.

V

Is Sexual Harassment Sex Discrimination?

It would appear that since the decision in 1980 in Bell v. Ladas, supra, human rights adjudication boards and courts in Canada have been to all intents unanimous in the recognition that certain forms of sexual harassment constitute sex discrimination. In Bell, in the course of determining whether sexual harassment was included in the concept of sex discrimination in s. 4 of the Ontario Human Rights Code, Adjudicator Shime, in obiter, made the following oft-quoted remarks (at p. D/156):

> In my view, the purpose of The Code is to establish uniform working conditions for employees and to remove those matters enumerated in Section 4 as relevant considerations in the work place. Consideration of matters such as "race, creed, colour, age, sex, marital status, nationality or place of origin" strikes at what the preamble of The Code refers to [as] "the foundation of freedom, justice and peace", and infringes on the "freedom of equality and dignity in rights" which this province and society revere as commonly held values and have enshrined those in The Code. Thus, The Code prohibits these values from becoming negative factors in the employment relationship.
>
> Subject to the exception provided in Section 4(6), discrimination based on sex is prohibited by The Code. Thus, the paying of a female person less than a male person for the same job is prohibited, or dismissing an employee on the basis of sex is also prohibited. But what about sexual harassment? Clearly a person who is disadvantaged because of her sex, is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve or maintain her existing benefits. The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms or conditions differ when compared to male employees, the woman is being discriminated against.
>
> The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment.... [Emphasis added. Italics in original.]

As Huband J.A. acknowledged, Adjudicator Shime's view that certain forms of sexual harassment fall within the statutory prohibition on sex discrimination has been adopted by human rights adjudication boards and tribunals across the country. For example: Kotyk v. Canadian Employment and Immigration Commission (1983), 4 C.H.R.R. D/1416 (Can.); Phillips v. Hermiz (1984), 5 C.H.R.R. D/2450 (Sask.); Doherty v. Lodger's International Ltd. (1981), 3 C.H.R.R. D/628 (N.B.); Coutroubis v. Sklavos Printing (1981), 2 C.H.R.R. D/457 (Ont.); Hughes v. Dollar Snack Bar (1981), 3 C.H.R.R. D/1014 (Ont.); Cox v. Jagbritte Inc. (1981), 3 C.H.R.R. D/609 (Ont.); Mitchell v. Traveller Inn (Sudbury) Ltd. (1981), 2 C.H.R.R. D/590 (Ont.); Torres v. Royalty Kitchenware Ltd., supra; Deisting v. Dollar Pizza (1978) Ltd. (1982), 3 C.H.R.R. D/898 (Alta.); Hufnagel v. Osama Enterprises Ltd., supra; and McPherson v. Mary's Donuts (1982), 3 C.H.R.R. D/961 (Ont.)

With the exception of the Manitoba Court of Appeal in the case at bar, all of the courts in Canada which have considered the issue, including two appellate courts, have also found sexual harassment to be a form of sex discrimination: Johnstone v. Zarankin (1985), 6 C.H.R.R. D/2651 (B.C.S.C.); Foisy v. Bell Canada (1984), 6 C.H.R.R. D/2817 (Que. Sup. Ct.); Commodore Business Machines Ltd. v. Ontario Minister of Labour (1984), 6 C.H.R.R. D/2833 (Ont. S.C.); Re Mehta and MacKinnon (1985), 19 D.L.R. (4th) 148 (N.S.C.A.); and Robichaud (F.C.A.), supra.

Since the middle of the 1970's, courts in the United States, including the United States Supreme Court, to which reference will be made later, have also reached the conclusion that forms of sexual harassment constitute sex discrimination.

The Manitoba Court of Appeal departed radically from this apparently unbroken line of judicial opinion. To determine whether the Manitoba Court of Appeal was correct in rejecting the reasoning in these cases and in holding that sexual harassment of the sort to which the appellants were subjected could not amount to sex discrimination, it is necessary to consider what is meant by the terms "sex discrimination" and "sexual harassment". Both sex discrimination and sexual harassment are broad concepts, encompassing a wide range of behaviour. For the purposes of this appeal I will restrict my discussion of each of these terms to their manifestations in the workplace. In Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, a case raising a claim of systemic sex discrimination, the Court had occasion to consider the meaning of discrimination in the employment context. The Court adopted at pp. 1138-39 the definition of discrimination found in the Abella Report on equality in employment (Abella, Equality in Employment: Royal Commission Report (1984), at p. 2), which I quote in full below:

> Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone

> who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.
>
> Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

In keeping with this general definition of employment discrimination, discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.

Numerous definitions of sexual harassment have been proposed. Professor Catharine MacKinnon describes sexual harassment, most broadly defined, as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power" (Sexual Harassment of Working Women: A Case of Sex Discrimination (1979), at p. 1). In Sexual Harassment in the Workplace (1987), Arjun P. Aggarwal states that sexual harassment (at p. 1) "is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity". As Aggarwal states, at p. 1:

> Sexual harassment is a complex issue involving men and women, their perceptions and behaviour, and the social norms of the society. Sexual harassment is not confined to any one level, class, or profession. It can happen to executives as well as factory workers. It occurs not only in the workplace and in the classroom, but even in parliamentary chambers and churches. Sexual harassment may be an expression of power or desire or both. Whether it is from supervisors, co-workers, or customers, sexual harassment is an attempt to assert power over another person.

> Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity. Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include sexual innuendos, and propositions for dates or sexual favours.

Professors Constance Backhouse and Leah Cohen cite a number of definitions in The Secret Oppression: Sexual Harassment of Working Women (1978), including the following description proposed by the Alliance Against Sexual Coercion (at p. 38) "[a]ny sexually oriented practice that endangers a woman's job - that undermines her job performance and threatens her economic livelihood". Backhouse and Cohen list a number of concrete illustrations of harassing behaviour (at p. 38):

> Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.

Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.

Legislative definitions of sexual harassment and guidelines promulgated by various organizations reflect this general view of sexual harassment. In 1980 the American Equal Employment Opportunity Commission produced one of the first set of guidelines dealing with sexual harassment (Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11(a) (1985)). The Commission took the position that sexual harassment was a violation of Title VII of the Civil Rights Act of 1964, the prohibition against sex discrimination:

> (a) harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment, when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

These guidelines have been quoted with approval by courts and human rights tribunals in both the United States and Canada. The Canada Labour Code, R.S.C., 1985, c. L-2, as amended by c. 9 (1st Supp.), s. 17, provides the following definition of "sexual harassment":

> **247.1** ... any conduct, comment, gesture or contact of a sexual nature
> (a) that is likely to cause offence or humiliation to any employee; or
> (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

The Manitoba Human Rights Code, quoted earlier, which repeals and replaces the Manitoba Human Rights Act in force at the time of the initiation of the proceedings in this appeal, also explicitly defines sexual harassment.

The human rights legislation of Ontario and Newfoundland, both of which expressly prohibit sexual harassment, contain similar definition of "sexual solicitation": Ontario Human Rights Code, 1981, S.O. 1981, c. 53, s. 6; The Newfoundland Human Rights Code, R.S.N. 1970, c. 262, s. 10.1.

Emerging from these various legislative proscriptions is the notion that sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity.

This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particulary blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.

The Manitoba Court of Appeal judges rejected a series of United States decisions which, over the past decade, considered the question whether sexual harassment of the nature of that found here by Adjudicator Henteleff could constitute sex discrimination within the context of human rights legislation, namely, Title VII of the Civil Rights Act of 1964. Title VII states that it is an unlawful employment practice "... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin".

The American courts have tended to divide sexual harassment into two categories: the "quid pro quo" variety in which tangible employment related benefits are made contingent upon participation in sexual activity, and conduct which creates a "hostile environment" by requiring employees to endure sexual gestures and posturing in the workplace. Both forms of sexual harassment have been recognized by the American Courts including the United States Supreme Court: Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982); and Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986). Canadian human rights tribunals have also tended to rely on the quid pro quo/hostile work environment dichotomy. I do not find this categorization particularly helpful. While the distinction may have been important to illustrate forcefully the range of behaviour that constitutes harassment at a time before sexual harassment was widely viewed as actionable, in my view there is no longer

any need to characterize harassment as one of these forms. The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity.

I am in accord with the following dictum of the United States Court of Appeals for the Eleventh Circuit in Henson v. Dundee, quoted with approval in the Meritor Savings Bank case:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in Bell v. Ladas, supra, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

Perpetrators of sexual harassment and victims of the conduct may be either male or female. However, in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female.

Professor Hickling documents this situation in an article entitled "Employer's Liability for Sexual Harassment" (1988), 17 Man. L.J. 124, at p. 127:

> Sexual harassment as a phenomenon of the workplace is not new. Nor is it confined to harassment of women by men, though this is by far the most prevalent and significant context. It may be committed by women against men, by homosexuals against members of the same sex. According to a Canadian survey published in 1983 [Canadian Human Rights Commission, Research and Special Studies Branch, Unwanted Sexual Attention and Sexual Harassment: Result of a Survey of Canadians (Ottawa: Minister of Supply and Services Canada (1983))], women reported far more exposure to all forms of unwanted sexual attention than did men. Forty-nine percent of women (as compared to 33% of men) stated that they had experienced at least one form of this kind of harassment. The frequency of sexual harassment directed against women was also significantly higher. In the case of sexual harassment experienced by women, most (93%) of the harassers were men, while men complained of harassment by women (62%) and men (24%). The victims of sexual harassment are not confined to any particular group, identifiable by age, sex, class, educational background, income or occupation, although younger single women (and interestingly, those at the lower end of the economic scale) tend to suffer the most. One characteristic that victims usually share in common is their vulnerability to economic sanctions both real and threatened.

Professor Hickling's exposition suggests that women may be at greater risk of being sexually harassed because they tend to occupy low status jobs in the employment hierarchy. Arjun Aggarwal, in his article quoted earlier, offers an additional explanation for the increased vulnerability of women to sexual harassment. Drawing an analogy to the practice of racial discrimination where racial slurs reinforce perceived racial inequality, Aggarwal argues that sexual harassment is used in a sexist society to (at pp. 5-6) "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to "remind women of their inferior ascribed status".

In the context of this understanding of sexual harassment and discrimination on the basis of sex, the reasons of the Court of Appeal of Manitoba may be evaluated. Let me say at the outset that, in my opinion, the Court of Appeal erred to the extent that it relied on legislation enacted by the Parliament of Canada and three of the provinces, defining and prohibiting sexual harassment, for the inference that in the absence of such express legislation a prohibition against sexual

discrimination could not embrace sexual harassment. The amendments were no doubt intended to make express and explicit what had previously been implicit. As the appellants point out in their factum:

> It is worth noting, however, that in those jurisdictions [Ontario, Quebec, Newfoundland, Canada] the decisions given prior to those amendments unanimously came to the conclusion that sexual harassment of the type we are dealing with here constituted sex discrimination. Moreover, most jurisdictions (eg. B.C., Alberta, Saskatchewan, Nova Scotia, etc.) have continued to rely on the prohibition against "sex discrimination" in employment, as a sufficient vehicle to cope with sexual harassment.
>
> The amendments were meant to clarify and educate, not to alter the interpretation of the legislation. As one Ontario Adjudicator, Prof. Peter Cummings, has noted in a subsequent analysis of the Court of Appeal for Manitoba's reasoning:
>
> > The question before the Court of appeal in Janzen, however, was not, of course, whether a prohibition against sexual harassment should be a part of Manitoba's human rights legislation but rather whether such a prohibition is in fact implicit in the existing general anti-discrimination provisions of the Act. This must be the question in every jurisdiction examining the place of harassing behaviour under a general anti-discriminatory provision. In some provinces (Quebec, Newfoundland and Ontario) and in the federal sphere the legislatures have decided to use express language where before an implicit prohibition had been sufficient. Given this obvious advantage of clarify and certainty which an express prohibition allows, these new provisions are to be applauded. It seems ironic, however, at the least, that in making its own progressive policies explicit a legislature may endanger equally progressive implicit assumptions about general legislation in another province.
> >
> > The legislative history of the Ontario provision suggests that the government of the day viewed the explicit inclusions of harassment as a measure to clarify existing rights rather than to create new ones . . . .
> >
> > In my view the more general language found in legislation without explicit provisions also prohibits sexual harassment in employment.
> >
> > See Boehm v. National System of Banking Ltd., (1987), 8 C.H.R.R. D/4110 at D/419-20; and also Zarankin, supra, at D/2276-77.

There appear to be two principal reasons, closely related, for the decision of the Court of Appeal of Manitoba that the sexual harassment to which the appellants were subjected was not sex discrimination. First, the Court of Appeal drew a link between sexual harassment and sexual attraction. Sexual harassment, in the view of the Court, stemmed from personal characteristics of

the victim, rather than from the victim's gender. Second, the appellate court was of the view that the prohibition of sex discrimination in s. 6(1) of the Human Rights Act was designed to eradicate only generic or categorical discrimination. On this reasoning, a claim of sex discrimination could not be made out unless all women were subjected to a form of treatment to which all men were not. If only some female employees were sexually harassed in the workplace, the harasser could not be said to be discriminating on the basis of sex. At most the harasser could only be said to be distinguishing on the basis of some other characteristic.

The two arguments raised by the Manitoba Court of Appeal may in fact be seen as alternate formulations of the following argument. Discrimination implies treating one group differently from other groups, thus all members of the affected group must be subjected to the discriminatory treatment. Sexual harassment, however, involves treating some persons differently from others, usually on the basis of the sexual attractiveness of the victim. The harasser will typically choose one, or several, persons to harass but will not harass all members of one gender. As harassers select their targets on the basis of a personal characteristic, physical attractiveness, rather than on the basis of a group characteristic, gender, sexual harassment does not constitute discrimination on the basis of sex.

This line of reasoning has been considered in both Canada and the United States, and in my view, quite properly rejected. The reasons for the rejection were cogently expressed by Adjudicator Lynn Smith in Zarankin v. Johnstone (1984), 5 C.H.R.R. D/2274 (B.C. Bd.), at p. 2276 (appeal to Supreme Court of British Columbia dismissed (1985), 6 C.H.R.R. D/2651):

> Although it might be thought that sexual harassment would not amount to sex discrimination unless all employees of the same gender were equally recipients of it, that is fallacious. So long as gender provides a basis for differentiation, it matters not that further differentiation on another basis is made. An analogy would be a complaint of sex discrimination against an employer who decided to dismiss all of his married female employees but none of his male employees and none of his unmarried female employees. The decision would affect one

> group adversely -- female employees -- even though it would not affect every member of that group. Similarly, an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminatory by reason of sex because the harassment affects only one group adversely.

The fallacy in the position advanced by the Court of Appeal is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action. To deny a finding of discrimination in the circumstances of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive. It is to argue, for example, that an employer who will only hire a woman if she has twice the qualifications required of a man is not guilty of sex discrimination if, despite this policy, the employer nevertheless manages to hire some women.

The argument that discrimination requires identical treatment of all members of the affected group is firmly dismissed by this Court in Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 000 (judgment being delivered concurrently herewith). In Brooks I stated that pregnancy related discrimination is sex discrimination. The argument that pregnancy related discrimination could not be sex discrimination because not all women become pregnant was dismissed for the reason that

pregnancy cannot be separated from gender. All pregnant persons are women. Although, in Brooks, the impugned benefits plan of the employer, Safeway, did not mention women, it was held to discriminate on the basis of sex because the plan's discriminatory effects fell entirely upon women.

The reasoning in Brooks is applicable to the present appeal. Only a woman can become pregnant; only a woman could be subject to sexual harassment by a heterosexual male, such as the respondent Grammas. That some women do not become pregnant was no defence in Brooks, just as it is no defence in this appeal that not all female employees at the restaurant were subject to sexual harassment. The crucial fact is that it was only female employees who ran the risk of sexual harassment. No man would have been subjected to this treatment. The sexual harassment the appellants suffered fits the definition of sex discrimination offered earlier: "practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender".

To argue that the sole factor underlying the discriminatory action was the sexual attractiveness of the appellants and to say that their gender was irrelevant strains credulity. Sexual attractiveness cannot be separated from gender. The similar gender of both appellants is not a mere coincidence, it is fundamental to understanding what they experienced. All female employees were potentially subject to sexual harassment by the respondent Grammas. That his discriminatory behaviour was pinpointed against two of the female employees would have been small comfort to other women contemplating entering such a workplace. Any female considering employment at the Pharos restaurant was a potential victim of Grammas and as such was disadvantaged because of her sex. A potential female employee would recognize that if she were a male employee she would not have to run the same risks of sexual harassment. In Brooks, in reference to a health benefits plan which imposed the costs of pregnancy upon women, I stated that "[R]emoval of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation" (p.

000). That statement is equally applicable to the sexual harassment that was suffered by the appellants in this appeal. Because they were women, the appellants were subject to a disadvantage to which no man at the restaurant would have been subject. As the LEAF factum puts it, "... sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex." It is one of the purposes of anti-discrimination legislation to remove such denials of equality of opportunity.

As noted earlier, the argument that sexual harassment is sex discrimination has been recognized by a long line of Canadian, American and English (see Porcelli v. Strathclyde Regional Council, [1985] I.C.R. 177 (E.A.T.-Scot.), aff'd [1986] I.C.R. 564 (Ct. of Session)) cases which have found sexual harassment to be sex discrimination.

In conclusion on this point, I offer a quotation from a leading American decision, Bundy v. Jackson, supra, at p. 942, which is equally applicable to the legislation at issue in this appeal:

> . . . our task of statutory construction in Barnes was to determine whether the disparate treatment Barnes suffered was "based on . . . sex." We heard arguments there that whatever harm Barnes suffered was not sex discrimination, since Barnes' supervisor terminated her job because she had refused sexual advances, not because she was a woman. We rejected those arguments as disingenuous in the extreme. The supervisor in that case made demands of Barnes that he would not have made of male employees. "But for her womanhood ... [Barnes'] participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.
>
> We thus made it clear in Barnes that sex discrimination within the meaning of Title VII is not limited to disparate treatment founded solely or categorically on gender. Rather, discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination.

Is the Respondent Liable?

The liability of employers for the acts of their employees in situations such as in the present appeal has been settled by the recent decision of this Court in Robichaud v. Canada (Treasury Board), supra. This decision, which reversed the judgment of the Federal Court of Appeal, was delivered subsequent to the decision of the Manitoba Court of Appeal in the present case. In Robichaud, La Forest J., writing for the Court, considered the liability of an employer for sexual harassment under the Canadian Human Rights Act, where the harassment was committed by an employee. His words are equally applicable to the Manitoba legislation; each Act has a similar purpose and structure.

La Forest J. began by stating that human rights legislation (at p. 92):

> . . . is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.

He continued two pages later:

> Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy -- a healthy work environment.

La Forest J. then concluded that the statute requires that employers be held liable for the discriminatory acts of their employees where those actions are work-related. He did not try to apply principles of vicarious liability, saying that this was unhelpful and, in any event, unnecessary since the employer's liability could be found within the statute (at p. 95):

> Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory.

Although the employer in the Robichaud case was the Crown, it is clear that La Forest J.'s words are meant to apply to all employment relationships. At no point in his judgment is any significance attached to the Crown status of the employer.

On the basis of La Forest J.'s decision, the respondent Platy Enterprises Ltd. must be held liable for the actions of the cook Grammas. Grammas' actions fall within the "course of his employment" as defined by La Forest J.'s purposive interpretation. On page 92, La Forest J. expanded on the meaning to be given to "course of employment", arguing that the term should not be interpreted as only referring to activities which fall narrowly within the employee's job description. To employ such a narrow definition, he said, would be wrongly to import tortious notions of vicarious liability into the field of discrimination law. He concluded that employers are liable for any action of their employees which is "work-related" (at p. 92):

> It would appear more sensible and more consonant with the purpose of the Act to interpret the phrase "in the course of employment" as meaning work- or job-related . . .

The difference between the words of the Manitoba Act, "in respect of employment", and those of the Canadian Act, "course of employment", is not significant. La Forest J.'s words apply equally to both Acts.

In light of this interpretation it cannot be argued that Grammas was not acting in respect of his employment when he sexually harassed the appellants. His actions were clearly work related. Grammas' opportunity to harass the appellants sexually was directly related to his employment

position as the next in line in authority to the employer. Grammas used his position of authority, a position accorded him by the respondent, to take advantage of the appellants. The authority granted to Grammas, both through his control in running the restaurant, including his control over food orders and work hours, and through his purported ability to fire waitresses, gave him power over the waitresses. It was the respondent's responsibility to ensure that this power was not abused. This it clearly did not do, even after the appellants made specific complaints about the harassment. So it is liable for the actions of Grammas.

VII

The Damages Award

I quoted earlier the remarks of Monnin J. in reducing the award of damages to Janzen and Govereau. With great respect, no persuasive arguments were presented by Monnin J. as to why Adjudicator Henteleff erred in his award. The amounts are not inordinate in light of the seriousness of the complaints.

VIII

Costs Before the Board of Adjudication

The Court of Appeal awarded costs to the respondents and against the Commission not only before the Court of Queen's Bench and the Court of Appeal, but also before the Board of Adjudication itself. The order with respect to costs will be set aside because of this Court's decision on the respondent's liability. I wish however to comment briefly on the Court of Appeal's decision to award costs against the Commission in respect of the hearing before the Board of

Adjudication. Even if the Court of Appeal's decision on liability had been upheld in this Court, I would see no justification for this award of costs against the Commission. Under the Act, the Board of Adjudication itself is given no authority to award costs. One reason for this is that the Commission has a duty under s. 20 of the Act to bring complaints before the Board, unless those complaints are, per s. 19(4), "without merit". Therefore, while appreciating that courts do have a discretion with respect to costs, I believe costs should only be ordered against the Manitoba Human Rights Commission in exceptional circumstances. There was no reason to exercise that discretion on the facts of this case, even as these facts were interpreted by the Court of Appeal. The complaint brought forth by the Commission was clearly with merit. It succeeded before the Board and the Court of Queen's Bench. For the Commission to have refused to have brought forth the complaint would have been a neglect of its statutory duty.

IX

Disposition

For the aforementioned reasons I would allow the appeal, set aside the judgment of the Court of Appeal of Manitoba and restore the judgment of Monnin J. of the Court of Queen's Bench, except as to the award of damages which should be as stated by Adjudicator Henteleff. The appellants are entitled to costs at all levels, except before the Board of Adjudication.

Appeal allowed with costs.

Solicitor for the appellants: Tanner Elton, Winnipeg.

Solicitors for the intervener: Fillmore & Riley, Winnipeg.

Matthew David Spencer *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions, Attorney General of Ontario, Attorney General of Alberta, Privacy Commissioner of Canada, Canadian Civil Liberties Association and Criminal Lawyers' Association of Ontario *Interveners*

Matthew David Spencer *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Directeur des poursuites pénales, procureur général de l'Ontario, procureur général de l'Alberta, commissaire à la protection de la vie privée du Canada, Association canadienne des libertés civiles et Criminal Lawyers' Association of Ontario *Intervenants*

Indexed as: R. *v.* Spencer

2014 SCC 43

File No.: 34644.

2013: December 9; 2014: June 13.*

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Répertorié : R. *c.* Spencer

2014 CSC 43

N° du greffe : 34644.

2013 : 9 décembre; 2014 : 13 juin*.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Search and seizure — Privacy — Police having information that IP address used to access or download child pornography — Police asking Internet service provider to voluntarily provide name and address of subscriber assigned to IP address — Police using information to obtain search warrant for accused's residence — Whether police conducted unconstitutional search by obtaining subscriber information matching IP address — Whether evidence obtained as a result should be excluded — Whether fault element of making child pornography available requires proof of positive facilitation — Criminal Code, R.S.C. 1985, c. C-46, ss. 163.1(3), (4), 487.014(1) — Personal Information Protection and Electronic Documents Act,

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Protection des renseignements personnels — Police détenant des renseignements selon lesquels une adresse IP a été utilisée pour avoir accès à de la pornographie juvénile ou pour la télécharger — Demande de la police au fournisseur de services Internet de lui fournir volontairement le nom et l'adresse de l'abonnée à qui appartient l'adresse IP — Utilisation de ces renseignements par la police pour obtenir un mandat lui permettant de perquisitionner dans la résidence de l'accusé — La police a-t-elle effectué une fouille ou une perquisition inconstitutionnelle lorsqu'elle a obtenu les renseignements relatifs à l'abonnée à qui appartenait l'adresse IP? — La preuve ainsi obtenue devrait-elle être

* A motion to amend the reasons was granted on November 6, 2014, amending para. 12. The amendments are included in these reasons.

* Une requête en modification des motifs a été accordée le 6 novembre 2014 modifiant le par. 12. Les modifications ont été incorporées dans les présents motifs.

S.C. 2000, c. 5, s. 7(3)(c.1)(ii) — Canadian Charter of Rights and Freedoms, s. 8.

écartée? — L'élément de faute de l'infraction qui consiste à rendre accessible la pornographie juvénile exige-t-il la preuve d'un appui délibéré? — Code criminel, L.R.C. 1985, ch. C-46, art. 163.1(3), (4), 487.014(1) — Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5, art. 7(3)c.1)(ii) — Charte canadienne des droits et libertés, art. 8.

The police identified the Internet Protocol (IP) address of a computer that someone had been using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. The request was purportedly made pursuant to s. 7(3)(*c.*1)(ii) of the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*). This led them to the accused. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it available. The Court of Appeal upheld the conviction, however set aside the acquittal on the making available charge and ordered a new trial.

La police a découvert l'adresse de protocole Internet (IP) de l'ordinateur qu'une personne avait utilisé pour accéder à de la pornographie juvénile et pour la stocker à l'aide d'un programme de partage de fichiers. Elle a ensuite obtenu auprès du fournisseur de services Internet (FSI), sans autorisation judiciaire préalable, les renseignements relatifs à l'abonnée à qui appartenait cette adresse IP. Il s'agit d'une demande qui aurait été fondée sur le sous-al. 7(3)*c.*1)(ii) de la *Loi sur la protection des renseignements personnels et les documents électroniques* (*LPRPDE*). Les policiers ont ainsi découvert l'accusé. Celui-ci avait téléchargé de la pornographie juvénile à partir d'Internet avant de sauvegarder les fichiers en question dans un répertoire qui était accessible à d'autres internautes utilisateurs du même programme de partage de fichiers. L'accusé a été inculpé et déclaré coupable au procès de possession de pornographie juvénile, mais il a été acquitté de l'accusation de la rendre accessible. La Cour d'appel a confirmé la déclaration de culpabilité; elle a cependant annulé l'acquittement et ordonné la tenue d'un nouveau procès.

Held: The appeal should be dismissed.

Arrêt : Le pourvoi est rejeté.

Whether there is a reasonable expectation of privacy in the totality of the circumstances is assessed by considering and weighing a large number of interrelated factors. The main dispute in this case turns on the subject matter of the search and whether the accused's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

On détermine s'il existe une attente raisonnable en matière de respect de la vie privée, compte tenu de l'ensemble des circonstances, en examinant et en soupesant un grand nombre de facteurs interreliés. Dans la présente affaire, le litige porte principalement sur l'objet de la fouille ou de la perquisition et sur la question de savoir si l'attente subjective de l'accusé en matière de vie privée était raisonnable. Les deux éléments pertinents pour déterminer le caractère raisonnable de son attente au respect de sa vie privée sont, d'une part, la nature de l'intérêt en matière de vie privée qui est en jeu et, d'autre part, le cadre législatif et contractuel régissant la communication par le FSI des renseignements relatifs à l'abonnée.

When defining the subject matter of a search, courts have looked not only at the nature of the precise information sought, but also at the nature of the information that it reveals. In this case, the subject matter of the search was not simply a name and address of someone in a contractual relationship with the ISP. Rather, it was the

Pour définir l'objet d'une fouille ou d'une perquisition, les tribunaux examinent non seulement la nature des renseignements précis recherchés, mais aussi la nature des renseignements qui sont ainsi révélés. En l'espèce, la fouille ou la perquisition n'avait pas simplement pour objet le nom et l'adresse d'une personne qui était liée

identity of an Internet subscriber which corresponded to particular Internet usage.

The nature of the privacy interest engaged by the state conduct turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. In this case, the primary concern is with informational privacy. Informational privacy is often equated with secrecy or confidentiality, and also includes the related but wider notion of control over, access to and use of information. However, particularly important in the context of Internet usage is the understanding of privacy as anonymity. The identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information. Subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating to an individual's identity as the source, possessor or user of that information. Some degree of anonymity is a feature of much Internet activity and depending on the totality of the circumstances, anonymity may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure. In this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized in other circumstances as engaging significant privacy interests.

There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. In this case, the contractual and statutory frameworks overlap and the relevant provisions provide little assistance in evaluating the reasonableness of the accused's expectation of privacy. Section 7(3)(*c.*1)(ii) of *PIPEDA* cannot be used as a factor to weigh against the

par contrat au FSI. Il s'agissait plutôt de l'identité d'une abonnée aux services Internet à qui correspondait une utilisation particulière de ces services.

La nature de l'intérêt en matière de vie privée visé par l'action de l'État tient au caractère privé du lieu ou de l'objet visé par la fouille ou la perquisition ainsi qu'aux conséquences de cette dernière pour la personne qui en fait l'objet, et non à la nature légale ou illégale de la chose recherchée. En l'espèce, on s'intéresse principalement au caractère privé des renseignements personnels. Ce dernier est souvent assimilé à la confidentialité. Il comprend également la notion connexe, mais plus large, de contrôle sur l'accès à l'information et sur l'utilisation des renseignements. L'anonymat en tant que facette du droit à la vie privée revêt cependant une importance particulière dans le contexte de l'utilisation d'Internet. Il faut reconnaître que l'identité d'une personne liée à son utilisation d'Internet donne naissance à un intérêt en matière de vie privée qui a une portée plus grande que celui inhérent à son nom, à son adresse et à son numéro de téléphone qui figurent parmi les renseignements relatifs à l'abonné. En établissant un lien entre des renseignements particuliers et une personne identifiable, les renseignements relatifs à l'abonné peuvent compromettre les droits en matière de vie privée quant à l'identité d'une personne en tant que source, possesseur ou utilisateur des renseignements visés. Un certain degré d'anonymat est propre à beaucoup d'activités menées sur Internet et l'anonymat pourrait donc, compte tenu de l'ensemble des circonstances, servir de fondement au droit à la vie privée visé par la protection constitutionnelle contre les fouilles, les perquisitions et les saisies abusives. En l'espèce, la demande de la police, dans le but d'établir un lien entre une adresse IP donnée et les renseignements relatifs à l'abonnée, visait en fait à établir un lien entre une personne précise et des activités en ligne précises. Ce genre de demande concerne, en ce qui a trait aux renseignements personnels, le droit à la vie privée relatif à l'anonymat puisqu'elle vise à établir un lien entre le suspect et des activités entreprises en ligne sous le couvert de l'anonymat, activités qui, comme on l'a reconnu dans d'autres circonstances, mettent en jeu d'importants droits en matière de vie privée.

Il ne fait aucun doute que les cadres législatif et contractuel peuvent aussi être pertinents, mais pas nécessairement déterminants, quant à la question de savoir s'il existe une attente raisonnable en matière de vie privée. En l'espèce, les cadres contractuel et législatif se chevauchent et les dispositions applicables ne sont guère utiles pour évaluer le caractère raisonnable de l'attente de l'accusé au respect de sa vie privée. Le sous-al. 7(3)*c.*1)(ii)

existence of a reasonable expectation of privacy since the proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. It would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*'s general prohibition on the disclosure of personal information without consent. The contractual provisions in this case support the existence of a reasonable expectation of privacy. The request by the police had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. In the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. Therefore, the request by the police that the ISP voluntarily disclose such information amounts to a search.

Whether the search in this case was lawful will be dependent on whether the search was authorized by law. Neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA* creates any police search and seizure powers. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries. *PIPEDA* is a statute whose purpose is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence of exigent circumstances or a reasonable law, the police do not gain a new search power through the combination of a declaratory provision and a provision enacted to promote the protection of personal information. The conduct of the search in this case therefore violated the *Charter*. Without the subscriber information obtained by the police, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant and the search of the residence was therefore unlawful and violated the *Charter*.

de la *LPRPDE* ne peut être considéré comme un des facteurs défavorables à l'existence d'une attente raisonnable en matière de vie privée puisque l'interprétation juste de la disposition applicable dépend elle-même de l'existence d'une telle attente raisonnable en matière de vie privée. Il serait raisonnable que l'internaute s'attende à ce qu'une simple demande faite par la police n'entraîne pas l'obligation de communiquer les renseignements personnels en question ou n'écarte pas l'interdiction générale prévue par la *LPRPDE* quant à la communication de renseignements personnels sans le consentement de l'intéressé. Les dispositions du contrat en l'espèce justifient l'existence d'une attente raisonnable en matière de vie privée. La demande de renseignements n'était pas étayée par la source de l'autorité légitime de la police, en ce sens que cette dernière pouvait formuler une demande, mais ne détenait pas l'autorité pour obliger le fournisseur à s'y conformer. Compte tenu de l'ensemble des circonstances de la présente affaire, il existe une attente raisonnable en matière de vie privée à l'égard des renseignements relatifs à l'abonnée. La demande faite par la police visant la communication volontaire par le FSI de renseignements de cette nature constitue donc une fouille.

La question de savoir si la fouille effectuée en l'espèce était légitime est subordonnée à celle de savoir si elle était autorisée par la loi. Ni le par. 487.014(1) du *Code criminel*, ni la *LPRPDE* n'ont pour effet de conférer à la police des pouvoirs en matière de fouilles, de perquisitions ou de saisies. Le paragraphe 487.014(1) est une disposition déclaratoire qui confirme les pouvoirs de common law permettant aux policiers de formuler des questions. La *LPRPDE* est une loi qui a pour objet d'accroître la protection des renseignements personnels. Puisque, en l'espèce, les policiers n'avaient pas le pouvoir d'effectuer une fouille ou une perquisition pour obtenir des renseignements relatifs à l'abonnée en l'absence de circonstances contraignantes ou d'une loi qui n'a rien d'abusif, ils ne peuvent obtenir un nouveau pouvoir en matière de fouille ou de perquisition par l'effet combiné d'une disposition déclaratoire et d'une disposition adoptée afin de favoriser la protection des renseignements personnels. L'exécution de la fouille ou de la perquisition en l'espèce violait donc la *Charte*. Si les renseignements relatifs à l'abonnée ne lui avaient pas été communiqués, la police n'aurait pas pu obtenir le mandat. Par conséquent, si ces renseignements sont écartés (ce qui doit être le cas, parce qu'ils ont été obtenus d'une façon inconstitutionnelle), il n'y avait aucun motif valable justifiant la délivrance d'un mandat. La fouille ou la perquisition à la résidence était donc abusive et violait la *Charte*.

The police, however, were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute. While the impact of the *Charter*-infringing conduct on the *Charter*-protected interests of the accused weighs in favour of excluding the evidence, the offences here are serious. Society has a strong interest in the adjudication of the case and also in ensuring the justice system remains above reproach in its treatment of those charged with these serious offences. Balancing the three factors, the exclusion of the evidence rather than its admission would bring the administration of justice into disrepute. The admission of the evidence is therefore upheld.

There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require however, that the accused must knowingly, by some positive act, facilitate the availability of the material. The offence is complete once the accused knowingly makes pornography available to others. Given that wilful blindness was a live issue and that the trial judge's error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, the error could reasonably be thought to have had a bearing on the trial judge's decision to acquit. The order for a new trial is affirmed.

Cases Cited

Referred to: *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Collins*, [1987] 1 S.C.R. 265;

Les policiers se sont toutefois servi de ce qu'ils croyaient raisonnablement être des moyens légitimes pour poursuivre un objectif important visant l'application de la loi. Par sa nature, la conduite des policiers en l'espèce ne serait pas susceptible de déconsidérer l'administration de la justice. Bien que l'incidence de la conduite attentatoire sur les droits de l'accusé garantis par la *Charte* favorise l'exclusion de la preuve, les infractions reprochées en l'espèce sont graves. La société a un intérêt manifeste à ce que l'affaire soit jugée et à ce que le fonctionnement du système de justice demeure irréprochable au regard des individus accusés de ces infractions graves. Une mise en balance de ces trois facteurs permet de conclure que c'est l'exclusion de la preuve, et non son admission, qui serait susceptible de déconsidérer l'administration de la justice. L'admission de la preuve est donc confirmée.

Il n'est pas contesté que, dans le cadre d'une poursuite sous le régime du par. 163.1(3) du *Code criminel*, il faut prouver que l'accusé avait connaissance du fait que le matériel pornographique était rendu accessible à d'autres personnes. Il n'est toutefois pas nécessaire que l'accusé doive sciemment, par une certaine action délibérée, faciliter l'accessibilité au matériel. Les éléments de l'infraction sont tous réunis lorsque l'accusé rend sciemment la pornographie accessible à d'autres personnes. Puisque l'aveuglement volontaire était une question en litige et que l'erreur du juge du procès — lorsqu'il a conclu qu'il était nécessaire d'accomplir une action délibérée pour satisfaire à l'exigence de la *mens rea* de l'infraction de rendre accessible — lui a fait omettre l'examen de cette question, il serait raisonnable de penser que cette erreur a eu une incidence sur le verdict d'acquittement. L'ordonnance prescrivant la tenue d'un nouveau procès est confirmée.

Jurisprudence

Arrêts mentionnés : *R. c. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Dyment*, [1988] 2 R.C.S. 417; *R. c. Plant*, [1993] 3 R.C.S. 281; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432; *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733; *R. c. Patrick*, 2009 CSC 17, [2009] 1 R.C.S. 579; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34; *R. c. Gomboc*, 2010 CSC 55, [2010] 3 R.C.S. 211; *R. c. Trapp*, 2011 SKCA 143, 377 Sask. R. 246; *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456; *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *McInerney c. MacDonald*, [1992] 2 R.C.S. 138; *R. c. Duarte*, [1990] 1 R.C.S. 30; *R. c. Wise*, [1992] 1 R.C.S. 527; *R. c. Morelli*, 2010 CSC 8, [2010] 1 R.C.S. 253; *R. c. Vu*, 2013 CSC 60, [2013] 3 R.C.S.

R. v. McNeice, 2010 BCSC 1544 (CanLII); *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Cameron, Ottenbreit and Caldwell JJ.A.), 2011 SKCA 144, 377 Sask. R. 280, 528 W.A.C. 280, [2012] 4 W.W.R. 425, 283 C.C.C. (3d) 384, [2011] S.J. No. 729 (QL), 2011 CarswellSask 786, affirming the accused's conviction for

657; *R. c. Collins*, [1987] 1 R.C.S. 265; *R. c. McNeice*, 2010 BCSC 1544 (CanLII); *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353; *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411; *R. c. Graveline*, 2006 CSC 16, [2006] 1 R.C.S. 609.

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Slane, Andrea, and Lisa M. Austin. « What's In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations » (2011), 57 *Crim. L.Q.* 486.
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POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (les juges Cameron, Ottenbreit et Caldwell), 2011 SKCA 144, 377 Sask. R. 280, 528 W.A.C. 280, [2012] 4 W.W.R. 425, 283 C.C.C. (3d) 384, [2011] S.J. No. 729 (QL), 2011 CarswellSask 786, qui a confirmé la déclaration de culpabilité

possession of child pornography and setting aside the accused's acquittal for making available child pornography entered by Foley J., 2009 SKQB 341, 361 Sask. R. 1, [2009] S.J. No. 798 (QL), 2009 CarswellSask 905, and ordering a new trial. Appeal dismissed.

Aaron A. Fox, *Q.C.*, and *Darren Kraushaar*, for the appellant.

Anthony B. Gerein, for the respondent.

Ronald C. Reimer and *David Schermbrucker*, for the intervener the Director of Public Prosecutions.

Susan Magotiaux and *Allison Dellandrea*, for the intervener the Attorney General of Ontario.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Mahmud Jamal, *Patricia Kosseim*, *Daniel Caron* and *Sarah Speevak*, for the intervener the Privacy Commissioner of Canada.

Anil K. Kapoor and *Lindsay L. Daviau*, for the intervener the Canadian Civil Liberties Association.

Jonathan Dawe and *Jill R. Presser*, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] The Internet raises a host of new and challenging questions about privacy. This appeal relates to one of them.

[2] The police identified the Internet Protocol (IP) address of a computer that someone had been

de l'accusé quant à l'infraction de possession de pornographie juvénile et annulé son acquittement quant à l'infraction de rendre accessible la pornographie juvénile prononcés par le juge Foley, 2009 SKQB 341, 361 Sask. R. 1, [2009] S.J. No. 798 (QL), 2009 CarswellSask 905, et ordonné la tenue d'un nouveau procès. Pourvoi rejeté.

Aaron A. Fox, *c.r.*, et *Darren Kraushaar*, pour l'appelant.

Anthony B. Gerein, pour l'intimée.

Ronald C. Reimer et *David Schermbrucker*, pour l'intervenant le directeur des poursuites pénales.

Susan Magotiaux et *Allison Dellandrea*, pour l'intervenant le procureur général de l'Ontario.

Jolaine Antonio, pour l'intervenant le procureur général de l'Alberta.

Mahmud Jamal, *Patricia Kosseim*, *Daniel Caron* et *Sarah Speevak*, pour l'intervenant le commissaire à la protection de la vie privée du Canada.

Anil K. Kapoor et *Lindsay L. Daviau*, pour l'intervenante l'Association canadienne des libertés civiles.

Jonathan Dawe et *Jill R. Presser*, pour l'intervenante Criminal Lawyers' Association of Ontario.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction

[1] L'existence d'Internet remet en question la protection de la vie privée et soulève une multitude de questions inédites et épineuses à cet égard. Le présent pourvoi porte sur une de ces questions.

[2] La police a découvert l'adresse de protocole Internet (IP) de l'ordinateur qu'une personne avait

using to access and store child pornography through an Internet file-sharing program. They then obtained from the Internet Service Provider (ISP), without prior judicial authorization, the subscriber information associated with that IP address. This led them to the appellant, Mr. Spencer. He had downloaded child pornography into a folder that was accessible to other Internet users using the same file-sharing program. He was charged and convicted at trial of possession of child pornography and acquitted on a charge of making it available.

[3] At trial, Mr. Spencer claimed that the police had conducted an unconstitutional search by obtaining subscriber information matching the IP address and that the evidence obtained as a result should be excluded. He also testified that he did not know that others could have access to the shared folder and argued that he therefore did not knowingly make the material in the folder available to others. The trial judge concluded that there had been no breach of Mr. Spencer's right to be secure against unreasonable searches and seizures. However, he was of the view that the "making available" offence required some "positive facilitation" of access to the pornography, which Mr. Spencer had not done, and further he believed Mr. Spencer's evidence that he did not know that others could access his folder so that the fault element (*mens rea*) of the offence had not been proved. The judge therefore convicted Mr. Spencer of the possession offence, but acquitted him of the making available charge.

[4] The Court of Appeal upheld the conviction for possession of child pornography, agreeing with the trial judge that obtaining the subscriber information was not a search and holding that even if it were a search, it would have been reasonable. The court, however, set aside the acquittal on the making available charge on the basis that the trial judge had been wrong to require proof of positive facilitation

utilisé pour accéder à de la pornographie juvénile et pour la stocker à l'aide d'un programme de partage de fichiers. Les policiers ont ensuite obtenu auprès du fournisseur de services Internet (FSI), sans autorisation judiciaire préalable, les renseignements relatifs à l'abonnée à qui appartenait cette adresse IP. Ils ont ainsi découvert l'appelant, M. Spencer. Celui-ci avait téléchargé de la pornographie juvénile dans un répertoire qui était accessible à d'autres internautes utilisateurs du même programme de partage de fichiers. M. Spencer a été inculpé, puis, au procès, déclaré coupable de possession de pornographie juvénile et acquitté de l'infraction de rendre accessible de la pornographie juvénile.

[3] Au procès, M. Spencer a fait valoir que la police avait effectué une fouille ou une perquisition inconstitutionnelle lorsqu'elle a obtenu les renseignements relatifs à l'abonnée à qui appartenait l'adresse IP et que la preuve ainsi obtenue devait être écartée. Il a également déclaré dans son témoignage qu'il ignorait que d'autres personnes pouvaient avoir accès au répertoire partagé et qu'il n'a donc pas sciemment rendu les fichiers accessibles. Le juge du procès a conclu qu'il n'y avait pas eu de violation du droit de M. Spencer à la protection contre les fouilles, les perquisitions et les saisies abusives. Il a toutefois estimé que pour être déclaré coupable de l'infraction de « rendre accessible » il faut avoir donné un certain [TRADUCTION] « appui délibéré » à l'accès à la pornographie, ce que M. Spencer n'avait pas fait. Il a également jugé que la déposition de M. Spencer selon laquelle il ignorait que d'autres personnes pouvaient avoir accès à son répertoire était véridique, de sorte que l'élément de faute de cette infraction (*mens rea*) n'avait pas été établi. Le juge a donc déclaré M. Spencer coupable de l'infraction de possession, mais l'a acquitté de l'accusation de rendre accessible.

[4] La Cour d'appel a confirmé la déclaration de culpabilité pour possession de pornographie juvénile, souscrivant à la conclusion du juge du procès selon laquelle le fait d'obtenir les renseignements relatifs à l'abonnée ne constituait pas une fouille ou une perquisition et concluant que, même s'il y en avait eu une, elle aurait été raisonnable. La cour a cependant annulé l'acquittement quant à l'accusation

of access by others to the material. A new trial was ordered on this charge.

[5] The appeal to this Court raises four issues which I would resolve as follows:

1. Did the police obtaining the subscriber information matching the IP address from the ISP constitute a search?

In my view, it did.

2. If so, was the search authorized by law?

In my view, it was not.

3. If not, should the evidence obtained as a result be excluded?

In my view, the evidence should not be excluded.

4. Did the trial judge err with respect to the fault element of the "making available" offence?

The judge did err and I would uphold the Court of Appeal's order for a new trial.

II. Analysis

A. *Did the Police Obtaining the Subscriber Information Matching the IP Address From the ISP Constitute a Search?*

[6] Mr. Spencer maintains that the police were conducting a search when they obtained the subscriber information associated with the IP address from the ISP, Shaw Communications Inc. The respondent Crown takes the opposite view. I agree with Mr. Spencer on this point. I will first set out a

de rendre accessible au motif que le juge du procès avait eu tort d'exiger la preuve d'un appui délibéré à l'accès aux fichiers par d'autres personnes et elle a ordonné la tenue d'un nouveau procès quant à ce chef d'accusation.

[5] Le présent pourvoi soulève quatre questions auxquelles je suis d'avis de répondre comme suit :

1. L'obtention par la police, auprès du FSI, des renseignements sur l'abonnée à qui appartenait l'adresse IP constitue-t-elle une fouille ou une perquisition?

Je suis d'avis que oui.

2. Si oui, la fouille ou la perquisition était-elle autorisée par la loi?

Je suis d'avis que non.

3. Sinon, la preuve ainsi obtenue devrait-elle être écartée?

J'estime que la preuve ne devrait pas être écartée.

4. Le juge du procès a-t-il commis une erreur relativement à l'élément de faute de l'infraction qui consiste à « rendre accessible »?

Le juge a effectivement commis une erreur et je suis d'avis de confirmer l'ordonnance de la Cour d'appel visant la tenue d'un nouveau procès.

II. Analyse

A. *L'obtention par la police, auprès du FSI, des renseignements sur l'abonnée à qui appartenait l'adresse IP constitue-t-elle une fouille ou une perquisition?*

[6] Monsieur Spencer soutient que la police effectuait une fouille ou une perquisition lorsqu'elle a obtenu, auprès du FSI, Shaw Communications Inc., les renseignements relatifs à l'abonnée à qui appartenait l'adresse IP en cause en l'espèce. Le ministère public intimé adopte le point de vue

summary of the relevant facts then turn to the legal analysis.

(1) Facts and Judicial History

[7] Mr. Spencer, who lived with his sister, connected to the Internet through an account registered in his sister's name. He used the file-sharing program LimeWire on his desktop computer to download child pornography from the Internet. LimeWire is a free peer-to-peer file-sharing program that, at the time, anyone could download onto their computer. Peer-to-peer systems such as LimeWire allow users to download files directly from the computers of other users. LimeWire does not have one central database of files, but instead relies on its users to share their files directly with others. It is commonly used to download music and movies and can also be used to download both adult and child pornography. It was Mr. Spencer's use of the file-sharing software that brought him to the attention of the police and which ultimately led to the search at issue in this case.

[8] Det. Sgt. Darren Parisien (then Cst.) of the Saskatoon Police Service, by using publicly available software, searched for anyone sharing child pornography. He could access whatever another user of the software had in his or her shared folder. In other words, he could "see" what other users of the file-sharing software could "see". He could also obtain two numbers related to a given user: the IP address that corresponds to the particular Internet connection through which a computer accesses the Internet at the time and the globally unique identifier (GUID) number assigned to each computer using particular software. The IP address of the computer from which shared material is obtained is displayed as part of the file-sharing process. There is little information in the record about the nature of IP addresses in general or the IP addresses provided

contraire. Je suis d'accord avec M. Spencer sur ce point. Je présenterai tout d'abord un résumé des faits pertinents; je procéderai ensuite à l'analyse juridique.

(1) Les faits et l'historique judiciaire

[7] Monsieur Spencer, qui habitait avec sa sœur, se connectait à Internet à partir d'un compte ouvert au nom de cette dernière. Il utilisait le programme de partage de fichiers LimeWire sur son ordinateur pour télécharger de la pornographie juvénile à partir d'Internet. LimeWire est un logiciel gratuit de partage de fichiers poste à poste que chacun pouvait télécharger à l'époque sur son ordinateur. Les systèmes poste à poste, comme LimeWire, permettent aux utilisateurs de télécharger des fichiers directement à partir des ordinateurs d'autres utilisateurs. LimeWire ne comporte pas de base de données centrale. Il compte plutôt sur ses utilisateurs qui partagent directement leurs fichiers avec d'autres utilisateurs. Le logiciel est couramment utilisé pour télécharger de la musique et des films, mais il peut aussi servir à télécharger de la pornographie tant adulte que juvénile. C'est l'utilisation du programme de partage de fichiers par M. Spencer qui a retenu l'attention de la police et qui a finalement mené à la fouille ou à la perquisition qui fait l'objet du présent litige.

[8] À l'aide d'un logiciel accessible au public, l'agent Darren Parisien (nommé sergent-détective depuis), du Service de police de Saskatoon, a recherché des personnes qui partageaient des fichiers de pornographie juvénile. Il pouvait accéder au contenu des répertoires partagés appartenant à d'autres utilisateurs du logiciel. Autrement dit, il pouvait [TRADUCTION] « voir » ce que d'autres utilisateurs du programme de partage de fichiers pouvaient « voir ». Il pouvait également obtenir deux numéros associés à un utilisateur donné : l'adresse IP correspondant à la connexion Internet établie par un ordinateur et l'identificateur global unique (GUID), soit le numéro associé à chaque ordinateur qui utilise un logiciel donné. L'adresse IP de l'ordinateur à partir duquel on obtient des fichiers partagés est affichée dans le cadre du processus de partage de

by Shaw to its subscribers. There is a description in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at paras. 21-26, which also notes some of the differences that may exist among IP addresses. For the purposes of this case, what we know is that the IP address obtained by Det. Sgt. Parisien matched computer activity at the particular point in time that he was observing that activity.

[9] Det. Sgt. Parisien generated a list of IP addresses for computers that had shared what he believed to be child pornography. He then ran that list of IP addresses against a database which matches IP addresses with approximate locations. He found that one of the IP addresses was suspected to be in Saskatoon, with Shaw as the ISP.

[10] Det. Sgt. Parisien then determined that Mr. Spencer's computer was online and connected to LimeWire. As a result, he (along with any LimeWire user) was able to browse the shared folder. He saw an extensive amount of what he believed to be child pornography. What he lacked was knowledge of where exactly the computer was and who was using it.

[11] To connect the computer usage to a location and potentially a person, investigators made a written "law enforcement request" to Shaw for the subscriber information including the name, address and telephone number of the customer using that IP address. The request, which was purportedly made pursuant to s. 7(3)(*c.*1)(ii) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (*PIPEDA*), indicated that police were investigating an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to child pornography and the Internet and that the subscriber information was being sought as part of an ongoing investigation. (The full text of the relevant statutory provisions is set out in an Appendix.) Investigators

fichiers. Il y a peu de renseignements au dossier sur la nature des adresses IP en général ou des adresses IP que Shaw fournit à ses abonnés. Dans l'arrêt *R. c. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, par. 21-26, on trouve une description de certaines des différences qui existent entre les adresses IP. Pour les besoins de l'espèce, une chose est certaine : l'adresse IP qu'a obtenue le sergent-détective Parisien correspondait aux activités informatiques qui se déroulaient au moment précis où il les observait.

[9] Le sergent-détective Parisien a dressé une liste des adresses IP correspondant aux ordinateurs qui avaient été utilisés pour le partage de ce qu'il estimait être de la pornographie juvénile. Il a ensuite comparé cette liste aux renseignements figurant dans une base de données qui permet d'associer des adresses IP à des emplacements approximatifs. Il a découvert qu'une des adresses IP semblait se trouver à Saskatoon et que Shaw était le FSI.

[10] Le sergent-détective Parisien a ensuite déterminé que l'ordinateur de M. Spencer était connecté à Internet ainsi qu'à LimeWire. Par conséquent, le sergent-détective (ainsi que tout autre utilisateur du logiciel LimeWire) pouvait parcourir le répertoire partagé du suspect. Il a vu une grande quantité de ce qu'il estimait être de la pornographie juvénile. Il ne connaissait cependant pas l'emplacement exact de l'ordinateur ni l'identité de son utilisateur.

[11] Pour établir un lien entre les activités informatiques en question et un emplacement précis, et potentiellement une personne, les enquêteurs ont présenté par écrit à Shaw une [TRADUCTION] « demande de la part des autorités d'application de la loi » en vue d'obtenir des renseignements relatifs à l'abonnée qui utilisait cette adresse IP, soit, notamment, son nom, son adresse et son numéro de téléphone. La demande — qui aurait été fondée sur le sous-al. 7(3)*c.*1)(ii) de la *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, ch. 5 (*LPRPDE*) — indiquait que la police enquêtait sur une infraction prévue au *Code criminel*, L.R.C. 1985, ch. C-46, relative à la pornographie juvénile et à Internet et

did not have or try to obtain a production order (i.e. the equivalent of a search warrant in this context).

[12] Shaw complied with the request and provided the name, address and telephone number of the customer associated with the IP address, Mr. Spencer's sister. With this information in hand, the police obtained a warrant to search Ms. Spencer's home (where Mr. Spencer lived) and seize his computer, which they did. The search of Mr. Spencer's computer revealed about 50 child pornography images and two child pornography videos.

[13] Mr. Spencer was charged with possessing child pornography contrary to s. 163.1(4) of the *Criminal Code* and making child pornography available over the Internet contrary to s. 163.1(3). There is no dispute that the images found in his shared folder were child pornography.

[14] At trial, Mr. Spencer sought to exclude the evidence found on his computer on the basis that the police actions in obtaining his address from Shaw without prior judicial authorization amounted to an unreasonable search contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The trial judge rejected this contention and convicted Mr. Spencer of the possession count. On appeal, the Saskatchewan Court of Appeal upheld the judge's decision with respect to the search issue.

(2) Was the Request to Shaw a Search?

[15] Under s. 8 of the *Charter*, "[e]veryone has the right to be secure against unreasonable search or seizure." This Court has long emphasized the need

que les renseignements relatifs à l'abonnée étaient demandés aux fins d'une enquête qui était en cours. (Les dispositions législatives pertinentes sont reproduites en annexe.) Les enquêteurs n'avaient pas obtenu ni tenté d'obtenir une ordonnance de communication (c.-à-d. l'équivalent d'un mandat de perquisition dans ce contexte).

[12] Shaw a donné suite à la demande et a fourni le nom, l'adresse et le numéro de téléphone de la sœur de M. Spencer, la cliente à qui appartenait l'adresse IP. À l'aide de ces renseignements, la police a obtenu un mandat permettant de perquisitionner dans la résidence de M^me^ Spencer, où habitait M. Spencer, et de saisir l'ordinateur de celui-ci, ce que les policiers ont fait. La fouille de l'ordinateur de M. Spencer a permis de découvrir environ 50 images et deux vidéos de pornographie juvénile.

[13] Monsieur Spencer a été accusé de possession de pornographie juvénile, infraction décrite au par. 163.1(4) du *Code criminel*, et de rendre accessible de la pornographie juvénile sur Internet, en contravention du par. 163.1(3). Le fait que les images trouvées dans son répertoire partagé constituaient de la pornographie juvénile n'est pas contesté.

[14] Au procès, M. Spencer a tenté de faire écarter les éléments de preuve découverts sur son ordinateur au motif que les mesures prises sans autorisation judiciaire préalable par les policiers, en vue d'obtenir son adresse auprès de Shaw, correspondaient à une fouille ou à une perquisition abusive et contrevenaient à l'art. 8 de la *Charte canadienne des droits et libertés*. Le juge du procès a rejeté cette prétention et déclaré M. Spencer coupable de l'infraction de possession. La Cour d'appel de la Saskatchewan a confirmé la décision du juge relativement à la question de la fouille ou de la perquisition.

(2) La demande adressée à Shaw constituait-elle une fouille ou une perquisition?

[15] Suivant l'article 8 de la *Charte*, « [c]hacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. » La Cour insiste

for a purposive approach to s. 8 that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 156-57; *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28; *R. v. Plant*, [1993] 3 S.C.R. 281, at pp. 292-93; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 12-16; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 22.

depuis longtemps sur la nécessité d'adopter, à l'égard de l'art. 8, une approche téléologique axée principalement sur la protection de la vie privée considérée comme une condition préalable à la sécurité individuelle, à l'épanouissement personnel et à l'autonomie ainsi qu'au maintien d'une société démocratique prospère : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 156-157; *R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427-428; *R. c. Plant*, [1993] 3 R.C.S. 281, p. 292-293; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 12-16; *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733, par. 22.

[16] The first issue is whether this protection against unreasonable searches and seizures was engaged here. That depends on whether what the police did to obtain the subscriber information matching the IP address was a search or seizure within the meaning of s. 8 of the *Charter*. The answer to this question turns on whether, in the totality of the circumstances, Mr. Spencer had a reasonable expectation of privacy in the information provided to the police by Shaw. If he did, then obtaining that information was a search.

[16] En premier lieu, il s'agit de savoir si cette protection contre les fouilles, les perquisitions et les saisies abusives s'applique en l'espèce. Pour le savoir, il faut déterminer si les mesures prises par la police en vue d'obtenir les renseignements sur l'abonnée à qui appartenait l'adresse IP constituaient une fouille, une perquisition ou une saisie au sens de l'art. 8 de la *Charte*. Pour ce faire, il faut déterminer si, compte tenu de l'ensemble des circonstances, M. Spencer s'attendait raisonnablement au respect du caractère privé des renseignements fournis par Shaw à la police. Si tel était le cas, l'obtention de ces renseignements constituait une fouille ou une perquisition.

[17] We assess whether there is a reasonable expectation of privacy in the totality of the circumstances by considering and weighing a large number of interrelated factors. These include both factors related to the nature of the privacy interests implicated by the state action and factors more directly concerned with the expectation of privacy, both subjectively and objectively viewed, in relation to those interests: see, e.g., *Tessling*, at para. 38; *Ward*, at para. 65. The fact that these considerations must be looked at in the "totality of the circumstances" underlines the point that they are often interrelated, that they must be adapted to the circumstances of the particular case and that they must be looked at as a whole.

[17] On détermine s'il existe une attente raisonnable en matière de respect de la vie privée, compte tenu de l'ensemble des circonstances, en examinant et en soupesant un grand nombre de facteurs interreliés qui comprennent à la fois des facteurs relatifs à la nature des droits en matière de vie privée visés par l'action de l'État et des facteurs qui ont trait plus directement à l'attente en matière de respect de la vie privée, considérée tant subjectivement qu'objectivement, par rapport à ces droits : voir, p. ex., *Tessling*, par. 38; *Ward*, par. 65. La nécessité d'examiner ces éléments compte tenu de « l'ensemble des circonstances » fait ressortir le fait qu'ils sont souvent interdépendants, qu'ils doivent être adaptés aux circonstances de chaque cas, et qu'ils doivent être considérés dans leur ensemble.

[18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: *Tessling*, at para. 32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 40. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: *Tessling*, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": *Patrick*, at para. 14; see also *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, and *Ward*, at paras. 81-85.

[19] I can deal quite briefly with two aspects of the appeal. The trial judge in this case held that there was no subjective expectation of privacy in this case: 2009 SKQB 341, 361 Sask. R. 1, at para. 18. However, as I will explain below, the trial judge reached this conclusion by incorrectly defining the subject matter of the search. On the proper understanding of the scope of the search, Mr. Spencer's subjective expectation of privacy in his online activities can readily be inferred from his use of the network connection to transmit sensitive information: *Cole*, at para. 43. Mr. Spencer's direct interest in the subject matter of the search is equally clear. Though he was not personally a party to the contract with the ISP, he had access to the Internet with the permission of the subscriber and his use of the Internet was by means of his own computer in his own place of residence.

[18] La grande variété et le nombre important de facteurs pouvant être pris en considération pour évaluer les attentes raisonnables en matière de respect de la vie privée peuvent être regroupés, par souci de commodité, en quatre grandes catégories : (1) l'objet de la fouille ou de la perquisition contestée; (2) le droit du demandeur à l'égard de l'objet; (3) l'attente subjective du demandeur en matière de respect de sa vie privée relativement à l'objet; et (4) la question de savoir si cette attente subjective en matière de respect de la vie privée était objectivement raisonnable, eu égard à l'ensemble des circonstances : *Tessling*, par. 32; *R. c. Patrick*, 2009 CSC 17, [2009] 1 R.C.S. 579, par. 27; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 40. Il ne s'agit toutefois pas d'un examen purement factuel. L'attente raisonnable en matière de vie privée est de nature normative et non simplement descriptive : *Tessling*, par. 42. Ainsi, même si l'analyse du droit au respect de la vie privée tient compte du contexte factuel, elle « abonde [inévitablement] en jugements de valeur énoncés du point de vue indépendant de la personne raisonnable et bien informée, qui se soucie des conséquences à long terme des actions gouvernementales sur la protection du droit au respect de la vie privée privée » : *Patrick*, par. 14; voir aussi *R. c. Gomboc*, 2010 CSC 55, [2010] 3 R.C.S. 211, par. 34, et *Ward*, par. 81-85.

[19] Quelques brefs commentaires suffiront pour traiter deux aspects du pourvoi. Selon le juge du procès, il n'y avait pas d'attente subjective en matière de vie privée dans la présente affaire : 2009 SKQB 341, 361 Sask. R. 1, par. 18. Toutefois, comme je vais l'expliquer ultérieurement, la conclusion du juge du procès reposait sur une définition inexacte de l'objet de la fouille ou de la perquisition. Selon une interprétation juste de cet objet, l'attente subjective de M. Spencer au respect du caractère privé de ses activités en ligne peut aisément être déduite de son utilisation de la connexion réseau pour transmettre des renseignements sensibles : *Cole*, par. 43. L'intérêt direct de M. Spencer à l'égard de l'objet de la fouille ou de la perquisition est également manifeste. Même s'il n'était pas personnellement parti au contrat conclu avec le FSI, il avait accès à Internet avec la permission de l'abonnée et il l'utilisait au moyen de son propre ordinateur, à son lieu de résidence.

[20] The main dispute in this case thus turns on the subject matter of the search and whether Mr. Spencer's subjective expectation of privacy was reasonable. The two circumstances relevant to determining the reasonableness of his expectation of privacy in this case are the nature of the privacy interest at stake and the statutory and contractual framework governing the ISP's disclosure of subscriber information.

[21] In this case, I have found it helpful to look first at the subject matter of the search, then at the nature of the privacy interests implicated by the state actions and then finally at the governing contractual and statutory framework. While these subjects are obviously interrelated, approaching the analysis under these broad headings provides a degree of focus while permitting full examination of the "totality of the circumstances".

(a) *The Subject Matter of the Search*

[22] Mr. Spencer alleges that the police request to Shaw is a state action that constitutes a search or seizure for the purposes of s. 8 of the *Charter*. We must therefore consider what the subject matter of that request was in order to be able to identify the privacy interests that were engaged by it.

[23] In many cases, defining the subject matter of the police action that is alleged to be a search is straightforward. In others, however, it is not. This case falls into the latter category. The parties and the courts below have markedly divergent perspectives on this important issue, a divergence which is reflected in the jurisprudence: see, for example, the authorities reviewed in *Ward*, at para. 3.

[24] Mr. Spencer contends that the subject matter of the alleged search was core biographical data, revealing intimate and private information about the people living at the address provided by Shaw which matched the IP address. The Crown, on the

[20] Dans la présente affaire, le litige porte donc principalement sur l'objet de la fouille ou de la perquisition et sur la question de savoir si l'attente subjective de M. Spencer en matière de vie privée était raisonnable. Les deux éléments pertinents pour déterminer le caractère raisonnable de son attente au respect de sa vie privée sont, d'une part, la nature de l'intérêt en matière de vie privée qui est en jeu et, d'autre part, le cadre législatif et contractuel régissant la communication par le FSI des renseignements relatifs à l'abonnée.

[21] En l'espèce, j'ai jugé utile d'examiner d'abord l'objet de la fouille ou de la perquisition, ensuite la nature des droits en matière de vie privée que mettent en jeu les actes de l'État et, enfin, le cadre législatif et contractuel applicable. Il s'agit manifestement d'éléments interreliés, mais l'analyse axée sur ces vastes catégories assure une certaine précision tout en permettant d'examiner de manière exhaustive « l'ensemble des circonstances ».

a) *L'objet de la fouille ou de la perquisition*

[22] Selon M. Spencer, c'est la demande faite à Shaw par la police qui constitue l'action de l'État correspondant à une fouille, à une perquisition ou à une saisie aux fins de l'application de l'art. 8 de la *Charte*. Nous devons donc examiner l'objet de cette demande pour pouvoir déterminer quels étaient les droits en jeu en matière de vie privée.

[23] Dans bien des cas, il est facile de définir l'objet de l'action de la police qui, selon les allégations, constitue une fouille ou une perquisition. Ce n'est par contre pas toujours ainsi; et la présente espèce appartient à cette seconde catégorie. Les parties et les tribunaux de juridiction inférieure ont adopté des positions nettement divergentes sur cette question importante, situation qui se retrouve également dans la jurisprudence : voir, par exemple, les décisions mentionnées dans l'arrêt *Ward*, par. 3.

[24] Monsieur Spencer fait valoir que l'objet de la fouille ou de la perquisition contestée comportait des renseignements d'ordre biographique, soit des renseignements personnels et confidentiels sur les personnes habitant à l'adresse fournie par Shaw

other hand, maintains that the subject matter of the alleged search was simply a name, address and telephone number matching a publicly available IP address.

[25] These divergent views were reflected in the decisions of the Saskatchewan courts. The trial judge adopted the Crown's view that what the police sought and obtained was simply generic information that does not touch on the core of Mr. Spencer's biographical information. Ottenbreit J.A. in the Court of Appeal was of largely the same view. For him, the information sought by the police in this case simply established the identity of the contractual user of the IP address. The fact that this information might eventually reveal a good deal about the activity of identifiable individuals on the Internet was, for him, "neither here nor there": 2011 SKCA 144, 377 Sask. R. 280, at para. 110 (see also *R. v. Trapp*, 2011 SKCA 143, 377 Sask. R. 246, at paras. 119-24 and 134). In contrast to this approach, Caldwell J.A. (Cameron J.A. concurring on this point) held that in characterizing the subject matter of the alleged search, it is important to look beyond the "mundane" subscriber information such as name and address (para. 22). The potential of that information to reveal intimate details of the lifestyle and personal choices of the individual must also be considered: see also *Trapp*, *per* Cameron J.A., at paras. 33-37.

[26] I am in substantial agreement with Caldwell and Cameron JJ.A. on this point. While, in many cases, defining the subject matter of the search will be uncontroversial, in cases in which it is more difficult, the Court has taken a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake. The Court has looked at not only the nature of the precise information sought, but also at the nature of the information that it reveals.

qui correspondait à l'adresse IP. Pour sa part, le ministère public soutient que la fouille ou la perquisition contestée visait plutôt simplement le nom, l'adresse et le numéro de téléphone correspondant à une adresse IP accessible au public.

[25] Les tribunaux de la Saskatchewan ont exprimé les mêmes opinions divergentes. Le juge du procès a adopté le point de vue du ministère public selon lequel la police n'avait recherché et obtenu que des renseignements d'ordre général qui ne correspondent pas à des données d'ordre biographique relatives à M. Spencer. Le juge Ottenbreit de la Cour d'appel a partagé en grande partie la même opinion. À son avis, les renseignements recherchés par la police en l'espèce ne faisaient qu'établir l'identité de l'utilisateur de l'adresse IP qui était désigné dans le contrat. La possibilité que ces renseignements finissent par révéler plusieurs aspects des activités menées par des personnes identifiables sur Internet était [TRADUCTION] « sans importance » : 2011 SKCA 144, 377 Sask. R. 280, par. 110 (voir également *R. c. Trapp*, 2011 SKCA 143, 377 Sask. R. 246, par. 119-124 et 134). Par contre, selon le juge Caldwell (le juge Cameron a souscrit à son opinion à ce sujet), lorsqu'il s'agit de qualifier l'objet d'une fouille ou d'une perquisition contestée, il faut aller au-delà des renseignements [TRADUCTION] « banals » relatifs à l'abonné, tels son nom et son adresse (par. 22). Il faut aussi tenir compte de la possibilité que ces renseignements révèlent des détails intimes sur le mode de vie et les choix personnels de l'individu : voir également l'arrêt *Trapp*, le juge Cameron, par. 33-37.

[26] Je souscris pour l'essentiel aux conclusions formulées sur ce point par les juges Caldwell et Cameron de la Cour d'appel. Dans bien des cas, la définition de l'objet de la fouille ou de la perquisition fait l'unanimité. Cependant, dans les cas qui posent davantage de difficultés à cet égard, la Cour a adopté dans le passé une approche large et fonctionnelle, en examinant le lien entre la technique d'enquête utilisée par la police et l'intérêt en matière de vie privée qui est en jeu. La Cour a examiné non seulement la nature des renseignements précis recherchés, mais aussi la nature des renseignements qui sont ainsi révélés.

[27] A number of decisions of the Court reflect this approach. I begin with *Plant*. There, the Court, dealing with informational privacy, stressed the strong claim to privacy in relation to information that is at the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": p. 293. Importantly, the Court went on to make clear that s. 8 protection is accorded not only to the information which is itself of that nature, but also to "information which tends to reveal intimate details of the lifestyle and personal choices of the individual": *ibid.* (emphasis added).

[28] *Tessling* took the same approach, although it led to a different conclusion. The subject matter of the alleged search was held to be the heat emitted from the surface of a building. The Forward Looking Infra-Red (FLIR) imaging technique was used to help assess the activities that transpired inside a house, but the heat emissions by themselves could not distinguish between one heat source and another. In short, the heat emanations were, on their own, meaningless because they did not permit any inferences about the precise activity giving rise to the heat: paras. 35-36. The critical question was: what inferences about activity inside the home — admittedly a highly private zone — did the FLIR images support?

[29] I turn next to *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, and the companion appeal in *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569. While the Court divided on other points, it was unanimous in holding that the dog sniff of Mr. Kang-Brown's bag constituted a search. As explained by both Deschamps and Bastarache JJ., the dog sniffing at the air in the vicinity of the bag functioned as an investigative procedure that allowed for a "strong, immediate and direct inference" about what was or was not inside the bag: Deschamps J., at paras. 174-75; Bastarache J., at para. 227. Thus, while the "information" obtained by the sniffer dog was simply the smell of the air outside the bag, the dog's

[27] Plusieurs arrêts de la Cour reflètent cette approche. J'examinerai d'abord l'arrêt *Plant*. Dans cette affaire concernant des aspects informationnels de la vie privée, la Cour a insisté sur le droit garanti au respect de la vie privée relativement à des renseignements « biographiques d'ordre personnel que les particuliers pourraient, dans une société libre et démocratique, vouloir constituer et soustraire à la connaissance de l'État » : p. 293. Fait important, la Cour a ensuite précisé que la protection garantie par l'art. 8 vise non seulement les renseignements de cette nature, mais aussi les « renseignements tendant à révéler des détails intimes sur le mode de vie et les choix personnels de l'individu » : *ibid.* (je souligne).

[28] La Cour a suivi la même approche dans l'arrêt *Tessling*, mais elle a tiré une conclusion différente. Dans cette affaire, il a été conclu que l'objet de la perquisition contestée était la chaleur émanant de la surface d'un édifice. La technique d'imagerie FLIR (système infrarouge à vision frontale) a servi à évaluer les activités qu'il y avait à l'intérieur d'une résidence, mais les émanations de chaleur ne permettaient pas, à elles seules, de distinguer les sources de chaleur. Bref, les émanations de chaleur n'avaient, en elles-mêmes, aucune signification, parce qu'elles ne permettaient pas de déduire quelle activité précise produisait la chaleur : par. 35-36. La question cruciale portait sur la nature des activités que permettaient de déduire les images FLIR et qui se déroulaient à l'intérieur de la résidence — nous en conviendrons, un lieu de nature éminemment privée.

[29] Je passe maintenant à l'arrêt *R. c. Kang-Brown*, 2008 CSC 18, [2008] 1 R.C.S. 456, et au pourvoi connexe *R. c. A.M.*, 2008 CSC 19, [2008] 1 R.C.S. 569. La Cour était divisée sur d'autres points, mais elle a conclu à l'unanimité que la vérification du sac de M. Kang-Brown à l'aide d'un chien renifleur constituait une fouille. Comme l'ont expliqué les juges Deschamps et Bastarache, en décelant ce qu'il y avait dans l'air à proximité du sac, le chien a servi d'outil d'enquête et son intervention a « immédiatement et directement permis [aux policiers] de faire une forte inférence » quant au contenu du sac : la juge Deschamps, par. 174-175; le juge Bastarache, par. 227. Ainsi,

reaction to it provided the police with a strong inference as to what was inside. As Binnie J. put it in *A.M.* (which concerned a dog sniff of the accused's backpack), "[b]y use of the dog, the policeman could 'see' through the concealing fabric of the backpack": para. 67.

[30] How to characterize the subject matter of an alleged search was addressed by the Court most recently in *Gomboc*. While the Court was divided on other matters, it was unanimous about the framework that must be applied in considering the subject matter of a "search". The Court considered the strength of the inference between data derived from a digital recording ammeter (DRA) and particular activities going on in a residence in assessing whether use of the DRA constituted a search. Abella J. (Binnie and LeBel JJ. concurring) took into account "the strong and reliable inference that can be made from the patterns of electricity consumption . . . as to the presence within the home of one particular activity": para. 81 (emphasis added). The Chief Justice and Fish J. referred to the fact that the DRA data "sheds light on private activities within the home": para. 119. Deschamps J. (Charron, Rothstein and Cromwell JJ. concurring) spoke in terms of the extent to which the DRA data was revealing of activities in the home: para. 38.

[31] Thus, it is clear that the tendency of information sought to support inferences in relation to other personal information must be taken into account in characterizing the subject matter of the search. The correct approach was neatly summarized by Doherty J.A. in *Ward*, at para. 65. When identifying the subject matter of an alleged search, the court must not do so "narrowly in terms of the physical acts involved or the physical space invaded,

bien que les « informations » recueillies par le chien renifleur tenaient simplement de l'odeur qu'il y avait dans l'air à l'extérieur du sac, la réaction du chien a permis aux policiers de faire une forte inférence quant au contenu du sac. Comme l'a indiqué le juge Binnie dans l'arrêt *A.M.* (qui portait sur l'intervention d'un chien renifleur pour vérifier le sac à dos de l'accusé), « [e]n se servant du chien, le policier a pu "voir" à travers le tissu opaque du sac à dos » : par. 67.

[30] La façon de définir l'objet d'une fouille ou d'une perquisition contestée a été examinée pour la dernière fois par la Cour dans l'arrêt *Gomboc*. Bien qu'elle fût divisée sur d'autres questions, elle s'est prononcée à l'unanimité sur le cadre d'analyse à appliquer pour déterminer l'objet d'une « fouille ou [d'une] perquisition ». Dans cette affaire, la Cour a examiné la fiabilité des inférences qu'il est possible de tirer à partir des données enregistrées à l'aide d'un ampèremètre numérique muni d'un enregistreur (AN) au sujet d'activités données se déroulant à l'intérieur d'une résidence pour déterminer si l'utilisation de l'ampèremètre constituait une fouille ou une perquisition. La juge Abella (avec l'accord des juges Binnie et LeBel) a tenu compte « de la solidité et de la fiabilité des inférences pouvant être tirées à partir des cycles de consommation d'électricité [. . .] relativement à la tenue d'une activité particulière à une adresse » : par. 81 (je souligne). La Juge en chef et le juge Fish ont affirmé que les données enregistrées par l'AN « éclairent sur les activités privées se déroulant à l'intérieur de la maison » : par. 119. La juge Deschamps (avec l'accord des juges Charron, Rothstein et Cromwell) s'est demandé dans quelle mesure les données enregistrées par l'AN révèlent les activités qui se déroulent à l'intérieur de la maison : par. 38.

[31] Ainsi, il est évident que, pour définir l'objet de la fouille ou de la perquisition, il faut tenir compte de la tendance qui consiste à chercher à obtenir des renseignements pour permettre d'en tirer des inférences au sujet d'autres renseignements qui, eux, sont de nature personnelle. La méthode qu'il convient d'adopter a été clairement résumée par le juge Doherty au par. 65 de l'arrêt *Ward*. Lorsqu'elle est appelée à identifier l'objet

but rather by reference to the nature of the privacy interests potentially compromised by the state action": *ibid.*

[32] Applying this approach to the case at hand, I substantially agree with the conclusion reached by Cameron J.A. in *Trapp* and adopted by Caldwell J.A. in this case. The subject matter of the search was not simply a name and address of someone in a contractual relationship with Shaw. Rather, it was the identity of an Internet subscriber which corresponded to particular Internet usage. As Cameron J.A. put it, at para. 35 of *Trapp*:

> To label information of this kind as mere "subscriber information" or "customer information", or nothing but "name, address, and telephone number information", tends to obscure its true nature. I say this because these characterizations gloss over the significance of an IP address and what such an address, once identified with a particular individual, is capable of revealing about that individual, including the individual's online activity in the home.

[33] Here, the subject matter of the search is the identity of a subscriber whose Internet connection is linked to particular, monitored Internet activity.

(b) *Nature of the Privacy Interest Potentially Compromised by the State Action*

[34] The nature of the privacy interest engaged by the state conduct is another facet of the totality of the circumstances and an important factor in assessing the reasonableness of an expectation of privacy. The Court has previously emphasized an understanding of informational privacy as confidentiality and control of the use of intimate information about oneself. In my view, a somewhat

d'une fouille ou d'une perquisition contestée, une cour ne doit pas adopter une approche [TRADUCTION] « restrictive qui porte sur les actions commises ou sur l'espace envahi, mais plutôt une approche fondée sur la nature des droits en matière de vie privée auxquels l'action de l'État pourrait porter atteinte » : *ibid.*

[32] Si on applique cette méthode en l'espèce, je souscris pour l'essentiel à la conclusion tirée par le juge Cameron dans l'arrêt *Trapp* et adoptée par le juge Caldwell de la Cour d'appel dans la présente affaire. La fouille n'avait pas simplement pour objet le nom et l'adresse d'une personne qui était liée par contrat à Shaw. Il s'agissait plutôt de l'identité d'une abonnée aux services Internet à qui correspondait une utilisation particulière de ces services. Comme l'a affirmé le juge Cameron au par. 35 de l'arrêt *Trapp* :

> [TRADUCTION] Qualifier de tels renseignements de simples « renseignements relatifs à l'abonné » ou de « renseignements sur le client » ou encore de rien d'autre que de « renseignements sur le nom, l'adresse et le numéro de téléphone » tend à occulter leur véritable nature. Je tiens à le préciser, parce que ces qualifications font abstraction de l'importance d'une adresse IP et des renseignements que cette adresse, une fois liée à une personne en particulier, peut révéler sur cette personne, notamment les activités en ligne que celle-ci pratique dans sa résidence.

[33] En l'espèce, la fouille avait pour objet l'identité de l'abonnée dont la connexion à Internet correspondait à une activité informatique particulière sous surveillance.

b) *La nature de l'intérêt en matière de vie privée auquel l'action de l'État pourrait porter atteinte*

[34] La nature de l'intérêt en matière de vie privée visé par l'action de l'État constitue un autre aspect de l'ensemble des circonstances et un facteur important pour apprécier le caractère raisonnable d'une attente en matière de vie privée. Dans le passé, la Cour a souligné l'importance, lorsqu'il est question de renseignements personnels, d'interpréter le droit à la vie privée de telle sorte qu'il

broader understanding of the privacy interest at stake in this case is required to account for the role that anonymity plays in protecting privacy interests online.

[35] Privacy is admittedly a "broad and somewhat evanescent concept": *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 67. Scholars have noted the theoretical disarray of the subject and the lack of consensus apparent about its nature and limits: see, e.g., C. D. L. Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011), 37 *Queen's L.J.* 167, at pp. 176-77. Notwithstanding these challenges, the Court has described three broad types of privacy interests — territorial, personal, and informational — which, while often overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations: see, e.g., *Dyment*, at pp. 428-29; *Tessling*, at paras. 21-24. These broad descriptions of types of privacy interests are analytical tools, not strict or mutually-exclusive categories.

[36] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J. in *Patrick*, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes: *Patrick*, at para. 32.

protège tant la confidentialité que le contrôle des renseignements en question. À mon avis, il est nécessaire en l'espèce d'élargir quelque peu cette interprétation de manière à tenir compte du rôle que joue l'anonymat dans la protection des droits en matière de vie privée sur Internet.

[35] Certes, la vie privée est « une notion générale quelque peu évanescente » : *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 67. Certains auteurs ont souligné la confusion à ce sujet, sur le plan théorique, et l'absence de consensus apparent quant à ses nature et limites : voir, p. ex., C. D. L. Hunt, « Conceptualizing Privacy and Elucidating its Importance : Foundational Considerations for the Development of Canada's Fledgling Privacy Tort » (2011), 37 *Queen's L.J.* 167, p. 176-177. Nonobstant ces enjeux, la Cour a décrit trois grandes catégories de droits en matière de vie privée, qui regroupent notamment les aspects qui ont trait aux lieux, à la personne et à l'information, et qui, malgré leur chevauchement fréquent, ont permis de préciser la nature des droits en matière de vie privée en jeu dans des situations particulières : voir, p. ex., *Dyment*, p. 428-429; *Tessling*, par. 21-24. Il s'agit d'outils d'analyse, et non de catégories strictes ou mutuellement exclusives.

[36] La nature de l'intérêt en matière de vie privée ne dépend pas de la question de savoir si, dans un cas particulier, le droit à la vie privée masque une activité légale ou une activité illégale. En effet, l'analyse porte sur le caractère privé du lieu ou de l'objet visé par la fouille ou la perquisition ainsi que sur les conséquences de cette dernière pour la personne qui en fait l'objet, et non sur la nature légale ou illégale de la chose recherchée. Pour reprendre les propos du juge Binnie dans l'arrêt *Patrick*, il ne s'agit pas de savoir si l'appelant possédait un droit légitime au respect de la vie privée à l'égard de la dissimulation de son utilisation d'Internet dans le but d'accéder à de la pornographie juvénile, mais plutôt de savoir si, d'une manière générale, les citoyens ont droit au respect de leur vie privée à l'égard des renseignements concernant les abonnés de services Internet relativement aux ordinateurs qu'ils utilisent dans leur domicile à des fins privées : *Patrick*, par. 32.

[37] We are concerned here primarily with informational privacy. In addition, because the computer identified and in a sense monitored by the police was in Mr. Spencer's residence, there is an element of territorial privacy in issue as well. However, in this context, the location where the activity occurs is secondary to the nature of the activity itself. Internet users do not expect their online anonymity to cease when they access the Internet outside their homes, via smartphones, or portable devices. Therefore, here as in *Patrick*, at para. 45, the fact that a home was involved is not a controlling factor but is nonetheless part of the totality of the circumstances: see, e.g., *Ward*, at para. 90.

[38] To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.

[39] Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician: see, e.g., *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149.

[40] Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7, cited in *Tessling*, at para. 23. La Forest J. made this point in *Dyment*. The understanding of informational privacy as control "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (*Dyment*, at p. 429, quoting from *Privacy and Computers*, the Report of the Task Force established by the Department of

[37] En l'espèce, nous nous intéressons principalement au caractère privé des renseignements personnels. En outre, puisque l'ordinateur repéré et, en quelque sorte, surveillé par la police se trouvait dans la résidence de M. Spencer, un aspect du droit à la vie privée lié aux lieux est aussi en jeu. Dans le présent contexte, le lieu de l'activité est toutefois accessoire à la nature de l'activité elle-même. En effet, les internautes ne s'attendent pas à perdre leur anonymat en ligne lorsqu'ils accèdent à Internet ailleurs que chez eux au moyen d'un téléphone intelligent ou d'un appareil portatif. En l'espèce, tout comme dans l'arrêt *Patrick*, par. 45, le fait qu'une résidence soit en cause ne constitue donc pas un facteur déterminant, mais fait néanmoins partie de l'ensemble des circonstances : voir, p. ex., *Ward*, par. 90.

[38] Pour revenir à la question du droit à la vie privée en ce qui a trait aux renseignements personnels, j'estime qu'il englobe au moins trois facettes qui se chevauchent, mais qui se distinguent sur le plan conceptuel. Il s'agit de la confidentialité, du contrôle et de l'anonymat.

[39] Le caractère privé des renseignements personnels est souvent assimilé à la confidentialité. Par exemple, le patient s'attend raisonnablement à ce que ses renseignements d'ordre médical demeurent confidentiels : voir, p. ex., *McInerney c. MacDonald*, [1992] 2 R.C.S. 138, p. 149.

[40] Or, le droit à la vie privée comprend également la notion connexe, mais plus large, de contrôle sur l'accès à l'information et sur l'utilisation des renseignements, c'est-à-dire [TRADUCTION] « le droit revendiqué par des particuliers, des groupes ou des institutions de déterminer eux-mêmes à quel moment les renseignements les concernant sont communiqués, de quelle manière et dans quelle mesure » : A. F. Westin, *Privacy and Freedom* (1970), p. 7, cité dans *Tessling*, par. 23. Le juge La Forest a d'ailleurs souligné ce point dans l'arrêt *Dyment* en affirmant que la facette du droit à la vie privée en ce qui a trait aux renseignements personnels qui porte sur le contrôle « découle du postulat selon lequel l'information de caractère

Communications/Department of Justice (1972), at p. 13). Even though the information will be communicated and cannot be thought of as secret or confidential, "situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected" (pp. 429-30); see also *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46.

[41] There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s. 8 must include this understanding of privacy.

[42] The notion of privacy as anonymity is not novel. It appears in a wide array of contexts ranging from anonymous surveys to the protection of police informant identities. A person responding to a survey readily agrees to provide what may well be highly personal information. A police informant provides information about the commission of a crime. The information itself is not private — it is communicated precisely so that it will be communicated to others. But the information is communicated on the basis that it will not be identified with the person providing it. Consider situations in which the police want to obtain the list of names that correspond to the identification numbers on individual survey results or in which the defence in a criminal case wants to obtain the identity of the informant who has provided information that has been disclosed to the defence. The privacy interest at stake in these examples is not simply the individual's name, but the link between the identified individual and the personal information provided anonymously. As the intervener the Canadian Civil Liberties Association urged in its submissions,

personnel est propre à l'intéressé, qui est libre de la communiquer ou de la taire comme il l'entend » (*Dyment*, p. 429, citant *L'ordinateur et la vie privée*, le Rapport du groupe d'étude établi conjointement par le ministère des Communications et le ministère de la Justice (1972), p. 13). Même si les renseignements seront divulgués et qu'ils ne peuvent être considérés comme confidentiels, « les cas abondent où on se doit de protéger les attentes raisonnables de l'individu que ces renseignements seront gardés confidentiellement par ceux à qui ils sont divulgués, et qu'ils ne seront utilisés que pour les fins pour lesquelles ils ont été divulgués » (p. 429-430); voir également *R. c. Duarte*, [1990] 1 R.C.S. 30, p. 46.

[41] Il existe aussi une troisième conception de l'aspect informationnel du droit à la vie privée qui revêt une importance particulière dans le contexte de l'utilisation d'Internet. Il s'agit de l'anonymat. À mon avis, le droit à la vie privée que garantirait l'art. 8 doit inclure cette conception de la vie privée.

[42] L'élément « anonymat » de la vie privée n'est pas nouveau. Il est présent dans un large éventail de contextes allant de sondages anonymes à la protection de l'identité des indicateurs de police. La personne qui répond à un sondage accepte volontiers de fournir ce qui peut fort bien être des renseignements de nature très personnelle. L'indicateur de police fournit des renseignements sur la perpétration d'un crime. Les renseignements en tant que tel ne sont pas privés — leur communication vise expressément la divulgation à d'autres personnes. Cela dit, cette communication tient compte du fait que l'identité de la personne qui fournit les renseignements demeurera confidentielle. Prenons, par exemple, des cas où la police veut obtenir la liste des noms correspondant aux numéros d'identification relativement aux résultats d'un sondage ou des cas où la partie défenderesse dans une affaire criminelle veut obtenir l'identité de l'indicateur ayant fourni les renseignements qui lui ont été communiqués. L'intérêt en matière de vie privée qui est en jeu dans ces exemples ne vise pas uniquement le nom d'une personne, mais

"maintaining anonymity can be integral to ensuring privacy": factum, at para. 7.

[43] Westin identifies anonymity as one of the basic states of privacy. Anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance: pp. 31-32; see A. Slane and L. M. Austin, "What's In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations" (2011), 57 *Crim. L.Q.* 486, at p. 501. The Court's decision in *R. v. Wise*, [1992] 1 S.C.R. 527, provides an example of privacy in a public place. The Court held that the ubiquitous monitoring of a vehicle's whereabouts on public highways amounted to a violation of the suspect's reasonable expectation of privacy. It could of course have been argued that the electronic device was simply a convenient way of keeping track of where the suspect was driving his car, something that he was doing in public for all to see. But the Court did not take that approach.

[44] La Forest J. (who, while dissenting on the issue of exclusion of the evidence under s. 24(2), concurred with respect to the existence of a reasonable expectation of privacy), explained that "[i]n a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the 'situational landscape'": p. 558 (emphasis added), quoting M. Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance" (1988), 39 *Syracuse L. Rev.* 647, at p. 706. The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a

aussi le lien entre la personne désignée et les renseignements personnels fournis de façon anonyme. Comme l'a fait valoir l'Association canadienne des libertés civiles, intervenante en l'espèce, dans ses observations, [TRADUCTION] « le maintien de l'anonymat peut être essentiel pour garantir la protection de la vie privée » : mémoire, par. 7.

[43] Le professeur Westin présente l'anonymat comme une des facettes fondamentales de la vie privée. Selon lui, il permet aux personnes d'avoir des activités publiques tout en préservant la confidentialité de leur identité et en se protégeant contre la surveillance : p. 31-32; voir A. Slane et L. M. Austin, « What's In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations » (2011), 57 *Crim. L.Q.* 486, p. 501. L'arrêt *R. c. Wise*, [1992] 1 R.C.S. 527, donne un exemple du droit à la vie privée dans un endroit public. Dans cette affaire, la Cour a statué que la surveillance omniprésente des déplacements d'un véhicule sur la voie publique déjouait les attentes raisonnables du suspect en matière de vie privée. On aurait évidemment pu affirmer que le dispositif électronique ne constituait qu'un moyen pratique de suivre les déplacements en voiture du suspect, qu'il faisait d'ailleurs à la vue de tous. Mais la Cour n'a pas adopté cette approche.

[44] Le juge La Forest (qui, bien que dissident sur la question de l'exclusion de la preuve en application du par. 24(2), a souscrit à l'existence d'une attente raisonnable en matière du respect de la vie privée), a expliqué que, « [s]'il est normal, dans divers contextes publics, d'être observé fortuitement, nous aurions par contre toutes les raisons d'être choqués par des regards insistants. Dans ces activités publiques, nous ne nous attendons pas à être identifiés personnellement et soumis à une surveillance intensive, mais nous cherchons plutôt à passer inaperçus » : p. 558 (je souligne), citant M. Gutterman, « A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance » (1988), 39 *Syracuse L. Rev.* 647, p. 706. Le simple fait qu'une personne quitte l'intimité de sa résidence et pénètre dans un lieu public ne signifie

person may not be able to control who observes him or her in public. Thus, in order to uphold the protection of privacy rights in some contexts, we must recognize anonymity as one conception of privacy: see E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at pp. 325-26; Westin, at p. 32; Gutterman, at p. 706.

[45] Recognizing that anonymity is one conception of informational privacy seems to me to be particularly important in the context of Internet usage. One form of anonymity, as Westin explained, is what is claimed by an individual who wants to present ideas publicly but does not want to be identified as their author: p. 32. Here, Westin, publishing in 1970, anticipates precisely one of the defining characteristics of some types of Internet communication. The communication may be accessible to millions of people but it is not identified with its author.

[46] Moreover, the Internet has exponentially increased both the quality and quantity of information that is stored about Internet users. Browsing logs, for example, may provide detailed information about users' interests. Search engines may gather records of users' search terms. Advertisers may track their users across networks of websites, gathering an overview of their interests and concerns. "Cookies" may be used to track consumer habits and may provide information about the options selected within a website, which web pages were visited before and after the visit to the host website and any other personal information provided: see N. Gleicher, "Neither a Customer Nor a Subscriber Be: Regulating the Release of User Information on the World Wide Web" (2009), 118 *Yale L.J.* 1945, at pp. 1948-49; R. W. Hubbard, P. DeFreitas and S. Magotiaux, "The Internet — Expectations of Privacy in a New Context" (2002), 45 *Crim. L.Q.* 170, at pp. 189-91. The user cannot fully control or even necessarily be aware of who

pas qu'elle renonce à tous ses droits en matière de vie privée, même si, en pratique, il se peut qu'elle ne soit pas en mesure d'exercer un contrôle à l'égard des personnes qui l'observent en public. Par conséquent, pour protéger les droits en matière de vie privée dans certains contextes, il nous faut reconnaître l'anonymat comme une des conceptions de la vie privée : voir E. Paton-Simpson, « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305, p. 325-326; Westin, p. 32; Gutterman, p. 706.

[45] S'agissant de l'utilisation d'Internet, il me semble particulièrement important de reconnaître que l'anonymat s'inscrit parmi les conceptions de l'aspect informationnel du droit à la vie privée. Comme l'explique le professeur Westin, l'anonymat porte entre autres sur le droit revendiqué par une personne qui veut présenter publiquement ses idées sans être identifiée comme leur auteur : p. 32. Le professeur Westin, dont l'ouvrage a été publié en 1970, avait anticipé précisément une des caractéristiques déterminantes de certains types de communication par Internet. En effet, des millions de personnes peuvent avoir accès à une communication qui n'est toutefois pas associée à son auteur.

[46] De plus, Internet a augmenté de façon exponentielle la qualité et la quantité des renseignements stockés concernant les internautes. L'historique de navigation, par exemple, permet d'obtenir des renseignements détaillés sur les intérêts des utilisateurs. Les moteurs de recherche peuvent recueillir des renseignements sur les termes recherchés par les utilisateurs. Les annonceurs peuvent suivre leurs utilisateurs à travers les réseaux de sites Web et obtenir un aperçu de leurs intérêts et de leurs préoccupations. Les fichiers témoins peuvent être utilisés pour suivre les habitudes de consommation et peuvent fournir des renseignements sur les options sélectionnées dans un site Web, sur les pages Web consultées avant et après avoir visité le site d'accueil et tout autre renseignement personnel fourni : voir N. Gleicher, « Neither a Customer Nor a Subscriber Be : Regulating the Release of User Information on the World Wide Web » (2009), 118 *Yale L.J.* 1945, p. 1948-1949; R. W. Hubbard, P. DeFreitas et S. Magotiaux, « The Internet — Expectations of

may observe a pattern of online activity, but by remaining anonymous — by guarding the link between the information and the identity of the person to whom it relates — the user can in large measure be assured that the activity remains private: see Slane and Austin, at pp. 500-3.

[47] In my view, the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person's name, address and telephone number found in the subscriber information. A sniffer dog provides information about the contents of the bag and therefore engages the privacy interests relating to its contents. DRA readings provide information about what is going on inside a home and therefore may engage the privacy interests relating to those activities. Similarly, subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating not simply to the person's name or address but to his or her identity as the source, possessor or user of that information.

[48] Doherty J.A. made this point with his usual insight and clarity in *Ward*. "Personal privacy" he wrote "protects an individual's ability to function on a day-to-day basis within society while enjoying a degree of anonymity that is essential to the individual's personal growth and the flourishing of an open and democratic society": para. 71. He concluded that some degree of anonymity is a feature of much Internet activity and that, "[d]epending on the totality of the circumstances, . . . anonymity may enjoy constitutional protection under s. 8": para. 75. I agree. Thus, anonymity may, depending on the

Privacy in a New Context » (2002), 45 *Crim. L.Q.* 170, p. 189-191. L'utilisateur n'est pas en mesure d'exercer un contrôle total à l'égard de la personne qui peut observer le profil de ses activités en ligne et il n'est pas toujours informé de l'identité de celle-ci. Or, sous le couvert de l'anonymat — en protégeant le lien entre l'information et l'identité de la personne qu'elle concerne —, l'utilisateur peut en grande partie être assuré que ses activités demeurent confidentielles : voir Slane et Austin, p. 500-503.

[47] À mon avis, il faut reconnaître que l'identité d'une personne liée à son utilisation d'Internet donne naissance à un intérêt en matière de vie privée qui a une portée plus grande que celui inhérent à son nom, à son adresse et à son numéro de téléphone qui figurent parmi les renseignements relatifs à l'abonné. Un chien renifleur fournit de l'information sur le contenu d'un sac et met donc en jeu des droits en matière de vie privée relativement à ce contenu. Les enregistrements de l'AN fournissent de l'information sur les activités qui se déroulent à l'intérieur d'une résidence et peuvent donc mettre en jeu des droits en matière de vie privée concernant ces activités. Dans le même ordre d'idées, en établissant un lien entre des renseignements particuliers et une personne identifiable, les renseignements relatifs à l'abonné peuvent compromettre les droits en matière de vie privée de cette personne non seulement parce qu'ils révèlent son nom et son adresse, mais aussi parce qu'ils l'identifient en tant que source, possesseur ou utilisateur des renseignements visés.

[48] Dans *Ward*, le juge Doherty, clair et lucide comme à son habitude, a fourni des explications semblables. [TRADUCTION] « Le droit à la vie privée », a-t-il écrit, « permet à une personne de fonctionner au quotidien dans la société tout en bénéficiant d'un certain degré d'anonymat indispensable à son épanouissement personnel ainsi qu'à l'épanouissement d'une société ouverte et démocratique » : par. 71. Il a conclu qu'un certain degré d'anonymat est propre à beaucoup d'activités exercées sur Internet et que, « [e]u égard à l'ensemble des circonstances, [. . .] l'anonymat peut bénéficier de

totality of the circumstances, be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure.

[49] The intervener the Director of Public Prosecutions raised the concern that recognizing a right to online anonymity would carve out a crime-friendly Internet landscape by impeding the effective investigation and prosecution of online crime. In light of the grave nature of the criminal wrongs that can be committed online, this concern cannot be taken lightly. However, in my view, recognizing that there *may* be a privacy interest in anonymity depending on the circumstances falls short of recognizing any "right" to anonymity and does not threaten the effectiveness of law enforcement in relation to offences committed on the Internet. In this case, for example, it seems clear that the police had ample information to obtain a production order requiring Shaw to release the subscriber information corresponding to the IP address they had obtained.

[50] Applying this framework to the facts of the present case is straightforward. In the circumstances of this case, the police request to link a given IP address to subscriber information was in effect a request to link a specific person (or a limited number of persons in the case of shared Internet services) to specific online activities. This sort of request engages the anonymity aspect of the informational privacy interest by attempting to link the suspect with anonymously undertaken online activities, activities which have been recognized by the Court in other circumstances as engaging significant privacy interests: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 3; *Cole*, at para. 47; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 40-45.

la protection constitutionnelle prévue à l'art. 8 » : par. 75. Je suis d'accord. L'anonymat pourrait donc, compte tenu de l'ensemble des circonstances, servir de fondement au droit à la vie privée visé par la protection constitutionnelle contre les fouilles, les perquisitions et les saisies abusives.

[49] Le directeur des poursuites pénales, intervenant, a fait valoir que la reconnaissance du droit à l'anonymat en ligne transformerait Internet en un endroit favorable aux actes criminels en faisant obstacle aux enquêtes et aux poursuites efficaces des cybercrimes. Compte tenu de la gravité des actes criminels qui peuvent être perpétrés en ligne, cette préoccupation ne peut être prise à la légère. J'estime toutefois que la reconnaissance de la *possibilité* qu'il existe un intérêt en matière de vie privée à l'égard de l'anonymat, selon les circonstances, ne suffit pas pour reconnaître le « droit » à l'anonymat et n'a pas pour effet de menacer l'efficacité des autorités d'application de la loi relativement aux infractions commises sur Internet. En l'espèce, par exemple, il semble évident que la police disposait de renseignements détaillés permettant d'obtenir une ordonnance de communication enjoignant à Shaw de fournir les renseignements sur l'abonnée à qui appartenait l'adresse IP qu'elle avait obtenue.

[50] L'application de ce cadre d'analyse aux faits de la présente affaire est simple. Dans les circonstances de l'espèce, la demande de la police dans le but d'établir un lien entre une adresse IP donnée et les renseignements relatifs à l'abonnée visait en fait à établir un lien entre une personne précise (ou un nombre restreint de personnes dans le cas des services Internet partagés) et des activités en ligne précises. Ce genre de demande porte sur l'aspect informationnel du droit à la vie privée relatif à l'anonymat en cherchant à établir un lien entre le suspect et des activités entreprises en ligne, sous le couvert de l'anonymat, activités qui, comme la Cour l'a reconnu dans d'autres circonstances, mettent en jeu d'importants droits en matière de vie privée : *R. c. Morelli*, 2010 CSC 8, [2010] 1 R.C.S. 253, par. 3; *Cole*, par. 47; *R. c. Vu*, 2013 CSC 60, [2013] 3 R.C.S. 657, par. 40-45.

[51] I conclude therefore that the police request to Shaw for subscriber information corresponding to specifically observed, anonymous Internet activity engages a high level of informational privacy. I agree with Caldwell J.A.'s conclusion on this point:

> . . . a reasonable and informed person concerned about the protection of privacy would expect one's activities on one's own computer used in one's own home would be private. . . . In my judgment, it matters not that the personal attributes of the Disclosed Information pertained to Mr. Spencer's sister because Mr. Spencer was personally and directly exposed to the consequences of the police conduct in this case. As such, the police conduct *prima facie* engaged a personal privacy right of Mr. Spencer and, in this respect, his interest in the privacy of the Disclosed Information was direct and personal. [para. 27]

(c) *Reasonable Expectation of Privacy*

[52] The next question is whether Mr. Spencer's expectation of privacy was reasonable. The trial judge found that there could be no reasonable expectation of privacy in the face of the relevant contractual and statutory provisions (para. 19), a conclusion with which Caldwell J.A. agreed on appeal: para. 42. Cameron J.A., however, was doubtful that the contractual and statutory terms had this effect in the context of this case: para. 98.

[53] In this Court, Mr. Spencer maintains that the contractual and statutory terms did not undermine a reasonable expectation of privacy with respect to the subscriber information. He submits that the contractual provisions do nothing more than suggest that the information will not be provided to police unless required by law and that *PIPEDA*, whose purpose is to protect privacy rights, supports rather than negates the reasonableness of an expectation of privacy in this case. The Crown

[51] Par conséquent, je conclus que la demande de la police auprès de Shaw — visant à obtenir des renseignements relatifs à l'abonnée qui correspondaient à des activités entreprises sur Internet de façon anonyme et observées en particulier — fait intervenir, dans une grande mesure, l'aspect informationnel du droit à la vie privée. Je souscris à la conclusion du juge Caldwell sur ce point :

> [TRADUCTION] . . . une personne raisonnable et bien informée, qui se soucie de la protection de la vie privée, s'attendrait à ce que les activités qu'une personne effectue sur son propre ordinateur et dans son domicile soient confidentielles. [. . .] À mon avis, il n'importe nullement que les renseignements communiqués concernaient la sœur de M. Spencer parce que, en l'espèce, M. Spencer a, personnellement et directement, subi les conséquences des actes de la police. À première vue, ces actes font intervenir le droit de M. Spencer à la vie privée et, de ce fait, son intérêt en matière de vie privée relativement à la confidentialité des renseignements communiqués était direct et personnel. [par. 27]

c) *L'attente raisonnable en matière de respect de la vie privée*

[52] Il s'agit maintenant de savoir si l'attente de M. Spencer en matière de respect de sa vie privée était raisonnable. Selon le juge du procès, il ne pouvait pas y avoir d'attente raisonnable en matière de respect de la vie privée compte tenu des dispositions contractuelles et législatives applicables (par. 19), conclusion à laquelle le juge Caldwell a souscrit en appel : par. 42. Le juge Cameron a affirmé douter pour sa part que les dispositions du contrat et celles de la loi aient cet effet dans le contexte de la présente affaire : par. 98.

[53] Devant la Cour, M. Spencer a fait valoir que les dispositions du contrat et de la loi n'ont pas pour effet de compromettre une attente raisonnable en matière de vie privée relativement aux renseignements relatifs à l'abonné. Selon lui, les dispositions du contrat ne font rien d'autre qu'indiquer qu'il n'y aura pas de communication des renseignements à la police, à moins que cela ne soit requis par la loi, et que la *LPRPDE* — qui vise à protéger les droits en matière de vie privée — tend

disagrees and supports the position taken on this point by Caldwell J.A. in the Court of Appeal.

[54] There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of, whether there is a reasonable expectation of privacy. So, for example in *Gomboc*, Deschamps J. writing for four members of the Court, found that the terms governing the relationship between the electricity provider and its customer were "highly significant" to Mr. Gomboc's reasonable expectation of privacy, but treated it as "one factor amongst many which must be weighed in assessing the totality of the circumstances": paras. 31-32. She also emphasized that when dealing with contracts of adhesion in the context of a consumer relationship, it was necessary to "procee[d] with caution" when determining the impact that such provision would have on the reasonableness of an expectation of privacy: para. 33. The need for caution in this context was pointedly underlined in the dissenting reasons of the Chief Justice and Fish J. in that case: paras. 138-42.

[55] The contractual and statutory frameworks overlap in the present case because the Shaw Joint Terms of Service make reference to *PIPEDA*, and the scope of permitted disclosure under *PIPEDA* turns partly on whether the customer has consented to the disclosure of personal information. I must first set out the details of these schemes before turning to their impact on the reasonable expectations analysis. In doing so, it becomes apparent that the relevant provisions provide little assistance in evaluating the reasonableness of Mr. Spencer's expectation of privacy.

[56] Shaw provides Internet services to its customers under a standard form "Joint Terms of

à confirmer plutôt qu'à nier le caractère raisonnable d'une attente en matière de vie privée en l'espèce. Le ministère public ne souscrit pas à cet argument et appuie la position adoptée sur ce point par le juge Caldwell de la Cour d'appel.

[54] Il ne fait aucun doute que les cadres législatif et contractuel peuvent être pertinents, mais pas nécessairement déterminants, quant à la question de savoir s'il existe une attente raisonnable en matière de vie privée. Dans l'arrêt *Gomboc*, par exemple, s'exprimant au nom de quatre juges de la Cour, la juge Deschamps a conclu que les dispositions régissant les rapports entre le fournisseur d'électricité et son client revêtent une « grande importance » quant à l'attente raisonnable de M. Gomboc en matière de vie privée, mais a considéré qu'il s'agissait d'« un des nombreux facteurs dont il faut tenir compte pour apprécier l'ensemble des circonstances » : par. 31-32. La juge Deschamps a également souligné que, dans le cadre de contrats d'adhésion qui régissent les relations avec les clients, « la prudence est évidemment de mise » lorsqu'il s'agit de juger des conséquences que peuvent avoir les dispositions de ces contrats sur le caractère raisonnable d'une attente en matière de respect de la vie privée : par. 33. Dans leurs motifs dissidents, la Juge en chef et le juge Fish ont mis l'accent sur le besoin de faire preuve de prudence dans ce contexte : par. 138-142.

[55] En l'espèce, les cadres contractuel et législatif se chevauchent parce que les conditions de service de Shaw renvoient à la *LPRPDE* et que la portée de la communication autorisée de renseignements personnels sous le régime de la *LPRPDE* repose en partie sur la question de savoir si le client a donné son consentement à cet égard. Avant d'examiner les conséquences de ces régimes sur l'analyse relative aux attentes raisonnables en matière de vie privée, je dois en préciser les modalités. Lorsque je le fais, il devient clair que les dispositions applicables ne sont guère utiles pour évaluer le caractère raisonnable de l'attente de M. Spencer au respect de sa vie privée.

[56] Shaw fournit des services Internet à ses clients conformément à une entente type relative

Service" agreement. Additional terms and conditions are provided in Shaw's "Acceptable Use Policy" and its "Privacy Policy". The terms of these agreements are posted online on Shaw's website and change from time to time. The investigators sought the subscriber information for the IP address used on August 31, 2007 in their request to Shaw.

aux « Conditions de service » (« *Joint Terms of Service* »). Sa [TRADUCTION] « Politique relative à l'utilisation acceptable » (« *Acceptable Use Policy* ») et sa « Politique sur la protection de la vie privée » (« *Privacy Policy* ») prévoient des modalités et conditions supplémentaires. Les dispositions de ces ententes sont affichées en ligne sur le site Web de Shaw et font périodiquement l'objet de modifications. Les enquêteurs ont demandé à Shaw des renseignements sur l'abonnée à qui appartenait l'adresse IP utilisée le 31 août 2007.

[57] Mr. Spencer was not personally a party to these agreements, as he accessed the Internet through his sister's subscription. It is common practice for multiple users to share a common Internet connection. A reasonable user would be aware that the use of the service would be governed by certain terms and conditions, and those terms and conditions were readily accessible through Shaw's website. This case does not require us to decide whether Mr. Spencer was bound by the terms of the contract with Shaw. Quite apart from contractual liability, the terms on which he gained access to the Internet are a relevant circumstance in assessing the reasonableness of his expectation of privacy. There are three relevant sets of provisions which, taken as a whole, provide a confusing and unclear picture of what Shaw would do when faced with a police request for subscriber information. The Joint Terms of Service at first blush appear to permit broad disclosure because they provide, among other things, that "Shaw may disclose any information as is necessary to . . . satisfy any legal, regulatory or other governmental request". This general provision, however, must be read in light of the more specific provision relating to disclosure of IP addresses and other identifying information in the context of criminal investigations contained in the Acceptable Use Policy, which in turn is subject to the Privacy Policy.

[57] Monsieur Spencer n'était pas lui-même partie à ces ententes, puisqu'il avait accès à Internet au moyen de l'abonnement de sa sœur. Il est d'ailleurs très courant que plusieurs utilisateurs partagent une connexion Internet. L'usager raisonnable sait que l'utilisation du service Internet est régie par certaines modalités, qui étaient d'ailleurs facilement accessibles sur le site Web de Shaw. Nous n'avons toutefois pas à décider en l'espèce si M. Spencer était lié par les modalités du contrat avec Shaw. Cependant, indépendamment de la responsabilité contractuelle, les conditions auxquelles il a pu accéder à Internet sont pertinentes pour évaluer le caractère raisonnable de son attente quant au respect de sa vie privée. Il existe trois séries de dispositions applicables qui, dans leur ensemble, prêtent à confusion quant à la manière de Shaw de répondre à une demande de renseignements relatifs à un abonné adressée par la police. À première vue, les Conditions de service semblent conférer à Shaw un vaste pouvoir discrétionnaire parce qu'elles prévoient, entre autres, qu'[TRADUCTION] « [elle] peut communiquer les renseignements nécessaires pour [. . .] satisfaire à toute demande fondée sur une loi ou un règlement ou toute autre demande du gouvernement ». Il convient toutefois d'interpréter cette disposition générale en fonction de la disposition plus spécifique concernant la communication d'adresses IP et d'autres renseignements personnels dans le contexte d'enquêtes criminelles qui figure dans la Politique relative à l'utilisation acceptable qui, elle-même, est assujettie à la Politique sur la protection de la vie privée.

[58] The Acceptable Use Policy (last updated on June 18, 2007) provides that Shaw is authorized

[58] Suivant la Politique relative à l'utilisation acceptable (dont la mise à jour la plus récente date

to cooperate with law enforcement authorities in the investigation of criminal violations, including supplying information identifying a subscriber *in accordance with its Privacy Policy*. The provision reads as follows:

You hereby authorize Shaw to cooperate with (i) law enforcement authorities in the investigation of suspected criminal violations, and/or (ii) system administrators at other Internet service providers or other network or computing facilities in order to enforce this Agreement. Such cooperation may include Shaw providing the username, IP address, or other identifying information about a subscriber, in accordance with the guidelines set out in Shaw's Privacy Policy. [Emphasis added.]

[59] The Privacy Policy in the record (last updated on November 12, 2008) states that Shaw is committed to protecting personal information, which is defined as information about an identifiable individual. One of the ten principles set out in the Privacy Policy deals with limiting the disclosure of personal information (principle 5). The policy limits the circumstances under which personal information will be disclosed without the customer's knowledge or consent to "exceptional circumstances, as permitted by law". Shaw may disclose information to its partners in order to provide its services and, in such cases, the information is governed by "strict confidentiality standards and policies" to keep the information secure and to ensure it is treated in accordance with *PIPEDA*. The Privacy Policy also provides that "Shaw may disclose Customer's Personal Information to: . . . a third party or parties, where the Customer has given Shaw Consent to such disclosure or if disclosure is required by law, in accordance with *The Personal Information Protection and Electronic Documents Act*" (emphasis added).

du 18 juin 2007), Shaw est autorisée à collaborer avec les autorités d'application de la loi dans le cadre d'enquêtes sur des infractions criminelles, notamment en fournissant des renseignements personnels sur un abonné, *conformément à sa Politique sur la protection de la vie privée*. Cette disposition est ainsi libellée :

[TRADUCTION] Par la présente, vous autorisez Shaw à collaborer avec (i) les autorités d'application de la loi dans le cadre d'enquêtes sur des infractions criminelles présumées, et avec (ii) les administrateurs du système d'autres fournisseurs de services Internet ou d'autres réseaux ou installations informatiques afin de faire appliquer la présente entente. Cette collaboration peut comprendre la communication du nom d'utilisateur, de l'adresse IP ou d'autres renseignements personnels concernant un abonné, conformément aux lignes directrices énoncées dans sa Politique sur la protection de la vie privée. [Je souligne.]

[59] Suivant la Politique sur la protection de la vie privée qui figure au dossier (dont la mise à jour la plus récente date du 12 novembre 2008), Shaw s'engage à protéger les renseignements personnels, définis comme des renseignements concernant un individu identifiable. Un des dix principes énoncés dans la Politique sur la protection de la vie privée a pour effet de restreindre la communication de renseignements personnels (principe n^{o} 5). Cette politique limite les circonstances dans lesquelles les renseignements personnels seront communiqués à l'insu du client ou sans son consentement à des [TRADUCTION] « circonstances exceptionnelles, conformément à la loi ». Shaw peut communiquer des renseignements à ses partenaires afin de fournir ses services, et, dans de tels cas, ces renseignements sont régis par des « normes et politiques strictes en matière de confidentialité » pour assurer leur sécurité et pour veiller à ce qu'ils soient traités conformément à la *LPRPDE*. La Politique sur la protection de la vie privée prévoit également que « Shaw peut communiquer des renseignements personnels concernant un client : [. . .] à une partie ou à plusieurs tierces parties lorsque le client visé a donné son consentement à cet égard ou lorsque la communication des renseignements est exigée par la loi, conformément à la *Loi sur la protection des renseignements personnels et les documents électroniques* » (je souligne).

[60] Whether or not disclosure of personal information by Shaw is "permitted" or "required by law" in turn depends on an analysis of the applicable statutory framework. The contractual provisions, read as a whole, are confusing and equivocal in terms of their impact on a user's reasonable expectation of privacy in relation to police initiated requests for subscriber information. The statutory framework provided by *PIPEDA* is not much more illuminating.

[61] Shaw's collection, use, and disclosure of the personal information of its subscribers is subject to *PIPEDA*, which protects personal information held by organizations engaged in commercial activities from being disclosed without the knowledge or consent of the person to whom the information relates: Sch. 1, clause 4.3. Section 7 contains several exceptions to this general rule and permits organizations to disclose personal information without consent. The exception relied on in this case is s. 7(3)(*c.*1)(ii). It permits disclosure to a government institution that has requested the disclosure for the purpose of law enforcement and has stated its "lawful authority" for the request. The provisions of *PIPEDA* are not of much help in determining whether there is a reasonable expectation of privacy in this case. They lead us in a circle.

[62] Section 7(3)(*c.*1)(ii) allows for disclosure without consent to a government institution where that institution has identified its *lawful authority* to obtain the information. But the issue is whether there was such lawful authority which in turn depends in part on whether there was a reasonable expectation of privacy with respect to the subscriber information. *PIPEDA* thus cannot be used as a factor to weigh against the existence of a reasonable expectation of privacy since the

[60] Ainsi, la réponse à la question de savoir si la communication des renseignements personnels par Shaw est « autorisée » ou « exigée par la loi » repose sur l'analyse du cadre législatif applicable. Les dispositions du contrat, lues conjointement, sont équivoques et prêtent à confusion quant à leurs conséquences sur l'attente raisonnable de l'utilisateur en matière de vie privée relativement aux demandes de la police visant à obtenir des renseignements relatifs à l'abonné. Le cadre législatif prévu par la *LPRPDE* ne permet pas d'en apprendre davantage.

[61] La collecte, l'utilisation et la communication par Shaw de renseignements personnels concernant ses abonnés sont assujetties à la *LPRPDE*, laquelle protège les renseignements personnels que possèdent les organisations qui exercent des activités commerciales contre leur communication à l'insu de l'intéressé et sans son consentement : ann. 1, art. 4.3. L'article 7 prévoit plusieurs exceptions à cette règle générale, permettant ainsi aux organisations de communiquer des renseignements personnels sans le consentement de l'intéressé. L'exception invoquée en l'espèce figure au sous-al. 7(3)*c.*1)(ii), qui autorise la communication de renseignements à une institution gouvernementale qui a demandé à obtenir les renseignements visés aux fins du contrôle d'application du droit en mentionnant la « source de l'autorité légitime » étayant la demande. En l'espèce, les dispositions de la *LPRPDE* ne sont pas très utiles pour déterminer s'il existe une attente raisonnable en matière de vie privée puisqu'après les avoir examinées, on se retrouve au point de départ.

[62] Le sous-alinéa 7(3)*c.*1)(ii) autorise la communication de renseignements, sans le consentement de l'intéressé, faite à une institution gouvernementale lorsque cette dernière mentionne la *source de l'autorité légitime* étayant son droit à obtenir les renseignements demandés. Il s'agit toutefois de savoir s'il existe une telle source d'autorité légitime, question dont la réponse dépend, en partie, de l'existence d'une attente raisonnable en matière de vie privée à l'égard des renseignements concernant

proper interpretation of the relevant provision itself depends on whether such a reasonable expectation of privacy exists. Given that the purpose of *PIPEDA* is to establish rules governing, among other things, disclosure "of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information" (s. 3), it would be reasonable for an Internet user to expect that a simple request by police would not trigger an obligation to disclose personal information or defeat *PIPEDA*'s general prohibition on the disclosure of personal information without consent.

[63] I am aware that I have reached a different result from that reached in similar circumstances by the Ontario Court of Appeal in *Ward*, where the court held that the provisions of *PIPEDA* were a factor which weighed against finding a reasonable expectation of privacy in subscriber information. This conclusion was based on two main considerations. The first was that an ISP has a legitimate interest in assisting in law enforcement relating to crimes committed using its services: para. 99. The second was the grave nature of child pornography offences, which made it reasonable to expect that an ISP would cooperate with a police investigation: paras. 102-3. While these considerations are certainly relevant from a policy perspective, they cannot override the clear statutory language of s. 7(3)(*c.*1)(ii) of *PIPEDA*, which permits disclosure only if a request is made by a government institution with "lawful authority" to request the disclosure. It is reasonable to expect that an organization bound by *PIPEDA* will respect its statutory obligations with respect to personal information. The Court of Appeal in *Ward* held that s. 7(3)(*c.*1)(ii) must be read in light of s. 5(3), which states that "[a]n organization may collect, use or disclose personal information only for purposes

l'abonné. La *LPRPDE* ne peut donc être considérée comme un des facteurs défavorables à l'existence d'une attente raisonnable en matière de vie privée puisque l'interprétation juste de la disposition applicable dépend elle-même de l'existence d'une telle attente raisonnable en matière de vie privée. Puisque la *LPRPDE* a pour objet de fixer des règles régissant, entre autres, la communication de « renseignements personnels d'une manière qui tient compte du droit des individus à la vie privée à l'égard des renseignements personnels qui les concernent » (art. 3), il serait raisonnable que l'internaute s'attende à ce qu'une simple demande faite par la police n'entraîne pas l'obligation de communiquer les renseignements personnels en question ou qu'elle n'écarte pas l'interdiction générale prévue par la *LPRPDE* quant à la communication de renseignements personnels sans le consentement de l'intéressé.

[63] Certes, je suis arrivé à une conclusion différente que celle formulée, dans des circonstances semblables, dans l'arrêt *Ward*, où la Cour d'appel de l'Ontario a statué que les dispositions de la *LPRPDE* constituaient un facteur qui pesait contre la reconnaissance de l'existence d'une attente raisonnable en matière de vie privée à l'égard des renseignements concernant l'abonné. Cette conclusion reposait sur deux considérations principales. Premièrement, le fait que le FSI a un intérêt légitime à collaborer avec les autorités d'application de la loi relativement à des crimes commis lors de l'utilisation de ses services : par. 99. Deuxièmement, la gravité des infractions de pornographie juvénile, compte tenu de laquelle il était raisonnable de s'attendre à ce que le FSI collabore avec la police dans le cadre d'une enquête : par. 102-103. Bien qu'elles soient certainement pertinentes sur le plan des principes, ces considérations ne sauraient avoir priorité sur le libellé clair du sous-al. 7(3)*c.*1)(ii) de la *LPRPDE*, qui n'autorise la communication de renseignements que lorsqu'une institution gouvernementale mentionne la « source de l'autorité légitime » étayant sa demande. En effet, il est raisonnable de s'attendre à ce qu'une organisation assujettie à la *LPRPDE* respecte les

that a reasonable person would consider are appropriate in the circumstances". This rule of "reasonable disclosure" was used as a basis to invoke considerations such as allowing ISPs to cooperate with the police and preventing serious crimes in the interpretation of *PIPEDA*. Section 5(3) is a guiding principle that underpins the interpretation of the various provisions of *PIPEDA*. It does not allow for a departure from the clear requirement that a requesting government institution possess "lawful authority" and so does not resolve the essential circularity of using s. 7(3)(*c.*1)(ii) as a factor in determining whether a reasonable expectation of privacy exists.

obligations que celle-ci lui impose à l'égard des renseignements personnels. La Cour d'appel a statué dans l'arrêt *Ward* qu'il convient d'interpréter le sous-al. 7(3)*c.*1)(ii) en tenant compte du par. 5(3), suivant lequel « [l']organisation ne peut recueillir, utiliser ou communiquer des renseignements personnels qu'à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances ». Cette règle de la « communication raisonnable » a permis de prendre en considération, pour interpréter la *LPRPDE*, des facteurs comme l'autorisation des FSI à collaborer avec la police et la lutte contre les crimes graves. Le paragraphe 5(3) énonce un principe directeur sur lequel repose l'interprétation des diverses dispositions de la *LPRPDE*. Il ne permet pas d'écarter l'exigence claire concernant la « source de l'autorité légitime » qui étaye la demande d'une institution gouvernementale et ne règle donc pas l'impasse que crée le sous-al. 7(3)*c.*1)(ii) pour juger de l'existence ou non d'une attente raisonnable en matière de vie privée.

[64] I also note with respect to an ISP's legitimate interest in preventing crimes committed through its services that entirely different considerations may apply where an ISP itself detects illegal activity and of its own motion wishes to report this activity to the police. Such a situation falls under a separate, broader exemption in *PIPEDA*, namely s. 7(3)(*d*). The investigation in this case was begun as a police investigation and the disclosure of the subscriber information arose out of the request letter sent by the police to Shaw.

[64] Je fais en outre remarquer, au sujet de l'intérêt légitime du FSI dans la lutte contre les crimes commis en utilisant ses services, que des considérations tout à fait différentes peuvent s'appliquer si le FSI détecte lui-même une activité illégale et, de sa propre initiative, souhaite la signaler à la police. Une telle situation tombe sous le coup d'une exemption distincte, plus large, prévue par la *LPRPDE*, à savoir celle énoncée à l'al. 7(3)*d*). En l'espèce, l'enquête a été commencée par la police et la communication des renseignements relatifs à l'abonnée a été faite par suite de la lettre de demande envoyée à Shaw par la police.

[65] The overall impression created by these terms is that disclosure at the request of the police would be made only where required or permitted by law. Such disclosure is only permitted by *PIPEDA* in accordance with the exception in s. 7, which in this case would require the requesting police to have "lawful authority" to request the disclosure. For reasons that I will set out in the next section, this request had no lawful authority in the sense that while the police could ask, they had no authority to compel compliance with that request. I conclude

[65] De ces modalités se dégage l'impression générale que la communication faite à la demande de la police n'aurait lieu que lorsqu'elle est exigée ou autorisée par la loi. Or, la *LPRPDE* n'autorise une telle communication que suivant l'exception prévue à l'art. 7. Il faudrait donc que la police qui formule la demande de communication détienne « l'autorité légitime » à cet égard. Pour les motifs que j'énoncerai dans la prochaine partie, la demande en cause n'était pas étayée par la source de l'autorité légitime de la police, en ce sens que

that, if anything, the contractual provisions in this case support the existence of a reasonable expectation of privacy, since the Privacy Policy narrowly circumscribes Shaw's right to disclose the personal information of subscribers.

[66] In my view, in the totality of the circumstances of this case, there is a reasonable expectation of privacy in the subscriber information. The disclosure of this information will often amount to the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous. A request by a police officer that an ISP voluntarily disclose such information amounts to a search.

[67] The intervener the Attorney General of Alberta raised a concern that if the police were not permitted to request disclosure of subscriber information, then other routine inquiries that might reveal sensitive information about a suspect would also be prohibited, and this would unduly impede the investigation of crimes. For example, when the police interview the victim of a crime, core biographical details of a suspect's lifestyle might be revealed. I do not agree that this result follows from the principles set out in these reasons. Where a police officer requests disclosure of information relating to a suspect from a third party, whether there is a search depends on whether, in light of the totality of the circumstances, the suspect has a reasonable expectation of privacy in that information: *Plant*, at p. 293; *Gomboc*, at paras. 27-30, *per* Deschamps J. In *Duarte*, the Court distinguished between a person repeating a conversation with a suspect to the police and the police procuring an audio recording of the same conversation. The Court held that the danger is "not the risk that someone will repeat our words but the

cette dernière pouvait formuler une demande, mais ne détenait pas l'autorité pour obliger le fournisseur à s'y conformer. Je conclus que les dispositions du contrat en l'espèce justifient l'existence d'une attente raisonnable en matière de vie privée, si un quelconque effet doit être donné à ces termes en cette matière, puisque la Politique sur la protection de la vie privée a pour effet de limiter strictement le droit de Shaw de communiquer des renseignements personnels concernant ses abonnés.

[66] À mon avis, compte tenu de l'ensemble des circonstances de la présente affaire, il existe une attente raisonnable en matière de vie privée à l'égard des renseignements relatifs à l'abonnée. La communication de ces renseignements permettra souvent d'identifier l'utilisateur qui mène des activités intimes ou confidentielles en ligne en tenant normalement pour acquis que ces activités demeurent anonymes. La demande faite par un policier visant la communication volontaire par le FSI de renseignements de cette nature constitue donc une fouille.

[67] Le procureur général de l'Alberta, intervenant en l'espèce, a dit craindre que, si la police n'était pas autorisée à demander la communication de renseignements relatifs à un abonné donné, d'autres demandes courantes pouvant révéler des renseignements confidentiels sur un suspect risquent d'être également interdites, ce qui aurait pour effet d'entraver indûment l'enquête sur des crimes. Par exemple, lorsque les policiers interrogent la victime d'un crime, des renseignements biographiques d'ordre personnel concernant le mode de vie du suspect pourraient être révélés. Je ne suis pas d'accord pour dire que cette conclusion découle des principes énoncés dans les présents motifs. Pour déterminer si la demande faite par un policier à un tiers de communiquer des renseignements concernant un suspect constitue une fouille ou une perquisition, il faut se demander si, compte tenu de l'ensemble des circonstances, le suspect a une attente raisonnable en matière de vie privée à l'égard de ces renseignements : *Plant*, p. 293; *Gomboc*, par. 27-30, la juge Deschamps. Dans l'arrêt *Duarte*, la Cour a établi une distinction entre une personne

much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words": at pp. 43-44. Similarly in this case, the police request that the ISP disclose the subscriber information was in effect a request to link Mr. Spencer with precise online activity that had been the subject of monitoring by the police and thus engaged a more significant privacy interest than a simple question posed by the police in the course of an investigation.

B. *Was the Search Lawful?*

[68] A warrantless search, such as the one that occurred in this case, is presumptively unreasonable: *R. v. Collins*, [1987] 1 S.C.R. 265. The Crown bears the burden of rebutting this presumption. A search will be reasonable if (a) it was authorized by law, (b) the law itself was reasonable, and (c) the search was carried out in a reasonable manner: p. 278. Mr. Spencer has not challenged the constitutionality of the laws that purportedly authorized the search. He did raise concerns about the reasonableness of the manner, but in my view, these are groundless. Accordingly, we need only consider whether the search was authorized by law.

[69] The Crown supports the conclusions of Caldwell and Cameron JJ.A. in the Court of Appeal that any search was lawful, relying on the combined effect of s. 487.014 of the *Criminal Code* and s. 7(3)(*c*.1)(ii) of *PIPEDA*. I respectfully do not agree.

[70] Section 487.014(1) of the *Criminal Code* provides that a peace officer does not need a production order "to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from

qui rapporte à la police une conversation avec un suspect et l'enregistrement par la police de la même conversation. Selon la Cour, il s'agit « non plus [du] risque que quelqu'un répète nos propos, mais [du] danger bien plus insidieux qu'il y a à permettre que l'État, à son entière discrétion, enregistre et transmette nos propos » : p. 43-44. De même, dans l'affaire qui nous occupe, la demande par la police que le FSI communique les renseignements relatifs à l'abonnée constituait en fait une demande d'établir un lien entre M. Spencer et des activités précises menées en ligne qui avaient été surveillées par police, et mettait donc en jeu un droit en matière de vie privée beaucoup plus important qu'une simple question formulée lors d'une enquête policière.

B. *La fouille était-elle légitime?*

[68] Une fouille sans mandat, comme celle qui a été effectuée en l'espèce, est présumée abusive : *R. c. Collins*, [1987] 1 R.C.S. 265. Il incombe au ministère public de réfuter cette présomption. Une fouille ne sera pas abusive si a) elle est autorisée par la loi, b) la loi elle-même n'a rien d'abusif, et c) la fouille n'a pas été effectuée d'une manière abusive : p. 278. M. Spencer ne conteste pas la constitutionnalité des lois qui auraient autorisé la fouille. Il a toutefois soulevé des objections quant à la manière, qu'il estime abusive, dont a été effectuée la fouille. À mon avis, ces objections sont mal fondées. Il ne reste donc qu'à examiner si la fouille était autorisée par la loi.

[69] Le ministère public appuie les conclusions tirées par les juges Caldwell et Cameron de la Cour d'appel selon lesquelles la fouille était légitime, compte tenu de l'effet combiné de l'art. 487.014 du *Code criminel* et du sous-al. 7(3)*c*.1)(ii) de la *LPRPDE*. En toute déférence, je ne souscris pas à cette opinion.

[70] Suivant le par. 487.014(1) du *Code criminel*, une ordonnance de communication n'est pas nécessaire pour qu'un agent de la paix « demande à une personne de lui fournir volontairement des documents, données ou renseignements qu'aucune

disclosing". *PIPEDA* prohibits disclosure of the information unless the requirements of the law enforcement provision are met, including that the government institution discloses a lawful authority *to obtain*, not simply to ask for the information: s. 7(3)(*c.*1)(ii). On the Crown's reading of these provisions, *PIPEDA*'s protections become virtually meaningless in the face of a police request for personal information: the "lawful authority" is a simple request without power to compel and, because there was a simple request, the institution is no longer prohibited by law from disclosing the information.

règle de droit n'interdit à celle-ci de communiquer ». La *LPRPDE* interdit la communication de renseignements à moins que les autorités d'application de la loi ne respectent les exigences les concernant, notamment l'exigence selon laquelle une institution gouvernementale doit mentionner la source de l'autorité légitime étayant son droit *d'obtenir* les renseignements, et non seulement de les demander : sous-al. 7(3)*c.*1)(ii). Selon l'interprétation que donne le ministère public de ces dispositions, une demande de renseignements personnels faite par la police rendrait pratiquement sans effet les protections prévues par la *LPRPDE* : l'exigence relative à la « source de l'autorité légitime » ne constitue qu'une simple demande sans aucun pouvoir de contrainte, mais, par suite d'une simple demande, la communication de renseignements par l'institution en question n'est plus prohibée par la loi.

[71] "Lawful authority" in s. 7(3)(*c.*1)(ii) of *PIPEDA* must be contrasted with s. 7(3)(*c*), which provides that personal information may be disclosed without consent where "required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records". The reference to "lawful authority" in s. 7(3)(*c.*1)(ii) must mean something other than a "subpoena or [search] warrant". "Lawful authority" may include several things. It may refer to the common law authority of the police to ask questions relating to matters that are not subject to a reasonable expectation of privacy. It may refer to the authority of police to conduct warrantless searches under exigent circumstances or where authorized by a reasonable law: *Collins*. As the intervener the Privacy Commissioner of Canada submitted, interpreting "lawful authority" as requiring more than a bare request by law enforcement gives this term a meaningful role to play in the context of s. 7(3) and should be preferred over alternative meanings that do not do so. In short, I agree with the Ontario Court of Appeal in *Ward* on this point that neither s. 487.014(1) of the *Criminal Code*, nor *PIPEDA*

[71] Il faut distinguer la « source de l'autorité légitime » à laquelle réfère le sous-al. 7(3)*c.*1)(ii) de la *LPRPDE* et l'al. 7(3)*c*), selon lequel la communication des renseignements personnels peut être faite sans le consentement de l'intéressé lorsqu'« elle est exigée par assignation, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de documents ». Le renvoi à la « source de l'autorité légitime » au sous-al. 7(3)*c.*1)(ii) doit viser autre chose qu'une « assignation » ou un « mandat » de perquisition. La « source de l'autorité légitime » peut avoir plusieurs sens. Cette notion peut désigner le pouvoir conféré par la common law aux policiers de poser des questions portant sur des éléments qui ne font pas l'objet d'une attente raisonnable en matière de vie privée. Elle peut renvoyer au pouvoir de la police d'effectuer une fouille ou une perquisition sans mandat dans des circonstances contraignantes ou dans des cas où une loi qui n'a rien d'abusif le permet : *Collins*. Comme le fait valoir la commissaire à la protection de la vie privée du Canada, intervenante en l'espèce, si on tient pour acquis que la « source de l'autorité légitime »

creates any police search and seizure powers: para. 46.

[72] I recognize that this conclusion differs from that of the Saskatchewan Court of Appeal in *Trapp*, at para. 66, and the British Columbia Supreme Court in *R. v. McNeice*, 2010 BCSC 1544 (CanLII), at para. 43. The Court of Appeal in *Trapp* read s. 487.014(1) together with s. 29(2)(g) of *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, an analogous provision to s. 7(3)(*c.*1)(ii) of *PIPEDA*, although one from which the "lawful authority" requirement is absent. The court held that s. 487.014(1) gave the police a power to make any inquiries that were not otherwise prohibited by law. The court in *McNeice* took the same approach, although that case concerned s. 7(3)(*c.*1)(ii) of *PIPEDA*, the same provision at issue in this case.

[73] With respect, I cannot accept that this conclusion applies to s. 7(3)(*c.*1)(ii) of *PIPEDA*. Section 487.014(1) is a declaratory provision that confirms the existing common law powers of police officers to make enquiries, as indicated by the fact that the section begins with the phrase "[f]or greater certainty": see *Ward*, at para. 49. *PIPEDA* is a statute whose purpose, as set out in s. 3, is to increase the protection of personal information. Since in the circumstances of this case the police do not have the power to conduct a search for subscriber information in the absence of exigent circumstances or a reasonable law, I do not see how they could gain a new search power through the combination of a declaratory provision and

nécessite davantage qu'une simple demande faite par les autorités d'application de la loi, cette notion arrive à jouer un rôle significatif dans le contexte du par. 7(3), au détriment d'autres interprétations qui n'ont pas cet effet. Bref, je suis d'accord avec la Cour d'appel de l'Ontario dans l'arrêt *Ward* sur ce point, pour dire que ni le par. 487.014(1) du *Code criminel* ni la *LPRPDE* n'ont pour effet de conférer à la police des pouvoirs en matière de fouilles, de perquisitions ou de saisies : par. 46.

[72] Je reconnais que cette conclusion diffère de celle tirée par la Cour d'appel de la Saskatchewan dans *Trapp*, par. 66, et par la Cour suprême de la Colombie-Britannique dans *R. c. McNeice*, 2010 BCSC 1544 (CanLII), par. 43. Dans l'arrêt *Trapp*, la Cour d'appel a interprété le par. 487.014(1) de concert avec l'al. 29(2)(g) de la *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, ch. F-22.01, disposition analogue à celle énoncée au sous-al. 7(3)*c.*1)(ii) de la *LPRPDE*, même si l'exigence relative à la « source de l'autorité légitime » y est absente. La cour a affirmé que le par. 487.014(1) conférait aux policiers le pouvoir de faire toute demande qui n'était pas prohibée par la loi. La Cour suprême de la Colombie-Britannique a adopté la même approche dans l'affaire *McNeice*, même si celle-ci portait sur le sous-al. 7(3)*c.*1)(ii) de la *LPRPDE*, disposition qui est en cause dans le présent pourvoi.

[73] En toute déférence, je ne peux accepter que cette conclusion s'applique au sous-al. 7(3)*c.*1)(ii) de la *LPRPDE*. Le paragraphe 487.014(1) est une disposition déclaratoire qui confirme les pouvoirs de common law permettant aux policiers de formuler des questions, comme l'indique les premiers mots de son libellé en français « [i]l demeure entendu qu[e] » ou de son libellé en anglais « [f]or greater certainty » : voir *Ward*, par. 49. La *LPRPDE* est une loi qui a pour objet, comme il est indiqué à l'art. 3, d'accroître la protection des renseignements personnels. Puisque, en l'espèce, les policiers n'avaient pas le pouvoir d'effectuer une fouille ou une perquisition pour obtenir des renseignements relatifs à l'abonnée en l'absence de circonstances

a provision enacted to promote the protection of personal information.

[74] The subscriber information obtained by police was used in support of the Information to Obtain which led to the issuance of a warrant to search Ms. Spencer's residence. Without that information, the warrant could not have been obtained. It follows that if that information is excluded from consideration as it must be because it was unconstitutionally obtained, there were not adequate grounds to sustain the issuance of the warrant, and the search of the residence was therefore unlawful. I conclude, therefore, that the conduct of the search of Ms. Spencer's residence violated the *Charter*: *Plant*, at p. 296; *Hunter v. Southam*, at p. 161. Nothing in these reasons addresses or diminishes any existing powers of the police to obtain subscriber information in exigent circumstances such as, for example, where the information is required to prevent imminent bodily harm. There were no such circumstances here.

C. *Should the Evidence Have Been Excluded*

[75] Neither the trial judge nor the Court of Appeal found a breach of s. 8 in this case and, therefore, did not have to consider the question of whether the evidence obtained in a manner that violated Mr. Spencer's *Charter* rights should be excluded under s. 24(2) of the *Charter*. The question is whether the admission of the evidence would bring the administration of justice into disrepute. I accept, as both Mr. Spencer and the Crown agree, that we can determine this issue on the record before us. However, I disagree with Mr. Spencer's submission that the evidence should be excluded. In my view, it should not.

contraignantes ou d'une loi qui n'a rien d'abusif, je ne vois pas comment ils pourraient obtenir un nouveau pouvoir en matière de fouille ou de perquisition par l'effet combiné d'une disposition déclaratoire et d'une disposition adoptée afin de favoriser la protection des renseignements personnels.

[74] La police a utilisé les renseignements relatifs à l'abonnée pour étayer la dénonciation qui a conduit à la délivrance d'un mandat l'autorisant à perquisitionner dans la résidence de M^me^ Spencer. En l'absence de ces renseignements, la police n'aurait pas pu obtenir le mandat. Par conséquent, si ces renseignements sont écartés (ce qui doit être le cas, parce qu'ils ont été obtenus d'une façon inconstitutionnelle), il n'y avait aucun motif valable justifiant la délivrance d'un mandat et la fouille ou la perquisition à la résidence était abusive. Je conclus donc que l'exécution de la fouille ou de la perquisition à la résidence de M^me^ Spencer violait la *Charte* : *Plant*, p. 296; *Hunter c. Southam*, p. 161. Rien dans les présents motifs ne porte sur les pouvoirs dont disposent les policiers pour obtenir des renseignements relatifs à un abonné dans des circonstances contraignantes, par exemple, lorsqu'il est nécessaire d'obtenir de tels renseignements pour prévenir un préjudice physique imminent, ce qui n'était pas le cas en l'espèce. Rien non plus, dans les présents motifs, ne restreint ces pouvoirs.

C. *La preuve aurait-elle dû être écartée?*

[75] Ni le juge du procès ni la Cour d'appel n'ont conclu qu'il y avait violation de l'art. 8 en l'espèce. Ils n'avaient donc pas à se demander si les éléments de preuve obtenus d'une façon qui portait atteinte aux droits de M. Spencer garantis par la *Charte* devraient être écartés en application du par. 24(2) de la même *Charte*. Il s'agit de savoir si l'admission de la preuve serait susceptible de déconsidérer l'administration de la justice. J'admets, comme M. Spencer et le ministère public intimé en conviennent, que nous pouvons trancher cette question sur la foi du dossier dont nous sommes saisis. Toutefois, je ne souscris pas à l'argument de M. Spencer selon lequel la preuve devrait être écartée. En effet, j'estime qu'il n'y a pas lieu qu'elle le soit.

[76] The test for applying s. 24(2) is set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The court must "assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct . . ., (2) the impact of the breach on the *Charter*-protected interests of the accused . . ., and (3) society's interest in the adjudication of the case on its merits": para. 71.

[77] Turning first to the seriousness of the state conduct, my view is that it cannot be characterized as constituting either "[w]ilful or flagrant disregard of the *Charter*": *Grant*, at para. 75. Det. Sgt. Parisien testified that he believed the request to Shaw was authorized by law and that Shaw could consent to provide the information to him. He also testified, however, that he was aware that there were decisions both ways on the issue of whether this was a legally acceptable practice. While I would not want to be understood to be encouraging the police to act without warrants in "gray areas", in light of the fact that the trial judge and three judges of the Court of Appeal concluded that Det. Sgt. Parisien had acted lawfully, his belief was clearly reasonable. In short, the police were acting by what they reasonably thought were lawful means to pursue an important law enforcement purpose. There is no challenge to any other aspect of the information to obtain the search warrant. The nature of the police conduct in this case would not tend to bring the administration of justice into disrepute.

[78] The second *Grant* factor is the impact of the *Charter*-infringing conduct on Mr. Spencer's *Charter*-protected interests. That impact here was serious. As discussed above, anonymity is an important safeguard for privacy interests online. The violation of that anonymity exposed personal choices made by Mr. Spencer to be his own and subjected them to police scrutiny as such. This weighs in favour of excluding the evidence.

[76] Le critère relatif à l'application du par. 24(2) est énoncé dans l'arrêt *R. c. Grant*, 2009 CSC 32, [2009] 2 R.C.S. 353. Le tribunal doit « évaluer et mettre en balance l'effet que l'utilisation des éléments de preuve aurait sur la confiance de la société envers le système de justice en tenant compte de : (1) la gravité de la conduite attentatoire de l'État [. . .], (2) l'incidence de la violation sur les droits de l'accusé garantis par la *Charte* [. . .] et (3) l'intérêt de la société à ce que l'affaire soit jugée au fond » : par. 71.

[77] En ce qui concerne la gravité de la conduite de l'État, j'estime qu'il n'y a pas lieu de qualifier cette dernière de « non-respect délibéré ou manifeste de la *Charte* » : *Grant*, par. 75. Le sergent-détective Parisien a déclaré qu'il croyait que la demande adressée à Shaw était autorisée par la loi et que Shaw consentirait à lui fournir l'information. Il a toutefois ajouté qu'il connaissait l'existence de décisions contradictoires quant à la question de savoir si cette pratique était légale. Bien que je ne voudrais pas qu'on comprenne des présents motifs que j'encourage les policiers à agir sans mandat dans les « zones grises », vu que le juge du procès et les trois juges de la Cour d'appel ont conclu que le sergent-détective Parisien avait agi légalement, sa conviction était manifestement raisonnable. Bref, les policiers se sont servi de ce qu'ils croyaient raisonnablement être des moyens légitimes pour poursuivre un objectif important visant l'application de la loi. Les autres aspects relatifs à la dénonciation justifiant l'obtention du mandat de perquisition ne sont pas contestés. Par sa nature, la conduite des policiers en l'espèce ne serait pas susceptible de déconsidérer l'administration de la justice.

[78] Le deuxième facteur énoncé dans l'arrêt *Grant* porte sur l'incidence de la conduite attentatoire sur les droits de M. Spencer garantis par la *Charte*. L'incidence était très grave en l'espèce. Rappelons que l'anonymat constitue une protection importante des droits en matière de vie privée à l'égard des activités en ligne. La violation de l'anonymat a exposé les choix personnels de M. Spencer et les a soumis à l'examen de la police. Ce facteur favorise l'exclusion de la preuve.

[79] That brings me to the final factor, society's interest in an adjudication on the merits. As explained in *Grant*,

> while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high. [para. 84]

[80] The offences here are serious and carry minimum prison sentences. Society has both a strong interest in the adjudication of the case and also in ensuring that the justice system remains above reproach in its treatment of those charged with these serious offences. If the evidence is excluded, the Crown will effectively have no case. The impugned evidence (the electronic files containing child pornography) is reliable and was admitted by the defence at trial to constitute child pornography. Society undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicates the safety of children.

[81] Balancing the three factors, my view is that exclusion of the evidence rather than its admission would bring the administration of justice into disrepute, and I would uphold its admission.

D. *The Fault Element of the "Making Available" Offence*

[82] The Court of Appeal ordered a new trial on the "making available" count on the basis that the trial judge had erred in his analysis of the fault requirement for the offence. It found that the trial judge had erred by finding that the making available offence required that Mr. Spencer knew that some positive act on his part facilitated access by others to the pornography. This error, in the Court of Appeal's view, led the judge to fail to consider whether Mr. Spencer had been wilfully blind to the fact that the pornography was being made available to others

[79] Je passe maintenant au dernier facteur, à savoir l'intérêt de la société à ce que l'affaire soit jugée au fond. Comme il est expliqué dans l'arrêt *Grant*,

> si la gravité d'une infraction accroît l'intérêt du public à ce qu'il y ait un jugement au fond, l'intérêt du public en l'irréprochabilité du système de justice n'est pas moins vital, particulièrement lorsque l'accusé encourt de lourdes conséquences pénales. [par. 84]

[80] Les infractions reprochées en l'espèce sont graves et sont punissables de peines minimales d'emprisonnement. La société a un intérêt manifeste à la fois à ce que l'affaire soit jugée et à ce que le fonctionnement du système de justice demeure irréprochable au regard des individus accusés de ces infractions graves. Si la preuve est écartée, le ministère public n'aura effectivement aucun recours à faire valoir. Les éléments de preuve contestés (les fichiers électroniques contenant de la pornographie juvénile) sont fiables et la défense a admis lors du procès qu'ils constituaient de la pornographie juvénile. La société a sans doute un intérêt à ce que l'affaire soit jugée dans le cadre d'un procès juste et équitable, fondé sur une preuve fiable, et encore plus dans le cas d'un crime qui vise la sécurité des enfants.

[81] Après avoir mis en balance les trois facteurs, j'estime que c'est l'exclusion de la preuve, et non son admission, qui serait susceptible de déconsidérer l'administration de la justice et je suis d'avis de confirmer l'admission de cette preuve.

D. *L'élément de faute de l'infraction de « rendre accessible »*

[82] La Cour d'appel a ordonné la tenue d'un nouveau procès sur le chef d'accusation de « rendre accessible », au motif que le juge du procès avait commis une erreur dans son analyse relative à l'exigence de faute de l'infraction. Selon la Cour, le juge du procès a commis une erreur en concluant que l'infraction de rendre accessible exigeait que M. Spencer ait connaissance que certaines de ses actions délibérées avaient facilité l'accès d'autres personnes à la pornographie. De l'avis de la Cour, le juge a ainsi omis de se demander si M. Spencer

through the shared folder. I respectfully agree with the Court of Appeal on both points and would affirm the order for a new trial.

[83] There is no dispute that the accused in a prosecution under s. 163.1(3) of the *Criminal Code* must be proved to have had knowledge that the pornographic material was being made available. This does not require, however, as the trial judge suggested, that the accused must knowingly, by some positive act, facilitate the availability of the material. I accept Caldwell J.A.'s conclusion that the offence is complete once the accused knowingly makes pornography available to others. As he put it,

> [i]n the context of a file sharing program, the *mens rea* element of making available child pornography under s. 163.1(3) requires proof of the intent to make computer files containing child pornography available to others using that program or actual knowledge that the file sharing program makes files available to others. [para. 87]

While the trial judge's reasons may perhaps be open to more than one interpretation on this point, reading his reasons as a whole, I also agree with Caldwell J.A. that the trial judge erred in deciding that a positive act was required to satisfy the *mens rea* component of the making available offence: para. 81.

[84] I further agree with Caldwell J.A. that wilful blindness was a live issue on the evidence and that it was because of the trial judge's error in relation to positive facilitation that he did not turn his mind to the evidence that could support an inference of wilful blindness. Wilful blindness is a substitute for knowledge. As explained by Charron J. in *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21,

avait fait preuve d'aveuglement volontaire quant à l'accessibilité de la pornographie à d'autres personnes au moyen du répertoire partagé. Je souscris à l'opinion de la Cour d'appel sur ces deux points et je suis d'avis de confirmer l'ordonnance prescrivant la tenue d'un nouveau procès.

[83] Il n'est pas contesté que, dans le cadre d'une poursuite sous le régime du par. 163.1(3) du *Code criminel*, il faut prouver que l'accusé avait connaissance du fait que le matériel pornographique était rendu accessible à d'autres personnes. Il n'est toutefois pas nécessaire, comme l'a suggéré le juge du procès, que l'accusé doive sciemment, par une certaine action concrète, faciliter l'accès au matériel. J'accepte la conclusion du juge Caldwell selon laquelle les éléments de l'infraction sont tous réunis lorsque l'accusé rend sciemment accessible la pornographie à d'autres personnes. Selon le juge :

> [TRADUCTION] S'agissant d'un programme de partage de fichiers, l'élément de *mens rea* relatif à l'infraction de rendre accessible de la pornographie juvénile prévue au par. 163.1(3) exige une preuve de l'intention de rendre les fichiers informatiques contenant de la pornographie juvénile accessibles à d'autres personnes en utilisant ce logiciel ou une connaissance réelle que le programme de partage de fichiers rend les fichiers accessibles à d'autres personnes. [par. 87]

Bien que les motifs formulés par le juge du procès se prêtent probablement à plusieurs interprétations sur ce point, compte tenu de leur ensemble, je partage également l'avis du juge Caldwell selon lequel le juge du procès a commis une erreur en décidant que la *mens rea* de l'infraction de rendre accessible exigeait l'accomplissement d'un geste délibéré : par. 81.

[84] À l'instar du juge Caldwell, j'estime aussi que l'aveuglement volontaire était une question en litige compte tenu de la preuve et qu'en raison de son erreur relative au geste délibéré le juge du procès ne s'est pas penché sur les éléments de preuve susceptibles d'étayer une conclusion d'aveuglement volontaire. L'aveuglement volontaire remplace la connaissance. Comme l'a expliqué la juge Charron dans l'arrêt *R. c. Briscoe*, 2010 CSC 13, [2010] 1 R.C.S. 411, par. 21 :

[w]ilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?" [Emphasis added.]

[85] The evidence calling for consideration of wilful blindness included, for example, evidence that in Mr. Spencer's statement to police he acknowledged the following: that LimeWire is a file-sharing program; that he had changed at least one default setting in LimeWire; that when LimeWire is first installed on a computer, it displays information notifying the user that it is a file-sharing program; that at the start of each session, LimeWire notifies the user that it is a file-sharing program and warns of the ramifications of file-sharing; and that LimeWire contains built-in visual indicators that show the progress of the uploading of files by others from the user's computer: paras. 88-89.

[86] Given that wilful blindness was a live issue and that the trial judge's error in holding that a positive act was required to meet the *mens rea* component of the making available offence resulted in his not considering the wilful blindness issue, I agree with Caldwell J.A. that the error could reasonably be thought to have had a bearing on his decision to acquit: para. 93; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

III. Disposition

[87] I would dismiss the appeal, affirm the conviction on the possession count and uphold the

L'ignorance volontaire ne définit pas la *mens rea* requise d'infractions particulières. Au contraire, elle peut remplacer la connaissance réelle chaque fois que la connaissance est un élément de la *mens rea*. La doctrine de l'ignorance volontaire impute une connaissance à l'accusé qui a des doutes au point de vouloir se renseigner davantage, mais qui choisit délibérément de ne pas le faire. Voir *Sansregret c. La Reine*, [1985] 1 R.C.S. 570, et *R. c. Jorgensen*, [1995] 4 R.C.S. 55. Comme l'a dit succinctement le juge Sopinka dans *Jorgensen* (par. 103), « [p]our conclure à l'ignorance volontaire, il faut répondre par l'affirmative à la question suivante : L'accusé a-t-il fermé les yeux parce qu'il savait ou soupçonnait fortement que s'il regardait, il saurait? » [Je souligne.]

[85] Parmi les éléments de preuve commandant l'examen de la question de l'aveuglement volontaire, mentionnons entre autres le fait que M. Spencer a reconnu dans sa déclaration à la police ceci : que LimeWire est un programme de partage de fichiers; qu'il avait modifié au moins un réglage par défaut de ce logiciel; que, lorsqu'il est installé la première fois sur un ordinateur, LimeWire affiche un message d'avertissement pour aviser l'utilisateur qu'il s'agit d'un programme de partage de fichiers; que, au début de chaque session, LimeWire avise l'utilisateur que c'est un programme de partage de fichiers et le met en garde contre les répercussions du partage de fichiers; que LimeWire contient des indicateurs visuels qui montrent la progression du téléchargement des fichiers par d'autres personnes à partir de l'ordinateur de l'utilisateur : par. 88-89.

[86] Puisque l'aveuglement volontaire était une question en litige et que l'erreur du juge du procès — lorsqu'il a conclu qu'un geste délibéré était nécessaire pour satisfaire à l'exigence de la *mens rea* de l'infraction de rendre accessible — lui a fait omettre l'examen de cette question, je conviens avec le juge Caldwell qu'il serait raisonnable de penser que cette erreur a eu une incidence sur le verdict d'acquittement : par. 93; *R. c. Graveline*, 2006 CSC 16, [2006] 1 R.C.S. 609, par. 14.

III. Dispositif

[87] Je suis d'avis de rejeter le pourvoi, de confirmer la déclaration de culpabilité relative au chef

Court of Appeal's order for a new trial on the making available count.

APPENDIX

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

7. . . .

(3) [Disclosure without knowledge or consent] For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

. . .

(*c*) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(*c.*1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

. . .

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

. . .

(*d*) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province

d'accusation de possession ainsi que l'ordonnance de Cour d'appel enjoignant la tenue d'un nouveau procès sur le chef d'accusation de rendre accessible.

ANNEXE

Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5

7. . . .

(3) [Communication à l'insu de l'intéressé et sans son consentement] Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut communiquer de renseignement personnel à l'insu de l'intéressé et sans son consentement que dans les cas suivants :

. . .

c) elle est exigée par assignation, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de documents;

*c.*1) elle est faite à une institution gouvernementale — ou à une subdivision d'une telle institution — qui a demandé à obtenir le renseignement en mentionnant la source de l'autorité légitime étayant son droit de l'obtenir et le fait, selon le cas :

. . .

(ii) que la communication est demandée aux fins du contrôle d'application du droit canadien, provincial ou étranger, de la tenue d'enquêtes liées à ce contrôle d'application ou de la collecte de renseignements en matière de sécurité en vue de ce contrôle d'application,

. . .

d) elle est faite, à l'initiative de l'organisation, à un organisme d'enquête, une institution gouvernementale ou une subdivision d'une telle institution et l'organisation, selon le cas, a des motifs raisonnables de croire que le renseignement est afférent à la violation d'un accord ou à une contravention au droit fédéral, provincial ou étranger qui a été commise ou est en

or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

. . .

Criminal Code, R.S.C. 1985, c. C-46

163.1 . . .

(3) [Distribution, etc. of child pornography] Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(*b*) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

. . .

487.014 (1) [Power of peace officer] For greater certainty, no production order is necessary for a peace officer or public officer enforcing or administering this or any other Act of Parliament to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing.

Appeal dismissed.

Solicitors for the appellant: McDougall Gauley, Regina.

Solicitor for the respondent: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Edmonton and Halifax.

train ou sur le point de l'être ou soupçonne que le renseignement est afférent à la sécurité nationale, à la défense du Canada ou à la conduite des affaires internationales;

. . .

Code criminel, L.R.C. 1985, ch. C-46

163.1 . . .

(3) [Distribution de pornographie juvénile] Quiconque transmet, rend accessible, distribue, vend, importe ou exporte de la pornographie juvénile ou en fait la publicité, ou en a en sa possession en vue de la transmettre, de la rendre accessible, de la distribuer, de la vendre, de l'exporter ou d'en faire la publicité, est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois.

. . .

487.014 (1) [Pouvoir de l'agent de la paix] Il demeure entendu qu'une ordonnance de communication n'est pas nécessaire pour qu'un agent de la paix ou un fonctionnaire public chargé de l'application ou de l'exécution de la présente loi ou de toute autre loi fédérale demande à une personne de lui fournir volontairement des documents, données ou renseignements qu'aucune règle de droit n'interdit à celle-ci de communiquer.

Pourvoi rejeté.

Procureurs de l'appelant : McDougall Gauley, Regina.

Procureur de l'intimée : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le directeur des poursuites pénales : Service des poursuites pénales du Canada, Edmonton et Halifax.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Calgary.

Solicitors for the intervener the Privacy Commissioner of Canada: Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intervenant le commissaire à la protection de la vie privée du Canada : Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Kapoor Barristers, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Kapoor Barristers, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Dawe & Dineen, Toronto; Schreck Presser, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association of Ontario : Dawe & Dineen, Toronto; Schreck Presser, Toronto.

Régie des rentes du Québec *Appellant*

v.

Canada Bread Company Ltd., Sean Kelly, in his capacity as trustee of the Bakery and Confectionery Union and Industry Canadian Pension Fund, Multi-Marques Inc., Multi-Marques Distribution Inc. and Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 468 *Respondents*

and

Attorney General of Quebec, Robert Thauvette and Administrative Tribunal of Québec *Interveners*

Indexed as: Régie des rentes du Québec *v.* Canada Bread Company Ltd.

2013 SCC 46

File No.: 34505.

2013: April 17; 2013: September 13.

Present: McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Legislation — Retroactivity — Declaratory provisions — Régie des rentes du Québec effecting partial termination of pension plan — Legislation amending Supplemental Pension Plans Act coming into force after Court of Appeal set aside Régie's decision and remitted case to Régie for redetermination — New declaratory provisions applying to pending cases — Whether dispute between parties was pending when provisions came into force — Whether Court of Appeal's judgment fully and definitively adjudicated rights and obligations of parties that resulted from partial termination of pension plan — Whether Régie was entitled to give effect to declaratory provisions in resolving dispute between parties — An Act to amend the Supplemental Pension Plans Act, the Act respecting the Québec Pension Plan and other legislative

Régie des rentes du Québec *Appelante*

c.

Canada Bread Company Ltd., Sean Kelly, en sa qualité de fiduciaire du Bakery and Confectionery Union and Industry Canadian Pension Fund, Multi-Marques Inc., Multi-Marques Distribution Inc. et Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 468 *Intimés*

et

Procureur général du Québec, Robert Thauvette et Tribunal administratif du Québec *Intervenants*

Répertorié : Régie des rentes du Québec *c.* Canada Bread Company Ltd.

2013 CSC 46

N° du greffe : 34505.

2013 : 17 avril; 2013 : 13 septembre.

Présents : La juge en chef McLachlin et les juges Fish, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Législation — Rétroactivité — Dispositions déclaratoires — Régie des rentes du Québec procédant à la terminaison partielle d'un régime de retraite — Loi modifiant la Loi sur les régimes complémentaires de retraite entrée en vigueur après l'annulation de la décision de la Régie par la Cour d'appel et son renvoi devant la Régie pour que cette dernière statue à nouveau sur l'affaire — Nouvelles dispositions déclaratoires applicables aux causes pendantes — Le litige entre les parties était-il pendant à l'entrée en vigueur des dispositions? — L'arrêt de la Cour d'appel a-t-il statué entièrement et définitivement sur les droits et obligations des parties découlant des terminaisons partielles du régime de retraite? — La Régie pouvait-elle donner effet aux dispositions déclaratoires pour trancher le litige

provisions, S.Q. 2008, c. 21 — Supplemental Pension Plans Act, R.S.Q., c. R-15.1, ss. 14.1, 228.1, 319.1.

Administrative law — Boards and tribunals — Jurisdiction — Régie des rentes du Québec effecting partial termination of pension plan — Legislation amending Supplemental Pension Plans Act coming into force after Court of Appeal set aside Régie's decision and remitted case to Régie for redetermination — Whether it was open to Régie to take new statutory provisions into consideration in determining outcome of case — An Act to amend the Supplemental Pension Plans Act, the Act respecting the Québec Pension Plan and other legislative provisions, S.Q. 2008, c. 21 — Supplemental Pension Plans Act, R.S.Q., c. R-15.1, ss. 14.1, 228.1, 319.1.

As a result of the closure of two divisions of the employer, Multi-Marques, the Régie des rentes du Québec issued two decisions under Quebec's *Supplemental Pension Plans Act* ("*SPPA*") to effect the partial termination of the pension plan of the divisions' employees. Multi-Marques challenged the manner in which the termination was carried out, arguing that under ss. 9.12 and 9.13 of the plan's rules, employee benefits should be reduced if employer contributions were insufficient to pay the pension fund's shortfall. A review committee convened by the Régie decided that ss. 9.12 and 9.13 were incompatible with the *SPPA*, which provides that where the assets of a pension plan are insufficient to satisfy the rights of the plan's members and beneficiaries, the amount of the deficiency constitutes a debt of the employer. This decision was subsequently affirmed by the Administrative Tribunal of Québec ("ATQ") and by the Superior Court, but the Court of Appeal found that ss. 9.12 and 9.13 were not incompatible with the *SPPA* and accordingly remitted the matter to the Régie, ordering the latter to review its initial decisions in conformity with the Court of Appeal's judgment.

While an application for leave to appeal from the Court of Appeal's decision was pending in this Court, the *SPPA* was amended by adding ss. 14.1 and 228.1. In these provisions, the legislature essentially adopted the Régie's approach to the application of ss. 9.12 and 9.13 of the plan's rules and rejected the approach taken by the Court of Appeal. After the application for leave to appeal had been dismissed, the Régie undertook to

qui opposait les parties? — Loi modifiant la Loi sur les régimes complémentaires de retraite, la Loi sur le régime de rentes du Québec et d'autres dispositions législatives, L.Q. 2008, ch. 21 — Loi sur les régimes complémentaires de retraite, L.R.Q., ch. R-15.1, art. 14.1, 228.1, 319.1.

Droit administratif — Organismes et tribunaux administratifs — Compétence — Régie des rentes du Québec procédant à la terminaison partielle d'un régime de retraite — Loi modifiant la Loi sur les régimes complémentaires de retraite entrée en vigueur après l'annulation de la décision de la Régie par la Cour d'appel et son renvoi devant la Régie pour que cette dernière statue à nouveau sur l'affaire — La Régie pouvait-elle tenir compte des nouvelles dispositions déclaratoires pour statuer sur l'affaire? — Loi modifiant la Loi sur les régimes complémentaires de retraite, la Loi sur le régime de rentes du Québec et d'autres dispositions législatives, L.Q. 2008, ch. 21 — Loi sur les régimes complémentaires de retraite, L.R.Q., ch. R-15.1, art. 14.1, 228.1, 319.1.

Par suite de la fermeture de deux divisions de l'employeur, Multi-Marques, la Régie des rentes du Québec a rendu, en application de la *Loi sur les régimes complémentaires de retraite* du Québec (« *LRCR* »), deux décisions qui terminaient partiellement le régime de retraite des employés de ces divisions. Multi-Marques a contesté la façon dont la terminaison avait été exécutée, faisant valoir que, selon les art. 9.12 et 9.13 des règles du régime, les droits des employés devaient être réduits si les cotisations de l'employeur étaient insuffisantes pour éponger le déficit du régime. Un comité de révision à qui la Régie a soumis la question a conclu que les art. 9.12 et 9.13 étaient incompatibles avec la *LRCR*, aux termes de laquelle le manque d'actifs d'un régime de pension nécessaires à l'acquittement des droits des participants et des bénéficiaires constitue une dette de l'employeur. Cette décision a été confirmée par le Tribunal administratif du Québec (« TAQ ») et par la Cour supérieure. La Cour d'appel a toutefois conclu que les art. 9.12 et 9.13 n'étaient pas incompatibles avec la *LRCR* et a donc renvoyé l'affaire à la Régie en lui enjoignant de réviser ses décisions initiales en tenant compte des principes se dégageant de son jugement.

Pendant qu'une demande d'autorisation d'appel de la décision de la Cour d'appel était pendante devant notre Cour, la *LRCR* a été modifiée par l'adjonction des art. 14.1 et 228.1. En adoptant ces dispositions, le législateur consacrait essentiellement le point de vue de la Régie relativement à l'application des art. 9.12 et 9.13 des règles du régime et rejetait l'interprétation de la Cour d'appel. Après le rejet de la demande d'autorisation

complete the partial termination of the pension plan. Instead of following the Court of Appeal's directions, the Régie's review committee applied the new provisions of the *SPPA*, and accordingly refused to apply ss. 9.12 and 9.13 and confirmed its initial decisions. The ATQ upheld the Régie's decision. On judicial review, the Superior Court set aside the ATQ's decision. The Court of Appeal dismissed the Régie's appeal on the ground that, once the application for leave to appeal had been dismissed, the Court of Appeal's initial judgment had acquired the authority of a final judgment and should have been followed by the Régie.

Held (McLachlin C.J. and Fish J. dissenting): The appeal should be allowed.

Per Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.: The principle of *res judicata*, which precludes parties from relitigating an issue in respect of which a final determination has been made as between them, does not preclude the legislature from negating the effects of such a determination. It is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation. Such legislation has an immediate effect on pending cases, and is therefore an exception to the general rule that legislation is prospective. Section 319.1 of the *SPPA*, which was enacted at the same time as ss. 14.1 and 228.1, expressly provides that these provisions are declaratory. In addition to this unambiguous language, the circumstances of their enactment show that the legislature intended them to be declaratory. It can be seen from the debate that led up to their enactment that the legislature's objective was to overrule the Court of Appeal's decision in order to protect the plan's members and beneficiaries and to ensure that the decision in question would not become a precedent that would be binding on the courts in pending and future cases.

The concept of the final judgment that does not ultimately determine the rights and obligations of the parties is the basis for distinguishing pending cases from those that are not pending. Here, when the declaratory provisions came into force, the case between the parties was still pending. The Court of Appeal's decision resulted in a final determination only on the question of law relating to the interpretation of certain provisions of the pension plan's rules and their compatibility with the *SPPA*. The court remitted the question of the parties' substantive rights in light of this interpretation to the Régie for determination. The terms of the partial termination of the fund had yet to be determined. Because the Court of Appeal had remitted the matter to it, the Régie was a competent authority properly charged with

d'appel, la Régie a entrepris de mener à terme la terminaison partielle du régime de retraite. Au lieu de suivre les directives de la Cour d'appel, le comité de révision de la Régie a appliqué les nouvelles dispositions de la *LRCR*. Elle a donc refusé de donner effet aux art. 9.12 et 9.13 et elle a confirmé ses décisions initiales. Le TAQ a confirmé la décision de la Régie. À l'issue d'une révision judiciaire, la Cour supérieure a annulé la décision du TAQ. La Cour d'appel a rejeté le pourvoi de la Régie au motif que, une fois la demande d'autorisation rejetée, l'arrêt initial de la Cour d'appel est passé en force de chose jugée et la Régie aurait dû s'y conformer.

Arrêt (la juge en chef McLachlin et le juge Fish sont dissidents) : Le pourvoi est accueilli.

Les juges Abella, Rothstein, Cromwell, Karakatsanis et Wagner : Le principe de la chose jugée, qui empêche les parties de soumettre à nouveau aux tribunaux une question qui a fait l'objet d'un jugement définitif à leur égard, n'empêche pas pour autant le législateur d'intervenir pour annuler les effets d'un tel jugement. Il entre dans la prérogative du législateur de jouer un rôle judiciaire et de déterminer par des lois déclaratoires l'interprétation que doivent recevoir ses lois. De telles lois ont un effet immédiat sur les affaires pendantes et elles font donc exception à la règle générale du caractère prospectif de la loi. L'article 319.1 de la *LRCR*, qui a été adopté en même temps que les art. 14.1 et 228.1, énonce expressément que ces dispositions sont déclaratoires. Au libellé sans équivoque de cette disposition s'ajoutent les circonstances de leur adoption, qui témoignent de l'intention du législateur qu'elles soient déclaratoires. Il ressort des délibérations ayant mené à leur adoption que le législateur voulait infirmer l'arrêt de la Cour d'appel afin de protéger les participants et bénéficiaires du régime et d'empêcher que la décision n'acquière valeur de précédent et ne lie les tribunaux dans les affaires pendantes ou futures.

Le concept de jugement définitif qui ne statue pas ultimement sur les droits et obligations des parties est celui qui permet de distinguer les affaires pendantes des affaires non pendantes. En l'espèce, à l'entrée en vigueur des dispositions déclaratoires, le litige entre les parties était encore pendant. L'arrêt de la Cour d'appel n'a statué définitivement que sur une question de droit relative à l'interprétation de certaines dispositions des règles du régime de retraite et à leur compatibilité avec la *LRCR*. La cour a renvoyé à la Régie la question des droits substantiels des parties pour qu'elle en décide en tenant compte de cette interprétation. Les modalités des terminaisons partielles du régime n'avaient pas encore été établies. La Cour d'appel lui ayant renvoyé la cause, la Régie était une autorité compétente à qui il appartenait

resolving a pending case when the declaratory provisions came into force. It was therefore open to the Régie to take them into consideration in determining the outcome of that case. Where an administrative decision-maker has a duty to follow the directions of a reviewing court, it is on the basis of *stare decisis*. It is therefore obligated to follow such directions, but only insofar as they remain good law. In the instant case, the declaratory legislation is not ambiguous, and the National Assembly decided unanimously to counter the effect of the Court of Appeal's decision by enabling the Régie to interpret the *SPPA* in a manner consistent with what the legislature considered to be the Act's true objectives. As a result of the legislature's intervention, the Court of Appeal's directions became bad law. Accordingly, the Régie was not only entitled to interpret the *SPPA* in light of the declaratory provisions, it was obligated to do so.

Per McLachlin C.J. and Fish J. (dissenting): When a retroactive law comes into force while a case is being appealed, it falls to be applied by whatever level of appellate court is seized of the matter at that time. In the present case, only the Supreme Court of Canada, before which an application for leave to appeal was pending at the time of the coming into force of the retroactive provisions, had the jurisdiction to apply the provisions to resolve the dispute between Multi-Marques and the pension beneficiaries. Once it denied leave to appeal, all avenues of appeal were exhausted. Consequently, the Quebec Court of Appeal's judgment acquired the authority of *res judicata* between the parties with respect to the issue of whether the employer's funding obligations could be limited by clauses 9.12 and 9.13 of the pension plan's rules.

The precise monetary liability of the employer was not determined by the Court of Appeal's disposition, and the matter was remitted back to the Régie for a computation of that liability. However, the fact that this remained in issue does not make the declaratory provisions applicable to this dispute. There is no principled basis on which to conclude that declaratory laws apply to judicial determinations for which all avenues of appeal have been exhausted, but which fall short of determining every issue in dispute. This runs counter to the principle that declaratory provisions must be interpreted and applied restrictively, and to the correlative principle that clear statutory language is required to extinguish the effects of a judgment as between the parties. The declaratory law in this case does not contain such language. It follows that the Court of Appeal's judgment was final and binding.

de trancher une affaire qui était pendante à l'entrée en vigueur des dispositions déclaratoires. Elle pouvait donc tenir compte de ces dispositions pour statuer sur l'affaire. Lorsqu'il revient à un décideur administratif de suivre les directives d'une cour de révision, c'est en application du principe du *stare decisis*. Le décideur est donc tenu de suivre ces directives, mais dans la seule mesure où elles demeurent juridiquement valables. En l'espèce, la loi déclaratoire n'est pas ambiguë et l'Assemblée nationale a décidé unanimement de contrer l'effet de la décision de la Cour d'appel en permettant à la Régie d'interpréter la *LRCR* conformément à ce que le législateur considérait être les véritables objectifs de cette Loi. L'intervention du législateur a donc privé les directives de la Cour d'appel de leur validité juridique. En conséquence, la Régie n'était pas seulement habilitée à interpréter la *LRCR* en fonction des dispositions déclaratoires, elle en avait l'obligation.

La juge en chef McLachlin et le juge Fish (dissidents) : Lorsqu'une loi rétroactive entre en vigueur pendant qu'une cause est portée en appel, il appartient à la juridiction d'appel alors saisie de l'appliquer. En l'espèce, seule la Cour suprême du Canada, qui était saisie d'une demande d'autorisation d'appel à la date où les dispositions rétroactives sont entrées en vigueur, avait compétence pour appliquer les dispositions en vue de trancher le différend opposant Multi-Marques aux bénéficiaires du régime de retraite. Le rejet de cette demande a épuisé toutes les voies d'appel. Le jugement de la Cour d'appel du Québec a donc acquis l'autorité de la chose jugée entre les parties concernant la question de savoir si les art. 9.12 et 9.13 des règles du régime pouvaient restreindre les obligations de l'employeur en matière de financement.

La décision de la Cour d'appel n'a pas établi à combien se chiffre précisément l'obligation pécuniaire de l'employeur, et la cour a renvoyé l'affaire à la Régie pour qu'elle le fasse. Le fait que cette question n'était pas résolue ne rend toutefois pas les dispositions déclaratoires applicables au présent litige. Aucun principe de droit ne permet de conclure que les lois déclaratoires s'appliquent aux décisions judiciaires pour lesquelles toutes les voies d'appel ont été épuisées, mais qui ne statuent pas sur toutes les questions en litige. Une telle conclusion irait à l'encontre du principe voulant que les dispositions déclaratoires doivent recevoir une interprétation et une application restrictives, et à l'encontre du principe corrélatif suivant lequel un texte législatif clair est nécessaire pour annuler les effets d'un jugement à l'égard des parties. En l'espèce, la loi déclaratoire n'a pas la clarté voulue. Il s'ensuit que le jugement de la Cour d'appel était définitif et exécutoire.

There was no authority for the Régie's purported jurisdiction to determine afresh whether Multi-Marques' funding obligations were limited by clauses 9.12 and 9.13 of the pension plan's rules. The Court of Appeal's directions did not instruct the Régie to determine the matter afresh. Nor does the Régie's enabling statute contain any provisions that allow it to review a matter on which a higher court has passed judgment. The Régie had to fulfill the task for which the case had been remitted to it, i.e. compute the precise monetary liability that resulted from the substantive rights and obligations determined by the Court of Appeal. By failing to do so, the Régie effectively circumvented the process of judicial review and reinstated its original decision without having the jurisdiction to do so.

Rien ne fondait la compétence dont se réclamait la Régie pour examiner à nouveau si les art. 9.12 et 9.13 des règles du régime de retraite limitaient les obligations de Multi-Marques en matière de financement. Les directives de la Cour d'appel n'obligeaient pas la Régie à reprendre l'examen du début. Et aucune disposition de la loi créant la Régie ne lui permet d'examiner une question sur laquelle une cour de juridiction supérieure s'est prononcée. La Régie devait accomplir la tâche pour laquelle l'affaire lui avait été renvoyée, soit calculer à combien se chiffrait l'obligation monétaire précise résultant des droits et obligations substantiels tels qu'ils avaient été circonscrits par la Cour d'appel. En se dérobant à cette tâche, la Régie a effectivement contourné le processus de contrôle judiciaire et elle a rétabli sa décision initiale alors qu'elle n'avait pas compétence pour ce faire.

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Sheila York and *Carole Arav*, for the appellant.

Éric Mongeau, *Patrick Girard* and *Michel Legendre*, for the respondents the Canada Bread Company Ltd., Multi-Marques Inc. and Multi-Marques Distribution Inc.

Natalie Bussière and *Sophie Tremblay*, for the respondent Sean Kelly, in his capacity as trustee of the Bakery and Confectionery Union and Industry Canadian Pension Fund.

No one appeared for the respondent the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 468.

Stéphane Rochette and *Jean-Yves Bernard*, for the intervener the Attorney General of Quebec.

No one appeared for the interveners Robert Thauvette and the Administrative Tribunal of Québec.

The judgment of Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ. was delivered by

Wagner J. —

I. Overview

[1] A criticism often levelled against retroactive legislation is that it thwarts settled expectations. This case concerns expectations relating to the interpretation of certain provisions of Quebec's *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 ("*SPPA*"). It confirms that the legislature may disrupt these expectations by enacting declaratory provisions, and that such provisions apply to any ongoing dispute in which a final judgment on the merits has not yet been handed down.

(QL), 2010 CarswellQue 13421, SOQUIJ AZ-50699375, qui a annulé une décision du Tribunal administratif du Québec, 2010 QCTAQ 04423, [2010] R.J.D.T. 796, 83 C.C.P.B. 111, 2010 LNQCTAQ 5 (QL), 2010 CarswellQue 3608, SOQUIJ AZ-50632060. Pourvoi accueilli, la juge en chef McLachlin et le juge Fish sont dissidents.

Sheila York et *Carole Arav*, pour l'appelante.

Éric Mongeau, *Patrick Girard* et *Michel Legendre*, pour les intimées Canada Bread Company Ltd., Multi-Marques Inc. et Multi-Marques Distribution Inc.

Natalie Bussière et *Sophie Tremblay*, pour l'intimé Sean Kelly, en sa qualité de fiduciaire du Bakery and Confectionery Union and Industry Canadian Pension Fund.

Personne n'a comparu pour l'intimée Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 468.

Stéphane Rochette et *Jean-Yves Bernard*, pour l'intervenant le procureur général du Québec.

Personne n'a comparu pour les intervenants Robert Thauvette et le Tribunal administratif du Québec.

Version française du jugement des juges Abella, Rothstein, Cromwell, Karakatsanis et Wagner rendu par

Le juge Wagner —

I. Aperçu

[1] Les lois rétroactives attirent souvent la critique selon laquelle elles frustrent des attentes légitimes. Le présent dossier traite des attentes liées à l'interprétation de certaines dispositions de la *Loi sur les régimes complémentaires de retraite* du Québec, L.R.Q., ch. R-15.1 (« *LRCR* »). Il confirme que le législateur peut contrecarrer ces attentes en adoptant des dispositions déclaratoires, et que ces dispositions s'appliquent à toute instance non encore tranchée au fond par un jugement définitif.

[2] When a legislature enacts a declaratory provision that has retrospective effect, it is presumed to have weighed the need for the interpretive clarity the provision would bring against the disruption and unfairness that might result from its retroactive nature. The courts therefore owe deference to a decision by the legislature to enact such legislation.

[3] In the case at bar, a final judicial determination of the rights and obligations of the parties had not yet been made. As a result, the declaratory provisions passed by the Quebec legislature to aid in the interpretation of the *SPPA* were applicable.

II. Facts

[4] The dispute between the parties to this appeal has passed before decision-makers and judges at various levels not once, but twice.

[5] The appellant, the Régie des rentes du Québec ("Régie"), is a government agency that is responsible for the application of the *SPPA*. The respondents Multi-Marques Inc. and Multi-Marques Distribution Inc. (referred to collectively as « Multi-Marques »), and Canada Bread Company Ltd. are contributing employers of the Bakery and Confectionery Union and Industry Canadian Pension Fund ("Fund"). Sean Kelly represents the trustees of the Fund.

[6] In 1992 and 1994, the employees of the Gailuron and Durivage divisions of Multi-Marques joined the Fund. The trustees granted pension credits to the employees of the two divisions to reflect the years of service they had accumulated before Multi-Marques joined the Fund. The granting of these credits created a deficit, which Multi-Marques was to remedy by making payments to the Fund over a 15-year period. Before that period expired, Multi-Marques decided to shut down its Gailuron and Durivage divisions in 1996 and 1997, respectively.

[7] As a result of the closures, the Régie issued, on May 16, 2002, two essentially identical decisions to effect the partial termination of the Fund for the

[2] Lorsque le législateur adopte une disposition déclaratoire à effet rétroactif, il est présumé avoir mesuré la nécessité de clarifier ainsi l'interprétation par rapport au bouleversement et à l'iniquité pouvant résulter de sa rétroactivité. Les tribunaux doivent donc faire preuve de déférence à l'endroit de cette décision du législateur.

[3] En l'espèce, aucun jugement n'avait encore établi définitivement l'étendue des droits et obligations des parties. En conséquence, les dispositions déclaratoires adoptées par la législature du Québec pour faciliter l'interprétation de la *LRCR* étaient applicables.

II. Faits

[4] Le litige entre les parties au présent pourvoi a franchi les différents niveaux de juridiction non pas une, mais deux fois.

[5] L'appelante, la Régie des rentes du Québec (« Régie »), est l'organisme gouvernemental chargé de l'application de la *LRCR*. Les intimées, Multi-Marques Inc. et Multi-Marques Distribution Inc. (collectivement « Multi-Marques ») et Canada Bread Company Ltd., sont des employeurs participants de la Bakery and Confectionery Union and Industry Canadian Pension Fund (« Régime »). Sean Kelly représente les fiduciaires du Régime.

[6] En 1992 et 1994, les employés des divisions Gailuron et Durivage de Multi-Marques ont adhéré au Régime. Les fiduciaires ont octroyé aux employés de ces deux divisions des crédits de rente afférents aux années de service qu'ils avaient accumulées avant l'adhésion de Multi-Marques au Régime. Cet octroi a engendré un déficit que Multi-Marques devait combler au moyen de versements échelonnés sur une période de 15 ans. Avant l'expiration de cette période, Multi-Marques a décidé de fermer les divisions Gailuron et Durivage, respectivement en 1996 et 1997.

[7] Par suite de ces fermetures, la Régie a rendu, le 16 mai 2002, deux décisions virtuellement identiques qui terminaient partiellement le Régime à

employees of the Gailuron and Durivage divisions of Multi-Marques. The closures also created a solvency deficiency of approximately $5 million that was needed to cover the pension credits granted to the employees of the two divisions for prior service. Both of the Régie's decisions required that the actuarial reports to be filed upon termination indicate the amounts to be paid by the employer to rectify the Fund's solvency deficiency in order to ensure that the benefits of the plan members affected by the termination would be paid in full.

[8] Although the partial termination of the Fund was not contested by any of the parties, the employer challenged the manner in which it was carried out. Multi-Marques argued that under ss. 9.12 and 9.13 of the Fund's Rules and Regulations ("Rules"), benefits could be reduced in response to certain extrinsic factors and that employee benefits should accordingly be reduced if employer contributions were insufficient to pay the Fund's shortfall. Thus, the Rules limited the employer's funding obligations to contributions it had already made. To respond to this challenge, the Régie convened a review committee to determine whether ss. 9.12 and 9.13 of the Rules were compatible with the *SPPA*.

[9] Sections 9.12 and 9.13 of the Rules read as follows:

Section 9.12 — Limitation of Liability

The Plan has been established on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis, fulfilling the funding requirements of the Act. Except for liabilities which may result from provisions of the Act, nothing in this Plan shall be construed to impose any obligation to contribute beyond the obligation of the Contributing Employer to make contributions as stipulated in its Collective Agreement with the Union or Local Union.

There shall be no liability upon the Trustees individually, or collectively, or upon the Union or Local Union to

l'égard des employés des divisions Gailuron et Durivage de Multi-Marques. Les fermetures ont également entraîné un déficit de solvabilité d'environ 5 millions de dollars, soit la somme nécessaire pour couvrir les crédits de rente pour services passés octroyés aux employés des deux divisions. Les deux décisions de la Régie exigeaient que les rapports actuariels déposés à la terminaison du Régime indiquent les sommes que l'employeur devait acquitter pour combler le déficit de solvabilité afin que les participants touchés par la terminaison reçoivent tout ce à quoi ils avaient droit.

[8] La terminaison partielle du Régime n'a suscité aucune contestation, mais l'employeur a contesté la façon dont elle avait été exécutée. Multi-Marques a fait valoir que les art. 9.12 et 9.13 des *Rules and Regulations* (les « Règles ») du Régime prévoient que des facteurs extrinsèques pouvaient entraîner la réduction des droits des employés et qu'il y avait lieu, en conséquence, de réduire ces droits si les cotisations de l'employeur étaient insuffisantes pour éponger le déficit du Régime. Ainsi, selon les Règles, les obligations de l'employeur en matière de financement se limitaient aux paiements déjà effectués. En réponse à cette contestation, la Régie a soumis à un comité de révision la question de la compatibilité des art. 9.12 et 9.13 des Règles avec la *LRCR*.

[9] Les articles 9.12 et 9.13 des Règles prévoient ce qui suit :

[TRADUCTION]

Article 9.12 — Limitation de responsabilité

Le régime est fondé sur des calculs actuariels ayant établi, autant que faire se peut, que les cotisations, si elles continuent d'être versées, seront suffisantes pour assurer la permanence du régime et satisfaire aux exigences de capitalisation énoncées à la Loi. Exception faite des obligations pouvant résulter de dispositions de la Loi, le régime n'a pas pour effet d'obliger l'employeur participant à verser des cotisations excédant celles qui sont prévues à la convention collective conclue avec le syndicat ou la section locale.

Ni les fiduciaires, individuellement ou collectivement, ni le syndicat ou la section locale ne sont tenus de verser les

provide the benefits established by this Plan, if the Fund does not have assets to make such payments.

Section 9.13 — Limitation of Liability for Pension Benefits

(a) Any provisions in the Plan to the contrary notwithstanding, if a Contributing Employer ceases to be a Contributing Employer (hereinafter referred to as a Withdrawing Employer) for any reason, the assets in respect of the Withdrawing Employer, which consist of the total contributions made by the Withdrawing Employer together with interest, less benefit payments already made, shall be allocated to provide for benefits, to the extent they are funded, in respect of service with that Withdrawing Employer, subject to the following:

(i) For purposes of this Section only, each Participant's accrued benefit shall be determined as if the Participant has satisfied the eligibility conditions for vesting.

(ii) If the Plan is fully funded on a going concern basis on the date the Withdrawing Employer terminates participation, benefits shall be reduced only to the extent that the actuarial liabilities that are established for benefits in respect of Past Service Credit, have not been fully funded by the Withdrawing Employer's assets.

(iii) If the Plan is not fully funded on a going concern basis on the date the Withdrawing Employer terminates participation, benefits shall be reduced to the extent they are not funded and, in any event, benefits in respect of Past Service Credit shall be reduced to the extent they are not fully funded by the Withdrawing Employer's assets.

(iv) Notwithstanding anything contained in this Section to the contrary, the allocation of the Withdrawing Employer's assets shall be in accordance with the applicable Act.

(b) If a group of Contributing Employers with Collective Agreements with any one Local Union shall cease to be Contributing Employers with respect to the members of that Local Union, on approximately the same date, the Trustees shall have the right to apply the above subsection (a)

prestations prévues au régime si la caisse ne dispose pas de l'actif suffisant pour ces paiements.

Article 9.13 — Limitation de responsabilité relativement aux prestations

(a) Nonobstant toute disposition contraire du régime, lorsqu'un employeur participant met fin à sa participation (ci-après appelé l'employeur sortant) pour quelque raison que ce soit, l'actif correspondant à cet employeur, soit les cotisations totales que celui-ci a versées et l'intérêt y afférant en sus des prestations déjà versées, est affecté, dans la mesure où les fonds le permettent, au versement des prestations afférentes aux années de service auprès de cet employeur, sous réserve des modalités suivantes :

(i) Pour l'application du présent article uniquement, les prestations acquises par chaque participant sont établies en tenant pour acquis que le participant satisfait aux conditions d'admissibilité.

(ii) Si le régime est entièrement capitalisé selon l'approche de la continuité à la date où l'employeur sortant met fin à sa participation, les prestations sont réduites dans la seule mesure où l'actif de l'employeur sortant ne couvre pas le passif actuariel établi à l'égard des prestations afférentes aux crédits pour services passés.

(iii) Si le régime n'est pas entièrement capitalisé selon l'approche de la continuité à la date où l'employeur sortant met fin à sa participation, les prestations sont réduites dans la mesure du déficit et, en tout état de cause, les prestations afférentes aux crédits pour services passés sont réduites dans la mesure où elles ne sont pas entièrement couvertes par l'actif de l'employeur sortant.

(iv) Nonobstant toute disposition contraire du présent article, l'actif de l'employeur sortant est affecté conformément à la loi applicable.

(b) Si un groupe d'employeurs participants liés par convention collective à une section locale met fin à sa participation pour ce qui concerne les membres de cette section locale à la même date approximativement, les fiduciaires peuvent appliquer l'alinéa (a) ci-dessus comme si ces

as though said Employers were one Contributing Employer. In any such case, the calculations shall include all Contributing Employers of the group having had Collective Agreements with such Local Union. [A.R., vol. I, at pp. 160-62]

[10] In its decision of April 14, 2003, the review committee decided that ss. 9.12 and 9.13 of the Rules were incompatible with s. 211 of the *SPPA*, which entitles the plan's members to the full value of their pensions, and s. 228 of the *SPPA*, which provides that where the assets of a pension plan are insufficient to satisfy the rights of the plan's members and beneficiaries, the amount of the deficiency constitutes a debt of the employer. Because ss. 9.12 and 9.13 of the Rules were incompatible with the *SPPA*, they were, pursuant to s. 5 of the *SPPA*, without effect. They could not therefore be applied in the actuarial reports required to conclude the partial termination. This decision was subsequently affirmed by the Administrative Tribunal of Québec ("ATQ") on June 15, 2004, and again on judicial review by the Quebec Superior Court on July 20, 2006. Multi-Marques, Sean Kelly and Canada Bread Company Ltd. appealed the Superior Court's decision to the Quebec Court of Appeal.

[11] On April 2, 2008, the Court of Appeal allowed the appeals: 2008 QCCA 597, [2008] R.J.Q. 853. It found that ss. 9.12 and 9.13 were not incompatible with the *SPPA* and that full effect should be given to them in the actuarial reports prepared in the context of the partial termination of the Fund. Accordingly, it set aside the decisions of the Superior Court, the ATQ and the Régie's review committee, and remitted the matter to the Régie, ordering the latter to review its initial decisions in conformity with the Court of Appeal's judgment. For ease of reference, I reproduce the Court of Appeal's orders here:

[TRANSLATION] Allows the appeals, with costs both in the Superior Court and in the Court of Appeal;

Sets aside the decision of the Superior Court dated July 20, 2006;

Sets aside the decision of the Administrative Tribunal of Québec dated June 15, 2004;

employeurs constituaient un employeur participant unique. Dans un tel cas, les calculs viseront tous les employeurs participants du groupe qui ont été liés par convention collective avec cette section locale. [d.a., vol. I, p. 160-162]

[10] Dans sa décision du 14 avril 2003, le comité de révision a conclu que les art. 9.12 et 9.13 des Règles étaient incompatibles avec l'art. 211 de la *LRCR* — en vertu duquel les participants au régime ont droit à la pleine valeur de leur rente — et avec l'art. 228 de la même loi — aux termes duquel le manque d'actifs d'un régime de pension nécessaires à l'acquittement des droits des participants et des bénéficiaires constitue une dette de l'employeur. Parce que les art. 9.12 et 9.13 des Règles étaient incompatibles avec la *LRCR*, aux termes de l'art. 5 de cette dernière, ils n'avaient pas d'effet. Ils ne pouvaient donc être appliqués dans les rapports actuariels exigés pour la terminaison partielle du Régime. Le 15 juin 2004, cette décision a été confirmée par le Tribunal administratif du Québec (« TAQ ») et, à l'issue d'une révision judiciaire, par la Cour supérieure du Québec le 20 juillet 2006. Multi-Marques, Sean Kelly et Canada Bread Company Ltd. ont porté la décision de la Cour supérieure en appel devant la Cour d'appel du Québec.

[11] Le 2 avril 2008, la Cour d'appel a accueilli les appels : 2008 QCCA 597, [2008] R.J.Q. 853. Elle a conclu que les art. 9.12 et 9.13 n'étaient pas incompatibles avec la *LRCR* et qu'il fallait donc leur donner plein effet dans les rapports actuariels préparés dans le cadre de la terminaison partielle du Régime. Elle a donc infirmé les décisions de la Cour supérieure, du TAQ et du comité de révision de la Régie, et elle a renvoyé l'affaire à la Régie en lui enjoignant de réviser ses décisions initiales en tenant compte des principes se dégageant de son jugement. Pour plus de commodité, je reproduis ci-après l'ordonnance de la Cour d'appel :

Accueille les appels, avec dépens tant en Cour supérieure qu'en Cour d'appel;

Infirme la décision de la Cour supérieure du 20 juillet 2006;

Infirme la décision du Tribunal administratif du Québec du 15 juin 2004;

Sets aside the decision of the review committee of the Régie des rentes du Québec dated April 14, 2003;

Refers the matter back to the Régie des rentes du Québec to review its decisions D-41130-001 and D-41130-02 dated May 16, 2002 in conformity with this decision;

Authorizes Kelly to file termination actuarial reports that apply clauses 9.12 and 9.13 of the pension plan in light of the partial terminations resulting from the withdrawal from the plan of the employees of the Gailuron and Durivage divisions of Multi-Marques. [Emphasis added; paras. 104-9.]

[12] On May 29, 2008, the Régie filed an application for leave to appeal to this Court.

[13] On the same day that the Court of Appeal rendered its judgment, the Quebec National Assembly introduced Bill 68, *An Act to amend the Supplemental Pension Plans Act, the Act respecting the Québec Pension Plan and other legislative provisions* (*Journal des débats*, vol. 40, No. 65, 1st Sess., 38th Leg., April 2, 2008). In the debate at the committee stage, the Minister of Employment and Social Solidarity, Sam Hamad, made it clear that this amending legislation was motivated by the Court of Appeal's decision and by the need to protect the Multi-Marques pensioners:

[TRANSLATION] So the purpose of this amendment is to counter the effects of the judgment rendered by the Quebec Court of Appeal on April 2, 2008, in the case of *Multi-Marques Distribution Inc. v. Régie des rentes du Québec*. . . . With respect for the court, that judgment is based on an interpretation of the *Supplemental Pension Plans Act* that is incompatible with the Act's objectives. [Emphasis added.]

(National Assembly, *Journal des débats de la Commission des affaires sociales*, vol. 40, No. 52, 1st Sess., 38th Leg., June 3, 2008)

[14] This legislation introduced ss. 14.1 and 228.1 into the *SPPA*. In these provisions, the legislature essentially adopted the Régie's approach to the application of ss. 9.12 and 9.13 of the Rules and rejected the approach taken by the Court of Appeal. As a result of the amendments, no provisions of a

Infirme la décision du comité de révision de la Régie des rentes du Québec datée du 14 avril 2003;

Retourne le dossier à la Régie des rentes du Québec pour qu'elle révise ses décisions D-41130-001 et D-41130-02 du 16 mai 2002 en se conformant au présent arrêt;

Autorise Kelly à déposer des rapports actuariels de terminaison qui appliquent les clauses 9.12 et 9.13 du régime de retraite, eu égard aux terminaisons partielles résultant du retrait du régime de retraite des employés des divisions Gailuron et Durivage de Multi-Marques. [Je souligne; par. 104-109.]

[12] Le 29 mai 2008, la Régie a demandé l'autorisation de se pourvoir devant notre Cour.

[13] Le jour même où la Cour d'appel rendait son arrêt, le projet de loi n^{o} 68 — *Loi modifiant la Loi sur les régimes complémentaires de retraite, la Loi sur le régime de rentes du Québec et d'autres dispositions législatives* (*Journal des débats*, vol. 40, n^{o} 65, 1re sess., 38^{e} lég., 2 avril 2008) — était présenté à l'Assemblée nationale du Québec. Lors des débats en commission parlementaire, le ministre de l'Emploi et de la Solidarité sociale, M. Sam Hamad, a clairement indiqué que les modifications législatives étaient proposées par suite de l'arrêt de la Cour d'appel et visaient à protéger les retraités de Multi-Marques :

Alors, cet amendement vise à contrer les effets du jugement que la Cour d'appel du Québec a rendu le 2 avril 2008 dans l'affaire *Multi-marques Distribution inc. c. Régie des rentes du Québec*. [. . .] Avec respect pour la cour, ce jugement repose sur une interprétation de la *Loi sur les régimes complémentaires de retraite* qui va à l'encontre des objectifs qu'elle vise. [Je souligne.]

(Assemblée nationale, *Journal des débats de la Commission des affaires sociales*, vol. 40, n^{o} 52, 1re sess., 38^{e} lég., 3 juin 2008)

[14] Ce projet de loi ajoutait à la *LRCR* les art. 14.1 et 228.1, qui consacraient essentiellement le point de vue de la Régie relativement à l'application des art. 9.12 et 9.13 des Règles et rejetaient l'interprétation de la Cour d'appel. Ces modifications ont fait en sorte qu'aucune disposition d'un régime de

pension plan may make benefits due conditional on extrinsic factors such that the obligations of an employer towards the plan are limited or reduced. In addition, the legislature expressly provided, in s. 319.1, that these new sections of the Act were declaratory in nature.

[15] The National Assembly passed Bill 68 on June 18, 2008 (S.Q. 2008, c. 21), and this Court dismissed the Régie's application for leave to appeal on October 16, 2008: [2008] 3 S.C.R. ix.

[16] Following this Court's decision, the Régie undertook to implement the Court of Appeal's judgment of April 2, 2008 and to complete the partial termination of the Fund. In November 2008, the Régie informed counsel for the parties that a review committee had been formed to implement the Court of Appeal's judgment, and invited them to submit comments with respect to the implementation. On August 14, 2009, the Régie's review committee released the decision which is the subject of this appeal.

[17] Instead of following the Court of Appeal's approach, according to which ss. 9.12 and 9.13 of the Rules were to be considered in establishing the obligations of Multi-Marques resulting from the partial termination, the Régie applied the new provisions of the *SPPA*. It accordingly refused to apply the clauses of the Rules that allowed for the reduction of benefits payable to the plan's members and beneficiaries, and confirmed its initial decisions of May 16, 2002. Sean Kelly, Canada Bread Company Ltd. and Multi-Marques contested the Régie's decision before the ATQ.

III. Judicial History

A. *Administrative Tribunal of Québec, 2010 QCTAQ 04423, [2010] R.J.D.T. 796 (Judges Cormier and Lévesque)*

[18] The ATQ addressed three issues in its decision: (1) whether the Régie had erred in law by establishing a committee to review its initial decisions; (2) whether the review committee had breached the rules of natural justice by failing to send prior notice of its decision and by failing to inform the parties that it was considering applying the amendments

retraite ne peut faire dépendre la valeur de droits accumulés d'un facteur extrinsèque de façon à limiter ou réduire les obligations d'un employeur envers le régime. En outre, le législateur énonce expressément, à l'art. 319.1, que ces nouveaux articles de la *LRCR* sont de nature déclaratoire.

[15] L'Assemblée nationale a adopté le projet de loi nº 68 le 18 juin 2008 (L.Q. 2008, ch. 21), et notre Cour a rejeté la demande d'autorisation d'appel de la Régie le 16 octobre 2008 : [2008] 3 R.C.S. ix.

[16] Par suite de cette décision de notre Cour, la Régie a entrepris la mise en œuvre de l'arrêt de la Cour d'appel du 2 avril 2008 afin de mener à terme la terminaison partielle du Régime. Au mois de novembre 2008, elle a informé les avocats des parties qu'un comité de révision avait été chargé de cette mise en œuvre et les a invités à présenter des observations. Le 14 août 2009, le comité de révision de la Régie a rendu la décision qui fait l'objet du présent pourvoi.

[17] Au lieu de suivre l'interprétation de la Cour d'appel, selon laquelle il fallait prendre en compte les art. 9.12 et 9.13 des Règles pour établir les obligations de Multi-Marques résultant de la terminaison partielle, la Régie a appliqué les nouvelles dispositions de la *LRCR*. Elle a donc refusé de donner effet aux articles des Règles qui permettaient de réduire les droits payables aux participants et aux bénéficiaires du Régime, et elle a confirmé ses décisions initiales du 16 mai 2002. Sean Kelly, Canada Bread Company Ltd. et Multi-Marques ont contesté la décision de la Régie devant le TAQ.

III. Historique judiciaire

A. *Tribunal administratif du Québec, 2010 QCTAQ 04423, [2010] R.J.D.T. 796 (les juges Cormier et Lévesque)*

[18] Dans sa décision, le TAQ a examiné trois questions : (1) La Régie a-t-elle commis une erreur de droit en constituant un comité chargé de revoir ses décisions initiales? (2) Le comité de révision a-t-il contrevenu aux règles de justice naturelle en ne donnant pas de préavis de sa décision et en n'informant pas les parties qu'il envisageait d'appliquer

that had been made to the *SPPA* after the Court of Appeal had rendered its judgment; and (3) whether the review committee had erred in applying the declaratory provisions of the *SPPA* in this case. Only the third issue remains relevant in this Court.

[19] With respect to this third issue, the ATQ upheld the Régie's position, finding that the Régie was right to apply the declaratory provisions, as the case had still been pending when the declaratory provisions came into force on June 20, 2008.

B. *Quebec Superior Court, 2010 QCCS 6104, [2011] R.J.Q. 122 (Grenier J.)*

[20] Both the employers and the representative of the trustees applied to the Superior Court for judicial review of the ATQ's decision. The Superior Court allowed their application.

[21] The application judge held that the standard of review was correctness. In addressing the Régie's decision, she stated that the issue was whether the Régie had the authority to make the order it did in light of the Court of Appeal's decision. In her view, the ATQ had erred in holding that it was open to the Régie to apply the declaratory provisions in the specific context of this case. She explained that the case could not have been "pending" in June 2008, and that when the Régie issued its new decision in 2009, the decision of the Court of Appeal had acquired the authority of a final judgment, which meant that the declaratory provisions of the *SPPA* could not apply to the dispute between the parties. As a result, the Régie was obligated to take ss. 9.12 and 9.13 of the Rules into account in its orders respecting the actuarial calculations to be made upon termination.

C. *Quebec Court of Appeal, 2011 QCCA 1518, [2011] R.J.Q. 1540 (Thibault, Rochette and Kasirer JJ.A.)*

[22] The Court of Appeal also found that the Régie had erred in applying the declaratory provisions. Thibault J.A., writing for the court, stated that,

les modifications apportées à la *LRCR* postérieurement à l'arrêt de la Cour d'appel? (3) En l'espèce, le comité de révision a-t-il appliqué à tort les dispositions déclaratoires de la *LRCR*? Seule la troisième question demeure pertinente pour le présent pourvoi.

[19] À l'issue de l'examen de cette question, le TAQ a confirmé la position de la Régie. Il lui a donné raison d'avoir appliqué les dispositions déclaratoires, puisque l'affaire était encore pendante lors de l'entrée en vigueur de ces dispositions le 20 juin 2008.

B. *Cour supérieure du Québec, 2010 QCCS 6104, [2011] R.J.Q. 122 (la juge Grenier)*

[20] Les employeurs et le représentant des fiduciaires ont demandé à la Cour supérieure du Québec la révision judiciaire de la décision du TAQ. La Cour supérieure a accueilli leur requête.

[21] Après avoir décidé que la norme de contrôle applicable était celle de la décision correcte, la juge a indiqué qu'il fallait déterminer si la Régie avait le pouvoir de rendre la décision qu'elle avait rendue compte tenu de l'arrêt de la Cour d'appel. Elle a jugé que, dans le contexte particulier de l'affaire, le TAQ avait conclu à tort que la Régie pouvait appliquer les dispositions déclaratoires. Elle a expliqué que l'affaire ne pouvait avoir été « pendante » au mois de juin 2008 et que, lorsque la Régie a rendu sa nouvelle décision en 2009, l'arrêt de la Cour d'appel avait acquis l'autorité de la chose jugée, de sorte que les dispositions déclaratoires de la *LRCR* ne pouvaient s'appliquer au litige opposant les parties. Les ordonnances de la Régie relatives aux calculs actuariels à effectuer par suite de la terminaison devaient donc prendre en compte les art. 9.12 et 9.13 des Règles.

C. *Cour d'appel du Québec, 2011 QCCA 1518, [2011] R.J.Q. 1540 (les juges Thibault, Rochette et Kasirer)*

[22] La Cour d'appel a elle aussi jugé que la Régie avait appliqué à tort les dispositions déclaratoires. S'exprimant au nom de la cour, la juge Thibault

when the application for leave to appeal was pending before this Court, the Court of Appeal's judgment had not yet acquired the authority of a final judgment. However, only this Court would have been able to apply the declaratory legislation had it decided to hear the case. Once this Court had dismissed the Régie's application for leave, the Court of Appeal's judgment had acquired the authority of a final judgment and should have been followed by the Régie. The Court of Appeal held that although the Régie has the power under *An Act respecting the Québec Pension Plan*, R.S.Q., c. R-9, s. 26, to review its decisions, that power of review does not empower it to disregard a final judgment of the Court of Appeal.

IV. Issues

[23] The issues in this case are:

1. What is the effect of declaratory legislation?

2. Did the Régie err in applying the declaratory legislation in determining the parties' rights and obligations?

V. Analysis

[24] The principle of *res judicata* precludes parties from relitigating an issue in respect of which a final determination has been made as between them: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18. However, it does not preclude the legislature from negating the effects of such a determination. In the case at bar, it is clear that the legislature's intention was not only to deprive the Court of Appeal's judgment of precedential value, but also to negate its effect of rendering the issue *res judicata* as between the parties. In my view, the legislature attained both these objectives.

[25] I have read my colleague's dissenting reasons. Although they focus on the Régie's jurisdiction, I firmly believe that the central issue in this appeal relates to the nature and effect of the declaratory legislation.

a souligné qu'au moment où la demande d'autorisation d'appel était pendante devant notre Cour, l'arrêt de la Cour d'appel n'avait pas encore l'autorité de la chose jugée. Toutefois, seule notre Cour aurait pu appliquer les dispositions déclaratoires si elle avait décidé d'entendre le pourvoi. L'arrêt de la Cour d'appel est passé en force de chose jugée lorsque notre Cour a rejeté la demande d'autorisation d'appel, et la Régie aurait dû s'y conformer. La Cour d'appel a jugé que, bien que la Régie dispose du pouvoir de réviser ses décisions, en vertu de l'art. 26 de la *Loi sur le régime de rentes du Québec*, L.R.Q., ch. R-9, elle n'est pas habilitée pour autant à passer outre à un jugement définitif de la Cour d'appel.

IV. Questions en litige

[23] Le pourvoi soulève les questions suivantes :

1. Quel est l'effet d'une loi déclaratoire?

2. La Régie a-t-elle commis une erreur en appliquant la loi déclaratoire pour statuer sur les droits et obligations des parties?

V. Analyse

[24] Le principe de la chose jugée empêche les parties de soumettre à nouveau aux tribunaux une question qui a fait l'objet d'un jugement définitif à leur égard : *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, par. 18. Cela ne signifie pas pour autant que le législateur ne peut pas intervenir pour annuler les effets d'un tel jugement. En l'espèce, il est évident que le législateur entendait non seulement priver le jugement de la Cour d'appel de sa valeur de précédent, mais il voulait également annuler son autorité de chose jugée entre les parties. J'estime qu'il a atteint ces deux objectifs.

[25] J'ai lu les motifs de dissidence de ma collègue. Avec respect et malgré l'accent qu'elle fait porter sur la juridiction de la Régie, je crois fermement que la nature et l'effet de la disposition législative déclaratoire demeurent, en l'espèce, la principale question en litige.

A. *What Is the Effect of Declaratory Legislation?*

[26] It is settled law in Canada that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation: L.-P. Pigeon, *Drafting and Interpreting Legislation* (1988), at pp. 81-82. As this Court acknowledged in *Western Minerals Ltd. v. Gaumont*, [1953] 1 S.C.R. 345, such forays are usually made where the legislature wishes to correct judicial interpretations that it perceives to be erroneous.

[27] In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 562. As a result, declaratory provisions operate less as legislation and more as jurisprudence. They are akin to binding precedents, such as the decision of a court: P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at p. 248. Such legislation may overrule a court decision in the same way that a decision of this Court would take precedence over a previous line of lower court judgments on a given question of law.

[28] It is also settled law that declaratory provisions have an immediate effect on pending cases, and are therefore an exception to the general rule that legislation is prospective. The interpretation imposed by a declaratory provision stretches back in time to the date when the legislation it purports to interpret first came into force, with the effect that the legislation in question is deemed to have always included this provision. Thus, the interpretation so declared is taken to have always been the law: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 682-83.

[29] The immediate effect of declaratory legislation is limited, however. In 1953, in *Western Minerals*, this Court endorsed the statement in W. F. Craies, *A Treatise on Statute Law* (4th ed. 1936), that declaratory laws "decide like cases pending when the judgments are given, but do not re-open decided cases": p. 370, citing Craies, at pp. 341-42.

A. *Quel est l'effet d'une loi déclaratoire?*

[26] Le droit canadien reconnaît qu'il entre dans la prérogative du législateur de jouer un rôle judiciaire et de déterminer par une loi déclaratoire l'interprétation que doivent recevoir ses lois : L.-P. Pigeon, *Rédaction et interprétation des lois* (3e éd. 1986), p. 132-133. Comme notre Cour l'a indiqué dans *Western Minerals Ltd. c. Gaumont*, [1953] 1 R.C.S. 345, le législateur intervient habituellement ainsi lorsqu'il veut corriger une interprétation judiciaire qu'il estime erronée.

[27] Lorsqu'il adopte une loi déclaratoire, le législateur joue le rôle d'un juge et dicte l'interprétation à donner à ses propres lois : P.-A. Côté, en collaboration avec S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), p. 609-610. Pour cette raison, les dispositions déclaratoires relèvent davantage de la jurisprudence que de la législation. Elles s'apparentent à des précédents ayant force obligatoire, telles les décisions judiciaires : P. Roubier, *Le droit transitoire : conflits des lois dans le temps* (2e éd. 1993), p. 248. Elles peuvent infirmer une décision judiciaire de la même façon qu'un arrêt de notre Cour prévaut sur la jurisprudence de juridictions inférieures sur un point de droit donné.

[28] Il est tout aussi reconnu en droit que les dispositions déclaratoires ont un effet immédiat sur les affaires pendantes et qu'elles font donc exception à la règle générale du caractère prospectif de la loi. L'interprétation imposée par une disposition déclaratoire remonte dans le temps jusqu'à la date d'entrée en vigueur du texte de loi qu'elle interprète, faisant en sorte que ce texte de loi est réputé avoir toujours inclus cette disposition. Cette interprétation est donc considérée comme ayant toujours été la loi : R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 682-683.

[29] Toutefois, des limites s'appliquent à l'effet immédiat d'une loi déclaratoire. En 1953, notre Cour a fait sien, dans *Western Minerals*, l'énoncé de W. F. Craies, *A Treatise on Statute Law* (4e éd. 1936), selon lequel les lois déclaratoires [TRADUCTION] « statuent sur les affaires semblables qui sont pendantes à la date du jugement, mais elles n'opèrent

Like a binding precedent, an interpretation the legislature adopts by enacting a declaratory provision is applicable to all future cases as well as to cases that are pending when the provision comes into force, despite the fact that the events that gave rise to any such dispute would have taken place before the provision was enacted. However, declaratory provisions do not reopen cases that have been resolved in a final judgment.

[30] Before going further in my analysis, I must highlight a distinction between two concepts that are central to the resolution of this appeal: that of a "final judgment" and that of a "final judgment that ultimately determines the rights and obligations of the parties". A judgment need not dispose of the litigation in its entirety to be final. If it disposes of any substantive interlocutory *issue*, *res judicata* will apply. On the other hand, *res judicata* will also apply to a final judgment that ultimately determines the rights and obligations of the parties, but it then disposes of the *case* in its entirety and makes any further proceedings unnecessary.

[31] This distinction is significant because, in *Western Minerals*, this Court endorsed the proposition that declaratory legislation does not reopen decided *cases*, but it made no mention of the effect of such legislation on decided *issues*. In Canada, there is no definitive case law on the effect of declaratory legislation on decided issues. As a result, I cannot presume that declaratory legislation that is clearly intended to negate final judgments that do not ultimately determine the rights and obligations of the parties does not apply to such a judgment. This conclusion is the only one I can reach in light of the jurisprudence and the relevant legal principles.

[32] The concept of the final judgment that does not ultimately determine the rights and obligations of the parties is the basis for distinguishing pending cases from those that are not pending. Pending cases are cases that are currently before a competent tribunal and are awaiting a final and irrevocable

pas la réouverture d'affaires déjà jugées » : p. 370, citant Craies, p. 341-342. Tout comme un précédent ayant force de loi, l'interprétation adoptée par le législateur au moyen d'une disposition déclaratoire s'applique à toutes les causes futures et à celles pendantes au moment de l'entrée en vigueur de la disposition, même si les faits générateurs du litige sont antérieurs à l'adoption de cette dernière. Toutefois, les dispositions déclaratoires n'ont pas pour effet de rouvrir des causes tranchées par un jugement définitif.

[30] Avant de poursuivre mon analyse, je dois faire ressortir une distinction entre deux notions dont l'importance est cruciale pour l'issue du présent pourvoi : la notion de « jugement définitif » et celle de « jugement définitif qui statue ultimement sur les droits et obligations des parties ». Un jugement n'a pas à statuer sur le litige en entier pour être définitif. S'il statue sur toute *question* de fond interlocutoire, il acquerra l'autorité de la chose jugée. Par contre, un jugement définitif qui statue ultimement sur les droits et obligations des parties acquiert aussi l'autorité de la chose jugée, mais il tranche le *litige* en entier et rend inutile la prise de toute autre mesure dans l'instance.

[31] Cette distinction est importante parce que, dans l'arrêt *Western Minerals*, la Cour a fait sienne la thèse selon laquelle les lois déclaratoires n'opèrent pas la réouverture des *causes* déjà jugées, mais elle ne mentionne pas l'effet de telles lois sur les *questions* tranchées. Au Canada, il n'existe aucune jurisprudence définitive quant à l'effet des lois déclaratoires sur les questions tranchées. En conséquence, je ne peux supposer que les lois déclaratoires qui visent manifestement à annuler des jugements définitifs qui ne statuent pas ultimement sur les droits et obligations des parties ne s'appliquent pas à de tels jugements. Cette conclusion est la seule que je peux tirer à la lumière de la jurisprudence et des principes de droit pertinents.

[32] Le concept de jugement définitif qui ne statue pas ultimement sur les droits et obligations des parties est celui qui permet de distinguer les affaires pendantes des affaires non pendantes. Les affaires pendantes sont celles dont sont présentement saisis des tribunaux compétents et qui sont en attente

determination on the merits. As Cartwright J. explained in *Western Minerals*, such cases include "actions in which, while judgment has been given, an appeal from such judgment is pending at the date of the declaratory act coming into force": p. 370. Accordingly, only cases in which judgments have definitively determined the parties' rights and obligations are no longer pending.

[33] In the case at bar, the declaratory legislation will therefore apply unless it is found that a *case*, and not merely an *issue*, has been decided.

[34] In contrast to my position, the Chief Justice states that clear language is required where the legislature intends to extinguish the effects of any final judgment in which an issue has been decided (paras. 62, 64 and 71). With respect, no support for this proposition can be found in this Court's case law. The Chief Justice relies solely on the Saskatchewan Court of Appeal's decision in *Zadvorny v. Saskatchewan Government Insurance* (1985), 38 Sask. R. 59, in support of this principle. For the reasons set out above, I am neither bound nor persuaded by that case. In my view, the Canadian jurisprudence and the relevant legal principles tend in the opposite direction.

[35] Furthermore, I find it unnecessary to insist on clear legislative language in a case such as this one where it is not in dispute that the legislature's intention was to extinguish the effects of the judgment as between the parties. Not only is this proposition unsupported by this Court's jurisprudence, it would effectively defeat the purpose of the enactment. As can be seen from the record of the legislative committee's debate, it was clear from the start that the legislature's objective in enacting the declaratory provisions was to counter the effects of the Court of Appeal's judgment of April 2, 2008 in order to protect the affected pensioners. With respect, an approach that disregarded this clear intent and instead required clear language would in my view be overly formalistic and would place unnecessary limits on the evidence that can be considered in determining the effects of declaratory legislation.

d'un jugement définitif et irrévocable sur le fond. Comme le juge Cartwright l'a expliqué dans *Western Minerals*, elles englobent [TRADUCTION] « les affaires jugées, mais dont le jugement a fait l'objet d'un appel qui est pendant au moment de l'entrée en vigueur de la loi déclaratoire » : p. 370. En conséquence, seules les affaires ayant abouti à un jugement statuant définitivement sur les droits et obligations des parties ne sont plus pendantes.

[33] En l'espèce, la loi déclaratoire s'appliquera, à moins qu'une *cause*, et non une simple *question*, n'ait été tranchée.

[34] Contrairement à moi, la Juge en chef est d'avis que lorsque le législateur entend supprimer les effets d'un jugement définitif qui tranche une question, il doit l'exprimer clairement (par. 62, 64 et 71). Avec égards, aucune décision de la Cour ne permet d'étayer une telle affirmation. La Juge en chef se fonde uniquement sur la décision *Zadvorny c. Saskatchewan Government Insurance* (1985), 38 Sask. R. 59, de la Cour d'appel de la Saskatchewan pour appuyer le principe qu'elle énonce. Or, pour les motifs que j'exprime dans la présente décision, je ne suis ni lié ni convaincu par cet arrêt. Selon moi, la jurisprudence canadienne et les principes juridiques pertinents empruntent plutôt la direction contraire.

[35] En outre, j'estime qu'il est inutile d'insister sur la clarté du libellé de la loi dans une affaire comme celle-ci alors que personne ne conteste que le législateur avait l'intention de supprimer les effets du jugement entre les parties. Non seulement cette proposition en faveur du langage clair n'est-elle pas soutenue par la jurisprudence de la Cour, mais elle contredit en fait l'objectif de la loi. Grâce à la transcription des débats législatifs, il n'a jamais fait de doute que, lorsqu'il a adopté les dispositions déclaratoires, le législateur visait à contrer les effets du jugement de la Cour d'appel du 2 avril 2008 de manière à protéger les retraités. En tout respect pour l'opinion contraire, une approche qui ignorerait cette intention manifeste et ne chercherait qu'un libellé clair constituerait une approche, selon moi, trop formaliste, et limiterait d'une manière injustifiée la preuve qui peut être examinée pour apprécier les effets d'une loi déclaratoire.

B. *Did the Régie Err in Applying the Declaratory Legislation?*

(1) Application of the Declaratory Legislation to the Dispute

[36] In the instant case, it is common ground that the provisions introduced into the *SPPA* by Bill 68 are declaratory in nature. Section 319.1 of the *SPPA*, which was enacted at the same time as ss. 14.1 and 228.1, expressly provides that these provisions are declaratory. In addition to this unambiguous language, the circumstances of their enactment show that the legislature intended them to be declaratory. It can be seen from the debate that led up to their enactment that the legislature's objective was to overrule the Court of Appeal's decision in order to protect the plan's members and beneficiaries and to ensure that the decision in question would not become a precedent that would be binding on the courts in pending and future cases.

[37] Since the declaratory nature of the provisions at issue in this appeal and the implications of that nature are not challenged by any of the parties, the question of the applicability of those provisions hinges on whether the dispute between the parties was pending when they were enacted. Put more simply, what must be determined is whether the appeal concerns a decided case, or merely a decided issue.

[38] Given that both the Régie and the intervener Attorney General of Quebec base their argument that this case was pending on the Régie's 2008 application for leave to appeal to this Court, I should make it clear that that application is not the basis for my finding that the case was pending at the relevant time. Although this Court clearly stated in *Western Minerals* that a case in which a final judgment has been rendered but an appeal from that judgment is pending qualifies as a pending case for the purpose of the application of declaratory legislation, that is not the only way for a case to qualify as one. Rather, as I explained above, the key factor in finding a case to be pending is the absence of a final determination of the rights and obligations of the parties. Like

B. *La Régie a-t-elle commis une erreur en appliquant la loi déclaratoire?*

(1) Application de la loi déclaratoire au litige

[36] En l'espèce, nul ne conteste la nature déclaratoire des dispositions introduites dans la *LRCR* par le projet de loi 68. L'article 319.1 de la *LRCR*, adopté en même temps que les art. 14.1 et 228.1, énonce expressément que ces dispositions sont déclaratoires. Au libellé sans équivoque de cette disposition s'ajoutent les circonstances de leur adoption, qui témoignent de l'intention du législateur qu'elles soient déclaratoires. Il ressort des délibérations ayant mené à leur adoption que le législateur voulait infirmer l'arrêt de la Cour d'appel afin de protéger les participants et bénéficiaires du Régime et d'empêcher que la décision n'acquière valeur de précédent et ne lie les tribunaux dans les affaires pendantes ou futures.

[37] Puisque ni le caractère déclaratoire des dispositions en cause ni les effets de ce caractère déclaratoire ne sont contestés, l'enjeu de l'applicabilité de ces dispositions en l'espèce dépend de la question de savoir si le différend était pendant lorsqu'elles ont été adoptées. Plus simplement, il nous faut déterminer si l'appel concerne en l'espèce une affaire jugée ou simplement une question tranchée.

[38] La Régie et le procureur général du Québec fondent leur argumentation sur le fait que l'affaire était pendante, puisque la Régie avait présenté en 2008 une demande d'autorisation d'appel à notre Cour. Je tiens donc à préciser que ma conclusion selon laquelle l'affaire était pendante à l'époque pertinente ne dépend pas de l'existence de cette demande d'autorisation d'appel. Bien que l'arrêt *Western Minerals* de notre Cour pose clairement que, pour l'application d'une loi déclaratoire, est pendante une affaire tranchée par un jugement définitif dont l'appel est pendant, il ne s'agit pas là du seul facteur qui détermine si une affaire peut être considérée comme pendante. Ainsi que je l'ai expliqué, le facteur déterminant à cet égard est

a case that has been appealed, one that has been remitted to a lower court is also a pending case.

[39] On June 20, 2008, when the declaratory provisions came into force, the case between the parties was pending. Although the Court of Appeal's judgment of April 2, 2008 had acquired "[t]he authority of a final judgment (*res judicata*)" in the sense of art. 2848 of the *Civil Code of Québec*, S.Q. 1991, c. 64, it did not fully and definitively adjudicate the rights and obligations of the parties that resulted from the two partial terminations. As I mentioned above, a pending case is one in which a final and irrevocable judgment determining the parties' rights and obligations has not yet been rendered. A final judgment on an issue in a case that falls short of a resolution of the case on its merits does not preclude an authority responsible for the final determination of the parties' rights and obligations from applying declaratory legislation that has been enacted since that judgment.

[40] In coming to this conclusion, I do not mean to call into question the capital importance of the doctrine of *res judicata* to the administration of justice. The purpose of *res judicata* is to prevent the relitigation of claims that have already been decided by a court of competent jurisdiction. However, it seems to me that a decision to extend this doctrine by applying it to the unique circumstances of this case would encroach unduly upon the legislature's prerogative to nullify the effects of a final judgment that would otherwise be binding as between the parties. Put more simply, whereas *res judicata* can preclude a party from asking a court to undo the effects of a judgment involving a decided issue, it precludes the *legislature* from undoing the effects of a judgment only if the judgment amounts to a decided case.

[41] In light of this Court's existing jurisprudence, only a final judgment on the merits of the case would preclude the application of an interpretation set out in declaratory legislation.

plutôt l'absence d'un jugement définitif statuant sur les droits et obligations des parties. Tout comme les causes qui font l'objet d'un appel, les affaires renvoyées devant un tribunal d'instance inférieure sont aussi pendantes.

[39] Le 20 juin 2008, à l'entrée en vigueur des dispositions déclaratoires, le litige entre les parties était pendant. Bien que l'arrêt du 2 avril 2008 de la Cour d'appel eût acquis « [l]'autorité de la chose jugée » au sens de l'art. 2848 du *Code civil du Québec*, L.Q. 1991, ch. 64, il ne statuait pas entièrement et définitivement sur les droits et obligations des parties découlant des deux terminaisons partielles. Je le répète, est pendante une affaire qui n'a pas été tranchée par un jugement définitif et irrévocable statuant sur les droits et obligations des parties. Un jugement définitif qui tranche une question sans résoudre le litige au fond n'empêche pas le décideur de qui relève la décision définitive sur les droits et obligations des parties d'appliquer une loi déclaratoire adoptée postérieurement à ce jugement.

[40] En concluant de la sorte, je ne souhaite pas remettre en question l'importance capitale, pour l'administration de la justice, de la doctrine de l'autorité de la chose jugée. Cette doctrine vise à éviter la réouverture des affaires déjà jugées par un tribunal compétent. Toutefois, j'estime qu'étendre la portée de cette doctrine et l'appliquer aux circonstances particulières de l'espèce empiéterait indûment sur la prérogative du législateur d'écarter les effets d'un jugement définitif qui lierait par ailleurs les parties. En termes plus simples, alors que l'autorité de la chose jugée peut empêcher une partie de demander à un tribunal d'annuler les effets d'une décision qui tranche une question, elle empêche seulement le *législateur* d'annuler l'effet d'une décision qui tranche une affaire.

[41] Selon la jurisprudence de la Cour, seul un jugement définitif rendu sur le fond de l'affaire ferait obstacle à l'application d'une interprétation formulée dans une loi déclaratoire.

[42] The Court of Appeal's decision resulted in a final determination only on the question of law relating to the interpretation of certain provisions of the Rules and their compatibility with the *SPPA*. The court remitted the question of the parties' substantive rights in light of this interpretation to the Régie for determination. As a result, there had been no final resolution of the dispute between the parties as of June 20, 2008. The terms of the partial termination of the Fund had yet to be determined. The case between the parties therefore remained pending when the declaratory provisions came into force, and a competent authority properly charged with resolving the dispute between the parties was entitled to give effect to those provisions in doing so.

[43] Because the Court of Appeal had remitted the matter to it, the Régie was a competent authority properly charged with resolving a pending case when the declaratory provisions came into force. It was therefore open to the Régie to take them into consideration in determining the outcome of that case.

(2) Significance of a Decision to Remit a Matter With Directions

[44] In its judgment of April 2, 2008, the Court of Appeal remitted the matter to the Régie, ordering it to review its decisions in light of the court's reasons. Having discussed the issue of *res judicata* that flowed from the Court of Appeal's decision, I will now turn to the issue of *stare decisis*.

[45] Multi-Marques and Sean Kelly argue that because the Court of Appeal had remitted the matter to the Régie together with a direction, the Régie's jurisdiction was limited and it was bound to apply the law as interpreted by the court regardless of developments subsequent to the court's decision.

[46] This approach is erroneous because it disregards the proper functioning of the principle of *stare decisis*. Where an administrative decision-maker has a duty to follow the directions of a reviewing court, it is on the basis of *stare decisis*: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, [2003] 3 F.C. 529, at

[42] L'arrêt de la Cour d'appel n'a statué définitivement que sur une question de droit relative à l'interprétation de certaines dispositions des Règles et à leur compatibilité avec la *LRCR*. La cour a renvoyé à la Régie la question des droits substantiels des parties pour qu'elle en décide en tenant compte de cette interprétation. Le 20 juin 2008, le litige entre les parties n'avait donc pas connu de résolution définitive. Les modalités des terminaisons partielles du Régime n'avaient pas encore été établies. Le litige entre les parties était donc toujours pendant lorsque les dispositions déclaratoires sont entrées en vigueur, et l'autorité compétente à qui il appartenait de résoudre le litige entre les parties pouvait alors donner effet aux dispositions déclaratoires.

[43] La Cour d'appel lui ayant renvoyé la cause, la Régie était une autorité compétente à qui il appartenait de trancher une affaire qui était pendante à l'entrée en vigueur des dispositions déclaratoires. Elle pouvait donc tenir compte de ces dispositions pour statuer sur l'affaire.

(2) Portée d'une décision portant renvoi d'une affaire et assortie de directives

[44] Dans sa décision du 2 avril 2008, la Cour d'appel a renvoyé l'affaire à la Régie en lui ordonnant de réviser ses décisions conformément aux motifs de l'arrêt. Ayant statué sur la question de l'autorité de la chose jugée qui a découlé de la décision de la Cour d'appel, je vais maintenant traiter de la question du *stare decisis*.

[45] Multi-Marques et Sean Kelly soutiennent que, parce que la Cour d'appel avait ordonné le renvoi en donnant des directives, la Régie n'exerçait qu'une compétence limitée et devait appliquer la loi telle que la Cour d'appel l'avait interprétée, sans tenir compte des changements postérieurs à l'arrêt.

[46] Ce raisonnement est erroné parce qu'il se méprend sur la raison d'être du principe du *stare decisis*. Lorsqu'il revient à un décideur administratif de suivre les directives d'une cour de révision, c'est en application du principe du *stare decisis* : *Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, 2003 CAF 53, [2003]

para. 54. It is therefore obligated to follow such directions only insofar as they remain good law.

[47] In the case at bar, once the matter had been remitted to the Régie for redetermination, the Régie's jurisdiction was limited only by the principle of *stare decisis*. It was by virtue of *stare decisis* that the Régie was bound to apply the Court of Appeal's interpretation to the case before it. When the declaratory legislation came into force, however, it operated as a part of the jurisprudence and overruled the court's interpretation. This legislation then became the new binding precedent on the question of the interpretation of certain provisions of the *SPPA*. The principle of *stare decisis* dictates, therefore, that changes to the law in the form of declaratory legislation that occur before a final disposition of the litigation will negate the precedential value of directions from the reviewing court that conflict with them. Had the law on this question been changed in the interim by a new precedent from this Court, the Régie would have been bound by this Court's decision in the same way as it is bound by the legislation in question. In the instant case, the declaratory legislation is not ambiguous, and the National Assembly decided unanimously to counter the effect of the Court of Appeal's decision by enabling the Régie to interpret the *SPPA* in a manner consistent with what the legislature considered to be the Act's true objectives. As a result of the legislature's intervention, the Court of Appeal's directions became bad law. Accordingly, the Régie was not only entitled to interpret the *SPPA* in light of the declaratory provisions, it was obligated to do so.

[48] Finally, it should be noted that under the *SPPA*, the Régie was required to apply the correct law and therefore had to adopt the meaning that, according to the declaratory legislation, the law had always had. Since declaratory legislation applies retroactively, the *SPPA* is deemed to have contained the relevant provisions since it was first enacted. Section 202 of the *SPPA* provides that when an employer withdraws from a multi-employer pension plan, the pension committee must file with the Régie "a report establishing the benefits accrued to each member and beneficiary affected and the

3 C.F. 529, par. 54. Le décideur est donc tenu de suivre ces directives dans la seule mesure où elles demeurent juridiquement valables.

[47] En l'espèce, la compétence de la Régie, une fois que l'affaire lui a été renvoyée, n'était limitée que par le principe du *stare decisis*. C'est ce principe qui obligeait la Régie à appliquer à l'affaire dont elle était saisie l'interprétation établie par la Cour d'appel. Toutefois, lorsqu'elle est entrée en vigueur, la loi déclaratoire a pris valeur jurisprudentielle et a infirmé l'interprétation de la Cour d'appel. Cette loi est alors devenue le nouveau précédent obligatoire relativement à l'interprétation de certaines dispositions de la *LRCR*. Ainsi, suivant le principe du *stare decisis*, les modifications juridiques opérées par une loi déclaratoire avant le règlement définitif d'un litige annulent la valeur de précédent des directives d'une cour de révision qui sont contraires. Si un nouveau précédent de notre Cour avait modifié entre-temps le droit relatif à la question litigieuse, la Régie aurait été liée par l'arrêt de notre Cour tout comme elle est liée par la loi en question. En l'espèce, la loi déclaratoire n'est pas ambiguë et l'Assemblée nationale a décidé unanimement de contrer l'effet de la décision de la Cour d'appel en permettant à la Régie d'interpréter la *LRCR* conformément à ce que le législateur considérait être les véritables objectifs de cette loi. L'intervention du législateur a donc privé les directives de la Cour d'appel de leur validité juridique. En conséquence, la Régie n'était pas seulement habilitée à interpréter la *LRCR* en fonction des dispositions déclaratoires, elle en avait l'obligation.

[48] Enfin, il faut signaler qu'il incombait à la Régie, aux termes de la *LRCR*, de donner effet au droit applicable, et elle devait donc attribuer à la *LRCR* le sens que celle-ci avait toujours eu, selon la loi déclaratoire. Les lois déclaratoires ayant une portée rétroactive, la *LRCR* est réputée avoir inclus les dispositions en cause depuis son adoption. Selon l'art. 202 de la *LRCR*, lorsqu'un employeur se retire d'un régime de retraite interentreprises, le comité de retraite doit transmettre à la Régie « un rapport établissant les droits de chacun des participants et bénéficiaires visés ainsi que leur valeur ». Selon

value thereof". Pursuant to s. 203, the Régie may not authorize the withdrawal unless this report is in conformity with the *SPPA*. Although the Régie's statutory obligation to issue a certificate in conformity with the law is not the main source of its authority to disregard the Court of Appeal's decision, this obligation certainly lends support to the proposition that the Régie may not apply bad law.

VI. Conclusion

[49] For these reasons, I would allow the appeal with costs throughout.

The reasons of McLachlin C.J. and Fish J. were delivered by

THE CHIEF JUSTICE (dissenting) —

I. Introduction

[50] In accordance with the rule of law principle, all administrative decision-makers are subject to judicial review by courts of inherent jurisdiction. "The function of judicial review is . . . to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 28). An administrative decision-maker does not have the power to second-guess the final judgment of a court of inherent jurisdiction regarding the legality of its decisions. This would in effect undermine the process of judicial review, and threaten the rule of law. I am concerned that the reasons of the majority in the present appeal do just that. They allow the Régie des rentes du Québec ("Régie") to disregard clear instructions from the Quebec Court of Appeal, and to re-visit an issue that — as between the parties to this appeal — had been definitively settled by the courts.

[51] I agree with my colleague Wagner J. that the legislature has the power to enact declaratory provisions which have a retroactive effect, and that such provisions apply to all pending cases. However, with respect for the contrary opinion, these propositions do not resolve the present appeal. At the heart of this

l'art. 203 de la même loi, la Régie ne peut autoriser le retrait si le rapport n'est pas conforme à la *LRCR*. Bien que l'obligation légale de la Régie de délivrer un certificat conformément à la loi ne soit pas ce qui l'habilite principalement à passer outre à la décision de la Cour d'appel, cette obligation permet certainement d'affirmer que la Régie ne peut appliquer une règle de droit invalide.

VI. Conclusion

[49] Pour ces motifs, je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours.

Version française des motifs de la juge en chef McLachlin et du juge Fish rendus par

LA JUGE EN CHEF (dissidente) —

I. Introduction

[50] Conformément au principe de la primauté du droit, toutes les décisions administratives sont assujetties au contrôle des cours de compétence inhérente. « Le contrôle judiciaire [. . .] vise à assurer la légalité, la rationalité et l'équité du processus administratif et de la décision rendue » (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 28). Les décideurs administratifs n'ont pas le pouvoir de remettre en question le jugement définitif rendu sur la légalité de leurs décisions par une cour de compétence inhérente, car le processus de contrôle judiciaire s'en trouverait alors compromis et la primauté du droit menacée. Je crains que les motifs de la majorité en l'espèce n'aient exactement cet effet. Ils permettent en effet à la Régie des rentes du Québec (« Régie ») de passer outre aux directives claires de la Cour d'appel du Québec et de rouvrir une question qui, pour les parties au présent pourvoi, a été définitivement tranchée par les tribunaux judiciaires.

[51] Comme mon collègue le juge Wagner, je suis d'avis que le législateur a le pouvoir d'édicter des dispositions déclaratoires de portée rétroactive et que de telles dispositions s'appliquent à toutes les affaires pendantes. Mais, en tout respect pour l'opinion contraire, j'estime que ces principes ne

appeal is the question of whether an administrative decision-maker can ignore the directions of a court that has supervisory jurisdiction over it, and effectively reinstate its original decision after it has been overturned in the course of judicial review. In my view, the answer to this question is no.

II. Facts and Judicial History

[52] I rely on my colleague's apt summary of the facts and judicial history relevant to this appeal.

III. Analysis

A. *The Quebec Court of Appeal Definitively Settled the Legal Issue in Dispute*

[53] It is a settled principle that laws can take effect retroactively, so long as the legislature indicates its intention in clear statutory language. In this way, the legislature can change the outcome of a legal dispute, by enacting provisions which apply to a *pending case*. As the British Columbia Court of Appeal stated in *Barbour v. University of British Columbia*, 2010 BCCA 63, 282 B.C.A.C. 270, leave to appeal refused, [2010] 1 S.C.R. vi:

> We consider it is clear in Canada that the Legislature may enact legislation that has the effect of retroactively altering the law applicable to a dispute. While a Legislature may not interfere with the Court's adjudicative role, it may amend the law which the court is required to apply in its adjudication. [para. 32]

(See also *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 69-72; *Société canadienne de métaux Reynolds ltée v. Québec (Sous-ministre du Revenu)*, [2004] R.D.F.Q. 45 (C.A.), at paras. 16-17.)

[54] However, retroactive laws do not apply to pending legal disputes of their own force. They fall to be applied by the administrative decision-makers or courts that have jurisdiction to resolve the matters in dispute. When a retroactive law comes into force

suffisent pas pour décider du présent pourvoi. La question fondamentale qui se pose en l'espèce est celle de savoir si un décideur administratif peut faire abstraction des directives d'une cour exerçant sur lui un pouvoir de surveillance et rétablir en substance sa décision initiale annulée à l'issue du contrôle judiciaire. J'estime qu'il faut y répondre par la négative.

II. Faits et historique judiciaire

[52] Je m'en tiendrai à l'excellent exposé des faits et de l'historique judiciaire formulé par mon collègue.

III. Analyse

A. *La Cour d'appel du Québec a statué définitivement sur la question de droit en litige*

[53] Il est de droit constant qu'une loi puisse rétroagir si le législateur a clairement exprimé cette intention dans la loi. Ainsi, le législateur peut, en édictant des dispositions applicables à une *affaire pendante*, modifier l'issue d'un litige. Comme la Cour d'appel de la Colombie-Britannique l'a affirmé dans *Barbour c. University of British Columbia*, 2010 BCCA 63, 282 B.C.A.C. 270, autorisation d'appel refusée, [2010] 1 R.C.S. vi :

> [TRADUCTION] Nous estimons qu'il est clair, au Canada, que le législateur peut édicter des lois ayant pour effet de modifier rétroactivement le droit applicable à un litige. Le législateur, bien qu'il ne puisse s'immiscer dans le rôle de la Cour de trancher des litiges, peut modifier la loi que la Cour doit appliquer dans l'exercice de cette fonction. [par. 32]

(Voir aussi *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 69-72; *Société canadienne de métaux Reynolds ltée c. Québec (Sous-ministre du Revenu)*, [2004] R.D.F.Q. 45 (C.A.), par. 16-17.)

[54] Toutefois, les lois rétroactives ne s'appliquent pas d'elles-mêmes aux litiges pendants. Elles doivent être appliquées par les tribunaux administratifs ou judiciaires ayant compétence pour statuer sur les points en litige. Lorsqu'une loi rétroactive

while a case is being appealed, it falls to be applied by whatever level of appellate court is seized of the matter at that time. This principle was recognized in *Western Minerals Ltd. v. Gaumont*, [1953] 1 S.C.R. 345, where Cartwright J. stated:

> . . . I think it clear that the Appellate Division would be bound to give effect to a Statute, passed after the judgment from which the appeal is taken but before the hearing or decision of the appeal, declaring what the law is and always has been and so, of necessity, declaring what it was at the time of the trial. [Emphasis added; p. 369.]

The Alberta Court of Appeal made the same point in *CNG Producing Co. v. Alberta (Provincial Treasurer)*, 2002 ABCA 207, 317 A.R. 171:

> Although retroactive legislation applies to pending cases, it does not apply to cases that have reached the stage of an entered judgment. If, however, a judgment has been entered following the trial of an action and the Legislature enacts a retroactive statute prior to the hearing of an appeal, then the outcome of the appeal may turn on the new statute . . . . [Emphasis added; para. 48.]

[55] Once all avenues of appeal have been exhausted, the authority of *res judicata* applies to preclude parties from re-litigating an issue that has been decided on the merits. This is so even if the legislature has changed the law retroactively and, as a result, the final judgment now contains an error in law. Indeed, "the authority of *res judicata* exists even when there is an error in the judgment" (*Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at p. 403).

[56] In the present case, only the Supreme Court of Canada, before which an application for leave to appeal was pending at the time of the coming into force of the retroactive provisions, had the jurisdiction to apply the provisions to resolve the dispute between Multi-Marques and the pension beneficiaries. Once it denied leave to appeal, all avenues of appeal were exhausted. Consequently, the Quebec Court of Appeal's judgment acquired the authority of *res judicata* between the parties with respect to the issue of whether the employer's funding obligations could be limited by clauses 9.12 and 9.13

entre en vigueur pendant qu'une cause est portée en appel, il appartient à la juridiction d'appel alors saisie de l'appliquer. Ce principe a été reconnu dans *Western Minerals Ltd. c. Gaumont*, [1953] 1 R.C.S. 345, où le juge Cartwright a indiqué ce qui suit :

> [TRADUCTION] . . . je crois que la Division d'appel serait clairement tenue de donner effet à une loi, adoptée postérieurement à la date du jugement porté en appel, mais avant l'audition de l'appel ou la décision d'appel, qui déclarerait ce qu'est et a toujours été le droit et, par voie de conséquence, ce qu'il était au moment du procès. [Je souligne; p. 369.]

La Cour d'appel de l'Alberta a réitéré ce principe dans *CNG Producing Co. c. Alberta (Provincial Treasurer)*, 2002 ABCA 207, 317 A.R. 171 :

> [TRADUCTION] Une loi rétroactive s'applique aux affaires pendantes, mais non aux affaires ayant franchi l'étape du jugement. Toutefois, si une affaire a été instruite et jugée et si une loi rétroactive est édictée avant l'instruction d'un appel, l'issue de l'appel peut alors dépendre de la nouvelle loi . . . [Je souligne; par. 48.]

[55] Lorsque toutes les voies d'appel sont épuisées, le principe de l'autorité de la chose jugée s'applique et empêche les parties de remettre en cause une question qui a été tranchée au fond. Il en est ainsi même si le législateur a modifié la loi rétroactivement, de sorte que le jugement définitif renferme alors une erreur de droit. En effet, « l'autorité de la chose jugée existe même dans le cas où le jugement est entaché d'erreur » (*Roberge c. Bolduc*, [1991] 1 R.C.S. 374, p. 403).

[56] En l'espèce, seule la Cour suprême du Canada, qui était saisie d'une demande d'autorisation d'appel à la date où les dispositions rétroactives sont entrées en vigueur, avait compétence pour appliquer les dispositions en vue de trancher le différend opposant Multi-Marques aux bénéficiaires du régime de retraite. Le rejet de cette demande a épuisé toutes les voies d'appel. Le jugement de la Cour d'appel du Québec a donc acquis l'autorité de la chose jugée entre les parties concernant la question de savoir si les art. 9.12 et 9.13 des règles du Bakery and Confectionery Union and

of the Rules and Regulations for the Bakery and Confectionery Union and Industry Canadian Pension Fund (the "Pension Fund's Rules") (2008 QCCA 597, [2008] R.J.Q. 853, leave to appeal refused, [2008] 3 S.C.R. ix).

[57] My colleague Wagner J. contends that the declaratory provisions applied to the dispute at hand, because it was a "pending case". He recognizes that disputes in which there has been a final determination of *all* the rights and obligations of the parties are beyond the reach of declaratory provisions. However, he argues that so long as there remain issues — no matter their nature — to be determined, declaratory provisions will apply to the dispute and may negate any final judgments which have definitively resolved certain of the legal questions at issue.

[58] In this appeal, the precise monetary liability of the employer was not determined by the Court of Appeal's disposition, and the matter was remitted back to the Régie for a computation of that liability. In my colleague's view, this sufficed for the dispute to remain a "pending case" and for the declaratory provisions to apply.

[59] I cannot agree. Courts interpret and apply declaratory laws restrictively. These laws apply to pending cases, but do not reopen decided cases (*Western Minerals*, at p. 370). The application of declaratory laws is closely tied to the appeal process — they do not apply to a dispute once all avenues of appeal have been exhausted. This restrictive interpretation and application of declaratory laws is intended to preserve stability and certainty in the legal system. It recognizes that judicial determinations which have been obtained by parties after a full appeal process should not be lightly disturbed.

[60] In my view, the rationale for applying declaratory laws restrictively suggests that my colleague's distinction between (i) a final judgment, and (ii) a final judgment that definitively determines *all* rights and obligations of the parties (Wagner J.,

Industry Canadian Pension Fund (les « Règles ») pouvaient restreindre les obligations de l'employeur en matière de financement (2008 QCCA 597, [2008] R.J.Q. 853, demande d'autorisation d'appel rejetée, [2008] 3 R.C.S. ix).

[57] Selon mon collègue le juge Wagner, les dispositions déclaratoires s'appliquaient à ce litige parce qu'il s'agissait d'une « affaire pendante ». Il reconnaît que les dispositions déclaratoires ne peuvent s'appliquer aux litiges dans lesquels une cour a statué définitivement sur *tous* les droits et les obligations des parties. Il affirme toutefois que dès lors qu'il reste des questions à trancher — quelle que soit leur nature — les dispositions déclaratoires s'appliquent au litige et peuvent écarter tout jugement qui a statué définitivement sur certaines des questions juridiques en cause.

[58] En l'espèce, la décision de la Cour d'appel n'a pas établi à combien se chiffre précisément l'obligation pécuniaire de l'employeur, et la cour a renvoyé l'affaire à la Régie pour qu'elle le fasse. De l'avis de mon collègue, cela suffisait pour que le litige reste une « affaire pendante » et pour que s'appliquent les dispositions déclaratoires.

[59] Je ne saurais être d'accord. Les tribunaux interprètent et appliquent de façon restrictive les lois déclaratoires. Ces lois s'appliquent aux affaires pendantes, mais n'opèrent pas la réouverture des affaires déjà jugées (*Western Minerals*, p. 370). L'application des lois déclaratoires est étroitement liée au processus d'appel — ces lois ne s'appliquent pas à un litige lorsque toutes les voies d'appel sont épuisées. Le principe de l'interprétation et de l'application restrictives des lois déclaratoires vise à préserver la stabilité et la certitude au sein du système juridique. Il indique qu'il ne faut pas modifier à la légère les décisions judiciaires qu'ont obtenues les parties à l'issue de tous les recours d'appel.

[60] À mon avis, la raison d'être de l'application restrictive des lois déclaratoires porte à croire que la distinction que fait mon collègue entre (i) un jugement définitif et (ii) un jugement statuant définitivement sur *tous* les droits et obligations des

at para. 30), is inappropriate in this context. Nor, in my respectful view, is there any legal authority to support my colleague's distinction. A judgment which definitively settles a contested legal issue as between the parties is no less worthy of being protected from the retroactive effects of declaratory laws than a judgment which settles all rights and obligations in dispute.

[61] The present appeal illustrates this. The Quebec Court of Appeal found that the Pension Fund's Rules effectively limited the employer's funding obligations, and the Supreme Court of Canada declined to interfere with that conclusion. Following this conclusive determination, what remained were the rather clerical tasks of collecting actuarial reports and computing the precise monetary liability of the employer — tasks which were left to the Régie, as they fell within its area of specialization. There were no longer any avenues of appeal through which the Quebec Court of Appeal's conclusions on the employer's funding obligations could be challenged. The parties had sought a final determination of the issue and had obtained it, running up the appellate ladder in the process. Yet the application of declaratory provisions reopened litigation of a dispute whose core issues had been definitively determined, leading the parties back up the appellate ladder. This is precisely what the well-settled principle of applying declaratory laws restrictively is meant to prevent.

[62] My colleague also relies heavily on the intent of the legislature, which he contends was specifically to negate the effects of the Court of Appeal's judgment as between the parties. I agree that, in theory, the legislature has the power to extinguish all the effects of a judgment. However, to infer that the legislature intended to extinguish the effects of a judgment as between the parties — an extraordinary step — clear language is required. The declaratory law in this case does not contain such language.

parties (motifs du juge Wagner, par. 30) est inopportune dans ce contexte. Et, à mon humble avis, aucun fondement légal n'appuie cette distinction que fait mon collègue. Un jugement qui tranche définitivement un point de droit sur lequel les parties s'opposent ne mérite pas moins d'être soustrait aux effets rétroactifs d'une loi déclaratoire qu'un jugement statuant sur tous les droits et les obligations en litige.

[61] C'est ce qu'illustre le présent pourvoi. La Cour d'appel du Québec a conclu que les Règles du régime de pension limitaient effectivement les obligations de l'employeur en matière de financement, et la Cour suprême du Canada n'a pas jugé bon d'intervenir dans cette décision. Après ce jugement décisif, seules demeuraient les tâches plutôt administratives de réunir les rapports actuariels et de calculer le montant exact de l'obligation pécuniaire de l'employeur — des tâches qui relevaient du domaine de spécialisation de la Régie et que la cour a laissées à cette dernière. Il n'existait plus aucune voie d'appel permettant de contester les conclusions de la Cour d'appel du Québec relatives aux obligations de l'employeur en matière de financement. Les parties avaient demandé et obtenu une décision définitive sur la question, en se rendant jusqu'au tribunal de dernier recours. Pourtant, l'application des dispositions déclaratoires a rouvert l'examen d'un litige dont les principales questions avaient été définitivement résolues et a ramené les parties à gravir tous les échelons des recours d'appel. C'est précisément ce que vise à prévenir le principe bien établi de l'interprétation restrictive des lois déclaratoires.

[62] En outre, mon collègue s'appuie fortement sur l'intention du législateur qui, selon lui, voulait spécifiquement annuler les effets du jugement de la Cour d'appel à l'égard des parties. Je suis d'accord pour dire qu'en théorie, le législateur a le pouvoir d'annuler tous les effets d'un jugement. Toutefois, pour inférer que le législateur voulait annuler les effets d'un jugement à l'égard des parties — une mesure extraordinaire — son intention doit être exprimée clairement dans la loi. Or, les termes de la loi déclaratoire en l'espèce n'expriment pas clairement cette intention.

[63] It is useful to distinguish between the different effects produced by a judgment. One effect of a final judgment is to create a precedent that courts and tribunals must follow. This effect is called *stare decisis*: ". . . a court must follow earlier judicial decisions when the same points arise again in litigation", unless or until such decisions are revisited or overruled by a higher court (*Black's Law Dictionary* (9th ed. 2009); *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515). A second effect of a binding judgment is to fix the rights and obligations of the parties, rendering the issue in dispute *res judicata*.

[64] It is sufficient for the legislature to say that a law is "declaratory" in order to deprive contrary jurisprudence of its precedential value. However, it takes more explicit language to infer that the legislature intended to deprive a final judgment of its authority of *res judicata* as between the parties to a dispute where all avenues of appeal have been exhausted. As the Saskatchewan Court of Appeal stated in *Zadvorny v. Saskatchewan Government Insurance* (1985), 38 Sask. R. 59:

> To change a law of general application, retroactively, is one thing; to legislate the extinguishment of a judgment is another. To satisfy us that the Legislature intended to deprive the respondent of his judgment . . . would take the clearest of language. [para. 9]

(Cited with approval in *Hornby Island Trust Ctee. v. Stormwell* (1988), 30 B.C.L.R. (2d) 383, at p. 392.)

In the present case, the legislature chose not to use language that specifically provided for the extinguishment of the Court of Appeal's judgment. In the absence of such language, it is appropriate to construe the provisions restrictively, as only depriving the judgment of its precedential value.

[65] In summary, I am of the view that there is no principled basis on which to conclude that declaratory laws apply to judicial determinations for

[63] Il est utile de faire une distinction entre les différents effets que produit un jugement. Un jugement définitif a notamment pour effet de créer un précédent que doivent suivre les tribunaux judiciaires ou administratifs. C'est l'effet que l'on appelle le *stare decisis* : [TRADUCTION] « . . . les tribunaux saisis de nouveau d'une question donnée doivent rendre des décisions conformes à celles qu'ils ont déjà rendues », jusqu'à ce que les décisions soient réexaminées ou infirmées par un tribunal supérieur (*Black's Law Dictionary* (9e éd. 2009); *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515). Un jugement définitif a aussi pour effet d'établir les droits et obligations des parties, ce qui confère à la question en litige l'autorité de la chose jugée.

[64] Il suffit pour le législateur de dire qu'une loi est « déclaratoire » pour priver de sa valeur précédentielle une jurisprudence contraire. Cependant, il faut un libellé plus explicite pour inférer que le législateur a voulu priver de l'autorité de la chose jugée un jugement définitif à l'égard des parties à un litige lorsque toutes les voies d'appel ont été épuisées. Comme la Cour d'appel de la Saskatchewan l'a affirmé dans *Zadvorny c. Saskatchewan Government Insurance* (1985), 38 Sask. R. 59 :

> [TRADUCTION] Modifier rétroactivement une loi d'application générale est une chose; annuler un jugement par voie législative en est une autre. Pour nous convaincre que le législateur entendait priver l'intimé de son jugement, [. . .] il faudrait qu'il l'eût exprimé dans les termes les plus clairs. [par. 9]

(Cité avec approbation dans *Hornby Island Trust Ctee. c. Stormwell* (1988), 30 B.C.L.R. (2d) 383, p. 392.)

En l'espèce, le législateur a choisi de ne pas employer des termes indiquant spécifiquement qu'il annulait le jugement de la Cour d'appel. En l'absence de tels termes, il convient d'interpréter les dispositions restrictivement et de conclure qu'elles ne privent le jugement que de sa valeur de précédent.

[65] En résumé, je suis d'avis qu'aucun principe de droit ne permet de conclure que les lois déclaratoires s'appliquent aux décisions judiciaires pour

which all avenues of appeal have been exhausted, but which fall short of determining every issue in dispute. This runs counter to the principle that declaratory provisions must be interpreted and applied restrictively, and to the correlative principle that clear statutory language is required to extinguish the effects of a judgment as between the parties. It follows that the Court of Appeal's judgment was final and binding: the Régie had [TRANSLATION] "to review its decisions . . . in conformity with" the Court of Appeal determination that clauses 9.12 and 9.13 of the Pension Fund's Rules operated to limit the employer's funding obligations (see para. 108 of the Court of Appeal's reasons).

B. *The Régie Had No Jurisdiction to Overturn the Court of Appeal's Final Judgment*

[66] The Régie had no jurisdiction to revise the Court of Appeal's decision and apply more recent legal developments to come to a different conclusion. The Régie was only seized of the case again because the Court of Appeal had remitted the matter to it with directions. I am willing to accept — as my colleague Wagner J. appears to argue — that a court's remission of a matter with directions to a decision-maker may sometimes revive that decision-maker's original jurisdiction over the matter, which would allow the legal issues in dispute to be considered afresh. However, in my view, this only happens if the substance of the court's directions *requires* the decision-maker to commence a fresh review of the legal matter. Here, the substance of the Court of Appeal's directions was that the Régie should compute the employer's precise monetary liability in light of the principle that the employer's funding obligations were limited by clauses 9.12 and 9.13 of the Pension Fund's Rules. The directions did not require the Régie to redetermine the substantive rights and obligations of the employer and of the fund beneficiaries. In so doing, the Régie acted without jurisdiction.

[67] Orders remitting a matter to an administrative decision-maker with directions can take many

lesquelles toutes les voies d'appel ont été épuisées, mais qui ne statuent pas sur toutes les questions en litige. Une telle conclusion irait à l'encontre du principe voulant que les dispositions déclaratoires doivent recevoir une interprétation et une application restrictives, et à l'encontre du principe corrélatif suivant lequel un texte législatif clair est nécessaire pour annuler les effets d'un jugement à l'égard des parties. Il s'ensuit que le jugement de la Cour d'appel était définitif et exécutoire : il fallait que la Régie « révise ses décisions [. . .] en se conformant » à la décision de la Cour d'appel selon laquelle les art. 9.12 et 9.13 des Règles limitaient les obligations de l'employeur en matière de financement (voir les motifs de la Cour d'appel, par. 108).

B. *La Régie n'avait pas compétence pour infirmer le jugement définitif de la Cour d'appel*

[66] La Régie n'avait pas compétence pour réviser la décision de la Cour d'appel et formuler une conclusion différente en appliquant des dispositions législatives plus récentes. Elle n'était saisie de nouveau de l'affaire que parce que la Cour d'appel la lui avait renvoyée avec des directives. Je suis prête à reconnaître — comme semble l'affirmer mon collègue le juge Wagner — que le renvoi d'une affaire au décideur administratif accompagné de directives puisse parfois faire renaître la compétence initiale de ce dernier, ce qui lui permettrait de reprendre du début l'examen des questions juridiques en litige. Toutefois, cela ne se produit, selon moi, que si les directives *obligent* le tribunal administratif à reprendre l'examen de ces questions. En l'espèce, la Cour d'appel donnait essentiellement instruction à la Régie de chiffrer précisément l'obligation pécuniaire de l'employeur en tenant pour acquis que les art. 9.12 et 9.13 des Règles limitaient l'obligation de l'employeur en matière de financement. Les directives n'exigeaient pas que la Régie se prononce de nouveau sur les droits et obligations substantiels de l'employeur et des bénéficiaires du régime et, en le faisant, la Régie a agi sans compétence.

[67] Les ordonnances portant renvoi d'une affaire à un décideur administratif et comportant des

shapes. A court's directions must be interpreted in light of the totality of their content and of the context in which they were given (*Shuchuk v. Workers' Compensation Board Appeals Commission (Alta.)*, 2012 ABCA 50, 522 A.R. 336, at para. 23).

[68] In *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, [2003] 3 F.C. 529, at para. 54, Rothstein J.A. (as he then was) stated that clarifications of the law contained in a court's directions bind lower courts and tribunals pursuant to the principle of *stare decisis*. In other words, the directions function as judicial precedents. My colleague Wagner J. infers from this principle that directions can be displaced by any change in the law which renders the legal substance of the directions erroneous.

[69] In my view, this conclusion is overbroad and does not apply in all cases of remission with directions. It is important to consider the substance of the directions. In some cases, directions merely clarify the law, and require the tribunal to determine legal matters afresh in accordance with these clarifications (D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 5-36 to 5-41). This was the case in *Superior Propane*, where the Federal Court of Appeal had clarified the methodology that the Competition Tribunal should use to determine whether a merger would substantially prevent or lessen competition, and had remitted to the Tribunal the legal matter of whether the merger at issue did in fact prevent or lessen competition. In these cases, the directions function as judicial precedents — it may well be that subsequent changes in the law will render the clarifications erroneous and that the directions will no longer bind the administrative decision-maker.

[70] However, in other cases, directions may in fact contain substantive determinations of the rights

directives peuvent prendre diverses formes. Les directives judiciaires doivent être interprétées au regard de tout leur contenu et du contexte dans lequel elles sont données (*Shuchuk c. Workers' Compensation Board Appeals Commission (Alta.)*, 2012 ABCA 50, 522 A.R. 336, par. 23).

[68] Dans l'arrêt *Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, 2003 CAF 53, [2003] 3 C.F. 529, par. 54, le juge Rothstein (maintenant juge de notre Cour) a indiqué qu'en application du principe du *stare decisis*, les clarifications juridiques figurant dans des directives judiciaires lient les juridictions inférieures et les tribunaux administratifs. Autrement dit, les directives ont valeur de précédent. Mon collègue le juge Wagner infère de ce principe que les directives peuvent devenir sans effet par suite de tout changement du droit les rendant juridiquement erronées.

[69] À mon avis, il tire une conclusion trop large qui ne s'applique pas à tous les cas de renvoi assorti de directives. Il est important de tenir compte de la teneur des directives. Dans certains cas, les directives clarifient simplement le droit et exigent du tribunal administratif qu'il pose un nouveau regard sur les questions juridiques en fonction de ces clarifications (D. J. M. Brown et J. M. Evans, avec la collaboration de C. E. Deacon, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 5-36 à 5-41). C'était le cas dans l'affaire *Supérieur Propane*, dans laquelle la Cour d'appel fédérale avait précisé la méthodologie que le Tribunal de la concurrence devait suivre pour déterminer si un fusionnement empêcherait ou diminuerait sensiblement la concurrence, et elle avait renvoyé au Tribunal la question juridique de savoir si le fusionnement en cause empêchait ou diminuait effectivement la concurrence. Dans de tels cas, les directives ont valeur de précédent — il est bien possible que des changements subséquents dans l'état du droit rendent les clarifications erronées et que les directives cessent de lier le décideur administratif.

[70] Dans d'autres cas, toutefois, les directives peuvent effectivement renfermer des conclusions

and obligations of parties, and require the administrative decision-maker to give effect to those rights and obligations. In these cases, the court's determination of the rights and obligations of the parties attracts the authority of *res judicata*. To conclude otherwise is to deprive the process of judicial review of finality and to put administrative decision-makers on an equal footing with the courts that exercise supervisory jurisdiction over them.

[71] In the present case, there was no authority for the Régie's purported jurisdiction to determine afresh whether Multi-Marques' funding obligations were limited by clauses 9.12 and 9.13 of the Pension Fund's Rules. As discussed, the Court of Appeal's directions did not instruct the Régie to determine the matter afresh. Nor does the Régie's enabling statute contain any provisions that allow it to review a matter on which a higher court has passed judgment. The Régie points to s. 26 of its enabling statute, which holds that the Régie "may, on its own initiative, revise or cancel any decision" (*An Act respecting the Québec Pension Plan*, R.S.Q., c. R-9). However, this provision merely grants the Régie a plenary jurisdiction, and absent clear legislative language it cannot have been intended to allow the Régie to circumvent the process of judicial review and side-step directions from a higher court (*Shuchuk*, at para. 37).

[72] As discussed above, the Court of Appeal's ruling remained binding. The ruling had lost its precedential value as a result of the declaratory provisions: the Régie would not be bound to follow its interpretation of the law in future cases. However, the authority of *res judicata* applied to it and the Régie could not disturb the Court of Appeal's definitive resolution of the legal issues as between the parties. It had to fulfill the task for which the case had been remitted to it, i.e. compute the precise monetary liability that resulted from the substantive rights and obligations determined by the Court of Appeal. By failing to do so, the Régie effectively circumvented the process of judicial review and reinstated its original decision without having the jurisdiction to do so. The majority's reasons endorse this behaviour, and undermine the finality of all

de fond sur les droits et obligations des parties et obliger le décideur administratif à donner effet à ces droits et obligations. Ces conclusions du tribunal judiciaire acquièrent alors force de chose jugée. Conclure autrement prive le processus de contrôle judiciaire de son caractère définitif et place le décideur administratif sur le même pied que les tribunaux judiciaires investis du pouvoir de le surveiller.

[71] En l'espèce, rien ne fondait la compétence dont se réclamait la Régie pour examiner à nouveau si les art. 9.12 et 9.13 des Règles limitaient les obligations de Multi-Marques en matière de financement. Comme il en a été fait mention, les directives de la Cour d'appel n'obligeaient pas la Régie à reprendre l'examen du début. En outre, aucune disposition de la loi créant la Régie ne lui permettait d'examiner une question sur laquelle une cour de juridiction supérieure s'était prononcée. La Régie invoque l'art. 26 de sa loi habilitante, lequel énonce qu'elle « peut, d'office, réviser ou révoquer toute décision » (*Loi sur le régime de rentes du Québec*, L.R.Q., ch. R-9). Cette disposition, toutefois, confère simplement une pleine compétence à la Régie, et en l'absence d'un texte législatif clair, elle ne peut exprimer l'intention de permettre à la Régie de contourner le processus de contrôle judiciaire et de faire abstraction des directives d'une cour de juridiction supérieure (*Shuchuk*, par. 37).

[72] Comme nous l'avons vu, la décision de la Cour d'appel a conservé son caractère obligatoire. La décision avait perdu sa valeur de précédent par l'effet des dispositions déclaratoires : dans les litiges futurs, la Régie ne serait plus liée par l'interprétation de la loi dictée par la Cour d'appel. Toutefois, la décision de cette dernière conservait l'autorité de la chose jugée et la Régie ne pouvait pas modifier cette décision définitive qui tranchait les questions juridiques à l'égard des parties. Elle devait accomplir la tâche pour laquelle l'affaire lui avait été renvoyée, soit calculer à combien se chiffrait l'obligation monétaire précise résultant des droits et obligations substantiels tels qu'ils avaient été circonscrits par la Cour d'appel. En se dérobant à cette tâche, la Régie a effectivement contourné le processus de contrôle judiciaire et elle a

judgments that contain a remission with directions to an administrative decision-maker.

IV. Conclusion

[73] For these reasons, I would dismiss the appeal and award costs to the respondents.

Appeal allowed with costs throughout, McLachlin C.J. *and* Fish J. *dissenting.*

Solicitor for the appellant: Régie des rentes du Québec, Québec.

Solicitors for the respondents the Canada Bread Company Ltd., Multi-Marques Inc. and Multi-Marques Distribution Inc.: Stikeman Elliott, Montréal.

Solicitors for the respondent Sean Kelly, in his capacity as trustee of the Bakery and Confectionery Union and Industry Canadian Pension Fund: Blake, Cassels & Graydon, Montréal.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

rétabli sa décision initiale alors qu'elle n'avait pas compétence pour ce faire. Les motifs des juges majoritaires approuvent cette conduite et compromettent le caractère définitif de tous les jugements concluant au renvoi d'une affaire devant un décideur administratif et comportant des directives.

IV. Conclusion

[73] Pour ces motifs, je suis d'avis de rejeter le pourvoi et d'accorder les dépens aux intimés.

Pourvoi accueilli avec dépens devant toutes les cours, la juge en chef McLachlin *et le juge* Fish *sont dissidents.*

Procureur de l'appelante : Régie des rentes du Québec, Québec.

Procureurs des intimées Canada Bread Company Ltd., Multi-Marques Inc. et Multi-Marques Distribution Inc. : Stikeman Elliott, Montréal.

Procureurs de l'intimé Sean Kelly, en sa qualité de fiduciaire du Bakery and Confectionery Union and Industry Canadian Pension Fund : Blake, Cassels & Graydon, Montréal.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Jean-Marc Richard *Appellant*

v.

Time Inc. and Time Consumer Marketing Inc. *Respondents*

Indexed as: Richard *v.* Time Inc.

2012 SCC 8

File No.: 33554.

2011: January 18; 2012: February 28.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Consumer protection — Prohibited business practices — False or misleading representations — Court of Appeal finding that merchant's representations would not mislead consumer "with average level of intelligence, scepticism and curiosity" — Test for determining whether general impression given by representation constitutes prohibited practice — Consumer Protection Act, R.S.Q., c. P-40.1, ss. 218, 219, 228, 238(c).

Consumer protection — Prohibited business practices — Recourses — Conditions for exercising recourses — Conditions that apply where consumer seeks, under s. 272 of Consumer Protection Act, to have court sanction violations of Title II of that Act — Consumer Protection Act, R.S.Q., c. P-40.1, ss. 2, 253, 272.

Consumer protection — Prohibited business practices — Recourses — Consumer seeking compensatory and punitive damages under s. 272 of Consumer Protection Act — Conditions for awarding damages and criteria for determining their quantum — Consumer Protection Act, R.S.Q., c. P-40.1, s. 272 — Civil Code of Québec, S.Q. 1991, c. 64, art. 1621.

In his mail, R received an "Official Sweepstakes Notification" (the "Document") in the form of a letter supposedly signed by the manager responsible for the

Jean-Marc Richard *Appelant*

c.

Time Inc. et Time Consumer Marketing Inc. *Intimées*

Répertorié : Richard *c.* Time Inc.

2012 CSC 8

N° du greffe : 33554.

2011 : 18 janvier; 2012 : 28 février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Charron et Cromwell.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Protection du consommateur — Pratiques de commerce interdites — Représentations fausses ou trompeuses — Cour d'appel concluant que des représentations faites par un commerçant n'étaient pas de nature à tromper un consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » — Quel est le critère à adopter pour déterminer si l'impression générale donnée par une représentation constitue une pratique interdite? — Loi sur la protection du consommateur, L.R.Q., ch. P-40.1, art. 218, 219, 228, 238c).

Protection du consommateur — Pratiques de commerce interdites — Recours — Conditions d'ouverture — À quelles conditions l'art. 272 de la Loi sur la protection du consommateur permet-il au consommateur de faire sanctionner les violations aux prescriptions du titre II de cette loi? — Loi sur la protection du consommateur, L.R.Q., ch. P-40.1, art. 2, 253, 272.

Protection du consommateur — Pratiques de commerce interdites — Recours — Demande de dommages-intérêts compensatoires et punitifs faite par un consommateur en vertu de l'art. 272 de la Loi sur la protection du consommateur — Quelles sont les conditions d'octroi des dommages-intérêts et les critères à utiliser pour déterminer leur quantum? — Loi sur la protection du consommateur, L.R.Q., ch. P-40.1, art. 272 — Code civil du Québec, L.Q. 1991, ch. 64, art. 1621.

R a reçu par courrier un « Avis officiel du concours Sweepstakes » (le « Document ») sous forme de lettre signée, apparemment, par la directrice du programme

sweepstakes. Along the edge of the letter were boxes printed in colour, some of which, because they referred to *Time* magazine, could lead the recipient to infer that it was from T and TCM. In the Document, which was written in English only, several exclamatory sentences in bold uppercase letters, whose purpose was to catch the reader's attention by suggesting that he or she had won a cash prize of US$833,337, were combined with conditional clauses in smaller print, some of which began with the words "If you have and return the Grand Prize winning entry in time". In addition, the back side of the letter informed R that he would qualify for a $100,000 bonus prize if he validated his entry within five days. The mailing also contained a reply coupon and a return envelope on which the official rules of the sweepstakes appeared in small print. The reply coupon also offered R the possibility of subscribing to *Time* magazine. As well, the rules stated that a winning number had been pre-selected by computer and that the holder of that number could receive the grand prize only if the reply coupon was returned by the deadline. If the holder of the pre-selected winning number did not return the reply coupon, the rules explained, the grand prize winner would be selected by random drawing among all eligible entries, that is, everyone who had returned the reply coupon, and each participant's odds of winning would then be 1:120 million. Convinced that he was about to receive the promised amount, R immediately returned the reply coupon that was in the envelope. In doing so, he also subscribed to *Time* magazine. R began regularly receiving issues of the magazine a short time later, but the cheque he was expecting was a long time coming. He contacted T and TCM, which informed him that he would not be receiving a cheque, because the Document had not contained the winning entry for the draw and was merely an invitation to participate in a sweepstakes. They also informed him that the manager who had signed the letter did not exist; the name was merely a "pen name".

R filed a motion to institute proceedings in which he asked the Quebec Superior Court to declare him to be the winner of the cash prize mentioned in the Document and to order T and TCM to pay compensatory and punitive damages corresponding to the value of the grand prize. The Superior Court allowed the action in part. It held that the Document contravened Title II of the *Consumer Protection Act* ("*C.P.A.*") on prohibited business practices and that the civil sanctions provided for in s. 272 *C.P.A.* were accordingly available. The judge set the value of the moral injuries suffered by R at $1,000 and fixed the quantum

et bordée d'encadrés imprimés en couleurs dont certains, en raison de leurs références au magazine *Time*, permettent à son destinataire de déduire qu'elle émane de T et TCM. Le Document, en langue anglaise seulement, combine plusieurs phrases écrites en majuscules et caractères gras rédigées sous forme exclamative, dont l'objectif est de capter l'attention du lecteur en lui suggérant qu'il est le gagnant d'un prix en argent de 833 337 $US, à des phrases imprimées en plus petits caractères rédigées sous forme conditionnelle, dont plusieurs débutent par les mots « Si vous détenez le coupon de participation gagnant du Gros Lot et le retournez à temps ». Au verso, la lettre indique d'ailleurs que R sera admissible à un prix additionnel de 100 000 $ s'il valide son inscription à l'intérieur d'un délai de cinq jours. L'envoi postal contenait aussi un coupon-réponse ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères. Le coupon-réponse offrait également à R la possibilité de s'abonner au magazine *Time*. Par ailleurs, les règles indiquaient qu'un numéro gagnant avait été présélectionné par ordinateur et que son détenteur ne pourrait toucher le gros lot que s'il retournait le coupon-réponse dans le délai fixé. Les règles indiquaient que, dans l'éventualité où le détenteur du numéro gagnant présélectionné ne retournerait pas le coupon-réponse, le gros lot serait tiré aléatoirement parmi toutes les personnes ayant retourné le coupon-réponse et que chaque participant aurait alors une chance de gagner sur 120 millions. Convaincu qu'il était sur le point de toucher la somme promise, R a aussitôt retourné le coupon-réponse se trouvant à l'intérieur de l'enveloppe. Ce faisant, il s'est abonné au magazine *Time*. Peu après, R a commencé à recevoir les numéros du magazine à intervalles réguliers, mais le chèque espéré se faisait attendre. Il a contacté T et TCM, qui l'ont informé qu'il ne recevrait aucun chèque puisque le Document ne portait pas le numéro gagnant du tirage et ne constituait qu'une simple invitation à participer à un concours. Elles l'ont également informé que la directrice du programme qui avait signé la lettre n'existait pas; il s'agissait plutôt d'un « nom de plume ».

R a déposé une requête introductive d'instance demandant à la Cour supérieure du Québec de le déclarer gagnant du prix en argent mentionné dans le Document et de condamner T et TCM à des dommages-intérêts compensatoires et punitifs correspondant à la valeur du gros lot. La Cour supérieure a accueilli le recours en partie. Elle a jugé que le Document contrevenait aux prescriptions du titre II de la *Loi sur la protection du consommateur* (« *L.p.c.* ») portant sur les pratiques interdites de commerce et donnait ouverture aux sanctions civiles prévues à l'art. 272 *L.p.c.* La juge a fixé à 1 000 $ la valeur des dommages moraux subis par

of punitive damages that were also awarded to him at $100,000.

The Court of Appeal allowed the appeal of T and TCM and concluded that they had not violated the *C.P.A.* First, T and TCM had not violated s. 228 *C.P.A.* by failing to indicate clearly in the Document that R might not be the grand prize winner. Moreover, using the name of a fictitious person as the signer of the Document did not contravene s. 238(*c*) *C.P.A.*, since it did not have the potential to mislead consumers about the merchant's identity. Finally, there were no false or misleading representations in the Document, as it would not mislead a consumer "with an average level of intelligence, scepticism and curiosity". The Court of Appeal set aside the award of compensatory and punitive damages.

Held: The appeal should be allowed in part.

Per McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ.: The analytical approach chosen by the Court of Appeal for establishing the general impression conveyed by the advertisement of T and TCM was inconsistent with the test adopted by the legislature. According to s. 218 *C.P.A.*, which guides the application of all the provisions of Title II concerning prohibited business practices, to determine whether a representation constitutes such a practice, it is necessary to consider the "general impression" given by the representation and, where appropriate, the "literal meaning" of the words used in it. In the case of false or misleading advertising, the general impression is the one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used. It is analysed without considering the personal attributes of the consumer who has instituted proceedings against the merchant. To be consistent with the legislature's objective of protecting vulnerable persons from the dangers of certain advertising techniques, the general impression test must be applied from the perspective of the average consumer, who is credulous and inexperienced and takes no more than ordinary care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement. Considerable importance must be attached not only to the text, but also to the entire context, including the way the text is displayed to the consumer. Defining the average consumer as having "an average level of intelligence, scepticism and curiosity" is inconsistent with the letter and the spirit of s. 218 *C.P.A.* A court asked to assess the veracity of a commercial representation must engage, under s. 218 *C.P.A.*, in a two-step

La Cour d'appel a accueilli l'appel de T et TCM et conclu qu'elles n'avaient pas violé la *L.p.c.* D'abord, T et TCM n'avaient pas violé l'art. 228 *L.p.c.* en omettant d'écrire clairement sur le Document que R pouvait ne pas être le gagnant du gros lot. De plus, l'utilisation du nom d'une personne fictive comme signataire du Document ne violait pas l'al. 238*c*) *L.p.c.*, car cela n'était pas susceptible de tromper les consommateurs sur l'identité du commerçant. Enfin, le Document ne contenait aucune représentation fausse ou trompeuse, car il ne serait pas de nature à tromper le consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux ». La Cour d'appel a cassé la condamnation à des dommages-intérêts compensatoires et punitifs.

Arrêt : Le pourvoi est accueilli en partie.

La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Charron et Cromwell : La méthode d'analyse choisie par la Cour d'appel pour déterminer l'impression générale donnée par la publicité de T et TCM ne respectait pas le critère retenu par le législateur. L'article 218 *L.p.c.*, qui encadre l'application de toutes les dispositions du titre II concernant les pratiques de commerce interdites, prescrit que, pour déterminer si une représentation constitue une telle pratique, il faut examiner l'« impression générale » donnée par la représentation ainsi que, s'il y a lieu, le « sens littéral » des termes qui y sont employés. En ce qui concerne la publicité fausse ou trompeuse, l'impression générale est celle qui se dégage après un premier contact complet avec la publicité, et ce, à l'égard tant de sa facture visuelle que de la signification des mots employés. Elle s'analyse en faisant abstraction des attributs personnels du consommateur à l'origine de la procédure engagée par le commerçant. Pour respecter l'objectif du législateur de protéger les personnes vulnérables contre les dangers de certaines méthodes publicitaires, le critère de l'impression générale doit être appliqué dans une perspective d'un consommateur moyen, crédule et inexpérimenté, qui ne prête rien de plus qu'une attention ordinaire à ce qui lui saute aux yeux lors d'un premier contact complet avec une publicité. Une importance considérable doit être attachée non seulement au texte, mais à tout son contexte, notamment à la manière dont il est présenté au consommateur. Définir le consommateur moyen comme « moyennement intelligent, moyennement sceptique et moyennement curieux » se concilie mal avec le libellé et l'esprit de l'art. 218 *L.p.c.* Les tribunaux appelés à évaluer la véracité d'une représentation commerciale doivent procéder, selon l'art. 218

analysis that involves — having regard, where appropriate, to the literal meaning of the words used by the merchant — (1) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (2) determining whether that general impression is true to reality. If the answer at the second step is no, the merchant has engaged in a prohibited practice.

In this case, the average consumer, after first reading the Document, would have been under the general impression that R held the winning entry and had only to return the reply coupon to initiate the claim process. The Document's strange collection of affirmations and restrictions was not clear or intelligible enough to dispel the general impression conveyed by the most prominent sentences. Even if it did not necessarily contain any statements that were actually false, the fact remains that it was riddled with misleading representations within the meaning of s. 219 *C.P.A.* Furthermore, the contest rules were not all apparent to someone reading the Document for the first time. These are important facts that T and TCM were required to mention. As a result, T and TCM also violated s. 228 *C.P.A.* However, the use by T and TCM of a "pen name" in their advertising material did not amount to a violation of s. 238(*c*) of the *C.P.A.*, as the Document contained no false representations concerning their status or identity. It can be understood from a single reading that the Document was from them and that they did not claim to have a particular status or identity that they did not actually have.

Subject to the other recourses provided for in the *C.P.A.*, a consumer can institute proceedings under s. 272 *C.P.A.* to have the court sanction a failure by a merchant or a manufacturer to fulfil an obligation imposed on the merchant or manufacturer by the *C.P.A.*, by the regulations made under the *C.P.A.* or by a voluntary undertaking. Where a merchant or a manufacturer fails to fulfil an obligation to which s. 272 *C.P.A.* applies, the consumer can claim a contractual remedy, compensatory damages and punitive damages, or just one of those remedies. It will then be up to the trial judge to award the remedies he or she considers appropriate in the circumstances. However, the sanction available under s. 272 for failing to fulfil an obligation must be imposed in accordance with the principles governing the application of the *C.P.A.* and, where applicable, the rules of the general law. In particular, legal interest under that provision depends on the existence of a contract to which the Act applies, since s. 2 *C.P.A.* establishes the basic principle that a consumer contract must

L.p.c., à une analyse en deux étapes, en tenant compte, s'il y a lieu, du sens littéral des mots employés par le commerçant : (1) décrire d'abord l'impression générale que la représentation est susceptible de donner chez le consommateur crédule et inexpérimenté; (2) déterminer ensuite si cette impression générale est conforme à la réalité. Dans la mesure où la réponse à cette dernière question est négative, le commerçant aura commis une pratique interdite.

En l'espèce, le consommateur moyen, après une première lecture du Document, aurait eu l'impression générale que R détenait le numéro gagnant et qu'il lui suffisait de retourner le coupon-réponse pour que la procédure de réclamation puisse s'enclencher. Le curieux assemblage d'affirmations et de restrictions que contient le Document n'est pas suffisamment clair et intelligible pour dissiper l'impression laissée par ses phrases prédominantes. Même si le Document ne contient pas nécessairement d'énoncés qui sont littéralement faux, il reste qu'il est truffé de représentations trompeuses au sens de l'art. 219 *L.p.c.* De plus, les règles du concours n'apparaissent pas toutes lors d'une première lecture du Document. Il s'agit là de faits importants que T et TCM ne pouvaient passer sous silence. Par voie de conséquence, T et TCM ont aussi contrevenu à l'art. 228 *L.p.c.* Toutefois, même si elles ont utilisé un « nom de plume » dans leur matériel publicitaire, T et TCM n'ont pas contrevenu à l'al. 238*c*) *L.p.c.*, car le Document ne contient aucune représentation fausse quant à leur statut ou identité. Une seule lecture du Document suffit pour comprendre qu'il émane d'elles et que celles-ci ne déclarent pas posséder un statut ou une identité qu'elles n'ont pas en réalité.

Un consommateur peut, sous réserve des autres recours prévus par la loi, intenter une poursuite en vertu de l'art. 272 *L.p.c.* afin de faire sanctionner la violation par un commerçant ou un fabricant d'une obligation que lui impose la *L.p.c.*, un règlement adopté en vertu de celle-ci ou un engagement volontaire. En cas de contravention par un commerçant ou un fabricant à une obligation visée par l'art. 272 *L.p.c.*, le consommateur peut demander à la fois des réparations contractuelles, des dommages-intérêts compensatoires et des dommages-intérêts punitifs ou, au contraire, ne réclamer que l'une de ces mesures. Il appartiendra ensuite au juge de première instance d'accorder les réparations qu'il estimera appropriées dans les circonstances. La sanction de la violation d'une obligation en vertu de l'art. 272 doit toutefois s'exercer conformément aux principes régissant l'application de la *L.p.c.* et, le cas échéant, aux règles du droit commun. En particulier, l'intérêt juridique pour agir en vertu de cette disposition dépend de l'existence d'un contrat visé par la loi, car l'art. 2 *L.p.c.* pose le

exist for the Act to apply, except in the specific case of the penal provisions. The recourse is therefore available only to natural persons who have entered into a contract governed by the Act with a merchant or a manufacturer.

The presumption of fraud provided for in s. 253 *C.P.A.* does not delimit the scope of s. 272 *C.P.A.* or govern the principles that underlie the application of that section. Rather, it provides consumers with additional protection in situations in which they do not wish or are not able to exercise a recourse under s. 272 *C.P.A.* Similarly, s. 217 *C.P.A.*, which provides that the fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made, is not intended to govern the conditions under which the recourses provided for in s. 272 *C.P.A.* are available and can be exercised. It relates only to the existence of a prohibited practice and authorizes the Director of Criminal and Penal Prosecutions to enforce the Act on a preventive basis, in keeping with the legislature's intention.

For the contractual remedies provided for in s. 272 *C.P.A.* to be available, a consumer does not have to prove fraud and its consequences on the basis of the ordinary rules of the civil law, since, given the influence that prohibited practices can have on a consumer's decision to enter into a contractual relationship with a merchant, a prohibited practice in itself constitutes fraud within the meaning of art. 1401 of the *Civil Code of Quebec* ("*C.C.Q.*"). As well, a merchant or manufacturer who is sued cannot raise a defence based on "fraud that has been uncovered and is not prejudicial". The recourse provided for in s. 272 *C.P.A.* is based on the premise that any failure to fulfil an obligation imposed by the Act gives rise to an absolute presumption of prejudice to the consumer. Proof that one of the statutory contractual obligations that are set out primarily in Title I of the Act has been violated entitles a consumer, without having to meet any additional requirements, to obtain one of the contractual remedies provided for in s. 272. A consumer who wishes to benefit from this presumption in order to have a court sanction the use by a merchant or a manufacturer of practices prohibited by Title II of the Act must prove the following: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act; (2) that the consumer saw the representation that constituted a prohibited practice; (3) that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract; and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract. This last requirement means that

principe fondamental que l'existence d'un contrat de consommation représente la condition nécessaire à l'application de la loi, sous réserve du cas particulier des dispositions pénales. Le recours n'est donc ouvert qu'aux personnes physiques ayant conclu avec un commerçant ou un fabricant un contrat régi par la loi.

La présomption de dol établie par l'art. 253 *L.p.c.* ne délimite pas la portée de l'art. 272 *L.p.c.* et ne régit pas les principes qui en sous-tendent l'application. Elle accorde plutôt une protection additionnelle au consommateur dans des situations où il ne souhaite pas ou ne peut pas exercer un recours en vertu de l'art. 272 *L.p.c.* De même, l'art. 217 *L.p.c.*, qui dispose que la commission d'une pratique interdite n'est pas subordonnée à la conclusion d'un contrat, n'a pas vocation à régir les conditions d'ouverture et d'exercice des recours prévus à l'art. 272 *L.p.c.* Cet article ne porte que sur l'existence d'une pratique interdite, et permet au directeur des poursuites criminelles et pénales de faire respecter la loi à titre préventif, conformément à l'intention législative en la matière.

Pour avoir accès aux mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.*, le consommateur n'a pas à prouver le dol et ses conséquences selon les règles ordinaires du droit civil, car, vu l'influence possible des pratiques interdites sur la décision des consommateurs de s'engager dans une relation contractuelle avec un commerçant, l'existence d'une pratique interdite constitue en soi un dol au sens de l'art. 1401 du *Code civil du Québec* (« *C.c.Q.* »). De même, le commerçant ou le fabricant poursuivi ne peut soulever un moyen de défense basé sur le « dol éclairé et non préjudiciable ». Le recours prévu à l'art. 272 *L.p.c.* est fondé sur la prémisse que tout manquement à une obligation imposée par la loi entraîne l'application d'une présomption absolue de préjudice pour le consommateur. La preuve de la violation d'une obligation contractuelle de source légale qui se retrouve principalement au titre I de la loi permet, sans exigence additionnelle, au consommateur d'obtenir l'une des mesures de réparation contractuelles prévues à l'art. 272. Lorsqu'il souhaite faire sanctionner les pratiques interdites au titre II de la loi et commises par les commerçants et fabricants, le consommateur, pour bénéficier de cette présomption, doit prouver : (1) la violation par le commerçant ou le fabricant d'une des obligations imposées par le titre II de la loi; (2) la prise de connaissance de la représentation constituant une pratique interdite par le consommateur; (3) la formation, la modification ou l'exécution d'un contrat de consommation subséquente à cette prise de connaissance et (4) une proximité suffisante entre le contenu de la représentation et le bien ou le service visé par le contrat. Selon ce dernier critère, la pratique interdite

the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract. Where these four requirements are met, the contract so formed, amended or performed constitutes, in itself, a prejudice suffered by the consumer, and the consumer is entitled to demand one of the contractual remedies provided for in s. 272 *C.P.A.*

The recourse in damages provided for in s. 272 *C.P.A.* is not dependent on the specific contractual remedies set out in s. 272(*a*) to (*f*). It must nevertheless be exercised in accordance with the rule concerning the legal interest required to institute proceedings under s. 272 and is subject to the general rules of Quebec civil law. In addition, a claim for extracontractual compensatory damages is available, since fraud committed during the pre-contractual phase is a civil fault that can give rise to extracontractual liability. Where the recourse in damages provided for in s. 272 *C.P.A.* is available to a consumer, his or her burden of proof is therefore eased, regardless of whether the recourse is contractual or extracontractual in nature, because of the absolute presumption of prejudice that results from any unlawful act committed by the merchant or manufacturer. This presumption means that the consumer does not have to prove that the merchant intended to mislead. A consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 *C.P.A.*

In this case, R has discharged his burden of proving a sufficient nexus between the prohibited practices engaged in by T and TCM and his subscription contract with them. R subscribed to *Time* magazine after reading the documentation T and TCM had sent him, and the trial judge found that he would not have subscribed to the magazine had he not read the misleading documentation. As a result, the Document is deemed to have had a fraudulent effect on R's decision to subscribe to *Time* magazine. The conduct of T and TCM that is in issue constitutes a civil fault that triggers their extracontractual liability.

There is no reason to interfere with the trial judge's finding that the fault of T and TCM caused moral injuries to R or with her award of $1,000 for those injuries. T and TCM have not shown that she erred in assessing the evidence or in applying the legal principles with regard either to their liability or to the quantum of damages.

Furthermore, consumers can be awarded punitive damages under s. 272 *C.P.A.* even if they are not

doit être susceptible d'influer sur le comportement adopté par le consommateur relativement à la formation, à la modification ou à l'exécution du contrat de consommation. Lorsque ces quatre éléments sont établis, le contrat formé, modifié ou exécuté constitue, en soi, un préjudice subi par le consommateur, et celui-ci peut demander l'une des mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.*

Le recours en dommages-intérêts prévu à l'art. 272 *L.p.c.* est autonome par rapport aux mesures de réparation contractuelles prévues aux al. *a*) à *f*) de ce même article. Il doit néanmoins être exercé dans le respect du principe régissant l'intérêt juridique pour intenter une poursuite en vertu de l'art. 272, et demeure soumis aux règles générales du droit civil québécois. En outre, l'octroi de dommages-intérêts compensatoires en matière extracontractuelle est permis, car le dol commis au cours de la phase précontractuelle constitue une faute civile susceptible d'engager la responsabilité extracontractuelle de son auteur. Dans la mesure où il est ouvert au consommateur, le recours en dommages-intérêts prévu à l'art. 272 *L.p.c.*, qu'il soit intenté sur une base contractuelle ou extracontractuelle, allège donc son fardeau de preuve au moyen d'une présomption absolue de préjudice découlant de toute illégalité commise par le commerçant ou le fabricant. Cette présomption dispense le consommateur de la nécessité de prouver l'intention de tromper du commerçant. Le consommateur qui bénéficie de la présomption irréfragable de préjudice aura également réussi à prouver la faute du commerçant ou du fabricant pour l'application de l'art. 272 *L.p.c.*

En l'espèce, R s'est déchargé de son fardeau de prouver l'existence d'un lien rationnel entre les pratiques interdites commises par T et TCM et le contrat d'abonnement l'unissant à ces dernières. R s'est abonné au magazine *Time* après avoir lu la documentation que T et TCM lui ont fait parvenir, et la juge de première instance a conclu qu'il ne se serait pas abonné s'il n'avait pas lu la documentation trompeuse. En conséquence, le Document est réputé avoir eu un effet dolosif sur la décision de R de s'abonner au magazine *Time*. Le comportement reproché à T et TCM constitue une faute civile entraînant leur responsabilité extracontractuelle.

Aucune raison ne justifie de réviser les conclusions de la juge de première instance selon lesquelles la faute de T et TCM a causé à R des dommages moraux évalués à 1 000 $. T et TCM n'ont pas démontré que la juge avait erré dans son appréciation de la preuve ou dans l'application des principes juridiques, à l'égard tant de leur responsabilité que du quantum des dommages.

Le consommateur qui invoque l'art. 272 *L.p.c.* peut également obtenir des dommages-intérêts punitifs,

awarded contractual remedies or compensatory damages at the same time. Because s. 272 *C.P.A.* establishes no criteria or rules for awarding punitive damages, such damages must be awarded in accordance with art. 1621 *C.C.Q.* and must have a preventive objective, that is, to discourage the repetition of undesirable conduct. The award must also be consistent with the objectives of the *C.P.A.*, namely to restore the balance in the contractual relationship between merchants and consumers and to eliminate unfair and misleading practices. Violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the *C.P.A.* may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violations.

An award of punitive damages was justified in this case, but the amount of $100,000 awarded by the trial judge should be varied. Although the trial judge did not err in finding that T and TCM had sent many mailings in Quebec to a large number of consumers and that these promotional sweepstakes had enabled them to sell many new subscriptions, she did err in considering the *Charter of the French language* and the patrimonial situation of T and TCM when assessing the appropriate quantum of punitive damages. T and TCM had intentionally violated the *C.P.A.* in a calculated manner in this case, and that violation was capable of affecting a large number of consumers, whereas nothing in the evidence indicates that, after R complained, T and TCM took corrective action to make their advertising clear or consistent with the letter and spirit of the *C.P.A.* This is an aggravating factor. On the other hand, the impact on R of the fault committed by T and TCM remains quite limited, though, it is true, not negligible, and R's attitude contributed to the proportions this case has ultimately assumed. Nevertheless, the fact that the amount of the award of compensatory damages is small favours awarding a significant amount of punitive damages. An amount of $15,000 suffices in the circumstances to fulfil the preventive purpose of punitive damages, underlines the gravity of the violations of the Act and sanctions the conduct of T and TCM in a manner that is serious enough to induce them to cease the prohibited practices in which they have been engaging, if they have not already done so.

même s'il ne lui a pas été accordé en même temps une réparation contractuelle ou des dommages-intérêts compensatoires. Parce que l'art. 272 *L.p.c.* n'établit aucun critère ou règle encadrant l'attribution de ces dommages-intérêts, ceux-ci seront octroyés en conformité avec l'art. 1621 *C.c.Q.*, dans un objectif de prévention pour décourager la répétition de comportements indésirables, et conformément aux objectifs de la *L.p.c.*, qui sont de rétablir l'équilibre dans les relations contractuelles entre commerçants et consommateurs et d'éliminer les pratiques déloyales et trompeuses. Les violations intentionnelles, malveillantes ou vexatoires, ainsi que la conduite marquée d'ignorance, d'insouciance ou de négligence sérieuse de la part des commerçants ou fabricants à l'égard de leurs obligations et des droits du consommateur sous le régime de la *L.p.c.* peuvent entraîner l'octroi de dommages-intérêts punitifs. Le tribunal doit toutefois étudier l'ensemble du comportement du commerçant lors de la violation et après celle-ci avant d'accorder des dommages-intérêts punitifs.

En l'espèce, une condamnation à des dommages-intérêts punitifs se justifiait. Toutefois, il y a lieu de réviser le montant de 100 000 $ retenu par la juge de première instance. Bien qu'elle ne se soit pas trompée en concluant que T et TCM avaient distribué un grand nombre d'envois postaux sur le territoire québécois à de nombreux consommateurs et que l'organisation de ces concours publicitaires leur permettait de vendre un grand nombre de nouveaux abonnements, la juge a commis une erreur en considérant, dans son évaluation du quantum approprié des dommages-intérêts punitifs, la *Charte de la langue française* ainsi que la situation patrimoniale de T et TCM. En l'espèce, T et TCM avaient commis une violation intentionnelle et calculée de la *L.p.c.* qui pouvait affecter un grand nombre de consommateurs, et rien dans la preuve n'indique que T et TCM ont pris des mesures correctives après la plainte de R afin de rendre leurs publicités claires ou conformes à la lettre et à l'esprit de la *L.p.c.* Cela constitue un facteur aggravant. Par contre, l'impact de la faute commise par T et TCM sur R demeure assez limité, même s'il n'est pas négligeable, et l'attitude de celui-ci n'est pas étrangère aux dimensions que ce litige a fini par prendre. Cependant, le caractère minime de la condamnation à des dommages-intérêts compensatoires milite en faveur de l'octroi d'un montant non négligeable de dommages-intérêts punitifs. Un montant de 15 000 $ suffit dans les circonstances pour assurer la fonction préventive des dommages-intérêts punitifs, souligne la gravité des violations de la loi et sanctionne la conduite de T et TCM de manière assez sérieuse pour les inviter à abandonner les pratiques interdites qu'elles ont utilisées, si ce n'est pas déjà fait.

Costs in the Superior Court and the Court of Appeal will be taxed in accordance with the tariffs applicable in those courts. However, R will have his costs in the Supreme Court of Canada on a solicitor and client basis because of the importance of the issues of law he raised.

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Les dépens seront taxés devant la Cour supérieure et la Cour d'appel du Québec conformément aux tarifs applicables devant ces tribunaux. Toutefois, des dépens sur la base avocat-client sont accordés à R devant la Cour suprême du Canada, en raison de l'importance des questions de droit qu'il a soulevées.

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APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Morin and Rochon JJ.A.), 2009 QCCA 2378, [2010] R.J.Q. 3, SOQUIJ AZ-50590237, [2009] J.Q. nº 15288 (QL), 2009 CarswellQue 12570, reversing a decision of Cohen J., 2007 QCCS 3390, [2007] R.J.Q. 2008, SOQUIJ AZ-50442262, [2007] Q.J. No. 7531 (QL), 2007 CarswellQue 6654. Appeal allowed in part.

Hubert Sibre, *Annie Claude Beauchemin* and *Jean-Yves Fortin*, for the appellant.

Pascale Cloutier and *Fadi Amine*, for the respondents.

English version of the judgment of the Court delivered by

LeBel and Cromwell JJ. —

I. Introduction

[1] This appeal arises out of an advertising campaign that undoubtedly did not turn out as intended. The central issues in the case are whether the respondents, by mailing a document entitled "Official Sweepstakes Notification" (the "Document") to the appellant, engaged in a practice prohibited by the *Consumer Protection Act*, R.S.Q., c. P-40.1 ("*C.P.A.*"), and, if so, whether the appellant is entitled to punitive and compensatory damages under s. 272 *C.P.A.* To decide these issues, the Court must, *inter alia*, define the characteristics that are relevant to the determination of whether a commercial representation is false or misleading, as well as the conditions for exercising the recourses in damages provided for in s. 272 *C.P.A.*

[2] In concrete terms, the appellant is appealing a judgment in which the Quebec Court of Appeal denied his claim for damages on the basis that the content of the Document did not violate any of the provisions of the *C.P.A.* (2009 QCCA 2378, [2010]

lité civile, thèse de doctorat. Montréal : Université de Montréal, 1995.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Chamberland, Morin et Rochon), 2009 QCCA 2378, [2010] R.J.Q. 3, SOQUIJ AZ-50590237, [2009] J.Q. nº 15288 (QL), 2009 CarswellQue 12570, qui a infirmé une décision de la juge Cohen, 2007 QCCS 3390, [2007] R.J.Q. 2008, SOQUIJ AZ-50442262, [2007] Q.J. No. 7531 (QL), 2007 CarswellQue 6654. Pourvoi accueilli en partie.

Hubert Sibre, *Annie Claude Beauchemin* et *Jean-Yves Fortin*, pour l'appelant.

Pascale Cloutier et *Fadi Amine*, pour les intimées.

Le jugement de la Cour a été rendu par

Les juges LeBel et Cromwell —

I. Introduction

[1] Le pourvoi résulte d'une campagne publicitaire qui, sans doute, n'a pas donné les résultats escomptés par ses auteurs. Au cœur du débat se trouvent les questions de savoir si les intimées, en postant à l'appelant un document intitulé [TRADUCTION] « Avis officiel du concours Sweepstakes » (le « Document »), se sont livrées à une pratique interdite par la *Loi sur la protection du consommateur*, L.R.Q., ch. P-40.1 (« *L.p.c.* »), et, dans l'affirmative, si l'appelant a le droit d'obtenir des dommages-intérêts punitifs et compensatoires en vertu de l'art. 272 *L.p.c.* Pour statuer sur ces questions, la Cour devra notamment préciser les paramètres qui permettent d'évaluer le caractère faux ou trompeur d'une représentation commerciale ainsi que les conditions d'ouverture des recours en dommages-intérêts prévus à l'art. 272 *L.p.c.*

[2] Concrètement, l'appelant se pourvoit contre un jugement de la Cour d'appel du Québec qui a rejeté sa demande en dommages-intérêts au motif que le contenu du Document ne violait aucune prescription de la *L.p.c.* (2009 QCCA 2378, [2010] R.J.Q. 3).

R.J.Q. 3). The Court of Appeal's main reason for denying the claim was that the Document would not mislead a consumer [TRANSLATION] "with an average level of intelligence, scepticism and curiosity" (para. 50). In this Court, the appellant argues that the criteria used by the Court of Appeal to define the average consumer for the purposes of the *C.P.A.* undermine certain of the foundations of Quebec consumer law. He is therefore asking this Court to reject that definition, find that the Document is misleading and award him punitive damages equivalent to nearly $1 million.

[3] For the reasons that follow, we agree with the appellant that the Document contains representations that contravene the *C.P.A.*'s provisions concerning prohibited business practices. We also agree with him that the Court of Appeal's definition of the "average consumer" is inconsistent with the objectives of the *C.P.A.* and must therefore be rejected. Finally, we would allow his claim for compensatory and punitive damages, but only in part.

II. Origin of the Case

[4] On August 26, 1999, the appellant, Jean-Marc Richard, found the Document in his mail. It was in English only and was in the form of a "letter" addressed to him and signed by Elizabeth Matthews, Director of Sweepstakes. Along the edge of the letter were various boxes printed in colour, some of which, because they referred to *Time* magazine, could lead the recipient to infer that it was from the respondents. The Document began with a sentence that immediately caught the reader's attention:

OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833,337.00!

[5] However, a closer look at the Document reveals that this passage was part of a two-part sentence that read as follows:

La Cour d'appel a justifié le rejet de la demande en faisant principalement valoir que le Document ne serait pas de nature à tromper le consommateur « moyennement intelligent, moyennement sceptique et moyennement curieux » (par. 50). Devant notre Cour, l'appelant prétend que les critères utilisés par la Cour d'appel pour définir le consommateur moyen visé par la *L.p.c.* ébranlent certaines assises du droit québécois de la consommation. Il invite donc notre Cour à rejeter cette définition, à conclure au caractère trompeur du Document et à lui accorder l'équivalent de près d'un million de dollars en dommages-intérêts punitifs.

[3] Pour les motifs qui suivent, nous sommes d'accord avec l'appelant que le Document contient des représentations qui contreviennent aux prescriptions de la *L.p.c.* sur les pratiques de commerce interdites. Nous partageons également son opinion que la définition du « consommateur moyen » retenue par la Cour d'appel n'est pas conforme aux objectifs poursuivis par la *L.p.c.* et, conséquemment, qu'elle doit être rejetée. Enfin, nous proposons d'accueillir, pour partie seulement, sa demande de dommages-intérêts compensatoires et de dommages-intérêts punitifs.

II. Origine du litige

[4] Le 26 août 1999, l'appelant, M. Jean-Marc Richard, a récupéré le Document dans son courrier. Rédigé exclusivement en anglais, le Document se présente sous la forme d'une « lettre » adressée à l'appelant. La lettre, signée par la directrice du programme « *Sweepstakes* », M^me^ Elizabeth Matthews, est bordée de différents encadrés imprimés en couleurs dont certains, en raison de leurs références au magazine *Time*, permettent à son destinataire de déduire qu'elle émane des intimées. Le Document s'ouvre sur une phrase qui attire aussitôt l'attention du lecteur :

[TRADUCTION] **NOUS AVONS MAINTENANT LES RÉSULTATS FINALS DU CONCOURS : M. JEAN MARC RICHARD A GAGNÉ LA SOMME DE 833 337 $ EN ARGENT COMPTANT!**

[5] En regardant le Document de plus près, on constate cependant que cet extrait s'insère dans une phrase à deux volets, rédigée ainsi :

If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we will officially announce that

OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833,337.00!

[6] This opening sentence clearly illustrates the technique used in the writing and layout of the Document: several exclamatory sentences in bold uppercase letters, whose purpose was to catch the reader's attention by suggesting that he or she had won a large cash prize, were combined with conditional clauses in smaller print, some of which began with the words "If you have and return the Grand Prize winning entry in time". For example, the Document identified the appellant as one of the latest sweepstakes winners and stated in large print that payment of his cash prize had been authorized. However, the heading "**LATEST CASH PRIZE WINNERS**", under which the appellant's name appeared, was preceded by the following sentence in small letters: "If you have and return the Grand Prize winning entry in time, our new list of major cash prize winners will read as follows".

[7] This same writing technique was used elsewhere in the letter, as several prominent sentences intended to boost the recipient's enthusiasm were combined with inconspicuous conditional clauses. It will be helpful to reproduce some passages from the Document to better illustrate the specific features of this technique:

If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we'll confirm that

WE ARE NOW AUTHORIZED TO PAY $833,337.00 IN CASH TO MR JEAN MARC RICHARD!

. . .

[TRADUCTION] *Si vous détenez le coupon de participation gagnant du Gros Lot et le retournez à temps, et si vous répondez correctement à une question de connaissances générales, nous annoncerons officiellement que*

NOUS AVONS MAINTENANT LES RÉSULTATS FINALS DU CONCOURS : M. JEAN MARC RICHARD A GAGNÉ LA SOMME DE 833 337 $ EN ARGENT COMPTANT!

[6] Cette phrase d'ouverture illustre bien le mode de rédaction et de présentation du Document. Celui-ci a été conçu de façon à combiner plusieurs phrases écrites en majuscules et caractères gras rédigées sous forme exclamative, dont l'objectif est de capter l'attention du lecteur en lui suggérant qu'il est le gagnant d'un important prix en argent, à des phrases imprimées en plus petits caractères rédigées sous forme conditionnelle, dont plusieurs débutent par les mots [TRADUCTION] « Si vous détenez le coupon de participation gagnant du Gros Lot et le retournez à temps ». À titre d'exemple, le Document mentionne l'appelant parmi les plus récents gagnants du programme « *Sweepstakes* » et indique en grosses lettres que le paiement de son prix en argent a été autorisé. Toutefois, l'inscription [TRADUCTION] « **DERNIERS GAGNANTS D'UN PRIX EN ARGENT** », sous laquelle figure le nom de l'appelant, est précédée de la phrase suivante rédigée en petits caractères : [TRADUCTION] « Si vous détenez le coupon de participation gagnant du Gros Lot et le retournez à temps, voici quelle sera notre nouvelle liste de gagnants de gros prix en argent ».

[7] Suivant le même procédé de rédaction, la lettre allie bon nombre de phrases prédominantes destinées à accroître l'enthousiasme de son destinataire à des phrases discrètes rédigées sous forme conditionnelle. Il est utile ici de reproduire quelques extraits du Document pour illustrer davantage les traits particuliers de ce mode de rédaction :

[TRADUCTION] *Si vous détenez le coupon de participation gagnant du Gros Lot et le retournez à temps, et si vous répondez correctement à une question de connaissances générales, nous confirmerons que*

NOUS AVONS EU L'AUTORISATION DE REMETTRE À M. JEAN MARC RICHARD LA SOMME DE 833 337 $ EN ARGENT COMPTANT!

. . .

. . . And now that we've been authorized to pay the prize money, the very next time you hear from us if you win, it will be to inform you that

A BANK CHEQUE FOR $833,337.00 IS ON ITS WAY TO —— ST!

. . .

. . . The truth is, if you hold the Grand Prize winning number,

YOU WILL FORFEIT THE ENTIRE $833,337.00 IF YOU FAIL TO RESPOND TO THIS NOTICE!

[8] Along with these many references to the "Grand Prize winning entry", the Document assigned the appellant a "Prize Claim Number" that was to be used for identification purposes when the entries were validated. In addition, the back side of the letter informed the appellant that he would qualify for a $100,000 bonus prize if he validated his entry within five days. It then referred to various benefits the appellant could have if he decided to subscribe to *Time* magazine at the same time as he validated his entry. All this information was set out as follows in the Document:

YOU'LL QUALIFY FOR A $100,000.00 BONUS IF YOU RESPOND WITHIN 5 DAYS!

. . .

YOU'LL RECEIVE A FREE GIFT: THE ULTRONIC™ PANORAMIC CAMERA & PHOTO ALBUM SET!

. . .

YOU'LL ALSO RECEIVE TIME AT UP TO 74% SAVINGS!

. . .

. . . And if you hold the Grand Prize winning entry,

. . . Et puisque nous avons eu l'autorisation de remettre le Gros Lot au gagnant, la prochaine fois que nous communiquerons avec vous si vous gagnez, ce sera pour vous aviser que

UN CHÈQUE BANCAIRE DE 833 337 $ A ÉTÉ EXPÉDIÉ AU [X, RUE X]!

. . .

. . . La vérité est que, si vous avez le numéro gagnant du Gros Lot,

VOUS RENONCEREZ À TOUCHER LA SOMME DE 833 337 $ SI VOUS NE RÉPONDEZ PAS AU PRÉSENT AVIS!

[8] Parallèlement à ces mentions multiples du [TRADUCTION] « coupon de participation gagnant du Gros Lot », le Document attribue à l'appelant un [TRADUCTION] « numéro de réclamation du prix » qui doit servir à des fins d'identification au stade de la validation des inscriptions. Au verso, la lettre indique d'ailleurs à l'appelant qu'il sera admissible à un prix additionnel de 100 000 $ s'il valide son inscription à l'intérieur d'un délai de cinq jours. Elle mentionne ensuite divers bénéfices dont l'appelant pourrait jouir s'il décidait, tout en validant son inscription, de s'abonner au magazine *Time*. Toutes ces informations sont présentées de la manière suivante dans le Document :

[TRADUCTION] **VOUS SEREZ ADMISSIBLE À UN PRIX ADDITIONNEL DE 100 000 $ SI VOUS RÉPONDEZ DANS LES 5 PROCHAINS JOURS!**

. . .

VOUS RECEVREZ EN CADEAU UNE CAMÉRA PANORAMIQUE ULTRONIC™ ACCOMPAGNÉE D'UN ALBUM PHOTOS!

. . .

VOUS RECEVREZ AUSSI LE MAGAZINE TIME EN BÉNÉFICIANT D'UN RABAIS ALLANT JUSQU'À 74 %!

. . .

. . . Et si vous détenez le billet gagnant du Gros Lot,

A BANK CHEQUE FOR $833,337.00 IN CASH WILL BE SENT TO YOU VIA CERTIFIED MAIL — IF YOU RESPOND NOW!

[9] To show more clearly what the Document looked like, we have reproduced it in its entirety in an appendix to these reasons. For now, suffice it to say that the Document's visual content and writing style are central to the issue of whether the mailing of the Document constitutes a prohibited practice within the meaning of the *C.P.A.*

[10] In addition to the Document, the mailing received by the appellant contained a reply coupon entitled "Official Entry Certificate" and a return envelope on which the official rules of the sweepstakes appeared in small print. The reply coupon also offered the appellant the possibility of subscribing to *Time* magazine for a period ranging from seven months to two years. As well, the official rules stated that a winning number had been pre-selected by computer and that the holder of that number could receive the grand prize only if the reply coupon was returned by the deadline. If the holder of the pre-selected winning number did not return the reply coupon, the rules explained, the grand prize winner would be selected by random drawing among all eligible entries, that is, everyone who had returned the reply coupon, and each participant's odds of winning would then be 1:120 million.

[11] The appellant testified that he had carefully read the Document twice the day he received it and had concluded that he had just won US$833,337. The next day, he took the Document to work to ask a vice-president of the company he worked for, whose first language was English, whether he had understood the Document correctly. The vice-president agreed that the appellant had just won the grand prize referred to in the Document. Convinced that he was about to receive the promised amount, the appellant immediately returned the reply coupon that was in the envelope. In doing so, he also subscribed to *Time* magazine for two years, and this entitled him to receive a free camera

UN CHÈQUE BANCAIRE DE 833 337 $ VOUS SERA EXPÉDIÉ PAR COURRIER RECOMMANDÉ — SI VOUS RÉPONDEZ MAINTENANT!

[9] Pour une meilleure compréhension de la facture visuelle du Document, nous renvoyons le lecteur à sa version intégrale qui est reproduite en annexe aux présents motifs. Dans l'immédiat, il suffit de mentionner que la teneur visuelle et le style de rédaction du Document jouent un rôle critique lorsqu'il s'agit de décider si l'envoi du Document constitue une pratique interdite au sens de la *L.p.c.*

[10] Outre le Document, l'envoi postal qu'a reçu l'appelant contenait un coupon-réponse intitulé [TRADUCTION] « Certificat officiel de participation » ainsi qu'une enveloppe de retour sur laquelle les règles officielles du concours étaient imprimées en petits caractères. Le coupon-réponse offrait également à l'appelant la possibilité de s'abonner au magazine *Time* pour une période variant de sept mois à deux ans. Par ailleurs, les règles officielles indiquaient qu'un numéro gagnant (« *winning number* ») avait été présélectionné par ordinateur et que son détenteur ne pourrait toucher le gros lot que s'il retournait le coupon-réponse dans le délai fixé. Les règles indiquaient que, dans l'éventualité où le détenteur du numéro gagnant présélectionné ne retournerait pas le coupon-réponse, le gros lot serait tiré aléatoirement parmi toutes les personnes ayant retourné le coupon-réponse (« *all eligible entries* ») et que chaque participant aurait alors une chance de gagner sur 120 millions.

[11] Selon son témoignage, le jour où il l'a reçu, l'appelant a lu attentivement le Document à deux reprises, au terme desquelles il est venu à la conclusion qu'il venait de gagner la somme de 833 337 $US. Le lendemain, il a apporté le Document à son lieu de travail afin qu'un vice-président de l'entreprise qui l'emploie dont la langue maternelle est l'anglais puisse confirmer ou infirmer la signification qu'il lui attribuait. Cet interlocuteur s'est dit pareillement d'avis que l'appelant venait de gagner le gros lot mentionné dans le Document. Convaincu qu'il était sur le point de toucher la somme promise, l'appelant a aussitôt retourné le coupon-réponse se trouvant à l'intérieur de l'enveloppe. Ce faisant, il s'est abonné

and photo album, as was indicated on the back of the Document.

[12] The appellant received the camera and photo album a short time later. He also began regularly receiving issues of the magazine. However, the cheque he was expecting was a long time coming. Believing that he had been patient enough, he decided to call Elizabeth Matthews at Time Inc. to inquire about the processing of his cheque. After leaving a few messages to which he received no reply, the appellant was finally able to speak with a representative of the marketing department of the respondent Time Inc. in New York. He then learned that he would not be receiving a cheque, because the Document mailed to him had not contained the winning entry for the draw. During the telephone conversation, Time Inc.'s representative told the appellant that the Document was merely an invitation to participate in a sweepstakes. The appellant was also informed that Elizabeth Matthews did not exist; the name was merely a "pen name" used by the respondents in their advertising material.

[13] The appellant replied that the Document clearly announced that he was the prize winner. His protests got him nowhere. The respondents flatly refused to pay him the amount he was claiming.

[14] On September 29, 2000, the appellant filed a motion to institute proceedings. He first asked the Quebec Superior Court to declare him to be the winner of the cash prize mentioned in the Document. He argued that the Document was an offer to contract within the meaning of art. 1388 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), and that he had accepted the offer by returning the reply coupon. He accordingly asked the court to order the respondents to provide him with the skill-testing question and pay him the grand prize amount. In the alternative, he asked the court to order the respondents to pay compensatory and punitive damages corresponding to the value of the grand prize (A.R., vol. I, at p. 53).

pour deux ans au magazine *Time*. Cet abonnement lui donnait aussi le droit de recevoir gratuitement une caméra ainsi qu'un album photos, comme cela était indiqué au verso du Document.

[12] Peu de temps après, l'appelant a reçu la caméra et l'album photos. Il a également commencé à recevoir les numéros du magazine à intervalles réguliers. Cependant, le chèque espéré se faisait attendre. Jugeant qu'il avait été suffisamment patient, il décida d'appeler Elizabeth Matthews chez Time Inc. afin de s'enquérir du traitement de son chèque. Après avoir laissé quelques messages qui sont restés sans réponse, l'appelant a finalement réussi à parler avec un représentant du service du marketing chez l'intimée Time Inc. à New York. Il apprit alors qu'il ne recevrait aucun chèque puisque le document qui lui avait été transmis par la poste ne portait pas le numéro gagnant du tirage. Lors de la conversation téléphonique, le représentant de Time Inc. informa l'appelant que le Document ne constituait qu'une simple invitation à participer à un concours. L'appelant a également été informé qu'Elizabeth Matthews n'existait pas; il s'agissait plutôt d'un « nom de plume » utilisé par les intimées dans leur matériel publicitaire.

[13] L'appelant a répondu que le Document annonçait clairement qu'il était le gagnant du lot mentionné. Ses protestations ne donnèrent rien. Les intimées refusèrent fermement de lui payer la somme réclamée.

[14] Le 29 septembre 2000, l'appelant a déposé une requête introductive d'instance. Il demandait d'abord à la Cour supérieure du Québec de le déclarer gagnant du prix en argent mentionné dans le Document. Il plaidait que celui-ci constituait une offre de contracter au sens de l'art. 1388 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »), offre qu'il avait acceptée en retournant le coupon-réponse. En conséquence, l'appelant a demandé à la Cour supérieure d'ordonner aux intimées de lui fournir la question de connaissances générales et de lui verser le montant du gros lot. À titre subsidiaire, l'appelant a demandé à la Cour supérieure de condamner les intimées à des dommages-intérêts compensatoires et punitifs correspondant à la valeur du gros lot (d.a., vol. I, p. 53).

III. Judicial History

A. *Quebec Superior Court (2007 QCCS 3390, [2007] R.J.Q. 2008, Cohen J.)*

[15] Cohen J. began by considering the contractual portion of the claim. She found that the parties had not entered into a contract and accordingly refused to order payment of the prize claimed by the appellant.

[16] Cohen J. then considered the appellant's claim for damages, which was based on alleged violations of the *C.P.A.* She held that the convoluted style of the offer contravened Title II of the *C.P.A.* on prohibited business practices. She wrote the following:

> The very same "conditional" wording which enabled Time to avoid the argument that a contract was formed or that it undertook unconditionally to pay $833,337 to Mr. Richard, illustrates the contention that this document was *specifically* designed to mislead the recipient, that it contains misleading and even false representations, contrary to the clear wording of article 219 of the *Consumer Protection Act* . . . . [Emphasis in original; para. 34.]

[17] Cohen J. reached this conclusion on the basis of the general impression conveyed by the Document. Referring to s. 218 *C.P.A.*, she stated that the Document gave the general impression that the appellant had won the grand prize. In her view, the general design of the Document thus amounted to a false or misleading representation within the meaning of s. 219 *C.P.A.*

[18] Cohen J. added that the Document contained two false representations. First, its signer, Elizabeth Matthews, did not exist, so she could not have "certified" the content of the Document, contrary to what was stated. That fiction was in clear contravention of ss. 219 and 238 *C.P.A.*, since it gave an imaginary person a particular status or identity (para. 38). Next, the fact that the appellant might not be the grand prize winner had been withheld from him by the respondents or, at the very least, had been "buried in a sea of text" with the expectation

III. Historique judiciaire

A. *Cour supérieure du Québec (2007 QCCS 3390, [2007] R.J.Q. 2008, la juge Cohen)*

[15] La juge Cohen a d'abord analysé le volet contractuel de la réclamation. À cet égard, elle a conclu qu'aucun contrat n'était intervenu entre les parties. Elle a donc refusé d'ordonner le paiement du prix réclamé par l'appelant.

[16] La juge Cohen a ensuite analysé la réclamation de dommages-intérêts de l'appelant, fondée sur des violations alléguées de la *L.p.c.* À cet égard, elle a jugé que la rédaction alambiquée de l'offre contrevenait aux prescriptions du titre II de la *L.p.c.* portant sur les pratiques interdites de commerce. Elle a écrit :

> [TRADUCTION] Le même emploi de la forme « conditionnelle », qui a permis à Time d'échapper à l'argument qu'un contrat était intervenu ou qu'elle s'était engagée à verser à M. Richard, sans condition, la somme de 833 337 $, illustre bien la prétention que ce document a été conçu *expressément* de manière à tromper son destinataire, qu'il contient des représentations trompeuses ou même fausses, et ce, en contravention du texte explicite de l'article 219 de la *Loi sur la protection du consommateur* . . . [En italique dans l'original; par. 34.]

[17] La juge Cohen a tiré cette conclusion sur la base de l'impression générale laissée par le Document. Se référant à l'art. 218 *L.p.c.*, elle a affirmé que le Document donnait l'impression générale que l'appelant avait gagné le gros lot. À son avis, la facture générale du Document constituait donc une représentation fausse ou trompeuse au sens de l'art. 219 *L.p.c.*

[18] La juge Cohen a ajouté que le Document contenait deux fausses représentations. D'abord, sa signataire, M^me^ Elizabeth Matthews, n'existait pas; elle n'avait donc pas pu « certifier » le contenu du Document, contrairement à ce qu'il indiquait. Cette fiction contrevenait clairement aux art. 219 et 238 *L.p.c.*, puisqu'elle conférait à une personne imaginaire un statut ou une identité particulière (par. 38). Ensuite, les intimées n'avaient pas dévoilé à l'appelant qu'il se pouvait qu'il ne soit pas le gagnant du gros lot ou, à tout le moins, cette information était

that his enthusiasm would induce him to subscribe to *Time* magazine (para. 39). In Cohen J.'s opinion, the failure to reveal such an important fact was contrary to s. 228 *C.P.A.* She summed up her view on the presence of false or misleading information in the Document as follows: "It is patently obvious to any reader that the mailing from Time was not only false and incomplete, it was specifically designed to be misleading, both in the words chosen, the size of the conditions or disclaimers and their ambiguity, especially to a person who is not reading in his or her mother tongue" (para. 40).

[19] Cohen J. added that she did not need to determine whether the appellant had actually been misled by the content of the Document (para. 49). To hold that a commercial representation is a practice prohibited by the *C.P.A.*, it is sufficient for a court to find that the average consumer, that is, one who is credulous and inexperienced, could be misled:

> There can be no doubt here that the unsolicited publicity sent to Mr. Richard indeed had the capacity to mislead if viewed through the eyes of the average, inexperienced French-speaking consumer in Quebec. In any event, the testimony of Mr. Richard made it clear that he would never have read the subscription portion of the document had the misleading representations not been present, making it obvious that his paid subscription to *Time Magazine* was a direct result of these misleading representations in the present case. [para. 49]

[20] According to Cohen J., the respondents' advertising strategy, as revealed by the content of the Document, involved the use of practices prohibited by Title II of the *C.P.A.* As a result, the civil sanctions provided for in s. 272 *C.P.A.* were available.

[21] Relying on the principles adopted by the Quebec Court of Appeal in *Nichols v. Toyota Drummondville (1982) inc.*, [1995] R.J.Q. 746, Cohen J. stated that, in certain circumstances, punitive damages can be awarded under s. 272 *C.P.A.* in the absence of prejudice to the consumer, that is,

[TRADUCTION] « submergée dans une mer de renseignements » de façon à miser sur son enthousiasme afin de l'inciter à s'abonner au magazine *Time* (par. 39). Selon la juge, l'omission de dévoiler un fait aussi important contrevenait à l'art. 228 *L.p.c.* La juge Cohen a résumé ainsi sa pensée concernant la présence d'informations fausses ou trompeuses dans le Document : [TRADUCTION] « Il saute aux yeux de tout lecteur que l'envoi postal de Time était non seulement faux et incomplet, mais qu'il avait aussi été expressément conçu de manière à tromper le lecteur — et particulièrement celui dont la langue maternelle n'est pas celle de l'envoi —, tant par son libellé que par la taille et l'ambiguïté des conditions ou avertissements » (par. 40).

[19] La juge Cohen a ajouté qu'elle n'avait pas à déterminer si le contenu du Document avait bel et bien trompé l'appelant (par. 49). Pour conclure qu'une représentation commerciale constituait une pratique interdite par la *L.p.c.*, il suffisait que le tribunal constate que le consommateur moyen, c'est-à-dire un consommateur crédule et inexpérimenté, pouvait être induit en erreur :

> [TRADUCTION] Il ne fait aucun doute que la publicité non sollicitée envoyée à M. Richard pouvait effectivement s'avérer trompeuse aux yeux du consommateur québécois francophone moyen et inexpérimenté. Quoi qu'il en soit, il ressort clairement du témoignage de M. Richard qu'il n'aurait jamais lu la partie du document portant sur l'abonnement n'eut été la présence des représentations trompeuses, ce qui démontre de façon évidente que sa décision de s'abonner au magazine Time est directement imputable à ces représentations trompeuses. [par. 49]

[20] Selon la juge Cohen, la stratégie publicitaire des intimées, telle que révélée par le contenu du Document, s'est traduite par la commission de pratiques interdites au titre II de la *L.p.c.* Ces faits donnaient ouverture aux sanctions civiles prévues à l'art. 272 *L.p.c.*

[21] S'appuyant sur la jurisprudence de la Cour d'appel du Québec découlant de l'arrêt *Nichols c. Toyota Drummondville (1982) inc.*, [1995] R.J.Q. 746, la juge Cohen a affirmé que l'art. 272 *L.p.c.* permettait, en certaines circonstances, d'accorder des dommages-intérêts punitifs en l'absence de

even if compensatory damages are not awarded at the same time (para. 55). In any event, she found that the evidence in the record showed that the appellant had suffered moral injuries — difficulty sleeping and embarrassment in his relations with the people around him — as a result of the respondents' refusal to pay him the grand prize (para. 57). Cohen J. set the value of those moral injuries at $1,000.

[22] Next, Cohen J. stated that it was appropriate in this case to award the appellant punitive damages in addition to the compensatory damages. On the issue of the quantum of punitive damages, she added that art. 1621 *C.C.Q.* required the court to consider all the circumstances, including the debtor's patrimonial situation and the gravity of the debtor's fault. In discussing the gravity of the fault, Cohen J. held that the respondents had failed to fulfil the obligations imposed on them by the *C.P.A.* by sending "thousands of these false and misleading mailings to francophone consumers in Quebec" (para. 59). She added that the respondents had also violated the *Charter of the French language*, R.S.Q., c. C-11, by sending the appellant advertising material in English only (para. 64). In her view, such a violation of the *Charter of the French language* could be taken into consideration in assessing the quantum of punitive damages awarded under s. 272 *C.P.A.* (para. 66).

[23] Furthermore, Cohen J. stated that the sweepstakes advertising method was quite lucrative for the respondents. She noted that, although the quantum of punitive damages should not convey the impression that the court in this case was using those damages to indirectly uphold the contractual portion of the appellant's claim, the quantum nonetheless had to reflect the deterrent function of such damages and take the respondents' patrimonial situation into account. Exercising her judicial discretion, she fixed the quantum of the punitive damages awarded to the appellant at $100,000, which corresponded to the value of the "Bonus" prize to

préjudice subi par le consommateur, c'est-à-dire sans que le tribunal n'octroie concurremment des dommages-intérêts compensatoires (par. 55). Quoi qu'il en soit, elle a néanmoins estimé que la preuve au dossier démontrait que l'appelant avait subi des dommages moraux — troubles de sommeil et embarras auprès de son entourage — à la suite du refus des intimées de lui verser le gros lot (par. 57). La juge Cohen a fixé à 1 000 $ la valeur des dommages moraux subis par l'appelant.

[22] La juge Cohen a ensuite affirmé qu'il était opportun dans le présent dossier d'accorder des dommages-intérêts punitifs à l'appelant en sus des dommages-intérêts compensatoires. Abordant la question du quantum des dommages-intérêts punitifs, elle a ajouté que l'art. 1621 *C.c.Q.* prescrivait au tribunal de considérer l'ensemble des circonstances, y compris la situation patrimoniale du débiteur et la gravité de la faute commise. À l'égard de ce dernier aspect, la juge Cohen a décidé que les intimées avaient violé les obligations que leur imposait la *L.p.c.* en envoyant [TRADUCTION] « des milliers d'envois postaux faux et trompeurs à des consommateurs francophones au Québec » (par. 59). Elle a aussi mentionné que les intimées avaient également violé les dispositions de la *Charte de la langue française*, L.R.Q., ch. C-11, en faisant parvenir à l'appelant du matériel publicitaire en langue anglaise seulement (par. 64). À son avis, une telle contravention à la *Charte de la langue française* pouvait être prise en considération dans l'évaluation du quantum des dommages-intérêts punitifs octroyés en vertu de l'art. 272 *L.p.c.* (par. 66).

[23] Par ailleurs, la juge Cohen a affirmé que la méthode publicitaire du programme « *Sweepstakes* » était fort lucrative pour les intimées. Tout en mentionnant que le quantum des dommages-intérêts punitifs ne devait pas, en l'espèce, donner l'impression que le tribunal utilisait ce type de dommages-intérêts pour accueillir indirectement le volet contractuel de la réclamation de l'appelant, elle a rappelé qu'il devait néanmoins refléter leur fonction dissuasive eu égard à la situation patrimoniale des intimées. Exerçant sa discrétion judiciaire, la juge Cohen a fixé à 100 000 $ le quantum des dommages-intérêts punitifs octroyés

which the appellant would have been entitled if he had had the winning entry and returned the reply coupon within five days.

[24] Cohen J. further ordered, again exercising her judicial discretion, that the costs awarded to the appellant be calculated on the basis of the value of the action "as instituted", namely $1,250,887.10, thus enabling the appellant to be reimbursed a portion of his judicial and extrajudicial costs, including the fees paid to his attorneys (para. 73).

B. *Quebec Court of Appeal (2009 QCCA 2378, [2010] R.J.Q. 3, Chamberland, Morin and Rochon JJ.A.)*

[25] Both parties appealed the Superior Court's decision. The Quebec Court of Appeal, in reasons written by Chamberland J.A., allowed the respondents' appeal and dismissed the incidental appeal. It thus dismissed the appellant's recourse in damages in its entirety, but without costs because of the nature of the case and the novelty of the issues (para. 53).

[26] The Court of Appeal began by dismissing the appellant's incidental appeal with respect to the payment of the prize. That conclusion is no longer being challenged. The principal issue concerned the award of compensatory and punitive damages against the respondents.

[27] The Court of Appeal held, contrary to the respondents' argument, that the *C.P.A.* was applicable in this case. Chamberland J.A. pointed out that s. 217 *C.P.A.* clearly states that the fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made (para. 25). He added that in any event, the parties had in fact formed a contractual relationship by means of the offer to participate in a sweepstakes and the acceptance of that offer in the form of the return of the reply coupon (para. 26).

à l'appelant. Ce montant correspond à la valeur du « prix additionnel » auquel l'appelant aurait eu droit s'il avait détenu le numéro gagnant et retourné le coupon-réponse à l'intérieur d'un délai de cinq jours.

[24] Toujours dans l'exercice de sa discrétion judiciaire, la juge Cohen a ordonné que les dépens accordés à l'appelant soient calculés sur la base de la valeur de l'action [TRADUCTION] « telle qu'elle a été introduite », soit la somme de 1 250 887,10 $. Cette conclusion voulait permettre à l'appelant d'être remboursé d'une partie de ses déboursés judiciaires et extrajudiciaires, y compris les honoraires versés à ses procureurs (par. 73).

B. *Cour d'appel du Québec (2009 QCCA 2378, [2010] R.J.Q. 3, les juges Chamberland, Morin et Rochon)*

[25] Les deux parties ont formé appel du jugement de la Cour supérieure. La Cour d'appel du Québec, dans une opinion rédigée par le juge Chamberland, a accueilli l'appel principal formé par les intimées et rejeté l'appel incident. La Cour d'appel a ainsi rejeté en totalité le recours en dommages-intérêts intenté par l'appelant, mais sans frais compte tenu de la nature du débat et de la nouveauté des questions en litige (par. 53).

[26] La Cour d'appel a d'abord rejeté le pourvoi incident de l'appelant quant au paiement du prix. Cette conclusion n'est plus remise en cause. Le débat principal a porté sur la condamnation des intimées à des dommages-intérêts compensatoires et punitifs.

[27] La Cour d'appel a décidé que la *L.p.c.* était applicable en l'espèce, contrairement aux prétentions des intimées. Le juge Chamberland a souligné que l'art. 217 *L.p.c.* indique clairement que la commission d'une pratique interdite n'est pas subordonnée à la conclusion d'un contrat (par. 25). Le juge Chamberland a ajouté qu'à tout événement, une relation contractuelle s'était bien formée entre les parties, par l'offre de participer à un concours et par son acceptation par le renvoi du coupon-réponse (par. 26).

[28] Following those initial findings, the Court of Appeal concluded that the respondents had not violated the *C.P.A.* First, in its view, the respondents had not violated s. 228 *C.P.A.* by failing to indicate clearly in the Document that the appellant might not be the grand prize winner (para. 28).

[29] Next, the Court of Appeal held that using the name of a fictitious person, Elizabeth Matthews, as the signer of the Document did not contravene s. 238(*c*) *C.P.A.* The use of a "pen name" did not on its own have the potential to mislead consumers about the merchant's identity and was simply intended to [TRANSLATION] "personalize" the mailings (para. 29).

[30] Finally, Chamberland J.A. disagreed with Cohen J.'s view that the Document contained false or misleading representations contrary to s. 219 *C.P.A.* The Court of Appeal stated that it could not conclude that the Document might give the average Quebec consumer the general impression that the recipient was the grand prize winner (paras. 49-50). The court was not even critical of the respondents' conduct:

[TRANSLATION] With respect, I see eye-catching text in the documentation sent to the [appellant], but I do not see any misleading, underhanded or deceitful statements. I even suspect that the [appellant], a well-informed businessman who worked locally and internationally in both French and English, understood the sweepstakes and his chances of winning perfectly well from the very start. [para. 51]

[31] According to the Court of Appeal, there were no false or misleading representations in the Document. Although the court seemed to acknowledge that the Document's eye-catching headings might initially convey the impression that the appellant had just won the grand prize, it expressed the view that a careful reading of the Document was sufficient to dispel that impression. It is, in a word, up to consumers to be suspicious of advertisements that seem too good to be true. For these reasons, the Court of Appeal set aside the award of compensatory and punitive damages against the respondents.

[28] Après ces premières constatations, la Cour d'appel a conclu que les intimées n'avaient pas violé la *L.p.c.* D'abord, à son avis, les intimées n'avaient pas violé l'art. 228 *L.p.c.* en omettant d'écrire clairement sur le Document que l'appelant pouvait ne pas être le gagnant du gros lot (par. 28).

[29] Ensuite, la Cour d'appel a décidé que l'utilisation du nom d'une personne fictive, en l'occurrence Elizabeth Matthews, comme signataire du Document ne violait pas l'al. 238*c*) *L.p.c.* En l'espèce, la seule utilisation d'un « nom de plume » n'était pas susceptible de tromper les consommateurs sur l'identité du commerçant, mais ne visait qu'à « personnaliser » les envois postaux (par. 29).

[30] Finalement, le juge Chamberland a exprimé son désaccord avec l'opinion de la juge Cohen selon laquelle le Document contenait des représentations fausses ou trompeuses, contrairement aux prescriptions de l'art. 219 *L.p.c.* La Cour d'appel se disait incapable de conclure que le Document était susceptible de laisser, chez le consommateur québécois moyen, l'impression générale que le destinataire était le gagnant du gros lot mentionné (par. 49-50). La cour ne se montrait même pas critique à l'égard du comportement des intimées :

Avec égards pour l'opinion contraire, je vois dans la documentation transmise à l'[appelant] un texte accrocheur, mais pas de déclarations trompeuses, déloyales ou fourbes. Je soupçonne même l'[appelant], un homme d'affaires averti œuvrant sur la scène locale et internationale, en français et en anglais, d'avoir parfaitement bien compris ce qu'il en était du sweepstake et de ses chances de gagner, et ce, depuis le tout début. [par. 51]

[31] D'après la Cour d'appel, le Document ne contenait aucune représentation fausse ou trompeuse. Bien qu'elle ait semblé reconnaître que ses titres accrocheurs pouvaient initialement donner l'impression que l'appelant venait de gagner le gros lot, à son avis, une lecture attentive du Document suffisait pour dissiper cette impression. En quelque sorte, il appartenait aux consommateurs de se méfier des messages publicitaires aux apparences trop avantageuses. Pour ces motifs, la Cour d'appel a cassé la condamnation des intimées à des dommages-intérêts compensatoires et punitifs.

IV. Analysis

A. *Issues*

[32] This appeal raises the following issues:

1. What is the proper approach in Quebec for determining whether an advertisement constitutes a false or misleading representation for the purposes of the *Consumer Protection Act*?

2. In the absence of a contract referred to in s. 2 *C.P.A.*, can a consumer exercise a recourse in damages under s. 272 *C.P.A.*?

3. What are the conditions for exercising the recourse in punitive damages provided for in s. 272 *C.P.A.*?

4. Should punitive damages be awarded in this case and, if so, what criteria should be considered in determining their quantum?

B. *Review of the General Objectives of Consumer Law and the Structure of the C.P.A.*

[33] For the purposes of this appeal, this Court must interpret certain core components of the legal scheme established by the *C.P.A.* As we mentioned above, we must define the characteristics of the prohibition against certain advertising practices and the conditions for exercising the recourse provided for in s. 272 *C.P.A.* where that prohibition has been violated. For this, a brief review of the objectives of modern consumer law and the origins of that law in Quebec and Canada will be helpful.

(1) Rise of the Consumer Society and Its Impact on the Normative Environment of Consumer Protection

[34] Historically, the Canadian consumer protection legislation was originally focused on protecting

IV. Analyse

A. *Questions en litige*

[32] Le présent pourvoi soulève les questions suivantes :

1. Quelle est la méthode appropriée, au Québec, pour évaluer si une publicité constitue une représentation fausse ou trompeuse pour l'application de la *Loi sur la protection du consommateur*?

2. En l'absence de contrat visé par l'art. 2 *L.p.c.*, le consommateur peut-il intenter un recours en dommages-intérêts en vertu de l'art. 272 *L.p.c.*?

3. Quelles sont les conditions d'ouverture du recours en dommages-intérêts punitifs prévu à l'art. 272 *L.p.c.*?

4. Doit-on accorder des dommages-intérêts punitifs en l'espèce et, dans l'affirmative, quels critères doivent être considérés pour en déterminer le montant?

B. *Rappel des objectifs généraux du droit de la consommation et présentation de la structure de la L.p.c.*

[33] Ce pourvoi demande à notre Cour d'interpréter des éléments centraux du régime juridique mis en place par la *L.p.c.* Comme nous l'avons mentionné précédemment, nous sommes appelés à préciser en l'espèce les paramètres qui encadrent l'interdiction de certaines pratiques publicitaires, ainsi que les conditions d'ouverture du recours prévu à l'art. 272 *L.p.c.* en cas de violation de cette interdiction. Dans ce contexte, il s'avère pertinent d'effectuer un bref rappel des objectifs poursuivis par le droit de la consommation moderne et de ses origines au Québec et au Canada.

(1) L'avènement de la société de consommation et ses incidences sur l'environnement normatif en matière de protection du consommateur

[34] Historiquement, la législation canadienne destinée à protéger le consommateur s'est d'abord

consumers from [TRANSLATION] "abuses of power" by merchants (L.-A. Couture, "Rapport sur la protection du consommateur au niveau fédéral en droit pénal canadien", in *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, vol. 24, *La protection des consommateurs* (1975), 303, at p. 307).

[35] Preserving a competitive economic environment remained central to Canadian consumer protection mechanisms until the mid-20th century. Consumer protection remained indirect in nature: for example, federal legislation was focused more on regulating the Canadian economy at a structural level than on directly protecting consumers' interests (see J.-L. Baudouin, "Rapport général", in *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, vol. 24, *La protection des consommateurs* (1975), 3, at p. 4).

[36] With the rise of the consumer society after World War II, however, new concerns came to the fore with respect, in particular, to the increased vulnerability of consumers (N. L'Heureux and M. Lacoursière, *Droit de la consommation* (6th ed. 2011), at pp. 1-4).

[37] Changes in the marketplace led to the realization that consumers needed to be better protected. In fact, the liberalization of markets favoured the emergence of systems focused more on protecting consumers (see Baudouin, at pp. 3-4; see also *Prebushewski v. Dodge City Auto (1984) Ltd.*, 2005 SCC 28, [2005] 1 S.C.R. 649, at para. 33).

[38] Both the Parliament of Canada and the Quebec legislature tried to resolve the problems raised by the new consumer society. Within the Canadian constitutional framework, Parliament and the legislatures have all played important — and often complementary — roles in this regard. We will not dwell here on the measures adopted by Parliament. Instead, we will be focusing on the Quebec legislation and on how it has developed.

concentrée sur la protection contre les « abus de pouvoirs » commis par les commerçants (L.-A. Couture, « Rapport sur la protection du consommateur au niveau fédéral en droit pénal canadien », dans *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, t. 24, *La protection des consommateurs* (1975), 303, p. 307).

[35] La préservation d'un environnement économique concurrentiel est demeurée au cœur des mécanismes de protection du consommateur au Canada jusqu'au milieu du XX^{e} siècle. La protection du consommateur conservait un caractère indirect : par exemple, la législation fédérale se préoccupait davantage des orientations structurelles de l'économie canadienne que de la protection particulière des intérêts du consommateur (voir J.-L. Baudouin, « Rapport général », dans *Travaux de l'Association Henri Capitant des amis de la culture juridique française*, t. 24, *La protection des consommateurs* (1975), 3, p. 4).

[36] Toutefois, après la Deuxième Guerre mondiale, l'avènement de la société de consommation a fait apparaître des préoccupations nouvelles, notamment des inquiétudes au sujet de la vulnérabilité accrue du consommateur (N. L'Heureux et M. Lacoursière, *Droit de la consommation* (6^{e} éd. 2011), p. 1-4).

[37] L'évolution des marchés a fait reconnaître le besoin d'une protection accrue du consommateur. En fait, la libéralisation des marchés a favorisé l'émergence de régimes plus orientés vers la protection du consommateur (voir Baudouin, p. 3-4; voir aussi *Prebushewski c. Dodge City Auto (1984) Ltd.*, 2005 CSC 28, [2005] 1 R.C.S. 649, par. 33).

[38] Le Parlement du Canada et le législateur québécois ont tous deux cherché à résoudre les problèmes posés par l'avènement de la société de consommation. Dans le cadre constitutionnel canadien, le Parlement et les législatures ont tous joué un rôle important et souvent complémentaire en ces matières. Nous n'insisterons pas ici sur les mesures adoptées par le Parlement fédéral. Notre opinion portera sur la législation québécoise et son évolution.

[39] The rise of the consumer society called attention to the limits of the general law in Quebec, as in the other Canadian provinces. In Quebec, the contractual fairness model based on freedom of contract, consensualism and the binding force of contracts seemed increasingly unsuited to ensuring real equality between merchants and consumers. When the Quebec legislature first became involved in this area, its goal was to develop a new model of contractual fairness based on a scheme of public order that would be an exception to the traditional rules of the general law (see Baudouin, at p. 5).

[40] Quebec consumer law has essentially centred around two successive consumer protection statutes enacted in 1971 and 1978, which were subsequently supplemented by the inclusion of certain provisions of public order in the *Civil Code of Québec*. The first *Consumer Protection Act* (S.Q. 1971, c. 74) applied only to contracts involving credit and distance contracts, and did not deal separately with business practices. In reality, advertising was regulated only indirectly by means of a legal fiction incorporating its content as a term of the resulting contract. Within just a few years after the first Act came into force, it had become obvious that the solution adopted by the legislature needed to be reviewed.

[41] Today's *Consumer Protection Act* establishes a much more elaborate legal scheme than the previous version did. Its enactment reflects the Quebec legislature's desire to extend the protection of the *C.P.A.* to a broader range of contracts and to explicitly regulate certain business practices that are considered fraudulent as regards their effect on consumers. In practical terms, the Act is divided into seven titles that reflect the main concerns of Quebec consumer law. Title I, "Contracts Regarding Goods and Services", contains provisions whose primary purpose is to restore the contractual balance between merchants and consumers. Title II, "Business Practices", identifies certain types of business conduct as prohibited practices

[39] L'avènement de la société de consommation a rendu évidentes les limites du droit commun au Québec comme dans les autres provinces canadiennes. Au Québec, le modèle de justice contractuelle fondé sur la liberté de contracter, le consensualisme et la force obligatoire du contrat apparaissait de moins en moins adapté pour assurer une réelle égalité entre commerçants et consommateurs. L'intervention du législateur québécois en ce domaine a initialement été inspirée par la recherche d'un modèle différent de justice contractuelle fondé sur un régime d'ordre public qui dérogerait aux règles traditionnelles du droit commun (voir Baudouin, p. 5).

[40] Le droit québécois de la consommation s'est pour l'essentiel organisé autour de deux lois successives sur la protection du consommateur, adoptées respectivement en 1971 et 1978, complétées plus tard par certaines dispositions d'ordre public contenues dans le *Code civil du Québec*. La première *Loi de la protection du consommateur* (L.Q. 1971, ch. 74) ne s'appliquait qu'aux contrats assortis d'un crédit ou conclus à distance, et ne réglementait pas les pratiques de commerce de façon autonome. En réalité, la publicité n'était régie qu'indirectement par le biais d'une fiction juridique l'incorporant aux termes du contrat. Quelques années seulement après l'entrée en vigueur de la première loi, il était devenu évident que la solution adoptée par le législateur québécois devait être revue.

[41] La *Loi sur la protection du consommateur* applicable aujourd'hui institue un régime juridique beaucoup plus élaboré que celui établi par sa version précédente. Son adoption témoigne de la volonté du législateur québécois d'étendre la protection de la *L.p.c.* à un ensemble plus vaste de contrats et de régir explicitement certaines pratiques de commerce jugées dolosives pour le consommateur. Concrètement, la loi est divisée en sept titres qui reflètent les grandes orientations du droit québécois de la consommation. Le titre I, intitulé « Contrats relatifs aux biens et aux services », contient des dispositions qui visent principalement à rétablir l'équilibre contractuel entre le commerçant et le consommateur. Le titre II, intitulé « Pratiques de

in order to ensure the veracity of information provided to consumers through advertising or otherwise.

[42] These two main titles are supplemented by, among others, Title IV, which sets out the civil and penal recourses that can be exercised to sanction violations of the Act by merchants. Aside from the recourse provided for in s. 272 *C.P.A.*, on which this appeal is focused, the main recourses are as follows: a demand by a consumer for the nullity of a contract (s. 271 *C.P.A.*), a penal proceeding instituted by the Director of Criminal and Penal Prosecutions (s. 277 *C.P.A.*) and an application for an interlocutory or permanent injunction by the Attorney General of Quebec, the president of the Office de la protection du consommateur ("Office") or a legal person that is a consumer advocacy body (ss. 290, 310 and 316 *C.P.A.*). The president of the Office may also negotiate a voluntary undertaking by a merchant to comply with the Act (s. 314 *C.P.A.*).

(2) Protection Against False or Misleading Advertising

[43] The measures to protect consumers from fraudulent advertising practices are one expression of a legislative intent to move away from the maxim *caveat emptor*, or "let the buyer beware". As a result of these measures, merchants, manufacturers and advertisers are responsible for the veracity of information they provide to consumers and may, should such information contain falsehoods, incur the civil or penal consequences provided for in the legislation. As Judge Matheson of the Ontario County Court explained in *R. v. Colgate-Palmolive Ltd.*, [1970] 1 C.C.C. 100, a case involving federal law, the maxim *caveat venditor* is now far more appropriate to describe the merchant-consumer relationship. In an oft-cited judgment, he wrote the following:

commerce », assimile à des pratiques interdites certains comportements commerciaux afin d'assurer la véracité de l'information transmise au consommateur par la publicité ou autrement.

[42] Ces deux titres principaux sont complétés notamment par le titre IV, qui prévoit les recours civils et pénaux susceptibles d'être exercés afin de sanctionner les manquements à la loi commis par les commerçants. En faisant abstraction du recours prévu à l'art. 272 *L.p.c.*, dont les conditions d'exercice sont au cœur du présent pourvoi, les principaux recours sont les suivants : recours du consommateur en nullité du contrat (art. 271 *L.p.c.*), poursuite pénale intentée par le directeur des poursuites criminelles et pénales (art. 277 *L.p.c.*) et recours en injonction interlocutoire ou permanente intenté, selon le cas, par le procureur général du Québec, le président de l'Office de la protection du consommateur (« Office ») ou une personne morale dont la mission est de protéger le consommateur (art. 290, 310 et 316 *L.p.c.*). Par ailleurs, le président de l'Office peut également négocier avec un commerçant un engagement volontaire de respecter la loi (art. 314 *L.p.c.*).

(2) La protection contre la publicité fausse ou trompeuse

[43] Les mesures destinées à protéger le consommateur contre les pratiques publicitaires frauduleuses constituent l'une des manifestations de la volonté des corps législatifs de se distancier de la maxime *caveat emptor*, qui signifie « que l'acheteur prenne garde ». En vertu de ces mesures, il appartient au commerçant, au fabricant ou au publicitaire de s'assurer de la véracité de l'information transmise au consommateur. À défaut, il s'expose à en subir les conséquences civiles ou pénales prévues par la législation. Comme l'a expliqué le juge Matheson, de la Cour de comté de l'Ontario, dans l'affaire *R. c. Colgate-Palmolive Ltd.*, [1970] 1 C.C.C. 100, impliquant la mise en œuvre du droit fédéral, c'est bien davantage la maxime *caveat venditor* qui trouve application de nos jours dans le contexte des relations entre commerçants et consommateurs. Dans son jugement souvent cité depuis, il a écrit ce qui suit :

This legislation is the expression of a social purpose, namely the establishment of more ethical trade practices calculated to afford greater protection to the consuming public. It represents the will of the people of Canada that the old maxim *caveat emptor*, let the purchaser beware, yield somewhat to the more enlightened view *caveat venditor* — let the seller beware. [p. 102]

[TRADUCTION] Cette loi est l'expression d'un objectif social, à savoir l'établissement de pratiques de commerce plus saines visant à mieux protéger le consommateur. Elle représente la volonté de la population canadienne de voir la vieille maxime *caveat emptor* — que l'acheteur prenne garde — céder quelque peu le pas au point de vue plus éclairé du *caveat venditor* — que le vendeur prenne garde. [p. 102]

(3) Protection Against False or Misleading Representations in the *C.P.A.*

(3) La protection contre les représentations fausses ou trompeuses dans la *L.p.c.*

[44] One of the main objectives of Title II of the *C.P.A.* is to protect consumers from false or misleading representations. Many of the practices it prohibits relate to the veracity of information provided to consumers. Section 219 *C.P.A.* sets out this objective in very clear language. It provides, quite generally, that no merchant, manufacturer or advertiser may make false or misleading representations to a consumer by any means whatever. The word "representation" is defined in s. 216 *C.P.A.* as including an affirmation, behaviour or an omission. Section 219 *C.P.A.* is supplemented by prohibitions relating to certain specific types of representations (ss. 220 to 251 *C.P.A.*).

[44] Un des objectifs principaux du titre II de la *L.p.c.* est la protection du consommateur contre les représentations fausses ou trompeuses. Un nombre important de pratiques qu'il interdit sont reliées à la véracité de l'information transmise au consommateur. L'article 219 *L.p.c.* exprime de façon particulièrement nette cet objectif. En effet, il interdit de façon générale à tout commerçant, fabricant ou publicitaire, de faire par quelque moyen que ce soit, une représentation fausse ou trompeuse à un consommateur. En effet, la notion de « représentation » est définie à l'art. 216 *L.p.c.* comme comprenant une affirmation, un comportement ou une omission. Des interdictions relatives à certaines représentations spécifiques (art. 220 à 251 *L.p.c.*) complètent l'art. 219 *L.p.c.*

[45] Section 218 *C.P.A.* guides the application of all these provisions of Title II. It explains the approach to be used to determine whether a representation is to be considered a prohibited practice. Its wording is based to a large extent on that of s. 52(4) of the *Combines Investigation Act*, R.S.C. 1985, c. C-23, a slightly different version of which can now be found in s. 52(4) of the *Competition Act*, R.S.C. 1985, c. C-34. Section 218 *C.P.A.* reads as follows:

[45] L'article 218 *L.p.c.* encadre l'application de toutes ces dispositions du titre II. Il expose la méthode prescrite pour déterminer si une représentation doit être considérée comme une pratique interdite. Son libellé est fortement inspiré de celui du par. 52(4) de la *Loi relative aux enquêtes sur les coalitions*, L.R.C. 1985, ch. C-23, dont une version légèrement modifiée se trouve aujourd'hui au par. 52(4) de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34. L'article 218 *L.p.c.* prévoit ce qui suit :

218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

218. Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés.

[46] The analytical approach provided for in s. 218 *C.P.A.* requires the consideration of two factors: the "general impression" given by a representation and the "literal meaning" of the words used in it. We will review the requirements of each of these two factors.

[46] La méthode d'analyse prévue à l'art. 218 *L.p.c.* commande l'examen de deux éléments : « l'impression générale » donnée par une représentation, ainsi que le « sens littéral » des termes qui y sont employés. Nous examinerons successivement la signification de ces deux éléments.

[47] The phrase "literal meaning of the terms used therein" does not raise any interpretation problems. It simply means that every word used in a representation must be interpreted in its ordinary sense. The purpose of this part of s. 218 *C.P.A.* is to prohibit merchants from raising a defence based on a subtle, technical or convoluted meaning of a word used in a representation. The legislature's intention was thus that the meanings given to words used in representations be the same as their meanings in everyday life.

[48] What is meant by the expression "general impression" requires further explanation, however. Although there have been few cases on this point, the courts seem in some recent decisions to have established more explicit principles from which a predominant interpretation can be drawn.

[49] One of these principles that has recently been developed more clearly by the Quebec courts relates to the abstract nature of the analysis of the general impression given by a representation. Influenced by Professor L'Heureux's comments on this point, the courts now seem to accept, as did the courts below in the instant case, that the "general impression" conveyed by a representation must be analysed in the abstract, that is, without considering the personal attributes of the consumer who has instituted proceedings against the merchant. (See *Québec (Procureur général) v. Distribution Canovex Inc.*, [1996] J.Q. nº 5302 (QL) (C.Q. (Crim. & Pen. Div.)), at paras. 39-40; *Option Consommateurs v. Brick Warehouse, l.p.*, 2011 QCCS 569 (CanLII), at paras. 71-73; N. L'Heureux, *Droit de la consommation* (5th ed. 2000), at p. 347. See also *Tremblay v. Ameublements Tanguay inc.*, 2011 QCCS 3078 (CanLII), at para. 97; and L'Heureux and Lacoursière, at pp. 489-90.)

[50] This approach is consistent with the spirit of the *C.P.A.*, whose main objective is to protect consumers. The courts must therefore be able to sanction any representation that, from an objective standpoint, constitutes a prohibited practice. Whether a commercial representation did or did

[47] L'expression « sens littéral des termes qui y sont employés » ne pose pas de problème d'interprétation. Elle reconnaît simplement que chaque mot contenu dans une représentation doit être interprété selon son sens ordinaire. Cette partie du texte de l'art. 218 *L.p.c.* vise à interdire aux commerçants de soulever une défense basée sur une signification subtile, technique ou alambiquée d'un mot utilisé dans une représentation. Le législateur a ainsi souhaité que l'on donne aux mots utilisés dans les représentations un sens conforme à celui qu'ils possèdent dans la vie quotidienne.

[48] En revanche, la notion d'« impression générale » requiert davantage d'explications. Bien que le corpus jurisprudentiel en la matière demeure limité, certaines décisions récentes paraissent avoir établi plus explicitement des principes qui permettent de dégager une interprétation dominante.

[49] L'un de ces principes récemment reconnus plus clairement par la jurisprudence québécoise concerne le caractère *in abstracto* de l'analyse de l'impression générale donnée par une représentation. Influencée en cette matière par les commentaires de la professeure L'Heureux, la jurisprudence semble désormais reconnaître, comme les tribunaux inférieurs dans ce dossier, que « l'impression générale » donnée par une représentation doit être analysée *in abstracto*, c'est-à-dire en faisant abstraction des attributs personnels du consommateur à l'origine de la procédure engagée contre le commerçant. (Voir *Québec (Procureur général) c. Distribution Canovex Inc.*, [1996] J.Q. nº 5302 (QL) (C.Q. crim. & pén.), par. 39-40; *Option Consommateurs c. Brick Warehouse, l.p.*, 2011 QCCS 569 (CanLII), par. 71-73; N. L'Heureux, *Droit de la consommation* (5e éd. 2000), p. 347. Voir aussi *Tremblay c. Ameublements Tanguay inc.*, 2011 QCCS 3078 (CanLII), par. 97; et L'Heureux et Lacoursière, p. 489-490.)

[50] Cette approche respecte l'esprit de la *L.p.c.*, dont l'objectif principal demeure la protection du consommateur. Les tribunaux doivent alors être en mesure de sanctionner toute représentation qui, objectivement, constitue une pratique interdite. Le fait qu'une représentation commerciale ait causé ou

not cause prejudice to one or more consumers is not relevant to the determination of whether a merchant engaged in a prohibited practice within the meaning of Title II of the *C.P.A.* The *C.P.A.* is concerned not only with remedying the harm caused to consumers by false or misleading representations, but also with preventing the distribution of advertisements that could mislead consumers and possibly cause them various types of prejudice.

[51] In sum, this is the objective being pursued in requiring that an abstract analysis be conducted under s. 218 *C.P.A.* This approach takes account of the concrete impact that advertising can have on consumers in their everyday lives. Professor Claude Masse has written the following on this subject:

[TRANSLATION] Commercial advertising often plays on the general impression that may be conveyed by an advertisement and even on the literal meaning of the terms used. Information in advertisements is transmitted quickly. Advertising relies on the image and the impression of the moment. This general impression is often what is sought in advertising. By definition, consumers do not have time to think at length about the real meaning of the messages being conveyed to them or about whether words are being used in their literal sense. The content of advertising is taken seriously in consumer law. Consumers do not have to wonder whether or not the promises made to them or the undertakings given are realistic, serious or plausible. Merchants, manufacturers and advertisers are therefore bound by the content of messages actually conveyed to consumers. [Emphasis added.]

(*Loi sur la protection du consommateur: analyse et commentaires* (1999), at p. 828)

[52] The use of the general impression test of s. 218 *C.P.A.* reflects how, in practice, consumers are very frequently led to exercise their freedom of choice. The question thus becomes how the courts are to determine the general impression conveyed by a commercial representation. The parties have taken very different positions in this Court on the interpretation of this concept.

[53] The appellant basically argues that the general impression conveyed by a written advertisement

non un préjudice à un ou plusieurs consommateurs n'est pas pertinent pour décider si un commerçant a commis une pratique interdite au sens du titre II de la *L.p.c.* La loi vise non seulement à réparer le tort causé aux consommateurs par des représentations fausses ou trompeuses, mais également à prévenir la diffusion de messages publicitaires capables de tromper les consommateurs et, éventuellement, de leur causer divers préjudices.

[51] En somme, la conduite d'une analyse *in abstracto* en vertu de l'art. 218 *L.p.c.* vise à réaliser cet objectif. Cette approche tient compte de la façon dont la publicité peut affecter concrètement la vie quotidienne du consommateur. À ce sujet, le professeur Claude Masse a écrit :

La publicité commerciale joue en effet souvent sur l'impression générale que peut laisser une publicité et même sur le sens littéral des mots employés. Les informations publicitaires sont transmises rapidement. On y mise sur l'image et l'impression du moment. C'est cette impression générale qui est souvent recherchée par la publicité. Le consommateur n'a pas, par définition, le temps de se livrer à de longues réflexions sur le sens véritable des messages qu'on lui communique ou sur la question de savoir si le sens des mots employés correspond ou non à leur sens littéral. Le droit de la consommation prend le contenu de la publicité au sérieux. Le consommateur n'a pas à se demander si les promesses qu'on lui fait ou les engagements que l'on prend sont ou non réalistes, sérieux ou vraisemblables. Le commerçant, le fabricant et le publicitaire sont donc liés par le contenu du message réellement communiqué aux consommateurs. [Nous soulignons.]

(*Loi sur la protection du consommateur : analyse et commentaires* (1999), p. 828)

[52] L'emploi du critère de l'impression générale fixé à l'art. 218 *L.p.c.* vise à traduire la façon dont, en pratique, les consommateurs sont très souvent amenés à exercer leur liberté de choix. Il faut alors déterminer comment les tribunaux doivent apprécier l'impression générale donnée par une représentation commerciale. Les parties ont adopté des positions fort contradictoires devant notre Cour à l'égard de l'interprétation de cette notion.

[53] L'appelant plaide essentiellement que l'impression générale donnée par une publicité écrite

must be assessed contextually, that is, by considering both the writing style and the choice of words. He submits that the approach required by s. 218 *C.P.A.* does not involve considering the words used in an advertisement in isolation from the medium in which they are used. In other words, the appellant contends that the general impression is based both on the layout of an advertisement and on the meaning of the words used.

[54] The respondents counter that the general impression test must not be likened to an "instant impression" test. They argue that the general impression is not the instant impression conveyed by an advertisement's layout and that the courts cannot dispense with a careful reading of a written advertisement. The respondents therefore submit that s. 218 *C.P.A.* requires an analytical approach that emphasizes the text of an advertisement rather than its layout.

[55] In our opinion, the respondents are wrong to downplay the importance of the layout of an advertisement. It must be remembered that the legislature adopted the general impression test to take account of the techniques and methods that are used in commercial advertising to exert a significant influence on consumer behaviour. This means that considerable importance must be attached not only to the text but also to the entire context, including the way the text is displayed to the consumer.

[56] However, the respondents are right to say that the general impression referred to in s. 218 *C.P.A.* is not the impression formed as a result of a rushed or partial reading of an advertisement. The analysis under that provision must take account of the entire advertisement rather than merely of portions of its content. But it is just as true that the analytical approach required by s. 218 *C.P.A.* does not involve the minute dissection of the text of an advertisement to determine whether the general impression it conveys is false or misleading. The courts must not approach a written advertisement as if it were a commercial contract by reading it several times,

doit s'apprécier de façon contextuelle, c'est-à-dire d'une façon qui tienne compte autant du style de rédaction que du choix des mots utilisés. Il affirme que l'approche prescrite par l'art. 218 *L.p.c.* ne consiste pas à extraire les mots employés dans une publicité du support sur lequel ils sont reproduits. En d'autres termes, l'appelant soutient que l'impression générale est conditionnée à la fois par la facture visuelle d'une publicité et par la signification des mots utilisés.

[54] Les intimées répondent que le critère de l'impression générale ne doit pas être assimilé à celui de « l'impression instantanée ». Elles plaident que l'impression générale ne correspond pas à l'impression instantanée laissée par la facture visuelle d'une publicité et que les tribunaux ne peuvent faire l'économie d'une lecture attentive des publicités écrites. Les intimées soutiennent donc que l'art. 218 *L.p.c.* prescrit une méthode d'analyse qui place l'accent sur le texte de la publicité plutôt que sur sa facture visuelle.

[55] À notre avis, les intimées ont tort de négliger l'importance de la facture visuelle d'une publicité. Il faut retenir d'abord que le législateur a adopté le critère de l'impression générale pour tenir compte des techniques et méthodes utilisées dans la publicité commerciale afin d'influencer de manière importante le comportement du consommateur. Cette réalité commande que l'on attache une importance considérable non seulement au texte, mais à tout son contexte, notamment à la manière dont il est présenté au consommateur.

[56] Les intimées ont cependant raison d'affirmer que l'impression générale à laquelle réfère l'art. 218 *L.p.c.* n'est pas celle qui se dégage d'une lecture précipitée ou partielle de la publicité. L'analyse requise par cette disposition doit prendre en considération l'ensemble de la publicité plutôt que de simples bribes de son contenu. Toutefois, la méthode d'analyse prescrite par l'art. 218 *L.p.c.* s'oppose tout autant à un décorticage minutieux du texte d'une publicité aux fins de déterminer si l'impression générale qu'elle donne est fausse ou trompeuse. En effet, les tribunaux ne doivent pas aborder une publicité écrite comme un contrat commercial, c'est-à-dire la lire

going over every detail to make sure they understand all its subtleties. Reading over the entire text once should be sufficient to assess the general impression conveyed by a written advertisement, and it is that general impression that will then make it possible to determine whether a representation made by a merchant constitutes a prohibited practice.

[57] In sum, it is our opinion that the test under s. 218 *C.P.A.* is that of the first impression. In the case of false or misleading advertising, the general impression is the one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used. This test is similar to the one that must be applied under the *Trade-marks Act*, R.S.C. 1985, c. T-13, to determine whether a trade-mark causes confusion (*Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824, at para. 20; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 41).

[58] We cannot therefore accept the distinction proposed by the respondents between "instant impression" and "general impression". In actual fact, the respondents are asking this Court to apply a standard much more exacting than that of the first impression. This conclusion flows necessarily from their position on the application of the general impression test to the facts of the case at bar. To explain why their advertising strategy does not contravene Title II of the *C.P.A.*, they state that the "documents . . . were in the possession of [the appellant] for a lengthy period of time and [that he] was able to read them carefully on several occasions before sending in the Official Entry Certificate" (R.F., at para. 46 (emphasis added)).

[59] We will now consider the approach taken by the Court of Appeal in this case in light of the principles discussed above regarding the analytical approach required by s. 218 *C.P.A.* With respect, the Court of Appeal seems, in our view, to have favoured an approach that does away with the need to ascertain the general impression conveyed by the

plusieurs fois, en s'attachant à tous ses détails pour en comprendre toutes les subtilités. Une seule lecture d'ensemble devrait suffire pour apprécier l'impression générale donnée par une publicité écrite. Cette impression générale permettra alors de déterminer si une représentation faite par un commerçant constitue une pratique interdite.

[57] En somme, à notre avis, l'art. 218 *L.p.c.* pose le critère de la première impression. En ce qui concerne la publicité fausse ou trompeuse, l'impression générale est celle qui se dégage après un premier contact complet avec la publicité, et ce, à l'égard tant de sa facture visuelle que de la signification des mots employés. Cette méthode d'analyse ressemble d'ailleurs à celle qui doit être appliquée en vertu de la *Loi sur les marques de commerce*, L.R.C. 1985, ch. T-13, afin de déterminer si une marque crée de la confusion (*Veuve Clicquot Ponsardin c. Boutiques Cliquot Ltée*, 2006 CSC 23, [2006] 1 R.C.S. 824, par. 20; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387, par. 41).

[58] Ainsi, nous ne saurions accepter la distinction proposée par les intimées entre « impression instantanée » et « impression générale ». En réalité, les intimées invitent notre Cour à appliquer une norme beaucoup plus exigeante que celle de la première impression. Leur position relativement à l'application du critère de l'impression générale aux faits du présent dossier impose une telle conclusion. En effet, afin d'expliquer les raisons pour lesquelles leur stratégie publicitaire ne contrevient pas aux prescriptions du titre II de la *L.p.c.*, elles affirment que les [TRADUCTION] « documents [. . .] ont été en la possession de [l'appelant] durant une longue période, ce qui a permis à ce dernier de les lire attentivement à plusieurs occasions avant d'envoyer le certificat officiel de participation » (m.i., par. 46 (nous soulignons)).

[59] Nous examinerons maintenant l'approche adoptée par la Cour d'appel en l'espèce, en appliquant les principes dégagés plus haut au sujet de la méthode d'analyse prescrite par l'art. 218 *L.p.c.* Avec égards, nous sommes d'avis que la Cour d'appel paraît avoir privilégié une approche qui substitue à la recherche de l'impression générale laissée par

Document and replaces it with an opinion resulting from an analysis. In substance, this approach involved dissecting the Document to isolate and connect parts of sentences to reveal the "real message" it conveyed (paras. 45-48). This led the Court of Appeal to attach excessive importance to the parts of the Document containing phrases such as "[i]f you have and return the Grand Prize winning entry" and "if you hold the Grand Prize winning number" (A.R., vol. II, at p. 59). In so doing, it departed from the general impression test provided for in s. 218 *C.P.A.*

[60] This dissection of the text by the Court of Appeal resembles the classical civil law approach to contract analysis and strays from the determination of the general impression the entire advertisement conveys to a consumer. Furthermore, the purpose of Title II of the *C.P.A.* is to make merchants responsible for the content of their advertisements on the basis of the general impression the advertisements convey. By adopting so exacting a standard in s. 218 *C.P.A.*, the legislature intended to ensure that consumers could view commercial advertising with confidence rather than suspicion. Thus, the objective of the current legislation is to enable a consumer to assume that the general impression conveyed by an advertisement is accurate and not the opposite. In sum, the analytical approach chosen by the Court of Appeal for establishing the general impression conveyed by the respondents' advertisement was inconsistent with the general impression test adopted by the legislature.

(4) Consumer in Issue in Title II of the *C.P.A.*

[61] The above discussion of the general impression concept leaves an important question unanswered: From what perspective should the courts assess the general impression conveyed by a commercial representation? Who is the consumer for the purposes of s. 218 *C.P.A.*? Answering this question is the second step of the analytical approach required by s. 218 *C.P.A.*

le Document, celle d'une « opinion après analyse ». En substance, cette approche a consisté à décortiquer le Document pour isoler et mettre en relation des extraits de phrases qui révéleraient le « vrai message » véhiculé (par. 45-48). Cette méthode a conduit la Cour d'appel à accorder une importance démesurée aux extraits du Document contenant des expressions telles que [TRADUCTION] « [s]i vous détenez le coupon de participation gagnant du Gros Lot et le retournez à temps » et « si vous détenez le numéro gagnant du Gros Lot » (d.a., vol. II, p. 59). En procédant ainsi, la Cour d'appel n'a pas respecté le critère de l'impression générale énoncé à l'art. 218 *L.p.c.*

[60] Cette dissection du texte par la Cour d'appel se rapproche de la méthode classique d'analyse des contrats de droit civil et s'éloigne d'une recherche de l'impression générale d'ensemble que la publicité donne au consommateur. De plus, les dispositions du titre II de la *L.p.c.* veulent rendre les commerçants responsables du contenu de leurs publicités sur la base de l'impression générale qu'elles donnent. En adoptant une norme aussi exigeante à l'art. 218 *L.p.c.*, le législateur a souhaité que le consommateur examine la publicité commerciale avec confiance plutôt qu'avec méfiance. La loi actuelle souhaite ainsi que le consommateur puisse présumer que l'impression générale donnée par une publicité correspond à la réalité, et non le contraire. En somme, la méthode d'analyse choisie par la Cour d'appel pour déterminer l'impression générale donnée par la publicité des intimées ne respectait pas le critère de l'impression générale que le législateur a retenu.

(4) Le consommateur visé par le titre II de la *L.p.c.*

[61] La discussion de la notion d'impression générale qui précède laisse néanmoins en suspens une question importante : selon quelle perspective les tribunaux doivent-ils apprécier l'impression générale donnée par une représentation commerciale? Qui est le consommateur visé par l'art. 218 *L.p.c.*? La réponse à cette question constitue le deuxième volet de la méthode d'analyse prescrite par l'art. 218 *L.p.c.*

[62] In recent decisions, judges have commonly used the expression "average consumer" to describe the consumer in issue in Title II of the *C.P.A.* Of course, the average consumer does not exist, but is the product of a legal fiction personified by an imaginary consumer to whom a level of sophistication that reflects the purpose of the *C.P.A.* is attributed. In the case at bar, the crux of the issue is whether the level of sophistication of the average consumer conceptualized by the Court of Appeal is consistent with the objectives of the *C.P.A.*

[63] The appellant argues that the Court of Appeal erred in defining the average consumer as one with [TRANSLATION] "an average level of intelligence, scepticism and curiosity" (para. 50). He submits that the Court of Appeal departed from the prevailing line of authority in Quebec, according to which the average consumer must be considered [TRANSLATION] "credulous and inexperienced". He adds that, by stressing the average consumer's intelligence, scepticism and curiosity, the Court of Appeal proposed a new standard that could deprive many consumers of the protection of the *C.P.A.* (A.F., at para. 40).

[64] The respondents argue that the Court of Appeal did not change the definition of the average consumer. In their view, Chamberland J.A. simply pointed out that the average consumer, although credulous, is not completely unintelligent. He did not change the requirements of s. 218 *C.P.A.* (R.F., at paras. 28 and 32).

[65] The *C.P.A.* is one of a number of statutes enacted to protect Canadian consumers. The courts that have applied these statutes have often used the average consumer test. In conformity with the objective of protection that underlies such legislation, the courts have assumed that the average consumer is not very sophisticated.

[66] This Court's decisions relating to trademarks provide a good example of this interpretive approach. In *Mattel, Inc. v. 3894207 Canada*

[62] La jurisprudence récente renvoie couramment au concept du « consommateur moyen » afin de désigner le consommateur visé par les dispositions du titre II de la *L.p.c.* Certes, ce consommateur moyen n'existe pas : il demeure le produit d'une fiction juridique incarnée par un consommateur mythique auquel on impute un degré de discernement qui reflète le but de la *L.p.c.* En l'espèce, le nœud de la question consiste à déterminer si le degré de discernement du consommateur moyen conceptualisé par la Cour d'appel respecte les objectifs poursuivis par la *L.p.c.*

[63] L'appelant plaide que la Cour d'appel s'est trompée en définissant le consommateur moyen comme « moyennement intelligent, moyennement sceptique et moyennement curieux » (par. 50). Il soutient que la Cour d'appel s'est écartée de la jurisprudence prédominante au Québec selon laquelle le consommateur moyen doit être considéré comme une personne « crédule et inexpérimentée ». Il affirme qu'en insistant sur le niveau d'intelligence, de scepticisme et de curiosité du consommateur moyen, la Cour d'appel a proposé une norme nouvelle qui pourrait priver une grande partie des consommateurs de la protection de la *L.p.c.* (m.a., par. 40).

[64] Pour leur part, les intimées plaident que la Cour d'appel n'a pas modifié la définition du consommateur moyen. À leur avis, le juge Chamberland a simplement rappelé que le consommateur moyen, même crédule, n'est pas complètement dépourvu d'intelligence, sans modifier les exigences de l'art. 218 *L.p.c.* (m.i., par. 28 et 32).

[65] La *L.p.c.* appartient à l'ensemble de lois destinées à protéger les consommateurs canadiens. La jurisprudence qui découle de l'application de ces dispositions utilise souvent le critère du consommateur moyen. Cette jurisprudence attribue un faible degré de discernement à ce consommateur, afin de respecter l'objectif de protection sous-jacent à ces mesures législatives.

[66] La jurisprudence de notre Cour en matière de marques de commerce fournit un bon exemple de cette approche interprétative. Dans l'arrêt *Mattel,*

Inc., 2006 SCC 22, [2006] 1 S.C.R. 772, the Court was asked to clarify the standard to be used by the courts to determine whether a trade-mark causes confusion with a registered trade-mark. Binnie J., writing for the Court, concluded that the average consumers protected by the *Trade-marks Act* are "ordinary hurried purchasers" (para. 56). He explained that "[t]he standard is not that of people 'who never notice anything' but of persons who take no more than 'ordinary care to observe that which is staring them in the face'" (para. 58).

Inc. c. 3894207 Canada Inc., 2006 CSC 22, [2006] 1 R.C.S. 772, la Cour était appelée à préciser la norme au moyen de laquelle les tribunaux doivent décider si une marque de commerce porte à confusion avec une marque enregistrée. Au nom de la Cour, le juge Binnie a conclu que le consommateur moyen que veut protéger la *Loi sur les marques de commerce* est « l'acheteur ordinaire pressé » (par. 56). Il a précisé que « [l]a norme applicable [n'était] pas celle des personnes [TRADUCTION] "qui ne remarquent jamais rien", mais celle des personnes qui ne prêtent rien de plus qu'une [TRADUCTION] "attention ordinaire à ce qui leur saute aux yeux" » (par. 58).

[67] The general impression test provided for in s. 218 *C.P.A.* must be applied from a perspective similar to that of "ordinary hurried purchasers", that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer.

[67] Le critère de l'impression générale prévu à l'art. 218 *L.p.c.* doit être appliqué dans une perspective similaire à celle de « l'acheteur ordinaire pressé », c'est-à-dire celle d'un consommateur qui ne prête rien de plus qu'une attention ordinaire à ce qui lui saute aux yeux lors d'un premier contact avec une publicité. Les tribunaux ne doivent pas conduire l'analyse dans la perspective du consommateur prudent et diligent.

[68] Obviously, the adjectives used to describe the average consumer may vary from one statute to another. Such variations reflect the diversity of economic realities to which different statutes apply and of their objectives. The most important thing is not the adjectives used, but the level of sophistication expected of the consumer.

[68] Les adjectifs utilisés pour qualifier le consommateur moyen sont évidemment susceptibles de varier d'une loi à l'autre. Ces variations reflètent la diversité des réalités économiques visées par chaque loi et des objectifs qui leur sont propres. L'essentiel ne réside pas dans ces épithètes, mais plutôt dans le choix du degré de discernement attendu du consommateur.

[69] In applying the general impression test provided for in s. 218 *C.P.A.*, the Quebec courts have traditionally used the words "credulous" and "inexperienced" to describe the consumer in issue in the Act, relying on *R. v. Imperial Tobacco Products Ltd.*, [1971] 5 W.W.R. 409 (Alta. S.C., A.D.), to incorporate the "credulous and inexperienced person" concept into Title II of the *C.P.A.* (Masse, at p. 828). After the courts had referred to this concept occasionally in the 1980s and 1990s, including in *P.G. du Québec v. Louis Bédard Inc.*, 1986 CarswellQue 981 (Ct. Sess. P.), the Quebec Court of Appeal rendered a landmark decision on this question in *Turgeon v. Germain Pelletier ltée*, [2001]

[69] Dans l'application du critère de l'impression générale prescrit par l'art. 218 *L.p.c.*, la jurisprudence québécoise a traditionnellement utilisé les qualificatifs « crédule » et « inexpérimenté » afin de décrire le consommateur visé par la loi. Les tribunaux québécois se sont inspirés alors de l'arrêt *R. c. Imperial Tobacco Products Ltd.*, [1971] 5 W.W.R. 409 (C.S. Alb., Div. app.), pour intégrer le concept de la « personne crédule et inexpérimentée » au titre II de la *L.p.c.* (Masse, p. 828). Après des mentions occasionnelles de ce concept dans la jurisprudence des années 1980 et 1990, notamment dans l'affaire *P.G. du Québec c. Louis Bédard Inc.*, 1986 CarswellQue 981 (C.S.P.), la Cour d'appel du

R.J.Q. 291, in which it confirmed that the "credulous and inexperienced" consumer test is applicable in Quebec consumer law. Fish J.A., as he then was, wrote the following on this point:

[TRANSLATION] As my colleague Gendreau J.A. pointed out in *Nichols v. Toyota Drummondville (1982) inc.*, the *Consumer Protection Act* is a statute of public order whose purpose is to restore the contractual [balance] between merchants and their customers. The credulous and inexperienced person test must be used to assess the misleading nature of the advertising and business practices to which the *Consumer Protection Act* applies. [Emphasis added; para. 36.]

[70] Since then, trial courts in Quebec have followed *Turgeon*, including in several class actions based on the *C.P.A.* (see *Riendeau v. Brault & Martineau inc.*, 2007 QCCS 4603, [2007] R.J.Q. 2620, at para. 149, aff'd by 2010 QCCA 366, [2010] R.J.Q. 507; *Adams v. Amex Bank of Canada*, 2009 QCCS 2695, [2009] R.J.Q. 1746, at para. 126; *Marcotte v. Banque de Montréal*, 2009 QCCS 2764 (CanLII), at para. 357; *Marcotte v. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743 (CanLII), at para. 257). In sum, it is clear that, since *Turgeon*, the "general impression" referred to in s. 218 *C.P.A.* is the impression of a commercial representation on a credulous and inexperienced consumer.

[71] Thus, in Quebec consumer law, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well-informed person. To meet the objectives of the *C.P.A.*, the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.

[72] The words "credulous and inexperienced" therefore describe the average consumer for the purposes of the *C.P.A.* This description of the average consumer is consistent with the legislature's

Québec a prononcé un jugement de principe sur cette question dans l'arrêt *Turgeon c. Germain Pelletier ltée*, [2001] R.J.Q. 291, et a confirmé à cette occasion l'applicabilité du critère du consommateur « crédule et inexpérimenté » en droit québécois de la consommation. Le juge Fish, alors de cette cour, a écrit ce qui suit à ce propos :

Comme l'a souligné mon collègue le juge Gendreau dans l'arrêt *Nichols c. Toyota Drummondville (1982) inc.*, la *Loi sur la protection du consommateur* est une loi d'ordre public qui vise à rétablir [l'équilibre] contractuel entre le commerçant et son client. Et c'est en vertu du critère de la personne crédule et inexpérimentée qu'il faut évaluer le caractère trompeur de la publicité et des pratiques commerciales visées par la *Loi sur la protection du consommateur.* [Nous soulignons; par. 36.]

[70] Depuis lors, les tribunaux de première instance au Québec ont suivi cet arrêt, notamment à l'occasion de plusieurs recours collectifs fondés sur la *L.p.c.* (voir *Riendeau c. Brault & Martineau inc.*, 2007 QCCS 4603, [2007] R.J.Q. 2620, par. 149, conf. par 2010 QCCA 366, [2010] R.J.Q. 507; *Adams c. Amex Bank of Canada*, 2009 QCCS 2695, [2009] R.J.Q. 1746, par. 126; *Marcotte c. Banque de Montréal*, 2009 QCCS 2764 (CanLII), par. 357; *Marcotte c. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743 (CanLII), par. 257). En somme, il est clair que depuis l'arrêt *Turgeon*, l'« impression générale » à laquelle renvoie l'art. 218 *L.p.c.* est assimilée à celle que donne une représentation commerciale chez le consommateur crédule et inexpérimenté.

[71] Ainsi, le concept du « consommateur moyen » n'évoque pas, en droit québécois de la consommation, la notion de personne raisonnablement prudente et diligente. Il renvoie encore moins à la notion de personne avertie. Afin de réaliser les objectifs de la *L.p.c.*, les tribunaux considèrent que le consommateur moyen n'est pas particulièrement aguerri pour déceler les faussetés ou les subtilités dans une représentation commerciale.

[72] Les qualificatifs « crédule et inexpérimenté » expriment donc la conception du consommateur moyen qu'adopte la *L.p.c.* Cette description du consommateur moyen respecte la volonté

intention to protect vulnerable persons from the dangers of certain advertising techniques. The word "credulous" reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisements. However, it does not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible.

[73] We must therefore find that the Court of Appeal changed the standard of the average consumer for the purposes of Title II of the *C.P.A.* and that its decision was incompatible with the *C.P.A.*'s objective of protecting consumers. In our opinion, defining the average consumer as having [TRANSLATION] "an average level of intelligence, scepticism and curiosity" is inconsistent with the letter and the spirit of s. 218 *C.P.A.* Such a definition raises a number of problems.

[74] First, the words "average level of intelligence" suggest that the consumer the legislature wanted to protect in Title II of the *C.P.A.* is a consumer who has the same level of sophistication as the average person. As we mentioned above, consumer law does not protect consumers only if they have proven to be prudent and well informed. The *C.P.A.*'s general objective of protecting consumers means that the appropriate test is not that of the prudent and diligent consumer.

[75] Moreover, from a practical standpoint, this part of the definition proposed by Chamberland J.A. is not really compatible with the abstract analysis required by s. 218 *C.P.A.*, since the use of a standard like that of the "consumer with an average level of intelligence" could lead the courts to adopt a test based on determining the level of sophistication of the consumer in question in a given case. Such a test would make it possible to exonerate a merchant who is lucky enough to be sued by a consumer of above-average intelligence. The court's role would then be to determine whether the consumer exercising the recourse was in fact misled rather than

législative de protéger les personnes vulnérables contre les dangers de certaines méthodes publicitaires. Le terme « crédule » reconnaît que le consommateur moyen est disposé à faire confiance à un commerçant sur la base de l'impression générale que la publicité qu'il reçoit lui donne. Cependant, il ne suggère pas que le consommateur moyen est incapable de comprendre le sens littéral des termes employés dans une publicité, pourvu que la facture générale de celle-ci ne vienne pas brouiller l'intelligibilité des termes employés.

[73] Il nous faut donc constater que la Cour d'appel a modifié la norme du consommateur moyen visé par le titre II de la *L.p.c.* et n'a pas respecté l'objectif de protection de la *L.p.c.* À notre avis, le fait de définir le consommateur moyen comme « moyennement intelligent, moyennement sceptique et moyennement curieux » se concilie mal avec le libellé et l'esprit de l'art. 218 *L.p.c.* En effet, une telle définition soulève plusieurs problèmes.

[74] D'abord, l'expression « moyennement intelligent » suggère que le consommateur que le législateur a souhaité protéger au titre II de la *L.p.c.* est celui dont le degré de discernement correspond à celui de la moyenne des gens. Comme nous l'avons souligné précédemment, le droit de la consommation ne protège pas les consommateurs dans la seule mesure où ils se sont montrés prudents et avertis. Pour respecter l'objectif général de protection de la *L.p.c.*, il faut éviter d'utiliser un critère correspondant à celui du consommateur prudent et diligent.

[75] De plus, dans une perspective pratique, ce volet de la définition proposée par le juge Chamberland s'harmonise mal avec l'analyse *in abstracto* requise par l'art. 218 *L.p.c.* L'utilisation d'une norme comme le « consommateur moyennement intelligent » peut inciter les tribunaux à adopter une méthode d'analyse basée sur la détermination du degré de discernement du consommateur en cause. Une telle approche faciliterait l'exonération d'un commerçant qui aurait eu le bonheur de se faire poursuivre par un consommateur plus intelligent que la moyenne. Les tribunaux seraient alors invités à déterminer si le consommateur qui a

whether the advertisement in question constituted a false or misleading representation. This would decrease the level of protection provided to consumers by the *C.P.A.*

[76] Next, the words "average level of . . . scepticism" replace the general impression test with a test based on the opinion formed after a more thorough analysis. It invites the courts to assume that the average consumer must take concrete action to find the "real message" hidden behind an advertisement that seems advantageous. This analytical approach can only weaken the general impression test, since a sceptical person will be inclined not to believe an advertisement solely on the basis of the general impression it conveys. A sceptical person will doubt, ask questions and perhaps make his or her own inquiries. If, at the end of that process, the person concludes that the content of the advertisement is true to reality, his or her assessment will be based not on the general impression conveyed by the advertisement but on the concrete action he or she has taken.

[77] The above comments also apply to the "average level of . . . curiosity" the average consumer must be presumed to have, according to the Court of Appeal. With respect, the use of this expression rests on the same incorrect premise as does that with respect to the scepticism of the average consumer. A consumer with "an average level of . . . curiosity" will not be so stupid or naïve as to rely on the first impression conveyed by a commercial representation but will be curious enough to consider that impression more closely. He or she will try to determine whether the general impression conveyed by an advertisement is actually true to reality. On this point, we reiterate that the purpose of Title II of the *C.P.A.* is to make it possible for consumers to trust the general impression given by merchants in their advertisements. If this general impression is not true to reality, the advertisement in question constitutes a false or misleading representation and the merchant has engaged in a prohibited practice for the purposes of the

entrepris le recours a été trompé, plutôt qu'à déterminer si la publicité en cause constituait une représentation fausse ou trompeuse. On réduirait ainsi le niveau de protection offert au consommateur par la *L.p.c.*

[76] Ensuite, le qualificatif « moyennement sceptique » substitue au critère de l'impression générale celui de l'opinion atteinte après une analyse plus poussée. Il invite les tribunaux à présumer que le consommateur moyen doit effectuer des démarches concrètes afin de découvrir le « vrai message » qui se cache derrière une publicité aux apparences avantageuses. Cette méthode d'analyse ne peut s'appliquer qu'au détriment du critère de l'impression générale. En effet, une personne sceptique aura tendance à refuser de se fier à un message publicitaire uniquement sur la base de l'impression générale qu'il dégage. La personne sceptique doutera, posera des questions et conduira peut-être ses propres recherches. Si, au terme de cet exercice, elle conclut que le contenu d'un message publicitaire est conforme à la réalité, son appréciation ne dépendra pas de l'impression générale qu'il a donnée. Elle proviendra plutôt des démarches concrètes qu'elle aura faites.

[77] Les commentaires qui précèdent s'appliquent aussi à la « curiosité moyenne » qui, selon la Cour d'appel, doit être présumée chez le consommateur moyen. Avec égards, l'utilisation de cette notion procède de la même prémisse erronée que dans le cas du scepticisme du consommateur moyen. Un consommateur « moyennement curieux » ne sera pas stupide et naïf au point de se fier aux premières impressions données par une représentation commerciale. Au contraire, il se montrera suffisamment curieux pour approfondir sa première perception. Son objectif demeurera de vérifier si l'impression générale donnée par une publicité correspond effectivement à la réalité. Sur ce point, nous rappelons que le titre II de la *L.p.c.* vise à permettre au consommateur de faire confiance aux commerçants sur la base de l'impression générale laissée par leurs publicités. Dans la mesure où cette impression générale ne correspond pas à la réalité, la publicité constitue une représentation fausse ou trompeuse et la *L.p.c.*

C.P.A., regardless of whether the "real message" of the advertisement could be understood by analysing it in depth. In fact, the Court of Appeal's interpretation of the average consumer concept is closer to that of the diligent person, which is neither mentioned in the Act nor in keeping with its spirit.

[78] For all these reasons, we cannot endorse the definition of the average consumer proposed by the Court of Appeal. In our opinion, the concept of the credulous and inexperienced consumer applied by the Quebec courts in the line of authority that prevailed before the judgment of the Court of Appeal in the instant case is more consistent with the Quebec legislature's objective of protecting consumers from false or misleading advertising. A court asked to assess the veracity of a commercial representation must therefore engage, under s. 218 *C.P.A.*, in a two-step analysis that involves — having regard, provided that the representation lends itself to such an analysis, to the literal meaning of the words used by the merchant — (1) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (2) determining whether that general impression is true to reality. If the answer at the second step is no, the merchant has engaged in a prohibited practice.

C. *Consistency of the Court of Appeal's Judgment with the C.P.A.*

[79] What must now be determined is whether, in light of these principles, the Court of Appeal was right to reverse the trial judge's finding that the Document contained representations that contravened certain provisions of Title II of the *C.P.A.* Cohen J. identified three violations of that Act. We will consider the alleged violations of ss. 219 and 228 *C.P.A.* together, since they concern different aspects of a single reality that cannot easily be separated from one another. We will discuss the alleged violation of s. 238(*c*) *C.P.A.* separately.

considère que le commerçant a commis une pratique interdite, et ce, sans égard au fait qu'une analyse approfondie de la publicité pourrait permettre de comprendre le « vrai message » qu'elle véhicule. En réalité, la conceptualisation du consommateur moyen retenue par la Cour d'appel s'apparente davantage à la notion de personne diligente qui n'est pas mentionnée dans la loi et qui ne respecte pas l'esprit de celle-ci.

[78] Pour l'ensemble de ces motifs, nous devons écarter la définition du consommateur moyen proposée par la Cour d'appel. Nous sommes d'avis que la notion du consommateur crédule et inexpérimenté, comme l'a employée la jurisprudence prédominante au Québec avant le jugement dont appel, respecte mieux les objectifs de protection contre la publicité fausse ou trompeuse que poursuit le législateur québécois. Ainsi, les tribunaux appelés à évaluer la véracité d'une représentation commerciale devraient procéder, selon l'art. 218 *L.p.c.*, à une analyse en deux étapes, en tenant compte, si la nature de la représentation se prête à une telle analyse, du sens littéral des mots employés par le commerçant : (1) décrire d'abord l'impression générale que la représentation est susceptible de donner chez le consommateur crédule et inexpérimenté; (2) déterminer ensuite si cette impression générale est conforme à la réalité. Dans la mesure où la réponse à cette dernière question est négative, le commerçant aura commis une pratique interdite.

C. *La conformité du jugement de la Cour d'appel à la L.p.c.*

[79] Il s'agit maintenant de déterminer si, selon ces principes, la Cour d'appel a eu raison d'infirmer la conclusion de la juge de première instance que le Document contenait des représentations qui contreviennent à certaines dispositions du titre II de la *L.p.c.* La juge Cohen a constaté trois violations de la loi. Nous analyserons ensemble les contraventions alléguées aux art. 219 et 228 *L.p.c.*, qui visent en l'espèce des aspects de la réalité qui peuvent difficilement être dissociés, et nous examinerons séparément celle relative à l'al. 238*c*) *L.p.c.*

(1) Alleged Violation of Sections 219 and 228 *C.P.A.*

[80] Sections 219 and 228 *C.P.A.* read as follows:

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[81] In the instant case, the alleged violation of s. 219 *C.P.A.* lay in the fact that the Document falsely stated that the appellant was the grand prize winner, while the alleged violation of s. 228 *C.P.A.* related specifically to the respondents' failure to reveal in the Document that the appellant might not be the grand prize winner. These two allegations therefore raise the question whether a credulous and inexperienced consumer, after first reading the Document, would have been under the general impression that the appellant had won the grand prize or would instead have understood that the respondents were merely offering him an opportunity to participate in a contest with a minute chance of winning a cash prize.

[82] The "real message" the respondents wanted to convey by sending the Document must be explained here. The sweepstakes in issue was a contest in which only one person would win the grand prize. To receive the prize, the person had to have the winning entry, return the reply coupon by the deadline and correctly answer a skill-testing question. Only one person had the winning entry, which had been selected before the mailings were sent. However, at the top of each recipient's document, the word "claim" appeared, followed by a combination of numbers and letters. In the event that the pre-selected winner failed to return the reply coupon, a draw would be held for the grand prize among all those who had returned it.

(1) La violation alléguée des art. 219 et 228 *L.p.c.*

[80] Les articles 219 et 228 *L.p.c.* prévoient ce qui suit :

219. Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.

228. Aucun commerçant, fabricant ou publicitaire ne peut, dans une représentation qu'il fait à un consommateur, passer sous silence un fait important.

[81] En l'espèce, la contravention alléguée à l'art. 219 *L.p.c.* tiendrait au fait que le Document présente faussement l'appelant comme le gagnant du gros lot, tandis que la violation de l'art. 228 *L.p.c.* découlerait spécifiquement de l'omission des intimées de dévoiler dans le Document qu'il se pouvait que l'appelant ne soit pas le gagnant du gros lot. Ces deux allégations soulèvent donc la question de savoir si le consommateur crédule et inexpérimenté, après une première lecture du Document, aurait eu l'impression générale que l'appelant avait remporté le gros lot ou s'il aurait plutôt compris que les intimées lui offraient seulement la possibilité de participer à un concours, qui lui donnerait une chance infime de gagner un prix en argent.

[82] À ce stade, il convient de préciser le « vrai message » que les intimées ont voulu transmettre par l'envoi du Document. Le « *Sweepstakes* » en cause est un concours à l'issue duquel une seule personne gagnera le gros lot. Pour recevoir son prix, cette personne doit se faire attribuer le numéro gagnant (« *winning entry* »), retourner le coupon-réponse dans le délai fixé et répondre correctement à une question de connaissances générales (« *skill-testing question* »). Une seule personne détient le numéro gagnant qui a été choisi avant l'expédition des envois postaux. Cependant, chaque destinataire trouve, dans le haut de son document, le mot [TRADUCTION] « réclamation » (« *claim* ») suivie d'une combinaison de chiffres et de lettres. Le gros lot n'est tiré parmi toutes les personnes ayant retourné le coupon-réponse que si le gagnant présélectionné ne le retourne pas.

[83] According to the respondents, the average consumer would be capable of understanding the following after reading once through the documentation received by the appellant: (1) the appellant had received number GV1T7IU62; (2) that number was not necessarily the winning number; (3) if his number was not the pre-selected number, his chances of winning were extremely small; (4) for him to have any chance of winning, the holder of the winning entry would have to fail to return his or her reply coupon, in which case a random draw would be held among all those who had returned their own reply coupons by the deadline; and (5) in such a case, the appellant's odds of winning would be 1:120 million. The Court of Appeal accepted the respondents' argument on this point (para. 49).

[84] With respect, we find it hard to understand how a credulous and inexperienced consumer could deduce all this after reading the Document for the first time. The first sentence that leaps off the page is the following one, written in bold uppercase letters:

OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF $833,337.00!

[85] The general impression conveyed by the Document is influenced by this sentence placed at the top of the Document. The average consumer would of course, assuming that he or she understood English, be capable of reading the words preceding that sentence: "If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we will officially announce that". However, it is unreasonable to assume that the average consumer would be particularly familiar with the special language or rules of such a sweepstakes and would clearly understand all the essential elements of the offer made to the appellant in this case. The Document's strange collection of affirmations and restrictions is not clear or intelligible enough to dispel the general impression conveyed by the most prominent sentences. On the contrary, it is highly likely that

[83] Selon les intimées, le consommateur moyen, après avoir lu une seule fois la documentation reçue par l'appelant, serait en mesure de comprendre ce qui suit : (1) l'appelant a reçu le numéro GV1T7IU62; (2) ce numéro n'est pas forcément le numéro gagnant; (3) si son numéro n'est pas le numéro présélectionné, alors ses chances de gagner sont infiniment minces; (4) pour qu'il détienne une chance de gagner, il faudrait que le détenteur du numéro gagnant ne retourne pas son coupon-réponse, auquel cas se tiendrait un tirage aléatoire entre toutes les personnes ayant retourné leur propre coupon-réponse dans le délai fixé; et (5) dans ce scénario, les chances de gagner de l'appelant seraient de 1/120 millions. La Cour d'appel a accepté sur ce point l'argument des intimées (par. 49).

[84] Avec égards pour l'opinion contraire, nous comprenons difficilement comment le consommateur crédule et inexpérimenté pourrait déduire tous ces éléments au terme d'une première lecture du Document. La première phrase qui saute aux yeux du lecteur est la suivante, écrite en majuscules et en caractères gras :

[TRADUCTION] **NOUS AVONS MAINTENANT LES RÉSULTATS FINALS DU CONCOURS : M. JEAN MARC RICHARD A GAGNÉ LA SOMME DE 833 337 $ EN ARGENT COMPTANT!**

[85] L'impression générale donnée par le Document est conditionnée par cette phrase placée dans le haut de celui-ci. Bien sûr, à supposer qu'il comprenne l'anglais, le consommateur moyen peut lire les mots qui précèdent cette phrase, soit « *If you have and return the Grand Prize winning entry in time and correctly answer a skill-testing question, we will officially announce that* » ([TRADUCTION] « Si vous détenez le coupon de participation gagnant du Gros Lot et le retournez à temps, et si vous répondez correctement à une question de connaissances générales, nous annoncerons officiellement que »). Toutefois, il est déraisonnable de présumer que le consommateur moyen connaît le langage particulier ou les règles du jeu d'un tel concours sur le bout de ses doigts et qu'il saisirait bien tous les éléments essentiels de la proposition faite à l'appelant en

the average consumer would conclude that the appellant held the winning entry and had only to return the reply coupon to initiate the claim process. Indeed, the Document did not state anywhere that a winner had been pre-selected and that the appellant had received only a participation number. This information instead appeared on the return envelope that accompanied the Document, where the terms and conditions of the random draw were defined very vaguely in small print.

[86] Despite all the conditions laid down in the Document, on which the respondents placed great emphasis, a point was made in the Document of referring to the appellant as the sweepstakes winner. In the column on the left, he was listed with other winners — real or fictitious — and the entry contained the notation "PRIZE STATUS: AUTHORIZED FOR PAYMENT". There were repeated indications that a cheque was about to be mailed to the appellant. He was also urged to put aside all his doubts and hurry to return the reply coupon, for otherwise he might lose everything! The reply coupon received by the appellant even referred to the number assigned to him as a "Prize Claim Number", not as a contest participation number. It would be possible to continue this list of tricks used in writing and laying out the text for a long time.

[87] In our opinion, the trial judge did not err in finding that the Document was misleading. The Document conveyed the general impression that the appellant had won the grand prize. Even if it did not necessarily contain any statements that were actually false, the fact remains that it was riddled with misleading representations within the meaning of s. 219 *C.P.A.* Furthermore, the contest rules were not all apparent to someone reading the Document for the first time. These are important facts that the

l'espèce. Le curieux assemblage d'affirmations et de restrictions que contient le Document n'est pas suffisamment clair et intelligible pour dissiper l'impression générale donnée par ses phrases prédominantes. Au contraire, il est hautement probable que le consommateur moyen conclurait que l'appelant détient le numéro gagnant et qu'il lui suffit de retourner le coupon-réponse pour que la procédure de réclamation puisse s'enclencher. D'ailleurs, le Document n'indique nulle part qu'un gagnant a été présélectionné et que l'appelant n'a reçu qu'un numéro de participation. Cette information se retrouve plutôt sur l'enveloppe de retour accompagnant le Document, qui définit très vaguement, en petits caractères, les modalités du tirage aléatoire.

[86] Malgré toutes les conditions que pose le Document et dont les intimées font grand état, le Document prend soin de présenter l'appelant comme le gagnant du concours. Dans la colonne de gauche, on mentionne son nom aux côtés de ceux d'autres gagnants — réels ou fictifs — avec la mention [TRADUCTION] « CONFIRMATION DU PRIX : PAIEMENT AUTORISÉ ». Le Document martèle l'idée qu'un chèque est sur le point d'être posté à l'appelant. Plus encore, on l'exhorte à mettre tous ses doutes de côté et à se dépêcher à retourner le coupon-réponse, à défaut de quoi il risquera de tout perdre! Le coupon-réponse reçu par l'appelant renvoie même au numéro qui lui a été attribué comme à un [TRADUCTION] « numéro de réclamation du prix », c'est-à-dire un numéro lui permettant de réclamer son prix, et non pas un numéro de participation à un concours. La liste de ces artifices de rédaction et de présentation pourrait se poursuivre longuement.

[87] À notre avis, la juge de première instance n'a commis aucune erreur dans son appréciation du caractère trompeur du Document. Celui-ci donne effectivement l'impression générale que l'appelant a gagné le gros lot. Même si le Document ne contient pas nécessairement d'énoncés qui sont littéralement faux, il reste qu'il est truffé de représentations trompeuses au sens de l'art. 219 *L.p.c.* De plus, les règles du concours n'apparaissent pas toutes d'une première lecture du Document. Il s'agit

respondents were required to mention. As a result, the respondents also violated s. 228 *C.P.A.*

(2) Alleged Violation of Section 238(*c*) *C.P.A.*

[88] Section 238(*c*) reads as follows:

238. No merchant, manufacturer or advertiser may, falsely, by any means whatever,

. . .

(*c*) state that he has a particular status or identity.

[89] In our opinion, Chamberland J.A. rightly concluded that the respondents had not contravened s. 238(*c*) of the *C.P.A.* in this case. The Document contained no false representations concerning the respondents' status or identity. It can be understood from a single reading that the Document was from the respondents and that they did not claim to have a particular status or identity that they did not actually have. As the Court of Appeal found, using a fictitious person, Elizabeth Matthews, as the signer of the Document did not constitute a prohibited practice under s. 238(*c*) *C.P.A.*

D. *Recourse Provided for in Section 272 C.P.A.: Conditions for Exercising the Recourse and Criteria for Granting Remedies*

[90] Our conclusion that the Document contained representations contrary to ss. 219 and 228 *C.P.A.* logically leads us to the question of the appropriate remedy in this case. The appellant submits that he is entitled to be awarded the equivalent of nearly US$1 million in punitive damages under s. 272 *C.P.A.* The respondents not only contend that he is not so entitled, but also deny that the recourse provided for in s. 272 *C.P.A.* can be exercised by a consumer to sanction a prohibited practice. This objection raised by the respondents revives a debate between Quebec authors that has been under way since the early 1980s and that this Court must now try to settle.

là de faits importants que les intimées ne pouvaient passer sous silence. Par voie de conséquence, les intimées ont aussi contrevenu à l'art. 228 *L.p.c.*

(2) La contravention alléguée à l'al. 238*c*) *L.p.c.*

[88] L'alinéa 238*c*) prévoit :

238. Aucun commerçant, fabricant ou publicitaire ne peut faussement, par quelque moyen que ce soit :

. . .

c) déclarer comme sien un statut ou une identité.

[89] À notre avis, le juge Chamberland a eu raison de conclure que les intimées n'avaient pas contrevenu à l'al. 238*c*) *L.p.c.* en l'espèce. Le Document ne contient aucune représentation fausse quant au statut ou à l'identité des intimées. Une seule lecture suffit pour comprendre qu'il émane des intimées, et que celles-ci ne déclarent pas posséder un statut ou une identité qu'elles n'ont pas en réalité. Comme l'a conclu la Cour d'appel, le fait d'utiliser une personne fictive, en l'occurrence Elizabeth Matthews, comme signataire du Document ne constitue pas une pratique interdite par l'al. 238*c*) *L.p.c.*

D. *Le recours prévu à l'art. 272 L.p.c. : ses conditions d'ouverture et les critères d'octroi des mesures de réparation*

[90] La conclusion que le Document contient des représentations qui contreviennent aux art. 219 et 228 *L.p.c.* nous amène logiquement à l'examen de la réparation appropriée en l'espèce. L'appelant prétend qu'il a le droit d'obtenir, aux termes de l'art. 272 *L.p.c.*, l'équivalent de près d'un million de dollars américains en dommages-intérêts punitifs. Les intimées contestent non seulement ce droit, mais nient au surplus que le recours prévu à l'art. 272 *L.p.c.* puisse être utilisé par un consommateur afin de sanctionner une pratique interdite. Cette objection soulevée par les intimées ravive une controverse doctrinale qui dure au Québec depuis le début des années 1980. Il appartient maintenant à notre Cour de tenter d'y mettre un terme.

(1) Section 272 *C.P.A.* and Sanctioning Prohibited Practices

[91] Section 272 *C.P.A.* reads as follows:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

(*a*) the specific performance of the obligation;

(*b*) the authorization to execute it at the merchant's or manufacturer's expense;

(*c*) that his obligations be reduced;

(*d*) that the contract be rescinded;

(*e*) that the contract be set aside; or

(*f*) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

[92] For many years now, the Quebec courts have held that s. 272 *C.P.A.* can be applied to sanction prohibited practices used by merchants and manufacturers (see, *inter alia*, *Chrysler Canada ltée v. Poulin*, 1988 CanLII 1001 (C.A.); *A.C.E.F. Sud-Ouest de Montréal v. Arrangements alternatifs de crédit du Québec Inc.*, [1994] R.J.Q. 114 (Sup. Ct.); *Beauchamp v. Relais Toyota inc.*, [1995] R.J.Q. 741 (C.A.); and *Centre d'économie en chauffage Turcotte inc. v. Ferland*, [2003] J.Q. nº 18096 (QL) (C.A.)). Defendants in proceedings under s. 272 *C.P.A.*, and in class actions in particular, nevertheless argued that this provision should not apply to allegations of violations of Title II of the Act (see, e.g., *9029-4596 Québec inc. v. Duplantie*, [1999] R.J.Q. 3059 (C.Q.)). But the Court of Appeal reiterated in *Brault & Martineau* that s. 272 does apply to such violations. In that case, Duval Hesler J.A. stated that [TRANSLATION] "I believe it has been clearly established that sanctions for prohibited practices within the meaning of the CPA cannot be limited to the recourse provided for in s. 253 of that Act" (para. 40),

(1) L'article 272 *L.p.c.* et la sanction des pratiques interdites

[91] L'article 272 *L.p.c.* prévoit :

272. Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas :

a) l'exécution de l'obligation;

b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;

c) la réduction de son obligation;

d) la résiliation du contrat;

e) la résolution du contrat; ou

f) la nullité du contrat,

sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

[92] Les tribunaux du Québec considèrent depuis de nombreuses années que l'art. 272 *L.p.c.* permet de sanctionner les pratiques interdites commises par les commerçants et fabricants (voir notamment *Chrysler Canada Ltée c. Poulin*, 1988 CanLII 1001 (C.A.); *A.C.E.F. Sud-Ouest de Montréal c. Arrangements alternatifs de crédit du Québec Inc.*, [1994] R.J.Q. 114 (C.S.); *Beauchamp c. Relais Toyota inc.*, [1995] R.J.Q. 741 (C.A.); et *Centre d'économie en chauffage Turcotte inc. c. Ferland*, [2003] J.Q. nº 18096 (QL) (C.A.)). Malgré cette jurisprudence, la contestation de poursuites intentées en vertu de l'art. 272 *L.p.c.*, notamment dans le cadre de recours collectifs, s'est accompagnée d'une remise en question de l'applicabilité de cette disposition aux allégations de contraventions aux prescriptions du titre II de la loi (voir, p. ex., *9029-4596 Québec inc. c. Duplantie*, [1999] R.J.Q. 3059 (C.Q.)). Toutefois, la Cour d'appel a réitéré dans l'arrêt *Brault & Martineau inc.* que l'art. 272 était applicable aux violations du titre II de la loi. Dans ce jugement, la juge Duval Hesler a affirmé : « Il me semble clairement établi que la sanction d'une

that is, the recourses available in the general law.

[93] Despite this case law, the respondents argue that s. 272 *C.P.A.* does not apply to prohibited practices. They submit that the sole purpose of that provision is to sanction failures by merchants and manufacturers to fulfil the contractual obligations imposed on them by Title I of the *C.P.A.* According to the respondents, the use of a prohibited practice is an offence that can be sanctioned only under the *C.P.A.*'s penal provisions.

[94] The respondents rely on a view long advocated by Professor L'Heureux. In a former edition of her treatise entitled *Droit de la consommation*, she wrote the following at p. 358:

> [TRANSLATION] Moreover, section 272 does not constitute a sanction for prohibited practices, since such practices are not obligations imposed by the Act. It must be recognized that the business practices in question in Title II are, first and foremost, offences that are matters of directive public order . . . . They are prohibitions that are sanctioned mainly through penal proceedings.

(See also N. L'Heureux, "L'interprétation de l'article 272 de la Loi sur la protection du consommateur" (1982), 42 *R. du B.* 455.)

[95] Not all the authors agree with Professor L'Heureux's view. A review of the literature published in Quebec on this question even suggests that it is a minority view. Some authors have taken the position that a literal reading of s. 272 *C.P.A.* does not support limiting the obligations to which it refers to certain specific "duties" imposed by Title I of the Act. In their opinion, the words "obligation imposed on him by this Act" apply to the obligations established in both Title I and Title II of the *C.P.A.* (see, *inter alia*, F. Lebeau, "La publicité et la protection des consommateurs" (1981), 41 *R. du B.* 1016, at p. 1039; C.-R. Dumais, "Une étude des tenants et aboutissants des articles 271 et 272 de la Loi sur la protection du consommateur"

pratique interdite au sens de la LPC ne saurait se limiter au seul recours prévu à l'article 253 de la loi » (par. 40), c'est-à-dire aux recours prévus par le droit commun.

[93] Malgré cette jurisprudence, les intimées plaident que l'art. 272 *L.p.c.* ne s'applique pas aux pratiques interdites. Elles affirment que cette disposition vise uniquement à sanctionner les manquements des commerçants et des fabricants aux obligations contractuelles qui leur incombent en vertu du titre I de la *L.p.c.* Selon les intimées, la commission d'une pratique interdite constituerait une infraction que seules les dispositions pénales de la *L.p.c.* permettraient de sanctionner.

[94] Les intimées s'appuient sur l'opinion qu'a défendue longtemps la professeure L'Heureux. Dans une édition antérieure de son traité *Droit de la consommation*, elle écrivait à la p. 358 :

> Par ailleurs, l'article 272 ne constitue pas la sanction des pratiques interdites puisqu'il ne s'agit pas d'obligations que la Loi impose. Il faut constater que les pratiques commerciales du titre II sont d'abord des infractions qui relèvent de l'ordre public de direction [. . .] Ce sont des interdictions principalement sanctionnées pénalement.

(Voir aussi N. L'Heureux, « L'interprétation de l'article 272 de la Loi sur la protection du consommateur » (1982), 42 *R. du B.* 455.)

[95] Cette opinion de la professeure L'Heureux n'a pas fait l'unanimité dans la doctrine. Une revue des commentaires publiés au Québec sur cette question suggère même que son point de vue est demeuré minoritaire. Selon d'autres auteurs, une lecture littérale de l'art. 272 *L.p.c.* ne permet pas de réduire les obligations auxquelles il renvoie à certains « devoirs » spécifiques imposés par le titre I de la loi. À leur avis, les termes « obligation que lui impose la présente loi » s'appliquent indistinctement aux obligations contenues aux titres I et II de la *L.p.c.* (voir notamment F. Lebeau, « La publicité et la protection des consommateurs » (1981), 41 *R. du B.* 1016, p. 1039; C.-R. Dumais, « Une étude des tenants et aboutissants des articles 271 et 272 de la

(1985), 26 *C. de D.* 763, at p. 775; Masse, at p. 835; and D. Lluelles and B. Moore, *Droit des obligations* (2006), at p. 316).

[96] The most thorough critique of Professor L'Heureux's view has come from Professor Pauline Roy. According to Professor Roy, to exclude the prohibitions set out in Title II of the *C.P.A.* from the application of s. 272 *C.P.A.* is to forget that in Quebec civil law, the failure to fulfil an obligation not to do something can trigger civil liability in the same way as the failure to fulfil an obligation to do something. For this reason, she does not believe that [TRANSLATION] "the [legislature's] choice of a negative wording to describe the obligation not to mislead and not to engage in unfair practices to induce consumers to enter into contracts can have the effect of depriving consumers of the civil recourses specifically provided for in the *Consumer Protection Act*" (P. Roy, *Les dommages exemplaires en droit québécois: instrument de revalorisation de la responsabilité civile*, doctoral thesis (1995), at p. 476).

[97] Professor Roy also advances arguments related to the general interest and the objectives of the *C.P.A.* If the contrary view were to prevail, she says, it would have to be concluded that the Quebec legislature intended to prevent consumers from claiming punitive damages from merchants or manufacturers who had engaged in practices prohibited by the Act. In her view, such an outcome would be inconsistent with the role the legislature intended for Title II of the *C.P.A.* She explains this as follows:

[TRANSLATION] To accept that the recourse in exemplary damages is unavailable where merchants engage in prohibited practices would have consequences that the legislature certainly did not intend, especially given that such practices are generally fraudulent and often involve trifling amounts. Consumers are thus disinclined to sue, yet such conduct can, when all is said and done, be a significant source of profit for merchants. If an award of exemplary damages is unavailable, therefore, merchants will, given that the risk of being sued is minimal, keep a large share of the profits derived from their fraudulent conduct. It must be asked how it can be logical for a merchant who engages in fraudulent

Loi sur la protection du consommateur » (1985), 26 *C. de D.* 763, p. 775; Masse, p. 835; et D. Lluelles et B. Moore, *Droit des obligations* (2006), p. 316).

[96] La critique la plus complète de l'opinion de la professeure L'Heureux sur cette question a été l'œuvre de la professeure Pauline Roy. Selon cette dernière, en soustrayant les interdictions contenues au titre II de la *L.p.c.* à l'application de l'art. 272 *L.p.c.*, on oublie qu'en droit civil québécois, le manquement à une obligation de ne pas faire peut engendrer la responsabilité civile de son auteur au même titre que la violation d'une obligation de faire. Pour cette raison, elle ne croit pas que « le fait [pour le législateur] d'avoir choisi la forme négative pour décrire l'obligation de ne pas tromper ou de ne pas avoir recours à des pratiques déloyales pour inciter les consommateurs à conclure des contrats puisse avoir pour effet de priver le consommateur des recours civils spécifiquement prévus à la *Loi sur la protection du consommateur* » (P. Roy, *Les dommages exemplaires en droit québécois : instrument de revalorisation de la responsabilité civile*, thèse de doctorat (1995), p. 476).

[97] La professeure Roy invoque également des arguments liés à l'intérêt général et aux objectifs poursuivis par la *L.p.c.* Si l'opinion contraire prévalait, il faudrait conclure que le législateur québécois a voulu empêcher le consommateur de réclamer des dommages-intérêts punitifs lorsqu'un commerçant ou un fabricant a commis des pratiques interdites par la loi. À son avis, un tel résultat n'est pas conforme au rôle que le législateur a voulu attribuer au titre II de la *L.p.c.* Elle explique :

Accepter que la commission de pratiques interdites ne donne pas ouverture au recours en dommages exemplaires entraînerait des conséquences que le législateur n'a certes pas voulues, surtout lorsque l'on sait que la commission de telles pratiques est généralement dolosive et implique souvent des montants dérisoires. Les consommateurs sont alors peu enclins à poursuivre, alors qu'au total ce comportement peut constituer une importante source de profit pour le commerçant. En l'absence d'une condamnation à des dommages exemplaires, les risques de poursuite étant minimes, le commerçant conserve donc une part importante du bénéfice retiré de sa conduite dolosive. Il importe de se demander

practices to be shielded from an award of exemplary damages even though such a sanction can be imposed on someone who violates the Act's other provisions without any malicious intent. [Emphasis added; p. 476.]

[98] In our opinion, Professor Roy's view on this point is persuasive. Section 272 *C.P.A.* begins with the following words: "If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act". It refers, without distinction, to obligations imposed "by this Act". Read literally, this section thus requires that all the obligations merchants and manufacturers have under the *C.P.A.* be taken into account. This undoubtedly includes the obligations in Title II related to business practices. Therefore, the language of s. 272 *C.P.A.* does not support the distinction proposed by Professor L'Heureux between "obligations imposed by the Act" and "prohibitions". If the legislature had intended the word "obligation" in s. 272 *C.P.A.* to mean something other than what it means in Quebec civil law, it would have said so. It must therefore be concluded that the legislature's intention was that a civil sanction for prohibited practices would also be available under s. 272 *C.P.A.*

[99] This conclusion is consistent with the Quebec legislature's general objectives in this area. The purpose of the *C.P.A.* is above all to purge business practices in order to protect consumers as fully as possible. To this end, the legislature has included in the *C.P.A.* administrative, civil and penal sanctions that jointly make up the Act's enforcement mechanism. The interpretation advocated by the respondents in this case would greatly reduce the Act's effectiveness by inappropriately limiting the role of consumers in ensuring the achievement of its objectives. From this standpoint, it is preferable to involve consumers, within a well-defined framework, in the pursuit of the legislative objectives associated with the prohibition of certain business practices. The public interest is thus better served, since consumers can actively contribute to the enforcement of legislation that is designed to protect them and can make up for any inadequacies

en vertu de quelle logique un commerçant ayant recours à des pratiques frauduleuses peut être à l'abri d'une condamnation à des dommages exemplaires, alors que celui qui contrevient aux autres dispositions de la loi, sans intention malicieuse, est susceptible de se voir imposer une telle sanction? [Nous soulignons; p. 476.]

[98] L'opinion de la professeure Roy nous semble convaincante sur ce point. En effet, le texte de l'art. 272 *L.p.c.* commence par les mots suivants : « Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi ». Cette disposition renvoie aux obligations imposées par « la présente loi », sans distinction aucune. Une lecture textuelle de cet article commande donc la prise en compte de toutes les obligations qui incombent aux commerçants ou aux fabricants en vertu de la *L.p.c.* Cela comprend sans aucun doute les obligations contenues au titre II de la loi qui portent sur les pratiques de commerce. Ainsi, le texte de l'art. 272 *L.p.c.* n'autorise pas la distinction proposée par la professeure L'Heureux entre « obligations imposées par la loi » et « interdictions ». Si le législateur avait souhaité s'écarter, à l'art. 272 *L.p.c.*, du sens donné au mot « obligation » en droit civil québécois, il l'aurait fait expressément. Il faut donc conclure que le législateur a voulu que l'art. 272 *L.p.c.* puisse permettre aussi une sanction civile des pratiques interdites.

[99] Cette conclusion respecte les objectifs généraux poursuivis par le législateur québécois en la matière. La *L.p.c.* vise au premier chef à assainir les pratiques commerciales afin de protéger le consommateur le plus adéquatement possible. Pour ce faire, le législateur a assorti la *L.p.c.* de sanctions administratives, civiles et pénales qui, conjointement, constituent le « bras armé » de la loi. Or, l'interprétation défendue par les intimées en l'espèce réduirait considérablement l'efficacité de la loi, en limitant à tort le rôle joué par les consommateurs dans la mise en œuvre de ses objectifs. Dans cette perspective, il est préférable d'associer, à l'intérieur d'un cadre bien défini, les consommateurs à la mise en œuvre des objectifs législatifs de l'interdiction de certaines pratiques de commerce. L'intérêt public se trouve alors mieux protégé puisque les consommateurs peuvent contribuer activement au respect d'une législation visant

in government intervention (E. P. Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 *Osgoode Hall L.J.* 327, at pp. 356-57).

[100] In our opinion, s. 272 *C.P.A.* establishes a legislative scheme that makes it possible, *inter alia*, to sanction prohibited practices by means of civil proceedings instituted by consumers. However, it is important that this be done in accordance with the principles governing the application of the *C.P.A.* and, where applicable, the rules of the general law. We will therefore now turn to the conditions for implementing this type of sanction.

(2) Legal Interest Under Section 272 *C.P.A.*

[101] Section 272 *C.P.A.* provides that "the consumer may demand, . . . subject to the other recourses provided by this Act". This wording raises the following question: Does the consumer referred to in s. 272 *C.P.A.* have to be a natural person who has a contractual relationship with a merchant or a manufacturer?

[102] The *C.P.A.* does not expressly define the consumer as a natural person who has entered into a contract governed by the Act. According to s. 1(*e*) *C.P.A.*, a consumer is "a natural person, except a merchant who obtains goods or services for the purposes of his business". At first glance, therefore, it might be thought that the "consumer" referred to in s. 272 *C.P.A.* need not have a contractual relationship with a merchant or a manufacturer to be found to have the legal interest required to institute proceedings under that provision. This view appears to be reinforced by s. 217 *C.P.A.*, which provides that "[t]he fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made". This is the gist of the position taken by the appellant on this question (transcript, at pp. 26-27).

[103] This position is undeniably based on a large and liberal conception of the role of consumer

à les protéger et suppléer, le cas échéant, aux insuffisances des interventions de l'État (E. P. Belobaba, « Unfair Trade Practices Legislation : Symbolism and Substance in Consumer Protection » (1977), 15 *Osgoode Hall L.J.* 327, p. 356-357).

[100] À notre avis, l'art. 272 *L.p.c.* met en place un régime législatif qui permet notamment de sanctionner les pratiques interdites dans le cadre de poursuites civiles intentées par les consommateurs. Toutefois, il importe que cette sanction s'exerce conformément aux principes régissant l'application de la *L.p.c.* et, le cas échéant, aux règles du droit commun. Nous passerons donc à l'examen des conditions de mise en œuvre de ce type de sanction.

(2) L'intérêt juridique pour agir en vertu de l'art. 272 *L.p.c.*

[101] L'article 272 *L.p.c.* dispose que « le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander ». Cette rédaction soulève la question suivante : le consommateur visé par l'art. 272 *L.p.c.* est-il nécessairement une personne physique engagée dans une relation contractuelle avec un commerçant ou un fabricant?

[102] La *L.p.c.* ne définit pas expressément le consommateur comme une personne physique ayant conclu un contrat régi par la loi. Selon l'al. 1*e*) *L.p.c.*, le consommateur est « une personne physique, sauf un commerçant qui se procure un bien ou un service pour les fins de son commerce ». À première vue, on pourrait donc penser qu'un lien contractuel entre « le consommateur » visé par l'art. 272 *L.p.c.* et un commerçant ou un fabricant n'est pas nécessaire pour que lui soit reconnu l'intérêt juridique pour intenter une poursuite en vertu de cette disposition. La présence de l'art. 217 *L.p.c.*, portant que « [l]a commission d'une pratique interdite n'est pas subordonnée à la conclusion d'un contrat » conforterait cette opinion. C'est, dans ses grandes lignes, la position adoptée par l'appelant sur cette question (transcription d'audience, p. 26-27).

[103] Cette position procède indéniablement d'une conception large et libérale du rôle de la

protection legislation, and specifically that of s. 272 *C.P.A.* The case law of the Quebec Court of Appeal confirms that such a conception is necessary to fully achieve the legislature's objectives in this area. For example, in *Nichols*, Gendreau J.A. noted that s. 272 *C.P.A.* must be [TRANSLATION] "interpreted liberally in order to give full effect to this Act and ensure that it achieves its purpose in a manner consistent with the principles that underlie it, while at the same time complying with legal rules" (p. 750).

[104] However, even a large and liberal principle of interpretation cannot justify overlooking the rules that are laid down in the Act to govern its application. One of those rules is found in s. 2 of the Act, which determines the general scope of the *C.P.A.*, providing that "[t]his Act applies to every contract for goods or services entered into between a consumer and a merchant in the course of his business". Section 2 *C.P.A.* establishes the basic principle that a consumer contract must exist for the Act to apply, except in the specific case of the Act's penal provisions. Professor Masse explains this as follows:

> [TRANSLATION] Generally speaking, five conditions must be met for the C.P.A. to apply:
>
> 1 – A contract must be entered into by the parties;
>
> 2 – One of the parties to the contract must be a "consumer";
>
> 3 – One of the parties must be a "merchant";
>
> 4 – The "merchant" must be acting in the course of his or her business; and
>
> 5 – The contract must be for goods or services. [p. 72]

[105] If ss. 1(*e*) and 2 *C.P.A.* are read together, it must be concluded that the recourse under s. 272 *C.P.A.* is available only to natural persons who have entered into a contract governed by the Act with a merchant or a manufacturer. A natural

législation en matière de protection du consommateur, et plus spécifiquement de celui de l'art. 272 *L.p.c.* La jurisprudence de la Cour d'appel du Québec confirme d'ailleurs qu'une telle conception est nécessaire à la pleine réalisation des objectifs du législateur en la matière. Ainsi, dans l'arrêt *Nichols*, le juge Gendreau a rappelé que l'art. 272 *L.p.c.* doit être « interprété libéralement de manière à donner à cette loi plein effet et lui faire rencontrer son objet, conformément aux principes qui la sous-tendent tout en respectant les règles de droit » (p. 750).

[104] Toutefois, même un principe d'interprétation large et libérale de la loi ne saurait justifier l'oubli des règles qu'elle édicte, afin d'encadrer son application. L'une de ces règles est contenue à l'art. 2 de la loi. Cette disposition, qui régit le champ d'application général de la *L.p.c.*, prévoit que « [l]a présente loi s'applique à tout contrat conclu entre un consommateur et un commerçant dans le cours des activités de son commerce et ayant pour objet un bien ou un service ». L'article 2 *L.p.c.* pose le principe fondamental que l'existence d'un contrat de consommation représente la condition nécessaire à l'application de la loi, sous réserve du cas particulier des dispositions pénales prévu par la *L.p.c.* À ce sujet, le professeur Masse a expliqué ce qui suit :

> De façon générale, cinq conditions sont nécessaires pour que l'on se trouve dans le champ d'application de la L.P.C. :
>
> 1 – Un contrat doit être passé entre les parties;
>
> 2 – Une des parties à ce contrat doit être un « consommateur »;
>
> 3 – Une des parties doit être un « commerçant »;
>
> 4 – Le « commerçant » doit agir dans le cours de son commerce et
>
> 5 – Le contrat doit avoir pour objet un bien ou un service. [p. 72]

[105] La lecture croisée de l'al. 1*e*) et de l'art. 2 *L.p.c.* impose la conclusion suivante : le recours prévu à l'art. 272 *L.p.c.* n'est ouvert qu'aux personnes physiques ayant conclu avec un commerçant ou un fabricant un contrat régi par la loi. En effet, une

person who has not entered into such a consumer contract cannot be considered a "consumer" within the meaning of s. 272 *C.P.A.*

[106] The fact that advertising companies are not referred to in s. 272 *C.P.A.* also confirms that legal interest under that provision depends on the existence of a contract to which the Act applies. This legislative choice is no doubt attributable to the fact that advertisers have no contractual relationship with consumers, so they are not in a position to enrich themselves at the expense of consumers when they contribute to the use of prohibited practices. In this context, it is not surprising that the legislature has chosen not to make the recourse provided for in s. 272 *C.P.A.* available to hold advertisers liable to consumers for violations of the *C.P.A.*

[107] Contrary to the appellant's arguments, the recourse provided for in s. 272 *C.P.A.* is therefore not available to a natural person who has not entered into a contract for goods or services to which the Act applies with a merchant or a manufacturer. In this sense, the fact that a natural person read a representation that constitutes a prohibited practice is not enough for that person to have the legal interest required to institute civil proceedings under that provision. As Professor Roy has noted, only a natural person who has been the "victim" of a prohibited practice can institute proceedings to have the practice sanctioned by a civil court (p. 474). To be clear, this means that a consumer must have entered into a contractual relationship with a merchant or a manufacturer to be able to exercise the recourse provided for in s. 272 *C.P.A.* against the person who engaged in the prohibited practice.

[108] Nevertheless, there is an important point with regard to legal interest that needs to be clarified. A consumer contract is not necessarily formed at the precise time when the consumer purchases or obtains goods or services. In Quebec civil law, a contract is formed when the acceptance of an offer to contract is received by the offeror (art. 1387 *C.C.Q.*). If a representation concerning

personne physique qui n'a pas conclu un tel contrat de consommation ne peut être considérée comme un « consommateur » au sens de l'art. 272 *L.p.c.*

[106] L'exclusion des entreprises de publicité du libellé de l'art. 272 *L.p.c.* confirme aussi que l'intérêt juridique pour agir en vertu de cette disposition dépend de l'existence d'un contrat visé par la loi. Ce choix législatif est sans doute attribuable au fait que les publicitaires n'entretiennent aucune relation contractuelle avec les consommateurs. Ils ne se trouvent donc pas dans une position qui leur permet de s'enrichir aux dépens des consommateurs lorsqu'ils contribuent à la commission de pratiques interdites. Dans ce contexte, il n'est pas surprenant que le législateur ait choisi, dans le cadre du recours prévu à l'art. 272 *L.p.c.*, de ne pas rendre les publicitaires responsables de leurs violations de la *L.p.c.* envers les consommateurs.

[107] Contrairement aux prétentions de l'appelant, le recours prévu à l'art. 272 *L.p.c.* n'est donc pas ouvert à une personne physique qui n'a pas contracté avec un commerçant ou un fabricant relativement à un bien ou un service visé par la loi. En ce sens, il ne suffit pas qu'une personne physique ait pris connaissance d'une représentation qui constitue une pratique interdite pour disposer de l'intérêt juridique pour engager une poursuite civile en vertu de cette disposition. Comme la professeure Roy l'a souligné, seule la personne physique qui a été « victime » d'une pratique interdite peut ester en justice afin de la faire sanctionner par un tribunal siégeant en matière civile (p. 474). En termes clairs, cela signifie que le consommateur doit s'être engagé dans une relation contractuelle avec un commerçant ou un fabricant pour exercer le recours prévu à l'art. 272 *L.p.c.* à l'encontre de l'auteur de la pratique interdite.

[108] Il importe néanmoins de préciser un aspect important du problème de l'intérêt juridique. Un contrat de consommation n'est pas nécessairement formé au seul moment où le consommateur achète ou se procure un bien ou un service. En droit civil québécois, un contrat est formé dès lors que l'offrant reçoit l'acceptation d'une offre de contracter (art. 1387 *C.c.Q.*). Dans la mesure

goods or services constitutes an offer under civil law rules, it can be concluded, subject to the formal requirements imposed by the *C.P.A.* on the undertakings to which it applies, that a consumer contract is formed at the moment when a merchant or one of the merchant's employees receives from a consumer the manifestation of his or her wish to accept that offer. However, s. 54.1 *C.P.A.* provides that every distance contract is deemed to be entered into at the consumer's address. Although the consumer's acceptance of the offer must always be assessed contextually, it remains distinct from the conclusion of the juridical operation envisaged by the parties (art. 1386 *C.C.Q.*). The performance of prestations does not coincide with, but rather results from, the formation of the contract.

où les représentations effectuées à l'égard d'un bien ou d'un service constituent une offre selon les règles du droit civil, et sous réserve du formalisme imposé par la *L.p.c.* aux engagements qu'elle régit, on peut conclure qu'un contrat de consommation est formé au moment où un commerçant ou l'un de ses employés reçoit d'un consommateur la manifestation de son désir d'accepter cette offre. Cependant, selon l'art. 54.1 *L.p.c.*, le contrat conclu à distance sera toujours réputé conclu à l'adresse du consommateur. Bien que l'acceptation de l'offre par le consommateur doive toujours être appréciée de façon contextuelle, cette acceptation demeure distincte de la conclusion de l'opération juridique envisagée par les parties (art. 1386 *C.c.Q.*). L'exécution des prestations ne se confond pas avec la conclusion du contrat, mais découle de celle-ci.

[109] Despite the limits to which the recourse provided for in s. 272 are subject as a result of the rules on the legal interest required by the *C.P.A.*, it must be borne in mind that the Act provides for other recourses for its enforcement.

[109] Malgré les restrictions auxquelles les règles relatives à l'intérêt juridique exigé par la *L.p.c.* assujettissent le recours prévu à l'art. 272, on se souviendra toujours que d'autres recours sont prévus dans la loi pour en assurer le respect.

[110] In the instant case, whether the sending of a reply coupon (or the receipt of the coupon by the respondents) resulted in the formation of a contract for participation in a sweepstakes could be debated at length. Was it impossible for a contract to be formed because there was no agreement on its object within the meaning of art. 1412 *C.C.Q.*? Did the parties enter into a contract and, if so, could it be annulled owing to the respondents' fraud? At the very least, the parties entered into a contract for a subscription to *Time* magazine. In this Court, the respondents emphasized the fact that, according to the Superior Court, the appellant understood that participating in the sweepstakes and subscribing to the magazine were separate undertakings. When the question is whether a consumer has the interest required to institute proceedings under s. 272 *C.P.A.*, however, the two undertakings are linked. Logically, one depends on the other. Moreover, a contract for a magazine subscription is a contract to which the *C.P.A.* applies. As a result, in these circumstances, the appellant had the interest required to take action against the respondents and his action was properly brought.

[110] En l'espèce, on pourrait discuter longtemps quant à savoir si l'envoi d'un coupon-réponse (ou la réception de celui-ci par les intimées) a permis la formation d'un contrat relatif à la participation à un concours. La formation du contrat aurait-elle été rendue impossible par l'absence d'accord sur l'objet de la convention, au sens de l'art. 1412 *C.c.Q.*? Un contrat aurait-il été conclu, mais aurait-il été annulable en raison du dol des intimées? Quoi qu'il en soit, il s'est au moins conclu un contrat d'abonnement à la revue *Time*. Devant notre Cour, les intimées ont insisté sur le fait que, selon la Cour supérieure, l'appelant avait compris que la participation au concours et l'abonnement constituaient des engagements distincts. Cependant, lorsqu'il s'agit de déterminer si le consommateur possède l'intérêt requis pour intenter une poursuite en vertu de l'art. 272 *L.p.c.*, les deux engagements demeurent liés. Logiquement, l'un dépendait de l'autre. De plus, un contrat d'abonnement à une revue demeure un contrat régi par la *L.p.c.* En conséquence, dans ces circonstances, l'appelant avait l'intérêt requis pour prendre action contre les intimées et sa demande en justice a été régulièrement formée.

(3) Remedies Available Under Section 272 *C.P.A.*

[111] The recourse provided for in s. 272 *C.P.A.* must be exercised in accordance with the specific principles governing consumer law in Quebec and, where applicable, the general rules of the civil law. We must now explain how these principles relate to the application of s. 272 *C.P.A.*

(a) *Contractual Remedies*

[112] Subject to the other recourses provided for in the *C.P.A.*, a consumer with the necessary legal interest can institute proceedings under s. 272 *C.P.A.* to have the court sanction a failure by a merchant or a manufacturer to fulfil an obligation imposed on the merchant or manufacturer by the *C.P.A.*, by the regulations made under the *C.P.A.* or by a voluntary undertaking. The Court of Appeal has correctly confirmed that the recourse provided for in s. 272 *C.P.A.* is based on the premise that any failure to fulfil an obligation imposed by the Act gives rise to an absolute presumption of prejudice to the consumer. In *Nichols*, Gendreau J.A. stressed that [TRANSLATION] "a merchant sued under s. 272 cannot have the action dismissed by raising the defence that the consumer suffered no prejudice" (p. 749). The recourse provided for in s. 272 *C.P.A.* thus differs from the one provided for in s. 271 *C.P.A.* Section 271 *C.P.A.* sanctions the violation of certain rules governing the formation of consumer contracts, whereas the purpose of s. 272 *C.P.A.* is not simply to sanction violations of formal requirements of the Act, but to sanction all violations that are prejudicial to the consumer (*Boissonneault v. Banque de Montréal*, [1988] R.J.Q. 2622 (C.A.)).

[113] There are basically two types of obligations that can result in a sanction under s. 272 *C.P.A.* if not fulfilled. First, the *C.P.A.* imposes a range of statutory contractual obligations on merchants and manufacturers that are set out primarily in Title I of the Act. Proof that one of these substantive rules has been violated entitles a consumer, without

(3) Les mesures de réparation disponibles en vertu de l'art. 272 *L.p.c.*

[111] Le recours prévu à l'art. 272 *L.p.c.* doit être exercé conformément aux principes spécifiques régissant le droit de la consommation au Québec et, le cas échéant, aux règles générales du droit civil. Il convient maintenant d'expliquer comment ces principes s'appliquent dans la mise en œuvre de l'art. 272 *L.p.c.*

a) *Les mesures de réparation contractuelles*

[112] Dans la mesure où il possède l'intérêt juridique requis, un consommateur peut, sous réserve des autres recours prévus par la loi, intenter une poursuite en vertu de l'art. 272 *L.p.c.* afin de faire sanctionner la violation par un commerçant ou un fabricant d'une obligation que lui impose la *L.p.c.*, un règlement adopté en vertu de celle-ci ou un engagement volontaire. La jurisprudence de la Cour d'appel confirme à juste titre que le recours prévu à l'art. 272 *L.p.c.* est fondé sur la prémisse que tout manquement à une obligation imposée par la loi entraîne l'application d'une présomption absolue de préjudice pour le consommateur. Dans l'arrêt *Nichols*, le juge Gendreau a souligné que « le commerçant poursuivi selon l'article 272 ne peut offrir la défense d'absence de préjudice subi par le consommateur pour faire rejeter l'action » (p. 749). Le recours prévu à l'art. 272 *L.p.c.* diffère en cela de celui qu'établit l'art. 271 *L.p.c.* En effet, cette dernière disposition sanctionne la transgression de certaines règles de formation du contrat de consommation. Par contraste, l'art. 272 *L.p.c.* ne vise pas simplement à sanctionner les manquements à des exigences formelles de la loi, mais toutes les violations préjudiciables au consommateur (*Boissonneault c. Banque de Montréal*, [1988] R.J.Q. 2622 (C.A.)).

[113] La nature des obligations dont la violation peut être sanctionnée par le biais de l'art. 272 *L.p.c.* est essentiellement de deux ordres. La *L.p.c.* impose d'abord aux commerçants et aux fabricants un éventail d'obligations contractuelles de source légale. Ces obligations se retrouvent principalement au titre I de la loi. La preuve de la violation de l'une

having to meet any additional requirements, to obtain one of the contractual remedies provided for in s. 272 *C.P.A.* As Rousseau-Houle J.A. stated in *Beauchamp*, [TRANSLATION] "[t]he legislature has adopted an absolute presumption that a failure by the merchant or manufacturer to fulfil any of these obligations causes prejudice to the consumer, and it has provided the consumer with the range of recourses set out in s. 272" (p. 744). It is up to the consumer to choose the remedy, but the court has the discretion to award another one that is more appropriate in the circumstances (L'Heureux and Lacoursière, at p. 621). Unlike s. 271 *C.P.A.*, s. 272 does not permit the merchant to raise the defence that the consumer suffered no prejudice where violations of Title I are in issue (L'Heureux and Lacoursière, at p. 620; *Service aux marchands détaillants ltée (Household Finance) v. Option Consommateurs*, 2006 QCCA 1319 (CanLII)).

de ces règles de fond permet donc, sans exigence additionnelle, au consommateur d'obtenir l'une des mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.* Comme la juge Rousseau-Houle l'a affirmé dans l'arrêt *Beauchamp*, « [l]e législateur présume de façon absolue que le consommateur subit un préjudice par suite d'un manquement par le commerçant ou le fabricant à l'une ou l'autre de ces obligations et donne au consommateur la gamme des recours prévue à l'article 272 » (p. 744). Le choix de la mesure de réparation appartient au consommateur, mais le tribunal conserve la discrétion de lui en accorder une autre plus appropriée aux circonstances (L'Heureux et Lacoursière, p. 621). Contrairement à l'art. 271 *L.p.c.*, l'art. 272 ne permet pas au commerçant de soulever l'absence de préjudice en défense pour ce qui est des contraventions aux dispositions du titre I (L'Heureux et Lacoursière, p. 620; *Service aux marchands détaillants ltée (Household Finance) c. Option Consommateurs*, 2006 QCCA 1319 (CanLII)).

[114] Second, Title II of the *C.P.A.* imposes obligations on merchants, manufacturers and advertisers that apply to them regardless of whether a consumer contract referred to in s. 2 of the Act exists. Unlike the obligations imposed under Title I of the Act, which apply to the contractual phase, the prohibitions against certain business practices set out in Title II apply to the pre-contractual phase. As Françoise Lebeau notes, Title II of the *C.P.A.* imposes on merchants, manufacturers and advertisers a duty to act honestly and an obligation to provide information during the period preceding the formation of the contract (p. 1020). The legislature's objective with respect to business practices is clear: to ensure the veracity of pre-contractual representations in order to prevent a consumer's consent from being vitiated by inadequate, fraudulent or improper information.

[114] La *L.p.c.* impose ensuite aux commerçants, aux fabricants et aux publicitaires des obligations énoncées au titre II de la loi. Celles-ci leur incombent indépendamment de l'existence d'un contrat de consommation visé par l'art. 2 de la loi. Contrairement aux obligations imposées en vertu du titre I de la loi, qui régissent la phase contractuelle, les interdictions relatives à certaines pratiques de commerce réglementent la phase précontractuelle. Comme M[e] Françoise Lebeau l'a souligné, les dispositions du titre II de la *L.p.c.* imposent aux commerçants, aux fabricants et aux publicitaires un devoir de loyauté et une obligation d'information au cours de la période précédant la formation du contrat (p. 1020). Le législateur poursuit un objectif évident en matière de pratiques de commerce : celui d'assurer la véracité des représentations précontractuelles afin d'éviter que le consentement du consommateur soit vicié par une information déficiente, frauduleuse ou abusive.

[115] In the case of prohibited practices, some judges and authors have asserted that the contractual remedies provided for in s. 272 *C.P.A.* are available to a consumer only if the consumer has suffered prejudice as a result of an unlawful act

[115] En matière de pratiques interdites, un courant jurisprudentiel et doctrinal affirme que les mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.* ne seraient ouvertes au consommateur que s'il a subi un préjudice découlant de l'illégalité

committed by a merchant or a manufacturer (see *Ata v. 9118-8169 Québec Inc.*, 2006 QCCS 3777, [2006] R.J.Q. 1883). For advocates of this view, the contravention of a provision of Title II of the *C.P.A.* does not give rise to an irrebuttable presumption of prejudice, since s. 272 *C.P.A.* is intended only to sanction unlawful acts that have actually deceived a consumer (see also Lluelles and Moore, at p. 312). This view corresponds in substance to the position taken by the respondents in the case at bar (R.F., at para. 57).

[116] According to this approach, a court cannot award a consumer one of the contractual remedies provided for in s. 272 *C.P.A.* if the merchant, after publishing a misleading advertisement in the pre-contractual phase, gave corrected information directly to the consumer just before they entered into the contract. Since such behaviour merely constitutes [TRANSLATION] "fraud that has been uncovered and is not prejudicial", it cannot give rise to these specific remedies (L. Nahmiash, "Le recours collectif et la *Loi sur la protection du consommateur*: le dol éclairé et non préjudiciable — l'apparence de droit illusoire", in *Développements récents sur les recours collectifs* (2004), 75).

[117] In our opinion, this position minimizes the influence that misleading advertising can have on a consumer's decision to enter into a contractual relationship with a merchant. It suggests that an advertisement cannot have a fraudulent effect if the consumer discovers that it is misleading a few minutes before entering into a contract with a merchant. This concept of "fraudulent effect" is too restrictive for the objectives of the recourse provided for in s. 272 *C.P.A.* to be achieved. It does not accurately reflect the way consumers are often invited to give their consent in such situations.

[118] To say that advertising can place consumers under a merchant's influence is an understatement. Very often, advertising stimulates the interest of consumers and induces them to go in person

commise par le commerçant ou le fabricant (voir *Ata c. 9118-8169 Québec Inc.*, 2006 QCCS 3777, [2006] R.J.Q. 1883). Pour les tenants de cette position, il ne saurait être question de présomption irréfragable de préjudice en cas de contravention à une disposition du titre II de la *L.p.c.*, puisque l'art. 272 *L.p.c.* ne viserait qu'à sanctionner les illégalités ayant eu un effet dolosif pour le consommateur (voir aussi Lluelles et Moore, p. 312). Cette opinion correspond, en substance, à la position défendue par les intimées en l'espèce (m.i., par. 57).

[116] Selon cette approche, le tribunal ne pourrait pas accorder au consommateur l'une des mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.* lorsqu'un commerçant, après avoir diffusé une publicité trompeuse au cours de la phase précontractuelle, aurait corrigé l'information directement auprès du consommateur dans les instants précédant la conclusion du contrat. Puisque ce comportement ne constituerait qu'un « dol éclairé et non préjudiciable », il ne pourrait donner ouverture à ces mesures de réparation spécifiques (L. Nahmiash, « Le recours collectif et la *Loi sur la protection du consommateur* : le dol éclairé et non préjudiciable — l'apparence de droit illusoire », dans *Développements récents sur les recours collectifs* (2004), 75).

[117] À notre avis, cette position sous-estime l'influence possible des publicités trompeuses sur la décision du consommateur de s'engager dans une relation contractuelle avec un commerçant. Cette position considère effectivement qu'une publicité ne peut avoir un effet dolosif lorsque le consommateur découvre son caractère trompeur quelques minutes avant de conclure un contrat avec un commerçant. Or, cette conception de l'« effet dolosif » est trop restreinte pour permettre au recours de l'art. 272 *L.p.c.* d'atteindre ses objectifs. Elle ne traduit pas fidèlement la façon dont les consommateurs sont souvent invités à donner leur consentement en cette matière.

[118] L'affirmation que les publicités possèdent la capacité d'attirer le consommateur dans la sphère d'influence des commerçants est un euphémisme. Très souvent, les publicités stimulent l'intérêt du

to the merchant's premises to learn more about the product or service being promoted. Their decision-making process begins at that time: they consider purchasing a good or service on the basis of the representations made in the advertisement. And then the consumer becomes more vulnerable once he or she is on the merchant's premises.

[119] In absolute terms, there is nothing reprehensible about a merchant's use of representations and insistence to induce the customer to give in. Such acts are normal and inevitable in an economic system based on free competition. But this is not true where the consumer is lured by false or misleading advertising, even if the merchant "corrects" the information in a one-on-one discussion just before they conclude the contract. Of course, a rigid interpretation of the rules of contract formation may lead to the conclusion that the consumer's consent is nonetheless free and informed if he or she discovers the misleading nature of an advertisement before entering into the contract. However, a view more in keeping with the social significance of the *C.P.A.* would lead to the conclusion that the consumer's decision to enter into a contractual relationship with the merchant was fundamentally tainted by the misleading advertisement.

[120] It would be hard to deny that such a "correction" of misleading information often occurs late in the contract formation process. For example, the members of the group covered by the class action in *Brault & Martineau* learned that they had to pay the sales taxes only once they were at the cash, that is, after they had discussed the payment and financing terms with a salesperson and after a purchase order had been issued (Sup. Ct., at paras. 29-30; see also *Chartier v. Meubles Léon ltée*, 2003 CanLII 7749 (Que. Sup. Ct.)). The correction might thus be made *after* the consumer has in fact consented to purchase the product in question. In such circumstances, the prohibited practice clearly plays a role in inducing the consumer to enter into a contractual relationship on the basis of misleading information.

consommateur et l'incitent à se rendre physiquement chez un commerçant afin d'en apprendre davantage sur le produit ou le service mis en valeur. Le processus décisionnel du consommateur s'engage alors : il envisage de se procurer un bien ou un service sur la base des représentations faites dans la publicité. Enfin, la vulnérabilité du consommateur augmente dès qu'il se trouve sur place.

[119] Dans l'absolu, les représentations et l'insistance d'un commerçant pour amener le client à céder n'ont rien de répréhensible. Elles sont normales et inévitables dans un système économique où prime la libre concurrence. La situation diffère lorsque le consommateur est attiré par une publicité fausse ou trompeuse, et ce, même si le commerçant « corrige » l'information dans le cadre de discussions individuelles dans les instants précédant la conclusion du contrat. Certes, une interprétation rigoriste des règles en matière de formation des contrats peut conduire à la conclusion que le consommateur donne malgré tout un consentement libre et éclairé lorsqu'il découvre, avant de contracter, le caractère trompeur d'une publicité. Cependant, une conception plus conforme à la portée sociale de la *L.p.c.* ferait conclure que la décision du consommateur de s'engager dans une relation contractuelle avec le commerçant a été viciée à la base par une publicité trompeuse.

[120] Il est difficile de nier qu'une telle « correction » de l'information trompeuse s'effectue souvent tardivement dans le processus de formation du contrat. À titre d'exemple, les membres du groupe visé par le recours collectif dans l'affaire *Brault & Martineau* ont appris à la caisse, c'est-à-dire après avoir discuté avec un vendeur des modalités de paiement et de financement ainsi qu'après l'émission d'un bon de commande, qu'ils devaient payer les taxes (C.S., par. 29-30; voir également *Chartier c. Meubles Léon ltée*, 2003 CanLII 7749 (C.S. Qué.)). Cette correction peut donc s'effectuer *après* que le consommateur a, dans les faits, consenti à acheter le produit en question. Dans un tel contexte, il est certain que la pratique interdite contribue à entraîner le consommateur dans une relation contractuelle sur la base d'informations trompeuses.

[121] For this reason, the argument that s. 272 *C.P.A.* is intended solely to sanction prohibited practices that have actually resulted in fraud improperly underemphasizes the prejudice resulting from a violation of a provision of Title II of the Act. It effectively introduces a variable rule. On the one hand, in cases in which the presumption of fraud provided for in s. 253 *C.P.A.* applies, this rule would allow a merchant or a manufacturer to raise the defence that the consumer suffered no prejudice. Section 253 *C.P.A.* creates a presumption that, had the consumer been aware of certain prohibited practices, he or she would not have agreed to the contract or would not have paid as high a price. On the other hand, where the presumption does not apply, the rule would require consumers to fully prove the prejudice they have suffered. There is no reason why consumers should bear a higher burden of proof where the breach of a statutory obligation falls under Title II of the Act rather than under Title I and the presumption of s. 253 *C.P.A.* does not apply. Neither the wording of s. 272 *C.P.A.* nor the philosophy underlying the application of the Act warrants such a conclusion, which could also dangerously pave the way for acceptance of the concept of "*bon dol*" (harmless fraud) in consumer law. As we will explain below, this position is based on a misconception of the role of s. 253 *C.P.A.*

[121] Pour cette raison, la prétention selon laquelle l'art. 272 *L.p.c.* ne vise à sanctionner que les pratiques interdites ayant eu un effet dolosif relativise à tort le préjudice découlant d'une contravention à une disposition du titre II de la loi. Elle implante effectivement une norme à portée variable. D'une part, cette norme permet aux commerçants et aux fabricants de soulever une défense fondée sur l'absence de préjudice subi par le consommateur dans les cas où la présomption de dol prévue à l'art. 253 *L.p.c.* s'applique. Cet article prévoit en effet une présomption que, si le consommateur avait eu connaissance de certaines pratiques interdites, il n'aurait pas contracté ou n'aurait pas donné un prix si élevé. D'autre part, cette norme oblige le consommateur à faire une preuve complète de son préjudice lorsque la présomption ne s'applique pas. Or, il n'existe aucune raison pour laquelle les consommateurs devraient supporter un fardeau de preuve plus lourd lorsque le manquement à une obligation légale relève du titre II de la loi plutôt que du titre I et que la présomption prévue à l'art. 253 *L.p.c.* ne s'applique pas. Ni le libellé de l'art. 272 *L.p.c.*, ni la philosophie qui sous-tend l'application de la loi, ne justifient une telle conclusion qui, par ailleurs, pourrait dangereusement ouvrir la porte à une reconnaissance du « bon dol » en droit de la consommation. Comme nous l'expliquerons plus loin, cette position découle d'une conception erronée du rôle de l'art. 253 *L.p.c.*

[122] This interpretation also leads to strange results. The presumption in s. 253 *C.P.A.* does not apply to all prohibited business practices. For reasons of its own, the legislature has chosen to list the practices that are covered by the presumption of fraud established in that provision. Where s. 253 does not apply, a consumer claiming to be the victim of a prohibited practice would be able to sue under s. 272 *C.P.A.* but would have to use the rules of the *Civil Code of Québec* to justify the application of the contractual remedies in that section. If we disregard the question of punitive damages, the recourse provided for in s. 272 *C.P.A.* would thus be of no real use to the consumer. With this in mind, it cannot be assumed that the legislature intended the implementation

[122] En outre, cette interprétation entraîne des résultats surprenants. En effet, la présomption de l'art. 253 *L.p.c.* ne vise pas toutes les pratiques de commerce interdites. Pour des motifs qui lui appartiennent, le législateur a choisi d'énumérer les pratiques de commerce visées par la présomption de dol établie par cette disposition. Lorsque celle-ci ne s'applique pas, le consommateur qui se déclare victime d'une pratique interdite pourrait engager une poursuite en vertu de l'art. 272 *L.p.c.* Cependant, il devrait justifier la mise en œuvre des mesures de réparation contractuelles que cette disposition prévoit sur la base des règles contenues dans le *Code civil du Québec*. Si on laisse de côté la question des dommages-intérêts punitifs, le recours prévu à l'art. 272 *L.p.c.* ne lui serait donc d'aucune utilité

of s. 272 to be subject to the application of s. 253 *C.P.A.*

[123] We greatly prefer the position taken by Fish J.A. in *Turgeon*, namely that a prohibited practice does not create a *presumption* that a merchant has committed fraud but in itself *constitutes* fraud within the meaning of art. 1401 *C.C.Q.* (para. 48). This position is consistent with the spirit of the Act and is also more consistent with the case law relating to failures to fulfil the obligations imposed by Title I of the Act. In our opinion, the use of a prohibited practice can give rise to an absolute presumption of prejudice. As a result, a consumer does not have to prove fraud and its consequences on the basis of the ordinary rules of the civil law for the contractual remedies provided for in s. 272 *C.P.A.* to be available. As well, a merchant or manufacturer who is sued cannot raise a defence based on [TRANSLATION] "fraud that has been uncovered and is not prejudicial". The severity of the sanctions provided for in s. 272 *C.P.A.* is not variable: the irrebuttable presumption of prejudice can apply to all violations of the obligations imposed by the Act.

[124] This absolute presumption of prejudice presupposes a rational connection between the prohibited practice and the contractual relationship governed by the Act. It is therefore important to define the requirements that must be met for the presumption to apply in cases in which a prohibited practice has been used. In our opinion, a consumer who wishes to benefit from the presumption must prove the following: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act; (2) that the consumer saw the representation that constituted a prohibited practice; (3) that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract; and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract. This last requirement means that the

tangible. Dans cette perspective, on ne saurait présumer que le législateur a voulu subordonner la mise en œuvre de l'art. 272 à l'application de l'art. 253 *L.p.c.*

[123] Nous préférons nettement à cet égard la position adoptée par le juge Fish dans l'arrêt *Turgeon*, où il a affirmé que l'existence d'une pratique interdite ne faisait pas *présumer* qu'un dol avait été commis par un commerçant, mais plutôt qu'elle *constituait* en soi un dol au sens de l'art. 1401 *C.c.Q.* (par. 48). Cette position respecte l'esprit de la loi et s'harmonise mieux avec la jurisprudence établie dans le contexte de contraventions à des obligations imposées par le titre I de la loi. À notre avis, la commission d'une pratique interdite peut entraîner l'application d'une présomption absolue de préjudice. En conséquence, le consommateur n'a pas à prouver le dol et ses conséquences selon les règles ordinaires du droit civil pour avoir accès aux mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.* De même, le commerçant ou le fabricant poursuivi ne peut soulever un moyen de défense basé sur le « dol éclairé et non préjudiciable ». La sévérité des sanctions prévues à l'art. 272 *L.p.c.* n'est pas un concept à géométrie variable : la présomption irréfragable de préjudice peut s'appliquer à toutes les contraventions aux obligations imposées par la loi.

[124] L'application de la présomption absolue de préjudice présuppose qu'un lien rationnel existe entre la pratique interdite et la relation contractuelle régie par la loi. Il importe donc de préciser les conditions d'application de cette présomption dans le contexte de la commission d'une pratique interdite. À notre avis, le consommateur qui souhaite bénéficier de cette présomption doit prouver les éléments suivants : (1) la violation par le commerçant ou le fabricant d'une des obligations imposées par le titre II de la loi; (2) la prise de connaissance de la représentation constituant une pratique interdite par le consommateur; (3) la formation, la modification ou l'exécution d'un contrat de consommation subséquente à cette prise de connaissance; et (4) une proximité suffisante entre le contenu de la représentation et le bien ou le service visé par le contrat. Selon ce dernier critère, la

prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract. Where these four requirements are met, the court can conclude that the prohibited practice is deemed to have had a fraudulent effect on the consumer. In such a case, the contract so formed, amended or performed constitutes, in itself, a prejudice suffered by the consumer. This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 *C.P.A.*

pratique interdite doit être susceptible d'influer sur le comportement adopté par le consommateur relativement à la formation, à la modification ou à l'exécution du contrat de consommation. Lorsque ces quatre éléments sont établis, les tribunaux peuvent conclure que la pratique interdite est réputée avoir eu un effet dolosif sur le consommateur. Dans un tel cas, le contrat formé, modifié ou exécuté constitue, en soi, un préjudice subi par le consommateur. L'application de cette présomption lui permet ainsi de demander, selon les mêmes modalités que celles décrites ci-dessus, l'une des mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.*

(b) *Compensatory Damages*

b) *Les dommages-intérêts compensatoires*

[125] Where a merchant or a manufacturer fails to fulfil an obligation to which s. 272 *C.P.A.* applies, the consumer can ask the court for an award of compensatory damages. The respondents argue that the recourse in compensatory damages is available only if the court awards one of the contractual remedies provided for in s. 272(*a*) to (*f*) *C.P.A.* (R.F., at para. 72). This argument is without merit. Section 272 *C.P.A.* contains the words "without prejudice to his claim in damages, in all cases". This phrase, which is in no way ambiguous, means that the recourse in damages, regardless of whether it is contractual or extracontractual in nature, is not dependent on the specific contractual remedies set out in s. 272(*a*) to (*f*). By using these words in s. 272 *C.P.A.*, the legislature intended to leave consumers free to choose the sanctions they consider appropriate to repair any prejudice they suffer.

[125] En cas de contravention par un commerçant ou un fabricant à une obligation visée par l'art. 272 *L.p.c.*, le consommateur peut demander au tribunal de lui accorder des dommages-intérêts compensatoires. À cet égard, les intimées plaident que le recours en dommages-intérêts compensatoires est accessoire à l'octroi par le tribunal de l'une des mesures de réparation contractuelles prévues aux al. *a*) à *f*) de l'art. 272 *L.p.c.* (m.i., par. 72). Cet argument n'est pas fondé. Le texte de l'art. 272 *L.p.c.* contient les mots « sans préjudice de sa demande en dommages-intérêts dans tous les cas ». Cette expression, qui ne souffre d'aucune ambiguïté, signifie que le recours en dommages-intérêts, qu'il soit de nature contractuelle ou extracontractuelle, est autonome par rapport aux mesures de réparation contractuelles spécifiques prévues aux al. *a*) à *f*) de l'art. 272. En rédigeant l'art. 272 *L.p.c.* de cette façon, le législateur a voulu laisser au consommateur la liberté de choisir la sanction qu'il estime appropriée en réparation de son préjudice.

[126] Nevertheless, the independence of the recourse in damages provided for in s. 272 *C.P.A.* does not mean that there is no legal framework for exercising it. First of all, the recourse in damages, regardless of whether it is based on a breach of contract or a fault, must be exercised in accordance with the rule concerning the legal interest required to institute proceedings under that provision. Next, where a consumer chooses to claim damages from the merchant or manufacturer he or she is suing,

[126] L'autonomie du recours en dommages-intérêts prévu à l'art. 272 *L.p.c.* ne signifie cependant pas que l'exercice de ce recours n'est assujetti à aucun encadrement juridique. D'abord, le recours en dommages-intérêts, qu'il se fonde sur un manquement contractuel ou sur une faute, doit être exercé dans le respect du principe régissant l'intérêt juridique pour intenter une poursuite en vertu de cette disposition. Ensuite, lorsque le consommateur choisit de réclamer des dommages-intérêts au

the exercise of the recourse is subject to the general rules of Quebec civil law. In particular, an award of compensatory damages can be obtained only if the prejudice suffered can be assessed or quantified.

[127] The use by a merchant or a manufacturer of a prohibited practice can also form the basis of a claim for extracontractual compensatory damages under s. 272 *C.P.A.* A majority of the Quebec authors and judges who have considered this issue have taken the view that fraud committed during the pre-contractual phase is a civil fault that can give rise to extracontractual liability (Lluelles and Moore, at p. 321; *Kingsway Financial Services Inc. v. 118997 Canada inc.*, 1999 CanLII 13530 (Que. C.A.)). Proof of fraud thus establishes civil fault. However, because of the specific nature of the *C.P.A.*, the procedure for proving fraud is different from the one under the *Civil Code of Québec.*

[128] This difference stems from the fact that, where the recourse provided for in s. 272 *C.P.A.* is available to a consumer, his or her burden of proof is eased because of the absolute presumption of prejudice that results from any unlawful act committed by the merchant or manufacturer. This presumption means that the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case. According to the interpretation proposed by Fish J.A. in *Turgeon*, a consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 *C.P.A.* The court can thus award the consumer damages to compensate for any prejudice resulting from that extracontractual fault.

(4) Issue of the Interplay Between Sections 253 and 272 *C.P.A.*

[129] However, the role of s. 253 *C.P.A.* in cases in which the recourse provided for in s. 272 *C.P.A.* is exercised raises an important issue of statutory

commerçant ou au fabricant qu'il poursuit, l'exercice de son recours demeure soumis aux règles générales du droit civil québécois. En particulier, pour obtenir des dommages-intérêts compensatoires, il faut que le dommage subi soit susceptible d'évaluation ou quantifiable.

[127] L'article 272 *L.p.c.* permet aussi l'octroi de dommages-intérêts compensatoires en matière extracontractuelle dans le cas où un commerçant ou un fabricant commet une pratique interdite. En effet, la doctrine et la jurisprudence majoritaires au Québec considèrent que le dol commis au cours de la phase précontractuelle constitue une faute civile susceptible d'engager la responsabilité extracontractuelle de son auteur (Lluelles et Moore, p. 321; *Kingsway Financial Services Inc. c. 118997 Canada inc.*, 1999 CanLII 13530 (C.A. Qué.)). La preuve du dol établit ainsi la faute civile. En raison du caractère particulier de la *L.p.c.*, cette preuve s'établit cependant selon des modalités différentes de celles applicables en vertu du *Code civil du Québec.*

[128] En effet, dans la mesure où il est ouvert au consommateur, le recours prévu à l'art. 272 *L.p.c.* allège son fardeau de preuve au moyen d'une présomption absolue de préjudice découlant de toute illégalité commise par le commerçant ou le fabricant. Cette présomption dispense le consommateur de la nécessité de prouver l'intention de tromper du commerçant, comme l'exigerait le droit civil en matière de dol. Suivant l'interprétation suggérée par le juge Fish dans l'arrêt *Turgeon*, le consommateur qui bénéficie de la présomption irréfragable de préjudice aura également réussi à prouver la faute du commerçant ou du fabricant pour l'application de l'art. 272 *L.p.c.* Cette preuve permettra ainsi au tribunal de lui accorder des dommages-intérêts visant à compenser tout préjudice résultant de cette faute extracontractuelle.

(4) Le problème de l'interaction entre les art. 253 et 272 *L.p.c.*

[129] Cependant, le rôle joué par l'art. 253 *L.p.c.* dans le contexte de l'exercice du recours prévu à l'art. 272 *L.p.c.* soulève une question importante

interpretation. A brief review of some of the academic literature makes it apparent that there are a variety of viewpoints on this issue. Section 253 *C.P.A.* reads as follows:

253. Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph *a* or *b* of section 220, *a*, *b*, *c*, *d*, *e* or *g* of section 221, *d*, *e* or *f* of section 222, *c* of section 224 or *a* or *b* of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.

[130] As we have seen, Professor L'Heureux has long maintained that the presumption provided for in s. 253 *C.P.A.* shows that s. 272 *C.P.A.* is not intended to be used to sanction prohibited business practices. In her view, consumers who claim to be victims of prohibited practices must instead turn to the general law or to ss. 8 and 9 *C.P.A.* to obtain a finding that their consent has been vitiated. Sections 8 and 9 *C.P.A.* read as follows:

8. The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.

9. Where the court must determine whether a consumer consented to a contract, it shall consider the condition of the parties, the circumstances in which the contract was entered into and the benefits arising from the contract for the consumer.

[131] Another view, voiced by Professors Lluelles and Moore among others, is that the presence of s. 253 *C.P.A.* at the end of Title II precludes the argument that the absolute presumption of prejudice applicable to violations of Title I also applies in the context of proceedings based on the use of a prohibited practice (Lluelles and Moore, at p. 312). The respondents rely on both of these views.

d'interprétation législative. Un bref coup d'œil sur certains commentaires doctrinaux permet d'ailleurs de constater l'hétérogénéité des points de vue exprimés sur le sujet. L'article 253 *L.p.c.* est rédigé ainsi :

253. Lorsqu'un commerçant, un fabricant ou un publicitaire se livre en cas de vente, de location ou de construction d'un immeuble à une pratique interdite ou, dans les autres cas, à une pratique interdite visée aux paragraphes *a* et *b* de l'article 220, *a*, *b*, *c*, *d*, *e* et *g* de l'article 221, *d*, *e* et *f* de l'article 222, *c* de l'article 224, *a* et *b* de l'article 225 et aux articles 227, 228, 229, 237 et 239, il y a présomption que, si le consommateur avait eu connaissance de cette pratique, il n'aurait pas contracté ou n'aurait pas donné un prix si élevé.

[130] Comme nous l'avons vu, la professeure L'Heureux a soutenu depuis fort longtemps que la présomption érigée par l'art. 253 *L.p.c.* illustre le fait que l'art. 272 *L.p.c.* n'est pas destiné à sanctionner les pratiques de commerce interdites. À son avis, le consommateur qui se dit victime d'une pratique interdite doit plutôt se tourner vers le droit commun ou vers les art. 8 et 9 *L.p.c.* afin de faire reconnaître que son consentement a été vicié. Ces articles prévoient ce qui suit :

8. Le consommateur peut demander la nullité du contrat ou la réduction des obligations qui en découlent lorsque la disproportion entre les prestations respectives des parties est tellement considérable qu'elle équivaut à de l'exploitation du consommateur, ou que l'obligation du consommateur est excessive, abusive ou exorbitante.

9. Lorsqu'un tribunal doit apprécier le consentement donné par un consommateur à un contrat, il tient compte de la condition des parties, des circonstances dans lesquelles le contrat a été conclu et des avantages qui résultent du contrat pour le consommateur.

[131] Une autre opinion, défendue notamment par les professeurs Lluelles et Moore, consiste à affirmer que la présence de l'art. 253 *L.p.c.* à la fin du titre II rend irrecevable la thèse selon laquelle la présomption absolue de préjudice applicable aux violations des dispositions du titre I serait également applicable dans le contexte d'une poursuite intentée sur la base de la commission d'une pratique interdite (Lluelles et Moore, p. 312). Les intimées invoquent d'ailleurs ces deux opinions.

[132] In our opinion, these two positions are wrong in suggesting that the role of s. 253 *C.P.A.* can be considered solely in relation to the statutory recourse provided for in s. 272 *C.P.A.* There is no direct relationship between these two statutory provisions: each of them makes its own contribution to the achievement of the legislature's social and legal objectives. The presumption of fraud provided for in s. 253 *C.P.A.* does not delimit the scope of s. 272 *C.P.A.* or govern the principles that underlie the application of that section; rather, it provides consumers with additional protection in situations in which they do not wish or are not able to exercise a recourse under s. 272 *C.P.A.* The primary purpose of s. 253 *C.P.A.* is to ease the burden of proof for consumers who choose to sue a merchant, a manufacturer or an advertiser under the ordinary rules of the general law. In such cases, s. 253 relieves consumers of the obligation to prove that the fraud was determinative in inducing them to give their consent. A rule of evidence such as this is helpful to consumers who want to sue advertisers under the general law, since they cannot take action against advertisers under s. 272 *C.P.A.*

[133] This conclusion is dictated not only by the characteristics of s. 272 *C.P.A.* itself, but also by the express reference in s. 253 *C.P.A.* to contracts relating to immovables. Although s. 6.1 *C.P.A.* provides that the provisions of Title II of the Act apply to such contracts, it is impossible to sanction prohibited practices involving immovables under s. 272 *C.P.A.* For this reason, aggrieved consumers will logically turn to the fraud provisions of the *Civil Code of Québec* (arts. 1401 and 1407 *C.C.Q.*). The whole rationale for the presumption provided for in s. 253 *C.P.A.* can therefore be found in this area (*Turgeon*, at para. 40).

[134] It must not be forgotten that the application of the *C.P.A.* is not dependent on the exercise of one of the civil or penal recourses for which it provides. The *C.P.A.* applies to any legal situation covered by s. 2 of the Act, and not solely to civil or penal proceedings instituted under the Act.

[132] À notre avis, ces deux thèses considèrent à tort que le rôle joué par l'art. 253 *L.p.c.* ne peut être envisagé qu'en relation avec le recours légal prévu à l'art. 272 *L.p.c.* En effet, il n'existe aucune relation directe entre ces deux dispositions législatives : chacune d'entre elles joue son rôle propre dans la réalisation des objectifs sociaux et juridiques visés par le législateur. Plutôt que de délimiter la portée de l'art. 272 *L.p.c.* ou de régir les principes qui sous-tendent son application, la présomption de dol établie par l'art. 253 *L.p.c.* accorde une protection additionnelle au consommateur dans des situations où il ne souhaite pas ou ne peut pas exercer un recours en vertu de l'art. 272 *L.p.c.* L'article 253 *L.p.c.* veut d'abord faciliter la preuve du consommateur qui choisit de poursuivre un commerçant, un fabricant ou un publicitaire selon les règles ordinaires du droit commun. Dans un tel cas, il dispense le consommateur de l'obligation de prouver le caractère déterminant de la fraude sur son consentement. Une telle règle de preuve assistera le consommateur lorsqu'il voudra poursuivre un publicitaire en vertu du droit commun, puisqu'il ne peut agir contre lui en vertu de l'art. 272 *L.p.c.*

[133] Au-delà des caractéristiques propres à l'art. 272 *L.p.c.*, cette conclusion s'impose en raison de la mention expresse des contrats immobiliers à l'art. 253 *L.p.c.* Bien que, selon l'art. 6.1 *L.p.c.*, les dispositions du titre II de la loi s'appliquent aux contrats relatifs aux immeubles, l'art. 272 *L.p.c.* ne permet pas de sanctionner les pratiques interdites commises en matière immobilière. Pour cette raison, le consommateur lésé se tournera logiquement vers les dispositions relatives au dol contenues dans le *Code civil du Québec* (art. 1401 et 1407 *C.c.Q.*). La présomption de l'art. 253 *L.p.c.* trouve donc toute sa raison d'être dans ce domaine (*Turgeon*, par. 40).

[134] Il ne faut pas perdre de vue que l'application de la *L.p.c.* n'est pas tributaire de l'exercice de l'un des recours civils ou pénaux qui y sont prévus. La *L.p.c.* s'applique à toute situation juridique visée par l'art. 2 de la loi, et non pas seulement lorsqu'une poursuite civile ou pénale est intentée en vertu de celle-ci.

[135] For the purposes of this appeal, we need not extend the discussion of the relationship between s. 253 *C.P.A.* and s. 272 *C.P.A.* to include a review of ss. 8 and 9 *C.P.A.* This being said, the assertion that [TRANSLATION] "[m]isleading advertising makes the recourse under sections 8 and 9 available, with or without the presumption of fraud of section 253", may have to be approached with caution (L'Heureux, *Droit de la consommation*, at p. 235). In Quebec civil law, lesion and fraud are two different defects of consent. Fraud does not necessarily involve exploitation of the consumer and, as a result, lesion. In this respect, it is important that the *C.P.A.* be interpreted in accordance with general principles of civil law obligations.

(5) Role of Section 217 *C.P.A.*

[136] We must now clarify the role of s. 217 *C.P.A.*, which provides that "[t]he fact that a prohibited practice has been used is not subordinate to whether or not a contract has been made". The Court of Appeal suggested that this provision makes the *C.P.A.* applicable once a prohibited practice is used, regardless of whether a consumer contract is entered into as a result of that practice (para. 25). However, it is important not to confuse the question of the existence of a prohibited practice with the question of interest under s. 272 *C.P.A.*

[137] Title II of the *C.P.A.* prohibits certain types of representations made "to a consumer". The definition of "consumer" in s. 1(*e*) of the Act might suggest that the provisions of Title II apply only where a consumer enters into a contract as a result of the use of a prohibited practice. However, the prohibitions relating to business practices also apply on a preventive basis, that is, before an unlawful representation dupes one or more consumers by fraudulently inducing them to enter into contractual relationships. This is why s. 217 *C.P.A.* exists: its purpose is to make it easier to sanction violations of the Act on a preventive basis by specifying that a merchant's representation may constitute a prohibited practice even if none of the natural persons targeted by the advertisement entered into a contract as a result of the advertisement. It is enough

[135] Le cadre du présent pourvoi n'exige pas que nous étendions la discussion sur la relation qu'entretient l'art. 253 *L.p.c.* avec l'art. 272 *L.p.c.* à l'examen des art. 8 et 9 *L.p.c.* Cela étant dit, l'affirmation selon laquelle « [l]a publicité trompeuse donne lieu au recours des articles 8 et 9, avec ou sans la présomption de dol de l'article 253 », pourrait devoir être abordée avec prudence (L'Heureux, *Droit de la consommation*, p. 235). En droit civil québécois, la lésion et le dol demeurent deux vices de consentement distincts. Le dol n'entraîne pas nécessairement l'exploitation du consommateur et, en conséquence, un cas de lésion. Il importe que l'interprétation de la *L.p.c.* respecte les principes généraux du droit civil des obligations à cet égard.

(5) Le rôle joué par l'art. 217 *L.p.c.*

[136] Il nous reste à préciser le rôle joué par l'art. 217 *L.p.c.*, qui dispose que « [l]a commission d'une pratique interdite n'est pas subordonnée à la conclusion d'un contrat ». La Cour d'appel a suggéré que cette disposition signifiait que la *L.p.c.* s'appliquait dès lors qu'une pratique interdite était commise, et ce, sans égard à la question de savoir si un contrat de consommation avait été conclu à la suite de celle-ci (par. 25). Il importe toutefois de ne pas confondre la question de l'existence d'une pratique interdite avec celle de l'intérêt pour agir en vertu de l'art. 272 *L.p.c.*

[137] Le titre II de la *L.p.c.* prohibe un certain nombre de représentations faites « à un consommateur ». La définition du « consommateur » contenue à l'al. 1*e*) de la loi pourrait laisser croire que les dispositions du titre II ne s'appliquent que lorsqu'un consommateur a conclu un contrat à la suite de la commission d'une pratique interdite. Or, les prohibitions portant sur les pratiques de commerce trouvent également à s'appliquer de façon préventive, c'est-à-dire avant qu'une représentation illégale ne floue un ou plusieurs consommateurs en les entraînant frauduleusement dans une relation contractuelle. C'est la raison d'être de l'art. 217 *L.p.c.* : cette disposition vise à faciliter la sanction préventive des violations de la loi en précisant qu'un commerçant peut commettre une pratique interdite même si aucune des personnes physiques à qui la

that the advertisement target a [TRANSLATION] "potential consumer" (L'Heureux and Lacoursière, at p. 489).

[138] Therefore, s. 217 *C.P.A.* relates strictly to the *existence* of a prohibited practice. It authorizes the Director of Criminal and Penal Prosecutions to enforce the Act on a *preventive* basis, in keeping with the legislature's intention. As Professor Masse explains,

> [TRANSLATION] [t]his provision authorizes penal proceedings where provisions of Title II have been contravened but no contract has been entered into as a result of a violation of the C.P.A. It is as a result possible to prove that an advertisement is misleading and to institute penal proceedings against the offender even where no contract was entered into with one or more consumers as a result of the advertisement. [p. 827]

[139] The applicability of the penal provisions is governed by a specific rule: s. 277 *C.P.A.* provides that an offence is committed where, *inter alia*, a person contravenes the Act. This rule, which constitutes a departure from s. 2 of the Act, can be explained by the fact that penal proceedings are instituted in the general interest. Thus, the purpose of such proceedings is not to protect the private interests of one or more consumers, but to protect the public in general from business practices that may be misleading. On the other hand, the general rule set out in s. 2 *C.P.A.* necessarily applies where consumers apply for the protection of the Act (Masse, at pp. 28-29), for example, when they seek to avail themselves of the recourses provided for in s. 272 *C.P.A.* Therefore, s. 217 *C.P.A.* is not intended to govern the conditions under which the recourses provided for in s. 272 *C.P.A.* are available and can be exercised. The principles that apply to s. 217 *C.P.A.* are different from those that apply to s. 272 *C.P.A.*, and the two provisions have different roles in the scheme of the *C.P.A.*

(6) Application of the Principles to This Appeal

[140] The appellant has not asked for any contractual remedies in this case. He is instead seeking the

publicité était destinée n'a conclu un contrat sur la base de celle-ci. Il suffit que la publicité ait été destinée à un « consommateur éventuel » (L'Heureux et Lacoursière, p. 489).

[138] L'article 217 *L.p.c.* porte donc strictement sur *l'existence* d'une pratique interdite. Il permet au directeur des poursuites criminelles et pénales de faire respecter la loi à titre *préventif*, conformément à l'intention législative en la matière. Comme le professeur Masse l'a expliqué :

> Cette disposition a pour but de rendre possibles les poursuites pénales lorsque les dispositions du titre II n'ont pas été respectées mais qu'aucun contrat n'a été conclu suite à une violation de la L.P.C. On peut ainsi faire la preuve qu'une publicité est trompeuse et poursuivre le contrevenant au pénal même si aucun contrat n'a été conclu avec un ou plusieurs consommateurs suite à cette publicité. [p. 827]

[139] L'applicabilité des dispositions pénales fait l'objet d'une règle spécifique : l'art. 277 *L.p.c.* prévoit qu'une infraction est notamment commise dès lors qu'une personne contrevient à la loi. Cette règle dérogatoire à l'art. 2 de la loi s'explique par le fait que les poursuites pénales sont intentées au nom de l'intérêt général. Il ne s'agit alors pas de défendre l'intérêt privé d'un ou de plusieurs consommateurs, mais plutôt de protéger le public au sens large contre des pratiques commerciales susceptibles de le tromper. En revanche, la règle générale prévue à l'art. 2 *L.p.c.* s'applique forcément lorsque le consommateur recherche la protection de la loi (Masse, p. 28-29), par exemple lorsqu'il veut se prévaloir des recours prévus à l'art. 272 *L.p.c.* L'article 217 *L.p.c.* n'a donc pas vocation à régir les conditions d'ouverture et d'exercice des recours prévus à l'art. 272 *L.p.c.* Les articles 217 et 272 *L.p.c.* se trouvent régis par des principes qui leur sont propres et jouent des rôles distincts au sein de la *L.p.c.*

(6) Application des principes au présent pourvoi

[140] L'appelant n'a demandé aucune mesure de réparation contractuelle en l'espèce. Son recours

equivalent of US$1 million in damages. Although his motion to institute proceedings is unclear in this respect, it became apparent as the case progressed that this amount is mainly for punitive damages and also includes an incidental amount for an extracontractual claim. We must begin by determining whether the appellant has established the respondents' extracontractual liability on the basis of the principles discussed above.

[141] To establish the respondents' extracontractual liability, the appellant had to show that they had engaged in a prohibited practice. He then had to prove that he had seen the representation constituting a prohibited practice before the contract was formed, amended or performed and that a sufficient nexus existed between the representation and the goods or services covered by the contract. If these facts were proven, the absolute presumption of prejudice would apply and the respondents' extracontractual liability would be triggered for the purposes of s. 272 *C.P.A*. The appellant did prove this. We have already found that the respondents contravened ss. 219 and 228 *C.P.A*. Whether the appellant saw the representations in question does not present any problems, since it is common ground that he subscribed to *Time* magazine after reading the documentation the respondents had sent him. Finally, there is no doubt that a sufficient nexus existed between the content of the Document and *Time* magazine: not only did the Document promote the magazine directly, but the trial judge found that the appellant would not have subscribed to the magazine had he not read the misleading documentation (para. 49). As a result, we find that the appellant has discharged his burden of proving a sufficient nexus between the prohibited practices engaged in by the respondents and his subscription contract with the respondents. This means that for the purposes of s. 272 *C.P.A*., the Document is deemed to have had a fraudulent effect on the appellant's decision to subscribe to *Time* magazine. The conduct of the respondents that is in issue constitutes a civil fault.

vise plutôt à obtenir l'équivalent d'un million de dollars américains en dommages-intérêts. Bien que sa requête introductive d'instance manque de clarté à cet égard, l'évolution du dossier a révélé que cette somme englobait principalement des dommages-intérêts punitifs et, de façon accessoire, une réclamation de nature extracontractuelle. Il convient d'abord de déterminer si, conformément aux principes dégagés ci-dessus, l'appelant a établi la responsabilité extracontractuelle des intimées.

[141] Pour établir la responsabilité extracontractuelle des intimées, l'appelant doit démontrer qu'elles ont commis une pratique interdite. Il lui faut ensuite prouver qu'il a pris connaissance de la représentation constituant une pratique interdite avant la formation, la modification ou l'exécution du contrat et qu'il existe une proximité suffisante entre la représentation et le bien ou le service visé par le contrat. La présomption absolue de préjudice découlera de la preuve de ces éléments et la responsabilité extracontractuelle des intimées se trouvera alors engagée pour l'application de l'art. 272 *L.p.c.* Cette preuve a été apportée en l'espèce. Nous avons déjà conclu que les intimées ont contrevenu aux art. 219 et 228 *L.p.c.* La prise de connaissance de ces représentations ne pose ici aucune difficulté puisqu'il n'est pas contesté que l'appelant s'est abonné au magazine *Time* après avoir lu la documentation que les intimées lui ont fait parvenir. Enfin, il ne fait aucun doute qu'il existe une proximité suffisante entre le contenu du Document et le magazine *Time* : non seulement le Document en fait-il directement la promotion, mais la juge de première instance a conclu que l'appelant ne se serait pas abonné au magazine *Time* s'il n'avait pas lu la documentation trompeuse (par. 49). En conséquence, nous concluons que l'appelant s'est déchargé de son fardeau de prouver l'existence d'un lien rationnel entre les pratiques interdites commises par les intimées et le contrat d'abonnement l'unissant aux intimées. Pour l'application de l'art. 272 *L.p.c.*, cette conclusion signifie que le Document est réputé avoir eu un effet dolosif sur la décision de l'appelant de s'abonner au magazine *Time*. Le comportement reproché aux intimées constitue une faute civile.

[142] The trial judge found that the respondents' fault had caused moral injuries to the appellant and awarded him $1,000 in compensatory damages. In this Court, the respondents have not shown that the trial judge erred in assessing the evidence or in applying the legal principles with regard either to their liability or to the quantum of damages. There is no reason for this Court to interfere with those findings. The appeal will accordingly be allowed to restore this part of the trial judge's judgment.

E. *Did the Trial Judge Err in Awarding the Appellant Punitive Damages?*

[143] In this part of our reasons, we must define the legal principles and tests that govern the admissibility of a recourse in punitive damages under s. 272 *C.P.A.* and the determination of the quantum of such damages. These questions of law will of course be considered on the basis of the trial judge's findings of fact, unless palpable and overriding errors were made in assessing the facts (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 25 and 37; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401).

(1) Independent Nature of Punitive Damages

[144] The respondents argue in their factum that a claim for punitive damages under s. 272 *C.P.A.*, like a claim for compensatory damages, is admissible only if one of the contractual remedies provided for in s. 272(*a*) to (*f*) is awarded at the same time (R.F., at para. 91). They submit that the trial judge erred in ordering them to pay punitive damages, because she had not awarded the appellant any of the remedies provided for in s. 272(*a*) to (*f*) *C.P.A.* In our opinion, the respondents' argument is wrong in law and must fail.

[142] La juge de première instance a reconnu que la faute des intimées a causé des dommages moraux à l'appelant. Elle lui a octroyé 1 000 $ à titre de compensation. Devant notre Cour, les intimées n'ont pas démontré qu'elle avait erré dans son appréciation de la preuve ou dans l'application des principes juridiques, à l'égard tant de leur responsabilité que du quantum des dommages. Aucune raison ne justifierait une intervention de notre Cour à l'égard de ces conclusions. Pour cette raison, l'appel sera accueilli afin de rétablir ce volet du jugement de première instance.

E. *La juge de première instance a-t-elle erré en accordant des dommages-intérêts punitifs à l'appelant?*

[143] Dans cette partie de nos motifs, nous devons préciser les principes de droit et les critères relatifs à la recevabilité d'un recours en dommages-intérêts punitifs intenté en vertu de l'art. 272 *L.p.c.* et à la fixation du montant de ces dommages-intérêts. Ces questions de droit seront examinées sur la base des constatations de fait de la juge de première instance, comme il se doit, sauf au cas d'erreurs manifestes et dominantes dans leur appréciation (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 25 et 37; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401).

(1) Autonomie des dommages-intérêts punitifs

[144] Dans leur mémoire, les intimées plaident qu'une demande de dommages-intérêts punitifs fondée sur l'art. 272 *L.p.c.*, à l'instar d'une demande de dommages-intérêts compensatoires, n'est recevable que lorsqu'une mesure de réparation contractuelle prévue aux al. *a*) à *f*) de cet article est accordée de façon concomitante (m.i., par. 91). Les intimées soutiennent que la juge de première instance s'est trompée en les condamnant au paiement de dommages-intérêts punitifs, puisqu'elle n'avait accordé à l'appelant aucune des réparations prévues aux al. *a*) à *f*) de l'art. 272 *L.p.c.* À notre avis, la position des intimées est mal fondée en droit et doit être rejetée.

[145] First of all, as with compensatory damages, we must take account of the actual wording of s. 272 *C.P.A.*, which clearly states that consumers who exercise a recourse under that section "may also claim punitive damages". As we explained above, this confirms that the legislature intended to allow consumers who exercise a recourse under s. 272 *C.P.A.* to choose between a number of remedies capable of correcting the effects of the violation of the rights conferred on them by the Act. Consumers who exercise the recourse provided for in s. 272 *C.P.A.* can therefore *choose* to claim contractual remedies, compensatory damages and punitive damages or to claim just one of those remedies. It will then be up to the trial judge to award the remedies he or she considers appropriate in the circumstances.

[146] Moreover, our interpretation is consistent with the one adopted by this Court in *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64. In that case, the Court stated that s. 49, para. 2 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), creates an independent and distinct right to claim punitive damages. In its decision, the Court accepted (at para. 40) the opinion expressed by L'Heureux-Dubé J., dissenting in part, in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, at para. 62, that the words "in addition" in s. 49, para. 2 of the *Quebec Charter*

> simply mean that a court can not only award compensatory damages but can "in addition", or equally, as well, moreover, also (see the definition of "*en outre*" in *Le Grand Robert de la langue française* (1986), vol. 6), grant a request for exemplary damages. The latter type of damages is therefore not dependent on the former. [Emphasis in original.]

According to LeBel J. in *de Montigny*, "[t]he solution adopted by L'Heureux-Dubé J. seems in fact to be the appropriate one in cases where, as here, the imperative of preserving government compensation systems is not part of the legal context"

[145] En premier lieu, nous devons prendre en compte, comme dans le cas des dommages-intérêts compensatoires, le libellé même de l'art. 272 *L.p.c.* Celui-ci indique clairement que le consommateur qui se prévaut d'un recours sous son égide « peut également demander des dommages-intérêts punitifs ». Comme nous l'avons exposé plus haut, cette rédaction confirme que le législateur a voulu permettre au consommateur qui intente un recours en vertu de l'art. 272 *L.p.c.* de choisir entre un ensemble de mesures réparatrices destinées à corriger les effets de la violation des droits que lui accorde la loi. Ainsi, le consommateur qui exerce un recours prévu par l'art. 272 *L.p.c.* a le *choix* de demander à la fois des réparations contractuelles, des dommages-intérêts compensatoires et des dommages-intérêts punitifs ou, au contraire, de ne réclamer que l'une de ces mesures. Il appartiendra ensuite au juge de première instance d'accorder les réparations qu'il estimera appropriées dans les circonstances.

[146] De plus, notre interprétation concorde avec celle que notre Cour a adoptée dans l'arrêt *de Montigny c. Brossard (Succession)*, 2010 CSC 51, [2010] 3 R.C.S. 64. Dans cet arrêt, la Cour a affirmé que l'art. 49, al. 2 de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12 (« *Charte québécoise* »), créait un droit autonome et distinct de demander des dommages-intérêts punitifs. À cette occasion, la Cour a accepté (au par. 40) l'opinion de la juge L'Heureux-Dubé, dissidente en partie dans l'arrêt *Béliveau St-Jacques c. Fédération des employées et employés de services publics inc.*, [1996] 2 R.C.S. 345, par. 62, selon laquelle la locution « en outre » de l'art. 49, al. 2 de la *Charte québécoise*

> veut simplement dire que le tribunal peut non seulement accorder des dommages compensatoires, mais « en outre », soit également, en plus de cela, de surcroît, d'autre part, aussi (voir *Le Grand Robert de la langue française* (1986), t. 6), faire droit à une demande de dommages exemplaires. Les seconds ne dépendent donc pas des premiers. [Souligné dans l'original.]

De l'avis du juge LeBel dans l'arrêt *de Montigny*, « [l]a solution retenue par la juge L'Heureux-Dubé semble effectivement celle qui s'impose dans les cas où, comme en l'espèce, l'impératif de préservation des régimes étatiques d'indemnisation est

(para. 42). These comments are also applicable in the instant case.

[147] Consumers can be awarded punitive damages under s. 272 *C.P.A.* even if they are not awarded contractual remedies or compensatory damages at the same time. This means that there was nothing to prevent the trial judge from ordering the respondents to pay punitive damages.

(2) General Criteria for Awarding Punitive Damages

(a) *Heterogeneous Nature of the Criteria in Quebec Civil Law*

[148] The respondents argue that, even if this Court finds that the appellant has the legal interest required to claim punitive damages, such damages cannot be awarded on the facts of this case. The respondents urge the Court to accept that an award of punitive damages under s. 272 *C.P.A.* is appropriate only if the conduct of the merchant or manufacturer was in bad faith or malicious (R.F., at para. 133). They rely in this regard on this Court's reasons in several decisions rendered in cases concerning the common law: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, and *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. In our opinion, this argument is wrong and must fail.

[149] To begin with, the decisions of this Court upon which the respondents rely were rendered in tort cases at common law. But the conditions for claiming punitive damages are approached very differently in Quebec civil law and at common law. At common law, punitive damages can be awarded in any civil suit in which the plaintiff proves that the defendant's conduct was "malicious, oppressive and high-handed [such] that it offends the court's sense of decency": *Hill*, at para. 196. The requirement that the plaintiff demonstrate misconduct that represents a marked departure from ordinary

absent du contexte juridique » (par. 42). Ces propos sont tout aussi applicables en l'instance.

[147] Le consommateur qui invoque l'art. 272 *L.p.c.* peut obtenir des dommages-intérêts punitifs, même si on ne lui a pas accordé en même temps une réparation contractuelle ou des dommages-intérêts compensatoires. Rien n'empêchait donc la juge de première instance de condamner les intimées à verser des dommages-intérêts punitifs.

(2) Critères encadrant l'octroi de dommages-intérêts punitifs de façon générale

a) *L'hétérogénéité des critères d'octroi en droit civil québécois*

[148] Les intimées soutiennent que, même si notre Cour reconnaissait que l'appelant avait l'intérêt juridique pour demander des dommages-intérêts punitifs en l'instance, les faits de cette affaire ne permettent pas de lui en accorder. En effet, les intimées nous invitent à retenir le critère selon lequel l'attribution des dommages-intérêts punitifs en vertu de l'art. 272 *L.p.c.* n'est appropriée que lorsque la conduite du commerçant ou fabricant est empreinte de mauvaise foi ou de malice (m.i., par. 133). Elles s'appuient à cet égard sur les motifs de notre Cour dans plusieurs arrêts prononcés dans des affaires de common law, *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, *Vorvis c. Insurance Corporation of British Columbia*, [1989] 1 R.C.S. 1085, et *Whiten c. Pilot Insurance Co.*, 2002 CSC 18, [2002] 1 R.C.S. 595. À notre avis, cet argument est mal fondé et doit être rejeté.

[149] En premier lieu, les arrêts de notre Cour invoqués par les intimées ont été rendus en matière de responsabilité civile de common law. Or, les approches adoptées en droit civil québécois et en common law au sujet des conditions d'ouverture d'une demande de dommages-intérêts punitifs divergent grandement. En effet, la common law prévoit que les dommages-intérêts punitifs peuvent être octroyés dans le cadre de toute poursuite civile où la partie demanderesse prouve que la partie défenderesse a fait montre d'une conduite « malveillante, opprimante et abusive [qui] choque

standards of decency ensures that punitive damages will be awarded only in exceptional cases (*Whiten*, at para. 36).

[150] In Quebec civil law, this test has not been adopted in its entirety. Punitive damages are an exceptional remedy in the civil law, too. Article 1621 *C.C.Q.* provides that they can be awarded only where this is provided for by law. The *Civil Code of Québec* does not create a general scheme for awarding punitive damages and does not establish a right to this remedy in all circumstances :

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

As a result, [TRANSLATION] "punitive damages must be denied where there is no enabling enactment" (J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, *Principes généraux*, at para. 1-364; see also *Béliveau St-Jacques*, at para. 20). The Quebec legislature thus intended to leave it to specific statutes to identify situations in which punitive damages can be awarded and, in some cases, establish the requirements for awarding them or rules for calculating them. Article 1621 *C.C.Q.* plays only a suppletive role by establishing a general principle for awarding such damages and by identifying their purpose.

[151] The legislature has thus retained greater flexibility in structuring specific schemes for awarding punitive damages. A review of Quebec legislation containing provisions that authorize awards of punitive damages confirms the flexibility and variability of the rules applicable to such damages in Quebec law. On the one hand, the enabling provisions take a variety of forms. Not all of them require proof that the act was malicious, oppressive or high-handed, which is required at all times at common law. For example, a violation of s. 1 of the *Tree Protection Act*, R.S.Q., c. P-37,

le sens de dignité de la cour » : *Hill*, par. 196. L'obligation de démontrer une conduite répréhensible représentant un écart marqué par rapport aux normes ordinaires en matière de comportement acceptable assure le caractère exceptionnel de l'octroi de cette forme de dommages-intérêts (*Whiten*, par. 36).

[150] Le droit civil québécois n'adopte pas globalement ce critère. En droit civil, les dommages-intérêts punitifs conservent un caractère exceptionnel. En effet, l'art. 1621 *C.c.Q.* dispose qu'ils ne peuvent être accordés que lorsque la loi le prévoit. Le *Code civil du Québec* ne crée pas un régime général d'attribution de dommages-intérêts punitifs et n'accorde pas un droit à cette réparation en toutes circonstances :

1621. Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.

En conséquence, « en l'absence d'un texte habilitant, les dommages punitifs doivent être refusés » (J.-L. Baudouin et P. Deslauriers, *La responsabilité civile* (7e éd. 2007), vol. I, *Principes généraux*, par. 1-364; voir aussi *Béliveau St-Jacques*, par. 20). Le législateur québécois a donc voulu s'en remettre aux textes des lois particulières qui déterminent les cas où des dommages-intérêts punitifs pourront être accordés et qui, parfois, déterminent les conditions de leur attribution ou leur calcul. L'article 1621 *C.c.Q.* n'intervient qu'à titre supplétif pour établir un principe général d'évaluation des dommages-intérêts et pour identifier leur fonction.

[151] Le législateur se laisse ainsi un degré plus important de flexibilité dans l'aménagement des régimes particuliers d'attribution des dommages-intérêts punitifs. Une analyse de lois québécoises qui contiennent des dispositions autorisant l'octroi de dommages-intérêts punitifs confirme la flexibilité et la variabilité du régime juridique des dommages-intérêts punitifs en droit québécois. D'une part, les dispositions habilitantes sont rédigées de manière variée. Elles n'exigent pas toutes la preuve du caractère malveillant, opprimant ou abusif de l'acte accompli, que requiert en tout

automatically entails the payment of punitive damages. As well, art. 1899 *C.C.Q.*, s. 56 of the *Act respecting prearranged funeral services and sepultures*, R.S.Q., c. A-23.001, and, of particular relevance in this appeal, s. 272 of the *C.P.A.* do not explicitly require malicious or high-handed conduct.

[152] On the other hand, the legislature does sometimes provide that malicious conduct or intentional fault must be proven in order to obtain punitive damages. Some examples are (1) s. 49 of the *Quebec Charter* (unlawful and intentional interference); (2) s. 167 of the *Act respecting access to documents held by public bodies and the protection of personal information*, R.S.Q., c. A-2.1 (gross neglect or intentional infringement); (3) arts. 1968 and 1902 *C.C.Q.* (bad faith or harassment); and (4) s. 67 of the *Petroleum Products Act*, R.S.Q., c. P-30.01 (abusive and unreasonable business practice). If the *Hill* test were applicable by default in Quebec civil law as proposed by the respondents (R.F., at paras. 133-36), it would be very difficult to explain the legislature's decision to insert the equivalent of that test into various statutes.

[153] Thus, unlike in the common law, there is no unified scheme for awarding punitive damages in Quebec civil law. Moreover, it cannot be argued that there is a traditional rule in Quebec civil law to the effect that only malicious misconduct can result in an award of such damages.

(b) *Factors to Consider in Developing Criteria for Awarding Punitive Damages*

[154] In this legislative context, in view of the silence of the Act, the criteria for awarding punitive damages must be established by taking account of the general objectives of punitive damages and those of the legislation in question.

temps la common law. Par exemple, une violation de l'art. 1 de la *Loi sur la protection des arbres*, L.R.Q., ch. P-37, entraîne automatiquement une condamnation à des dommages-intérêts punitifs. De même, l'art. 1899 *C.c.Q.*, l'art. 56 de la *Loi sur les arrangements préalables de services funéraires et de sépulture*, L.R.Q., ch. A-23.001, et, d'une pertinence particulière dans le présent pourvoi, l'art. 272 de la *L.p.c.*, n'exigent pas de manière explicite la présence d'une conduite malveillante ou abusive.

[152] Par contre, le législateur a parfois prévu que la preuve d'une conduite malveillante ou d'une faute intentionnelle était nécessaire pour obtenir des dommages-intérêts punitifs. Prenons à titre d'exemple (1) l'art. 49 de la *Charte québécoise* (atteinte illicite et intentionnelle), (2) l'art. 167 de la *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, L.R.Q., ch. A-2.1 (faute lourde ou atteinte intentionnelle), (3) les art. 1968 et 1902 *C.c.Q.* (mauvaise foi ou harcèlement), et (4) l'art. 67 de la *Loi sur les produits pétroliers*, L.R.Q., ch. P-30.01 (pratique commerciale excessive et déraisonnable). Si le critère de l'arrêt *Hill* était applicable par défaut en droit civil québécois, comme le proposent les intimées (m.i., par. 133-136), la décision du législateur d'en insérer l'équivalent dans diverses lois s'expliquerait fort mal.

[153] Ainsi, contrairement à la common law, le régime des dommages-intérêts punitifs en droit civil québécois n'a pas été unifié. De plus, on ne saurait prétendre qu'il existe en droit civil québécois une règle traditionnelle selon laquelle seule une conduite malveillante et répréhensible permet l'octroi de ce type de dommages-intérêts.

b) *Éléments à considérer dans l'élaboration des critères d'octroi de dommages-intérêts punitifs*

[154] Dans ce contexte législatif, devant le silence de la loi, la détermination des critères d'octroi de dommages-intérêts punitifs doit prendre en compte les objectifs généraux des dommages-intérêts punitifs et ceux de la loi en cause.

[155] Article 1621 *C.C.Q.* itself requires that the general objectives of punitive damages be taken into account. It indicates that punitive damages are essentially preventive. Under it, the ultimate objective of an award of punitive damages must always be to prevent the repetition of undesirable conduct. This Court has held that the preventive purpose of punitive damages is fulfilled if such damages are awarded where an individual has engaged in conduct the repetition of which must be prevented, or that must be denounced, in the specific circumstances of the case in question (*Béliveau St-Jacques*, at paras. 21 and 126; *de Montigny*, at para. 53). Where a court chooses to punish a wrongdoer for misconduct, its decision indicates to the wrongdoer that he or she will face consequences both for that instance of misconduct and for any repetition of it. An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct both by the wrongdoer and in society. The award thus serves the purpose of specific and general deterrence. In addition, the principle of denunciation may justify an award where the trier of fact wants to emphasize that the act is particularly reprehensible in the opinion of the justice system. This denunciatory function also helps ensure that the preventive purpose of punitive damages is fulfilled effectively.

[156] The need to also consider the objectives of the legislation in question is justified by the fact that the right to seek punitive damages in Quebec civil law always depends on a specific legislative provision. As well, punitive damages in their current form are not intended to sanction generally every act prohibited by law. Rather, their purpose is to protect the integrity of a legislative scheme by sanctioning any act that is incompatible with the objectives the legislature was pursuing in enacting the statute in question. The types of conduct whose repetition needs to be prevented and the legislature's objectives are determined on the basis of the statute under which a sanction is sought.

[155] L'article 1621 *C.c.Q.* impose lui-même la prise en compte des objectifs généraux des dommages-intérêts punitifs. En effet, la rédaction de cette disposition confère aux dommages-intérêts punitifs une fonction essentiellement préventive. Suivant cet article, l'octroi de dommages-intérêts punitifs doit toujours conserver pour objectif ultime la prévention de la récidive de comportements non souhaitables. Notre Cour a reconnu que cette fonction préventive est remplie par l'octroi de dommages-intérêts punitifs dans des situations où un individu a adopté un comportement dont il faut prévenir la répétition ou qu'il faut dénoncer, dans les circonstances précises d'une affaire donnée (*Béliveau St-Jacques*, par. 21 et 126; *de Montigny*, par. 53). Lorsque le tribunal choisit de punir, sa décision indique à l'auteur de la faute que son comportement et la répétition de celui-ci auront des conséquences pour lui. Une condamnation à des dommages-intérêts punitifs est fondée d'abord sur le principe de la dissuasion et vise à décourager la répétition d'un comportement semblable, autant par l'individu fautif que dans la société. La condamnation joue ainsi un rôle de dissuasion particulière et générale. Par ailleurs, le principe de la dénonciation peut aussi justifier une condamnation lorsque le juge des faits désire souligner le caractère particulièrement répréhensible de l'acte dans l'opinion de la justice. Cette fonction de dénonciation contribue elle-même à l'efficacité du rôle préventif des dommages-intérêts punitifs.

[156] La nécessité de prendre également en compte les objectifs de la législation en cause se justifie par le fait que le droit à des dommages-intérêts punitifs en droit civil québécois dépend toujours d'une disposition législative précise. De plus, dans leurs manifestations actuelles, les dommages-intérêts punitifs n'ont pas pour but de punir généralement tout comportement interdit par la loi. Leur fonction consiste plutôt à protéger l'intégrité d'un régime législatif en sanctionnant toute action incompatible avec les objectifs poursuivis par le législateur dans la loi en question. La détermination des types de conduite dont il importe de prévenir la récidive et des objectifs du législateur s'effectue à partir de la loi en vertu de laquelle une sanction est demandée.

[157] In practice, to discharge its obligation to take the above-mentioned objectives into account, the court must identify the types of conduct that are incompatible with the objectives the legislature was pursuing in enacting the statute in question and that interfere with the achievement of those objectives. Punitive damages can be awarded only for those types of conduct.

(3) Criteria for Awarding Punitive Damages Under Section 272 *C.P.A.*

[158] Under s. 272 *C.P.A.*, punitive damages can be sought only if it is proved that an obligation resulting from the Act has not been fulfilled. However, s. 272 establishes no criteria or rules for awarding such damages. It is thus necessary to refer to art. 1621 *C.C.Q.* and determine what criteria for awarding punitive damages would suffice to enable s. 272 *C.P.A.* to fulfil its function.

[159] The objectives of the Act must therefore be identified to ensure that punitive damages will indeed meet the objectives of art. 1621 *C.C.Q.*

(a) *Objectives of the C.P.A.*

[160] The *C.P.A.*'s first objective is to restore the balance in the contractual relationship between merchants and consumers (Roy, at p. 466; L'Heureux and Lacoursière, at pp. 25-26). This rebalancing is necessary because the bargaining power of consumers is weaker than that of merchants both when they enter into contracts and when problems arise in the course of their contractual relationships. It is also necessary because of the risk of informational vulnerability consumers face at every step in their relations with merchants. In sum, the obligations imposed on merchants and the formal requirements for contracts to which the Act applies are intended to restore the balance between the respective contractual powers of merchants and consumers (L'Heureux and Lacoursière, at pp. 26-31).

[157] En pratique, pour s'acquitter de son obligation de prendre en compte les objectifs susmentionnés, le tribunal devra identifier les types de comportements qui sont incompatibles avec les objectifs poursuivis par le législateur dans la loi en cause et dont la perpétration nuit à leur réalisation. L'octroi de dommages-intérêts punitifs ne peut viser que ces types de comportements.

(3) Les critères d'octroi de dommages-intérêts punitifs en vertu de l'art. 272 *L.p.c.*

[158] Selon l'art. 272 *L.p.c.*, la preuve d'une contravention aux obligations découlant de la loi est nécessaire pour donner ouverture à une demande de dommages-intérêts punitifs. Cependant, l'art. 272 n'établit aucun critère ou règle encadrant l'attribution de ces dommages-intérêts. Il faut donc s'en rapporter aux dispositions de l'art. 1621 *C.c.Q.* et déterminer quels critères d'attribution de ces dommages-intérêts permettraient à l'art. 272 *L.p.c.* de remplir sa fonction.

[159] L'identification des objectifs de la loi devient alors nécessaire pour s'assurer que les dommages-intérêts punitifs rempliront bien les fonctions prévues dans l'art. 1621 *C.c.Q.*

a) *Les objectifs de la L.p.c.*

[160] Le premier objectif de la *L.p.c.* est le rétablissement d'un équilibre dans les relations contractuelles entre les commerçants et le consommateur (Roy, p. 466; L'Heureux et Lacoursière, p. 25-26). La nécessité de ce rééquilibrage découle de la faiblesse du pouvoir de négociation du consommateur face aux commerçants, autant lors de la conclusion d'un contrat qu'au moment du règlement de problèmes survenant au cours de leurs relations contractuelles. Elle découle également du risque de vulnérabilité informationnelle auquel est exposé le consommateur à toutes les étapes de ses rapports avec des commerçants. En somme, les obligations imposées aux commerçants et le formalisme des contrats régis par la loi visent à établir un équilibre contractuel entre les commerçants et le consommateur (L'Heureux et Lacoursière, p. 26-31).

[161] The *C.P.A.*'s second objective is to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices (L'Heureux and Lacoursière, at pp. 479 *et seq.*). Most of the measures imposed by the legislature to achieve this objective are found in Title II of the *C.P.A.*, which we discussed above.

[162] The legislature's intention in pursuing these two objectives is to secure the existence of an efficient market in which consumers can participate confidently.

(b) *Differences of Opinion Among Judges About the Criteria for Awarding Punitive Damages Under the C.P.A.*

[163] The criteria to be applied in awarding punitive damages under the *C.P.A.* are not at all clear from the decisions of the Quebec courts. Sharply conflicting positions can be found both in the case law and in the academic literature. We will discuss these positions before proposing a test for implementing the recourse in punitive damages.

[164] According to one of these positions, proof of conduct that is intentional or in bad faith, or of gross fault or similar behaviour, is necessary. The Quebec Court of Appeal has rejected this approach for more than a decade now (see *Lambert v. Minerve Canada, compagnie de transport aérien inc.*, [1998] R.J.Q. 1740 (C.A.), and, more recently, *Brault & Martineau* (C.A.), at para. 44). However, it would seem that some judges have nevertheless continued to require such proof (see, e.g., *Lafontaine v. La Source d'eau Val-d'Or inc.*, 2001 CanLII 10566 (C.Q.), at paras. 50-51; *Jabraian v. Trévi Fabrication Inc.*, 2005 CanLII 10580 (C.Q.), at para. 31; *Santangeli v. 154995 Canada Inc.*, 2005 CanLII 32103 (C.Q.), at paras. 34-35; *Martin v. Rénovations métropolitaines (Québec) ltée*, 2006 QCCQ 1760 (CanLII), at para. 75; *Darveau v. 9034-9770 Québec inc.*, 2005 CanLII 41136 (C.Q.), at para. 123).

[161] La *L.p.c.* possède comme second objectif l'élimination des pratiques déloyales et trompeuses susceptibles de fausser l'information dont dispose le consommateur et de l'empêcher de faire des choix éclairés (L'Heureux et Lacoursière, p. 479 et suiv.). Les mesures imposées par le législateur pour atteindre cet objectif se retrouvent, pour la majorité, au titre II de la *L.p.c.*, dont nous avons discuté plus haut.

[162] Par la réalisation de ces deux objectifs, le législateur cherche à sauvegarder l'existence d'un marché efficient où le consommateur peut intervenir avec confiance.

b) *Les divergences jurisprudentielles au sujet des critères d'octroi de dommages-intérêts punitifs sous le régime de la L.p.c.*

[163] L'examen de la jurisprudence québécoise laisse un degré significatif d'incertitude au sujet des critères qui devraient gouverner l'attribution de dommages-intérêts punitifs sous le régime de la *L.p.c.* Nous avons noté la présence de courants jurisprudentiels et doctrinaux nettement divergents. Nous les passerons en revue avant de proposer un critère de mise en œuvre du recours en dommages-intérêts punitifs.

[164] Un premier courant exige la démonstration d'une conduite intentionnelle ou empreinte de mauvaise foi ou encore la preuve d'une faute lourde ou de comportements similaires. La Cour d'appel du Québec a rejeté cette approche depuis déjà plus d'une décennie (voir *Lambert c. Minerve Canada, compagnie de transport aérien inc.*, [1998] R.J.Q. 1740 (C.A.), et plus récemment *Brault & Martineau* (C.A.), par. 44). Cependant, il semblerait que certains décideurs continuent à imposer ce fardeau de preuve (voir, p. ex., *Lafontaine c. La Source d'eau Val-d'Or inc.*, 2001 CanLII 10566 (C.Q.), par. 50-51; *Jabraian c. Trévi Fabrication Inc.*, 2005 CanLII 10580 (C.Q.), par. 31; *Santangeli c. 154995 Canada Inc.*, 2005 CanLII 32103 (C.Q.), par. 34-35; *Martin c. Rénovations métropolitaines (Québec) ltée*, 2006 QCCQ 1760 (CanLII), par. 75; *Darveau c. 9034-9770 Québec inc.*, 2005 CanLII 41136 (C.Q.), par. 123).

[165] This position is inconsistent with the objectives of the *C.P.A.* The burden of proof it imposes would not contribute to changing the conduct of merchants and manufacturers. This interpretation of the Act would not encourage merchants and manufacturers to fulfil the obligations imposed on them by the *C.P.A.* Instead, it might suggest to them that they do not have to worry about complying with the Act as long as their violations are not particularly serious. L'Heureux and Lacoursière note that the requirement of bad faith could sterilize the implementation of the Act, so they propose a test based on conduct [TRANSLATION] "that goes beyond what is normal" (p. 630).

[166] According to the second position, a finding that an obligation imposed by the *C.P.A.* has not been fulfilled is in itself sufficient to justify an award of punitive damages. Duval Hesler J.A. (as she then was) took this position in *Brault & Martineau* (C.A.):

> [TRANSLATION] In my opinion, and at the risk of repeating myself, the existence of an unlawful business practice, such as advertising that does not meet the requirements of the CPA, in itself justifies an award of punitive damages. [Emphasis added; para. 45.]

[167] This position lies at the other end of the spectrum of solutions contemplated by the courts. Such a strict, if not automatic, application of s. 272 *C.P.A.* is not necessary to achieve the legislature's objectives.

[168] It is true that consumers should be encouraged to enforce their rights under the *C.P.A.* This does not necessarily mean that court proceedings must always be instituted for this purpose or that informal methods of dispute resolution cannot be considered first. It seems to us that the commencement of proceedings implies the failure of attempts by a consumer and a merchant or manufacturer to resolve their disagreement informally. The rule advocated by Duval Hesler J.A. would make an informal resolution less appealing and would encourage the indiscriminate judicialization of disputes that might have been resolved differently. Punitive damages would then be awarded in circumstances in which doing so would serve none

[165] Ce courant ne respecte pas les objectifs de la *L.p.c.* Le fardeau de preuve qu'il impose ne permettrait pas de modifier le comportement des commerçants et fabricants. Cette interprétation de la loi ne les inciterait pas à respecter les obligations que leur impose la *L.p.c.* Elle les inviterait plutôt à penser qu'ils n'ont pas à se préoccuper de respecter la loi, tant que leur violation n'atteint pas un degré élevé de gravité. Les auteurs L'Heureux et Lacoursière soulignent d'ailleurs que l'exigence de la mauvaise foi risque de stériliser la mise en œuvre de la loi. Ils proposent alors un critère de conduite « qui excède les frontières de la normalité » (p. 630).

[166] Selon le deuxième courant jurisprudentiel, le simple constat d'un manquement à une obligation imposée par la *L.p.c.* justifierait en lui-même l'octroi de dommages-intérêts punitifs. La juge Duval Hesler (maintenant juge en chef) a adopté cette position dans l'arrêt *Brault & Martineau* (C.A.) :

> À mon avis, et au risque de me répéter, l'existence d'une pratique commerciale illégale, telle la publicité qui ne satisfait pas aux exigences de la LPC, justifie à elle seule l'attribution de dommages punitifs. [Nous soulignons; par. 45.]

[167] Cette position se situe à l'autre extrême du spectre des solutions envisagées par la jurisprudence. Une application aussi stricte, sinon automatique, de l'art. 272 *L.p.c.* n'est pas nécessaire pour atteindre les objectifs poursuivis par le législateur.

[168] Il est vrai qu'il convient d'encourager le consommateur à faire respecter les droits que lui confère la *L.p.c.* Cette préoccupation ne signifie pas inéluctablement que la mise en œuvre de ces droits se réalise toujours par la voie de poursuites judiciaires et que des efforts de résolution informelle ne puissent être envisagés préalablement. L'institution d'une poursuite suppose, il nous semble, l'échec d'efforts de règlement informel du différend entre le consommateur et le commerçant ou fabricant. La règle préconisée par la juge Duval Hesler réduit l'attrait d'une telle résolution et encouragerait la judiciarisation aveugle de différends qui auraient pu se régler autrement. On imposerait alors des condamnations à des dommages-intérêts

of the objectives of the *C.P.A.* or of punitive damages generally.

[169] According to a third position, an award of punitive damages is justified where there is proof of a certain carelessness by a merchant or manufacturer with respect to the Act and the conduct it is supposed to prevent. As we shall see, however, the exact level of carelessness required to satisfy this test has been defined in various, inconsistent ways by authors and judges.

[170] The carelessness test is stated in its most basic form by Professor Masse:

[TRANSLATION] For [punitive damages] to be awarded, therefore, it is sufficient that the merchant display carelessness with respect to the Act and the conduct it is supposed to prevent. [p. 1000]

[171] Quebec courts have adopted Professor Masse's opinion in several judgments: *Marcotte v. Fédération des caisses Desjardins du Québec*, at para. 724; *Gastonguay v. Entreprises D. L. Paysagiste*, 2004 CanLII 31925 (C.Q.), at paras. 77-79; and *Mathurin v. 3086-9069 Québec Inc.*, 2003 CanLII 19131 (Que. Sup. Ct.), at para. 18.

[172] In *Systèmes Techno-Pompes inc. v. Tremblay*, 2006 QCCA 987, [2006] R.J.Q. 1791, the Quebec Court of Appeal opted for a test of carelessness that is serious enough to justify an award of punitive damages:

[TRANSLATION] Finally, the most important aspect of exemplary damages is the prevention of similar conduct. Before awarding such damages, a court must assess the merchant's conduct to determine whether it displays carelessness with respect to the consumer's rights that is serious enough to justify imposing an additional sanction in order to prevent the conduct from being repeated.

It was this last objective of punishment and deterrence that the trial judge adopted as a basis for awarding exemplary damages. It can hardly be concluded that the appellant displayed malice and carelessness that

punitifs dans des circonstances où leur octroi ne servirait aucun des objectifs de la *L.p.c.* ni de ceux des dommages-intérêts punitifs de façon générale.

[169] Selon un troisième courant, la preuve d'une certaine mesure d'insouciance de la part du commerçant ou fabricant face à la loi et au comportement qu'elle cherche à réprimer justifierait une condamnation à des dommages-intérêts punitifs. Cependant, comme nous le verrons, la mesure exacte d'insouciance requise pour satisfaire à ce critère, selon les auteurs et les tribunaux, est variable et inconstante.

[170] Ce critère de l'insouciance est énoncé dans sa forme la plus élémentaire par le professeur Masse :

Il suffit donc que la conduite du commerçant démontre une insouciance face à la loi et aux comportements que la loi cherche à réprimer pour que [des dommages-intérêts punitifs] soient accordés. [p. 1000]

[171] Les tribunaux québécois ont adopté l'opinion exprimée par le professeur Masse dans plusieurs jugements : *Marcotte c. Fédération des caisses Desjardins du Québec*, par. 724; *Gastonguay c. Entreprises D. L. Paysagiste*, 2004 CanLII 31925 (C.Q.), par. 77-79; *Mathurin c. 3086-9069 Québec Inc.*, 2003 CanLII 19131 (C.S. Qué.), par. 18.

[172] La Cour d'appel du Québec a opté pour un critère d'insouciance assez sérieuse pour justifier l'octroi de dommages-intérêts punitifs, dans l'arrêt *Systèmes Techno-Pompes inc. c. Tremblay*, 2006 QCCA 987, [2006] R.J.Q. 1791 :

Enfin, l'aspect le plus important des dommages-intérêts exemplaires consiste à prévenir des comportements semblables. Avant d'octroyer de tels dommages, le tribunal doit apprécier la conduite du commerçant afin de déterminer si elle manifeste une insouciance des droits du consommateur d'une manière assez sérieuse pour justifier une sanction supplémentaire et pour prévenir la récidive.

C'est ce dernier objectif de châtiment et de dissuasion qu'a retenu la juge de première instance pour accorder des dommages exemplaires. On peut difficilement conclure que l'appelante a manifesté une malveillance

were serious enough to justify an additional sanction. [Emphasis added; paras. 33-34.]

[173] Similarly, in *Champagne v. Toitures Couture et Associés inc.*, [2002] R.J.Q. 2863, Poulin J. of the Quebec Superior Court denied an award of punitive damages on the basis that there was little risk of the defendant acting carelessly again with respect to the application of the Act (para. 79).

[174] According to the Court of Appeal in *Systèmes Techno-Pompes inc.* and the Superior Court in *Champagne*, a violation of the *C.P.A.* that results from mere carelessness by a merchant will not as a general rule suffice to justify an award of punitive damages. Although we accept this proposition in principle, it is our opinion that the decision to award punitive damages should also not be based solely on the seriousness of the carelessness displayed at the time of the violation. That would encourage merchants and manufacturers to be imaginative in not fulfilling their obligations under the *C.P.A.* rather than to be diligent in fulfilling them. As we will explain below, our position is that the seriousness of the carelessness must be considered in the context of the merchant's conduct both before and after the violation. At this point, we will look more specifically at the types of conduct other than carelessness that are covered by the recourse in punitive damages provided for in s. 272 *C.P.A.*

(c) *Criteria for Awarding Punitive Damages*

[175] In establishing the criteria for awarding punitive damages under s. 272 *C.P.A.*, it must be borne in mind that the *C.P.A.* is a statute of public order. No consumer may waive in advance his or her rights under the Act (s. 262 *C.P.A.*), nor may any merchant or manufacturer derogate from the Act, except to offer more advantageous warranties (s. 261 *C.P.A.*). The provisions on prohibited practices are also of public order (L'Heureux and Lacoursière, at pp. 443 *et seq.*).

et une insouciance assez sérieuses pour justifier une sanction supplémentaire. [Nous soulignons; par. 33-34.]

[173] De la même façon, dans *Champagne c. Toitures Couture et Associés inc.*, [2002] R.J.Q. 2863, la juge Poulin de la Cour supérieure du Québec a refusé d'octroyer des dommages-intérêts punitifs parce que les risques de répétition par la défenderesse d'un comportement insouciant face à l'application de la loi étaient minimes (par. 79).

[174] Selon la Cour d'appel, dans l'arrêt *Systèmes Techno-Pompes inc.*, et la Cour supérieure, dans l'affaire *Champagne*, une violation de la *L.p.c.* résultant de la simple insouciance du commerçant ne suffirait pas, en règle générale, pour justifier l'octroi de dommages-intérêts punitifs. Bien que nous acceptions en principe ce postulat, à notre avis, la décision d'octroyer des dommages-intérêts punitifs ne devrait pas non plus se baser seulement sur le niveau de gravité de l'insouciance au moment de la violation. En effet, on encouragerait alors les commerçants et les fabricants à faire preuve d'imagination dans l'inexécution de leurs obligations sous le régime de la *L.p.c.*, plutôt que de diligence dans l'exécution de celles-ci. Comme nous l'expliquerons plus bas, notre position veut que l'analyse du caractère sérieux de l'insouciance s'effectue dans le contexte du comportement du commerçant tant avant qu'après la violation. À cette occasion, nous examinerons de façon plus précise les types de comportements, autres que l'insouciance, que vise le recours en dommages-intérêts punitifs prévu à l'art. 272 *L.p.c.*

c) *Les critères d'octroi de dommages-intérêts punitifs*

[175] Dans la détermination des critères d'octroi de dommages-intérêts punitifs en vertu de l'art. 272 *L.p.c.*, il est important de rappeler que la *L.p.c.* est une loi d'ordre public. Le consommateur ne peut renoncer à l'avance aux droits que lui accorde la loi (art. 262 *L.p.c.*). Les commerçants et fabricants ne peuvent non plus y déroger, sauf pour offrir des garanties plus avantageuses (art. 261 *L.p.c.*). De même, les dispositions relatives aux pratiques interdites ont un caractère d'ordre public (L'Heureux et Lacoursière, p. 443 et suiv.).

[176] The fact that the consumer-merchant relationship is subject to rules of public order highlights the importance of those rules and the need for the courts to ensure that they are strictly applied. Therefore, merchants and manufacturers cannot be lax, passive or ignorant with respect to consumers' rights and to their own obligations under the *C.P.A.* On the contrary, the approach taken by the legislature suggests that they must be highly diligent in fulfilling their obligations. They must therefore make an effort to find out what obligations they have and take reasonable steps to fulfil them.

[176] L'assujettissement des relations consommateurs-commerçants à des règles d'ordre public met en évidence l'importance de ces dernières et la nécessité pour les tribunaux de veiller à leur application stricte. Les commerçants et fabricants ne peuvent donc adopter une attitude laxiste, passive ou ignorante à l'égard des droits du consommateur et des obligations que leur impose la *L.p.c.* Au contraire, l'approche adoptée par le législateur suggère qu'ils doivent faire preuve d'une grande diligence dans l'exécution de leurs obligations. Ils doivent donc manifester le souci de s'informer de leurs obligations et de mettre en place des mesures raisonnables pour en assurer le respect.

[177] In our opinion, therefore, the purpose of the *C.P.A.* is to prevent conduct on the part of merchants and manufacturers in which they display ignorance, carelessness or serious negligence with respect to consumers' rights and to the obligations they have to consumers under the *C.P.A.* Obviously, the recourse in punitive damages provided for in s. 272 *C.P.A.* also applies, for example, to acts that are intentional, malicious or vexatious.

[177] Ainsi, selon nous, la *L.p.c.* cherche à réprimer chez les commerçants et fabricants des comportements d'ignorance, d'insouciance ou de négligence sérieuse à l'égard des droits du consommateur et de leurs obligations envers lui sous le régime de la *L.p.c.* Évidemment, le recours en dommages-intérêts punitifs prévu à l'art. 272 *L.p.c.* s'applique aussi aux actes intentionnels, malveillants ou vexatoires, par exemple.

[178] The mere fact that a provision of the *C.P.A.* has been violated is not enough to justify an award of punitive damages, however. Thus, where a merchant realizes that an error has been made and tries diligently to solve the problems caused to the consumer, this should be taken into account. Neither the *C.P.A.* nor art. 1621 *C.C.Q.* requires a court to be inflexible or to ignore attempts by a merchant or manufacturer to correct a problem. A court that has to decide whether to award punitive damages should thus consider not only the merchant's conduct prior to the violation, but also how (if at all) the merchant's attitude toward the consumer, and toward consumers in general, changed after the violation. It is only by analysing the whole of the merchant's conduct that the court will be able to determine whether the imperatives of prevention justify an award of punitive damages in the case before it.

[178] Cependant, le simple fait d'une violation d'une disposition de la *L.p.c.* ne suffirait pas à justifier une condamnation à des dommages-intérêts punitifs. Par exemple, on devrait prendre en compte l'attitude du commerçant qui, constatant une erreur, aurait tenté avec diligence de régler les problèmes causés au consommateur. Ni la *L.p.c.*, ni l'art. 1621 *C.c.Q.* n'exigent une attitude rigoriste et aveugle devant les efforts d'un commerçant ou d'un fabricant pour corriger le problème survenu. Ainsi, le tribunal appelé à décider s'il y a lieu d'octroyer des dommages-intérêts punitifs devrait apprécier non seulement le comportement du commerçant avant la violation, mais également le changement (s'il en est) de son attitude envers le consommateur, et les consommateurs en général, après cette violation. Seule cette analyse globale du comportement du commerçant permettra au tribunal de déterminer si les impératifs de prévention justifient une condamnation à des dommages-intérêts punitifs dans une affaire donnée.

(d) *Summary of Principles*

[179] The principles applicable to the recourse in punitive damages under the *C.P.A.* can be summarized as follows:

- The current rule in Quebec civil law is that punitive damages may be awarded only if there is a legislative provision authorizing them;
- Once an enabling legislative provision has been identified, the court must first determine whether the plaintiff has the interest required to claim punitive damages under that provision;
- The court is bound by any criteria for awarding punitive damages established in the enabling provision;
- If the conditions for awarding punitive damages or the criteria for assessing them are not set out in the enabling statute, the court must consider the general provisions of art. 1621 *C.C.Q.* and the objectives of the enabling statute;
- For this purpose, the court must identify the conduct that is to be sanctioned to discourage its repetition, having regard to the general objectives of punitive damages under art. 1621 *C.C.Q.* and the objectives the legislature was pursuing in enacting the statute in question. The court must determine (1) whether the conduct is incompatible with the objectives the legislature was pursuing in enacting the statute and (2) whether it interferes with the achievement of those objectives.

[180] In the context of a claim for punitive damages under s. 272 *C.P.A.*, this analytical approach applies as follows:

- The punitive damages provided for in s. 272 *C.P.A.* must be awarded in accordance with art. 1621 *C.C.Q.* and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;

d) *Récapitulation des principes*

[179] Pour récapituler, les principes applicables au recours en dommages-intérêts punitifs sous le régime de la *L.p.c.* peuvent se résumer comme suit :

- Actuellement, le droit civil québécois ne permet l'octroi de dommages-intérêts punitifs que si une disposition législative le prévoit;
- Une fois une disposition législative habilitante identifiée, le tribunal doit en premier lieu décider si le demandeur possède l'intérêt requis pour demander des dommages-intérêts punitifs en vertu de cette disposition législative;
- Le tribunal est lié par les critères établis, le cas échéant, par la disposition législative habilitante à l'égard de l'attribution de dommages-intérêts punitifs;
- Si la loi habilitante ne prévoit pas les conditions d'attribution de dommages-intérêts punitifs ou les critères de leur évaluation, le tribunal doit prendre en compte les dispositions générales de l'art. 1621 *C.c.Q.* et les objectifs de la loi en cause;
- À cette fin, le tribunal doit identifier les comportements qui, eu égard aux objectifs généraux des dommages-intérêts punitifs selon l'art. 1621 *C.c.Q.* et aux objectifs du législateur dans la loi concernée, doivent être réprimés pour décourager leur récidive. Le tribunal doit déterminer s'il se trouve devant des comportements (1) qui sont incompatibles avec les objectifs poursuivis par le législateur dans la loi en cause et (2) dont la perpétration nuit à leur réalisation.

[180] Dans le cas d'une demande de dommages-intérêts punitifs fondée sur l'art. 272 *L.p.c.*, la méthode analytique ci-haut mentionnée s'applique comme suit :

- Les dommages-intérêts punitifs prévus par l'art. 272 *L.p.c.* seront octroyés en conformité avec l'art. 1621 *C.c.Q.*, dans un objectif de prévention pour décourager la répétition de comportements indésirables;

- Having regard to this objective and the objectives of the *C.P.A.*, violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the *C.P.A.* may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violation.

F. *Is the Appellant Entitled to Punitive Damages in This Case?*

[181] The trial judge found that the respondents had intentionally violated the *C.P.A.* in a calculated manner:

> The very same "conditional" wording which enabled Time to avoid the argument that a contract was formed or that it undertook unconditionally to pay $833,337 to Mr. Richard, illustrates the contention that this document was *specifically* designed to mislead the recipient, that it contains misleading and even false representations, contrary to the clear wording of [section] 219 of the *Consumer Protection Act* . . . . [Italics in original, underlining added; para. 34.]

[182] These findings contain no palpable and overriding errors. Accordingly, this Court would not be justified in changing them.

[183] These findings are fatal to the respondents' defence in the circumstances of this case. The violations in issue were intentional and calculated. Moreover, nothing in the evidence indicates that, after the appellant complained, the respondents took corrective action to make their advertising clear or consistent with the letter and spirit of the *C.P.A.* On the contrary, the evidence suggests that they rejected his entire claim and proposed nothing. An award of punitive damages was therefore justified.

[184] For these reasons, we would allow the appellant's recourse in respect of the claim for

- Compte tenu de cet objectif et des objectifs de la *L.p.c.*, les violations intentionnelles, malveillantes ou vexatoires, ainsi que la conduite marquée d'ignorance, d'insouciance ou de négligence sérieuse de la part des commerçants ou fabricants à l'égard de leurs obligations et des droits du consommateur sous le régime de la *L.p.c.* peuvent entraîner l'octroi de dommages-intérêts punitifs. Le tribunal doit toutefois étudier l'ensemble du comportement du commerçant lors de la violation et après celle-ci avant d'accorder des dommages-intérêts punitifs.

F. *L'appelant a-t-il droit à des dommages-intérêts punitifs en l'instance?*

[181] La juge de première instance a conclu que les intimées avaient commis une violation intentionnelle et calculée de la *L.p.c.* :

> [TRADUCTION] Le même emploi de la forme « conditionnelle », qui a permis à Time d'échapper à l'argument qu'un contrat était intervenu ou qu'elle s'était engagée à verser à M. Richard, sans condition, la somme de 833 337 $, illustre bien la prétention que ce document a été conçu *expressément* de manière à tromper son destinataire, qu'il contient des représentations trompeuses ou même fausses, et ce, en contravention du texte explicite de l'article 219 de la *Loi sur la protection du consommateur* . . . [En italique dans l'original, nous soulignons; par. 34.]

[182] Ces conclusions ne sont entachées d'aucune erreur manifeste et dominante. Il ne serait donc pas justifié que notre Cour les modifie.

[183] Ces conclusions sont fatales pour les intimées dans le contexte de la présente affaire. Les violations relevées sont intentionnelles et calculées. De plus, rien dans la preuve n'indique que les intimées ont pris des mesures correctives après la plainte de l'appelant afin de rendre leurs publicités claires ou conformes à la lettre et à l'esprit de la *L.p.c.* Au contraire, selon la preuve, elles ont rejeté sa réclamation en totalité et n'ont rien proposé. Une condamnation à des dommages-intérêts punitifs se justifiait donc.

[184] Pour ces raisons, nous sommes d'avis d'accueillir le recours de l'appelant à l'égard de sa

punitive damages. The appropriate quantum of damages remains to be determined.

G. *What is the Appropriate Quantum of Damages in This Case?*

[185] The trial judge fixed the quantum of the punitive damages payable by the respondents to the appellant at $100,000. The respondents challenge the fairness of this amount, arguing that the trial judge erred in several respects in determining the appropriate quantum of punitive damages. They submit that, if this Court upholds the trial judge's decision to award punitive damages, the quantum should be reduced significantly.

[186] More specifically, the respondents criticize the trial judge for (1) speculating about the number of violations of the *C.P.A.* they had committed; (2) taking what she perceived as a violation of the *Charter of the French language* into consideration in her assessment of the gravity of their conduct; and (3) making inferences about their patrimonial situation without a sufficient factual basis.

[187] Finally, according to the respondents, the trial judge's decision to fix the quantum of punitive damages at $100,000 was arbitrary. At paragraph 71 of her reasons, the trial judge stated that she had chosen that amount because it was the amount of the bonus prize the appellant had a chance to win in addition to the grand prize of US$833,337 if he validated his entry within five days after receiving the Document. The respondents seem to be arguing that it was irrational to fix the quantum at $100,000 in these circumstances.

(1) Role of Trial Courts

[188] This appeal highlights the problems trial judges face in calculating punitive damages. Although they have a discretion in this regard,

demande de dommages-intérêts punitifs. Il reste maintenant à déterminer le montant de dommages-intérêts approprié.

G. *Quel est le quantum approprié des dommages-intérêts dans la présente affaire?*

[185] La juge de première instance a fixé à 100 000 $ les dommages-intérêts punitifs payables par les intimées à l'appelant. Les intimées contestent la justesse de la somme accordée, alléguant que la juge de première instance a erré à plusieurs égards dans son processus de détermination du quantum approprié des dommages-intérêts punitifs. Elles plaident que, si notre Cour confirmait la décision de la juge de première instance d'accorder des dommages-intérêts punitifs, leur montant devrait être réduit substantiellement.

[186] Spécifiquement, les intimées reprochent à la juge de première instance d'avoir (1) spéculé sur le nombre de violations de la *L.p.c.* qu'elles auraient commises; (2) pris en compte ce qu'elle percevait comme une violation des dispositions de la *Charte de la langue française*, dans son évaluation de la gravité de leur conduite; et (3) tiré des inférences quant à leur situation patrimoniale sans assises factuelles suffisantes.

[187] Finalement, selon les intimées, la décision de la juge de première instance de retenir la somme de 100 000 $ comme quantum des dommages-intérêts punitifs était arbitraire. En effet, au par. 71 de ses motifs, la juge de première instance indique avoir choisi ce montant parce qu'il représenterait la somme additionnelle que l'appelant avait la chance de gagner en sus du gros lot de 833 337 $US, s'il validait son inscription à l'intérieur d'un délai de cinq jours après la réception du Document. Les intimées semblent prétendre qu'il était irrationnel de fixer les dommages-intérêts punitifs à ce montant de 100 000 $ dans ce contexte.

(1) Le rôle des tribunaux de première instance

[188] Le pourvoi souligne les difficultés que le calcul des dommages-intérêts punitifs présente pour le juge de première instance. Bien qu'il

they must exercise it judicially and must also, to the extent possible, comply with the practice established by the courts and consider all the specific circumstances of each case, bearing in mind the principles of deterrence, punishment and denunciation that underlie punitive damages.

[189] Since this task requires trial judges to examine the facts carefully, the Court of Appeal must show considerable deference before varying the quantum of damages. It must not set aside a trial judge's decision in respect of findings and inferences of fact related to the assessment of damages absent a palpable and overriding error (*Housen*, at paras. 1-6, 10 and 25; *H.L.*, at para. 53; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 129; *Landry v. Quesnel*, [2002] R.J.Q. 80 (C.A.), at para. 31; C. Dallaire, "La gestion d'une réclamation en dommages exemplaires: éléments essentiels à connaître quant à la nature et l'objectif de cette réparation, les éléments de procédure et de preuve incontournables ainsi que l'évaluation du quantum", in *Congrès annuel du Barreau du Québec (2007)*, at p. 168).

[190] It should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it (*St-Ferdinand*, at para. 125; *Whiten*, at para. 100). Appellate intervention will be warranted only where there has been an error of law or a wholly erroneous assessment of the quantum. An assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (*St-Ferdinand*, at para. 129; *Provigo Distribution inc. v. Supermarché A.R.G. inc.*, 1997 CanLII 10209 (Que. C.A.)). In our opinion, errors of this nature have been made in the case at bar,

possède une discrétion en cette matière, le juge doit l'exercer judiciairement et aussi, autant que possible, respecter la pratique déjà établie par la jurisprudence et prendre en considération l'ensemble des circonstances particulières de chaque cas, et ce, en conformité avec les principes de dissuasion, de punition et de dénonciation des dommages-intérêts punitifs.

[189] Puisque l'exécution de cette tâche impose au juge du procès un examen attentif des faits, la Cour d'appel doit faire preuve de beaucoup de retenue avant de modifier le quantum des dommages-intérêts. Elle ne doit pas infirmer la décision de première instance à propos de conclusions et inférences de fait relatives à la fixation de ces dommages-intérêts en l'absence d'une erreur manifeste et dominante (*Housen*, par. 1-6, 10 et 25; *H.L.*, par. 53; *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 R.C.S. 211, par. 129; *Landry c. Quesnel*, [2002] R.J.Q. 80 (C.A.), par. 31; C. Dallaire, « La gestion d'une réclamation en dommages exemplaires : éléments essentiels à connaître quant à la nature et l'objectif de cette réparation, les éléments de procédure et de preuve incontournables ainsi que l'évaluation du quantum », dans *Congrès annuel du Barreau du Québec (2007)*, p. 168).

[190] On doit se rappeler que le tribunal de première instance jouit d'une latitude dans la détermination du montant des dommages-intérêts punitifs, pourvu que la somme fixée demeure dans des limites rationnelles, eu égard aux circonstances précises d'une affaire donnée (*St-Ferdinand*, par. 125; *Whiten*, par. 100). Une intervention en appel ne se justifiera qu'en présence d'une erreur de droit ou d'une erreur sérieuse dans l'évaluation du montant. L'erreur d'évaluation sera jugée sérieuse lorsqu'il sera établi que le tribunal de première instance a exercé sa discrétion judiciaire d'une façon manifestement erronée, c.-à-d. lorsque le montant octroyé n'était pas rationnellement relié aux objectifs de l'attribution de dommages-intérêts punitifs dans l'affaire dont il était saisi (*St-Ferdinand*, par. 129; *Provigo Distribution inc. c. Supermarché A.R.G. inc.*, [1998] R.J.Q. 47 (C.A.)). À notre

and they warrant the intervention of this Court in assessing the quantum of punitive damages.

(2) Trial Judge's Assessment of the Quantum of Punitive Damages

[191] In her decision to award punitive damages, the trial judge began by noting that the respondents' fault was of considerable gravity, since they had sent false and misleading advertisements to thousands of French-speaking consumers in Quebec. The respondents sharply dispute this finding of fact by the trial judge. In their view, no evidence was adduced to support this finding, and the appropriate quantum of punitive damages should instead have been established on the assumption that only *one* advertisement was sent to only *one* consumer (R.F., at para. 109).

[192] This argument is untenable. William Miller, Director of Promotion Policy for the respondent Time Consumer Marketing Inc., himself testified that "[t]he sweepstakes are used to attract attention to our subscription promotions" (A.R., vol. II, at p. 4). He also explained in detail that Time Inc. had decided to send out direct mailings using several lists of names in order to increase subscriptions (A.R., vol. II, at p. 5). The mailings were personalized to attract the attention of consumers and invite them to subscribe to *Time* magazine (trial judgment, at para. 21; A.R., vol. II, at pp. 4 and 5). We infer from Mr. Miller's testimony that the distribution of such mailings was not only a common practice for the respondents but was also done on a large scale. In light of this evidence, although the trial judge did not have evidence that could indicate the precise number of mailings, her finding cannot be characterized as wholly erroneous. In our opinion, the gist of her finding was that the respondents had sent many mailings in Quebec to a large number of consumers. The evidence supporting this finding was something she could properly consider in analysing the gravity of the respondents' conduct in this case. The quantum of

avis, des erreurs de cette nature ont été commises en l'espèce et justifient l'intervention de notre Cour à l'égard du montant des dommages-intérêts punitifs.

(2) La fixation du montant des dommages-intérêts punitifs par la juge de première instance

[191] Dans sa décision d'accorder des dommages-intérêts punitifs, la juge de première instance a d'abord souligné que la faute des intimées était d'une gravité appréciable puisqu'elles avaient envoyé des publicités fausses et trompeuses à des milliers de consommateurs francophones du Québec. Les intimées ont vivement critiqué cette conclusion de fait de la juge de première instance. À leur avis, aucune preuve n'appuyait cette conclusion. D'après elles, la détermination du montant de dommages-intérêts punitifs approprié aurait plutôt dû se faire en supposant que seule *une* publicité avait été envoyée à *un* seul consommateur (m.i., par. 109).

[192] Cette prétention est insoutenable. En effet, William Miller, directeur des politiques promotionnelles de l'intimée Time Consumer Marketing Inc., a lui-même témoigné qu'[TRADUCTION] « [o]n utilise les concours pour attirer l'attention sur nos promotions d'abonnement » (d.a., vol. II, p. 4). Il a également expliqué en détail que, dans un désir d'attirer plus d'abonnés, Time Inc. avait décidé d'envoyer des messages « publipostés » en se servant de plusieurs listes de noms (d.a., vol. II, p. 5). Les envois postaux étaient personnalisés pour attirer l'attention des consommateurs et les inviter à s'abonner au magazine *Time* (jugement de première instance, par. 21; d.a., vol. II, p. 4 et 5). Nous déduisons de ce témoignage que la distribution de ces envois postaux était non seulement pratique courante chez les intimées, mais s'effectuait également à grande échelle. À la lumière de ces éléments de preuve, bien que la juge de première instance n'ait pas disposé d'une preuve capable d'indiquer avec précision le nombre d'envois postaux effectués, sa conclusion ne peut être qualifiée de sérieusement erronée. L'essentiel de sa conclusion était, à notre avis, que les intimées avaient distribué un grand nombre d'envois postaux sur le territoire québécois

punitive damages cannot therefore be revised on this basis.

[193] The respondents also challenge the trial judge's findings (1) that Time Inc. violated the *Charter of the French language*, in particular by sending out advertising material in English only (paras. 64-65), and (2) that this violation had to be taken into consideration in determining the appropriate quantum. On this issue, the respondents are correct. It was not open to the trial judge to consider the *Charter of the French language* in assessing the appropriate quantum of punitive damages. The *C.P.A.* and the *Charter of the French language* are two separate statutes with distinct legislative objectives. Moreover, violations of the *Charter of the French language* are sanctioned pursuant to its own provisions.

[194] Finally, the respondents argue that the trial judge made palpable and overriding errors in her conclusions respecting their patrimonial situation. First of all, they submit that she erred in finding that William Miller, Director of Promotion Policy for Time Consumer Marketing Inc., had admitted in his testimony that the company "certainly [had] the capacity to pay the amount of US$833,337" (*per* Cohen J., at para. 24). A second submission the respondents make in this regard is that there was no basis in the facts for the trial judge's finding that the evidence established that their advertising campaign was lucrative in terms of the subscriptions they generated. We are in partial agreement with the respondents on this point. In our opinion, the trial judge did in fact err in attributing to Mr. Miller an admission he had not actually made. On the other hand, we do not consider it unreasonable for her to find that the respondents' advertising campaign was profitable.

à de nombreux consommateurs. La preuve supportant cette conclusion constituait, à bon titre, un fait qu'elle pouvait considérer dans l'analyse de la gravité de la conduite des intimées dans la présente affaire. Il n'y a donc pas lieu de réviser le montant des dommages-intérêts punitifs octroyés sur cette base.

[193] Les intimées ont également attaqué les conclusions de la juge de première instance voulant que (1) Time Inc. ait violé la *Charte de la langue française*, notamment en faisant parvenir du matériel publicitaire en langue anglaise uniquement (par. 64-65), et que (2) cette violation doive être prise en compte dans la détermination du quantum approprié. Sur cette question, les intimées ont raison. La juge de première instance ne pouvait considérer la *Charte de la langue française* dans son évaluation du quantum approprié des dommages-intérêts punitifs. La *L.p.c.* et la *Charte de la langue française* sont deux lois distinctes qui possèdent des objectifs législatifs particuliers. Les violations à la *Charte de la langue française* sont d'ailleurs sanctionnées par ses propres recours.

[194] Enfin, les intimées ont reproché à la juge de première instance d'avoir commis des erreurs manifestes et dominantes dans ses conclusions ayant trait à leur situation patrimoniale. D'une part, elles soumettent qu'elle a conclu erronément que M. William Miller, directeur des politiques promotionnelles de Time Consumer Marketing Inc., avait admis dans son témoignage que l'entreprise avait [TRADUCTION] « certainement la capacité de payer un montant de 833 337 $US » (la juge Cohen, par. 24). D'autre part, elles lui reprochent d'avoir conclu, sans assises factuelles aucunes, que la preuve établissait que leur campagne publicitaire était lucrative, eu égard aux abonnements qu'elle générait. Nous sommes partiellement en accord avec les prétentions des intimées. À notre avis, la juge de première instance a effectivement erré en imputant à M. Miller une admission qu'il n'avait pas réellement faite. Par contre, nous ne croyons pas qu'il était déraisonnable de la part de la juge de première instance de conclure que la campagne publicitaire des intimées était profitable.

[195] Where Mr. Miller's testimony is concerned, we, like the respondents, were unable to find any admission in it that Time Inc. was capable of paying the amount of US$833,337 claimed by the appellant. Quite the contrary, it is clear from his testimony that at no time did Mr. Miller attempt to quantify the company's assets or assess its ability to pay. Indeed, he said he was unable to do so because he was not part of the company's financial team (testimony of William Miller, at p. 32, lines 2-4). We believe it would be helpful to reproduce the relevant passage from Mr. Miller's testimony on this point:

THE COURT:

[William Miller] admitted [that Time Inc.] did [use the advertising scheme at issue over the years]. Why don't you ask him if Time is able to pay that amount if I would award the amount in the claim, the part of the claim which relates to moral and punitive damages?

[HUBERT SIBRE]:

Q. 338 Would Time be able to pay this amount? Would it have the solvency to pay this amount if ever condemned?

[A.] You know, I'm not part of the financial structure of the company so I really can't comment on that. [Emphasis added; A.R., vol. II, at pp. 31-32.]

[196] This passage speaks for itself. The trial judge's finding that Mr. Miller had made an admission regarding Time Inc.'s ability to pay had no basis in the facts and constituted a palpable error. The trial judge was not therefore in a position to make, as she did, findings with respect to the respondents' patrimonial situation on the basis of this testimony.

[197] However, our conclusion is quite different as to the trial judge's finding that the respondents' advertising campaign that led to this litigation was profitable. The respondents argue that it was not open to the trial judge to make this finding, (1) because all that had been proven was that a single consumer had purchased a single subscription, and

[195] En ce qui a trait au témoignage de M. Miller, nous sommes, à l'instar des intimées, incapables de déceler dans celui-ci une quelconque admission selon laquelle Time Inc. était en mesure de payer la somme de 833 337 $US demandée par l'appelant. Bien au contraire, il appert clairement du témoignage de M. Miller qu'à aucun moment il n'a voulu quantifier les actifs de l'entreprise ou évaluer sa capacité de payer. Il se disait en fait incapable de le faire puisqu'il n'appartenait pas à l'équipe des finances de l'entreprise (témoignage de William Miller, p. 32, lignes 2-4). Il nous paraît d'ailleurs opportun de reproduire le passage pertinent du témoignage de M. Miller sur ce point :

[TRADUCTION] **LA COUR :**

[M. William Miller] a admis [que Time Inc.] a [utilisé la méthode publicitaire en cause pendant des années]. Pourquoi ne lui demandez-vous pas si Time est en mesure de payer cette somme si j'accordais le montant réclamé, la partie de la réclamation qui concerne les dommages moraux et les dommages-intérêts punitifs?

[M^E HUBERT SIBRE] :

Q. 338 Est-ce que Time serait en mesure de payer cette somme? Sa solvabilité lui permettrait-elle de payer ce montant si jamais elle y était condamnée?

[R.] Vous savez, je ne fais pas partie du secteur des finances de la compagnie, ce qui fait que je ne peux vraiment pas faire de commentaire à ce sujet. [Nous soulignons; d.a., vol. II, p. 31-32.]

[196] Le passage ci-dessus cité parle de lui-même. La conclusion de la juge de première instance que M. Miller avait fait une admission quelconque concernant la capacité de payer de Time Inc. ne se basait pas sur les faits et elle était manifestement erronée. La juge de première instance ne pouvait donc, comme elle l'a fait, tirer, sur la base de ce témoignage, de conclusions sur la situation patrimoniale des intimées.

[197] Il en est cependant tout autrement de la conclusion de la juge de première instance que la campagne publicitaire des intimées qui a mené au présent litige était profitable. Pour les intimées, la juge de première instance ne pouvait tirer cette conclusion puisque (1) preuve n'avait été faite que d'un abonnement contracté par un seul

(2) because the fact that Time Inc. had paid out more than US$1 million to winners of its sweepstakes in the year 2000 provided no information on its patrimonial situation in 2007 (the year of the trial judge's decision in this case). In our view, these arguments are unconvincing. In Mr. Miller's own words, the respondents had been organizing promotional sweepstakes in Canada and the United States since the mid-1980s. He added that several hundred people had won amounts ranging from US$1,000 to $1,600,000 in these sweepstakes, the admitted purpose of which was to attract consumers' attention to the respondents' subscription promotions (testimony of William Miller, A.R., vol. II, at p. 4). We find it logical and reasonable, in light of the amounts paid out by Time Inc. and the number of years that the promotional sweepstakes have existed, to infer from the evidence, as the trial judge did, that these sweepstakes were lucrative in that they enabled Time Inc. to add significantly to its readership.

[198] When all is said and done, should this Court vary the amount of $100,000 awarded by the trial judge as punitive damages? In our opinion, it should. Although the trial judge did not err in finding that the respondents had sent many mailings in Quebec to a large number of consumers and that these promotional sweepstakes had enabled them to sell many new subscriptions, we consider that the errors she made had a by no means insignificant impact on her assessment. In light of those errors and the fact that the trial judge's decision seems to have been influenced by the fact that the respondents had promised a $100,000 bonus in addition to the grand prize, we believe that it will be necessary to re-assess the quantum of the punitive damages she awarded.

(a) *Criteria for Assessing the Quantum*

[199] An assessment of the quantum of punitive damages must start with art. 1621 *C.C.Q.*, which

consommateur et que (2) le fait que Time Inc. avait distribué, en l'an 2000, plus d'un million de dollars américains aux gagnants du concours qu'elle avait organisé ne fournissait aucune information sur sa situation patrimoniale en 2007 (année de la décision de première instance dans cette affaire). Nous trouvons ces arguments peu convaincants. En effet, au dire de M. Miller lui-même, les intimées organisent des concours promotionnels au Canada et aux États-Unis depuis le milieu des années 1980. Il a ajouté que plusieurs centaines de personnes avaient gagné des sommes variant de 1000 $ à 1 600 000 $US grâce à ces concours et que le but avoué de ces derniers était d'attirer l'attention des consommateurs sur les promotions d'abonnement des intimées (témoignage de M. William Miller, d.a., vol. II, p. 4). Il nous semble logique et raisonnable, de par les montants distribués par Time Inc. et le nombre d'années d'existence des concours promotionnels, d'inférer de la preuve, comme l'a fait la juge de première instance, que l'organisation de ces concours était lucrative, en ce sens qu'elle permettait à Time Inc. d'augmenter sensiblement son lectorat.

[198] En définitive, est-ce qu'il y a lieu de réviser le montant de 100 000 $ retenu par la juge de première instance à titre de dommages-intérêts punitifs? Nous croyons que oui. Bien qu'elle ne se soit pas trompée en concluant que les intimées avaient distribué un grand nombre d'envois postaux sur le territoire québécois à de nombreux consommateurs et que l'organisation de ces concours publicitaires leur permettait de vendre un grand nombre de nouveaux abonnements, il n'en demeure pas moins que les erreurs qu'elle a commises ont, à notre avis, joué un rôle non négligeable dans son évaluation. À la lumière de ces erreurs et du fait que la décision de la juge de première instance semble avoir été influencée par l'existence du prix additionnel de 100 000 $ promis par les intimées en sus du gros lot, nous croyons qu'une réévaluation du montant des dommages-intérêts punitifs qu'elle a accordés s'impose.

a) *Critères d'évaluation du quantum*

[199] Dans l'évaluation du montant des dommages-intérêts punitifs, il faut se tourner

sets out some guiding principles that are intended to bring greater consistency and objectivity to the assessment of such damages (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin with the collaboration of N. Vézina, at para. 912). Article 1621 *C.C.Q.* begins by stating that the amount awarded as punitive damages must never exceed what is necessary to fulfil their preventive purpose. The second paragraph of art. 1621 adds that the amount must be determined in light of all the appropriate circumstances, in particular (1) the gravity of the debtor's fault, (2) the debtor's patrimonial situation, (3) the extent of the reparation for which the debtor is already liable to the creditor and (4), where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

[200] The gravity of the fault is undoubtedly the most important factor (*Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743; *Fondation québécoise du cancer v. Patenaude*, 2006 QCCA 1554, [2007] R.R.A. 5; *Voltec ltée v. CJMF FM ltée*, [2002] R.R.A. 1078 (C.A.); Baudouin, Jobin and Vézina, at para. 912). It is assessed from two perspectives: the wrongful conduct of the wrongdoer and the seriousness of the infringement of the victim's rights. According to Claude Dallaire, the courts consider the gravity of the conduct and its impact on the victim (pp. 127 *et seq.*). The analysis of the evidence will therefore be focused sometimes on the offender's conduct and sometimes on the effect of that conduct on the victim (*Procureur général du Québec v. Boisclair*, [2001] R.J.Q. 2449 (C.A.), at paras. 9-10). In either case, it must be borne in mind that a myriad of contextual factors can be taken into account in the analysis. If, for example, the evidence shows that the contract was abusive, that the merchant committed a fault and gained an undue competitive advantage by doing so, or that the consumers who were victims of the practice were particularly vulnerable, these facts will obviously

d'abord vers l'art. 1621 *C.c.Q.* En effet, ce dernier énumère quelques principes directeurs destinés à apporter plus de constance et d'objectivité dans l'évaluation des dommages-intérêts punitifs (J.-L. Baudouin et P.-G. Jobin, *Les obligations* (6e éd. 2005), par P.-G. Jobin avec la collaboration de N. Vézina, par. 912). L'article 1621 *C.c.Q.* dispose d'abord que le montant octroyé à titre de dommages-intérêts punitifs ne doit jamais dépasser la somme nécessaire pour remplir leur fonction préventive. Il ajoute à son deuxième alinéa que la détermination du montant doit se faire en tenant compte de toutes les circonstances appropriées, notamment (1) de la gravité de la faute du débiteur, (2) de sa situation patrimoniale ou (3) de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que (4) le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.

[200] La gravité de la faute constitue sans aucun doute le facteur le plus important (*Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743; *Fondation québécoise du cancer c. Patenaude*, 2006 QCCA 1554, [2007] R.R.A. 5; *Voltec ltée c. CJMF FM ltée*, [2002] R.R.A. 1078 (C.A.); Baudouin, Jobin et Vézina, par. 912). Le niveau de gravité s'apprécie sous deux angles : la conduite fautive de l'auteur et l'importance de l'atteinte aux droits de la victime. L'auteur Claude Dallaire a souligné que les tribunaux examinent le degré de gravité de la conduite et l'ampleur des répercussions de cette conduite sur la victime (p. 127 et suiv.). Ainsi, l'analyse de la preuve se concentrera tantôt sur la conduite du contrevenant, tantôt sur les effets de son comportement sur la victime (*Procureur général du Québec c. Boisclair*, [2001] R.J.Q. 2449 (C.A.), par. 9-10). Dans un cas comme dans l'autre, il est important de garder à l'esprit qu'une myriade d'éléments contextuels peuvent être pris en compte dans l'analyse. Si, par exemple, la preuve démontrait que le contrat était de nature abusive, que le commerçant fautif s'est attiré un avantage concurrentiel indu en se livrant à cette pratique, ou encore que les consommateurs

be relevant to the assessment of the gravity of the fault.

[201] The second factor mentioned in art. 1621, para. 2 *C.C.Q.* is the debtor's patrimonial situation, and its purpose is to ensure that the amount of the award is tailored to the offender's situation in order to achieve the intended effect of the statute in question. Thus, the larger the debtor's patrimony, the higher the award of punitive damages must be to ensure that the general objectives of such damages are achieved and to discourage any repetition. The reverse is also true where a debtor is of modest means. Obviously, even where an offender is extremely wealthy, the amount of the award must still be rationally connected with the purposes for which punitive damages are awarded in a particular case.

[202] The third factor mentioned in art. 1621, para. 2 *C.C.Q.*, the extent of the reparation already awarded under other heads, is an analytical criterion that has been used frequently (*St-Ferdinand*; *Augustus v. Gosset*, [1996] 3 S.C.R. 268; *Lambert v. Macara*, [2004] R.J.Q. 2637 (C.A.)). According to it, the court must not award punitive damages unless compensatory damages are not enough to discourage repetition either because their amount is too small or because they will have no impact on the debtor's financial situation. However, this principle does not change the independent nature of punitive damages. Even if an award of compensatory damages is generous, it will not necessarily preclude an award of punitive damages.

[203] Finally, the purpose of the fourth factor mentioned in art. 1621, para. 2 *C.C.Q.* is to adjust the quantum of punitive damages on the basis of the total amount the debtor will have to pay personally. This assessment ensures that the amount of the award will actually have the intended effect on the offender. The amount may sometimes have to be varied where a third person is paying,

visés par la pratique étaient particulièrement vulnérables, il ne fait aucun doute que ces éléments seraient pertinents pour l'évaluation de la gravité de la faute.

[201] Le deuxième facteur énoncé dans l'art. 1621, al. 2 *C.c.Q.*, en l'occurrence la situation patrimoniale du débiteur, vise à faire en sorte que le montant octroyé soit adapté à la situation du contrevenant, afin de produire l'effet recherché par la loi en cause. Ainsi, plus le patrimoine du débiteur est considérable, plus la condamnation à des dommages-intérêts punitifs doit être élevée pour que les objectifs généraux qu'ils poursuivent soient atteints et pour décourager la récidive. L'inverse est aussi vrai dans le cas d'un débiteur peu fortuné. Bien évidemment, même devant un contrevenant à la fortune colossale, il faudra que la somme octroyée conserve un lien rationnel avec les buts recherchés par l'imposition de dommages-intérêts punitifs dans une affaire donnée.

[202] Le troisième facteur de l'art. 1621, al. 2 *C.c.Q.*, soit l'étendue de la réparation déjà accordée sous d'autres chefs, constitue un critère d'analyse fréquemment utilisé (*St-Ferdinand*; *Augustus c. Gosset*, [1996] 3 R.C.S. 268; *Lambert c. Macara*, [2004] R.J.Q. 2637 (C.A.)). Selon ce critère, le tribunal ne doit accorder des dommages-intérêts punitifs que si les dommages-intérêts compensatoires ne suffisent pas pour décourager la récidive, soit parce qu'ils sont trop minimes, soit parce qu'ils n'ont aucun effet sur la situation financière du débiteur. Ce principe ne modifie pas cependant le caractère autonome des dommages-intérêts punitifs. Une indemnisation, même généreuse, par l'octroi de dommages-intérêts compensatoires n'exclut pas nécessairement une condamnation à des dommages-intérêts punitifs.

[203] Finalement, le quatrième facteur énuméré à l'art. 1621, al. 2 *C.c.Q.* vise à ajuster les dommages-intérêts punitifs en fonction du montant total que le débiteur sera appelé à débourser personnellement. Cette évaluation permet de s'assurer que le montant accordé aura réellement l'effet escompté sur le contrevenant. Le montant peut parfois devoir être modulé dans le cas où il existe un tiers payeur,

since the objective of preventing repetition is then achieved through an intermediary. The person actually paying must thus be punished to motivate that person to encourage the wrongdoer to change his or her ways. Closely related to this consideration, another purpose of this factor is to evaluate the real utility of the second of the factors mentioned in art. 1621, para. 2 *C.C.Q.*, namely the debtor's patrimonial situation. Thus, where the debtor of the obligation will not personally be paying the amount of the award of punitive damages, there is no need to assess his or her patrimony to determine that amount.

puisque l'objectif de prévention de la récidive se réalise alors par personne interposée. Il faut alors punir l'auteur effectif du paiement de façon à l'inciter à encourager le fautif à se réformer. Intimement relié à cette considération, ce facteur vise également à évaluer l'utilité réelle du deuxième facteur de l'art. 1621, al. 2 *C.c.Q.*, soit la situation patrimoniale du débiteur. Ainsi, dans le cas où le débiteur de l'obligation ne versera pas lui-même le montant auquel il est condamné à titre de dommages-intérêts punitifs, l'évaluation de son patrimoine devient non pertinente pour la détermination de la somme en question.

(b) *Other Criteria to be Considered*

b) *Autres critères à prendre en considération*

[204] Although art. 1621, para. 2 *C.C.Q.* lists various factors that are relevant in determining the appropriate quantum of punitive damages, the fact that this list is preceded by the words "all the appropriate circumstances" and "in particular" clearly indicates that the legislature intended that it be possible to consider other, unnamed factors as well. In our view, it will be helpful to mention a few of the factors we believe can be of assistance to trial courts in this regard. Some of them have already been referred to by the Quebec courts, while others, although taken from the common law, can also be applied within the framework of Quebec law in this area.

[204] Bien que l'art. 1621, al. 2 *C.c.Q.* énumère des facteurs variés comme pertinents dans la détermination du quantum approprié des dommages-intérêts punitifs, il est clair que le législateur a voulu, en faisant précéder cette énumération par l'expression « toutes les circonstances appropriées » et par l'adverbe « notamment », que d'autres facteurs innommés puissent également être considérés. Nous croyons utile d'en mentionner quelques-uns qui, à notre avis, peuvent aider le tribunal de première instance dans sa tâche. Certains ont déjà été mentionnés dans la jurisprudence québécoise, alors que d'autres, bien qu'ils aient été tirés de la common law, s'appliquent aussi bien dans le cadre du droit québécois en la matière.

[205] First, where rights and freedoms guaranteed by the *Quebec Charter* have been interfered with, the courts have held that the identity and characteristics of a legal person established for a private interest can also be considered. The courts' approach to the quantification of damages may therefore vary depending on whether the wrongdoer is a natural person, a legal person or a legal person established in the public interest. [TRANSLATION] "It is easy to understand why the courts react unfavourably to antisocial conduct on the part of a legal person established for a private interest or a legal person established in the public interest that is greedy to make profits or to gain political or strategic advantages" (Dallaire, at pp. 131-33).

[205] Premièrement, dans les cas d'atteinte aux droits et libertés garantis par la *Charte québécoise*, les tribunaux ont retenu l'identité et le profil d'une personne morale de droit privé comme critère supplémentaire. L'attitude des tribunaux dans la quantification des dommages-intérêts peut ainsi changer selon que l'auteur de l'atteinte est une personne physique, une personne morale ou une personne morale de droit public. « On comprend aisément que les tribunaux s'offusquent de la conduite antisociale d'une personne morale de droit privé ou de droit public avide de profits ou d'avantages politiques ou stratégiques » (Dallaire, p. 131-133).

[206] Also, in our opinion, it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law (*Whiten*, at para. 72).

[207] Third, the civil, disciplinary or criminal history of the person guilty of a violation may be a relevant factor. The amount awarded against a wrongdoer who has committed a first offence and whose previous conduct has been exemplary may therefore differ from the amount awarded against one who has been involved in many serious prior offences (*Whiten*, at para. 69; Dallaire, at pp. 136-42 and 164-65).

[208] Finally, in addition to the fact that compensatory damages have been awarded, the trial court can, in determining the appropriate quantum of punitive damages in the civil proceedings before it, take account of any disciplinary, criminal or administrative penalties that have already been imposed as punishment for the offender's conduct (*Whiten*, at para. 123). In appropriate circumstances, therefore, the quantum of punitive damages may be limited because such other penalties have already contributed to achieving the legislature's objective of prevention.

[209] We note that the above factors must not be considered automatically by the trial court in every case. Their relevance will depend on the circumstances of the specific case. As well, these factors do not represent an exhaustive list of the considerations that are relevant to determining the quantum of punitive damages. Every relevant factor can be considered, provided that the purpose of the analysis remains the same: to ensure that the amount awarded as punitive damages is rationally proportionate to the objectives for which those damages are awarded in the case in question, having due regard to the specific

[206] Il est également tout à fait acceptable, à notre avis, d'utiliser les dommages-intérêts punitifs, comme en common law, pour dépouiller l'auteur de la faute des profits qu'elle lui a rapportés lorsque le montant des dommages-intérêts compensatoires ne représenterait rien d'autre pour lui qu'une dépense lui ayant permis d'augmenter ses bénéfices tout en se moquant de la loi (*Whiten*, par. 72).

[207] En troisième lieu, les antécédents civils, disciplinaires ou criminels de l'auteur de l'atteinte peuvent constituer des facteurs pertinents. Le montant accordé peut ainsi varier dans le cas d'un fautif qui en est à sa première infraction et qui a eu auparavant une conduite exemplaire, par rapport à celui qui a des antécédents nombreux et importants (*Whiten*, par. 69; Dallaire, p. 136-142 et 164-165).

[208] Finalement, au-delà de l'attribution des dommages-intérêts compensatoires, le tribunal de première instance peut également, dans le cadre de la poursuite civile dont il est saisi, prendre en compte, dans sa détermination du quantum approprié des dommages-intérêts punitifs, les sanctions disciplinaires, criminelles ou administratives déjà infligées au contrevenant pour sanctionner le comportement qui lui est reproché (*Whiten*, par. 123). Le quantum de dommages-intérêts punitifs octroyés peut donc, dans des circonstances appropriées, être limité parce que ces autres sanctions auraient déjà contribué à l'atteinte de l'objectif de prévention visé par le législateur.

[209] Soulignons que les facteurs mentionnés plus haut ne doivent pas être considérés automatiquement par le tribunal de première instance dans tous les cas. Leur pertinence dépendra des circonstances de chaque affaire. De même, les facteurs mentionnés ne forment pas une liste exhaustive des considérations pertinentes pour la détermination du quantum des dommages-intérêts punitifs. Tout élément pertinent pour l'analyse peut être pris en considération, pourvu que la finalité de l'analyse demeure la même : s'assurer que la somme octroyée à titre de dommages-intérêts punitifs est rationnellement proportionnée aux objectifs poursuivis par

circumstances of the case (*Whiten*, at paras. 74 and 111).

(3) Application to the Facts

[210] Where a court decides to award punitive damages, it must relate the facts of the case before it to the objectives that underlie such damages and ask itself how, in that particular case, awarding them would further those objectives. It must try to fix the most appropriate amount, that is, the lowest amount that would serve the purpose (*Whiten*, at para. 71). Even if we disregard the alleged violation of the *Charter of the French language* as an aggravating factor, the fact remains that the respondents' conduct was serious and deliberate and that it was capable of affecting a large number of consumers. Moreover, even after the consumer complained about their misleading practices, there is no evidence that the respondents did anything to correct them. This must also be considered an aggravating factor.

[211] On the other hand, the impact of the respondents' fault on the appellant remains quite limited, though, granted, not negligible. The appellant subscribed to *Time* magazine, began receiving it the following month and also received, as promised, a camera and photo album as a bonus. Moreover, he never asked to be reimbursed for the cost of the subscription to *Time* magazine on the basis of the misleading advertising material. As we have seen, he instituted a proceeding in which he alleged that the respondents were contractually bound to pay him $1,250,887.10, a claim which proved to be unfounded. Thus, the appellant's attitude has contributed to the proportions this case has ultimately assumed.

[212] In a context in which a large number of consumers may have been victims of the prohibited practices engaged in by the respondents, we believe that the limited impact of the respondents' fault on the appellant and the appellant's attitude

son attribution dans une affaire donnée, compte dûment tenu des circonstances précises de cette dernière (*Whiten*, par. 74 et 111).

(3) Application aux faits

[210] Lorsqu'un tribunal décide s'il accordera des dommages-intérêts punitifs, il doit mettre en corrélation les faits de l'affaire et les buts visés par ces dommages-intérêts et se demander en quoi, dans ce cas précis, leur attribution favoriserait la réalisation de ces objectifs. Il doit tenter de déterminer la somme la plus appropriée, c'est-à-dire la somme la moins élevée, mais qui permettrait d'atteindre ce but (*Whiten*, par. 71). Même sans retenir l'allégation d'une violation de la *Charte de la langue française* comme facteur aggravant, il n'en demeure pas moins que la conduite des intimées était grave et délibérée et pouvait affecter un grand nombre de consommateurs. De plus, même après que le consommateur leur a reproché leurs pratiques trompeuses, selon la preuve, elles n'ont rien corrigé. Ce fait doit également être considéré comme un facteur aggravant.

[211] Par contre, l'impact de la faute commise par les intimées sur l'appelant demeure assez limité, même s'il n'est pas négligeable. L'appelant s'est abonné au magazine *Time*, a commencé à recevoir la revue le mois suivant, et on lui a aussi livré, comme promis, un appareil photographique et un album photos en prime. De plus, il n'a jamais demandé le remboursement de ses frais d'abonnement au magazine *Time* sur la base de la publicité trompeuse. Comme nous l'avons vu, il a institué une poursuite, alléguant que les intimées étaient tenues par contrat de lui payer la somme de 1 250 887,10 $, réclamation qui s'est avérée sans fondement. L'attitude de l'appelant n'est donc pas étrangère aux dimensions que ce litige a fini par prendre.

[212] Devant une situation où un grand nombre de consommateurs ont potentiellement été victimes des pratiques interdites commises par les intimées, nous croyons que l'impact réduit de la faute des intimées sur l'appelant ainsi que l'attitude de

in this case are relevant factors in determining the amount that should be awarded as punitive damages.

[213] Where the respondents' patrimonial situation is concerned, the information obtained at trial was insufficient to make any useful findings. The appellant tries to get around this lack of evidence by arguing that it was open to the trial judge to take judicial notice of the fact that the respondents were wealthy. His position is based on the facts that they belong to the TimeWarner conglomerate and that the wealth of that conglomerate is common knowledge. In our view, the appellant's position is incorrect. The respondents and TimeWarner are distinct entities, and TimeWarner is not a defendant in this case. The criterion of the patrimonial situation set out in the second paragraph of art. 1621 *C.C.Q.* concerns the patrimony of one or more *debtors*, not of third persons. The patrimony of a third person can in principle be taken into account only if it is shown that this person will be wholly or partly assuming the payment of the damages (art. 1621, para. 2 *C.C.Q.*). The appellant has not proven this to be the case. It follows that the fact that the respondents belong to the TimeWarner conglomerate is of no assistance to the appellant in this case. Nevertheless, we would like to make it clear that the lack of evidence regarding the respondents' patrimonial situation in no way means that they are immune from a possible award of damages. On the contrary, it means that this Court may properly render its decision without having to assess their actual financial capacity. The Court cannot assume that the respondents' financial capacity would not permit them to pay an award set at an otherwise reasonable amount. Moreover, it must not be forgotten that the evidence showed that the prohibited practices engaged in by the respondents had been very profitable for them from a financial standpoint. In the circumstances of this case, this is a relevant factor to be considered in determining the quantum of punitive damages.

l'appelant dans le cadre de ce litige constituent des facteurs pertinents dans la détermination de la somme qui devrait lui être octroyée à titre de dommages-intérêts punitifs.

[213] Par ailleurs, l'information obtenue au procès sur la situation patrimoniale des intimées était insuffisante pour en tirer des conclusions utiles à cet égard. L'appelant tente de contourner ce déficit de preuve en plaidant qu'il était loisible à la juge de première instance de prendre connaissance d'office du fait que les intimées avaient un patrimoine nanti. Sa position s'appuie sur le fait qu'elles appartiennent au conglomérat TimeWarner, dont le patrimoine est bien connu. Nous croyons sa position mal fondée. Les intimées et TimeWarner sont des entités distinctes et TimeWarner n'est pas une défenderesse dans la présente affaire. Or, le critère de la situation patrimoniale édicté au deuxième alinéa de l'art. 1621 *C.c.Q.* demande que l'on regarde le patrimoine du ou des *débiteurs* et non de tiers. Le patrimoine d'une partie tierce ne peut en principe être pris en compte que lorsqu'il est démontré que cette partie prendra en charge, en tout ou en partie, le paiement réparateur (art. 1621, al. 2 *C.c.Q.*). Cette preuve n'a nullement été faite par l'appelant. Il s'ensuit donc que l'appartenance des intimées au conglomérat TimeWarner n'était d'aucune assistance à l'appelant en l'instance. Tout cela étant dit, nous tenons à souligner que l'absence de preuve sur la situation patrimoniale des intimées n'a pas du tout pour effet de les immuniser contre la possibilité d'une condamnation à des dommages-intérêts. Au contraire, cela signifie que notre Cour peut à bon droit rendre sa décision sans devoir mesurer leur capacité financière réelle. La Cour ne peut présumer que la capacité financière des intimées ne leur permettrait pas d'acquitter une condamnation établie à un niveau par ailleurs raisonnable. De plus, il ne faut pas perdre de vue que la preuve a démontré que les pratiques interdites commises par les intimées leur avaient été financièrement très profitables. Dans le contexte de cette affaire, ce fait est un élément pertinent à prendre en considération dans la détermination du montant de dommages-intérêts punitifs à octroyer.

[214] Finally, the fact that the amount of the award of compensatory damages is small favours awarding a significant amount of punitive damages. At trial, the respondents were ordered to pay $1,000 in compensatory damages, and we propose to uphold that award. However, that amount is clearly inadequate to meet the preventive purpose of art. 1621 *C.C.Q.*

[215] Having regard to all the factors discussed above, we would reduce the punitive damages awarded to the appellant to $15,000. This amount suffices in the circumstances to fulfil the preventive purpose of punitive damages, underlines the gravity of the violations of the Act and sanctions the respondents' conduct in a manner that is serious enough to induce them to cease the prohibited practices in which they have been engaging, if they have not already done so.

[216] The appellant has requested costs on the amount of his original action. In our view, this request is not justified. Costs in the Superior Court and the Court of Appeal will be taxed in accordance with the tariffs applicable in those courts. However, the appellant will have his costs in this Court on a solicitor and client basis because of the importance of the issues of law he raised before us (*Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17).

V. Conclusion

[217] For the reasons set out above, the appellant's appeal is allowed in part. The judgment of the Court of Appeal, in which it set aside the judgment of the Superior Court and dismissed the appellant's action in damages against the respondents, is set aside. The Superior Court's judgment is restored in part, as the respondents are ordered to pay the appellant $1,000 in compensatory damages and $15,000 in punitive damages, with interest from the date of service. The appellant is entitled to

[214] Finalement, le caractère minime de la condamnation à des dommages-intérêts compensatoires milite en faveur de l'octroi d'un montant non négligeable de dommages-intérêts punitifs. En effet, en première instance, les intimées ont été condamnées à payer 1 000 $ à titre de dommages-intérêts compensatoires et nous proposons de confirmer cette condamnation. Cependant, un tel montant resterait nettement inadéquat pour atteindre l'objectif de prévention prévu à l'art. 1621 *C.c.Q.*

[215] En considérant l'ensemble des facteurs analysés précédemment, nous sommes d'avis de réduire le montant octroyé à l'appelant à titre de dommages-intérêts punitifs à 15 000 $. Ce montant suffit dans les circonstances pour assurer la fonction préventive des dommages-intérêts punitifs, souligne la gravité des violations de la loi et sanctionne la conduite des intimées de manière assez sérieuse pour les inviter à abandonner les pratiques interdites qu'elles ont utilisées, si ce n'est pas déjà fait.

[216] L'appelant a demandé des dépens établis en fonction du montant de son action originale. Cette demande nous paraît injustifiée. Les dépens seront taxés devant la Cour supérieure et la Cour d'appel du Québec conformément aux tarifs applicables devant ces tribunaux. Toutefois, nous accordons à l'appelant des dépens sur la base avocat-client, dans notre Cour, en raison de l'importance des questions de droit qu'il a soulevées devant elle (*Finney c. Barreau du Québec*, 2004 CSC 36, [2004] 2 R.C.S. 17).

V. Conclusion

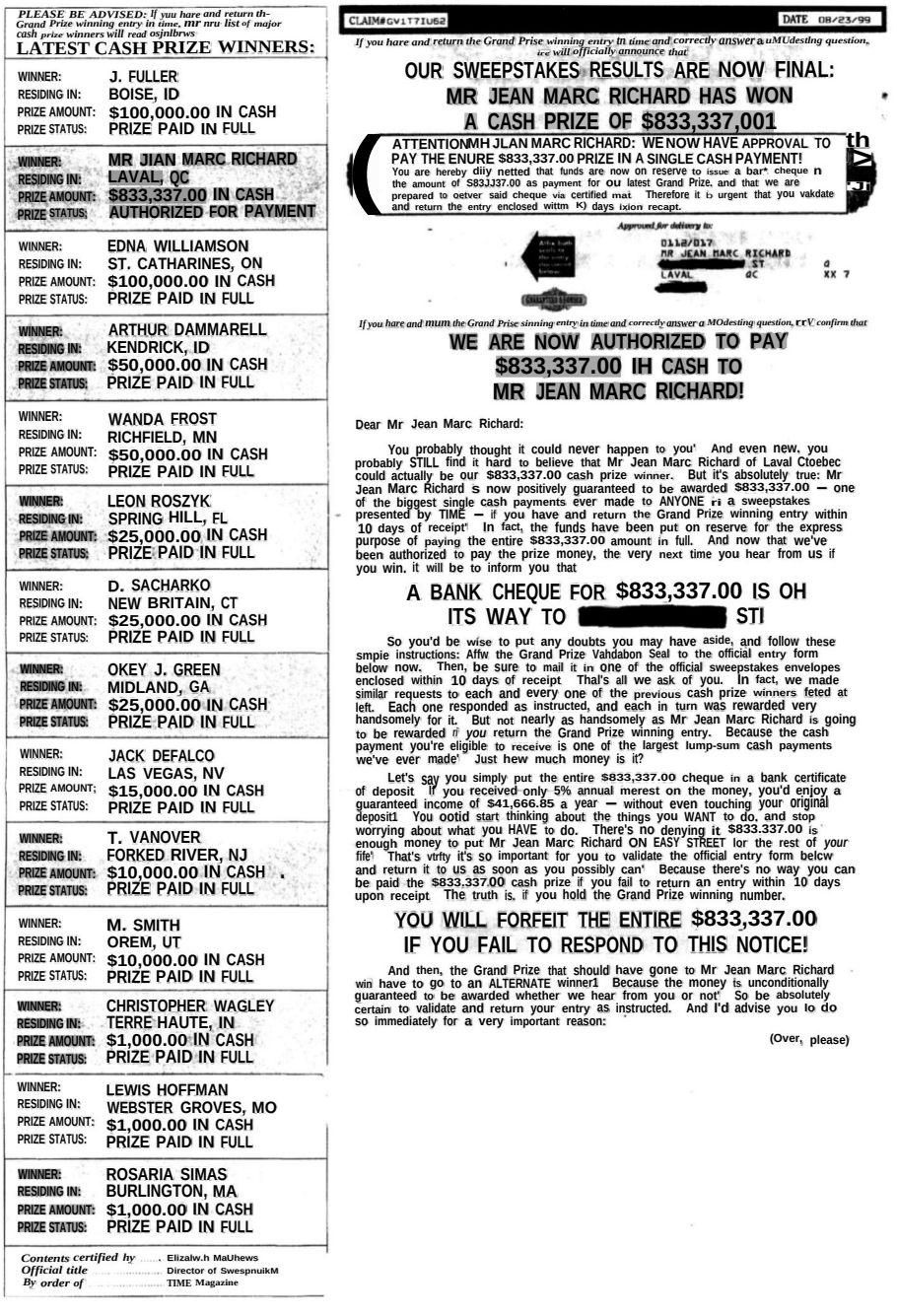
[217] Pour les motifs exposés plus haut, nous accueillons, en partie, le pourvoi de l'appelant. Nous cassons l'arrêt de la Cour d'appel du Québec infirmant le jugement de la Cour supérieure du Québec et rejetant l'action en dommages-intérêts de l'appelant contre les intimées. Nous rétablissons en partie le jugement de la Cour supérieure en condamnant les intimées à verser à l'appelant 1 000 $ à titre de dommages-intérêts compensatoires et 15 000 $ à titre de dommages-intérêts punitifs, avec intérêts

costs in the Superior Court and the Court of Appeal in accordance with the tariffs applicable in those courts, and on a solicitor and client basis in this Court.

depuis l'assignation. L'appelant aura droit aux dépens selon les tarifs applicables devant la Cour supérieure et la Cour d'appel du Québec et sur la base avocat-client devant notre Cour.

APPENDIX

ANNEXE



PLEASE BE ADVISED: If you have and return the Grand Prize winning entry in time, MY NAME will be on one of major cash prize winners will read as follows

LATEST CASH PRIZE WINNERS:

WINNER:	J. FULLER
RESIDING IN:	BOISE, ID
PRIZE AMOUNT:	$100,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	MR JIAN MARC RICHARD
RESIDING IN:	LAVAL, QC
PRIZE AMOUNT:	$833,337.00 IN CASH
PRIZE STATUS:	AUTHORIZED FOR PAYMENT
WINNER:	EDNA WILLIAMSON
RESIDING IN:	ST. CATHARINES, ON
PRIZE AMOUNT:	$100,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	ARTHUR DAMMARELL
RESIDING IN:	KENDRICK, ID
PRIZE AMOUNT:	$50,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	WANDA FROST
RESIDING IN:	RICHFIELD, MN
PRIZE AMOUNT:	$50,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	LEON ROSZYK
RESIDING IN:	SPRING HILL, FL
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	D. SACHARKO
RESIDING IN:	NEW BRITAIN, CT
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	OKEY J. GREEN
RESIDING IN:	MIDLAND, GA
PRIZE AMOUNT:	$25,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	JACK DEFALCO
RESIDING IN:	LAS VEGAS, NV
PRIZE AMOUNT;	$15,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	T. VANOVER
RESIDING IN:	FORKED RIVER, NJ
PRIZE AMOUNT:	$10,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	M. SMITH
RESIDING IN:	OREM, UT
PRIZE AMOUNT:	$10,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	CHRISTOPHER WAGLEY
RESIDING IN:	TERRE HAUTE, IN
PRIZE AMOUNT:	$1,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	LEWIS HOFFMAN
RESIDING IN:	WEBSTER GROVES, MO
PRIZE AMOUNT:	$1,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL
WINNER:	ROSARIA SIMAS
RESIDING IN:	BURLINGTON, MA
PRIZE AMOUNT:	$1,000.00 IN CASH
PRIZE STATUS:	PRIZE PAID IN FULL

Contents certified by . Elizalw.h MaUhews
Official title Director of SwespnuikM
By order of TIME Magazine

CLAIM#GV1T7IU62 DATE 08/23/99

If you hare and return the Grand Prise winning entry in time and correctly answer a uMUdestlng question, ice will officially announce that

OUR SWEEPSTAKES RESULTS ARE NOW FINAL:
MR JEAN MARC RICHARD HAS WON
A CASH PRIZE OF $833,337,001

ATTENTION MH JLAN MARC RICHARD: WE NOW HAVE APPROVAL TO PAY THE ENURE $833,337.00 PRIZE IN A SINGLE CASH PAYMENT! You are hereby diiy netted that funds are now on reserve to issue a bar* cheque n the amount of S83JJ37.00 as payment for ou latest Grand Prize, and that we are prepared to oetver said cheque via certified mat Therefore it b urgent that you vakdate and return the entry enclosed wittm K) days ixion recapt.

Approved for delivery to:

0112/017
MR JEAN MARC RICHARD
ST
LAVAL QC XX 7

If you hare and mum the Grand Prise sinning entry in time and correctly answer a MOdesting question, rrV confirm that

WE ARE NOW AUTHORIZED TO PAY
$833,337.00 IH CASH TO
MR JEAN MARC RICHARD!

Dear Mr Jean Marc Richard:

You probably thought it could never happen to you' And even new, you probably STILL find it hard to believe that Mr Jean Marc Richard of Laval Ctoebec could actually be our $833,337.00 cash prize winner. But it's absolutely true: Mr Jean Marc Richard s now positively guaranteed to be awarded $833,337.00 — one of the biggest single cash payments ever made to ANYONE ri a sweepstakes presented by TIME — if you have and return the Grand Prize winning entry within 10 days of receipt' In fact, the funds have been put on reserve for the express purpose of paying the entire $833,337.00 amount in full. And now that we've been authorized to pay the prize money, the very next time you hear from us if you win. it will be to inform you that

A BANK CHEQUE FOR $833,337.00 IS OH ITS WAY TO [redacted] STI

So you'd be wise to put any doubts you may have aside, and follow these smpie instructions: Affw the Grand Prize Vahdabon Seal to the official entry form below now. Then, be sure to mail it in one of the official sweepstakes envelopes enclosed within 10 days of receipt Thal's all we ask of you. In fact, we made similar requests to each and every one of the previous cash prize winners feted at left. Each one responded as instructed, and each in turn was rewarded very handsomely for it. But not nearly as handsomely as Mr Jean Marc Richard is going to be rewarded ri you return the Grand Prize winning entry. Because the cash payment you're eligible to receive is one of the largest lump-sum cash payments we've ever made' Just hew much money is it?

Let's say you simply put the entire $833,337.00 cheque in a bank certificate of deposit If you received only 5% annual merest on the money, you'd enjoy a guaranteed income of $41,666.85 a year — without even touching your original deposit1 You ootid start thinking about the things you WANT to do, and stop worrying about what you HAVE to do. There's no denying it $833.337.00 is enough money to put Mr Jean Marc Richard ON EASY STREET lor the rest of your fife' That's vtrfty it's so important for you to validate the official entry form belcw and return it to us as soon as you possibly can' Because there's no way you can be paid the $833.337.00 cash prize if you fail to return an entry within 10 days upon receipt The truth is, if you hold the Grand Prize winning number.

YOU WILL FORFEIT THE ENTIRE $833,337.00
IF YOU FAIL TO RESPOND TO THIS NOTICE!

And then, the Grand Prize that should have gone to Mr Jean Marc Richard win have to go to an ALTERNATE winner1 Because the money is unconditionally guaranteed to be awarded whether we hear from you or not' So be absolutely certain to validate and return your entry as instructed. And I'd advise you to do so immediately for a very important reason:

(Over, please)

YOU'LL QUALIFY FOR A $100,000.00 BONUS IF YOU RESPOND WITHIN 5 DAYS!

Take special note ol the Bonus Award Validation Seal affixed to the front of this notice. Because if you act quickly and return your entry with the Bonus Awara Validation Seal within 5 days of receipt, you'll be eligible to win a cash prize of S100.000.00 -- m addition to the $833,337.00. So respond at once. But first, take a moment to consider a sensational offer from TIME1 O' course, ihere's no obligation to purchase anything to be eligible for a prize. But if you've ever thought about trying TIME, NOW is the time1 Because THIS offer may be the most exciting offer we've ever made to anyone* To begin with,

YOU'LL RECEIVE A FREE GIFT: THE ULTRONIC" PANORAMIC CAMERA A PHOTO ALBUM SET!

When the view is so vast, so breathtaking, that no ordinary camera could possibly do it justice, just pull out your ULTRONIC" PANORAMIC **CAMERA1** lake it along wherever and whenever you want to ge. a big. sweeping picture: when you're camping, or sight-seeing, or for family get-togethers (it's great for group portraits!). And the rich matte-finish PHOTO **ALBUM** will keep all your special pictures safe1 Your ULTRONIC" PANORAMIC **CAMERA &** PHOTO **ALBUM SET** is yours FREE, with your paid subscription, if you say YES to TIME1 And there's another reason why right now may oe tne best time to try TIME ever:

YOU'LL ALSO RECEIVE TIME AT UP TO 74% SAVINGS!

That's nght* Save up to 74X off the cover price* And you'll get FREE HOME DELIVERY in the bargain. Plus all the news, all Ihe information, all the m-depth analysis you need to keep pace with today's rapidly changing world — from global events to international politics, from economics to education, from science and technology to entertainment. In short, if it's important to you. it's in TIME. And you'll understand it better than ever through TIME'S comprehensive reports and unforgettable photographs. That's why TIME has won more awards than any other newsmagazine. And that's why 30 million people turn to FIMt every week. If you'd like io receive TIME at up to 74X SAVINGS and the ULTRONIC" PANORAMIC CAMERA & PHOTO ALBUM SET FREE with your paid subscrption. be sure to attach the FREE GIFT Seal to your entry and mail it in the YES envelope* And h you hold the Grand Prize winning entry.

A BANK CHEQUE FOR $833,337.00 IN CASH WILL BE SENT TO YOU VIA CERTIFIED MAIL -- IF YOU RESPOND NOW!

Remember, we have already received authorization to pay the entire $833,337.00 cash amount in full. And we're waiting to receive your entry. But if you fail lo respond, one thing is certain -- someone ELSE will be awarded the Grand Prize. Because the Grand Prize is unconditionally guaranteed to be awarded whether we hear from you or not* So be absolutely certain to validate and return your entry now. And don't miss this opportunity to receive TIME al BIG SAVINGS along with AN EXCITING FREE GIFT*

Sincerely,

Elizabeth Matthews

Elizabeth Matthews
Director of Sweepstakes

YOURS FREE!

This remarkable quick-shot camera is always ready for action. You'll be amazed at trie spectacuiai wide-angle pictures you'll take with it. And the accompanying photo album will protect your cherished memories for all the years to come.

So be sure to return the entry below in the YES envelope immediately!

Also included:

TIME'S famous Man of the Year issue

IMPORTANT:

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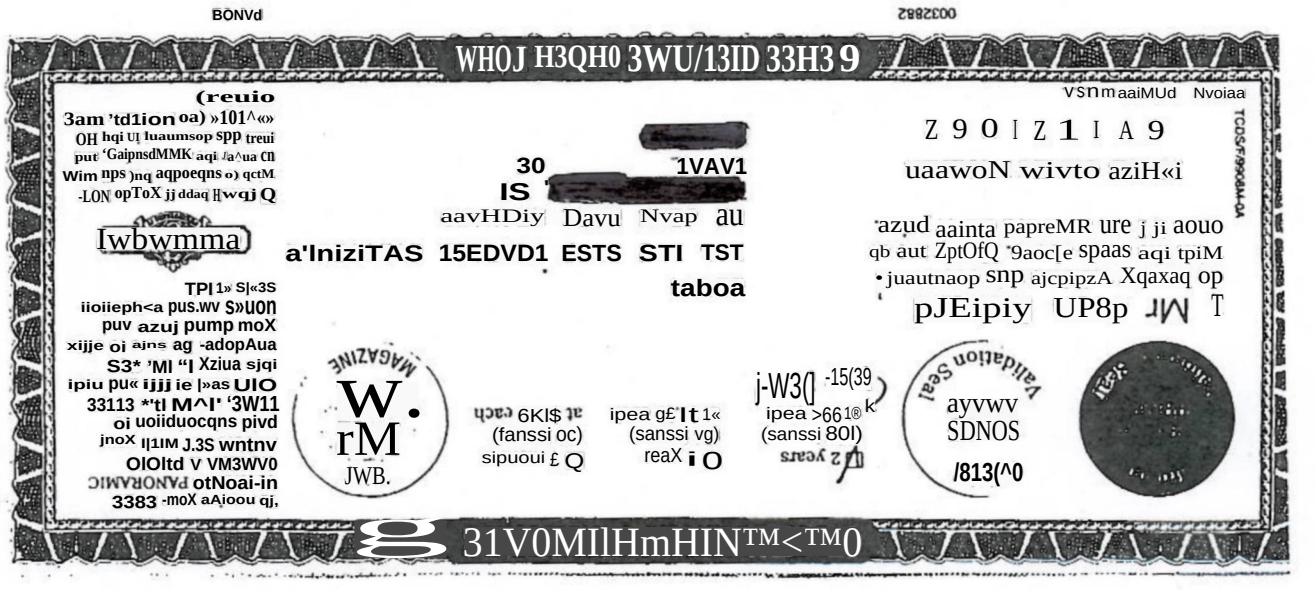

Appeal allowed in part with costs.

Solicitors for the appellant: Davis, Montréal.

Solicitors for the respondents: Miller Thomson Pouliot, Montréal.

Pourvoi accueilli en partie avec dépens.

Procureurs de l'appelant : Davis, Montréal.

Procureurs des intimées : Miller Thomson Pouliot, Montréal.

Federal ®ourf of Appeal (Hour b'appel f^b^raU

Date: 20230801

Docket: A-89-23

Citation: 2023 FCA 172

CORAM: **WOODS J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

SECURE ENERGY SERVICES INC.

Appellant

and

THE COMMISSIONER OF COMPETITION

Respondent

Heard at Toronto, Ontario, on June 19, 2023.

Judgment delivered at Ottawa, Ontario, on August 1, 2023.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: WOODS J.A.
LEBLANC J.A.

Federal ®onrf of ^Appeal (Hour b'appel f^b^raU

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Respondent

REASONS FOR JUDGMENT

LOCKE J.A.

I. Overview

[1] The appellant, SECURE Energy Services Inc. (Secure), is the result of a merger with Tervita Corporation (Tervita) that closed on July 2, 2021 (the Merger). The respondent, the Commissioner of Competition (the Commissioner), as part of his responsibilities, looked into

whether the Merger "prevents or lessens, or is likely to prevent or lessen, competition substantially" such that section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act), might apply to empower the Competition Tribunal (the Tribunal) to order the dissolution of the Merger or the disposition of certain assets or shares. Section 92 of the Act is reproduced in the Annex to these reasons.

[2] On June 29, 2021, the Commissioner commenced an application before the Tribunal pursuant to section 92 of the Act seeking an order for the divestiture of 41 of Secure's facilities. Among the various grounds cited in opposition to the Commissioner's application, Secure argued that section 96 of the Act prohibited the Tribunal from issuing an order under section 92. Subsection 96(1) of the Act provides as follows:

Exception where gains in efficiency	**Exception dans les cas de gains en efficience**
96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.	**96 (1)** Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

[3] Secure argued before the Tribunal that the gains in efficiency brought about by the Merger would be greater than, and would offset, any anti-competitive effects resulting therefrom, and those gains in efficiency would not likely be attained if the order were made.

[4] The Commissioner's application was heard over a period of 19 days in May and June 2022, hearing from dozens of witnesses and receiving over 40,000 pages of written evidence. On March 3, 2023, the Tribunal issued its decision on the Commissioner's application. Supported by reasons running more than 700 paragraphs, the Tribunal ordered the divestiture of 29 of the 41 facilities identified by the Commissioner. Of particular importance to the present appeal, the Tribunal found that Secure had not met its burden of establishing sufficient gains in efficiency to engage section 96 of the Act. It is this decision by the Tribunal (the Tribunal's Decision) that is the subject of the present appeal.

[5] Secure raises a number of issues on appeal. These can be identified as:

A. Interpretation of subsection 96(1) of the Act;
B. Exercising discretion in respect of the application of section 96;
C. Ignoring evidence of costs savings from the Elk Point facility in determining the relevant gains in efficiency;
D. Relying on the Tribunal's own expert opinion in determining the price elasticity of demand;
E. Errors related to the assessment of pre-order price effects;
F. Uneven approach to the application of the evidentiary standard of proof; and
G. Denial of procedural fairness.

[6] I will address each of these issues in the paragraphs below. However, I preface my comments by stating that I find no merit in any of the issues raised by Secure, and I would dismiss the appeal.

II. Standard of Review

[7] The parties agree, and I concur, that since this is a statutory appeal, the appellate standards of review apply: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 37; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328 at para. 27. The appellate standards of review are as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: questions of law are reviewed on a standard of correctness, whereas questions of fact or of mixed fact and law, in which there is no extricable question of law, are reviewed on a standard of palpable and overriding error.

[8] With regard to the palpable and overriding error standard, it is helpful to note the comments of this Court in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at paragraph 46:

> Palpable and overriding error is a highly deferential standard of review. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [Citations omitted]

[9] It should be noted that Secure's right to appeal the Tribunal's decision to this Court is provided for in section 13 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), in

which subsection 13(2) provides that an appeal on a question of fact lies only with the leave of this Court. Secure sought leave to appeal on questions of fact contemplated in issues C, D and E, but this Court (by Order dated April 21, 2023) granted leave only in respect of issues C and E. It denied leave to appeal on questions of fact arising out of issue D (Relying on the Tribunal's own expert opinion in determining the price elasticity of demand).

III. Interpretation of subsection 96(1) of the Act

[10] The core of the dispute between the parties on the interpretation of subsection 96(1) concerns which gains in efficiency are considered relevant (cognizable) in determining whether they "will be greater than, and will offset," anti-competitive effects of the merger in question. The parties appear to be agreed, and I concur, that this is a question of law, and that the applicable standard of review is correctness.

[11] This dispute centers on the final words of subsection 96(1): "and that the gains in efficiency would not likely be attained if the order were made." The Tribunal concluded, and the Commissioner agrees, that these final words qualify the "gains in efficiency" that are to be weighed against anti-competitive effects to determine whether section 96 applies to prohibit the Tribunal from making an order under section 92. Where subsection 96(1) asks whether the merger in question "has brought about … gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from" the merger, the Tribunal applied the final words to limit the scope of the "gains in efficiency" underlined above to those that "would not likely be attained if the order were made."

Effectively, the Tribunal and the Commissioner interpret subsection 96(1) to read more or less as:

> The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency **not likely to be attained if the order were made** that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger.
>
> Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience **qui ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue, et qui** surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé.

[12] The Tribunal required that, in order for Secure's section 96 defence to be successful, Secure would have to establish that the gains in efficiency brought about by the Merger and that would not likely be attained if the Tribunal issued an order under section 92 would be greater than all of the anti-competitive effects of the Merger. This is referred to as the order-driven approach.

[13] For its part, Secure argues that the order-driven approach leads to unintended asymmetry in the section 96 defence whereby only a subset of gains in efficiency brought about by the Merger (those that would not likely be attained if the order were made) are compared to all of the anti-competitive effects thereof. Secure argues that this "apple to oranges" approach should not be followed, and that the final words of subsection 96(1) should instead be read as a separate limitation on the Tribunal's power to make an order under section 92. By this approach, if the total of all gains in efficiency brought about by a merger "will be greater than, and will offset,"

all of the anti-competitive effects thereof, then the Tribunal cannot make an order that would cause any of those efficiencies to be lost. As characterized by Secure, subsection 96(1) asks two questions: (i) whether efficiency gains resulting from a merger exceed anti-competitive effects thereof, and (ii) whether efficiency gains will be attained if an order is made. Though Secure did not state its position this way, its argument appears to interpret subsection 96(1) to read more or less as:

> The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that **(i)** will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and **(ii)** would not likely be attained if the order were made.
>
> Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, **(i) qui** surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et **(ii) qui** ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

[14] The Commissioner opposes this interpretation on the basis that it would prevent the Tribunal from making an order under section 92 even where most of the claimed gains in efficiency would likely be attained in any event. As argued by the Commissioner, a single dollar of efficiency gains that would be lost as a result of an order by the Tribunal would engage the section 96 defence, which could not have been Parliament's intent. Secure does not dispute this consequence of its interpretation.

[15] Secure also offers an alternative interpretation in the event that this Court concludes that subsection 96(1) does indeed contemplate an order-driven approach. In that event, Secure argues

that this provision should nevertheless be interpreted to provide for a symmetrical analysis. By such an analysis, both gains in efficiency brought about by the merger and anti-competitive effects thereof should relate to the same time period and the same geographic markets. Presumably, they should also be similarly limited to such gains and effects as would not be attained if an order under section 92 were made. It is not clear to me what meaning is being given to the final words of subsection 96(1) under this interpretation.

A. *Principles of statutory interpretation*

[16] To resolve the dispute concerning the proper interpretation of subsection 96(1) of the Act, it is necessary to conduct an analysis following the relevant principles of statutory interpretation. In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10, the Supreme Court of Canada instructed as follows:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[17] Following this guidance, I will consider first the text of subsection 96(1), and then the context and the purpose thereof.

B. *Text*

[18] For convenience, I reproduce subsection 96(1) here again:

Exception where gains in efficiency	**Exception dans les cas de gains en efficience**
96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.	**96 (1)** Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

[19] The parties' competing views on how to interpret this provision are set out in paragraphs 11 to 15 above. In summary, and as stated above, Secure argues that the order-driven approach imposes an asymmetrical "apples to oranges" analysis that was not intended by Parliament. There are two aspects to the asymmetry noted by Secure. First, because gains in efficiency that occurred in the past would be unaffected by any order under section 92, the Tribunal in this case compared 10 years of efficiency gains going forward, with about 12 years of anti-competitive effects, being 10 years forward and roughly two years back. The second asymmetry concerns the fact that gains in efficiency that would likely not be attained if an order were made would be limited to the 136 geographic markets addressed in the order, whereas anti-competitive effects

were considered in respect of all 271 overlapping markets affected by the Merger, regardless of whether they would be affected by an order.

[20] The Commissioner argues that there is nothing in the text of subsection 96(1) that requires a symmetrical approach, and in fact it is the words themselves of this provision that create the asymmetry of which Secure complains. With regard to gains in efficiency, the text expressly focuses on the subset of those that "would not likely be attained if the order were made." On the other hand, with regard to anti-competitive effects, the text focuses on "any" prevention or lessening of competition, and is not limited in time or by whether such effects would be affected by the Tribunal's order. In fact, the scope of anti-competitive effects to be considered for a section 96 defence is not even limited to substantial prevention or lessening of competition as it is in section 92.

[21] Secure argues that one indication that the Commissioner's interpretation is wrong is that it leads to certain wording in subsection 96(1) being meaningless, which is inconsistent with the well-accepted principle that the law is always speaking (see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 10), and that an interpretation that leaves certain wording without meaning is to be avoided. Specifically, Secure points to the fact that subsection 96(1) contemplates gains in efficiency that have been brought about or that are likely to be brought about. Secure argues that gains in efficiency that have been brought about have already been realized, and if the final words of subsection 96(1) limit the scope of relevant gains in efficiency to those that would not likely be attained if the order were made, then the reference to gains in efficiency that have been brought about would never apply since they have already been attained.

[22] I disagree that the reference to gains in efficiency that have been brought about would never apply under the Commissioner's interpretation. Section 92 contemplates the possibility of an order that dissolves a merger that has already happened. I see no reason that certain gains in efficiency that have been brought about by a merger could not be undone by an order under section 92. While some such efficiency gains will have been realized in the time between the merger and the order, others will not have been realized yet. Accordingly, it is relevant to consider whether such unrealized efficiency gains have been "brought about" by a merger, and "would not likely be attained if the order were made."

[23] In my view, the Commissioner's interpretation of subsection 96(1) is consistent with the text. In both English and in French, it is reasonable to read the concluding words of the provision as limiting the scope of "gains in efficiency" that are to be weighed against anti-competitive effects, thus creating the asymmetry.

[24] As regards Secure's interpretation, it is reasonable, in my view, to read subsection 96(1) as shown in the modified version quoted at paragraph 13 above. However, it does not necessarily follow from such a reading that even a single dollar of efficiency gains lost by an order is enough to engage section 96. Based on that reading of the text, it is not clear what threshold of lost efficiency gains would engage section 96. Moreover, it seems to me that subsection 96(1) could have been worded much more clearly if the intent had been as Secure argues: to prohibit certain kinds of section 92 orders (those that would eliminate any efficiency gains) in cases where efficiency gains resulting from a merger exceed anti-competitive effects thereof.

C. *Context*

[25] The defence contemplated in section 96 applies only where the Tribunal finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially", as contemplated in section 92. This section, together with the rest of the "Mergers" portion of the Act (ss. 91 to 103), forms the most relevant context for the interpretation of subsection 96(1). That said, I do not find anything in the sections other than 92 and 96 that requires comment for the purposes of this appeal.

[26] As indicated at the beginning of these reasons, section 92 empowers the Tribunal, in appropriate circumstances, to order the dissolution of a merger or the disposition of certain assets or shares. Section 96 acts as a check on this power in cases where a merger brings about certain gains in efficiency. As stated in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 at paragraph 111 (*Tervita*), and as recognized by the Tribunal at paragraph 491 of its Decision, section 96 gives primacy to economic efficiency, but not without limitation. At paragraph 110 of *Tervita*, the majority of the Supreme Court of Canada rejected the argument that all gains in efficiency, however arising, should be considered under section 96. At paragraph 113, the majority stated:

> In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.
>
> [Emphasis added]

[27] In my view, the underlined sentence in the quote above, being part of a discussion of the limits of the section 96 defence, demonstrates that the majority of the Supreme Court of Canada favoured an interpretation of subsection 96(1) that is consistent with that argued by the Commissioner and found by the Tribunal: the gains in efficiency to be compared to anti-competitive effects are limited to those that would not likely be attained if a section 92 order were made. There is no suggestion in that paragraph that the final words of section 96 are intended to limit the scope of a section 92 order, as Secure argues.

D. *Purpose*

[28] Section 1.1 of the Act provides that its purpose is "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy." The goal of efficiency is clearly the key motivation for the section 96 defence: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 at paragraph 110 (see also *Tervita* at para. 87). That said, Parliament clearly tempered this goal by its choice of wording. It did not set aside entirely the goal of maintaining and encouraging competition, so as to deprive the Tribunal of the power to make an order under section 92 where such an order would stop any efficiency gains, even in the case of a merger with major anti-competitive effects. I do not accept Secure's argument that this is implicit in section 96. In the English version, when addressing anti-competitive effects, this provision refers to "the effects of any prevention or lessening of competition…" (Emphasis added). The word "any" was not included in addressing efficiency gains in section 96, though it could have been.

[29] Secure argues that another goal of the Act is predictability. It argues that the asymmetrical reading of subsection 96(1) urged by the Commissioner and applied by the Tribunal could not have been intended by Parliament because it prevents parties who are considering a merger from being able to properly assess in advance whether an order under section 92 is likely to be imposed. This is because the scope and the timing of such an order would be unknown to the merging parties until its issuance. Whereas all of the anti-competitive effects of the merger would be considered under subsection 96(1), those effects would be balanced against only a subset of gains in efficiency – those not likely to be attained if the order were made. Clearly, the scope and timing of the order would affect which efficiency gains are relevant.

[30] Secure also cites the majority in *Tervita* at paragraph 115 to the effect that "[e]fficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96." Secure argues that an interpretation of subsection 96(1) of the Act that treats efficiency gains as cognizable or not depending on the scope and timing of the order under section 92 conflicts with this instruction by the majority of the Supreme Court.

[31] In my view, paragraph 115 of *Tervita* should not be understood to forbid an interpretation of subsection 96(1) that treats efficiency gains as being cognizable or not depending on the timing and scope of an order under section 92. That paragraph dealt with OIEs (order implementation efficiencies), which were distinguished in *Tervita* from efficiency gains resulting from the merger itself. At paragraph 107, the majority stated:

> A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the

> case but for the merger (what could be called "early-mover" efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.

[32] I accept the premises that predictability is important in merger reviews (see *Tervita* at para. 130), and that predictability may be limited by the Commissioner's interpretation of subsection 96(1). However, I conclude that an interpretation that limits relevant efficiency gains (to those that would likely not be attained if the order were made) is the clearly expressed intention of the text of the provision. A limit on predictability is baked in. Parliament may simply have been less concerned about predictability than Secure would have liked.

[33] Secure points to the instruction in *Tervita* at paragraphs 124 and 150 that assessment of a section 96 defence should be as objective as possible. However, I do not accept that the Commissioner's interpretation of subsection 96(1) introduces subjectivity to the assessment that is not present anyway. As recognized in *Tervita*, the Commissioner has a burden to quantify the quantifiable, but effects that cannot be quantitatively estimated can be considered qualitatively.

[34] Given the explicit asymmetry in the text of subsection 96(1), the Commissioner's interpretation is correct. In my view, it is appropriate to read the words "and that the gains in efficiency would not likely be attained if the order were made" to limit the scope of cognizable efficiency gains in a way that does not apply to the scope of relevant anti-competitive effects.

[35] This explicit asymmetry in the text of subsection 96(1) is also a key reason that I reject Secure's alternative interpretation. In my view, this asymmetry precludes requiring the Tribunal to consider gains in efficiency and anti-competitive effects symmetrically in taking an order-driven approach.

[36] Secure draws the Court's attention to comments made concerning the final words of subsection 96(1) during a Parliamentary Committee meeting on May 21, 1986 by Mel Cappe, then Assistant Deputy Minister of Consumer and Corporate Affairs, Policy Coordination (see House of Commons, *Minutes of Proceedings and Evidence on the Legislative Committee on Bill C-91*, 33-1, No. 11 (21 May 1986) at 42). After quoting the clause in question, he stated:

> Here they are talking about the order of prohibition. Therefore, in order for this defence to be valuable to the parties which are merging, they would have to prove that the gains in efficiency overwhelmed the costs and moreover show that the order of the tribunal would stop those efficiencies from taking place.
>
> [Emphasis added]

[37] In my view, these comments are not sufficient to conclude, over the indications to the contrary discussed above, that the section 96 defence was intended to limit the scope of the Tribunal's power under section 92 to prohibit an order that would stop any amount of lost efficiency gains. As indicated at paragraph 24 above, such an intention could have been worded much more clearly.

[38] Secure argues that the asymmetrical interpretation of subsection 96(1) applied by the Tribunal and argued by the Commissioner leads to an absurd result, which is to be avoided. Secure also argues that the Tribunal even acknowledged this absurdity at paragraph 706 of its

reasons. I do not agree that the Tribunal acknowledged an absurdity in the interpretation it adopted. It acknowledged the asymmetry, but found that it was a product of the language of the provision. It then stated as follows:

> To the extent that there is a sound basis for including in the trade-off assessment any anti-competitive effects that have materialized prior to the issuance of the Tribunal's order, and for excluding efficiencies that are unlikely to be affected by such order, the panel does not consider such an outcome to result in the type of absurdity that might otherwise warrant a search for a different interpretation of subsection 96(1).

[39] In my view, the Tribunal clearly understood the principle that an interpretation that leads to an absurd result is to be avoided, and it clearly found no such absurdity. The Tribunal's use of the words "the type of absurdity that might otherwise warrant a search for a different interpretation" does not change my view.

[40] In any case, I do not agree with Secure's argument that the asymmetrical interpretation of subsection 96(1) is absurd. Secure repeatedly cites *Tervita* at paragraph 144 in support of its position that such an "apples to oranges" approach, which leads to a "balancing of incommensurables" should not be followed. I do not read paragraph 144 of *Tervita* as Secure urges. I reproduce that paragraph here for convenience:

> The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

[41] Firstly, the "incommensurables" cited are not efficiency gains versus anti-competitive effects. Rather, they are quantitative aspects versus qualitative aspects. Moreover, this paragraph acknowledged that the word "offset" implies that "apples and oranges" will be compared.

E. *Conclusion on interpretation of subsection 96(1)*

[42] Having considered the text, context and purpose of subsection 96(1) of the Act, I conclude that the Tribunal was correct in its interpretation of this provision.

IV. Exercise of discretion in application of section 96

[43] Secure argues that the Tribunal erred by purporting to exercise discretion, in the circumstances of this close case, to reject Secure's section 96 defence. Secure argues that the Tribunal had no discretion to exercise under section 96 since the wording is mandatory: "The Tribunal shall not make an order under section 92 if it finds…".

[44] It is true that the section 96 defence is mandatory in the sense that, once the requirements thereof are met, the Tribunal loses the power to make an order under section 92. In this sense, the Tribunal's use of the word "discretion" may give an incorrect impression. However, the Tribunal did not err. In fact, it did precisely what the majority of the Supreme Court of Canada instructed in *Tervita* at paragraph 154, which the Tribunal cited:

> Though it is necessary to re-emphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net

> efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.
>
> [Emphasis added]

[45] At paragraphs 714 to 716 of the Tribunal's Decision, the Tribunal found that even though this might be said to be a close case, a closer look at the evidence (and specifically the conservative nature of the Commissioner's estimates of price and non-price effects) leads to the conclusion that the section 96 defence should not succeed. I do not accept that, in its first review of these estimates, the Tribunal reached clear conclusions that prevented it from further reviewing them and considering their conservative nature. In my view, the Tribunal adequately explained its conclusion as required in *Tervita*.

V. Elk Point facility

[46] The Elk Point Treatment, Recovery and Disposal facility was one of the facilities acquired by Secure in the Merger. Some months later, that facility was accidentally destroyed by fire. Secure had another facility that could be used to meet customers' requirements (the Tulliby Lake Treatment, Recovery and Disposal facility), and therefore Secure did not have to incur the cost of rebuilding the Elk Point facility.

[47] The Elk Point facility was one of the facilities that the Tribunal ordered to be divested. Secure argues that any purchaser of the Elk Point facility will have to incur the cost of rebuilding that Secure itself has avoided. Secure argues that this rebuilding cost is therefore a gain in efficiency resulting from the Merger that will not likely be attained if the Tribunal's order were maintained, and therefore such cost should have been taken into account in assessing the section 96 defence. Secure notes that the Tribunal's calculations of efficiency gains fail to consider evidence of the savings of rebuilding costs.

[48] The Commissioner responds that the Tribunal made no error in this respect because it found that Secure had failed to prove that processing at the Tulliby Lake facility rather than the Elk Point facility would be less costly overall (see Tribunal's Decision at paras. 569-570 and 574-583). The Commissioner argues that this is a fundamental deficiency, which would have been present even if the avoided rebuilding cost had been discussed. The Commissioner buttresses his argument by noting that it was Secure's original decision to close the Tulliby Lake facility and to maintain the Elk Point facility. According to the Commissioner, this suggests that maintaining the Tulliby Lake facility may well be the less efficient option.

[49] This is a factually-suffused issue that must be reviewed on a standard of palpable and overriding error. Based on the high threshold to be met to establish such an error, I am not convinced that this Court should intervene on this issue. Though it does indeed appear that the Tribunal's calculations of efficiency gains do not address evidence of saved costs of rebuilding the Elk Point facility, it also appears that considering such evidence would not have addressed the fundamental lack of evidence that processing at the Tulliby Lake facility rather than the Elk

Point facility would be less costly overall. The Tribunal's conclusions on this lack of evidence do not apply solely to day-to-day savings as Secure alleges. The Tribunal made clear at paragraph 580 of its reasons that "Secure has failed to demonstrate, on a balance of probabilities, the overall efficiency gains that it has claimed in respect of facility rationalizations."

[50] If there was any error by the Tribunal on this issue, I am not convinced that it was either palpable or overriding.

VI. Expert opinion on price elasticity of demand

[51] Secure argues that the Tribunal erred when it rejected expert evidence on price elasticity of demand submitted by both the Commissioner and Secure. Secure argues that, at the hearing, the Commissioner's expert (Dr. Miller) resiled from his initial estimate and agreed with the estimate provided by Secure's expert (Dr. Yatchew). Despite the apparent absence of disagreement, the Tribunal found that, "[g]iven the shortcomings in the analyses of Dr. Miller and Dr. Yatchew, the Tribunal was unable to reach a definitive conclusion, based on their evidence alone" (see Tribunal's Decision at para. 659).

[52] The Tribunal followed up in paragraph 660 as follows: "However, having regard to the evidentiary record as a whole, the Tribunal finds, on a balance of probabilities, that the price elasticity of demand for each of those services is likely in the range of -0.1 to -0.3." The Tribunal found that this estimate was "consistent with where Dr. Yatchew and Dr. Miller ultimately landed."

[53] Secure argues that the Tribunal erred in law in two respects here. First, Secure argues that the Tribunal exceeded its judicial role, and denied procedural fairness, by substituting its own "expert" opinion for that expressed by the parties' experts. Second, Secure argues that the Tribunal was not entitled to rely on expert evidence of the parties after having rejected it.

[54] I start by noting that it was necessary for Secure to characterize these alleged errors as errors of law because, as noted at paragraph 9 above, leave to appeal on this issue as a question of fact had been denied. It is awkward for Secure, having characterized these alleged errors as questions of fact for the purposes of its motion seeking leave to appeal, to now characterize them as questions of law. In any case, I see no error of law.

[55] On the first point, I see no legal error in the Tribunal refusing to adopt as a whole the evidence of any one expert, and considering other evidence in reaching its conclusion. This neither exceeds the Tribunal's judicial role, nor denies procedural fairness. Secure has not shown any inconsistency between the Tribunal's conclusion and the evidence.

[56] With regard to the second point, I do not accept the premise that the Tribunal rejected the parties' expert evidence. As indicated in the quote reproduced at paragraph 51 above, the Tribunal simply found that it was unable to reach a definitive conclusion based on the experts' evidence alone. Its statement immediately thereafter that its conclusion was consistent with that of the experts further suggests that it did not entirely reject such evidence.

VII. Assessment of pre-order price effects

[57] Secure argues that the Tribunal erred in two closely related respects in its consideration of price effects of the Merger prior to its order. In both respects, Secure argues that it was manifestly inconsistent for the Tribunal to rely on alleged price effects from the date of closing without adjusting for its own conclusion that price effects are unlikely to have occurred. Secure characterizes these as errors of law, or alternatively as palpable and overriding errors of fact.

[58] Either way, I see no error.

[59] Firstly, I do not accept Secure's premise that the Tribunal concluded that price effects are unlikely to have occurred from the date of closing of the Merger. Rather, the Tribunal criticized the eight-month data set relied on by Secure's witness Dr. Duplantis as too short to produce reliable results (see Tribunal's Decision at para. 207). The Tribunal mentioned factors that Dr. Duplantis should have taken into account: (i) the time required to negotiate rates with customers, (ii) existing contracts that may remain in force during the eight-month period, and (iii) possible reluctance to increase prices while under the Commissioner's scrutiny. However, the Tribunal did not conclude that the result was that price effects are unlikely to have occurred from the date of closing.

[60] As regards the allegation that the Tribunal's treatment of the evidence on this subject was inconsistent, Secure's argument is that the Tribunal accepted the evidence of the Commissioner's witness Dr. Miller without insisting on the adjustments that it found missing in Dr. Duplantis'

evidence, and which prompted the Tribunal to discount that evidence. This is a factually-suffused issue in respect of which the Tribunal's expertise merits considerable deference (see *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2023 FCA 16, 447 D.L.R. (4th) 553 at para. 7). Absent a palpable and overriding error, it would be inappropriate for this Court to intervene. Based on the paragraphs from the Tribunal's Decision cited by Secure (Tribunal's Decision at paras. 635, 662, 667), it is not obvious to me (palpable) that the Tribunal's treatment of the Dr. Miller's evidence was inconsistent with that of Dr. Duplantis.

VIII. Application of evidentiary standard of proof

[61] Secure argues that, in many respects, the Tribunal used an uneven approach in considering the evidence of the respective parties. It argues that this amounts to an error of law, including of procedural fairness.

[62] I should note that some of Secure's arguments on this issue depend on success on other issues it raises. These include the asymmetrical interpretation of subsection 96(1) as well as the treatment of expert evidence on price elasticity of demand. Given my conclusions discussed above, such arguments must fail.

[63] The other arguments raised by Secure alleging an uneven approach to the treatment of the evidence are directed to examples where the Tribunal criticized Secure's evidence and gave it no weight but made adjustments to evidence submitted by the Commissioner in order to overcome deficiencies therein, and give such evidence some weight.

[64] However, it is the Tribunal's role to review and weigh the evidence. I see no error of law in finding that certain evidence is so flawed that it should be given no weight, whereas other flawed evidence can be corrected. I also am not convinced that the Tribunal decided either to give no weight to flawed evidence, or to make adjustments thereto, based on whether that evidence was submitted by Secure or by the Commissioner.

[65] I am inclined to agree with the Commissioner that Secure's arguments on this issue are essentially a collateral attack on the Tribunal's findings of fact. Secure did not seek, and was not granted, leave to appeal on these issues as questions of fact. Therefore, we cannot consider these as alleged errors of fact. In any case, Secure has not convinced me that the Tribunal made any error in the treatment of the evidence that was either palpable or overriding.

IX. Procedural fairness

[66] Secure argues that it was denied procedural fairness when the Tribunal, having found that the Merger had not substantially lessened competition in several geographic markets, ordered divestiture of only 29 of the 41 facilities that the Commissioner had proposed. Secure notes that, in closing argument before the Tribunal, it requested that the Commissioner's application be dismissed entirely, but in the alternative, it requested the opportunity to lead evidence and make submissions on the issue of remedy. No such opportunity was granted.

[67] Secure cites this Court's decision in *Air Canada v. Robinson*, 2021 FCA 204 at paragraph 54 (*Air Canada*), for examples of situations in which procedural fairness requires that a party be

given an opportunity to be heard on a particular issue. These include where the adjudicator has received evidence or submissions from one party on an *ex parte* basis (without notice to the other), or has received input from other members of the administrative body without notice to the parties of new issues that arose therefrom. The idea is that the parties should know the case against them and be afforded an opportunity to answer it.

[68] The specific circumstances identified in the previous paragraph are not present in this case. Moreover, this Court clarified in *Air Canada* at paragraph 55 that, generally speaking, an administrative decision maker is not required to give a warning as to what remedy it is considering granting. In *Air Canada*, that general rule did not apply because Air Canada did not have a sense of the sort of remedies that might be imposed.

[69] In the present case, Secure was fully aware of the 41 facilities that the Commissioner proposed should be divested, and of the possibility that some subset of those facilities might be ordered divested. Secure had every opportunity during the hearing before the Tribunal to submit evidence and make submissions on the question of remedy. In short, Secure knew the case against it, and was afforded an opportunity to answer it. I see no breach of procedural fairness in this case.

X. Conclusion

[70] For the reasons discussed above, I would dismiss the present appeal with costs.

"George R. Locke"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
René LeBlanc J.A."

ANNEX

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

…

Order

92 (1) 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

(a) in a trade, industry or profession,

(b) among the sources from which a trade, industry or profession obtains a product,

(c) among the outlets through which a trade, industry or

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[…]

Ordonnance en cas de diminution de la concurrence

92 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

a) dans un commerce, une industrie ou une profession;

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

c) entre les débouchés par l'intermédiaire desquels un

profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

commerce, une industrie ou une profession écoule un produit;

d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

e) dans le cas d’un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) de le dissoudre, conformément à ses directives,

(ii) de se départir, selon les modalités qu’il indique, des éléments d’actif et des actions qu’il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l’ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d’un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l’ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l’ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both	**(iii)** en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :
(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or	**(A)** à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,
(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.	**(B)** à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.
Evidence	**Preuve**
(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.	**(2)** Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.
…	[…]
Exception where gains in efficiency	**Exception dans les cas de gains en efficience**
96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is	**96 (1)** Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui

made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

Facteurs pris en considération

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

(a) a significant increase in the real value of exports; or

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

(b) a significant substitution of domestic products for imported products.

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Restriction

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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Tervita Corporation,
Complete Environmental Inc. and
Babkirk Land Services Inc. *Appellants*

v.

Commissioner of Competition *Respondent*

Indexed as: Tervita Corp. *v.* Canada (Commissioner of Competition)

2015 SCC 3

File No.: 35314.

2014: March 27; 2015: January 22.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Competition — Mergers — Review — Commissioner of Competition opposing merger on ground that merger likely to prevent competition substantially — Merged parties raising statutory efficiencies defence — Competition Tribunal rejecting defence and making divestiture order — Proper legal test for determining when merger gives rise to substantial prevention of competition under Competition Act — Proper approach to statutory efficiencies defence — Content of Commissioner's burden for purposes of efficiencies defence — Whether merger likely to prevent competition substantially — Whether gains in efficiency resulting from merger greater than and offset anti-competitive effects of merger — Competition Act, R.S.C. 1985, c. C-34, ss. 92, 96.

Administrative law — Appeals — Standard of review — Competition Tribunal — Standard of review applicable to tribunal's determinations of questions of law arising under Competition Act, R.S.C. 1985, c. C-34 — Whether statutory language in appeal provision rebuts presumption that standard of reasonableness applies to tribunal's interpretation of own statute — Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1).

Tervita Corporation,
Complete Environmental Inc. et
Babkirk Land Services Inc. *Appelantes*

c.

Commissaire de la concurrence *Intimé*

Répertorié : Tervita Corp. *c.* Canada (Commissaire de la concurrence)

2015 CSC 3

N° du greffe : 35314.

2014 : 27 mars; 2015 : 22 janvier.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Concurrence — Fusionnements — Examen — Opposition de la commissaire de la concurrence à un fusionnement au motif qu'il aura vraisemblablement pour effet d'empêcher sensiblement la concurrence — Défense fondée sur les gains en efficience prévue par la loi invoquée par les parties fusionnées — Rejet de la défense par le Tribunal de la concurrence et prononcé d'une ordonnance de dessaisissement — Quel est le bon critère juridique pour déterminer si le fusionnement empêche sensiblement la concurrence aux termes de la Loi sur la concurrence? — Comment faut-il envisager la défense fondée sur les gains en efficience prévue par la loi? — En quoi consiste le fardeau qui incombe à la commissaire relativement à la défense fondée sur les gains en efficience? — Le fusionnement aura-t-il vraisemblablement pour effet d'empêcher sensiblement la concurrence? — Les gains en efficience résultant du fusionnement surpassent-ils et neutralisent-ils les effets anticoncurrentiels du fusionnement? — Loi sur la concurrence, L.R.C. 1985, c. C-34, art. 92, 96.

Droit administratif — Appels — Norme de contrôle — Tribunal de la concurrence — Norme de contrôle applicable aux décisions du tribunal sur des questions de droit qui concernent la Loi sur la concurrence, L.R.C. 1985, c. C-34 — Le libellé de la disposition d'appel réfute-t-il la présomption selon laquelle la norme de la décision raisonnable s'applique à l'interprétation par le tribunal de sa loi constitutive? — Loi sur le Tribunal de la concurrence, L.R.C. 1985, c. 19 (2e suppl.), art. 13(1).

Four permits for the operation of secure landfills for the disposal of hazardous waste generated by oil and gas operations have been issued in Northeastern British Columbia. T holds two permits and operates two landfills pursuant to them. A third permit is held by an Aboriginal community but the landfill has not yet been constructed. The fourth permit is held by B, a wholly owned subsidiary of C. When T acquired C, the Commissioner of Competition (the "Commissioner") opposed the transaction on the ground that it was likely to substantially prevent competition in secure landfill services in Northeastern British Columbia. The Commissioner asked the Competition Tribunal (the "Tribunal") to order, pursuant to s. 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), that the transaction be dissolved, or in the alternative, that T divest itself of B or C.

Pursuant to s. 92 of the Act, the Tribunal found that the merger was likely to prevent competition substantially in the relevant market. It further found that the efficiencies gained by the merger were not greater than and would not offset the anti-competitive effects of the merger, such that T had failed to bring itself within the efficiencies exception contained in s. 96 of the Act. The Tribunal ordered T to divest itself of B. The Federal Court of Appeal upheld the Tribunal's conclusion that the merger would likely substantially prevent competition. With respect to the s. 96 efficiencies defence, the court held that the Tribunal erred in a number of respects. However, in its fresh assessment of the matter, the court concluded that the merger only provided marginal gains in efficiency which were not significant enough to approve a merger under s. 96. As a result, the court dismissed the appeal.

Held (Karakatsanis J. dissenting): The appeal should be allowed, the divestiture order set aside and the s. 92 application dismissed.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver and Wagner JJ.: While a standard of reasonableness presumptively applies in this case because the questions at issue are questions of law arising under the Tribunal's home statute, that presumption is rebutted. The appeal provision in the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less

Quatre permis d'exploitation visant des sites d'enfouissement sécuritaire des déchets dangereux produits par des exploitations pétrolières et gazières ont été délivrés dans le Nord-Est de la Colombie-Britannique. T est titulaire de deux de ces permis et exploite deux sites d'enfouissement conformément à ces permis. Un troisième permis est détenu par une collectivité autochtone, mais les installations n'ont pas encore été construites. Le quatrième permis est détenu par B, une filiale en propriété exclusive de C. Quand T a acquis C, la commissaire de la concurrence s'est opposée à cette opération, au motif qu'elle aurait vraisemblablement pour effet de nuire sensiblement à la concurrence dans les services d'enfouissement sécuritaire du Nord-Est de la Colombie-Britannique. La commissaire a demandé au Tribunal de la concurrence (le « Tribunal ») d'ordonner l'annulation de la transaction en vertu de l'art. 92 de la *Loi sur la concurrence*, L.R.C. 1985, c. C-34 (la « Loi »), ou, à titre subsidiaire, d'ordonner à T de se départir de B ou de C.

Le Tribunal a conclu, en vertu de l'art. 92, que le fusionnement aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence dans le marché en cause. Il a statué en outre que les gains en efficience engendrés par le fusionnement ne surpassaient pas les effets anticoncurrentiels du fusionnement et ne les neutraliseraient pas, de telle sorte que T ne pouvait invoquer l'exception relative aux gains en efficience énoncée à l'art. 96 de la Loi. Il a ordonné à T de se départir de B. La Cour d'appel fédérale a confirmé la conclusion du Tribunal selon laquelle le fusionnement proposé aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence. Quant à la défense fondée sur les gains en efficience prévue à l'art. 96, de l'avis de la cour, le Tribunal s'était trompé à certains égards. Toutefois, après une nouvelle appréciation de la question, la cour a conclu que le fusionnement avait seulement engendré des gains en efficience négligeables, qui n'étaient pas assez importants pour que le fusionnement soit approuvé sous le régime de l'art. 96. Par conséquent, la cour a rejeté l'appel.

Arrêt (la juge Karakatsanis est dissidente) : Le pourvoi est accueilli, l'ordonnance de dessaisissement est annulée et la demande présentée en vertu de l'art. 92 est rejetée.

La juge en chef McLachlin et les juges Rothstein, Cromwell, Moldaver et Wagner : Même si la norme de contrôle de la décision raisonnable est présumée applicable en l'espèce, car les questions en litige sont des questions de droit qui concernent la loi constitutive du Tribunal, cette présomption est réfutée. La disposition d'appel de la *Loi sur le Tribunal de la concurrence*, L.R.C. 1985, c. 19 (2e suppl.), témoigne de l'intention

than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness.

The concern under the "prevention" branch of s. 92 of the Act is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. To determine whether a merger gives rise to a substantial prevention of competition under s. 92(1), the Tribunal must look to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. First, it is necessary to identify the firm or firms the merger would prevent from independently entering the market. Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, it would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm.

Second, it is necessary to examine the "but for" market condition to see if, absent the merger, the potential competitor would have likely entered the market and if so whether the effect of that competitor's entry on the market would likely be substantial. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially. At this stage of the analysis, any factor that could influence entry upon which evidence has been adduced should be considered, such as the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act. The timeframe for entry must be discernible. In other words, there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. That evidence must be sufficient to meet the "likely" test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks, the more difficult it will be to meet the test. 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 is an important consideration, but should not support an effort to

claire du législateur de ne pas imposer la retenue judiciaire dans le contrôle des décisions du Tribunal, ce qui appuie la thèse selon laquelle la norme de la décision correcte s'applique aux questions de droit et celle de la décision raisonnable aux questions mixtes de droit et de fait et aux questions de fait.

Le volet de l'art. 92 relatif à l'« empêchement » vise à prévenir qu'une entreprise possédant une puissance commerciale procède à un fusionnement pour empêcher la concurrence susceptible par ailleurs de s'exercer dans un marché contestable. Pour déterminer si un fusionnement empêche sensiblement la concurrence, aux termes du par. 92(1), le Tribunal doit envisager l'état du marché, n'eût été le fusionnement, pour apprécier le paysage concurrentiel qui existerait vraisemblablement si le fusionnement n'avait pas eu lieu. Premièrement, il faut déterminer l'entreprise — ou les entreprises — que le fusionnement empêcherait d'entrer dans le marché de manière indépendante. Le concurrent éventuel est habituellement une partie au fusionnement : l'entreprise acquise ou l'entreprise acquérante. L'analyse est axée sur l'entrée potentielle dans le marché par la première lorsque, n'eût été le fusionnement, celle-ci aurait vraisemblablement pénétré le marché en cause. L'analyse est axée sur l'entrée potentielle dans le marché par la seconde lorsque, n'eût été le fusionnement, celle-ci aurait pénétré le marché en question de manière indépendante ou par le truchement de l'acquisition et de l'expansion d'une entreprise de plus petite taille.

Deuxièmement, il faut examiner l'état du marché pour voir si, n'eût été le fusionnement, le concurrent éventuel serait vraisemblablement entré dans le marché et, dans l'affirmative, si l'effet de la pénétration par le concurrent éventuel aurait vraisemblablement un effet sensible sur le marché. Si la pénétration par le concurrent n'a aucun effet sur la puissance commerciale de l'entreprise acquérante, l'on ne peut dire du fusionnement qu'il a pour effet d'empêcher sensiblement la concurrence. À cette étape de l'analyse, tous les éléments qui sont susceptibles d'influer sur cette pénétration du marché et à l'égard desquels une preuve a été produite doivent être pris en considération, comme les plans et éléments d'actif de la partie concernée, les conditions du marché actuelles et attendues et d'autres facteurs, énumérés à l'art. 93 de la Loi. Le délai de pénétration du marché doit être discernable. Autrement dit, il doit y avoir une preuve du moment où la partie au fusionnement aurait, de façon réaliste, pénétré le marché en l'absence du fusionnement. La preuve doit être suffisante pour qu'il soit satisfait à la condition de « vraisemblance » selon la prépondérance des probabilités, mais il ne faut pas oublier que plus l'examen par le Tribunal porte loin dans le futur, plus

look farther into the future than the evidence supports. As for whether a potential competitor's entry into the market will have a substantial effect, it is necessary to assess a variety of dimensions of competition including price and output, as well as the degree and duration of any effect it would have on the market. Section 93 of the Act provides a non-exhaustive list of factors that may be considered.

In the present case, the Tribunal's conclusion that the merger is likely to substantially prevent competition is correct. It used a forward-looking "but for" analysis, identified the acquired party as the focus of the analysis, and assessed whether, but for the merger, the acquired party would likely have entered the relevant market in a manner sufficient to compete with T. The Tribunal did not speculate; rather, it made findings of fact based on the abundant evidence before it. While the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in absence of the merger was flawed, there was sufficient other evidence upon which it could find a substantial prevention of competition as a result of the merger.

As s. 92 of the Act is engaged, it is necessary to determine whether the s. 96 efficiencies defence applies to prevent the making of an order under s. 92. The defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. The Commissioner has the burden of proving the anti-competitive effects, and the merging parties bear the onus of proving the remaining elements of the defence. There are different possible methodologies for the comparative exercise under s. 96, two of which have been the subject of judicial consideration in Canada: the "total surplus standard" which involves quantifying the deadweight loss which will result from a merger, and the "balancing weights standard" under which the Tribunal weighs the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. Because the Act does not set out which methodology should be used, the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.

il est difficile d'y satisfaire. La période qu'un nouveau concurrent aux prises avec certains obstacles et qui agit avec diligence pour les surmonter pourrait voir s'écouler lorsqu'il tente de pénétrer le marché est certes un facteur important, mais ne permet toutefois pas d'envisager au-delà de ce que la preuve appuie. Quant à savoir si la pénétration du marché par un concurrent éventuel aura un effet sensible, il faut examiner diverses dimensions de la concurrence, dont le prix et les extrants, ainsi que l'ampleur et la durée de tout effet qu'elle aurait sur le marché. L'article 93 de la Loi dresse une liste non exhaustive de facteurs dont il peut être tenu compte.

En l'espèce, la conclusion du Tribunal selon laquelle le fusionnement aura vraisemblablement pour effet d'empêcher sensiblement la concurrence est correcte. Il a procédé à une analyse prospective axée sur l'absence hypothétique, a mis la partie acquise au centre de l'analyse et a demandé si, n'eût été le fusionnement, la partie acquise aurait vraisemblablement pénétré le marché pertinent dans une mesure suffisante pour livrer concurrence à T. Le Tribunal n'a fait aucune conjecture; il a plutôt tiré des conclusions de fait sur le fondement de la preuve abondante dont il disposait. Si la caractérisation par le Tribunal de la soi-disant baisse du prix de 10 p. 100 qui aurait été réalisée en l'absence du fusionnement était mal fondée, il disposait de suffisamment d'autres éléments de preuve pour conclure que le fusionnement empêcherait sensiblement la concurrence.

Étant donné qu'il est satisfait à l'art. 92 de la Loi, il y a lieu de déterminer si la défense fondée sur les gains en efficience prévue à l'art. 96 fait obstacle à l'ordonnance visée à l'art. 92. La défense commande une analyse visant à déterminer si les gains en efficience qu'entraîne le fusionnement, résultant de l'intégration des ressources, surpassent les effets anticoncurrentiels qui découlent de la diminution ou de l'absence de concurrence dans le marché géographique et dans celui du produit en cause. La commissaire est tenue de prouver les effets anticoncurrentiels; les parties au fusionnement assument quant à elles la charge de prouver les autres éléments de la défense. Il existe diverses manières de procéder à l'exercice de comparaison qu'appelle l'art. 96; deux ont été examinées par les tribunaux au Canada : le critère du « surplus total », qui implique une quantification de la perte sèche qui découlera d'un fusionnement, et le critère des « coefficients pondérateurs » suivant lequel le Tribunal compare les effets du fusionnement sur les consommateurs et sur les actionnaires de l'entité fusionnée. Comme la Loi ne précise pas la méthode à appliquer, le Tribunal jouit de la latitude requise pour décider en bout de ligne à la lumière des circonstances propres à chaque fusionnement.

While s. 96 does give primacy to economic efficiency, it is not without limitation. Not all economic efficiencies should be taken into account under s. 96. A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger ("early-mover efficiencies"), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order ("order implementation efficiencies"). Efficiencies that are the result of the regulatory process of the Act are not cognizable under s. 96, because they result from the operation and application of the legal framework regulating competition law in Canada, rather than from the merger itself. On the other hand, early-mover efficiencies are cognizable under s. 96, because they are real economic efficiencies that are caused by the merger. In this case, however, the classification of the one-year transportation and market efficiency gains claimed by T as either early-mover efficiencies or order implementation efficiencies would not be dispositive because the efficiencies were not ultimately realized by T.

In its consideration of the efficiencies defence, the Tribunal should consider all available quantitative and qualitative evidence. It is the Commissioner's burden to quantify all quantifiable anti-competitive effects. Effects that can be quantified should be quantified, even as estimates, provided such estimates are grounded in evidence that can be challenged and weighed. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis. Effects will only be considered qualitatively if they cannot be quantitatively estimated. This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances.

Here, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96. Specifically, there is no price elasticity information which means that the possible range of deadweight loss resulting from the merger is unknown. To permit the Tribunal to consider the price decrease evidence without the rest of the information necessary to

L'article 96 accorde effectivement la primauté à l'efficience de l'économie, mais il n'est pas dépourvu de limites. Ce ne sont pas tous les gains en efficience économiques qui devraient être pris en considération dans l'analyse qu'appelle l'art. 96. Il y a lieu de distinguer entre les gains en efficience qu'une partie au fusionnement prétend être en mesure de réaliser plus rapidement qu'en l'absence du fusionnement (« gains en efficience du premier arrivé ») et les gains en efficience qu'une partie au fusionnement pourrait réaliser plus tôt qu'un concurrent pour la seule raison que ce dernier devrait attendre la fin de la procédure de dessaisissement (« gains en efficience liés à l'exécution d'une ordonnance »). Les gains en efficience qui résultent de l'application de la Loi ne peuvent être pris en compte au titre de l'art. 96, car ils découlent de l'exécution et de l'application du cadre qui réglemente le droit de la concurrence au Canada, plutôt que du fusionnement en soi. En revanche, les gains en efficience du premier arrivé sont admissibles pour l'application de l'art. 96, car il s'agit de gains en efficience économiques qui résultent véritablement du fusionnement. Néanmoins, en l'espèce, la classification de ces gains en efficience d'un an relatifs au transport et à l'expansion du marché invoqués par T à titre de gains du premier arrivé ou de gains liés à l'exécution d'une ordonnance ne serait pas déterminante, puisque ces gains n'ont pas été réalisés.

Dans l'analyse de la défense fondée sur les gains en efficience, le Tribunal devrait prendre en considération tous les éléments quantitatifs et qualitatifs à sa disposition. Il incombe à la commissaire de quantifier tous les effets anticoncurrentiels quantifiables. Les effets qui peuvent être quantifiés devraient l'être, ou à tout le moins être estimés, dans la mesure où de telles estimations sont fondées sur une preuve qui peut être attaquée et soupesée. L'omission d'en donner au moins une estimation quantitative, lorsqu'il est réalistement possible de le faire, ne donnera pas lieu à une analyse qualitative de ces effets. Seuls les effets ne pouvant être estimés sur le plan quantitatif seront pris en considération sur le plan qualitatif. Cette méthode réduit au minimum le jugement subjectif nécessaire dans l'analyse et permet au Tribunal d'effectuer l'évaluation la plus objective possible dans les circonstances.

En l'espèce, la commissaire n'a pas quantifié les effets anticoncurrentiels quantifiables et, partant, elle ne s'est pas acquittée du fardeau que lui impose l'art. 96. En particulier, sans données sur l'élasticité par rapport au prix, la fourchette possible de la perte sèche résultant du fusionnement est inconnue. Permettre au Tribunal de tenir compte de la baisse des prix invoquée sans les

quantify deadweight loss admits far too much subjectivity into the analysis, with no guarantee that the Tribunal will have enough information to ensure that a subjective assessment would align with what would actually be observed if the effect were properly quantified. As a result, those quantifiable anti-competitive effects should be assigned zero weight. In setting the weight of these effects at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Its "undetermined" approach also raises concerns of fairness to the merging parties, in that it places them in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, requiring the merging parties to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as they do not know the case they have to meet.

The balancing test under s. 96 mandates a flexible but objectively reasonable approach by which the Tribunal must determine both quantitative and qualitative aspects of the merger, and then weigh and balance those aspects. The test may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger should be compared against the quantitative anti-competitive effects. Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue. However, despite the flexibility the Tribunal has in applying this balancing approach, more than marginal efficiency gains should not be required for the defence to apply. The words of the Act do not provide a basis for requiring this kind of threshold. Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. As a result, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

In this case, the Commissioner did not meet her burden to prove the anti-competitive effects, and as such, the weight given to the quantifiable effects is zero. There are no proven qualitative effects. T, however, established overhead efficiency gains resulting from B's obtaining

autres données sur la perte sèche fait intervenir une trop grande subjectivité dans l'équation, et rien ne garantit qu'il dispose de données suffisantes pour vérifier si l'analyse subjective concorderait avec celle fondée sur des effets quantifiés en bonne et due forme. Par conséquent, les effets anticoncurrentiels quantifiables doivent alors être jugés nuls. En concluant que ces effets avaient une valeur indéterminée, la Cour d'appel fédérale a permis qu'un jugement subjectif dicte l'analyse. La démarche de la Cour d'appel fédérale, qui a attribué une valeur « indéterminée », soulève aussi des questions d'équité à l'égard des parties au fusionnement en ce sens qu'on les met dans une situation insoutenable : démontrer que les gains en efficience surpassent et neutralisent une somme indéterminée. Ainsi, exiger des parties au fusionnement qu'elles prouvent les autres éléments de la défense selon la prépondérance des probabilités devient un exercice inéquitable, car elles ignorent la preuve qui leur est opposée.

La pondération qu'exige l'art. 96 commande une méthode souple, mais objectivement raisonnable invitant le Tribunal à déterminer les aspects tant quantitatifs que qualitatifs du fusionnement, puis à les soupeser. On peut concevoir le critère comme une analyse en deux étapes. Dans un premier temps, il faut comparer les gains en efficience quantitatifs du fusionnement à ses effets anticoncurrentiels quantitatifs. Si les effets anticoncurrentiels quantitatifs dépassent les gains en efficience quantitatifs, l'analyse prend alors fin dans la plupart des cas, et la défense ne s'appliquera pas. Dans un deuxième temps, il faut mettre en balance les gains en efficience qualitatifs et les effets anticoncurrentiels qualitatifs et décider en dernière analyse si le total des gains en efficience neutralise le total des effets anticoncurrentiels du fusionnement en cause. Cependant, en dépit de la latitude dont jouit le Tribunal lorsqu'il applique cette méthode de pondération, il ne faudrait pas exiger des gains en efficience plus que négligeables pour que la défense s'applique. Le libellé de la Loi ne permet pas d'exiger un tel seuil. Le contexte législatif du par. 96(1) ne permet pas non plus que cette disposition soit assortie d'un seuil implicite. La Cour d'appel fédérale a donc commis une erreur en statuant qu'un fusionnement anticoncurrentiel ne saurait être approuvé sous le régime de l'art. 96 si seuls des gains négligeables ou insignifiants en découlent.

En l'espèce, la commissaire ne s'est pas acquittée de la charge qui lui incombait de prouver l'existence d'effets anticoncurrentiels, de sorte qu'une valeur nulle a été accordée aux effets quantifiables. Aucun effet anticoncurrentiel qualitatif n'a été établi. Or, T a établi l'existence de

access to T's administrative and operating functions. These proven gains meet the "greater than and offset" requirement, and the efficiencies defence has therefore been made out.

Per Abella J.: The applicable standard of review in this case is reasonableness, not correctness. Following the case of *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, which introduced a new edifice for the review of specialized tribunals, the jurisprudence of this Court has developed into a presumption that, regardless of the presence or absence of either a right of appeal or a privative clause, when a tribunal is interpreting its home statute, reasonableness applies. While the statutory language granting the right of appeal in this case may be different from the language granting the right of appeal in other cases where this Court has applied a reasonableness standard, it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute. Using such language to trump the deference owed to tribunal expertise, elevates the factor of statutory language to a pre-eminent and determinative status we have long denied it. To apply correctness in this case represents a reversion to the pre-*Pezim* era, undermines the statutorily-recognized expertise of the Tribunal, and constitutes an inexplicable variation from the Court's jurisprudence that is certain to engender the very "standard of review" confusion that inspired this Court to try to weave the strands together in the first place. Applying the reasonableness standard, the Tribunal's interpretation of s. 96 of the Act was unreasonable.

Per Karakatsanis J. (dissenting): T was not entitled to the benefit of the s. 96 efficiencies defence. Efficiencies and effects should be quantified wherever reasonably possible in the s. 96 analysis, and the assessment of qualitative effects should be objectively reasonable, supported by evidence and clear reasoning. However, the need for "reasonable objectivity" does not justify a hierarchical approach to quantitative and qualitative aspects under the efficiencies defence; nor should qualitative effects be of lesser importance than quantitative effects. The statutory language of the Act does not distinguish between quantitative and qualitative efficiencies, and many of the wide-ranging purposes of the Act set out in s. 1.1

gains en efficience liés à la baisse des coûts indirects qui découlent de l'obtention par B de l'accès aux fonctions administratives et opérationnelles de T. Ces gains prouvés satisfont à la condition de surpassement et de neutralisation, et par conséquent, la défense fondée sur les gains en efficience a été établie.

La juge Abella : La norme de contrôle judiciaire qui s'applique en l'espèce est celle de la décision raisonnable, et non celle de la décision correcte. Après l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, qui a jeté les bases d'un nouvel édifice de révision des décisions des tribunaux spécialisés, la jurisprudence de la Cour a créé une présomption selon laquelle, qu'il y ait ou non de droit d'appel ou de clause privative, dès lors qu'un tribunal administratif interprète sa propre loi constitutive, c'est la norme de la décision raisonnable qui s'applique. Bien que le libellé de la disposition accordant le droit d'appel en l'espèce diffère de celui qui est en cause dans d'autres affaires où la Cour applique la norme de la décision raisonnable, il ne diffère pas suffisamment pour saper le principe établi, à savoir que la déférence s'impose à l'égard de l'interprétation par un tribunal expert de sa loi constitutive. Invoquer ce genre de libellé pour supplanter la déférence que commande l'expertise du tribunal a pour effet d'élever le facteur du libellé de la loi au rang d'élément prééminent et déterminant que nous avons longtemps refusé de lui reconnaître. Appliquer la norme de la décision correcte en l'espèce constitue un retour à la situation antérieure à l'arrêt *Pezim*, sape l'expertise du Tribunal reconnue par le texte législatif et représente un écart inexplicable par rapport à la jurisprudence de la Cour qui va engendrer sans aucun doute la confusion relative à la « norme de contrôle » qui avait amené la Cour au départ à vouloir y mettre de l'ordre. Si l'on applique la norme de la décision raisonnable, l'interprétation de l'art. 96 de la Loi par le Tribunal n'était pas raisonnable.

La juge Karakatsanis (dissidente) : T n'avait pas le droit de se prévaloir de la défense fondée sur les gains en efficience en l'espèce. Les gains en efficience et les effets anticoncurrentiels devraient être quantifiés chaque fois qu'il est raisonnablement possible de le faire dans le cadre de l'analyse que commande l'art. 96, et l'évaluation des effets qualitatifs devrait être objectivement raisonnable et étayée par des éléments de preuve et un raisonnement clair. Toutefois, la nécessité d'une « objectivité raisonnable » ne saurait justifier une conception hiérarchique des aspects quantitatifs et qualitatifs qu'il faut évaluer au regard de la défense fondée sur les gains en efficience; et les aspects qualitatifs ne jouent pas un rôle moins important

may not be quantifiable. Indeed, many important anti-competitive effects of a merger may be qualitative in nature, and in some cases, those qualitative effects may be determinative in the s. 96 analysis. The legislation mandates a purposive analysis, and the relative significance of qualitative and quantitative gains or effects can only be determined in the circumstances of each case. It is neither helpful nor necessary to predetermine their relative role and importance in the s. 96 defence.

The Federal Court of Appeal's view that the s. 96 analysis is at heart about balancing overall efficiency gains against overall anti-competitive effects is an approach that provides an appropriate level of flexibility, given that efficiencies and anti-competitive effects will not always be easy to measure. The s. 96 framework enables the expert Tribunal to holistically assess the entirety of the evidence before it, rather than artificially bifurcating the analysis of qualitative and quantitative effects that may, in some cases, more helpfully be analyzed together.

Further, while the Commissioner bears the evidentiary burden to lead evidence of the anti-competitive effects of a merger, and bears the risk that the failure to fully quantify such effects where possible may render the evidence insufficient to counter the evidence of efficiency gains, the failure to quantify quantifiable anti-competitive effects does not invalidate the evidence that established there was a known anti-competitive effect of undetermined extent. Relevant evidence is generally admissible, and the failure to lead the best evidence available goes to weight, not admissibility. Neither the statutory language of the Act nor its purpose or context require that an anti-competitive effect of undetermined weight become irrelevant or inadmissible.

The Federal Court of Appeal was entitled to conclude that the Tribunal's finding that prices would have been 10 percent lower in the relevant area in the absence of a merger amounted to evidence of a known anti-competitive effect of undetermined weight. The court was also in a position to accept that T's pre-existing monopoly was likely to magnify the anti-competitive effects of the merger. Ultimately, the court was entitled to find that the proven efficiency gains were marginal to the

que les effets quantitatifs. Le libellé de la Loi n'établit aucune distinction entre les gains en efficience quantitatifs et qualitatifs, et plusieurs des objets variés de Loi prévus à l'art. 1.1 peuvent ne pas être quantifiables. En effet, il se peut que nombre d'effets anticoncurrentiels importants d'un fusionnement soient de nature qualitative et, dans certains cas, ces effets qualitatifs peuvent être déterminants dans l'analyse qu'appelle l'art. 96. La loi prévoit une analyse téléologique, et l'importance relative des gains ou effets qualitatifs d'une part et quantitatifs d'autre part ne peut être déterminée qu'au cas par cas. Il n'est ni utile ni nécessaire de déterminer à l'avance le rôle et l'importance de chaque catégorie dans l'analyse visant à décider si la défense fondée sur l'art. 96 s'applique.

L'avis de la Cour d'appel fédérale, selon qui l'analyse qu'appelle l'art. 96 porte essentiellement sur la pondération des gains en efficience toutes catégories confondues et des effets anticoncurrentiels toutes catégories confondues, permet une certaine souplesse, les gains en efficience et les effets anticoncurrentiels n'étant pas toujours faciles à mesurer. Le cadre applicable à l'art. 96 permet au Tribunal expert d'évaluer globalement la preuve qui lui a été présentée plutôt que de scinder artificiellement l'analyse des effets qualitatifs et des effets quantitatifs. En effet, dans certains cas, il peut être plus utile de les analyser ensemble.

En outre, si la commissaire doit présenter des éléments de preuve sur les effets anticoncurrentiels du fusionnement et assume le risque qu'une quantification incomplète des effets quantifiables soit insuffisante pour réfuter la preuve des gains en efficience, la preuve ayant établi qu'il y avait un effet anticoncurrentiel connu d'une valeur indéterminée n'est pas invalidée du fait d'une quantification incomplète. La preuve pertinente est généralement admissible, et le défaut de présenter la meilleure preuve possible influe sur le poids qui peut être accordé à cette preuve, non pas sur son admissibilité. Ni le libellé de la Loi ni par ailleurs son objet ou son contexte ne font en sorte qu'un effet anticoncurrentiel d'une valeur indéterminée devienne non pertinent ou inadmissible.

La Cour d'appel fédérale pouvait juger que la conclusion du Tribunal selon laquelle les prix auraient été inférieurs de 10 p. 100 dans la zone pertinente, n'eût été le fusionnement, constituait la preuve d'un effet anticoncurrentiel connu, mais d'une valeur indéterminée. Elle pouvait également juger que le monopole préexistant de T aurait vraisemblablement pour effet d'amplifier les effets anticoncurrentiels du fusionnement. Finalement, la cour pouvait conclure à bon droit que les gains en efficience

point of being negligible and did not likely exceed the known (but undetermined) anti-competitive effects.

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By Rothstein J.

Distinguished: *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185, rev'g 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385, leave to appeal dismissed, [2001] 2 S.C.R. xiii; *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 64 C.P.R. (4th) 181; *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425, aff'd 2003 FCA 131, 24 C.P.R. (4th) 178, leave to appeal refused, [2004] 1 S.C.R. vii; *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289; *BOC International Ltd. v. Federal Trade Commission*, 557 F.2d 24 (1977); *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417, aff'd 2003 FCA 53, [2003] 3 F.C. 529.

By Abella J.

Applied: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012]

établis étaient minimes au point d'être négligeables et n'excédaient vraisemblablement pas les effets anticoncurrentiels connus mais indéterminés.

Jurisprudence

Citée par le juge Rothstein

Distinction d'avec les arrêts : *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; **arrêts mentionnés :** *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; *Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, 2001 CAF 104, [2001] 3 C.F. 185, inf. 2000 Trib. conc. 15, [2000] D.T.C.C. nº 15 (QL), autorisation d'appel rejetée, [2001] 2 R.C.S. xiii; *Air Canada c. Canada (Commissaire de la concurrence)*, 2002 CAF 121, [2002] 4 C.F. 598; *Canada (Commissaire de la concurrence) c. Tuyauteries Canada Ltée*, 2006 CAF 233, [2007] 2 R.C.F. 3; *Commissaire de la concurrence c. Brassage Labatt Ltée*, 2008 CAF 22; *Canada (Commissaire de la concurrence) c. Canadian Waste Services Holdings Inc.*, 2001 Trib. conc. 3, [2001] D.T.C.C. nº 3 (QL), conf. par 2003 CAF 131, autorisation d'appel refusée, [2004] 1 R.C.S. vii; *Directeur des enquêtes et recherches c. Hillsdown Holdings Ltd.*, 1992 CanLII 1901; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *F.H. c. McDougall*, 2008 CSC 53, [2008] 3 R.C.S. 41; *Canada (Directeur des enquêtes et recherches : Loi sur la concurrence) c. Laidlaw Waste Systems Ltd.*, [1992] D.T.C.C. nº 1 (QL); *BOC International Ltd. c. Federal Trade Commission*, 557 F.2d 24 (1977); *Commissaire de la concurrence c. Supérieur Propane Inc.*, 2002 Trib. conc. 16 (en ligne : http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0238c_45QDJ-5222007-2669.pdf), conf. par 2003 CAF 53, [2003] 3 C.F. 529.

Citée par la juge Abella

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By Karakatsanis J. (dissenting)

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John B. Laskin, *Linda M. Plumpton*, *Dany H. Assaf* and *Crawford G. Smith*, for the appellants.

Christopher Rupar, *John Tyhurst* and *Jonathan Hood*, for the respondent.

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John B. Laskin, *Linda M. Plumpton*, *Dany H. Assaf* et *Crawford G. Smith*, pour les appelantes.

Christopher Rupar, *John Tyhurst* et *Jonathan Hood*, pour l'intimé.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver and Wagner JJ. was delivered by

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I. Overview

[1] The appellant in this case, Tervita Corp., operates two hazardous waste secure landfills in British Columbia. In February 2010, Tervita Corp. acquired a company which held a permit for another secure landfill site. This transaction attracted the attention of the Commissioner of Competition, who initiated

I. Aperçu

[1] L'appelante dans la présente affaire, Tervita Corp., exploite deux sites d'enfouissement sécuritaire de déchets dangereux en Colombie-Britannique. En février 2010, elle a procédé à l'acquisition d'une entreprise titulaire d'un permis visant un autre site d'enfouissement sécuritaire. Cette opération a attiré

the merger review process under the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

[2] The purpose of the Act is in part "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy" (s. 1.1). It is within this context that merger reviews are conducted. This appeal provides this Court the opportunity to address two issues in merger review: the "prevention" branch of s. 92 and the s. 96 efficiencies defence.

II. Facts

[3] Four permits for the operation of secure landfills for the disposal of hazardous waste generated by oil and gas operations have been issued in Northeastern British Columbia. The appellant Tervita Corp. holds two of the permits and operates two hazardous waste landfills pursuant to them: the Silverberry (capacity for 6,000,000 tonnes of waste) and Northern Rockies (3,344,000 tonnes) landfills. A third permit was issued for the Peejay site, a site developed by an Aboriginal community, but the landfill has not yet been constructed.

[4] The fourth permit, Babkirk site, is held by the appellant Babkirk Land Services Inc. ("Babkirk"), a wholly owned subsidiary of the appellant Complete Environmental Inc. ("Complete"). The previous Babkirk owners operated a hazardous waste landfill on the site from 1998 to 2004. In 2009, they sold Babkirk to Complete, which is owned and controlled by five investors (the "Vendors").

[5] The Vendors intended to begin operating the Babkirk site mainly as a bioremediation facility which would treat contaminated soil using microorganisms, and to complement the bioremediation site with a secure landfill facility to store hazardous

l'attention de la commissaire de la concurrence, qui a alors ordonné l'examen du fusionnement sous le régime de la *Loi sur la concurrence*, L.R.C. 1985, c. C-34 (la « Loi »).

[2] La Loi a pour objet notamment « de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne » (art. 1.1). C'est dans cet esprit que s'effectue l'examen d'un fusionnement. Le présent pourvoi offre à la Cour l'occasion de se pencher sur deux aspects d'un tel exercice : le volet de l'art. 92 relatif à l'« empêchement » et la défense fondée sur les gains en efficience, énoncée à l'art. 96.

II. Faits

[3] Quatre permis d'exploitation visant des sites d'enfouissement sécuritaire des déchets dangereux produits par des exploitations pétrolières et gazières ont été délivrés dans le Nord-Est de la Colombie-Britannique. Tervita Corp., appelante, est titulaire de deux de ces permis, en vertu desquels elle exploite les sites d'enfouissement Silverberry (capacité de six millions de tonnes de déchets) et Northern Rockies (3 344 000 tonnes). Un troisième permis a été délivré à l'égard du site Peejay, aménagé par une collectivité autochtone, mais dont les installations n'ont pas encore été construites.

[4] Le quatrième permis, délivré à l'égard du site Babkirk, est détenu par Babkirk Land Services Inc. (« Babkirk »), appelante en l'espèce, une filiale en propriété exclusive de Complete Environmental Inc. (« Complete »), autre appelante. De 1998 à 2004, les propriétaires précédents de Babkirk ont exploité à cet endroit un site d'enfouissement de déchets dangereux. En 2009, ils ont vendu Babkirk à Complete, que cinq investisseurs (les « vendeurs ») possédaient et contrôlaient.

[5] Sur le site Babkirk, les vendeurs comptaient exploiter principalement une installation de biorestauration utilisant des microorganismes pour la décontamination des sols, assortie d'un site d'enfouissement sécuritaire ayant la capacité de

waste not amenable to bioremediation. In February 2010, the Vendors received a permit for this secure landfill with a capacity of 750,000 tonnes.

[6] Soon afterwards, a company called Integrated Resources Technologies Ltd. ("IRTL") offered to purchase Complete. The Vendors then explored the possibility of selling to other third parties. Secure Energy Services ("SES") showed some interest, but at a lower price. The Vendors decided to accept IRTL's offer, but it was withdrawn in June 2010 due to lack of financing. In one last attempt to sell, the Vendors pursued various discussions with SES and Tervita Corp., then known as CCS Corp. (hereinafter "Tervita Corp."). In July 2010, the Vendors reached an understanding with Tervita Corp. and a letter of intent was signed.

[7] The sale of the Vendors' shares in Complete (including Babkirk and the Babkirk site) closed on January 7, 2011. However, prior to closing, the Commissioner of Competition informed the parties that she opposed the transaction on the ground that it was likely to substantially prevent competition in secure landfill services in Northeastern British Columbia. After closing, the Commissioner asked the Competition Tribunal to order, pursuant to s. 92 of the *Competition Act*, that the transaction be dissolved, or in the alternative, that Tervita Corp. divest itself of Complete or Babkirk.

[8] The three appellants in this appeal, Tervita Corp., Complete and Babkirk, are hereinafter referred to collectively as "Tervita".

III. Statutory Provisions

[9] The relevant statutory provisions in this case are included in the Appendix. The statutory provisions most directly at issue in this appeal are ss. 92, 93 and 96 of the Act.

stocker les déchets dangereux qui ne se prêtent pas à la biorestauration. En février 2010, le permis d'enfouissement a été délivré pour une capacité de 750 000 tonnes.

[6] Peu de temps après, Integrated Resources Technologies Ltd. (« IRTL ») a offert d'acquérir Complete. Les vendeurs ont ensuite envisagé la possibilité de vendre à des tiers. Secure Energy Services (« SES ») s'est montrée intéressée, mais offrait un prix inférieur. Les vendeurs avaient décidé d'accepter l'offre d'IRTL quand elle l'a retirée en juin 2010 pour financement insuffisant. Dans une ultime tentative, les vendeurs ont engagé des pourparlers avec SES et Tervita Corp., dont la raison sociale était alors CCS Corp. (ci-après « Tervita Corp. »). En juillet 2010, une entente est intervenue entre les vendeurs et Tervita Corp., qui ont signé la lettre d'intention.

[7] La vente des parts des vendeurs dans Complete (qui possède Babkirk et le site Babkirk) a été conclue le 7 janvier 2011. Or, auparavant, la commissaire de la concurrence avait informé les parties qu'elle s'opposait à cette opération, au motif qu'elle aurait vraisemblablement pour effet de nuire sensiblement à la concurrence dans les services d'enfouissement sécuritaire du Nord-Est de la Colombie-Britannique. Après la vente, la commissaire a demandé au Tribunal de la concurrence d'ordonner l'annulation de la transaction en vertu de l'art. 92 de la *Loi sur la concurrence* ou, à titre subsidiaire, d'ordonner à Tervita Corp. de se départir de Complete ou de Babkirk.

[8] Les trois appelantes dans le présent pourvoi, Tervita Corp., Complete et Babkirk, sont ci-après appelées collectivement « Tervita ».

III. Dispositions législatives

[9] Les dispositions législatives pertinentes, dont les art. 92, 93 et 96 de la Loi, sont reproduites en annexe.

IV. Decisions Below

A. *Competition Tribunal, [2012] C.C.T.D. No. 14 (QL)*

[10] Pursuant to s. 92, the Tribunal found that the merger was likely to prevent competition substantially in the relevant market. The Tribunal further found that Tervita had not brought itself within the efficiencies exception contained in s. 96 that would have permitted the merger notwithstanding s. 92. It found that the efficiencies gained by the merger were not greater than the effects of the likely prevention of competition resulting from the merger, and would not offset those effects. It ordered Tervita to divest itself of Babkirk.

(1) Section 92

[11] The Tribunal assessed whether "effective competition in the relevant market likely [would] have emerged 'but for' the [m]erger" (para. 129). The parties "essentially agreed" that the commencement of the timeframe for considering the "but for" market condition, i.e. a market condition where the merger did not occur, was the end of July 2010 (para. 131). This was the point in time a letter of intent between Tervita and the Vendors was signed. The Tribunal agreed that this timeframe commenced at the end of July 2010.

[12] As of the end of July 2010, the Tribunal saw only two realistic scenarios for the Babkirk site:

1. The Vendors would have sold to a waste company called [SES], which would have operated a Secure Landfill; or
2. The Vendors would have operated a bioremediation facility together with a half cell of Secure Landfill. [para. 132]

[13] The Tribunal found that, on a balance of probabilities, SES would not have made an acceptable offer for the Complete site at any time during the summer of 2010. Thus, according to the Tribunal, the Vendors would have moved forward with the second option: operate the Babkirk site as a bioremediation facility.

IV. Historique judiciaire

A. *Tribunal de la concurrence, 2012 CACT 14 (CanLII)*

[10] Le Tribunal a conclu, en vertu de l'art. 92, que le fusionnement aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence dans le marché en cause. Il a statué en outre que Tervita ne pouvait invoquer l'exception relative aux gains en efficience énoncée à l'art. 96, en application de laquelle le fusionnement serait permis en dépit de l'art. 92, car les gains en efficience engendrés ne surpassaient ou ne neutralisaient pas les effets anticoncurrentiels vraisemblables du fusionnement. Il a ordonné à Tervita de se départir de Babkirk.

(1) Article 92

[11] Le Tribunal a demandé s'il y aurait « vraisemblablement eu une concurrence réelle en l'absence du fusionnement » (par. 129). Les parties étaient « essentiellement d'accord » pour dire que la période à examiner pour déterminer l'état du marché en l'absence du fusionnement commençait à la fin de juillet 2010 (par. 131), car c'était l'époque à laquelle Tervita et les vendeurs avaient signé la lettre d'intention. Le Tribunal en a convenu.

[12] Selon le Tribunal, à la fin de juillet 2010, seuls deux scénarios réalistes pouvaient se présenter pour le site Babkirk :

1. Les vendeurs auraient vendu à une société de déchets appelée [SES], laquelle aurait exploité un site d'enfouissement sécuritaire;
2. Les vendeurs auraient exploité une installation de biorestauration ainsi qu'une demi-cellule d'enfouissement sécuritaire. [par. 132]

[13] Le Tribunal a conclu que, selon la prépondérance des probabilités, SES n'aurait à aucun moment à l'été de 2010 présenté une offre acceptable à l'égard du site Complete. Ainsi, de l'avis du Tribunal, les vendeurs auraient choisi la deuxième option : exploiter une installation de biorestauration au site Babkirk.

[14] Bioremediation is a "method of treating soil by using micro-organisms to reduce contamination" (para. 42). The Tribunal concluded that the Vendors would have had the bioremediation facility fully operational by October 2011, but that it would have been unprofitable. The Tribunal concluded that it was "unreasonable to suppose that [the Vendors] would have been prepared to operate unprofitably beyond the fall of 2012" (para. 206). Accordingly, the Tribunal found that the Vendors would have either begun operating the Babkirk site as a secure landfill themselves or would have sold the site to a purchaser who would have operated the site as a secure landfill. Either way, the Babkirk site full-service secure landfill would have been a "direct and substantial" competitor with Tervita no later than the spring of 2013 (para. 215).

[15] The Tribunal found that a likely effect of the merger would have been to allow Tervita to maintain its ability to exercise materially greater market power than it would in the absence of the merger. It found that in the absence of the merger, disposal fees, called "tipping fees" in the industry, would have been 10 percent lower in the "Contestable Area" (the relevant geographic market) (para. 229(iii)).

[16] The Tribunal concluded that the merger was likely to prevent competition substantially.

(2) Section 96

[17] The s. 96 efficiencies defence is an exception to the application of s. 92. The defence prohibits the Tribunal from making an order precluding a merger when it finds that the merger is likely to bring about gains in efficiency that would be greater than and would offset the anti-competitive effects of the merger.

[18] The Tribunal found that the Commissioner had failed to meet her burden to demonstrate the

[14] La biorestauration est une « méthode de traitement du sol qui fait appel à des microorganismes pour diminuer le degré de contamination » (par. 42). Le Tribunal a conclu que les vendeurs auraient rendu l'installation de biorestauration pleinement opérationnelle au plus tard en octobre 2011, mais que celle-ci ne se serait pas révélée rentable. Il était d'avis qu'il n'était « pas raisonnable de supposer [que les vendeurs] auraient été en mesure d'exploiter une installation non rentable après l'automne 2012 » (par. 206). En conséquence, selon le Tribunal, les vendeurs auraient opté pour l'enfouissement sécuritaire ou auraient vendu le site Babkirk à un acheteur, qui l'aurait exploité pour l'enfouissement sécuritaire. Quel que soit le scénario, Tervita et le site d'enfouissement sécuritaire à service complet Babkirk seraient devenus des concurrents « directs et importants » au plus tard au printemps 2013 (par. 207).

[15] Le Tribunal a conclu que Tervita aurait selon toute vraisemblance continué d'exercer une puissance commerciale beaucoup plus importante grâce au fusionnement que sans le fusionnement. Il a conclu que l'absence de fusionnement se serait traduite par une diminution des droits d'élimination — que l'on appelle « redevances de déversement » dans l'industrie — de 10 p. 100 dans la « région contestable » (la zone pertinente pour ce marché) (par. 229(iii)).

[16] Le Tribunal a conclu que le fusionnement aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence.

(2) Article 96

[17] La défense fondée sur les gains en efficience prévue à l'art. 96 constitue une exception à l'application de l'art. 92. Elle empêche le Tribunal de rendre une ordonnance interdisant un fusionnement dans les cas où il conclut que celui-ci aura vraisemblablement pour effet d'entraîner des gains en efficience qui surpasseront et neutraliseront les effets anticoncurrentiels du fusionnement.

[18] Le Tribunal était d'avis que la commissaire ne s'était pas acquittée du fardeau de démontrer la

extent of the quantifiable anti-competitive effects. The Commissioner's expert had only estimated that a price decrease of 10 percent would be precluded by the merger but provided no estimate of the volume having regard to the elasticity of demand. The Tribunal found that this meant that Tervita could not take a position about whether the number it calculated as its total efficiencies was greater than the adverse effects of the merger (para. 246). However, the Tribunal concluded that, "in the unusual circumstances of this case", Tervita was not prejudiced by the Commissioner's failure to quantify the anti-competitive effects of the merger. Tervita was still able to effectively attack the Commissioner's expert's findings and assert the s. 96 defence (para. 246). The Tribunal accepted, on a balance of probabilities, the Commissioner's expert's estimate of a minimum annual deadweight loss (paras. 301-3).

[19] The Tribunal also accepted what it found to be qualitative anti-competitive effects — namely environmental effects related to price reduction on-site clean-up and "value propositions", or offers Tervita would have made in a competitive environment to certain customers resulting in lower total cost for overall waste services used by such customers (paras. 306-7).

[20] The Tribunal rejected most of Tervita's claimed efficiencies gains because they would likely be achieved even if the divestiture order were made (para. 265). The Tribunal also rejected the claimed "order implementation efficiencies" ("OIEs") — those transportation and market expansion efficiencies resulting from delays associated with the implementation of a divestiture order. The Tribunal held that OIEs are not cognizable under s. 96, because to give merging parties the benefit of these efficiencies would be contrary to the purposes of the Act (para. 270). The Tribunal did accept "overhead" efficiencies claimed by Tervita (para. 275).

mesure des effets anticoncurrentiels quantifiables. L'expert de la commissaire avait estimé seulement que le fusionnement empêcherait une baisse des prix de 10 p. 100, mais il n'a fourni aucune estimation quant au volume compte tenu de l'élasticité de la demande. Selon le Tribunal, Tervita n'était donc pas en mesure de déterminer si, suivant ses calculs, le total des gains en efficience surpassait les effets néfastes du fusionnement (par. 246). Il a cependant conclu que, « dans les circonstances inhabituelles de la présente affaire », le fait que la commissaire n'avait pas quantifié les effets anticoncurrentiels du fusionnement n'avait causé aucun préjudice à Tervita. Cette dernière avait pu contester les conclusions de l'expert de la commissaire et opposer la défense fondée sur l'art. 96 (par. 246). Le Tribunal a admis, suivant la norme de la prépondérance des probabilités, l'estimation avancée par l'expert de la commissaire au sujet de la valeur minimale de la perte sèche annuelle (par. 301-303).

[19] Le Tribunal a admis également ce qu'il a jugé être des effets anticoncurrentiels qualitatifs — à savoir d'une part les effets environnementaux de l'assainissement des lieux découlant de la réduction des prix et d'autre part les « propositions de valeur », qui représentent les offres que Tervita aurait faites dans un contexte concurrentiel à certains clients et qui se seraient traduites pour eux par une baisse du coût total des services généraux d'élimination des déchets (par. 306-307).

[20] Le Tribunal a rejeté la plupart des gains en efficience invoqués par Tervita au motif que ceux-ci se réaliseraient vraisemblablement même s'il prononçait l'ordonnance de dessaisissement (par. 265). Le Tribunal a rejeté également les « gains en efficience liés à l'exécution de l'ordonnance » (« GEEO ») — soit ceux associés au transport et à l'expansion du marché découlant du délai d'exécution de l'ordonnance de dessaisissement. Le Tribunal a conclu que les GEEO ne sont pas admissibles pour l'application de l'art. 96, car accorder aux parties au fusionnement le bénéfice de ces gains en efficience irait à l'encontre des objectifs de la Loi (par. 270). Le Tribunal a cependant admis les gains en efficience liés à la « baisse des coûts indirects » avancés par Tervita (par. 275).

[21] The Tribunal weighed the proven quantifiable efficiency gains against the quantifiable anti-competitive effects it accepted and found that the combined quantitative and qualitative efficiency gains were not likely to be "greater than" the combined quantitative and qualitative anti-competitive effects (paras. 313-14). The Tribunal further supported this conclusion on the basis that, in the absence of a s. 92 order, the merger would maintain a monopolistic structure in the relevant market, thus precluding "benefits of competition that will arise in ways that will defy prediction" (para. 317).

[22] In his concurring reasons, Chief Justice Crampton[1] held that for non-quantified effects, where there is not sufficient evidence to provide even a rough quantification of an effect that is ordinarily quantifiable, the Tribunal is still able to accord this factor some qualitative weight (para. 408).

B. *Federal Court of Appeal, 2013 FCA 28, [2014] 2 F.C.R. 352*

[23] Tervita appealed to the Federal Court of Appeal, challenging the divestiture order made by the Tribunal.

[24] The Federal Court of Appeal first determined that the Tribunal's findings on questions of law should be reviewed on a standard of correctness, while its findings on questions of fact or of mixed law and fact should be reviewed on a standard of reasonableness (paras. 52-68).

(1) Section 92

[25] The Federal Court of Appeal confirmed the Tribunal's approach that the analysis required under s. 92 of the Act is "necessarily forward-looking" (para. 87) and therefore the Tribunal was correct in "look[ing] into the future to ascertain whether the [Babkirk site entering] the market would have occurred within a reasonable period of time" (para. 88).

[1] Crampton C.J. is a judicial member of the Competition Tribunal as well as the Chief Justice of the Federal Court.

[21] Le Tribunal a comparé les gains en efficience quantifiables établis aux effets anticoncurrentiels quantifiables qu'il a admis, concluant que les gains en efficience quantitatifs et qualitatifs ne « surpasseront » vraisemblablement pas les effets anticoncurrentiels quantitatifs et qualitatifs (par. 313-314). Il a fondé cette conclusion également sur le fait que, si l'ordonnance visée à l'art. 92 n'était pas prononcée, le fusionnement maintiendrait une structure monopolistique dans le marché en question, de sorte qu'il empêcherait la réalisation des « avantages de la concurrence de manière impossible à prévoir » (par. 317).

[22] Dans ses motifs concordants, le juge en chef Crampton[1] a affirmé qu'il est loisible au Tribunal, lorsque la preuve ne permet pas de quantifier, même grossièrement, des effets qui seraient normalement quantifiables, de leur attribuer une valeur qualitative (par. 408).

B. *Cour d'appel fédérale, 2013 CAF 28, [2014] 2 R.C.F. 352*

[23] Tervita a contesté devant la Cour d'appel fédérale l'ordonnance de dessaisissement prononcée par le Tribunal.

[24] Dans un premier temps, la Cour d'appel a déterminé que la norme de la décision correcte s'appliquait aux conclusions du Tribunal sur les questions de droit et que celle de la décision raisonnable s'appliquait à ses conclusions sur les questions de fait ou sur les questions mixtes de fait et de droit (par. 52-68).

(1) Article 92

[25] La Cour d'appel fédérale a confirmé la conception du Tribunal, suivant laquelle l'analyse qu'appelle l'art. 92 de la Loi est « nécessairement prospective » (par. 87). À son avis, c'est à bon droit que le Tribunal a envisagé « l'avenir afin de vérifier si la pénétration du marché [par le site Babkirk] aurait eu lieu dans un délai raisonnable » (par. 88).

[1] Le juge en chef Crampton est juge du Tribunal de la concurrence et juge en chef de la Cour fédérale.

While recognizing that what constitutes a reasonable period of time will "necessarily vary from case to case and will depend on the business under consideration" (para. 89), the court set out two guidelines for determining what constitutes a "reasonable period of time":

(1) "the time frame must be discernible" (para. 90), and

(2) "the time frame for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (para. 91).

[26] Applying those guidelines, the Federal Court of Appeal held that the Tribunal "discerned a clear time frame under which the Babkirk site would enter the market for secure landfills" (para. 92) and that this discernible timeframe "was also well within the temporal framework of the barriers to market entry" (para. 94).

[27] The Federal Court of Appeal upheld the Tribunal's conclusion that the proposed merger would likely substantially prevent competition.

(2) Section 96

[28] The Federal Court of Appeal found that the Tribunal had erred in allowing the Commissioner to discharge her burden of proving the quantifiable anti-competitive effects through a reply expert report setting out a "rough estimate" of the deadweight loss arising from the merger (para. 128). Tervita had suffered prejudice because the Tribunal had accepted the methodology of the Commissioner's expert which was "clearly deficient" (para. 124) as the methodology used was not capable of calculating the deadweight loss (paras. 123-25). Although Tervita has the ultimate burden of establishing that the efficiency gains are greater than and offset the anti-competitive effects, this "does not relieve the Commissioner of her burden to prove the anti-competitive effects and to quantify those effects where possible" (para. 127).

Tout en reconnaissant que ce qui est susceptible de constituer un délai raisonnable « varie nécessairement d'une affaire à l'autre et dépend du type d'entreprise en cause » (par. 89), la cour a énoncé deux critères permettant de circonscrire ce concept :

(1) « le délai doit être discernable » (par. 90),

(2) « le délai de pénétration du marché devrait normalement s'inscrire dans la dimension temporelle des obstacles à la pénétration du marché en question » (par. 91).

[26] Ayant appliqué ces critères, la Cour d'appel fédérale est arrivée à la conclusion que le Tribunal « discernait un délai évident à l'intérieur duquel le site Babkirk pénétrerait le marché des sites d'enfouissement sécuritaires » (par. 92) et que ce délai discernable « s'inscrivait résolument dans le cadre temporel des obstacles à la pénétration du marché » (par. 94).

[27] La Cour d'appel fédérale a confirmé la conclusion du Tribunal selon laquelle le fusionnement proposé aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence.

(2) Article 96

[28] Selon la Cour d'appel fédérale, c'est à tort que le Tribunal a permis à la commissaire de produire en réplique un rapport d'expert énonçant une « estimation approximative » de la perte sèche découlant du fusionnement pour s'acquitter de son fardeau de prouver les effets anticoncurrentiels quantifiables (par. 128). Tervita a subi un préjudice du fait que le Tribunal a admis la méthodologie « clairement déficiente » (par. 124) de l'expert de la commissaire, qui ne permettait pas le calcul de la perte sèche (par. 123-125). Même s'il incombe à Tervita d'établir que les gains en efficience surpassent et neutralisent les effets anticoncurrentiels, cela « ne dégage nullement la commissaire du fardeau de prouver les effets anticoncurrentiels et de les quantifier autant que possible » (par. 127).

[29] The Federal Court of Appeal agreed with the Tribunal that to recognize the OIEs would be contrary to the overall scheme of the Act (para. 135). Further, because Tervita had still not started to build or operate at the Babkirk site, those gains had not been and never would be realized (para. 138).

[30] Respecting the final balancing under s. 96, the Federal Court of Appeal found that the Tribunal had generally set out the right test (para. 146), except that its methodology was overly subjective. Efficiencies and anti-competitive effects should be quantified wherever reasonably possible, and the weight given to unquantifiable qualitative effects must be reasonable (para. 148). The court held that the Tribunal erred in a number of respects, including considering qualitative environmental effects that were not cognizable under s. 96 (paras. 155-56), double-counting the reduced site clean-up as both a qualitative effect and as part of the deficient deadweight loss analysis (para. 157) and considering Tervita Corp.'s monopoly as a distinct anti-competitive effect (paras. 159-61).

[31] In the Federal Court of Appeal's fresh assessment of the matter, it concluded that the quantitative anti-competitive effects of the merger which were not quantified by the Commissioner should be afforded an "undetermined" weight (paras. 167-68), as opposed to a weight of zero. In this case, the merger only provided marginal gains in efficiency while at the same time strengthening the market monopoly in the area (para. 169). The court held that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from it (paras. 170-72). In this case, the conclusion was strengthened because "a pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger" (para. 173).

[29] La Cour d'appel fédérale a souscrit à la conclusion du Tribunal selon laquelle prendre en considération les gains en efficience liés à l'exécution d'une ordonnance serait contraire à l'objectif global de la Loi (par. 135). De plus, Tervita n'ayant pas encore entrepris la construction ou l'exploitation du site Babkirk, ces gains ne s'étaient pas matérialisés et ne se matérialiseraient jamais (par. 138).

[30] La Cour d'appel fédérale a conclu que le Tribunal avait généralement énoncé le bon critère pour la pondération finale qu'appelle l'art. 96 (par. 146), mais que sa méthodologie était trop subjective. Les gains en efficience et les effets anticoncurrentiels devraient être quantifiés chaque fois qu'il est raisonnablement possible de le faire, et la valeur accordée aux effets qualitatifs qu'il est impossible de quantifier doit être raisonnable (par. 148). De l'avis de la cour, le Tribunal s'était trompé à certains égards. Entre autres, il avait pris en considération des effets environnementaux qualitatifs que n'admet pas l'art. 96 (par. 155-156), il avait compté la réduction des coûts d'assainissement des lieux à la fois dans les effets qualitatifs et dans son analyse déficiente de la perte sèche (par. 157) et il avait tenu le monopole détenu par Tervita Corp. pour un effet anticoncurrentiel distinct (par. 159-161).

[31] Ayant procédé à une nouvelle appréciation de la question, la Cour d'appel fédérale a conclu qu'il fallait donner aux effets anticoncurrentiels quantitatifs du fusionnement qui n'avaient pas été quantifiés par la commissaire, non pas une valeur nulle, mais une valeur « indéterminée » (par. 130). Dans la présente affaire, le fusionnement a seulement engendré des gains en efficience négligeables tout en renforçant la situation de monopole dans le secteur (par. 169). La cour a statué qu'un fusionnement anticoncurrentiel ne peut être approuvé sous le régime de l'art. 96 s'il permet seulement de réaliser des gains en efficience négligeables ou insignifiants (par. 170-172). Cette conclusion se trouve confirmée ici parce qu'« un monopole préexistant comme celui dont il s'agit en l'espèce aura habituellement pour effet d'amplifier les effets anticoncurrentiels d'un fusionnement » (par. 173).

[32] The Federal Court of Appeal dismissed Tervita's appeal.

V. Issues

[33] This appeal raises three issues:

1. What is the appropriate standard of review?

2. What is the proper legal test to determine when a merger gives rise to a substantial prevention of competition under s. 92(1) of the Act?

3. What is the proper approach to the efficiencies defence under s. 96 of the Act and, in this respect:

a. Can order implementation efficiencies be included as efficiency gains in the balancing analysis?

b. What is the proper approach to the requirement that efficiency gains be greater than and offset the anti-competitive effects?

VI. Analysis

A. *Standard of Review*

[34] The parties agree that the Federal Court of Appeal properly applied a correctness standard of review to the Tribunal's determinations of questions of law. I agree that correctness is the applicable standard in this case.

[35] The questions at issue are questions of law arising under the Tribunal's home statute and therefore a standard of reasonableness presumptively applies (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, per Fish J.; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30).

[32] La Cour d'appel fédérale a rejeté l'appel de Tervita.

V. Questions en litige

[33] Trois questions sont soulevées dans le présent pourvoi :

1. Quelle est la norme de contrôle applicable?

2. Quel critère juridique permet de déterminer dans quel cas un fusionnement a pour effet d'empêcher sensiblement la concurrence au sens où il faut entendre cette expression pour l'application du par. 92(1) de la Loi?

3. Comment faut-il envisager la défense fondée sur les gains en efficience prévue à l'art. 96 de la Loi et, à cet égard :

a. Les gains en efficience liés à l'exécution d'une ordonnance comptent-ils dans la pondération?

b. Comment faut-il envisager la condition selon laquelle les gains en efficience doivent surpasser et neutraliser les effets anticoncurrentiels?

VI. Analyse

A. *Norme de contrôle*

[34] Les parties sont d'accord pour dire que la Cour d'appel fédérale a bien appliqué la norme de contrôle de la décision correcte à l'égard des conclusions du Tribunal sur les questions de droit. J'en conviens, la norme de contrôle applicable dans la présente affaire est celle de la décision correcte.

[35] Les questions en litige sont des questions de droit qui concernent la loi constitutive du Tribunal. La norme de contrôle de la décision raisonnable est présumée applicable (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 28, le juge Fish; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654,

However, the presumption of reasonableness is rebutted in this case.

[36] A decision or order of the Tribunal on a question of law is appealable as of right as if "it were a judgment of the Federal Court" with the proviso that leave is required for appeals on questions of fact (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1)). The Federal Court of Appeal has consistently held that questions of law arising from decisions of the Tribunal should be reviewed on a correctness standard (see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185 ("*Superior Propane II*"), at paras. 59-91; see also *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598, at para. 43; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3, at para. 34; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 64 C.P.R. (4th) 181, at para. 5).

[37] In finding that the presumption of reasonableness is not rebutted, Justice Abella acknowledges that the statutory language in the appeal provisions in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; and *Smith* differs from the language at issue here, but is of the opinion that "it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute" (para. 179).

[38] With respect, the difference in statutory language between the *Competition Tribunal Act* and the legislation relied upon by Justice Abella is significant. The appeal provision at issue in *Pezim* and *McLean* provided that individuals affected by decisions of the B.C. Securities Commission "may appeal to the Court of Appeal with leave of a justice of that court" (*Securities Act*, S.B.C. 1985, c. 83, s. 149(1), which later became *Securities Act*,

par. 30). Or, dans la présente affaire, cette présomption est réfutée.

[36] Les décisions ou ordonnances du Tribunal sur les questions de droit sont susceptibles d'appel de plein droit tout comme « s'il s'agissait de jugements de la Cour fédérale », alors que l'appel sur des questions de fait est subordonné à l'autorisation de la Cour d'appel fédérale (*Loi sur le Tribunal de la concurrence*, L.R.C. 1985, c. 19 (2e suppl.), par. 13(1)). Cette dernière a statué dans tous les cas que la norme de la décision correcte s'applique aux questions de droit soulevées dans les décisions du Tribunal (voir *Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, 2001 CAF 104, [2001] 3 C.F. 185 (« *Supérieur Propane II* »), par. 59-91; voir aussi *Air Canada c. Canada (Commissaire de la concurrence)*, 2002 CAF 121, [2002] 4 C.F. 598, par. 43; *Canada Commissaire de la concurrence) c. Tuyauteries Canada Ltée*, 2006 CAF 233, [2007] 2 R.C.F. 3, par. 34; *Commissaire de la concurrence c. Brassage Labatt Ltée*, 2008 CAF 22, par. 5).

[37] En concluant que la présomption d'application de la norme de la décision raisonnable n'avait pas été réfutée, la juge Abella reconnaît que le libellé des dispositions prévoyant le droit d'appel qui étaient en cause dans les affaires *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; et *Smith* se distingue du libellé sur lequel porte le présent litige. Or, elle est d'avis que la formulation « ne diffère pas suffisamment pour saper le principe établi, à savoir que la déférence s'impose à l'égard de l'interprétation par un tribunal expert de sa loi constitutive » (par. 179).

[38] Je ferai observer que la différence entre le libellé de la *Loi sur le Tribunal de la concurrence* et celui des lois qu'invoque ma collègue est importante. La disposition en cause dans les affaires *Pezim* et *McLean* prévoit qu'une personne touchée par une décision de la Commission des valeurs mobilières de la Colombie-Britannique [TRADUCTION] « peut, avec autorisation, interjeter appel devant la Cour d'appel » (*Securities Act*, S.B.C. 1985, c. 83,

R.S.B.C. 1996, c. 418, s. 167(1)). The appeal provision in *Smith* provided that, under the *National Energy Board Act*, R.S.C. 1985, c. N-7, "[a] decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court" (s. 101). By contrast, the *Competition Tribunal Act* provides that "an appeal lies to the Federal Court of Appeal from any decision or order . . . of the Tribunal as if it were a judgment of the Federal Court" (s. 13(1)).

[39] The statutes at issue in *Pezim*, *McLean*, and *Smith* did not contain statutory language directing that appeals of tribunal decisions were to be considered as though originating from a court and not an administrative source. The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.

[40] I also agree with the Federal Court of Appeal that the standard of review for mixed questions of fact and law and questions of fact is reasonableness. Reasonableness is normally the "governing standard" for questions of fact or mixed fact and law (*Smith*, at para. 26). In this case, there is nothing to indicate that this presumption should be rebutted.

B. *Merger Review Analysis Under Section 92 of the Act*

[41] At the outset, it will be helpful to provide a brief overview of the merger review process under the Act.

par. 149(1), plus tard *Securities Act*, R.S.B.C. 1996, c. 418, par. 167(1)). La disposition de la *Loi sur l'Office national de l'énergie*, L.R.C. 1985, c. N-7, dont il est question dans l'affaire *Smith* est ainsi rédigée : « Appel d'une décision ou d'une ordonnance du comité d'arbitrage peut être interjeté, sur une question de droit ou de compétence, devant la Cour fédérale . . . » (art. 101). En revanche, la *Loi sur le Tribunal de la concurrence* prévoit : « . . . les décisions ou ordonnances du Tribunal [. . .] sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale » (par. 13(1)).

[39] Dans les affaires *Pezim*, *McLean* et *Smith*, les dispositions légales en cause ne prévoyaient pas qu'en cas d'appel, la décision administrative devait être traitée comme si elle émanait d'une cour de justice plutôt que d'un tribunal administratif. La disposition d'appel de la *Loi sur le Tribunal de la concurrence* témoigne de l'intention claire du législateur de ne pas imposer la retenue judiciaire dans le contrôle des décisions du Tribunal, ce qui appuie la thèse selon laquelle la norme de la décision correcte s'applique aux questions de droit et celle de la décision raisonnable aux questions mixtes de droit et de fait et aux questions de fait. En l'espèce, la présomption suivant laquelle les questions de droit qui concernent la loi constitutive du Tribunal sont assujetties à la norme de la décision raisonnable est réfutée.

[40] Je partage également l'avis de la Cour d'appel fédérale pour qui la norme de contrôle applicable aux questions mixtes de fait et de droit et aux questions de fait est celle de la décision raisonnable. C'est généralement « la norme de la décision raisonnable qui s'applique » aux questions de fait ou mixtes de fait et de droit (*Smith*, par. 26). Dans la présente affaire, rien n'indique que cette présomption doive être réfutée.

B. *Cadre analytique applicable à l'examen du fusionnement prévu par l'art. 92 de la Loi*

[41] Avant toute chose, il serait utile de donner un aperçu du processus légal d'examen du fusionnement.

(1) Merger Review: An Overview

[42] Merger review is conducted under s. 92 of the Act. A merger is "an acquisition of control or a significant interest in all or part of the business of another" (B. A. Facey and D. H. Assaf, *Competition and Antitrust Law: Canada and the United States* (4th ed. 2014), at p. 205). Section 91 of the Act defines merger as follows:

91. [Definition of "merger"] In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

[43] A merger review is designed to identify those mergers that will have anti-competitive effects (Facey and Assaf, at p. 209). Section 92 identifies these anti-competitive effects as either substantially lessening competition or substantially preventing competition. Section 92(1) provides for remedial orders to be made when a merger is found to either lessen or prevent competition substantially.

[44] Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms" (O. Wakil, *The 2014 Annotated Competition Act* (2013), at p. 246). Market power is the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425, at para. 7, aff'd 2003 FCA 131, 24 C.P.R. (4th) 178, leave to appeal refused, [2004] 1 S.C.R. vii). Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable" (*Canada (Director of Investigation and*

(1) Examen du fusionnement : aperçu

[42] L'examen du fusionnement est effectué sous le régime de l'art. 92 de la Loi. Le fusionnement est [TRADUCTION] « l'acquisition du contrôle sur une partie ou la totalité de l'entreprise d'autrui ou d'une participation importante dans celle-ci » (B. A. Facey et D. H. Assaf, *Competition and Antitrust Law : Canada and the United States* (4e éd. 2014), p. 205). L'article 91 de la Loi définit le fusionnement dans les termes suivants :

91. [Définition de « fusionnement »] Pour l'application des articles 92 à 100, « fusionnement » désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

[43] L'examen vise à déterminer les fusionnements qui auront des effets anticoncurrentiels (Facey et Assaf, p. 209). Aux termes de l'art. 92, un effet anticoncurrentiel empêche ou diminue sensiblement la concurrence. Le paragraphe 92(1) confère au Tribunal le pouvoir de prononcer une ordonnance de réparation lorsqu'il conclut qu'un fusionnement empêche ou diminue sensiblement la concurrence.

[44] De manière générale, il ne sera satisfait à la norme de l'empêchement ou de la diminution sensible que si un fusionnement a vraisemblablement pour effet de [TRADUCTION] « créer, de maintenir ou d'accroître la capacité de l'entité fusionnée d'exercer une puissance commerciale, unilatéralement ou de concert avec d'autres entreprises » (O. Wakil, *The 2014 Annotated Competition Act* (2013), p. 246). La puissance commerciale s'entend de la capacité « d'exercer avec profit une influence sur les prix, la qualité, la variété, le service, la publicité, l'innovation et les autres dimensions de la concurrence » (*Canada (Commissaire de la concurrence) c. Canadian Waste Services Holdings Inc.*, 2001 Trib. conc. 3, [2001] D.T.C.C. no 3 (QL), par. 7, conf. par 2003 CAF 131, autorisation d'appel refusée, [2004] 1 R.C.S. vii). Autrement dit, elle s'entend de « la capacité de maintenir des prix

Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), at p. 314); where "price" is "generally used as shorthand for all aspects of a firm's actions that have an impact on buyers" (J. B. Musgrove, J. MacNeil and M. Osborne, eds., *Fundamentals of Canadian Competition Law* (2nd ed. 2010), at p. 29). If a merger does not have or likely have market power effects, s. 92 will not generally be engaged (B. A. Facey and C. Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (2013), at p. 141).

[45] The merger's likely effect on market power is what determines whether its effect on competition is likely to be "substantial". Two key components in assessing substantiality under the "lessening" branch are the degree and duration of the exercise of market power (*Hillsdown*, at pp. 328-29). There is no reason why degree and duration should not also be considered under the "prevention" branch.

[46] What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:

> What will constitute a likely "substantial" lessening will depend on the circumstances of each case. . . .Various tests have been proposed: a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise. The Tribunal does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes.

(*Hillsdown,* at pp. 328-29)

[47] If the Tribunal concludes that the merger substantially lessens or prevents or is likely to substantially lessen or prevent competition, the Tribunal is empowered to make a remedial order pursuant

plus élevés que le niveau concurrentiel pendant une longue période, sans que cette pratique soit non rentable » (*Directeur des enquêtes et recherches c. Hillsdown Holdings Ltd.*, 1992 CanLII 1901 (Trib. conc.), p. 49), où « prix » est [TRADUCTION] « généralement le terme qui regroupe tous les aspects des activités d'une entreprise qui ont une incidence sur les acheteurs » (J. B. Musgrove, J. MacNeil et M. Osborne, dir., *Fundamentals of Canadian Competition Law* (2e éd. 2010), p. 29). Le fusionnement qui n'a aucun effet ou n'aura vraisemblablement aucun effet sur la puissance commerciale ne met généralement pas en jeu l'art. 92 (B. A. Facey et C. Brown, *Competition and Antitrust Laws in Canada : Mergers, Joint Ventures and Competitor Collaborations* (2013), p. 141).

[45] L'effet vraisemblable du fusionnement sur la puissance commerciale permet de déterminer si ce dernier aura vraisemblablement un effet « sensible » sur la concurrence. Le degré et la durée de l'exercice de la puissance commerciale sont des éléments clés dans l'analyse permettant de déterminer si le fusionnement aura pour effet de diminuer sensiblement la concurrence (*Hillsdown*, p. 78). Rien n'interdit que ces éléments soient également pris en considération pour déterminer s'il y aura empêchement.

[46] Ce que l'on peut qualifier de « sensible » variera d'une affaire à l'autre. Le Tribunal n'a pas jugé utile d'appliquer un critère numérique strict :

> Ce qui constituera vraisemblablement une diminution « sensible » dépendra des circonstances dans chaque cas. [. . .] On a proposé plusieurs critères : hausse de prix vraisemblable de 5 % pouvant être maintenue pendant un an; hausse de prix de 5 % pouvant être maintenue pendant plus de deux ans; hausse de prix faible, mais notable, et non transitoire. Le Tribunal ne juge pas utile d'utiliser des critères numériques stricts, bien que ceux-ci puissent être utiles pour des fins d'application.

(*Hillsdown*, p. 78)

[47] S'il conclut que le fusionnement diminue ou empêche sensiblement ou aura vraisemblablement pour effet de diminuer ou d'empêcher sensiblement la concurrence, le Tribunal est habilité par

to s. 92(1)(*e*) and (*f*). The Tribunal "may prohibit the parties from proceeding with all or part of the merger, or it may order the dissolution of a completed merger or divestiture of assets or shares" (Musgrove, MacNeil and Osborne, at p. 185).

[48] The ability to make a remedial order is subject to exceptions (see ss. 94 to 96 of the Act). For the purposes of this appeal, only s. 96, the so-called efficiencies defence, is relevant. After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anti-competitive effects resulting from the merger.

(2) Determining Whether a Substantial Lessening or Prevention Will Likely Occur

(a) *"But For" Analysis Should Be Used*

[49] The Tribunal, relying on *Canada Pipe*, used the "but for" test to assess the merger in this case.

[50] *Canada Pipe* was a case involving abuse of dominance under s. 79(1)(*c*) of the Act. The words of s. 79(1)(*c*) — "is having or is likely to have the effect of preventing or lessening competition substantially in a market" — are very close to the words of s. 92(1) — "likely to prevent or lessen" — and convey the same ideas. In *Canada Pipe*, the Federal Court of Appeal employed a "but for" test to conduct the inquiry:

. . . the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that

les al. 92(1)*e*) et *f*) à prononcer une ordonnance de réparation. Il [TRADUCTION] « peut interdire aux parties de procéder au fusionnement en tout ou en partie ou encore ordonner que le fusionnement réalisé soit dissous ou que l'on se départisse d'éléments d'actif ou d'actions » (Musgrove, MacNeil et Osborne, p. 185).

[48] Le pouvoir de prononcer une ordonnance de réparation est assorti d'exceptions (voir les art. 94 à 96 de la Loi). Dans le cadre du présent pourvoi, seul est pertinent l'art. 96, qui prévoit le moyen de défense que l'on dit fondé sur les gains en efficience. À la conclusion selon laquelle le fusionnement satisfait aux critères énoncés au par. 92(1), les parties au fusionnement peuvent opposer l'art. 96 pour faire obstacle à l'ordonnance de réparation prévue à l'art. 92. Ainsi, aux termes de l'art. 96, l'ordonnance n'est pas rendue s'il est conclu que le fusionnement entraînera vraisemblablement des gains en efficience qui surpasseront et neutraliseront les effets anticoncurrentiels.

(2) Le fusionnement aura-t-il vraisemblablement pour effet de diminuer ou d'empêcher sensiblement la concurrence?

a) *Analyse axée sur l'absence hypothétique*

[49] Appliquant l'arrêt *Tuyauteries Canada*, le Tribunal a recouru au critère de l'absence hypothétique pour examiner le fusionnement dans la présente affaire.

[50] L'affaire *Tuyauteries Canada* portait sur un abus de position dominante au sens de l'al. 79(1)*c*) de la Loi. Les termes de l'al. 79(1)*c*) — « la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché » — se rapprochent de très près de ceux du par. 92(1) — « empêche ou diminue [. . .] vraisemblablement » — et évoquent les mêmes idées. Dans cette affaire, la Cour d'appel fédérale a appliqué le critère de l'absence hypothétique :

. . . le Tribunal doit comparer le niveau de concurrence sur le marché caractérisé par la présence de la pratique

which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial". . . .

The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. [paras. 37-38]

[51] A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: ". . . whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or 'but for' world" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

(b) *The "But For" Analysis Under Section 92(1) Is Forward-Looking*

[52] The words of the Act and the nature of the "but for" merger review analysis that must be conducted under s. 92 of the Act require that this analysis be forward-looking.

[53] The Tribunal must determine whether "a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially". While the tense of the words "prevents or lessens" indicates existing circumstances, the ordinary meaning of "is likely to prevent or lessen" points to events in the future. To the same effect, the French text of s. 92(1) states "*qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet*". Both the English and French text allow for a forward-looking analysis. This proposition is not controversial. Both parties to this appeal agree that a forward-looking analysis is appropriate.

attaquée au niveau qui existerait en l'absence de cette pratique, pour ensuite établir si la concurrence est empêchée ou diminuée « sensiblement », en supposant qu'elle le soit tant soit peu. . .

Or, l'interprétation comparative que je viens de décrire est à mon sens équivalente au critère de l'« absence hypothétique » proposé par l'appelante. [par. 37-38]

[51] Le paragraphe 92(1) appelle une analyse comparative similaire. De par sa nature, l'examen du fusionnement emporte l'examen d'un scénario conjectural : [TRADUCTION] « . . . le fusionnement permettra-t-il à l'entité fusionnée d'empêcher ou de diminuer sensiblement la concurrence par rapport à l'état de fait antérieur au fusionnement et qui sert de repère » (Facey et Brown, p. 205). Le critère de l'absence hypothétique est le cadre analytique qu'il convient d'appliquer sous le régime de l'art. 92.

b) *L'analyse axée sur l'absence hypothétique qu'appelle le par. 92(1) est prospective*

[52] Le libellé de la Loi et la nature de l'analyse axée sur l'absence hypothétique à laquelle il faut procéder dans le cadre de l'examen du fusionnement sous le régime de l'art. 92 commandent une démarche prospective.

[53] Le Tribunal est appelé à déterminer si « un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet ». Si le temps présent des verbes « empêche ou diminue » renvoie aux circonstances actuelles, l'emploi du futur dans « aura vraisemblablement » annonce un acte qui se produira à l'avenir. Le libellé de la version anglaise de la disposition a le même effet. Elle est ainsi rédigée : « . . . *a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially* ». L'expression « *is likely to prevent or lessen* » dans son sens ordinaire indique quant à elle des actes futurs. Le texte anglais et le texte français permettent tous deux une analyse prospective. Cette proposition ne suscite aucune controverse. Les deux parties au présent pourvoi reconnaissent qu'une analyse prospective est de mise.

(c) *Similarities and Differences Between the "Lessening" and "Prevention" Branches of Section 92*

[54] In his concurring reasons at the Tribunal, Crampton C.J. found that the assessment of a merger review under either the "prevention" or "lessening" branch is "essentially the same" (para. 367). Both focus on "whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger" (*ibid.*). Under both branches, the lessening or prevention in question must be "substantial" (*Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 ("*Superior Propane I*"), at paras. 246 and 313). And the analysis under both the "lessening" and "prevention" branches is forward-looking.

[55] However, there are some differences between the two branches. In determining whether competition is substantially lessened, the focus is on whether the merged entity would increase its market power. Under the "prevention" branch, the focus is on whether the merged entity would retain its existing market power. As explained by Chief Justice Crampton in his concurring reasons:

> In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur. [Emphasis in original.]
>
> (Tribunal decision, at para. 368)

c) *Similarités et différences entre les volets relatifs à la « diminution » et à l'« empêchement » de l'art. 92*

[54] Dans les motifs concordants qu'il a rédigés pour le Tribunal, le juge en chef Crampton a conclu que les points sur lesquels porte l'examen d'un fusionnement sont « fondamentalement les mêmes », qu'il s'agisse du volet relatif à la « diminution » ou de celui relatif à l'« empêchement » (par. 367). Quel que soit le volet, il s'agit de déterminer « si l'entité fusionnée sera vraisemblablement en mesure d'exercer une puissance commerciale beaucoup plus importante qu'en l'absence de fusionnement » (*ibid.*). Dans un cas comme dans l'autre, il est question de diminuer ou d'empêcher « sensiblement » (*Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, 2000 Trib. conc. 15, [2000] D.T.C.C. nº 15 (QL) (« *Supérieur Propane I* »), par. 48). En outre, l'analyse, peu importe qu'elle cherche à déterminer s'il y aura « diminution » ou « empêchement », est prospective.

[55] Les deux volets diffèrent cependant à certains égards. Pour déterminer s'il y a diminution sensible de la concurrence, il faut demander si l'entité fusionnée accroîtra sa puissance commerciale. Dans le cas de l'empêchement, la question est celle de savoir si l'entité fusionnée conservera sa puissance commerciale. Pour reprendre les propos du juge en chef Crampton dans ses motifs concordants :

> Pour déterminer si le fusionnement aura vraisemblablement pour effet de *diminuer* la concurrence, le Tribunal s'en tiendra à déterminer si le fusionnement aura vraisemblablement pour effet de rendre plus facile l'exercice d'une nouvelle ou d'une plus grande puissance commerciale par l'entité issue du fusionnement qu'elle ait agi seule ou en interdépendance avec d'autres entreprises rivales. Pour déterminer si le fusionnement aura vraisemblablement pour effet d'« *empêcher* » la concurrence, le Tribunal cherchera à savoir si le fusionnement aura vraisemblablement pour effet de préserver la puissance commerciale de l'une des parties fusionnantes ou des deux, en empêchant l'érosion de cette puissance commerciale qui se serait vraisemblablement produite en l'absence de fusionnement. [En italique dans l'original.]
>
> (Décision du Tribunal, par. 368)

C. *The "Prevention" Branch of Section 92(1)*

[56] While this Court has had occasion to consider the "lessening" branch of s. 92(1) in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, this is the first case in which we have had the opportunity to focus on the "prevention" branch of s. 92(1).

[57] Tervita seeks clarity as to the appropriate legal test under the "prevention" branch. In Tervita's view, the "Tribunal erred in its application of the legal test for a substantial prevention of competition" (A.F., at para. 59). Tervita argues that "the Act requires that the Tribunal focus its analysis on the merger under review" (*ibid.*). Tervita acknowledges that s. 92 does involve a forward-looking approach, but submits that what should be projected into the future is the merging parties as they are, with their assets, plans and businesses at the time of the merger. Tervita argues that the Act does not permit the Tribunal to speculate, as it says it did in this case, and that its "fundamental error" is that it focused "not on the merger between Tervita and [the Vendors], but rather on how competition might have developed looking years into the future" (A.F., at para. 71).

[58] My understanding of Tervita's argument is that the wording of s. 92 essentially limits the inquiry to whether the Babkirk site was a viable competitive entrant into the secure landfill market at the time it was acquired by Tervita. That is, in order to establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger.

[59] For the reasons that follow, I am unable to agree with Tervita. Rather, I agree with the Commissioner that the wording of s. 92 generally supports the analysis and conclusions of the Tribunal and the Federal Court of Appeal with respect to s. 92.

C. *Volet relatif à l'« empêchement » du par. 92(1)*

[56] Bien que la Cour ait eu l'occasion de se pencher sur le volet du par. 92(1) relatif à la « diminution » dans l'affaire *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, c'est la première fois qu'elle examine le volet relatif à l'« empêchement ».

[57] Tervita demande que le critère juridique applicable au volet relatif à l'« empêchement » soit clarifié. À son avis, le [TRADUCTION] « Tribunal a appliqué erronément le critère juridique servant à déterminer s'il y a empêchement sensible de la concurrence » (m.a., par. 59). Elle soutient en outre que « la Loi oblige le Tribunal à faire porter son analyse sur le fusionnement en question » (*ibid.*). Si elle reconnaît que l'art. 92 commande une analyse prospective, elle soutient cependant que ce qui doit être projeté dans l'avenir, ce sont les parties au fusionnement dans leur état actuel — y compris leurs éléments d'actif, leurs plans et leurs activités à la date du fusionnement. Tervita fait valoir que la Loi ne permet pas au Tribunal de faire des conjectures comme, soutient-elle, il l'a fait dans la présente affaire, et que son « erreur fondamentale » tient au fait qu'il s'est concentré « non pas sur le fusionnement entre Tervita et [les vendeurs], mais sur la manière dont la concurrence pourrait s'être développée au fil des ans » (m.a., par. 71).

[58] Si je comprends bien, Tervita soutient que le libellé de l'art. 92 limite essentiellement l'analyse à la question de savoir si le site Babkirk était un nouveau concurrent viable dans le marché de l'enfouissement sécuritaire à la date de son acquisition par Tervita. Autrement dit, selon elle, pour établir que le fusionnement aura vraisemblablement pour effet d'empêcher sensiblement la concurrence, une partie au fusionnement doit constituer un concurrent éventuel compte tenu de ses éléments d'actif, de ses plans et de ses activités à la date du fusionnement.

[59] Pour les motifs qui suivent, je ne suis pas d'accord. En revanche, je partage l'avis de la commissaire selon lequel le libellé de l'art. 92 appuie généralement l'analyse et les conclusions du Tribunal et de la Cour d'appel fédérale sur cette disposition.

(1) The Law

[60] 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.

(a) *Identify the Potential Competitor*

[61] The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence "entry" is considered "either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area . . ., or local firms which previously did not offer the product in question commencing to do so" (*Hillsdown*, at p. 325).

[62] Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called "toehold" entry.

[63] I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of

(1) Le droit

[60] Le volet de l'art. 92 relatif à l'« empêchement » vise à prévenir qu'une entreprise possédant une puissance commerciale procède à un fusionnement pour empêcher la concurrence susceptible par ailleurs de s'exercer dans un marché contestable. L'analyse qu'il commande envisage l'état du marché, n'eût été le fusionnement, pour apprécier le paysage concurrentiel qui existerait vraisemblablement si le fusionnement n'avait pas eu lieu. Elle détermine le concurrent éventuel, la probabilité qu'il entre dans le marché en l'absence du fusionnement et la probabilité qu'il y ait un effet sensible.

a) *Déterminer le concurrent éventuel*

[61] La première étape consiste à déterminer l'entreprise — ou les entreprises — que le fusionnement empêcherait d'entrer dans le marché de manière indépendante, c.-à-d. le concurrent éventuel. Selon la jurisprudence qui porte sur le droit de la concurrence, il y a « entrée dans le marché » quand « une nouvelle firme s'établit dans le marché, qu'elle soit complètement nouvelle venue dans l'industrie ou nouvelle venue dans la région géographique [. . .], ou bien quand des firmes locales qui n'offraient pas avant le produit en question commencent à le faire » (*Hillsdown*, p. 68).

[62] Le concurrent éventuel est habituellement une partie au fusionnement : l'entreprise acquise ou l'entreprise acquérante. L'analyse est axée sur l'entrée potentielle dans le marché par la première lorsque, n'eût été le fusionnement, celle-ci aurait vraisemblablement pénétré le marché en cause. L'analyse est axée sur l'entrée potentielle dans le marché par la seconde lorsque, n'eût été le fusionnement, celle-ci aurait pénétré le marché en question de manière indépendante ou par le truchement de l'acquisition et de l'expansion d'une entreprise de plus petite taille, ce que l'on appelle l'entrée sur le marché « à échelle réduite ».

[63] Je n'exclurais pas non plus la possibilité, comme l'a expliqué le juge en chef Crampton dans ses motifs concordants, qu'un fusionnement ait

competition could stem from the merger preventing "another type of future competition" (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.

(b) *Examine the "But For" Market Condition*

[64] The second step in determining whether a merger engages the "prevention" branch is to examine the "but for" market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.

[65] Tervita argues that the intention of s. 92 is "to establish a merger test that provides certainty to Canadian businesses" (A.F., at para. 66). However, the term "likely" in s. 92 does not require certainty. "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal licence to speculate; its findings must be based on evidence.

[66] There is only one civil standard of proof: proof on a balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.

vraisemblablement pour effet d'empêcher sensiblement la concurrence en faisant obstacle à « une future situation de concurrence autre » (par. 386). À mon avis, cela signifie qu'il est possible qu'un tiers ne puisse pénétrer ce marché par suite du fusionnement.

b) *L'état du marché n'eût été le fusionnement*

[64] Pour déterminer si un fusionnement « empêche » la concurrence, il faut dans un deuxième temps examiner l'état du marché pour voir si, n'eût été le fusionnement, le concurrent éventuel (normalement une partie au fusionnement) serait vraisemblablement entré dans le marché et, dans l'affirmative, si cette entrée aurait réduit la puissance commerciale de l'entreprise acquérante. Si la pénétration par le concurrent n'a aucun effet sur la puissance commerciale de l'entreprise acquérante, l'on ne peut dire du fusionnement qu'il a pour effet d'empêcher sensiblement la concurrence.

[65] Tervita soutient que l'objet de l'art. 92 est [TRADUCTION] « d'établir un critère en matière de fusionnement qui offre une certitude aux entreprises canadiennes » (m.a., par. 66). Or, le terme « vraisemblablement » à l'art. 92 n'exige pas la certitude. Il traduit le fait que l'examen du fusionnement est en soi un exercice prédictif, sans toutefois permettre au Tribunal de conjecturer; ce dernier doit fonder ses conclusions sur la preuve.

[66] Il n'existe qu'une seule norme de preuve en matière civile : la preuve selon la prépondérance des probabilités (*F.H. c. McDougall*, 2008 CSC 53, [2008] 3 R.C.S. 41, par. 40 et 49). Il en découle que, pour que l'art. 92 de la Loi s'applique, le Tribunal doit être d'avis que le fusionnement aura probablement pour effet d'empêcher sensiblement la concurrence. La simple possibilité ne permet pas de satisfaire à cette norme. Et, comme nous le verrons, plus la situation est projetée dans l'avenir, plus le risque de non-fiabilité s'accroît, tant et si bien qu'à un certain point, la preuve sera jugée conjecturale seulement.

(i) Likelihood of Entry by One of the Merging Parties

[67] In determining whether one of the merging parties would, in the absence of the merger, be likely to enter the market independently, any factor that in the opinion of the Tribunal could influence entry upon which evidence has been adduced should be considered. This will include the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act.

[68] Where the evidence does not support the conclusion that one of the merging parties or a third party would enter the market independently, there cannot be a finding of likely prevention of competition by reason of the merger. To the same effect, where the evidence is only that there is a possibility of the merging party entering the market at some time in the future, a finding of likely prevention cannot be made. In this respect, I agree with Justice Mainville that the timeframe for entry must be discernible (F.C.A. decision, at para. 90). While timing does not need to be a "precisely calibrated determination" (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.

[69] My understanding of Tervita's argument is that it seeks to limit the Tribunal's ability to look into the future to what can be discerned from the merging parties' assets, plans and business at the time of the merger. However, in my view, there is no legal basis to restrict the evidence the Tribunal can look at in this way.

(i) Une partie au fusionnement serait-elle vraisemblablement entrée dans le marché?

[67] Pour déterminer si, n'eût été le fusionnement, l'une des parties à ce dernier serait vraisemblablement entrée dans le marché de manière indépendante, le Tribunal doit prendre en considération tous les éléments qui, de son avis, sont susceptibles d'influer sur cette pénétration du marché et à l'égard desquels une preuve a été produite. Il s'agit notamment des plans et éléments d'actif de la partie concernée, des conditions du marché actuelles et attendues et d'autres facteurs, énumérés à l'art. 93 de la Loi.

[68] Lorsque la preuve ne permet pas de conclure que l'une des parties au fusionnement ou un tiers aurait pénétré le marché de manière indépendante, l'on ne peut conclure que le fusionnement aura vraisemblablement pour effet d'empêcher la concurrence. De même, si la preuve permet d'établir uniquement qu'il est possible que la partie au fusionnement pénètre le marché à l'avenir, l'on ne peut conclure à un empêchement vraisemblable. À cet égard, je suis d'accord avec le juge Mainville : le délai de pénétration du marché doit être discernable (décision de la C.A.F., par. 90). S'il ne faut pas nécessairement une « date précise » (*ibid.*), il doit cependant y avoir une preuve du moment où la partie au fusionnement aurait, de façon réaliste, pénétré le marché en l'absence du fusionnement. Sinon, c'est de la simple conjecture, et il n'est pas satisfait à la condition de vraisemblance. Même lorsqu'il y a une preuve d'un délai de pénétration du marché de manière indépendante, plus on regarde loin dans le futur, moins cette prédiction sera fiable. Le Tribunal doit faire preuve de prudence avant de déclarer qu'un long délai est discernable, surtout lorsque la pénétration du marché dépend d'un certain nombre d'impondérables.

[69] Si je comprends bien, Tervita cherche à circonscrire l'examen prospectif du Tribunal aux seuls éléments qu'il est possible de dégager des éléments d'actif, des plans et des activités des parties au fusionnement à la date de celui-ci. Or, à mon avis, rien ne permet en droit de restreindre ainsi la preuve que le Tribunal peut examiner.

[70] Justice Mainville held that how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he referred to as the "temporal dimension" of the barriers to entry: ". . . the time frame for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (F.C.A. decision, at para. 91).

[71] Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor (*Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, at p. 330). The lead time required to enter a market due to barriers to entry ("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.

[72] In setting lead time as the appropriate length of time to consider, Justice Mainville relied on the American case *BOC International Ltd. v. Federal Trade Commission*, 557 F.2d 24 (2d Cir. 1977), which considered whether a merger violated s. 7 of the *Clayton Act*, 15 U.S.C. § 18, under the "actual potential competition" doctrine, the U.S. equivalent of the "prevention" branch of s. 92 of the Act. *BOC International* turned on whether the evidence was sufficient to meet the requirements under the "actual potential competition" doctrine. The U.S. Federal Trade Commission found that there was a "reasonable probability" that the acquiring firm would have "eventually entered" the U.S. market but for its acquisition of the acquired company (*BOC International*, at p. 28).

[73] The Second Circuit Court of Appeals held that the language "eventual entry" made the overall test

[70] Selon le juge Mainville, la période visée par un tel examen prospectif — à savoir si, en l'absence du fusionnement, la partie à celui-ci aurait pénétré le marché — est normalement fonction du délai de pénétration du marché compte tenu des obstacles, qu'il a qualifiée de « dimension temporelle » des obstacles à l'entrée : « . . . le délai de pénétration du marché devrait normalement s'inscrire dans la dimension temporelle des obstacles à la pénétration du marché en question » (décision de la C.A.F., par. 91).

[71] Les obstacles à la pénétration du marché se rapportent au degré de facilité qu'éprouverait une entreprise à s'établir dans le marché en question en tant que concurrente viable (*Canada (Directeur des enquêtes et recherches : Loi sur la concurrence) c. Laidlaw Waste Systems Ltd.*, [1992] D.T.C.C. nº 1 (QL), p. 42-43). Le délai de pénétration d'un marché découlant des obstacles à cette pénétration (« délai de pénétration ») s'entend de la période qu'un nouveau concurrent aux prises avec certains obstacles et qui agit avec diligence pour les surmonter pourrait voir s'écouler lorsqu'il tente de pénétrer le marché.

[72] En désignant le délai de pénétration comme étant la période pertinente pour l'analyse, le juge Mainville a renvoyé à l'affaire américaine *BOC International Ltd. c. Federal Trade Commission*, 557 F.2d 24 (2d Cir. 1977), dans laquelle il fallait déterminer si un fusionnement contrevenait à l'art. 7 de la *Clayton Act*, 15 U.S.C. § 18, sur le fondement de la doctrine de la [TRADUCTION] « concurrence éventuelle véritable », l'équivalent aux É.-U. du volet relatif à « l'empêchement » de l'art. 92 de la Loi. L'affaire *BOC International* soulevait la question de savoir si la preuve était suffisante pour qu'il soit satisfait à la doctrine de la « concurrence éventuelle véritable ». La Federal Trade Commission des É.-U. a conclu qu'il était « raisonnablement probable » que l'entreprise acquérante aurait « fini par pénétrer » le marché américain, n'eût été l'acquisition par elle de la société acquise (*BOC International*, p. 28).

[73] La Second Circuit Court of Appeals a statué que l'emploi de l'expression [TRADUCTION] « finir

based largely on "ephemeral possibilities" (*BOC International*, at pp. 28-29). An actual potential entrant should be expected to enter in the "near" future, with "near" being defined in relation to the barriers to entry relevant in that particular industry:

> . . . it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with "near" defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.

(*BOC International*, at p. 29)

[74] Neither Justice Mainville nor *BOC International* expressly explain why the lead time should establish the length of time the Tribunal can look into the future when assessing whether, absent the merger, there would have been likely independent entry of one of the merging parties. Though Justice Mainville notes that lead time should be treated "as a guidepost and not as a fixed temporal rule" (para. 91), it is important to emphasize that lead time should not be used to justify predictions about the distant future. In some contexts, 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. However, in other contexts — for example, those where product development or regulatory approval processes may extend for some years — the lead time may be 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.

[75] The timeframe that can be considered must of course be determined by the evidence in any given

par pénétrer » faisait reposer largement le critère général sur « des possibilités éphémères » (*BOC International*, p. 28-29). Un véritable nouveau concurrent éventuel devrait s'attendre à pénétrer le marché dans un « proche » avenir, le qualificatif « proche » étant défini par rapport aux obstacles à la pénétration qui sont pertinents dans l'industrie en question :

> [TRADUCTION] . . . il semble nécessaire sous le régime de l'article 7 que, pour en arriver à une conclusion de pénétration probable, on ait au moins une estimation temporelle raisonnable relativement à un proche avenir, le qualificatif « proche » étant défini par rapport aux obstacles à la pénétration et aux délais requis pour la pénétration dans l'industrie en question, et que la conclusion repose sur une preuve substantielle au dossier.

(*BOC International*, p. 29)

[74] Ni le juge Mainville ni l'affaire *BOC International* n'expliquent expressément pourquoi le délai de pénétration devrait permettre de déterminer la période visée par l'examen prospectif que fait le Tribunal pour décider si, n'eût été le fusionnement, il y aurait vraisemblablement eu pénétration indépendante du marché par une partie à celui-ci. Le juge Mainville précise que le délai de pénétration devrait être vu comme étant une « ligne directrice, et non pas [une] règle temporelle coulée dans le béton » (par. 91), mais il importe de souligner qu'il ne devrait pas justifier des prédictions dans un avenir éloigné. Dans certains contextes, ce délai peut être court; partant il est possible de déterminer avec suffisamment de précision si la pénétration du marché dans cette période est vraisemblable, de sorte que la condition de « vraisemblance » soit remplie. Toutefois, dans d'autres contextes — par exemple ceux où le développement du produit ou les processus d'approbation réglementaires peuvent s'étaler sur des années —, le délai de pénétration peut être si long qu'une décision quant à la probabilité d'une pénétration du marché avant la fin de cette période serait influencée par tant d'impondérables et inconnues qu'elle tiendrait en grande partie de la conjecture.

[75] La période qui peut être prise en considération dépend évidemment de la preuve produite dans un

case. The evidence must be sufficient to meet the "likely" test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks the more difficult it will be to meet this test. Lead time is an important consideration, though this factor should not support an effort to look farther into the future than the evidence supports.

[76] Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. 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.

[77] If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernible timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.

(ii) Likely to Have a Substantial Effect on the Market

[78] It is not enough that a potential competitor must be likely to enter the market; this entry must be likely to have a substantial effect on the market. As discussed above, assessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market.

[79] Section 93 provides a non-exhaustive list of factors that may be considered when assessing whether a merger substantially lessens or prevents competition or is likely to do so, including whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant

cas donné. La preuve doit être suffisante pour qu'il soit satisfait à la condition de « vraisemblance » selon la prépondérance des probabilités, mais il ne faut pas oublier que plus l'examen par le Tribunal porte loin dans le futur, plus il est difficile d'y satisfaire. S'il est un facteur important, le délai de pénétration ne permet toutefois pas d'envisager au-delà de ce que la preuve appuie.

[76] Les affaires peuvent être imprévisibles, et les décisions commerciales ne reposent pas toujours sur des faits objectifs et une froide logique; l'état du marché peut fluctuer. Pour déterminer si un fusionnement aura vraisemblablement pour effet d'empêcher sensiblement la concurrence, ni le Tribunal ni les cours de justice ne devraient prétendre prendre des décisions commerciales futures pour les sociétés. Les conclusions factuelles quant à ce qu'une société ferait ou ne ferait pas doivent reposer sur une preuve de la décision que la société même prendrait, et non pas sur la décision que le Tribunal prendrait dans la même situation.

[77] Si le Tribunal détermine qu'en l'absence du fusionnement, la partie au fusionnement serait vraisemblablement entrée dans le marché dans un délai discernable, il faut ensuite déterminer si cette entrée aurait vraisemblablement un effet sensible sur la concurrence dans le marché.

(ii) Y aurait-il vraisemblablement un effet sensible sur le marché?

[78] Il ne suffit pas qu'un concurrent éventuel pénètre vraisemblablement le marché; il faut aussi que cette pénétration ait vraisemblablement un effet sensible sur le marché. Comme nous l'avons vu, pour déterminer s'il y aurait un effet sensible, il faut nécessairement examiner diverses dimensions de la concurrence, dont le prix et les extrants. Il faut également mesurer l'ampleur et la durée de tout effet qu'elle aurait sur le marché.

[79] L'article 93 dresse une liste non exhaustive de facteurs dont le Tribunal peut tenir compte pour déterminer si un fusionnement diminue ou empêche sensiblement la concurrence ou aura vraisemblablement cet effet, notamment la déconfiture de l'entreprise d'une partie, la mesure dans laquelle

market, the extent to which effective competition remains or would remain after a merger, and whether the merger would result in the removal of a vigorous and effective competitor.

(2) Application to the Present Case

[80] The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.

[81] The Tribunal concluded that the merger "is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)). In coming to this conclusion the Tribunal assessed a number of the s. 93 factors including the following:

- barriers to entry were "at least 30 months" and there was "no evidence of any proposed entry in the Contestable Area" (para. 222; see s. 93(*d*));
- there is an absence of acceptable substitutes and effective remaining competition (para. 223; see s. 93(*c*));
- there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand

sont disponibles des substituts acceptables, les entraves à l'accès au marché en cause, la mesure dans laquelle il y a ou il y aurait concurrence réelle après un fusionnement et la possibilité que le fusionnement entraîne la disparition d'un concurrent dynamique et efficace.

(2) Application à la présente affaire

[80] Le cadre analytique et la conclusion selon laquelle le fusionnement aura vraisemblablement pour effet d'empêcher sensiblement la concurrence sont corrects selon moi. Le Tribunal a bien appliqué le cadre analytique énoncé précédemment. Il a procédé à une analyse prospective axée sur l'absence hypothétique pour déterminer si le fusionnement aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence. Il a mis la partie acquise (les vendeurs) au centre de l'analyse. Le Tribunal a ensuite demandé si, n'eût été le fusionnement, les vendeurs auraient vraisemblablement pénétré le marché du produit pertinent dans une mesure suffisante pour livrer concurrence à Tervita.

[81] Le Tribunal a conclu que le fusionnement « permettrait, selon toute vraisemblance, [à Tervita] de maintenir sa capacité d'exercer une puissance commerciale beaucoup plus importante qu'en l'absence du fusionnement, et que le fusionnement aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence » (par. 229(iv)). Avant d'en arriver à cette conclusion, le Tribunal a soupesé certains facteurs énumérés à l'art. 93, dont les suivants :

- Les entraves à l'accès au marché s'étalaient sur « au moins 30 mois » et il n'y avait aucune preuve d'un « projet d'entrée sur le marché projetée dans la région contestable » (par. 222; voir l'al. 93*d*));
- L'absence de substitut acceptable et de concurrence réelle (par. 223; voir l'al. 93*c*));
- La demande de services d'enfouissement sécuritaires aurait été suffisante pour que la transformation du site Babkirk en un site d'enfouissement

has "been projected to increase as new drilling is undertaken in the area north and west of Babkirk" (para. 207; see s. 93(*f*));

- the permitted capacity of the Babkirk site was sufficient to allow it to "compete effectively" with Tervita (para. 208; see s. 93(*f*)); and

- "the [m]erger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition" (para. 297; see s. 93(*e*)).

[82] I agree with the Commissioner that "the Tribunal did not speculate on what would happen to the Babkirk site . . . . It made findings of fact based on the abundant evidence before it" (R.F., at para. 61). The reasonableness of the factual findings were reviewed by the Federal Court of Appeal and found to be supported by sufficient evidence. While, as will be discussed, I question the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in the absence of a merger (para. 229(iii)), it is evident that there was sufficient other evidence upon which the Tribunal could find a substantial prevention of competition as a result of the merger.

[83] Accordingly, the Tribunal's conclusion that the merger is likely to substantially prevent competition was correct. As s. 92 is engaged, it is necessary to determine whether the s. 96 defence applies to prevent the making of an order under s. 92.

D. *The Efficiencies Defence*

[84] Tervita raises two issues with respect to the Tribunal's assessment of the s. 96 efficiencies defence. First, should OIEs, or efficiencies that would arise because of the time necessary to implement the Tribunal's divestiture order under s. 92, be taken into

sécuritaire soit rentable, étant donné « l'augmentation anticipée [. . .] de la demande de services de décharge sécuritaire, en raison des nouveaux forages effectués dans la région située au nord et à l'ouest de l'installation Babkirk » (par. 207; voir l'al. 93*f*));

- La capacité autorisée du site Babkirk était suffisante pour lui permettre d'entrer « effectivement en concurrence » avec Tervita (par. 208; voir l'al. 93*f*));

- « le fusionnement préserve une structure de marché monopolistique et, par conséquent, empêche l'émergence d'une concurrence potentiellement importante » (par. 297; voir l'al. 93*e*)).

[82] Je partage l'avis de la commissaire selon qui [TRADUCTION] « le Tribunal n'a fait aucune conjecture sur ce qu'il adviendrait du site Babkirk [. . .] Il a tiré des conclusions de fait sur le fondement de la preuve abondante dont il disposait » (m.i., par. 61). La Cour d'appel fédérale a évalué le caractère raisonnable des conclusions factuelles et a conclu qu'elles étaient appuyées par une preuve suffisante. Si, ainsi que nous le verrons, je mets en doute la caractérisation par le Tribunal de la soi-disant baisse du prix de 10 p. 100 qui aurait été réalisée en l'absence du fusionnement (par. 229(iii)), manifestement, il disposait de suffisamment d'autres éléments de preuve pour conclure que le fusionnement empêcherait sensiblement la concurrence.

[83] Par conséquent, la conclusion du Tribunal selon laquelle le fusionnement aura vraisemblablement pour effet d'empêcher sensiblement la concurrence était correcte. Étant donné qu'il est satisfait à l'art. 92, il y a lieu de déterminer si la défense prévue à l'art. 96 fait obstacle à l'ordonnance visée à l'art. 92.

D. *Défense fondée sur les gains en efficience*

[84] Tervita soulève deux questions en ce qui concerne l'examen par le Tribunal de la défense fondée sur les gains en efficience que prévoit l'art. 96. Premièrement, les GEEO — ceux qui seraient réalisés en raison du délai d'exécution de l'ordonnance

account in the balancing test under s. 96? Second, what is the proper approach to the balancing analysis under s. 96? Before addressing the issues raised on appeal, it will be useful to review the history of the statutory efficiencies defence and the adjudicative treatment of the defence prior to this case.

(1) History of the Efficiencies Defence

[85] Section 96 was included as part of the new *Competition Act*, proclaimed into force on June 19, 1986. The process of reforming Canada's competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council's 1969 report "identified economic efficiency as the overriding policy objective" of legislative reform (A. N. Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (1997), at p. 21). After a number of attempts to amend the legislation and following a lengthy and extensive consultative process, the new *Competition Act* was introduced. This amendment process reflected concerns raised about the number of significant mergers taking place in Canada (Facey and Assaf, at p. 9; see also W. T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More Unto the Breach" (1981), 5 *Can. Bus. L.J.* 381, at p. 388). In early 1981, the federal Minister of Consumer and Corporate Affairs solicited the views of his provincial counterparts, trade associations, consumer groups and academics with respect to proposals for amending the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (*ibid.*, at p. 381). This process "yielded valuable experience laying the groundwork for what was to become the *Competition Act*" (Facey and Assaf, at p. 10).

[86] Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence*

de dessaisissement rendue par le Tribunal en vertu de l'art. 92 — devraient-ils compter dans la pondération qu'exige l'art. 96? Deuxièmement, comment faut-il procéder à cette pondération? Avant de trancher les questions soulevées en appel, il est utile de passer en revue l'historique de la défense légale fondée sur les gains en efficience et la manière dont les tribunaux l'ont traitée auparavant.

(1) Historique de la défense fondée sur les gains en efficience

[85] L'article 96 faisait partie de la nouvelle *Loi sur la concurrence*, entrée en vigueur le 19 juin 1986. La réforme de la législation canadienne sur la concurrence a été entreprise en 1966 lorsque le gouvernement fédéral a demandé au Conseil économique du Canada de se pencher sur la question. Dans le rapport qu'il a publié en 1969, le Conseil [TRADUCTION] « a dit de l'efficience économique qu'elle était l'objectif politique prépondérant » de la réforme législative (A. N. Campbell, *Merger Law and Practice : The Regulation of Mergers Under the Competition Act* (1997), p. 21). Après quelques tentatives de modification législative et au terme de consultations longues et vastes, le législateur a adopté la nouvelle *Loi sur la concurrence*. Il répondait ainsi aux préoccupations formulées à l'égard du nombre de fusionnements importants intervenus au Canada (Facey et Assaf, p. 9; voir aussi W. T. Stanbury et G. B. Reschenthaler, « Reforming Canadian Competition Policy : Once More Unto the Breach » (1981), 5 *Rev. can. dr. comm.* 381, p. 388). Au début de 1981, le ministre fédéral de la Consommation et des Affaires commerciales avait sollicité l'opinion de ses homologues provinciaux, d'associations syndicales, de groupes de consommateurs et d'universitaires sur des propositions de modifications à la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, c. C-23 (*ibid.*, p. 381). Cette démarche [TRADUCTION] « a permis d'obtenir une expérience précieuse qui a servi à établir les assises de ce qui allait devenir la *Loi sur la concurrence* » (Facey et Assaf, p. 10).

[86] Le projet de loi C-91, la *Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur*

thereof, was introduced in the House of Commons in 1985 (1st Sess., 33rd Parl., first reading Dec. 17, 1985, assented to June 17, 1986, S.C. 1986, c. 26). This bill included comprehensive amendments to the *Combines Investigation Act*, including the creation of a new expert adjudicative body, the Competition Tribunal, and the inclusion of the efficiencies defence (Facey and Assaf, at pp. 9-10).

[87] A stand-alone statutory efficiencies defence was considered "particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally" (Campbell, at p. 152; see also *House of Commons Debates*, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (*ibid.*, at pp. 15-17).

(2) Jurisprudential History of Section 96

[88] The leading case law on the interpretation of the efficiencies defence remains the *Superior Propane* series of cases, which began when the Commissioner applied to the Tribunal seeking an order to prevent a merger between the two largest national distributors of propane (*Superior Propane I*, rev'd on other grounds in *Superior Propane II*, leave to appeal dismissed, [2001] 2 S.C.R. xiii; redetermination in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 ("*Superior Propane III*"), aff'd 2003 FCA 53, [2003] 3 F.C. 529 ("*Superior Propane IV*")). Although this Court is not bound by these decisions, the *Superior Propane* cases considered

les banques et apportant des modifications corrélatives à d'autres lois, a été déposé à la Chambre des communes en 1985 (1re sess., 33e lég., première lecture le 17 déc. 1985, sanctionnée le 17 juin 1986, L.C. 1986, c. 26). Ce projet de loi a modifié profondément la *Loi relative aux enquêtes sur les coalitions*, notamment en constituant un nouvel organisme décisionnel expert, le Tribunal de la concurrence, et en prévoyant la défense fondée sur les gains en efficience (Facey et Assaf, p. 9-10).

[87] Une défense distincte fondée sur les gains en efficience, d'origine législative, avait été jugée [TRADUCTION] « convenir particulièrement au Canada, car un marché intérieur modeste ne permet souvent qu'à quelques entreprises tout au plus de produire à des niveaux efficients, et les entreprises canadiennes doivent pouvoir tirer parti d'économies d'échelle pour demeurer concurrentielles sur le marché international » (Campbell, p. 152; voir aussi *Débats de la Chambre des communes*, vol. VIII, 1re sess., 33e lég., 7 avril 1986, p. 11962; ministre de la Consommation et des Corporations, *Réforme de la législation sur la concurrence : Guide* (1985), p. 4). Dans le contexte de l'économie canadienne relativement modeste, où le commerce international est important, le législateur reconnaît par la défense fondée sur les gains en efficience que, dans certains cas, le regroupement est plus avantageux que la concurrence (*ibid.*, p. 15-17).

(2) Historique jurisprudentiel de l'art. 96

[88] Encore aujourd'hui, la jurisprudence de principe sur l'interprétation de la défense fondée sur les gains en efficience est la série *Supérieur Propane*, qui commence lorsque le commissaire s'adresse au Tribunal pour obtenir une ordonnance interdisant un fusionnement entre les deux plus importants distributeurs nationaux de propane (*Supérieur Propane I*, inf. pour d'autres motifs dans *Supérieur Propane II*, autorisation d'appel rejetée, [2001] 2 R.C.S. xiii; nouvelle décision dans *Commissaire de la concurrence c. Supérieur Propane Inc.*, 2002 Trib. conc. 16 (en ligne) (« *Supérieur Propane III* »), conf. par 2003 CAF 53, [2003] 3 C.F. 529 (« *Supérieur Propane IV* »)). Bien que notre Cour ne soit pas liée par

a number of factors relevant to the efficiencies defence and its application.

[89] The *Superior Propane I* case confirmed that s. 96 is a defence to the application of s. 92 (paras. 398-99). As such, the onus of alleging and proving that efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger falls upon the merging parties (*Superior Propane I*, at para. 399; *Superior Propane II*, at para. 154; *Superior Propane IV*, at para. 64).

[90] The s. 96 efficiencies defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. As the Federal Court of Appeal explained in *Superior Propane II*, "This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other" (para. 95).

(3) Methodological Approaches to Section 96

[91] There are different possible methodologies for the comparative exercise under s. 96 (Facey and Brown, at pp. 256-57). In Canada, two main standards have been the subject of judicial consideration: the "total surplus standard" and the "balancing weights standard". For both standards, two types of economic surplus are relevant: producer surplus and consumer surplus.

[92] Producer surplus "measures how much more producers are able to collect in revenue for a product than their cost of producing it" (Facey and Brown, at p. 256). Producer surplus therefore represents the wealth that accrues to producers. Consumer surplus is "a measure of how much more the consumers of a product would have been willing to pay to purchase the product compared to the prevailing market price" (*ibid.*). Consumer surplus therefore represents the

ces décisions, il reste que celles-ci traitent un certain nombre de facteurs pertinents quant à la défense fondée sur les gains en efficience et à son application.

[89] *Supérieur Propane I* a confirmé que l'art. 96 établit une défense à l'application de l'art. 92 (par. 398-399). Pour cette raison, il incombe aux parties au fusionnement de l'invoquer et de prouver que les gains en efficience entraînés par le fusionnement surpasseront et neutraliseront les effets de tout empêchement ou de toute diminution de la concurrence résultant du fusionnement (*Supérieur Propane I*, par. 399; *Supérieur Propane II*, par. 154; *Supérieur Propane IV*, par. 64).

[90] La défense que prévoit l'art. 96 commande une analyse visant à déterminer si les gains en efficience qu'entraîne le fusionnement, résultant de l'intégration des ressources, surpassent les effets anticoncurrentiels qui découlent de la diminution ou de l'absence de concurrence dans le marché géographique et dans celui du produit en cause. Pour reprendre les propos exprimés par la Cour d'appel fédérale dans l'affaire *Supérieur Propane II*, « [i]l s'agit, en substance, d'un critère de pondération qui met en balance les gains en efficience d'un côté et les effets anticoncurrentiels de l'autre » (par. 95).

(3) Méthodologies applicables à l'art. 96

[91] Il existe diverses manières de procéder à l'exercice de comparaison qu'appelle l'art. 96 (Facey et Brown, p. 256-257). Au Canada, les tribunaux ont examiné deux grands critères : celui du « surplus total » et celui des « coefficients pondérateurs ». Pour chacun, deux types de surplus économique sont pertinents : le surplus du producteur et le surplus du consommateur.

[92] Le surplus du producteur [TRADUCTION] « mesure la différence entre les recettes attribuables à un produit et ses coûts de production » (Facey et Brown, p. 256). Le surplus du producteur représente donc les richesses qui reviennent aux producteurs. En revanche, le surplus du consommateur « mesure la différence entre le prix que les consommateurs d'un produit auraient été disposés à payer par rapport au prix du marché courant » (*ibid.*). Le surplus du

savings that accrue to consumers from what they would have been willing to pay.

[93] The term "total surplus" refers to the sum of producer and consumer surplus (see Facey and Brown, at p. 256). If a producer covers its costs, including its cost of capital, by selling a unit of a product at $20 and a consumer is willing to buy the unit for $40, then the total surplus created by the unit is $20. If the eventual sale price is $30, for example, then each of producer and consumer surplus is increased by $10 as a result of the transaction. The total surplus in the economy represents the aggregate of the total surplus created by each unit produced.

[94] The total surplus standard involves quantifying the deadweight loss which will result from a merger — "the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied" (Facey and Brown, at pp. 256-57). Deadweight loss "results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute" (*Superior Propane IV*, at para. 13). Estimates of the elasticity of demand — or the degree to which demand for a product varies with its price — are necessary to calculate the deadweight loss (Tribunal decision, at para. 244).

[95] Under the total surplus standard, equal weight is given from a welfare perspective to changes in producer and consumer surplus (Facey and Brown, at p. 257). The decrease in total surplus resulting from decreased competition is balanced against any offsetting increase in total surplus resulting from more efficient production. The focus of this method is purely on the magnitude of the total surplus: the degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures

consommateur représente donc les économies qui reviennent aux consommateurs par rapport à ce que ces derniers auraient été disposés à payer.

[93] Le terme « surplus total » renvoie à la somme du surplus du producteur et du surplus du consommateur (voir Facey et Brown, p. 256). Si un producteur fait ses frais, y compris le coût du capital, en vendant un produit 20 $ et qu'un consommateur est disposé à l'acheter 40 $, le surplus total créé par l'article est égal à 20 $. Si le prix de vente est de 30 $, par exemple, le surplus du producteur et le surplus du consommateur augmentent chacun de 10 $ par suite de l'opération. Le surplus total à l'échelle de l'économie représente la somme du surplus total créé par chaque article produit.

[94] Le critère du surplus total implique une quantification de la perte sèche qui découlera d'un fusionnement — [TRADUCTION] « ce qui est retranché au surplus total dans certaines conditions du marché ayant pour effet de réduire la quantité d'un bien qui est fourni » (Facey et Brown, p. 256-257). La perte sèche « résulte de la chute de la demande des produits des entités fusionnées par suite d'une hausse de prix intervenue après le fusionnement et de l'affectation inefficiente des ressources qui se produit lorsque, par suite de la hausse des prix, les consommateurs achètent un produit de substitution convenant moins bien » (*Supérieur Propane IV*, par. 13). L'estimation de l'élasticité de la demande — ou la mesure dans laquelle la demande d'un produit varie selon son prix — est nécessaire aux fins du calcul de la perte sèche (décision du Tribunal, par. 244).

[95] Suivant le critère du surplus total, une valeur égale est attribuée, du point de vue du bien-être, aux changements du surplus du producteur et du surplus du consommateur (Facey et Brown, p. 257). La réduction du surplus total qui découle d'une concurrence réduite est compensée par toute hausse du surplus total découlant de l'optimisation de la production. Cette méthode s'intéresse exclusivement à la valeur du surplus total : le rapport entre le surplus des producteurs et le surplus des consommateurs ne joue pas dans la balance. Autrement dit, le critère

only the total benefit flowing to the economy and is not concerned with to whom the benefits flow; the analysis of the relevant effects is limited to the deadweight loss (*Superior Propane IV*, at para. 16). Therefore, the total surplus standard "does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity as a result of the anti-competitive merger and the consequent increase of prices. This 'wealth transfer' or 'redistributive effect' is considered to be neutral" (*Superior Propane IV*, at para. 14). As such, under the total surplus standard approach, an anti-competitive merger will proceed when efficiency gains to producer surplus are greater than the decrease in consumer surplus.

[96] In the *Superior Propane* cases, the Tribunal and the Federal Court of Appeal recognized another methodology called the "balancing weights" approach. This approach enables Tribunal members to "use their individual judgment and discretion to evaluate whether the gains to shareholders are more or less important to society than the losses of surplus imposed on consumers by the exercise of market power" (*Superior Propane I*, at para. 431).

[97] As explained in *Superior Propane IV*, under the balancing weights approach, the Tribunal weighs the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. The Tribunal first determines the relative weights to be assigned to producer gains and consumer losses, to equate them, or to make the wealth transfer neutral in effect. Then, the Tribunal engages in a value judgment process to conclude whether the assigned weights are reasonable in light of any disparity between the incomes of the relevant consumers and shareholders of the merged entity (*Superior Propane IV*, at para. 20).

[98] The Tribunal may also adopt a modified version of the balancing weights approach (see *Superior Propane IV*, at paras. 21 and 26). Under this modified approach, socially adverse redistribution effects, or the portion of the wealth transfer that is

du surplus total mesure uniquement le bénéfice total pour l'économie sans égard à qui en jouit; l'analyse des effets pertinents est limitée à la seule perte sèche (*Supérieur Propane IV*, par. 16). Ainsi, le critère du surplus total « ne tient pas compte de l'effet de la richesse qui sera vraisemblablement transférée des consommateurs aux actionnaires de l'entité fusionnée par suite du fusionnement anticoncurrentiel et de l'augmentation des prix en résultant. Ce "transfert de richesse" ou cet "effet de redistribution" est considéré comme neutre » (*Supérieur Propane IV*, par. 14). Ainsi donc, suivant le critère du surplus total, un fusionnement anticoncurrentiel va de l'avant lorsque les gains en efficience associés au surplus du producteur sont supérieurs à la réduction du surplus du consommateur.

[96] Dans la série *Supérieur Propane*, le Tribunal et la Cour d'appel fédérale ont reconnu une autre méthode, celle des « coefficients pondérateurs ». Elle appelle les membres du Tribunal à « exercer leur jugement personnel et leur discrétion pour déterminer si les gains qui reviennent aux actionnaires sont plus importants (ou moins importants) pour la société que la réduction du surplus du consommateur causée par l'exercice d'une puissance commerciale » (*Supérieur Propane I*, par. 431).

[97] Ainsi qu'il est expliqué dans *Supérieur Propane IV*, suivant la méthode des coefficients pondérateurs, le Tribunal compare les effets du fusionnement sur les consommateurs et les effets du fusionnement sur les actionnaires de l'entité fusionnée. Il détermine dans un premier temps les coefficients pondérateurs à attribuer aux gains des producteurs et aux pertes des consommateurs, pour les égaliser ou pour neutraliser l'effet du transfert de richesse. Ensuite, le Tribunal doit porter un jugement de valeur pour décider si les coefficients pondérateurs attribués sont raisonnables compte tenu de la disparité entre les revenus des consommateurs touchés et des actionnaires de l'entité fusionnée (*Supérieur Propane IV*, par. 20).

[98] Le Tribunal peut aussi appliquer une méthode des coefficients pondérateurs modifiée (voir *Supérieur Propane IV*, par. 21 et 26). Suivant cette méthode modifiée, les effets de redistribution socialement défavorables, soit la portion du transfert

attributable to higher prices paid by low-income households, may be taken into account as an anti-competitive effect, while components of the wealth transfer that are not socially adverse may be treated as neutral (*Superior Propane III*, at para. 333).

[99] However, there is no mandated "correct" methodology for the s. 96 analysis (*Superior Propane II*, at paras. 139-42). The statute does not set out which standard should be used. From an economic perspective, there are arguments in favour of the total surplus standard (see M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at pp. 146-51). However, that is not the issue before this Court and, for the purpose of this case, it suffices to say that *Superior Propane II* established that the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.

[100] The Tribunal should consider all available quantitative and qualitative evidence (*Superior Propane I*, at para. 461; *Superior Propane III*, at para. 335). While quantitative aspects of a merger are those which can be measured and reduced to dollar amounts, qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market (see *Superior Propane I*, at paras. 459-60). Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Superior Propane III*, at para. 233; *Superior Propane IV*, at para. 35).

[101] The above principles developed in the *Superior Propane* series of cases provide the foundation for the analysis of the s. 96 efficiencies defence. These principles serve as the backdrop to the legal issues in the present case: consideration of whether specific efficiencies are valid efficiencies for the purposes of the defence and the proper approach to the balancing exercise under s. 96.

de la richesse qui est attribuable aux prix plus élevés payés par les ménages à faible revenu, peuvent être considérés comme des effets anticoncurrentiels, tandis que les éléments du transfert de la richesse qui ne sont pas socialement défavorables peuvent être considérés comme neutres (*Supérieur Propane III*, par. 333).

[99] Cependant, aucune méthode « correcte » n'est prescrite pour l'analyse qu'appelle l'art. 96 (*Supérieur Propane II*, par. 139-142). La loi ne précise pas le critère à appliquer. Certains arguments économiques militent en faveur du critère du surplus total (voir M. Trebilcock et autres, *The Law and Economics of Canadian Competition Policy* (2002), p. 146-151). Or, là n'est pas la question dont notre Cour est saisie et, pour nos fins, il suffit de dire que l'affaire *Supérieur Propane II* a permis d'établir que le Tribunal jouit de la latitude requise pour décider en bout de ligne de la méthode à la lumière des circonstances propres à chaque fusionnement.

[100] Le Tribunal devrait prendre en considération tous les éléments quantitatifs et qualitatifs à sa disposition (*Supérieur Propane I*, par. 461; *Supérieur Propane III*, par. 335). Si les aspects quantitatifs d'un fusionnement sont ceux qui peuvent être mesurés et exprimés en dollars, les éléments qualitatifs, y compris dans certains cas les facteurs comme l'amélioration ou la diminution du service ou de la qualité, peuvent ne pas être mesurables, puisqu'ils dépendent des préférences individuelles dans le marché (voir *Supérieur Propane I*, par. 459-460). Les effets qui peuvent être quantifiés devraient l'être, ou à tout le moins être estimés. L'omission d'en donner au moins une estimation quantitative, lorsqu'il est réalistement possible de le faire, ne donnera pas lieu à une analyse qualitative de ces effets (*Supérieur Propane III*, par. 233; *Supérieur Propane IV*, par. 35).

[101] Élaborés dans la série *Supérieur Propane*, les principes qui précèdent étayent l'analyse de la défense fondée sur les gains en efficience prévue à l'art. 96. Ils sous-tendent les questions juridiques soulevées en l'espèce, à savoir l'admissibilité de certains gains en efficience pour l'application de la défense et la manière de procéder à la pondération qu'appelle l'art. 96.

(4) Order Implementation Efficiencies Are Not Valid Efficiencies Under Section 96

[102] In the context of a merger, efficiencies are pro-competitive benefits. As Brian A. Facey and Cassandra Brown explain, "Economists' conception of efficiency revolves around the benefit, value or satisfaction that accrues to society due to the actions and choices of its members" (p. 253). There are three components: (1) production efficiency, which "is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology"; (2) innovation or dynamic efficiency, which "is achieved through the invention, development and diffusion of new products and production processes"; and (3) allocative efficiency, which "is achieved when the existing stock of goods and productive output is allocated throughout the price system to those buyers who value them most in terms of willingness to pay, such that 'resources available to society are allocated to their most valuable use'" (Facey and Brown, at pp. 253-55, quoting Competition Bureau, *Merger Enforcement Guidelines* (2011), at para. 12.4).

[103] Tervita argues that the Tribunal erred in rejecting valid efficiencies from its consideration of the efficiency gains, namely those referred to by the Tribunal as OIEs. Tervita submits that all economic efficiencies, however arising, should be considered.

[104] Tervita claimed certain transportation and market expansion efficiencies which Tervita could have attained more quickly than a third party purchaser of the Babkirk site (A.F., at para. 100). As the Federal Court of Appeal explained, the *transportation* gains in efficiency are "productive gains in efficiency realized by the customers who are closer to the Babkirk site, than to Tervita's Silverberry secure landfill. Since Tervita acquired the site allegedly to open a full-service secure landfill operation there, customers located closer to that site would achieve transportation cost savings" (para. 131).

(4) Les gains en efficience liés à l'exécution de l'ordonnance ne sont pas admissibles pour l'application de l'art. 96

[102] Dans le contexte d'un fusionnement, les gains en efficience sont des avantages favorisant la concurrence. Ainsi que Brian A. Facey et Cassandra Brown l'expliquent, [TRADUCTION] « la conception qu'ont les économistes de l'efficience tient à l'avantage, à la valeur ou à la satisfaction que tire la société des actions et des choix de ses membres » (p. 253). Elle se compose de trois éléments : (1) l'efficience de la production, « réalisée lorsque la production de l'extrant repose sur la combinaison la plus économique de ressources productives que permet la technologie existante »; (2) l'innovation ou l'efficience dynamique, « réalisée grâce à l'invention, à l'élaboration et à la diffusion de nouveaux produits et processus de production »; (3) l'efficience de la répartition des ressources, « réalisée lorsque les stocks actuels de biens et d'extrants productifs sont répartis dans tout le système des prix parmi les acheteurs qui y tiennent le plus au regard de leur volonté de payer, de telle sorte que "les ressources dont dispose la société sont affectées à leur emploi le plus valable" » (Facey et Brown, p. 253-255, citant le Bureau de la concurrence, *Fusions — Lignes directrices pour l'application de la loi* (2011), par. 12.4).

[103] Tervita fait valoir que le Tribunal a exclu à tort des gains en efficience qu'il a appelés les GEEO. Or, selon elle, tous les gains en efficience économiques, peu importe la manière dont ils sont réalisés, devraient être pris en considération.

[104] Tervita a fait valoir certains gains en efficience liés au transport et à l'expansion du marché qu'elle prétendait pouvoir réaliser plus rapidement qu'un tiers acquéreur du site Babkirk (m.a., par. 100). Ainsi que la Cour d'appel fédérale l'a expliqué, en matière de *transport*, il s'agit « des gains de productivité réalisés par les clients qui se trouvent plus près du site Babkirk que du site d'enfouissement sécuritaire Silverberry de Tervita. Étant donné que Tervita aurait acquis le site en vue d'y ouvrir un site d'enfouissement sécuritaire à service complet, les clients situés plus près de ce site que de

Tervita asserted before the Tribunal that, had the Commissioner not intervened, it would have already been operating a secure landfill at the Babkirk site by the spring of 2012 (Tribunal decision, at para. 269). However, a third party purchaser would have been unlikely to have a secure landfill in operation before the spring of 2013. Only Tervita therefore could have enabled customers to achieve these additional transportation efficiencies for that one-year period.

[105] The *market* gains in efficiency are the result of additional hazardous waste which would be disposed at the Babkirk site secure landfill: "Since there are significant costs and risks associated with transporting such waste over long distances to the Silverberry secure landfill, a site requiring a shorter transportation route (such as the Babkirk site) would attract more hazardous waste than would otherwise have been disposed of at Silverberry . . ." (F.C.A. decision, at para. 132). As with the transportation gains in efficiency, Tervita would have been able to achieve the market gains one year earlier than a third party purchaser — from the spring of 2012 to the spring of 2013.

[106] The Tribunal held that these one-year transportation and market efficiency gains were a result of the time associated with the implementation of its divestiture order, including the time required to effect the actual sale of the shares or assets of Babkirk (estimated to take at least six months including the due diligence process), to modify or prepare an operations plan for the landfill, for the B.C. Ministry of the Environment ("MOE") to approve the operations plan, and for the purchaser to construct the landfill, which can only be undertaken between June and September (para. 269). As such, the Tribunal held that the OIEs were not cognizable efficiencies under the Act (paras. 269-70).

l'autre auraient réalisé des économies au chapitre du transport » (par. 131). Tervita a affirmé devant le Tribunal que, n'eût été l'intervention de la commissaire, elle aurait exploité un site d'enfouissement sécuritaire au site Babkirk dès le printemps 2012 (décision du Tribunal, par. 269). En revanche, un tiers acquéreur n'y serait probablement pas arrivé avant le printemps 2013. Seule Tervita aurait donc pu permettre aux clients de réaliser ces gains en efficience supplémentaires liés au transport durant la période d'un an.

[105] Les gains en efficience liés à l'expansion du *marché* résultent de quantités accrues de déchets dangereux éliminés au site d'enfouissement sécuritaire Babkirk : « Étant donné les coûts et les risques considérables associés au transport de ce type de déchets sur un trajet aussi long que celui qui mène au site d'enfouissement sécuritaire Silverberry, un site moins éloigné (comme le site Babkirk) aurait l'avantage de réduire le trajet et d'attirer ainsi davantage de déchets dangereux que ne le ferait le seul site Silverberry . . . » (décision de la C.A.F., par. 132). Comme pour ce qui est des gains en efficience liés au transport, Tervita aurait été en mesure de réaliser des gains liés à l'expansion du marché un an plus tôt qu'un tiers acquéreur, c'est-à-dire du printemps 2012 au printemps 2013.

[106] Le Tribunal a conclu que ces gains en efficience d'un an relatifs au transport et à l'expansion du marché étaient liés au délai d'exécution de son ordonnance de dessaisissement, dont le temps nécessaire pour conclure la vente effective des actions ou des éléments d'actif de Babkirk (selon les estimations, cela devait prendre au moins six mois, en comptant les mesures de vérification), pour dresser le plan d'exploitation du site d'enfouissement ou le modifier, pour que le ministère de l'Environnement de la Colombie-Britannique (« ME ») approuve le plan d'exploitation et pour que l'acquéreur construise le site d'enfouissement, ce qui n'est possible qu'entre juin et septembre (par. 269). Ainsi, le Tribunal a conclu que les GEEO n'étaient pas admissibles pour l'application de la Loi (par. 269-270).

[107] A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger (what could be called "early-mover" efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.

[108] Though the Tribunal held that the one-year efficiencies claimed by Tervita were OIEs, the Tribunal's reasons also appear to suggest that those efficiencies could have been classified as early-mover efficiencies. The Tribunal noted that Tervita would have been prepared to operate the Babkirk site as a secure landfill by the summer of 2012 (para. 269), and also found that, under its "but for" analysis in which the merger would not have occurred, the site would not have been operated as a secure landfill accepting significant quantities of waste until the spring of 2013 (para. 207). Thus, it would appear that any transportation and market expansion efficiencies arising from the operation of the Babkirk site as a secure landfill from 2012 to 2013 under Tervita's plans could have arisen not due to delays caused by legal proceedings, but by Tervita's ability to bring the site into operation sooner than a potential competitor.

[109] The Tribunal's reasons appear inconsistent on whether the facts as found by the Tribunal would properly support the classification of the one-year efficiencies at issue as early-mover efficiencies or as OIEs. However, as will be discussed below, the classification of these efficiencies in this case would

[107] Il y a lieu de distinguer entre les gains en efficience qu'une partie au fusionnement prétend être en mesure de réaliser plus rapidement qu'en l'absence du fusionnement (ce que l'on pourrait appeler les gains en efficience « du premier arrivé ») et les gains en efficience qu'une partie au fusionnement pourrait réaliser plus tôt qu'un concurrent pour la seule raison que ce dernier devrait attendre la fin de la procédure de dessaisissement (ce que le Tribunal a appelé les GEEO). Si, comme nous le verrons, les GEEO ne sont pas admissibles pour l'application de l'art. 96, les gains en efficience du premier arrivé constituent en revanche des gains en efficience économiques qui résultent véritablement du fusionnement, et non pas du délai d'exécution associé à une instance judiciaire. N'eût été le fusionnement, l'économie n'aurait tiré aucun profit de ces gains en efficience qui auraient été réalisés entre la date du fusionnement et celle des actions d'un concurrent futur.

[108] S'il a qualifié de GEEO les gains en efficience que Tervita a prétendu pouvoir réaliser durant la période d'un an, le Tribunal laisse toutefois entendre qu'il aurait pu s'agir de gains en efficience du premier arrivé. Selon lui, Tervita aurait été prête à exploiter un site d'enfouissement sécuritaire au site Babkirk à l'été 2012 (par. 269). En outre, suivant son analyse axée sur l'absence hypothétique — où il n'y a pas de fusionnement —, le site d'enfouissement sécuritaire n'aurait pas été prêt à accepter des quantités importantes de déchets avant le printemps 2013 (par. 207). Il semblerait donc que les gains en efficience liés au transport et à l'expansion du marché susceptibles de découler de l'exploitation d'un site d'enfouissement sécuritaire au site Babkirk de 2012 à 2013 selon les plans de Tervita auraient pu être attribuables non pas aux délais associés à une instance judiciaire, mais à la capacité de Tervita d'exploiter le site plus rapidement qu'un concurrent éventuel.

[109] Les motifs du Tribunal semblent indécis quant à savoir si les faits tels qu'il les a admis permettent d'assimiler les gains en efficience réalisables pendant la période d'un an à des gains du premier arrivé ou à des GEEO. Cependant, comme nous le verrons, la classification de ces gains dans

not be dispositive because the efficiencies were not ultimately realized by Tervita. Nevertheless, in light of the importance of the issue of whether OIEs should be cognizable in future cases, I turn now to an examination of that issue.

[110] In Tervita's submission, OIEs must be considered because s. 96 affords paramountcy to the statutory objective of economic efficiency such that all efficiencies, however arising, must be considered. I am unable to agree with Tervita on this point.

[111] Section 96 does give primacy to economic efficiency. However, s. 96 is not without limitation.

[112] For ease of reference, I produce s. 96(1) here:

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

[113] In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.

le présent pourvoi ne serait pas déterminante, puisque Tervita ne les a pas réalisés. Néanmoins, étant donné qu'il importe de savoir si les GEEO devraient être admissibles à l'avenir, j'examine maintenant cette question.

[110] De l'avis de Tervita, les GEEO doivent être pris en considération au motif que l'art. 96 attribue une importance primordiale à l'objet de la loi qu'est l'efficience de l'économie, de telle sorte que tous les gains en efficience, quelle qu'en soit la source, doivent être pris en considération. Je ne partage malheureusement pas cet avis.

[111] L'article 96 accorde effectivement la primauté à l'efficience de l'économie, mais il n'est pas dépourvu de limites.

[112] Par souci de commodité, je reproduis le par. 96(1) :

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

[113] Pour qu'une partie bénéficie de la défense prévue à l'art. 96, le Tribunal doit être convaincu que le fusionnement, réalisé ou proposé, a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience et il doit également conclure que les gains en efficience ne seraient vraisemblablement pas réalisés s'il rendait l'ordonnance prévue à l'art. 92. En outre, le par. 96(3) interdit au Tribunal, nonobstant la primauté accordée à l'efficience économique à cet article, de considérer la « redistribution de revenu entre plusieurs personnes » comme un gain en efficience neutralisant. Cette limite démontre que le législateur ne souhaite pas que tous les gains en efficience, quelle qu'en soit la source, soient pris en considération pour l'application de l'art. 96.

[114] The transportation and market efficiencies at issue in this case are efficiency gains resulting from the operation of a secure landfill facility at a location closer to some customers. However, subject to the above discussion as to the proper classification of these efficiencies in this case, the OIEs specifically are efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal's order to be implemented.

[115] Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger* or *proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.

[116] Finally, regardless of whether the efficiencies are classified as early-mover efficiencies or OIEs, and as the Federal Court of Appeal explained, the efficiencies were nevertheless not realized in this case because Tervita did not actually construct and operate a landfill at the Babkirk site before the merger review, or indeed before the date of the Tribunal's order. Tervita argues that this reasoning does not withstand scrutiny. In this case, Tervita undertook to preserve and maintain all provincial MOE approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argues that, as a result of this "hold separate undertaking", it could not have constructed its planned secure landfill. Again, I cannot agree.

[114] Les gains en efficience liés au transport et à l'expansion du marché qui sont en cause dans la présente affaire découlent de la situation géographique du site d'enfouissement sécuritaire, qui se trouve plus près de certains clients. Cependant, sous réserve de ce qui précède sur la bonne catégorisation des gains dans la présente affaire, les GEEO découlent non pas du fusionnement même, mais du délai d'exécution de l'ordonnance de dessaisissement (décision de la C.A.F., par. 135). Bref, si ces gains en efficience étaient bel et bien des GEEO, ils seraient réalisés par Tervita, et non par un tiers, du seul fait qu'elle exploiterait l'installation un an plus tôt qu'un tiers l'ayant acquise à la suite de l'ordonnance de dessaisissement, et uniquement à cause du délai d'exécution de cette dernière.

[115] Les gains en efficience qui résultent de l'application de la Loi ne peuvent être pris en compte au titre de l'art. 96. Les GEEO découlent de l'exécution et de l'application du cadre qui réglemente le droit de la concurrence au Canada. Aux termes de la disposition, c'est le *fusionnement réalisé ou proposé* qui doit avoir eu ou qui aura vraisemblablement pour effet d'entraîner des gains en efficience. Les GEEO ne constituent pas des gains en efficience attribuables au fusionnement, ils sont attribuables au délai d'exécution de l'ordonnance de dessaisissement.

[116] Enfin, peu importe qu'il s'agisse de gains en efficience du premier arrivé ou de GEEO. En effet, comme l'explique la Cour d'appel fédérale, aucun gain en efficience n'a été réalisé en l'espèce parce que Tervita n'a pas construit ni exploité un site d'enfouissement au site Babkirk avant l'examen du fusionnement ou même avant la date de l'ordonnance du Tribunal. Tervita soutient que ce raisonnement ne résiste pas à l'analyse. Dans la présente affaire, Tervita a conservé toutes les approbations et autorisations ainsi que tous les permis qu'elle avait obtenus du ME de la province en vue de l'aménagement et de l'exploitation d'un site d'enfouissement sécuritaire proposé au site Babkirk en attendant l'issue de l'instance devant le Tribunal. Elle fait valoir qu'elle n'avait pu construire le site d'enfouissement sécuritaire en raison de l'entente de séparation d'actifs. Encore une fois, je ne suis pas d'accord.

[117] "Hold separate" orders are typically issued to prevent the intermingling of assets or businesses that would otherwise occur through the merger (B. A. Facey, G. Hilton-Sullivan and M. Graham, "The Reinvigoration of Canadian Antitrust Law — Canada's New Approach to Merger Review" (2010), 6 *C.L.I.* 28, at p. 33). These orders aim at avoiding the difficulties that would arise in attempting to "unscramble the egg" if an order was issued after a merger proceeded in full. In this case, the hold separate undertaking was not the typical "unscramble the egg" undertaking concerned with the intermingling of assets.

[118] The evidence in this case does not support Tervita's claim that the undertaking prevented it from operating the landfill. The undertaking merely required Tervita to preserve and maintain the necessary provincial environmental approvals for establishing and operating the proposed secure landfill at the Babkirk site. The evidence before the Tribunal was that Tervita wanted to increase the capacity of the secure landfill and doing so would require an amendment to the approval for the site — a process Tervita understood to be contrary to the undertaking. However, nothing prevented Tervita from establishing and operating the landfill at the capacity allowed for under the existing approval.

[119] The evidence is that Tervita had not taken the steps to commence operating the landfill. Even assuming no divestiture order were made, Tervita would not have been in a position to begin operating the secure landfill at the conclusion of the proceedings.

[120] For these reasons, both the Tribunal and the Federal Court of Appeal were correct that the OIEs are not cognizable efficiencies under s. 96 (see Tribunal decision, at para. 270; F.C.A. decision, at para. 135).

(5) The Balancing Test Under Section 96

[121] Tervita argues that the Federal Court of Appeal took an overly subjective approach to the offset analysis under s. 96. This argument is based on

[117] La séparation d'actifs est généralement ordonnée pour empêcher la réunion des éléments d'actif ou des affaires qui résulterait autrement du fusionnement (B. A. Facey, G. Hilton-Sullivan et M. Graham, « The Reinvigoration of Canadian Antitrust Law — Canada's New Approach to Merger Review » (2010), 6 *C.L.I.* 28, p. 33). Ce type d'ordonnance vise à empêcher que l'on ait à « démêler l'écheveau » après le fusionnement complet si le Tribunal ordonnait le dessaisissement. En l'espèce, l'entente de séparation d'actifs ne se rapportait pas à l'objet habituel, à savoir empêcher l'écheveau de s'embrouiller sur le plan des éléments d'actif.

[118] La preuve dans le présent pourvoi n'appuie pas la prétention de Tervita selon laquelle l'entente l'empêchait d'exploiter le site d'enfouissement. L'entente l'obligeait simplement à conserver les approbations environnementales provinciales nécessaires pour l'aménagement et l'exploitation du site d'enfouissement sécuritaire proposé au site Babkirk. Selon la preuve produite devant le Tribunal, Tervita souhaitait accroître la capacité du site d'enfouissement sécuritaire, ce qui nécessitait une modification de l'approbation visant le site — un processus qui, d'après ce que Tervita croyait comprendre, était contraire à l'entente. Or, rien n'empêchait Tervita d'aménager et d'exploiter le site d'enfouissement selon la capacité autorisée dans l'approbation qui lui avait été délivrée.

[119] La preuve révèle que Tervita n'a pris aucune mesure pour commencer à exploiter le site d'enfouissement. Même à supposer qu'aucune ordonnance de dessaisissement n'ait été prononcée, elle n'aurait pu exploiter le site d'enfouissement sécuritaire dès l'issue de l'instance.

[120] Pour ces motifs, le Tribunal et la Cour d'appel fédérale ont tous deux conclu à juste titre que les GEEO ne peuvent être pris en considération pour l'application de l'art. 96 (voir décision du Tribunal, par. 270; décision de la C.A.F., par. 135).

(5) Pondération qu'exige l'art. 96

[121] Tervita soutient que la Cour d'appel fédérale a adopté une perspective excessivement subjective à l'égard de l'analyse de l'effet neutralisant

the Commissioner's failure to quantify the quantifiable anti-competitive effects — specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner's burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita's argument requires consideration of the overall balancing approach under s. 96.

(a) *The Commissioner's Burden*

[122] As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*, at para. 64). The parties do not take issue with this allocation of onus.

(i) The Content of the Commissioner's Burden

[123] Tervita argues that the Commissioner's onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.

[124] The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., at paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would

qu'appelle l'art. 96. Son argument repose sur l'omission par la commissaire de quantifier les effets anticoncurrentiels quantifiables, tout particulièrement la perte sèche, et soulève le fardeau que l'art. 96 impose à la commissaire et les conséquences du défaut de s'en acquitter. Plus généralement, l'argument de Tervita nous invite à examiner la méthode de pondération globale qu'exige l'art. 96.

a) *Fardeau de la commissaire*

[122] Comme nous l'avons vu, la série *Supérieur Propane* a établi que la commissaire a le fardeau, aux termes de l'art. 96, de prouver l'existence d'effets anticoncurrentiels. En revanche, il incombe aux parties au fusionnement d'établir les autres éléments de la défense, y compris la valeur des gains en efficience et si ceux-ci surpassent et neutralisent les effets anticoncurrentiels (voir *Supérieur Propane I*, par. 399 et 403; *Supérieur Propane II*, par. 154; et *Supérieur Propane IV*, par. 64). Les parties ne contestent pas cette répartition du fardeau de la preuve.

(i) Teneur du fardeau de la commissaire

[123] Tervita soutient qu'il incombe à la commissaire de quantifier tous les effets anticoncurrentiels qui peuvent l'être. Or, dans la présente affaire, la commissaire ne s'est pas acquittée de ce fardeau.

[124] La commissaire fait valoir que la quantification n'est pas une condition préalable en droit à l'examen des effets anticoncurrentiels (m.i., par. 84 et 88). Au contraire, elle est tenue en droit de quantifier les effets anticoncurrentiels quantifiables qui serviront de fondement à la décision. Dans les cas où les effets peuvent être mesurés, ils doivent être estimés. Seuls les effets ne pouvant être estimés sur le plan quantitatif seront pris en considération sur le plan qualitatif. L'absence de mesure des effets quantifiables ne saurait se traduire par l'attribution d'une valeur qualitative (*Supérieur Propane IV*, par. 35). Cette méthode réduit au minimum le jugement subjectif nécessaire dans l'analyse et permet au Tribunal d'effectuer l'évaluation la plus objective possible dans les circonstances (*Supérieur Propane IV*,

permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.

[125] The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are "incommensurable"). Due to the uncertainty inherent in economic prediction, the analysis must be as analytically rigorous as possible in order to enable the Tribunal to rely on a forward-looking approach to make a finding on a balance of probabilities.

[126] In this case, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96.

(ii) What Consequences Flow From a Failure to Meet the Burden?

[127] The question concerns the legal implications of a failure by the Commissioner to quantify quantifiable anti-competitive effects. The Federal Court of Appeal recognized that "[a] quantitative effect which has not in fact been quantified should not be considered as a qualitative effect" (para. 158) but went on to hold that the non-quantified deadweight loss should be assigned a weight of "undetermined" (paras. 130 and 167).

par. 38). Une approche selon laquelle la commissaire pourrait s'acquitter de son obligation sans avoir donné au moins une estimation des effets anticoncurrentiels quantifiables ne permettrait pas aux parties au fusionnement de connaître la preuve qui leur est opposée.

[125] Le fardeau de la commissaire consiste à quantifier au moyen d'estimations tous les effets anticoncurrentiels quantifiables. Les estimations sont acceptables, car l'analyse est prospective et s'intéresse aux effets anticoncurrentiels qui résulteront ou résulteront vraisemblablement du fusionnement. En outre, le calcul des effets anticoncurrentiels qu'exige l'art. 96 n'a pas la précision avec laquelle on peut examiner un fait survenu. Toutefois, pour s'acquitter de son fardeau, la commissaire doit fonder ses estimations sur une preuve qui peut être attaquée et soupesée. Les effets anticoncurrentiels qualitatifs, dont la diminution du service ou de la qualité, ne sont appréciés que sur un fondement subjectif, car une telle analyse fait appel à l'examen de considérations qui ne peuvent être quantifiées parce qu'elles n'ont aucune commune unité de mesure (à savoir elles sont « incommensurables »). En raison de l'incertitude inhérente aux prédictions économiques, l'analyse doit être aussi rigoureuse que possible du point de vue analytique afin de permettre au Tribunal de tirer une conclusion prospective selon la prépondérance des probabilités.

[126] Dans le présent pourvoi, la commissaire n'a pas quantifié les effets anticoncurrentiels quantifiables et, partant, elle ne s'est pas acquittée du fardeau que lui impose l'art. 96.

(ii) Quelles sont les conséquences de l'omission de s'acquitter du fardeau?

[127] La question touche aux conséquences juridiques de l'omission par la commissaire de quantifier les effets anticoncurrentiels quantifiables. La Cour d'appel fédérale a reconnu qu'un « effet quantitatif qui n'a pas été en réalité quantifié ne devrait pas être considéré comme un effet qualitatif » (par. 158), mais elle a ensuite conclu qu'il y a lieu de donner une valeur « indéterminée » à la perte sèche non quantifiée (par. 130).

[128] With respect, I cannot agree. As explained above, the Commissioner's burden is to quantify all quantifiable anti-competitive effects. The failure to do so is a failure to meet this legal burden and, as a result, the quantifiable anti-competitive effects should be fixed at zero. Quite simply, where the burden is not met, there are no proven quantifiable anti-competitive effects.

[129] As Tervita submits, this approach is consistent with that in civil proceedings where a party has failed to discharge its burden of proof with respect to loss (see S. M. Waddams, *The Law of Damages* (5th ed. 2012), at paras. 10.10 to 10.30). In addition, setting the effects at zero where the Commissioner has failed to meet her legal burden is consistent with taking an approach to the balancing analysis that is objectively reasonable. In setting the weight at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Undetermined effects were weighed against the proven overhead gains in efficiency, which were described by the court as "marginal" and "insignificant" (para. 174). Nonetheless, it is not clear how the Federal Court of Appeal — or any court — could weigh undetermined effects.

[130] The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*, at para. 38). As the Federal Court of Appeal recognized in this case:

> Objective determinations are better suited for ensuring predictability in the application of the *Competition Act* and avoiding arbitrary decisions. Predictability is particularly important in merger reviews since most merger transactions are reviewed only by the Commissioner and rarely reach the Tribunal. A methodology which favours objective determinations whenever possible allows the parties to merger transactions and the Commissioner to more readily predict the impacts of a merger, discourages the use of arbitrary judgment in the process, and reduces overall uncertainty in the Canadian business community. [para. 152]

[128] Je ne puis malheureusement me rallier à cette opinion. Comme nous l'avons vu, il incombe à la commissaire de quantifier tous les effets anticoncurrentiels quantifiables. Une omission à cet égard est une omission en droit, de sorte que les effets anticoncurrentiels quantifiables doivent alors être jugés nuls. En termes très simples, dans les cas où ce fardeau n'est pas acquitté, aucun effet anticoncurrentiel quantifiable n'est prouvé.

[129] Ainsi que Tervita le fait valoir, une telle démarche est compatible avec celle qui vaut dans une instance civile où une partie ne s'est pas acquittée du fardeau de preuve qui lui incombe au chapitre des pertes (voir S. M. Waddams, *The Law of Damages* (5e éd. 2012), par. 10.10 à 10.30). De plus, indiquer des effets nuls dans le cas où la commissaire ne s'est pas acquittée de son fardeau en droit vaut, à l'égard de l'exercice de pondération, une démarche qui est objectivement raisonnable. En concluant à une valeur indéterminée, la Cour d'appel fédérale a permis qu'un jugement subjectif dicte l'analyse. Les effets indéterminés ont été comparés aux gains en efficience liés à la baisse des coûts indirects qui ont été établis, et que la cour a qualifiés de « secondaires » et « négligeables » (par. 174). Or, comment la Cour d'appel fédérale — ou n'importe quelle cour — pourrait-elle soupeser des effets indéterminés?

[130] La jurisprudence a, dans tous les cas, reconnu l'importance d'une démarche objective dans la pondération (voir *Supérieur Propane IV*, par. 38). Ainsi que la Cour d'appel fédérale l'a reconnu dans la présente affaire :

> L'appréciation objective favorise davantage la prévisibilité lorsqu'il s'agit d'appliquer la *Loi sur la concurrence* et d'éviter des décisions arbitraires. La prévisibilité revêt une importance particulière dans le cas de l'examen des fusionnements, étant donné que la plupart des fusionnements ne sont examinés que par le commissaire et qu'ils sont rarement soumis à l'examen du Tribunal. Une méthodologie qui favorise une appréciation objective dans tous les cas possibles permet aux parties à une opération de fusionnement et au commissaire de prédire plus aisément les répercussions d'un fusionnement, en plus de dissuader les jugements arbitraires et de diminuer l'incertitude générale dans le monde canadien des affaires. [par. 152]

I agree with these reasons for favouring an objective approach. Although the Federal Court of Appeal recognized the importance of an objective analysis, in assigning the quantifiable but non-quantified effects a weight of "undetermined", its analysis did not meet the necessary objective standard.

[131] The Federal Court of Appeal's "undetermined" approach also raises concerns of fairness to the merging parties. The court recognized that a "proper interpretation of section 96 of the *Competition Act* requires that the [merging parties] must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects" (para. 167). The difficulty with assigning non-quantified quantifiable effects a weight of "undetermined" is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.

[132] The Commissioner argues that, although the anti-competitive effects in this case were not quantified, they could be inferred as a result of the Tribunal's finding that competition from the Babkirk site would have led to an average price decrease of at least 10 percent (Tribunal decision, at para. 297; R.F., at paras. 89-91). However, the 10 percent amount is not enough to calculate the deadweight loss as the Commissioner did not establish the price elasticity of demand. The proven facts demonstrated the size of the Contestable Area and the potential tonnes of waste per year. Without a calculation of the actual loss, all that is known is that there was a certain amount of potential waste subject to the effect of the elasticity. In other words, the 10 percent calculation is not enough to determine the extent of any anti-competitive effect. As the Federal Court of Appeal noted:

Je souscris à ces motifs, car ils favorisent une démarche objective. Si la Cour d'appel fédérale a reconnu l'importance d'une analyse objective, en donnant une valeur « indéterminée » aux effets quantifiables non quantifiés, elle n'a pas respecté la norme d'objectivité applicable.

[131] La démarche de la Cour d'appel fédérale, qui a attribué une valeur « indéterminée », soulève aussi des questions d'équité à l'égard des parties au fusionnement. La cour a reconnu que, pour « bien interpréter l'article 96 de la *Loi sur la concurrence*, il faut que [les parties au fusionnement] démontre[nt], selon la prépondérance des probabilités, que les gains en efficience neutralisent les effets anticoncurrentiels » (par. 167). En accordant une valeur « indéterminée » à des effets quantifiables, mais non quantifiés, on met les parties au fusionnement dans une situation insoutenable : démontrer que les gains en efficience surpassent et neutralisent une somme indéterminée. Ainsi, prouver les autres éléments de la défense selon la prépondérance des probabilités devient un exercice inéquitable, car les parties au fusionnement ignorent la preuve qui leur est opposée.

[132] La commissaire fait valoir que, bien que les effets anticoncurrentiels dans la présente affaire n'aient pas été quantifiés, ils pourraient être inférés de la conclusion du Tribunal selon laquelle la concurrence du site Babkirk aurait mené à une baisse moyenne du prix d'au moins 10 p. 100 (décision du Tribunal, par. 297; m.i., par. 89-91). Toutefois, ce pourcentage ne permet pas de calculer la perte sèche étant donné que la commissaire n'a pas établi l'élasticité de la demande par rapport au prix. Les faits prouvés ont démontré la taille de la zone contestable et les déchets susceptibles d'être produits par année. Sans un calcul de la perte véritable, tout ce que l'on sait, c'est qu'une certaine quantité de déchets potentiels était soumise à l'effet de l'élasticité. Autrement dit, le calcul ayant donné pour résultat 10 p. 100 n'est pas suffisant pour déterminer la mesure des effets anticoncurrentiels, si tant est qu'il y en ait. Ainsi que la Cour d'appel fédérale l'a signalé :

In this case, the Tribunal itself found that estimates of market elasticity [the change over the market as a whole] and the merged entity's own-price elasticity of demand [the degree to which demand is effected by a change in price by the merged entity] are necessary in order to calculate the "deadweight loss". The Tribunal also recognized that a range of plausible elasticities are required in order to understand the sensitivity of the Commissioner's estimates. Without those estimates, the "deadweight loss" could not be properly calculated by the Commissioner, and Tervita could not adequately challenge the calculations. [Emphasis deleted; para. 124.]

[133] In his reply expert report, the Commissioner's expert did submit estimates of potential market expansion. However, these estimates were based on Tervita's expert's calculations of Tervita's claimed market expansion efficiencies, which were themselves based on unsupported assumptions. As Tervita's expert testified before the Tribunal, these calculations could not be used to calculate the deadweight loss in the absence of an adequate market demand elasticity study. In response to questioning from the Tribunal, Tervita's expert testified that it is not possible to calculate the deadweight loss without customer-specific elasticity or market elasticity numbers: "You need the shape of the demand curve to figure out dead weight loss" (testimony of Dr. Kahwaty, F.C.A. decision, at para. 125).

[134] Without estimates of elasticity, the "deadweight loss" could not be properly calculated by the Commissioner, and Tervita could not adequately challenge the calculations (F.C.A. decision, at para. 124). Indeed, the proven facts serve to demonstrate that the anti-competitive effects might well have been estimated, but were not estimated due to the absence of the critical component of elasticity measure. An inference based on the 10 percent finding and the unknown potential elasticity is not a substitution for quantification.

[135] The Commissioner submits in the alternative that the Tribunal did not breach procedural fairness in relying upon the rough estimate of the Commissioner's expert of the deadweight loss flowing from

Dans ce cas, le Tribunal a lui-même estimé que, pour calculer la « perte sèche », il était nécessaire de disposer d'estimations de l'élasticité du marché [le changement subi par le marché dans son ensemble] et des données d'élasticité de la demande par rapport au prix établi par l'entité fusionnée [la mesure dans laquelle la demande varie par suite de la modification des prix par l'entité fusionnée]. Le Tribunal a également reconnu qu'il fallait disposer d'une gamme d'élasticités plausibles pour comprendre la sensibilité des estimations de la commissaire. Sans ces estimations, la commissaire ne pouvait calculer convenablement la « perte sèche » et Tervita ne pouvait contester adéquatement les calculs. [Soulignement omis; par. 124.]

[133] Dans son rapport produit en réplique, l'expert de la commissaire a bien présenté des estimations relatives à l'expansion possible du marché. Or, ces estimations reposaient sur les calculs, par l'expert de Tervita, des gains en efficience liés à l'expansion du marché, invoqués par cette dernière, qui reposaient eux-mêmes sur des hypothèses non étayées. Ainsi que l'expert de Tervita l'a déclaré devant le Tribunal, ces calculs ne pouvaient servir à évaluer la perte sèche sans une véritable analyse de l'élasticité de la demande dans le marché. Répondant à une question du Tribunal, l'expert de Tervita a dit qu'il était impossible de calculer la perte sèche sans données sur l'élasticité du marché ou l'élasticité qui se rapporte aux consommateurs : « Pour déterminer la perte sèche, il faut tracer la courbe de demande » (témoignage de M. Kahwaty, décision de la C.A.F., par. 125).

[134] Sans une estimation de l'élasticité, la commissaire ne pouvait calculer convenablement la « perte sèche », et Tervita ne pouvait contester adéquatement les calculs (décision de la C.A.F., par. 124). Effectivement, les faits prouvés démontrent que les effets anticoncurrentiels auraient pu être estimés, mais ne l'ont pas été, vu l'absence de la mesure de l'élasticité, qui est essentielle. L'inférence reposant sur la baisse des prix de 10 p. 100 et sur une élasticité potentielle inconnue ne saurait se substituer à une quantification.

[135] La commissaire soutient à titre subsidiaire que le Tribunal n'a pas manqué à l'équité procédurale en admettant l'estimation approximative faite par son expert de la perte sèche découlant d'une baisse

the 10 percent price reduction (R.F., at para. 107). I cannot agree. As the Federal Court of Appeal found, the Commissioner's failure to quantify the quantifiable anti-competitive effects combined with the Tribunal's decision to allow the Commissioner to discharge her burden through a reply expert report setting out the rough estimate resulted in prejudice to Tervita. Tervita was unable to adequately challenge the Commissioner's calculations due to the failure to quantify the anti-competitive effects and as a result of the insufficient time for Tervita to formally respond to the reply expert report (see F.C.A. decision, at paras. 121-30).

[136] While the Commissioner has the burden to prove the anti-competitive effects, the merging parties bear the onus of proving the remaining elements of the defence. To allow for these kinds of procedural deficiencies would be to leave the merging parties in an untenable position where they are expected to prove that efficiencies are greater than and offset the anti-competitive effects, despite not knowing what those effects are. I cannot accept the Commissioner's arguments that there was no unfairness in this case because the calculation was "not complex" or because Tervita's expert had the opportunity to respond "briefly in direct examination", in cross-examination and on questioning from the Tribunal (R.F., at para. 108). The reply expert report was only made available to Tervita two weeks before the Tribunal's hearing (Tribunal decision, at para. 235). As the Tribunal noted: "By then, the Tribunal's Scheduling Order did not permit [Tervita] to bring a motion or file a further expert report. In addition . . . there was insufficient time before the hearing to permit [Tervita] to move to strike [the Commissioner's expert] report or to seek leave to file a further report in response . . ." (*ibid.*). The Tribunal found that the procedural deficiencies meant that Tervita could not prepare a proper response to the case presented by the Commissioner and that Tervita could not effectively challenge the Commissioner's evidence.

des prix de 10 p. 100 (m.i., par. 107). Je ne suis pas d'accord. Ainsi que la Cour d'appel fédérale l'a conclu, l'omission par la commissaire de quantifier les effets anticoncurrentiels quantifiables et la décision du Tribunal de permettre à la commissaire de s'acquitter de son fardeau en produisant en réplique un rapport d'expert énonçant une estimation approximative ont porté préjudice à Tervita. Cette dernière a été incapable de contester les calculs de la commissaire, car d'une part celle-ci n'avait pas quantifié les effets anticoncurrentiels et d'autre part Tervita a manqué de temps pour répondre en bonne et due forme au rapport de l'expert produit en réplique (voir décision de la C.A.F., par. 121-130).

[136] Si la commissaire est tenue de prouver les effets anticoncurrentiels, les parties au fusionnement assument quant à elles la charge de prouver les autres éléments de la défense. Permettre ce genre de lacunes en matière procédurale placerait les parties au fusionnement dans la situation insoutenable où elles doivent prouver que les gains en efficience surpassent et neutralisent les effets anticoncurrentiels sans connaître la valeur de ces derniers. Je ne peux retenir les arguments de la commissaire selon lesquels il n'y a eu aucune injustice dans la présente instance, au motif que le calcul n'était [TRADUCTION] « pas complexe » ou que l'expert de Tervita avait eu l'occasion de répondre « brièvement lors de l'interrogatoire principal », en contre-interrogatoire et en réponse aux questions du Tribunal (m.i., par. 108). Tervita n'a obtenu le rapport d'expert déposé en réplique que deux semaines avant l'audience devant le Tribunal (décision du Tribunal, par. 235). Ainsi que le Tribunal l'a fait remarquer : « À cette date, l'ordonnance du Tribunal concernant les échéances ne permettait pas à [Tervita] de déposer une requête ou un autre rapport d'expert. De plus [. . .] [Tervita] n'avait pas suffisamment de temps avant l'audience pour déposer une requête en radiation du rapport de [l'expert de la commissaire] ou pour demander l'autorisation de déposer un autre rapport en réplique . . . » (*ibid.*). Le Tribunal a conclu qu'en raison des lacunes en matière procédurale, Tervita ne pouvait préparer une réponse en bonne et due forme à la preuve présentée par la commissaire ni attaquer convenablement cette preuve.

[137] In this case, the Commissioner failed to meet her burden to quantify the quantifiable anti-competitive effects. As a result, the Tribunal should have assigned zero weight to the quantifiable anti-competitive effects.

[138] Justice Karakatsanis would permit quantitative but unquantified effects to be considered with "undetermined" weight, on the argument that such information is nonetheless probative on the question of efficiency (para. 194). I cannot agree. As discussed above, there are sound reasons to require that the s. 96 analysis be as objective as possible. This argument concerns evidence for which quantification is entirely possible, but has not been done. To consider such evidence is to conduct an analysis that is less objective than is possible with more complete estimation. The Tribunal should not sacrifice the objectivity of its analysis because a party has failed to conduct a complete quantitative estimate of the magnitude of an effect.

[139] In this case, the absence of price elasticity information means that the possible range of deadweight loss resulting from the merger is unknown. All else being equal, high price elasticity would likely result in significant deadweight loss, while low price elasticity could result in minimal deadweight loss. To permit the Tribunal to consider the price decrease evidence without the rest of the information necessary to quantify deadweight loss admits far too much subjectivity into the analysis, with no guarantee that the Tribunal will have enough information to ensure that a subjective assessment would align with what would actually be observed if the effect were properly quantified. Holding parties to account for the quantification of the quantitative effects they wish to adduce by assigning zero weight to undetermined quantitative effects acts to ensure that the Tribunal will be presented with information on all of the parameters necessary to estimate the magnitude of quantitative effects. To do otherwise invites speculation into the analysis.

[140] Justice Karakatsanis agrees that "[o]bviously, the Tribunal must apply the test in s. 96 to the evidence before it in a way that is fair to the parties" (para. 196), but she does not explain how the party

[137] En l'espèce, la commissaire n'a pas quantifié les effets anticoncurrentiels quantifiables. En conséquence, le Tribunal aurait dû leur accorder une valeur nulle.

[138] La juge Karakatsanis permettrait que soit attribué un poids « indéterminé » aux effets quantitatifs qui n'ont pas été quantifiés. Selon elle, ces données ont une valeur probante quant à l'efficience (par. 194). Je ne puis souscrire à son avis. Comme nous l'avons vu, il y a de bonnes raisons d'exiger que l'analyse qu'appelle l'art. 96 soit la plus objective possible. Il est ici question d'un élément de preuve tout à fait possible à quantifier, mais qui ne l'a pas été. En tenant compte de cet élément de preuve, on effectue une analyse moins objective que si on disposait d'une estimation plus étoffée. Le Tribunal n'a pas à sacrifier l'objectivité de l'analyse parce qu'une partie n'a pas fait une estimation quantitative complète de l'ampleur d'un effet.

[139] En l'espèce, sans données sur l'élasticité par rapport au prix, la fourchette possible de la perte sèche résultant du fusionnement est inconnue. Toutes choses égales d'ailleurs, une forte élasticité par rapport au prix emporterait vraisemblablement une perte sèche importante tandis qu'une faible élasticité par rapport au prix emporterait une perte sèche minime. Permettre au Tribunal de tenir compte de la baisse des prix invoquée sans les autres données sur la perte sèche fait intervenir une trop grande subjectivité dans l'équation, et rien ne garantit qu'il dispose de données suffisantes pour vérifier si l'analyse subjective concorderait avec celle fondée sur des effets quantifiés en bonne et due forme. En imposant aux parties la charge de quantifier les effets quantitatifs qu'elles invoqueront en attribuant une valeur nulle aux effets quantitatifs indéterminés, on fait en sorte qu'elles présenteront au Tribunal tous les paramètres nécessaires à l'évaluation de l'ampleur de tels effets. Toute autre démarche revient à se perdre en conjectures.

[140] La juge Karakatsanis convient qu'« [é]videmment, le Tribunal doit appliquer le critère prévu à l'art. 96 à la preuve qui lui a été présentée d'une façon équitable pour les parties » (par. 196), mais

opposed to such incomplete evidence may fairly determine the quantitative case they must meet, or challenge the methodological details related to the undetermined quantitative effects. These concerns reinforce the appropriateness of assigning "undetermined" quantitative effects a weight of zero in the s. 96 analysis.

(b) *The Approach to the Section 96 Balancing*

[141] The Federal Court of Appeal found that the Tribunal erred in law in its s. 96 analysis by "accepting a defective 'deadweight' loss calculation, by using an overly subjective offset methodology, by treating as qualitative effects certain quantitative effects which the Commissioner had failed to quantify, and by referring to qualitative environmental effects that are not cognizable under the *Competition Act*" (para. 163). Rather than remitting the matter to the Tribunal for a new determination, the court, satisfied that there was a complete record on which to carry out a new determination, engaged in a fresh assessment of the offset analysis. The court found that the efficiencies defence did not apply for two primary reasons. First, "marginal and insignificant gains in efficiency cannot offset known anti-competitive effects even where the weight to be afforded to such effects is undetermined" (para. 174). Second, the present case was one of a pre-existing monopoly, which the Federal Court of Appeal held magnified the anti-competitive effects of the merger (para. 173).

(i) The Requirement That the Efficiency Gains Be "Greater Than" and "Offset" the Anti-competitive Effects

[142] The Federal Court of Appeal held that the efficiency gains did not meet the "greater than" and "offset" requirement under s. 96. The gains were "marginal" (paras. 34, 169-71 and 174), "negligible" (para. 169) and "insignificant" (paras. 170 and 174) and therefore were not enough to outweigh the anti-competitive effects. In addition, the Tribunal found

elle s'abstient d'expliquer comment la partie qui veut réfuter une telle thèse lacunaire est censée déterminer de manière juste les éléments quantitatifs qui lui sont opposés ou contester les éléments de la méthode d'évaluation des effets quantitatifs indéterminés. De telles réserves militent en faveur de l'attribution d'une valeur nulle aux effets quantitatifs « indéterminés » dans l'analyse qu'appelle l'art. 96.

b) *Méthode de pondération applicable dans l'analyse qu'appelle l'art. 96*

[141] La Cour d'appel fédérale a conclu que le Tribunal avait commis une erreur de droit dans son analyse fondée sur l'art. 96 en « acceptant un calcul de la perte "sèche" fautif, en recourant à une méthodologie trop subjective pour apprécier la "neutralisation", en qualifiant d'effets qualitatifs certains effets quantitatifs que la commissaire n'avait pas quantifiés et en mentionnant des effets environnementaux qualitatifs non reconnus par la *Loi sur la concurrence* » (par. 163). Plutôt que de renvoyer l'affaire au Tribunal pour qu'il statue à nouveau, la cour, convaincue de disposer d'un dossier complet lui permettant de trancher, a procédé à une nouvelle analyse des effets neutralisants. Elle a conclu que la défense fondée sur les gains en efficience ne s'appliquait pas pour deux raisons principales. D'une part, des « gains en efficience secondaires et négligeables ne sauraient neutraliser des effets anticoncurrentiels connus, même lorsque la valeur à accorder à ces effets demeure inconnue » (par. 174). D'autre part, la présente affaire portait sur un monopole préexistant, ce qui de l'avis de la Cour d'appel fédérale a amplifié les effets anticoncurrentiels du fusionnement (par. 173).

(i) La condition selon laquelle les gains en efficience « surpasseront » et « neutraliseront » les effets anticoncurrentiels

[142] La Cour d'appel fédérale a conclu que les gains en efficience ne satisfaisaient pas à la condition établie à l'art. 96, soit qu'ils « surpasseront » et « neutraliseront » les effets anticoncurrentiels. Les gains étaient « secondaires » (par. 174), « négligeables » (par. 34, 169-170 et 174) et « insignifiants » (par. 170) et, donc, ils ne surpassaient pas

that "even if a zero weighting is given to the quantifiable Effects, as [Tervita] submitted should be done, [Tervita] has not satisfied the 'offset' element of section 96" (para. 314 (emphasis added; emphasis in original deleted)). Although I have determined that the anti-competitive effects should be assigned zero weight, I nonetheless consider the interpretation of the "greater than and offset" requirement due to the importance of this question in the overall s. 96 assessment.

[143] The issue to be determined is whether the statutory standard of "greater than, and will offset" requires that the merging parties demonstrate that the efficiencies not only merely exceed the anti-competitive effects, but in addition offset them. As I understand it, the Commissioner's argument in this regard is that the statutory language mandates a threshold level of "more than marginal" efficiency gains in order for the efficiencies defence to succeed (transcript, at p. 60). With respect, I cannot agree.

[144] The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

les effets anticoncurrentiels. En outre, le Tribunal a conclu que « même si une pondération nulle était attribuée aux effets quantifiables, comme le propose [Tervita], celle-ci n'a pas satisfait au critère de "neutralisation" de l'article 96 » (par. 314 (je souligne; italique dans l'original omis)). Si j'ai conclu qu'il y a lieu d'accorder une valeur nulle aux effets anticoncurrentiels, je me pencherai tout de même sur l'interprétation à donner à la condition de surpassement et de neutralisation en raison de l'importance que revêt cette question dans le cadre de l'analyse globale effectuée sous le régime de l'art. 96.

[143] La question à trancher est celle de savoir si cette condition légale oblige les parties au fusionnement à démontrer que les gains en efficience non seulement surpasseront les effets anticoncurrentiels, mais les neutraliseront également. Si je comprends bien, la commissaire soutient à cet égard que le libellé de la loi commande un seuil de gains en efficience [TRADUCTION] « plus que négligeables » pour que la défense fondée sur les gains en efficience soit retenue (transcription, p. 60). On me pardonnera de ne pas être d'accord.

[144] Le libellé de la loi — aux termes de laquelle la défense s'applique si les gains en efficience « surpasseront » et « neutraliseront » les effets anticoncurrentiels — emporte la mise en balance des aspects tant quantitatifs que qualitatifs. Le verbe « surpasseront » évoque une comparaison numérique des gains en efficience et des effets anticoncurrentiels. Le verbe « neutraliseront » implique une analyse subjective liée à une « pondération en nombres incommensurables (par ex., des pommes et des oranges) » (décision du Tribunal, par. 309) — des considérations qui ne peuvent être comparées sur le plan quantitatif parce qu'elles n'ont aucune commune mesure. L'emploi du verbe « neutraliseront » dans la loi donne à penser que l'analyse consiste en partie à porter un jugement (voir *Supérieur Propane II*, par. 100). L'emploi du terme « *offset* » dans la version anglaise de l'art. 96 laisse entendre qu'il faut procéder à une évaluation subjective pour déterminer si les gains en efficience compenseront ou contrebalanceront les effets anticoncurrentiels.

[145] Together, the terms "greater than" and "offset" mandate that the Tribunal determine both quantitative and qualitative aspects of the merger, and then weigh and balance these aspects. This approach is supported by the common understanding of the word "offset". *The Oxford English Dictionary* (2nd ed. 1989) defines the verb "offset" to mean "[t]o set off as an equivalent against something else . . .; to balance by something on the other side or of contrary nature" (p. 738). Similarly, the *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) entry defines it to mean "to serve as a counterbalance for" (p. 862). This understanding supports the interpretation of the "offset" requirement in s. 96 as imposing a consideration of the qualitative aspects of the merger and a balancing of those qualitative aspects against the quantitative effects of the merger.

[146] This is a flexible balancing approach, but the Tribunal's conclusions must be objectively reasonable. As the Federal Court of Appeal held, the overall analysis "must be as *objective* as is reasonably possible, and where an objective determination cannot be made, it must be *reasonable*" (para. 147 (emphasis in original)). As such, in most cases the qualitative effects will be of lesser importance. In addition, the statutory requirement that efficiencies be greater than *and* offset the anti-competitive effects would in most cases require a showing that the quantitative efficiencies exceed the quantitative anti-competitive effects as a necessary element of the defence.

[147] In light of this recognition, the balancing test under s. 96 may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the "greater than" prong of the s. 96 inquiry). Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. There may be unusual situations in which there are relatively few quantified efficiencies, yet where truly significant qualitative efficiencies would support the application

[145] Ensemble, les verbes « surpasseront » et « neutraliseront » obligent le Tribunal à déterminer les aspects tant quantitatifs que qualitatifs du fusionnement, puis à les soupeser. Ce point de vue est étayé par le sens ordinaire du verbe « neutraliser », que *Le Grand Robert de la langue française* (version électronique) définit en ces termes : « Empêcher d'agir, par une action contraire qui tend à annuler les efforts ou les effets » et, dans sa forme pronominale : « S'équilibrer ». De même, *Le Petit Larousse illustré* (2013) donne : « Annuler l'effet de l'action de qqn, qqch », et dans sa forme pronominale, « S'annuler réciproquement, se contrebalancer » (p. 735). Ces définitions étayent l'interprétation selon laquelle la condition de neutralisation établie à l'art. 96 exige que les aspects qualitatifs du fusionnement soient examinés et mis en balance avec les effets quantitatifs de ce dernier.

[146] Il s'agit d'une méthode de pondération souple, qui appelle toutefois des conclusions objectivement raisonnables. Ainsi que la Cour d'appel fédérale l'a statué, l'analyse globale « doit être aussi *objective* que possible et, lorsqu'il est impossible de faire une appréciation objective, cette appréciation se doit d'être *raisonnable* » (par. 147 (en italique dans l'original)). Ainsi, dans la plupart des cas, les aspects qualitatifs joueront un rôle moins important. En outre, la condition légale selon laquelle les gains en efficience doivent surpasser *et* neutraliser les effets anticoncurrentiels exigera presque toujours la preuve que les gains quantitatifs surpassent les effets anticoncurrentiels quantitatifs pour que la défense s'applique.

[147] À la lumière de ce qui précède, on peut concevoir la pondération qu'exige l'art. 96 comme une analyse en deux étapes. Dans un premier temps, il faut comparer les gains en efficience quantitatifs du fusionnement à ses effets anticoncurrentiels quantitatifs (le volet de l'analyse relatif au surpassement). Si les effets anticoncurrentiels quantitatifs dépassent les gains en efficience quantitatifs, l'analyse prend alors fin dans la plupart des cas, et la défense ne s'appliquera pas. Il se peut que dans une situation exceptionnelle caractérisée par des gains en efficience quantitatifs relativement peu élevés

of the defence. However, such cases would likely be rare in view of the emphasis of the analysis on objectivity and the impermissibility of asserting unquantified-but-quantifiable efficiencies as qualitative efficiencies. Qualitative considerations must next be weighed. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the "offset" prong of the inquiry). For the Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.

et des gains en efficience qualitatifs véritablement importants, la défense s'applique. Or, ce genre de situation se présentera sans doute rarement, vu que l'analyse mise sur l'objectivité et qu'il n'est pas permis de qualifier de gains qualitatifs des gains quantifiables qui n'ont pas été quantifiés. Dans un deuxième temps, il faut mettre en balance les gains en efficience qualitatifs et les effets anticoncurrentiels qualitatifs et décider en dernière analyse si le total des gains en efficience neutralise le total des effets anticoncurrentiels du fusionnement en cause (le volet de l'analyse relatif à la neutralisation). Pour que le Tribunal tienne compte des éléments qualitatifs dans l'analyse, ceux-ci doivent être appuyés par la preuve, et leur justification doit être clairement formulée.

[148] It should be noted that this two-step analysis does not seek to define the methodological details of how quantitative efficiencies and anti-competitive effects are to be identified and compared. Instead, the two-step analysis preserves the ability of the Tribunal to select the quantitative methodology to be employed, provided this quantitative comparison is conducted within step one of the framework described above.

[148] Il y a lieu de noter que cette analyse en deux étapes ne vise pas à préciser la méthodologie visant à dégager et à comparer les gains en efficience et les effets anticoncurrentiels quantitatifs. Le soin est laissé au Tribunal de sélectionner la méthodologie quantitative à employer, à condition qu'elle respecte la première étape du cadre décrit précédemment.

[149] Justice Karakatsanis raises concerns that this framework unnaturally separates quantitative and qualitative considerations, and that doing so is "superfluous" in light of the final offset determination which considers both quantitative and qualitative factors (para. 189). Instead, she would instruct the Tribunal to weigh whether the quantitative and qualitative efficiencies, taken as a whole, outweigh the quantitative and qualitative anti-competitive effects, taken as a whole. I would emphasize that the above framework does not require the Tribunal to isolate quantitative and qualitative considerations such that they are never compared. The ultimate offset analysis does allow for consideration of both quantitative and qualitative effects. However, I would think that the Tribunal, even proceeding under Justice Karakatsanis's proposed single-step weighing, would at some point in that consideration ask how the quantitative factors lined up relative to each other, and would also examine how the qualitative

[149] La juge Karakatsanis estime pour sa part que ce cadre crée une distinction artificielle entre les éléments quantitatifs et qualitatifs et qu'une telle démarche est « factice » compte tenu de la dernière étape, le volet relatif à la neutralisation, qui examine les deux catégories en chœur (par. 189). Selon elle, le Tribunal devrait déterminer si les gains en efficience quantitatifs et qualitatifs confondus l'emportent sur les effets anticoncurrentiels quantitatifs et qualitatifs confondus. Je tiens à préciser que le cadre n'oblige pas le Tribunal à isoler les éléments quantitatifs et qualitatifs pour ne jamais les comparer. L'analyse de l'effet neutralisant à la dernière étape permet effectivement que soient pris en compte les effets tant quantitatifs que qualitatifs. Or, à mon avis, même s'il procédait suivant la pondération en une étape que propose la juge Karakatsanis, le Tribunal finirait par comparer les facteurs quantitatifs entre eux et les facteurs qualitatifs entre eux avant de réduire cet univers de facteurs à une décision ultime.

factors compared to each other, before attempting to reconcile the whole universe of factors into an ultimate determination. The above framework merely guides the structure of that inquiry to ensure that the Tribunal's reasoning is as explicit and transparent as possible.

[150] Respectfully, the assertion in the dissenting reasons that "simply tallying up 'mathematical quantifications', while important, cannot provide a complete answer" (para. 190) misreads these reasons. They do not say that quantitative considerations are in all cases a sufficient and "complete answer". Rather, they emphasize that the nature of economic efficiencies, the language of s. 96, and the Federal Court of Appeal's apt observation that the s. 96 analysis "must be as *objective* as is reasonably possible" support the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations.

[151] However, and despite the flexibility the Tribunal has in applying this balancing approach, I cannot accept that more than marginal efficiency gains are required for the defence to apply. Had Parliament intended for there to be a threshold level of efficiencies, qualifying language could have been used to express this intention. The Commissioner's argument essentially asks this Court to read into the statute a threshold significance requirement where the statute does not provide a basis for doing so. In addition, it is not clear to me when efficiency gains become more than marginal. Determining when proven efficiency gains meet a more than marginal threshold would require overly subjective analysis. Although there is some subjectivity in the ultimate weighing of the efficiency gains and anti-competitive effects, in a case such as this where the Commissioner has not established either quantitative or qualitative anti-competitive effects, the weight given to those effects is zero. Proven efficiency gains of any magnitude will therefore outweigh the anti-competitive effects. Moreover, and as discussed above, because of the importance of employing an objective approach, the qualitative

Le cadre qui précède ne fait que guider la structure de l'analyse de sorte que le raisonnement du Tribunal soit le plus explicite et transparent possible.

[150] Je ferai observer à ma collègue qu'elle interprète mal les présents motifs en affirmant que « réduire [l'analyse] simplement à des "calculs mathématiques", aussi importants soient-ils, ne peut fournir une réponse complète » (par. 190). Je ne dis pas que les considérations quantitatives constituent dans tous les cas une « réponse complète » et suffisante. Je précise plutôt que la nature des gains en efficience économiques, le libellé de l'art. 96 et l'observation judicieuse de la Cour d'appel fédérale selon laquelle l'analyse qu'appelle l'art. 96 « doit être aussi *objective* que possible » permettent de conclure que les considérations quantitatives revêtent, dans la plupart des cas, une plus grande importance que les considérations qualitatives.

[151] Cependant, et en dépit de la latitude dont jouit le Tribunal lorsqu'il applique cette méthode de pondération, je ne peux accepter qu'il faille des gains en efficience plus que négligeables pour que la défense s'applique. S'il avait eu l'intention de fixer un seuil à cet égard, le législateur aurait pu le prévoir expressément dans la loi. La commissaire demande essentiellement à la Cour d'assortir la disposition d'un seuil implicite alors que son libellé ne le permet pas. En outre, il est difficile à mon avis de déterminer le point où les gains en efficience deviennent plus que négligeables. Pour y arriver, il faudrait procéder à une analyse excessivement subjective. Bien que la pondération ultime des gains en efficience et des effets anticoncurrentiels admette une certaine subjectivité, dans une affaire comme celle-ci, où la commissaire n'a pas établi l'existence d'effets anticoncurrentiels quantitatifs ou qualitatifs, leur valeur est nulle. Les gains en efficience établis, de quelque importance soient-ils, l'emportent donc sur les effets anticoncurrentiels. En outre, comme nous l'avons vu, en raison de l'importance du recours à une méthode objective, les effets qualitatifs joueront un rôle modeste dans

effects will assume a lesser role in the analysis in most cases. As such, it is possible that, where proven quantitative efficiency gains exceed the proven quantitative anti-competitive effects to only a small degree, the Tribunal may still find that the s. 96 defence applies.

[152] Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. While s. 96(2) prompts the Tribunal to consider whether the merger will generate "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products", this significance requirement should not be read back into s. 96(1). Given that the issue of significance was contemplated in s. 96(2), Parliament could just as easily have drafted s. 96(1) to require that efficiencies be "significantly greater than and offset" the anti-competitive effects. Instead, "significance" language appears only in s. 96(2), which is logically subservient to s. 96(1): by its terms, the text of s. 96(2) does not apply the significance threshold to the entire s. 96(1) analysis.

[153] With respect, the Federal Court of Appeal's conclusion that marginal efficiency gains cannot meet the requirements for the s. 96 defence to apply does not take into account the fact that the analysis under s. 96 is a balancing exercise. Proven efficiency gains must be assessed relative to any proven anti-competitive effects. Efficiency gains of a smaller scale may not be "marginal" when compared to and weighed against anti-competitive effects of an even smaller degree.

[154] Though it is necessary to re-emphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of

l'analyse dans la plupart des cas. Il est donc possible, si les gains en efficience quantitatifs prouvés ne surpassent que de peu les effets anticoncurrentiels quantitatifs prouvés, que le Tribunal conclue tout de même que la défense prévue à l'art. 96 s'applique.

[152] Le contexte législatif du par. 96(1) ne permet pas non plus que cette disposition soit assortie d'un seuil implicite. Certes, le par. 96(2) exige du Tribunal qu'il détermine si le fusionnement engendrera « une augmentation relativement importante de la valeur réelle des exportations » ou « une substitution relativement importante de produits nationaux à des produits étrangers », mais il ne faut pas appliquer cette exigence au par. 96(1). Vu qu'il l'a exprimée au par. 96(2), le législateur aurait pu tout aussi facilement en assortir le par. 96(1), qui prévoirait alors que les gains en efficience « surpasseront de manière importante et neutraliseront » les effets anticoncurrentiels. Or, l'idée ne figure qu'au par. 96(2), qui en toute logique est subordonné au par. 96(1) : le libellé du par. 96(2) ne dicte pas l'application d'un certain seuil dans l'analyse qu'appelle le par. 96(1).

[153] Malheureusement, la conclusion de la Cour d'appel fédérale, selon laquelle les gains en efficience négligeables n'emportent pas l'application de la défense fondée sur l'art. 96, oublie que l'analyse qu'exige cette disposition est un exercice de pondération. Les gains en efficience établis doivent être comparés aux effets anticoncurrentiels établis, s'il en est. De faibles gains en efficience peuvent ne pas être « négligeables » lorsqu'ils sont comparés à des effets anticoncurrentiels qui le sont davantage.

[154] Répétons que point n'est besoin que les gains en efficience atteignent un seuil d'importance précis. Or, il ne faut pas oublier que les modèles économiques sont intrinsèquement probabilistes et sont toujours assortis d'une certaine marge d'incertitude. Lorsque la pondération quantitative effectuée à la première étape de l'analyse qu'appelle l'art. 96 se traduit par des gains nets positifs, mais faibles, par rapport à l'incertitude intrinsèque de ces estimations, le Tribunal doit tenir compte de cette

this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.

[155] For these reasons, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

(ii) Pre-existing Monopoly

[156] The Federal Court of Appeal held that the Tribunal erred in "taking into account the monopoly position of Tervita resulting from the merger without any evidence from the Commissioner of additional anti-competitive effects resulting from that monopoly" (para. 161), but concluded that a "pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger" (para. 173). The Commissioner submits that the court did not rely on the presence of monopoly as an effect *per se*, but rather simply concluded that this was a factor likely to *magnify* the merger's anti-competitive effect. There are two problems with this argument.

[157] First, to accept that the existence of a monopoly was likely to magnify the anti-competitive effect requires accepting that there are proven anti-competitive effects. In this case, the Commissioner did not establish the impact of Tervita's superior market power and as a result of the Commissioner's failure to quantify the quantifiable anti-competitive effects, zero weight has been assigned to those effects. It is not possible to "magnify" a factor which has zero weight. This equation still results in zero.

incertitude dans sa mise en balance des différentes considérations. Je ne dis pas qu'il faille minimiser les gains quantitatifs dans de tels cas, je dis simplement que dans les affaires où l'écart entre les gains en efficience et les effets anticoncurrentiels est faible le Tribunal doit examiner soigneusement les hypothèses sur lesquelles repose l'analyse quantitative. Il peut alors rejeter la défense fondée sur les gains en efficience, en vertu de son pouvoir discrétionnaire, mais il doit justifier clairement sa décision. Ses motifs doivent sembler rationnels, même si la décision est contraire au résultat strict que l'analyse quantitative indiquerait par ailleurs.

[155] Pour ces motifs, la Cour d'appel fédérale a commis une erreur en statuant qu'un fusionnement anticoncurrentiel ne saurait être approuvé sous le régime de l'art. 96 si seuls des gains négligeables ou insignifiants en découlent.

(ii) Monopole préexistant

[156] La Cour d'appel fédérale a statué que le Tribunal avait commis une erreur du fait qu'il « tient compte de la situation de monopole occupée par Tervita grâce au fusionnement sans disposer d'élément de preuve de la commissaire quant aux effets anticoncurrentiels supplémentaires résultant de ce monopole » (par. 161), mais elle a conclu qu'un « monopole préexistant comme celui dont il s'agit en l'espèce aura habituellement pour effet d'amplifier les effets anticoncurrentiels d'un fusionnement » (par. 173). La commissaire soutient que la cour n'a pas tenu compte du monopole comme d'un effet en soi, mais a simplement conclu qu'il s'agissait d'un facteur susceptible d'*amplifier* l'effet anticoncurrentiel du fusionnement. Cet argument présente deux lacunes.

[157] Premièrement, si l'on accepte que l'existence d'un monopole soit susceptible d'amplifier les effets anticoncurrentiels, il faut d'abord accepter que des effets anticoncurrentiels soient établis. Dans la présente affaire, la commissaire n'a pas démontré l'incidence de la puissance commerciale supérieure de Tervita et, comme elle n'a pas quantifié les effets anticoncurrentiels quantifiables, une valeur nulle leur a été attribuée. Or, il est impossible d'« amplifier » un facteur assorti d'une valeur nulle. Le résultat de cette équation demeure nul.

[158] Second, in my respectful view, the Federal Court of Appeal considered the existence of a monopoly *per se* as opposed to its effects. As the court held in *Superior Propane IV*:

> Monopoly, however it might be defined (e.g. 95 percent market share, 100 percent market share, high barriers to entry), is a description of a market condition, not the effect of that market condition. If monopoly is to be taken into account for purposes of subsection 96(1), it is the effects of the monopoly that must be considered, not the existence of the monopoly *per se*. [para. 49]

Here, where no effects have been proven, it is not possible to say that such effects have been magnified. Inevitably, that approach reverts to relying on the existence of a monopoly *per se*.

(iii) Application to This Case

[159] In this case, the Commissioner did not meet her burden to prove the anti-competitive effects. As such, the weight given to the quantifiable effects is zero. The Tribunal did not accept any of Tervita's claimed qualitative efficiencies and Tervita does not challenge this on appeal. Tervita established "overhead" efficiency gains resulting from Babkirk obtaining access to Tervita's administrative and operating functions. These gains meet the "greater than" requirement in this case.

[160] Turning to qualitative considerations, the Federal Court of Appeal rejected the qualitative effects accepted by the Tribunal — environmental effects with respect to the price reduction on-site clean-up. This issue is raised by the Commissioner as an alternative to rejecting the efficiencies defence on the basis of quantitative factors. As I have found that the court's rejection of the efficiencies defence was in error, I now turn to whether the evidence of environmental effects was cognizable for the purposes of s. 96.

[158] Deuxièmement, à mon humble avis, la Cour d'appel fédérale a pris en compte l'existence d'un monopole en soi et non ses effets. Pour reprendre ses propos dans l'affaire *Supérieur Propane IV* :

> Le monopole, de quelque façon qu'on le définisse (p. ex. part de marché de 95 pour cent, part de marché de 100 pour cent, barrières élevées à l'entrée), est la description d'une situation du marché, non l'effet de cette situation du marché. Si le monopole doit être pris en compte pour l'application du paragraphe 96(1), ce sont les effets du monopole qu'il faut prendre en considération, non l'existence du monopole en soi. [par. 49]

Dans la présente affaire, où la preuve des effets n'a pas été faite, l'on ne peut affirmer que de tels effets ont été amplifiés. Inévitablement, la démarche revient à prendre en compte l'existence du monopole en soi.

(iii) Application à la présente affaire

[159] En l'espèce, la commissaire ne s'est pas acquittée de la charge qui lui incombait de prouver l'existence d'effets anticoncurrentiels. Pour cette raison, une valeur nulle a été accordée aux effets quantifiables. Le Tribunal n'a accepté aucun des gains en efficience qualitatifs invoqués par Tervita, et cette dernière ne conteste pas cette décision en appel. Elle a établi l'existence de gains en efficience « liés à la baisse des coûts indirects » qui découlent de l'obtention par Babkirk de l'accès aux fonctions administratives et opérationnelles de Tervita. Ces gains satisfont à la condition de surpassement dans la présente affaire.

[160] Quant aux considérations qualitatives, la Cour d'appel fédérale a rejeté les effets qualitatifs acceptés par le Tribunal — les effets environnementaux, pour la restauration de sites, découlant de la réduction des redevances. Subsidiairement, la commissaire fait valoir cet argument comme motif de rejet de la défense fondée sur les gains en efficience autre que les facteurs quantitatifs. Étant donné que j'ai conclu que la cour a rejeté à mauvais droit la défense fondée sur les gains en efficience, passons maintenant à la question de savoir si la preuve des effets environnementaux est admissible pour l'application de l'art. 96.

(c) *The Commissioner's Alternative Argument*

[161] The Commissioner argues that the Federal Court of Appeal erred in rejecting price reduction on potential customers' site clean-up and the resulting environmental benefits which the Tribunal had accepted as qualitative effects of the merger. In rejecting these effects, the court first questioned whether "the environmental effects of a merger, where no economic effect is ascribed to them, can be taken into account in a merger review under the *Competition Act*" (para. 155). The court then went on to hold that, nonetheless, the Tribunal had double-counted this effect as it had already addressed the 10 percent drop in tipping fees which would be brought about by competition and which would result in the disposal of additional tonnes of hazardous waste as part of the "deadweight loss" analysis. The court held that this effect should only have been considered once "as a quantitative anti-competitive effect that had not been appropriately quantified by the Commissioner" (para. 157).

[162] The Commissioner's arguments centre on her position that the environmental impacts did have an economic effect. However, while the Federal Court of Appeal questioned whether non-economic environmental effects could be considered under the s. 96 analysis, the effects in this case had an economic aspect. The court ultimately rejected these effects on the basis that the environmental effects had been double-counted by the Tribunal.

[163] I agree with the Commissioner that where environmental effects have economic dimensions, these effects may properly be considered under the s. 96 analysis. Indeed, I do not read the Federal Court of Appeal as saying otherwise. The issue raised by the Commissioner is whether the environmental effects put into evidence by the Commissioner did have an economic dimension. I agree that an effect such as a contingent liability on the books of a company which has to remediate a site is an economic aspect of an environmental effect. However, while there was evidence before the Tribunal

c) *Argument subsidiaire de la commissaire*

[161] La commissaire fait valoir que la Cour d'appel fédérale a rejeté à tort la réduction des redevances de restauration de sites pour des clients potentiels et ses avantages environnementaux, ces derniers ayant été acceptés par le Tribunal à titre d'effets qualitatifs du fusionnement. Avant de les rejeter, la cour a d'abord demandé « si l'on peut tenir compte, dans le cadre de l'examen d'un fusionnement effectué sous le régime de la *Loi sur la concurrence*, des effets environnementaux d'un fusionnement lorsqu'aucun effet économique n'est associé aux effets environnementaux en question » (par. 155). La cour a ensuite conclu que le Tribunal avait néanmoins compté deux fois cet effet, puisqu'il avait examiné, dans le cadre de l'analyse sur la « perte sèche », la réduction de 10 p. 100 des redevances de déversement qui résulterait de la concurrence et qui se traduirait par une augmentation de la quantité de déchets dangereux éliminés. La cour a statué que le Tribunal aurait dû en tenir compte une seule fois « en tant qu'effet anticoncurrentiel quantitatif qui n'avait pas été quantifié de façon appropriée par la commissaire » (par. 157).

[162] Les arguments de la commissaire s'articulent autour de sa thèse, à savoir que les effets environnementaux ont bel et bien eu des retombées économiques. La Cour d'appel fédérale doutait que les effets environnementaux non économiques puissent entrer dans l'analyse qu'appelle l'art. 96. Or, dans la présente affaire, les effets présentaient un aspect économique. La cour a fini par les écarter au motif qu'ils avaient été pris en compte à deux reprises par le Tribunal.

[163] Je suis d'avis, comme la commissaire, que lorsqu'ils ont une dimension économique, les effets environnementaux peuvent à juste titre être pris en considération dans le cadre de l'analyse qu'appelle l'art. 96. De fait, je ne crois pas que la Cour d'appel fédérale dise le contraire. La question soulevée par la commissaire est celle de savoir si les effets environnementaux qu'elle a mis en preuve avaient effectivement une dimension économique. Je conviens par exemple qu'un passif éventuel consigné sur les registres de la société tenue de restaurer un site constitue un aspect économique d'un

with respect to this kind of contingent liability, this evidence cannot be considered in this case.

[164] First, there is no evidence as to whether the waste covered by the contingent liability in question fell within the Contestable Area. Second, there is no evidence as to the price elasticity of demand of the customer in question. Finally, and as the Federal Court of Appeal found, if this effect did fall within the Contestable Area, it was quantifiable and therefore should have been quantified by the Commissioner. As explained above, anti-competitive effects which are quantifiable will not be treated qualitatively as a result of a failure to quantify. Therefore, and although the environmental effects in this case had an economic dimension, the Tribunal erred in assessing these effects qualitatively.

(d) *Conclusion on the Balancing Under Section 96*

[165] The Commissioner failed to meet her burden, resulting in the quantifiable anti-competitive effects being assigned a weight of zero. The Federal Court of Appeal properly rejected the environmental effects. There are therefore no proven qualitative anti-competitive effects. Tervita successfully proved quantifiable "overhead" efficiency gains resulting from Babkirk obtaining access to Tervita's administrative and operating functions. In this case, these proven gains met the "greater than and offset" requirement. As there were no quantifiable or qualitative anti-competitive effects proven by the Commissioner, the efficiencies defence applies, and the Federal Court of Appeal was incorrect to conclude otherwise.

[166] It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition, only to then conduct the

effet environnemental. Toutefois, le Tribunal disposait certes d'une preuve relative à ce type de passif éventuel, mais cette preuve ne peut être prise en considération dans la présente affaire.

[164] Premièrement, rien ne prouve que les déchets faisant l'objet du passif éventuel en question se trouvaient dans la zone contestable. Deuxièmement, l'élasticité de la demande par rapport au prix relativement à ce client n'avait pas été démontrée. Enfin, et ainsi que la Cour d'appel fédérale l'a conclu, si cet effet portait dans la zone contestable, il était quantifiable et, partant, il aurait dû être quantifié par la commissaire. Comme nous l'avons vu, les effets anticoncurrentiels qui sont quantifiables ne deviennent pas des effets qualitatifs du fait qu'ils n'ont pas été quantifiés. En conséquence, et bien que les effets environnementaux dans la présente affaire aient une dimension économique, le Tribunal a commis une erreur lorsqu'il leur a accordé une valeur qualitative.

d) *Conclusion sur la pondération qu'exige l'art. 96*

[165] La commissaire ne s'est pas acquittée de son fardeau, de sorte qu'une valeur nulle a été attribuée aux effets anticoncurrentiels quantifiables. La Cour d'appel fédérale a rejeté à bon droit les effets environnementaux. Aucun effet anticoncurrentiel qualitatif n'a par conséquent été établi. Tervita a réussi à prouver l'existence de gains en efficience quantifiables « liés à la baisse des coûts indirects » découlant de l'obtention par Babkirk de l'accès aux fonctions administratives et opérationnelles de Tervita. En l'espèce, ces gains établis ont satisfait à la condition de surpassement et de neutralisation. Étant donné que la commissaire n'a pas prouvé l'existence d'effets anticoncurrentiels, qu'ils soient quantifiables ou qualitatifs, la défense fondée sur les gains en efficience s'applique, et la conclusion contraire de la Cour d'appel fédérale était incorrecte.

[166] Il peut paraître paradoxal de conclure que la décision du Tribunal, selon laquelle il y aurait vraisemblablement un empêchement sensible de

s. 96 balancing test and find zero anti-competitive effects. However, this result merely appears paradoxical in view of the particular facts of this case. Here, as discussed above, the Tribunal was able to consider evidence as to the effect on the market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner's failure to do so in this case was not fatal to the s. 92 determination. By contrast, the balancing test under s. 96 does require that quantifiable anti-competitive effects be quantified in order to be considered. As such, the failure to quantify deadweight loss in this case barred consideration, under s. 96, of the quantifiable effects that supported a finding of likely substantial prevention under s. 92. In circumstances where quantifiable effects were in fact quantified, a finding of likely substantial prevention under s. 92 would be accompanied by the consideration of quantified anti-competitive effects under the s. 96 analysis.

(6) Postscript

[167] While the efficiencies defence applies in this case under the terms of s. 96 as written, this case does not appear to me to reflect the policy considerations that Parliament likely had in mind in creating an exception to the general ban on anti-competitive mergers. As discussed above at para. 84 in the historical examination of s. 96, the evidence suggests that the efficiencies defence was created

la concurrence, était correcte pour ensuite déterminer, à l'issue de la pondération qu'exige l'art. 96, qu'il n'y avait aucun effet anticoncurrentiel. Or ce résultat ne semble paradoxal qu'en raison des faits propres à la présente affaire. Comme nous l'avons vu, le Tribunal a pu examiner une preuve portant sur l'effet sur le marché de l'arrivée de concurrents probables, l'existence de substituts acceptables, et ainsi de suite. L'article 93 permet expressément l'examen de ces facteurs. Ordinairement, la commissaire présenterait également la preuve portant sur ces facteurs pour quantifier leur effet net sur l'économie sous la forme d'une perte sèche. Cependant, le régime législatif ne fait pas obstacle à une conclusion qu'il y aura vraisemblablement un empêchement sensible de la concurrence dans les cas où la perte sèche n'a pas été quantifiée. Ainsi cette omission de la part de la commissaire dans la présente affaire n'a pas été fatale à la conclusion rendue en application de l'art. 92. En revanche, l'analyse de pondération visée à l'art. 96 exige bel et bien que les effets anticoncurrentiels quantifiables soient quantifiés pour être pris en considération. Pour cette raison, la non-quantification de la perte sèche en l'espèce a fait obstacle à la prise en compte, dans l'analyse qu'appelle l'art. 96, des effets quantifiables étayant la conclusion que le fusionnement aura vraisemblablement pour effet d'empêcher sensiblement la concurrence au sens où il faut entendre l'expression pour l'application de l'art. 92. Si les effets quantifiables avaient effectivement été quantifiés, après avoir conclu, à l'issue de l'analyse qu'exige l'art. 92, que le fusionnement aura vraisemblablement pour effet d'empêcher sensiblement la concurrence, on procéderait à l'examen des effets anticoncurrentiels quantifiés dans le cadre de l'analyse qu'appelle l'art. 96.

(6) Post-scriptum

[167] Si la défense fondée sur les gains en efficience s'applique en l'espèce selon le libellé de l'art. 96, la présente affaire ne soulève pas selon moi les considérations que le législateur avait probablement en tête lorsqu'il a conçu cette exception à l'interdiction générale des fusionnements anticoncurrentiels. Comme nous l'avons vu au par. 84 dans le cadre de l'examen de l'historique de l'art. 96, la

in recognition of the size of Canada's domestic market and with an eye toward supporting operation at efficient levels of production and the realization of economies of scale, particularly with reference to international competition. By contrast, this case deals with competition on a local scale and where the operational efficiencies obtained do not appear to have been central to the acquiring party's ability to realize economies of scale to compete in the relevant market. Although I tend to think that this case may not represent one that Parliament had in mind in creating the efficiencies defence, I nonetheless find that the statute as currently drafted supports a finding that the defence is available in this case.

VII. Conclusion

[168] I would allow the appeal. I would set aside the divestiture order of the Tribunal and dismiss the Commissioner's s. 92 application. The appellants are entitled to costs in this Court and in the Federal Court of Appeal.

The following are the reasons delivered by

[169] Abella J. — In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, which predates *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Court deferred to the British Columbia Securities Commission's specialized expertise in the interpretation of provisions of the *Securities Act*, S.B.C. 1985, c. 83, and applied a reasonableness standard despite the presence of a right of appeal and the absence of a privative clause. In other words, the specialized nature of the tribunal was seen to be more determinative of the legislature's true intent to make the tribunal master of its mandate. More recently, notwithstanding the same right of appeal in *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, this Court once again applied a reasonableness standard based on the British Columbia Securities Commission's

preuve permet de penser que cette défense avait été créée en raison de la taille du marché intérieur du Canada et pour favoriser l'efficience de la production et les économies d'échelle, surtout par rapport à la concurrence internationale. Or, il s'agit en l'espèce d'une affaire de concurrence locale, où les gains en efficience liés à l'exploitation réalisés ne paraissent pas avoir été essentiels aux économies d'échelle destinées à favoriser la compétitivité de la partie acquérante dans le marché en cause. Bien que je tende à penser que la présente affaire ne correspond peut-être pas à la situation que le législateur avait en tête lorsqu'il a créé la défense fondée sur les gains en efficience, je suis d'avis que la loi dans sa version actuelle permet de conclure que le moyen de défense s'applique dans la présente affaire.

VII. Conclusion

[168] Je suis d'avis d'accueillir le pourvoi, d'infirmer l'ordonnance de dessaisissement prononcée par le Tribunal et de rejeter la demande fondée sur l'art. 92 présentée par la commissaire. Les appelantes ont droit aux dépens devant la Cour et devant la Cour d'appel fédérale.

Version française des motifs rendus par

[169] La juge Abella — Dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, rendu avant l'arrêt *Dunsmuir c. Nouveau-Brunswick*, [2008] 1 R.C.S. 190, la Cour a déféré à l'expertise spécialisée de la commission des valeurs mobilières de la Colombie-Britannique dans l'interprétation de dispositions de la *Securities Act*, S.B.C. 1985, c. 83, et a appliqué la norme de la décision raisonnable, nonobstant l'existence d'un droit d'appel et l'absence d'une clause privative. Autrement dit, la nature spécialisée de ce tribunal administratif était considérée comme étant plus déterminante pour dégager l'intention véritable du législateur de confier à ce tribunal les rênes de son mandat. Plus récemment, dans l'arrêt *McLean c. Colombie-Britannique (Securities Commission)*, [2013] 3 R.C.S. 895, malgré l'existence d'un tel

specialized expertise: see *Securities Act*, R.S.B.C. 1996, c. 418, s. 167.

[170] The cornerstone laid in *Pezim* introduced a new edifice for the review of specialized tribunals. Through cases like *McLean*, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, judges and lawyers engaging in judicial review proceedings came to believe, rightly and reasonably, that the jurisprudence of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause — that is notwithstanding legislative wording — when a tribunal is interpreting its home statute, reasonableness applies. I am at a loss to see why we would chip away — again[2] — at this precedential certainty. It seems to me that what we should be doing instead is confirming, not undermining, the reasonableness presumption and our jurisprudence that statutory language alone is not determinative of the applicable standard of review.

[171] That is why, with respect, although I otherwise agree with the reasons of the majority, I think the applicable standard is reasonableness, not correctness. I am aware that it is increasingly difficult to discern the demarcations between a reasonableness and correctness analysis, but until those lines are completely erased, I think it is worth protecting the existing principles as much as possible. To apply correctness in this case represents a reversion to the pre-*Pezim* era. Creating yet another exception by relying on the statutory language in this case which sets out a right of appeal, undermines the expertise the statute recognizes. This new exception is also, in my respectful view, an inexplicable variation from our jurisprudence that is certain to engender the very "standard of review" confusion

[2] See *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283.

droit d'appel, la Cour a appliqué à nouveau la norme de la décision raisonnable, en raison du domaine d'expertise de la commission des valeurs mobilières de la province (voir *Securities Act*, R.S.B.C. 1996, c. 418, art. 167).

[170] La pierre angulaire déposée dans l'arrêt *Pezim* a jeté les bases d'un nouvel édifice de révision des décisions des tribunaux spécialisés. Au fil d'affaires comme *McLean*, *Smith c. Alliance Pipeline Ltd.*, [2011] 1 R.C.S. 160, et *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, [2011] 3 R.C.S. 654, les juges et les avocats participant au contrôle judiciaire en sont venus à croire, valablement et raisonnablement, que la jurisprudence de la Cour avait créé une présomption selon laquelle, qu'il y ait ou non de droit d'appel ou de clause privative — soit nonobstant le libellé de la loi —, dès lors qu'un tribunal administratif interprète sa propre loi constitutive, c'est la norme de la décision raisonnable qui s'applique. Je ne comprends pas pourquoi il faudrait miner — encore une fois[2] — une telle certitude jurisprudentielle. À mon avis, il convient de confirmer, et non d'ébranler, la présomption d'application de la norme de la décision raisonnable et la jurisprudence de la Cour selon laquelle le seul libellé de la loi ne dicte pas la norme de contrôle applicable.

[171] Voilà pourquoi, soit dit en tout respect, bien que je souscrive par ailleurs aux motifs des juges majoritaires, j'estime que la norme de contrôle qui s'applique est celle de la décision raisonnable, et non celle de la décision correcte. J'admets qu'il devient de plus en plus difficile de distinguer les démarcations entre l'analyse propre à la norme de la décision raisonnable et celle propre à la norme de la décision correcte, mais avant que ces démarcations soient complètement oblitérées, je pense qu'il vaut la peine de préserver dans la mesure du possible les principes établis. Appliquer la norme de la décision correcte en l'espèce constitue un retour à la situation antérieure à l'arrêt *Pezim*. En créant encore une autre exception fondée sur le libellé de la loi, qui prévoit dans ce cas un droit d'appel, on sape

[2] Voir *Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, [2012] 2 R.C.S. 283.

that inspired this Court to try to weave the strands together in the first place.

[172] The building blocks in our jurisprudence were carefully constructed. Binnie J. explained in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 25, that

> *Dunsmuir* recognized that *with or without a privative clause*, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54). [Emphasis added.]

[173] This was further explained in *Alberta Teachers' Association* in its first paragraph: "Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals."

l'expertise reconnue par le texte législatif. Cette nouvelle exception représente également à mon avis un écart inexplicable par rapport à la jurisprudence de la Cour et va engendrer sans aucun doute la confusion relative à la « norme de contrôle » qui avait amené la Cour au départ à vouloir y mettre de l'ordre.

[172] La jurisprudence de la Cour a été soigneusement édifiée. Pour reprendre l'explication du juge Binnie dans l'arrêt *Canada (Citoyenneté et Immigration) c. Khosa*, [2009] 1 R.C.S. 339 :

> Dans *Dunsmuir*, notre Cour a reconnu que, *sans égard à l'existence d'une clause privative*, il est maintenant admis qu'une certaine déférence s'impose lorsqu'une décision particulière a été confiée à un décideur administratif plutôt qu'aux tribunaux judiciaires. Cette déférence s'étend non seulement aux questions touchant aux faits et à la politique, mais aussi à l'interprétation, par le tribunal administratif, de sa loi constitutive et des dispositions législatives connexes étant donné « qu'une disposition législative peut donner lieu à plus d'une interprétation valable, et un litige, à plus d'une solution, et que la cour de révision doit se garder d'intervenir lorsque la décision administrative a un fondement rationnel » (*Dunsmuir*, par. 41). Le principe de la déférence « reconnaît que dans beaucoup de cas, les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent ou acquièrent une grande connaissance ou sensibilité à l'égard des impératifs et des subtilités des régimes législatifs en cause » (*Dunsmuir*, par. 49, citant le professeur David J. Mullan, « Establishing the Standard of Review : The Struggle for Complexity? » (2004), 17 *C.J.A.L.P.* 59, p. 93). En outre, la déférence « peut également s'imposer lorsque le tribunal administratif a acquis une expertise dans l'application d'une règle générale de common law ou de droit civil dans son domaine spécialisé » (*Dunsmuir*, par. 54). [Je souligne; par. 25.]

[173] La Cour réitère l'explication dans le premier paragraphe de l'arrêt *Alberta Teachers' Association* : « En créant un tribunal administratif, une législature confère à un décideur le pouvoir de rendre des décisions dans un domaine où il est censé posséder une expertise. Une cour de justice doit déférer aux décisions administratives qui ressortissent à ce pouvoir décisionnel. »

[174] In *Smith*, this Court applied a reasonableness standard of review to an arbitration committee's interpretation of its home statute, even though that statute provided that decisions of the arbitration committee on questions of law or jurisdiction *could be appealed to the Federal Court* (para. 40; see *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 101). And, as previously noted, in *McLean* the Court held that a reasonableness standard applied to the British Columbia Securities Commission's interpretation of its home statute despite the fact that the statute contained a statutory right of appeal with leave to the British Columbia Court of Appeal: paras. 23-24; *Securities Act*, s. 167.

[175] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, the Court recognized that the fact that little deference had traditionally been extended to human rights tribunals in respect of their decisions on legal questions, was in tension with the deferential approach to judicial review espoused in *Dunsmuir*. The Court ultimately held that because the question of costs was located within the Canadian Human Rights Tribunal's core function and expertise relating to its interpretation and application of its enabling statute, a reasonableness standard of review applied. As LeBel and Cromwell JJ. noted, "[i]n the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise": para. 30.

[176] The presumption of reasonableness to an administrative decision maker's interpretation of its home statute or closely related legislation, even on questions of law, is therefore well established in this Court's jurisprudence: see also *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011]

[174] Dans l'arrêt *Smith*, la Cour applique la norme de contrôle de la décision raisonnable à l'interprétation, par un comité d'arbitrage, de sa loi constitutive, même si cette dernière prévoit *un droit d'appel à la Cour fédérale* des décisions du comité sur des questions de droit ou de compétence (par. 40; voir également la *Loi sur l'Office national de l'énergie*, L.R.C. 1985, c. N-7, art. 101). En outre, comme nous l'avons vu, la Cour dans l'arrêt *McLean* conclut à l'application de la norme de la décision raisonnable à l'interprétation que fait la commission des valeurs mobilières de la Colombie-Britannique de sa loi constitutive, et ce même si cette loi prévoit un droit d'appel à la Cour d'appel de la province sur autorisation de celle-ci (par. 23-24; *Securities Act*, art. 167).

[175] Dans l'arrêt *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, [2011] 3 R.C.S. 471, la Cour reconnaît que le peu de déférence accordé par le passé aux décisions des tribunaux des droits de la personne sur des questions de droit contredit la démarche empreinte de déférence en matière de contrôle judiciaire qu'elle préconise dans l'arrêt *Dunsmuir*. La Cour finit par conclure que parce que la question des dépens relève essentiellement du mandat et de l'expertise du Tribunal canadien des droits de la personne liés à l'interprétation et à l'application de sa loi constitutive, c'est la norme de la décision raisonnable qui s'applique. Selon les juges LeBel et Cromwell, « [d]ans le cas du contrôle judiciaire, la déférence peut protéger le décideur administratif d'une immixtion judiciaire trop poussée, même à l'égard de certaines questions de droit dès lors que celles-ci touchent au cœur même du mandat et du domaine d'expertise du décideur » (par. 30).

[176] Ainsi, la présomption selon laquelle c'est la norme de la décision raisonnable qui vaut à l'égard de l'interprétation par un décideur administratif de sa loi constitutive ou d'une loi qui y est étroitement liée, même lorsqu'une question de droit est soulevée, est bien établie dans la jurisprudence de la Cour (voir aussi *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, [2014] 2 R.C.S. 135; *Agraira c. Canada (Sécurité publique et Protection civile)*, [2013] 2 R.C.S.

3 S.C.R. 616; *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678.

[177] It is true that this Court has recognized that certain categories of questions warrant a correctness review. Rothstein J. set them out in *Alberta Teachers' Association*, at para. 30:

> There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

[178] Notably, a statutory right of appeal is not one of them.

[179] While the statutory language granting the right of appeal in this case may be different from the language in *Pezim*, *McLean* and *Smith*, it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute. Using such language to trump the deference owed to tribunal expertise, elevates the factor of statutory language to a pre-eminent and determinative status we have long denied it. I see nothing, in other words, that warrants departing from what the legal profession has come to see as our governing template for reviewing the decisions of specialized expert tribunals on a reasonableness standard, most recently on

559; *Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, [2011] 3 R.C.S. 616; *Celgene Corp. c. Canada (Procureur général)*, [2011] 1 R.C.S. 3; *Nolan c. Kerry (Canada) Inc.*, [2009] 2 R.C.S. 678).

[177] Certes, la Cour reconnaît que certaines catégories de questions sont assujetties à la norme de la décision correcte. Le juge Rothstein les énumère dans l'arrêt *Alberta Teachers' Association* :

> Suivant la jurisprudence, « [l]orsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie, la déférence est habituellement de mise » (*Dunsmuir*, par. 54; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 28, le juge Fish). Le principe ne vaut cependant pas lorsque l'interprétation de la loi constitutive relève d'une catégorie de questions à laquelle la norme de la décision correcte demeure applicable, à savoir les « questions constitutionnelles, [les] questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur, [les] questions portant sur la "délimitation des compétences respectives de tribunaux spécialisés concurrents" [et] les questions touchant véritablement à la compétence » (*Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 18, les juges LeBel et Cromwell, citant *Dunsmuir*, par. 58, 60-61). [par. 30]

[178] Signalons qu'un droit d'appel légal n'en fait pas partie.

[179] Bien que le libellé de la disposition accordant le droit d'appel dans l'affaire qui nous occupe diffère de celui qui est en cause dans les affaires *Pezim*, *McLean* et *Smith*, il ne diffère pas suffisamment pour saper le principe établi, à savoir que la déférence s'impose à l'égard de l'interprétation par un tribunal expert de sa loi constitutive. Invoquer ce genre de libellé pour supplanter la déférence que commande l'expertise du tribunal a pour effet d'élever le facteur du libellé de la loi au rang d'élément prééminent et déterminant que nous avons longtemps refusé de lui reconnaître. Autrement dit, rien ne justifie que l'on s'écarte de ce que les juristes considèrent comme le cadre régissant le contrôle des

muscular display in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633.

[180] In this case, applying that template leads to the conclusion that the Competition Tribunal's interpretation of s. 96 of the *Competition Act*, R.S.C. 1985, c. C-34, was unreasonable. I would allow the appeal.

The following are the reasons delivered by

[181] KARAKATSANIS J. (dissenting) — I agree with the reasons of my colleague Justice Rothstein as they concern the proper analytical approach to s. 92(1) of the *Competition Act*, R.S.C. 1985, c. C-34. I further agree with his conclusion that it was open to the Competition Tribunal to find that the merger in this case was likely to substantially prevent competition contrary to s. 92(1).

[182] However, I cannot agree with my colleague's approach to the s. 96 efficiencies defence and his conclusion that Tervita was entitled to the benefit of that defence in this case. I would affirm the decision and the analysis of the Federal Court of Appeal, 2013 FCA 28, [2014] 2 F.C.R. 352, in that regard.

[183] The efficiencies defence set out in s. 96(1) of the *Competition Act* requires the Tribunal to balance the efficiencies of the merger against its anti-competitive effects:

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and

décisions de tribunaux administratifs experts, qui appelle la norme de la décision raisonnable et dont nous avons vu une puissante démonstration dans l'arrêt récent *Sattva Capital Corp. c. Creston Moly Corp.*, [2014] 2 R.C.S. 633.

[180] En l'espèce, l'application de ce cadre mène à la conclusion que l'interprétation de l'art. 96 de la *Loi sur la concurrence*, L.R.C. 1985, c. C-34, par le Tribunal de la concurrence n'était pas raisonnable. Je suis d'avis d'accueillir l'appel.

Version française des motifs rendus par

[181] LA JUGE KARAKATSANIS (dissidente) — Je souscris aux motifs de mon collègue le juge Rothstein dans la mesure où ils portent sur la bonne méthode à adopter pour l'analyse qu'appelle le par. 92(1) de la *Loi sur la concurrence*, L.R.C. 1985, c. C-34. Je souscris également à sa conclusion selon laquelle il était loisible au Tribunal de la concurrence de conclure que le fusionnement en l'espèce aurait vraisemblablement pour effet d'empêcher sensiblement la concurrence, ce que ne permet pas le par. 92(1).

[182] Toutefois, je ne saurais souscrire à l'approche préconisée par mon collègue à l'égard de la défense fondée sur les gains en efficience prévue à l'art. 96 et à sa conclusion selon laquelle Tervita avait le droit de s'en prévaloir en l'espèce. Je suis d'avis de confirmer la décision et l'analyse de la Cour d'appel fédérale, 2013 CAF 28, [2014] 2 R.C.F. 352, à cet égard.

[183] L'application de la défense fondée sur les gains en efficience prévue au par. 96(1) de la *Loi sur la concurrence* est subordonnée à la mise en balance par le Tribunal des gains en efficience qu'entraîne le fusionnement et de ses effets anticoncurrentiels :

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront

that the gains in efficiency would not likely be attained if the order were made.

[184] The Federal Court of Appeal and Justice Rothstein concluded, rightly in my view, that the statutory requirement that efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of quantitative and qualitative aspects. The Tribunal has the discretion to decide what methodology to apply on a case-by-case basis, so long as the various objectives of the Act are taken into account. Section 96 provides for flexible trade-off analysis, in order to meet the various objectives of the Act. Efficiencies and effects should be quantified wherever reasonably possible; rough estimates should be provided where precise quantification is not possible; and the assessment of qualitative effects should be objectively reasonable, supported by evidence and clear reasoning. (See Rothstein J.'s reasons, at paras. 144-45 and 148; F.C.A. reasons, at paras. 146 and 148.)

[185] However, I do not agree that the need for "reasonable objectivity" justifies Justice Rothstein's hierarchical approach to quantitative and qualitative aspects under the efficiencies defence. Nor do I accept his assessment that "qualitative effects will be of lesser importance" (para. 146; see also paras. 147-48). I see no value in prioritizing quantitative over qualitative efficiencies. Both are relevant to the statutory test, and their significance depends on the circumstances of the case.

[186] The statutory language makes no such distinction. Moreover, many of the purposes set out in s. 1.1 of the Act may not be quantifiable. These purposes include not only providing consumers with competitive prices and products, but also promoting adaptability of the Canadian economy, expanding opportunities for Canadian businesses abroad, recognizing the value of foreign competition in Canada,

vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

[184] La Cour d'appel fédérale et le juge Rothstein ont conclu, à juste titre selon moi, que la condition prévue par la loi — selon laquelle les gains en efficience « surpasseront » et « neutraliseront » les effets anticoncurrentiels — emporte une pondération des aspects tant quantitatifs que qualitatifs. Le Tribunal est habilité à déterminer la méthodologie applicable à chaque cas, si les divers objets de la Loi sont pris en compte. L'article 96 prévoit une analyse conciliatoire souple qui permet le respect des divers objets de la Loi. Les gains en efficience et les effets anticoncurrentiels devraient être quantifiés chaque fois qu'il est raisonnablement possible de le faire; des estimations approximatives devraient être fournies lorsqu'une quantification précise n'est pas possible et l'évaluation des effets qualitatifs devrait être objectivement raisonnable et étayée par des éléments de preuve et un raisonnement clair. (Voir les motifs du juge Rothstein, par. 144-145 et 148; motifs de la C.A.F., par. 146 et 148.)

[185] Toutefois, je ne saurais accepter que la nécessité d'une « objectivité raisonnable » justifie la conception hiérarchique adoptée par le juge Rothstein à l'égard des aspects quantitatifs et qualitatifs qu'il faut évaluer au regard de la défense fondée sur les gains en efficience. Je ne saurais non plus accepter son affirmation selon laquelle « les aspects qualitatifs joueront un rôle moins important » (par. 146; voir aussi par. 147-148). Je ne vois aucun intérêt à accorder plus de valeur aux gains en efficience quantitatifs qu'aux gains en efficience qualitatifs. Les deux sont pertinents dans l'analyse qu'appelle le critère légal, et leur importance dépend des circonstances de l'espèce.

[186] Le libellé de la loi n'établit aucune distinction de cette nature. De plus, bon nombre des objets prévus à l'art. 1.1 de la Loi peuvent ne pas être quantifiables; par exemple, assurer aux consommateurs des prix et des produits compétitifs, stimuler l'adaptabilité de l'économie canadienne, améliorer les chances de participation canadienne aux marchés étrangers, tenir compte du rôle de la concurrence étrangère au

and ensuring that businesses of all sizes are able to participate fully in the Canadian economy.

[187] These wide-ranging purposes illustrate that important anti-competitive effects of a merger may be qualitative in nature. In some cases, such qualitative effects may be determinative in the s. 96 analysis. Thus, the flexible analytical approach mandated by this provision reflects the wide range of objectives the Act serves. Where the legislation mandates such a purposive analysis, the relative significance of qualitative and quantitative gains or effects can only be determined in the circumstances of each case. It is neither helpful nor necessary to predetermine their relative role and importance in the s. 96 defence.

[188] Justice Rothstein, however, frames the balancing test in s. 96 as a two-step inquiry. First, he says, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the "greater than" prong of the s. 96 inquiry). Second, qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the "offset" prong of the inquiry) (paras. 147-48).

[189] I do not read s. 96 as mandating a two-step framework that separates quantitative and qualitative efficiencies and anti-competitive effects. Such an approach is unnecessarily artificial and not required by the statutory language or context. Presumably Justice Rothstein's "final determination" assesses whether the (quantitative and qualitative) gains in efficiencies will be *greater than*, and will *offset*, the (quantitative and qualitative) anti-competitive effects of the merger. This is precisely what is required by the language of s. 96. The first two steps are superfluous. In any event, the expert Tribunal is best positioned to identify instances where like factors

Canada et assurer aux entreprises de toutes tailles une pleine participation à l'économie canadienne.

[187] Ces objets variés démontrent la possibilité que les effets anticoncurrentiels importants d'un fusionnement soient de nature qualitative. Dans certains cas, ces effets qualitatifs peuvent être déterminants dans l'analyse qu'appelle l'art. 96. Ainsi, la méthode d'analyse souple que commande cette disposition témoigne de la grande variété d'objets que vise la Loi. Lorsque la loi prévoit une telle analyse téléologique, l'importance relative des gains ou effets qualitatifs d'une part et quantitatifs d'autre part ne peut être déterminée qu'au cas par cas. Il n'est ni utile ni nécessaire de déterminer à l'avance le rôle et l'importance de chaque catégorie dans l'analyse visant à décider si la défense fondée sur l'art. 96 s'applique.

[188] Toutefois, le juge Rothstein caractérise la pondération à laquelle il faut procéder au titre de l'art. 96 comme une analyse en deux étapes. Dans un premier temps, affirme-t-il, les gains en efficience quantitatifs du fusionnement sont comparés aux effets anticoncurrentiels quantitatifs (le volet du surpassement de l'analyse qu'appelle l'art. 96). Dans un deuxième temps, les gains en efficience qualitatifs sont mis en balance avec les effets anticoncurrentiels qualitatifs, et la dernière analyse détermine si le total des gains en efficience neutralise le total des effets anticoncurrentiels du fusionnement en cause (le volet de neutralisation de l'analyse) (par. 147-148).

[189] À mon avis, l'art. 96 ne commande pas l'application d'un cadre analytique en deux étapes qui distingue entre les gains en efficience et les effets anticoncurrentiels quantitatifs et qualitatifs. Cette approche est inutilement factice et n'est requise ni par le libellé ni par le contexte de la loi. On peut supposer que la « dernière analyse » que décrit le juge Rothstein consiste à déterminer si les gains en efficience (quantitatifs et qualitatifs) *surpasseront* et *neutraliseront* les effets anticoncurrentiels (quantitatifs et qualitatifs) du fusionnement. C'est précisément ce qu'exige le libellé de l'art. 96. Les deux premières étapes sont superflues. Quoi qu'il en soit,

should be compared, as well as circumstances where this would not be as effective.

[190] The Federal Court of Appeal agreed with the Tribunal's articulation of this aspect of the efficiencies defence test. Writing for the court, Mainville J.A. found that "the offset called for under section 96 . . . requires the Tribunal to balance both quantitative and non-quantitative (i.e. qualitative) gains in efficiency against both the quantitative and non-quantitative (i.e. qualitative) effects of any prevention or lessening of competition" flowing from the merger (para. 146). In the court's view, the analysis is at heart about balancing overall efficiency gains against overall anti-competitive effects, and simply tallying up "mathematical quantifications", while important, cannot provide a complete answer (*ibid.*). Of course, quantification is very important in order to ensure, whenever possible, that proper weight is attributed to any given efficiency or anti-competitive effect.

[191] The Federal Court of Appeal's approach to the s. 96 analysis provides an appropriate level of flexibility, given that efficiencies and anti-competitive effects will not always be easy to measure. For instance, there may be circumstances where a given quantitative factor is closely linked to a qualitative factor. The s. 96 framework enables the expert Tribunal to holistically assess the entirety of the evidence before it, rather than artificially bifurcating the analysis of qualitative and quantitative effects that may, in some cases, more helpfully be analyzed together. Such a test allows the Tribunal to reach an objective and reasonable determination regarding the s. 96 defence by minimizing subjective considerations, but without limiting itself to solely mathematical considerations. This approach provides more flexibility to achieve the purposes of the Act.

[192] Further, I disagree with my colleague that the Tribunal (and in this case the Federal Court of

le Tribunal expert est le mieux placé pour savoir quand il convient ou non de comparer des facteurs de même nature.

[190] La Cour d'appel fédérale a souscrit à l'interprétation par le Tribunal de cet aspect de la défense fondée sur les gains en efficience. S'exprimant au nom de la cour, le juge Mainville a conclu que « la neutralisation exigée par l'article 96 [. . .] oblige le Tribunal à pondérer tant les gains en efficience quantitatifs et les gains en efficience non quantitatifs (c.-à-d. qualitatifs) que les effets quantitatifs et les effets non quantitatifs (c.-à-d. qualitatifs) de tout empêchement ou de toute diminution de la concurrence » découlant du fusionnement (par. 146). Selon la cour, l'analyse porte essentiellement sur la pondération des gains en efficience toutes catégories confondues et des effets anticoncurrentiels toutes catégories confondues, et la réduire simplement à des « calculs mathématiques », aussi importants soient-ils, ne peut fournir une réponse complète (*ibid.*). Bien entendu, la quantification est très importante en ce qui a trait à l'attribution, dans la mesure du possible, d'une valeur suffisante à tout gain en efficience ou à tout effet anticoncurrentiel.

[191] La démarche préconisée par la Cour d'appel fédérale à l'égard de l'analyse qu'appelle l'art. 96 prévoit une certaine souplesse, les gains en efficience et les effets anticoncurrentiels n'étant pas toujours faciles à mesurer. Par exemple, il peut exister des situations où un facteur quantitatif donné est lié de près à un facteur qualitatif. Le cadre applicable à l'art. 96 permet au Tribunal expert d'évaluer globalement la preuve qui lui a été présentée plutôt que de scinder artificiellement l'analyse des effets qualitatifs et des effets quantitatifs. En effet, dans certains cas, il peut être plus utile de les analyser ensemble. En appliquant ce critère, le Tribunal peut rendre une décision objective et raisonnable concernant l'application de la défense fondée sur l'art. 96 en réduisant au minimum les considérations subjectives, sans pour autant la limiter aux calculs mathématiques. Cette approche offre davantage de souplesse dans la réalisation des objets de la Loi.

[192] En outre, je ne souscris pas à l'avis de mon collègue selon lequel le Tribunal (et en l'espèce la

Appeal) is precluded from considering any evidence of a quantifiable anti-competitive effect because the Commissioner of Competition failed to fully quantify it. I agree with the Federal Court of Appeal that while the Commissioner should quantify when possible, the failure to do so does not invalidate the evidence that established there was a known anti-competitive effect of undetermined extent.

[193] The Commissioner bears the onus to prove "that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially" under s. 92. She met that onus in this case. Section 96 is a defence. It is the appellants who must demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects in order for the s. 96 defence to apply. The Commissioner bears the evidentiary burden to lead evidence of the anti-competitive effects of a merger, and bears the risk that the failure to fully quantify such effects where possible may render the evidence insufficient to counter the evidence of efficiency gains.

[194] However, where the expert evidence does not fully provide a quantification of the anti-competitive effects, I do not agree with my colleague that the evidence has no probative value whatsoever and must be ignored. Relevant evidence is generally admissible, and the failure to lead the best evidence available goes to weight, not admissibility. Clearly, the evidence will have less probative value without an estimate or quantification. No doubt it would be more difficult for an undetermined anti-competitive effect to outweigh any significant efficiency gains. However, it does not become irrelevant or inadmissible. The statutory language does not require such a result. Nor does the purpose or context of the legislation.

[195] Although Justice Rothstein recognizes that this exclusionary rule may lead to a "paradoxical"

Cour d'appel fédérale) ne peut tenir compte de tout effet anticoncurrentiel quantifiable parce que la commissaire de la concurrence ne l'a pas entièrement quantifié. Je partage l'avis de la Cour d'appel fédérale selon qui la commissaire devrait procéder, dans la mesure du possible, à une quantification. À l'instar de la cour, j'estime également que la preuve ayant établi qu'il y avait un effet anticoncurrentiel connu d'une valeur indéterminée n'est pas invalidée du fait d'une quantification incomplète.

[193] Il incombe à la commissaire de prouver « qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet » pour l'application de l'art. 92. Elle s'est acquittée de ce fardeau en l'espèce. L'article 96 est un moyen de défense. Pour que la défense s'applique, il incombe aux appelantes de démontrer selon la prépondérance des probabilités que les gains en efficience neutralisent les effets anticoncurrentiels. La commissaire doit présenter des éléments de preuve sur les effets anticoncurrentiels du fusionnement et assume le risque qu'une quantification incomplète des effets quantifiables soit insuffisante pour réfuter la preuve des gains en efficience.

[194] Cependant, je ne partage pas l'avis de mon collègue selon qui, lorsqu'une preuve d'expert ne quantifie pas complètement les effets anticoncurrentiels, cette preuve n'a aucune valeur probante et ne compte pas. La preuve pertinente est généralement admissible, et le défaut de présenter la meilleure preuve possible influe sur le poids qui peut être accordé à cette preuve, non pas sur son admissibilité. De toute évidence, la preuve est moins probante si elle n'est pas fondée sur une estimation ou une quantification. Il ne fait aucun doute qu'un effet anticoncurrentiel indéterminé surpassera difficilement un gain en efficience important. Toutefois, la preuve de cet effet n'en devient pas pour autant non pertinente ou inadmissible. Ce n'est pas ce que prévoit le libellé de la loi, ni par ailleurs son objet ou son contexte.

[195] Certes, le juge Rothstein admet qu'une telle règle d'exclusion risque de mener à un résultat

result in this case, he justifies his restrictive approach on the basis that it promotes objective assessment and discourages subjectivity and speculation (paras. 151 and 166). In my view, such an approach unduly limits the ability of the Tribunal to fulfill its statutory mandate. Section 96 gives the Tribunal the flexibility to meet all the purposes of the Act, including the primary purpose "to maintain and encourage competition in Canada" (s. 1.1). The balancing exercise under s. 96 necessarily requires the Tribunal to use its expert assessment and judgment. It must also provide explicit and transparent reasons for its conclusions.

[196] Obviously, the Tribunal must apply the test in s. 96 to the evidence before it in a way that is fair to the parties. Expert decision makers routinely assess evidence that is not the best evidence available, and they are attuned to when the particular circumstances of the case could result in procedural unfairness.

[197] Here, the Federal Court of Appeal determined that there was some value to the Tribunal's finding that prices would have been 10 percent lower in the Contestable Area in the absence of a merger. While the evidence did not permit a calculation of the deadweight loss in the absence of estimates of market elasticity and the merged entity's own price elasticity of demand, in my view the court was entitled to conclude that this amounted to evidence of a known anti-competitive effect, although its extent was undetermined.

[198] Since it was open to the Federal Court of Appeal to consider the anti-competitive effects in its analysis, it follows that the court was also in a position to accept that Tervita's pre-existing monopoly was likely to magnify the anti-competitive effects of the merger (F.C.A. reasons, at para. 173). Ultimately, the court was entitled to find that the proven efficiency gains were "marginal to the point of being negligible" and did not likely exceed the known (but undetermined) anti-competitive effects (para. 169).

« paradoxal » dans la présente affaire, mais justifie sa démarche restrictive en affirmant qu'elle favorise l'objectivité et décourage la subjectivité et les conjectures (par. 151 et 166). Selon moi, ce serait mettre des bâtons dans les roues au Tribunal dans la réalisation du mandat que lui confère la loi. L'article 96 accorde au Tribunal la souplesse nécessaire pour favoriser la réalisation des objets de la Loi, dont l'objet principal, à savoir « préserver et favoriser la concurrence au Canada » (art. 1.1). L'exercice de pondération qu'exige cette disposition oblige le Tribunal à faire appel à son expertise et à son jugement. Il doit aussi assortir ses conclusions de motifs clairs.

[196] Évidemment, le Tribunal doit appliquer le critère prévu à l'art. 96 à la preuve qui lui a été présentée d'une façon équitable pour les parties. Les décideurs experts ont souvent à évaluer une preuve qui n'est pas la meilleure possible; ils peuvent détecter les cas où les circonstances particulières risquent de se traduire par un manque d'équité procédurale.

[197] En l'espèce, la Cour d'appel fédérale a accordé du poids à la conclusion du Tribunal selon laquelle les prix auraient sans doute été inférieurs de 10 p. 100 dans la zone contestable, n'eût été le fusionnement. Bien que la preuve n'ait pas permis de calculer la perte sèche sans une estimation de l'élasticité du marché et sans données sur l'élasticité de la demande par rapport au prix à l'égard de l'entité fusionnée, à mon sens, la cour pouvait conclure à la preuve d'un effet anticoncurrentiel connu, mais d'une valeur indéterminée.

[198] Puisqu'il était loisible à la Cour d'appel fédérale de tenir compte des effets anticoncurrentiels dans son analyse, elle pouvait également juger que le monopole préexistant de Tervita aurait vraisemblablement pour effet d'amplifier les effets anticoncurrentiels du fusionnement (motifs de la C.A.F., par. 173). Finalement, la cour pouvait conclure à bon droit que les gains en efficience établis étaient « minimes au point d'être négligeables » et n'excédaient vraisemblablement pas les effets anticoncurrentiels connus (mais indéterminés) (par. 169).

[199] As noted above, the overall analysis under s. 96 must be as objective and reasonable as possible. Effects that can be quantified should be quantified. However, within this framework, negligible gains in efficiency will not necessarily outweigh and offset known anti-competitive effects, even if they are assigned an "undetermined" weight. This approach is in keeping with past jurisprudence of the Tribunal: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417, at paras. 171-72. Such an approach also accurately reflects the primary purpose of the Act, which is "to maintain and encourage competition in Canada" (s. 1.1).

[200] The Federal Court of Appeal was accordingly entitled to conclude that the s. 96 efficiencies defence was not available. I would dismiss the appeal, and award costs to the respondent.

[199] Comme je l'ai déjà dit, l'analyse globale qu'appelle l'art. 96 doit être aussi objective et raisonnable que possible. Les effets qui peuvent être quantifiés devraient l'être. Toutefois, dans ce contexte, les gains en efficience négligeables ne surpasseront pas et ne neutraliseront pas forcément les effets anticoncurrentiels connus, même si on leur accorde une valeur « indéterminée ». Ce raisonnement est dans le droit fil de la jurisprudence antérieure du Tribunal (*Commissaire de la concurrence c. Supérieur Propane Inc.*, 2002 Trib. conc. 16 (en ligne), par. 171-172). De plus, ce raisonnement est tout à fait conforme à l'objet principal de la Loi, qui est « de préserver et de favoriser la concurrence au Canada » (art. 1.1).

[200] Par conséquent, c'est à bon droit que la Cour d'appel fédérale a conclu que la défense fondée sur les gains en efficience prévue par l'art. 96 n'était pas applicable. Je suis d'avis de rejeter le pourvoi et d'adjuger les dépens à l'intimé.

APPENDIX

Competition Act, R.S.C. 1985, c. C-34

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

ANNEXE

Loi sur la concurrence, L.R.C. 1985, c. C-34

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anticoncurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

. . .

92. (1) 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

(*a*) in a trade, industry or profession,

(*b*) among the sources from which a trade, industry or profession obtains a product,

(*c*) among the outlets through which a trade, industry or profession disposes of a product, or

(*d*) otherwise than as described in paragraphs (*a*) to (*c*),

the Tribunal may, subject to sections 94 to 96,

(*e*) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(*f*) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

. . .

92. (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

a) dans un commerce, une industrie ou une profession;

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;

d) autrement que selon ce qui est prévu aux alinéas *a*) à *c*),

le Tribunal peut, sous réserve des articles 94 à 96 :

e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) de le dissoudre, conformément à ses directives,

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

93. In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

(*a*) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

(*b*) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(*c*) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(*d*) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(*e*) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

93. Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

(*f*) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(*g*) the nature and extent of change and innovation in a relevant market; and

(*h*) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Appeal allowed with costs, KARAKATSANIS J. *dissenting.*

Solicitors for the appellants: Torys, Toronto.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

Pourvoi accueilli avec dépens, la juge KARAKATSANIS *est dissidente.*

Procureurs des appelantes : Torys, Toronto.

Procureur de l'intimé : Procureur général du Canada, Ottawa.

PUBLIC

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2005 Comp. Trib. 2
File no.: CT2002004
Registry document no.: 0158b

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(*b*)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

Sears Canada Inc.
(respondent)

Dates of hearing: 20031020 to 20031024, 20031027 to 20031031, 20031103 to 20031107, 20031112 to 20031114, 20040116, 20040119 to 20040122, 20040202 to 20040203, 20040628 to 20040629, 20040819 to 20040820
Final written submissions filed: September 10, 2004; September 24, 2004 and October 1, 2004
Judicial Member: Dawson J. (presiding)
Date of Reasons: January 11, 2005

REASONS FOR ORDER

I. INTRODUCTION

[1] The Commissioner of Competition ("Commissioner") alleges that, during three sales events held in November and December of 1999, Sears Canada Inc. ("Sears") employed deceptive marketing practices in connection with price representations Sears made concerning five kinds, or lines, of all-season tires that Sears promoted and sold to the public. The Commissioner asserts that this constituted reviewable conduct contrary to subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act").

[2] Specifically at issue are representations made in advertisements about the regular selling price of the five lines of tires. The advertisements contained "save" and "percentage off" statements. For example, Sears advertised "Save 45% Our lowest prices of the year on Response RST Touring '2000' tires", and advertised comparisons between Sears' regular prices and its sale prices. The Commissioner asserts that the prices referred to by Sears as being its regular prices were inflated because: i) Sears did not sell a substantial volume of these tires at the regular price featured in the advertisements within a reasonable period of time before making the representations; and, ii) Sears did not offer these tires in good faith at the regular price featured in the advertisements for a substantial period of time recently before making the representations.

[3] The Commissioner states that Sears did not offer the tires at its regular prices in good faith because Sears had no expectation that it would sell a substantial volume of the tires at its regular prices, and because Sears' regular prices for the tires were not comparable to, and were much higher than, the regular prices for comparable tires offered by Sears competitors. The Commissioner says that the regular prices were set by Sears at inflated levels with the ulterior motive of attracting customers and generating sales by creating the impression that, when promoted as being "on sale", the tires represented a greater value than was really the case.

[4] The remedies sought by the Commissioner include an order prohibiting such reviewable conduct for a period of 10 years, the publication of corrective notices, and the payment of an administrative monetary penalty in the amount of $500,000.00.

[5] Sears contests the Commissioner's application with vigour. Sears asserts that the representations contained in its advertisements with respect to its regular or ordinary selling prices were not misleading in any, or in any material, respect. Sears says that the regular prices referred to in the advertisements were reasonably comparable to the prices being offered by many, if not most, of the principal tire retail outlets in each individual trade area where Sears competed. As well, Sears argues that the remedies sought by the Commissioner are unavailable at law and inappropriate. Finally, Sears says that subsection 74.01(3) of the Act is an unjustifiable infringement of Sears' fundamental freedom of commercial expression guaranteed by subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* ("Charter"). Sears seeks a determination that subsection 74.01(3) of the Act is inconsistent with the Charter and, therefore, of no force or effect.

[6] The Commissioner has conceded that subsection 74.01(3) of the Act ("impugned legislation") infringes Sears' constitutionally guaranteed right of commercial speech. The Commissioner submits, however, that this infringement is justified under section 1 of the Charter as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

[7] These reasons are lengthy. In them I find that: (i) subsection 74.01(3) of the Act is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society; (ii) Sears conceded that it failed to comply with the volume test ; (iii) Sears' regular prices for the Tires were not offered in good faith as required by the time test; (iv) Sears did not meet the frequency requirement of the time test for 4 of the 5 lines of tires; (v) Sears failed to establish that its OSP representations were not false or misleading in a material respect; (vi) a prohibition order should issue; and (vii) no order should issue requiring publication of a corrective notice. The issues of payment of an administrative monetary penalty and costs are reserved pending further submissions. The following is an index of the headings and sub-headings pursuant to which these reasons are organized, and the paragraph numbers where each section begins.

Index

II. BACKGROUND FACTS

[8] The parties agree that Sears is one of Canada's largest and most trusted retailers. It sells

general merchandise to the public through various business channels, including retail outlets located across Canada. In 1999, Sears supplied 28 lines of tires to the public through 67 Retail Automotive Centres located across Canada.

(i) The Tires

[9] At issue are the following five tire lines (together the "Tires"):

i) RoadHandler "T" Plus (manufactured by Michelin)

ii) BF Goodrich Plus (manufactured by BF Goodrich)

iii) Weatherwise R H Sport (manufactured by Michelin)

iv) Response RST Touring '2000' (manufactured by Cooper)

v) Silverguard Ultra IV (manufactured by Bridgestone)

[10] The Tires are all-season passenger tires. Together they represented approximately **[CONFIDENTIAL]** % of the all-season passenger tire sold by Sears in 1999 and about **[CONFIDENTIAL]** % of the passenger vehicle tires sold by Sears in 1999. In dollar terms, the Tires represented approximately **[CONFIDENTIAL]** % of the total sales generated by Sears with respect to the sale of all of its tires. No other retailer in Canada promoted the Tires or supplied the Tires to the public in 1999. Each line was exclusive to Sears.

(ii) Sears' pricing strategy

[11] Sears is an "off-price" (also called a "high-low") retailer, which means that Sears relies on discounting and promotions to build in-store traffic and generate sales. An off-price or high-low retailer typically charges a higher "regular" price for its merchandise and then, from time to time, offers merchandise "on-sale" at event-driven discount sales.

[12] During 1999, Sears offered the Tires for sale at the following four price points:

a) Sears' "regular" price was the price of a single unit of any Tire offered by Sears, when that particular tire was not promoted as being "on sale". This was the price used as the reference price in advertisements when the Tires were promoted as being "on sale" by Sears.

b) Sears' "2For" price was the price at which Sears would sell two or more of a given tire to consumers when that tire was not being offered at a "sale" price. In 1999, Sears' "2For" price for a given tire was always lower than its regular price for a single unit. Sears did not use its "2For" price as a reference price in any of the sales representations at issue

and did not advertise its "2For" price when promoting retail sales. The "2For" price came into effect when a customer bought more than one tire and the customer was only informed of the discount on a purchase of multiple tires by the sales associate at the store.

c) Sears' "normal promotional" price was the usual sale price advertised by Sears, which was a set percentage off the "regular" price for each tire. The amount of the discount depended on the line of tire. When "normal promotional" prices were advertised in 1999, they were always compared to the "regular" price for the relevant tire, and not to the "2For" price. These discounts were referred to by Sears as "Save Stories".

d) Sears' "Great Item", "Big News", "Lowest Prices of the Year" or other similar expressions refer to a further discounted promotional price where the discount consumers received was greater than the discount obtained with the "normal promotional" price. When "Great Item" style promotional prices were advertised in 1999, they were always compared to the "regular" price for a single relevant tire and not the "2For" price.

[13] The following illustrates the relationship between the four price levels. For the Response RST Touring '2000' tire (size P215/70R14), Sears' pricing in 1999 was as follows:

i) Regular (single unit) price - $133.99;

ii) 2For price - $87.99 (each);

iii) Normal promotional price - $79.99 (each, representing a 40 % discount off the regular single unit price);

iv) Great Item price - $72.99 (each, representing a 45 % discount off the regular single unit price).

[14] Sears' regular single unit prices for tires in 1999 were set in the Fall of 1998 and were not altered in 1999. Sears' 2For, normal promotional, and Great Item prices were also set in the Fall of 1998 and those prices remained largely unchanged in 1999. As a general rule, Sears' prices were set nationally so that the Tires sold for the same price at each Sears Retail Automotive Centre.

(iii) The promotion of the Tires

[15] Throughout 1999, Sears advertised the Tires through various media, including flyers (or "pre-prints"), newspapers, in-store leaflets, and corporate-wide, national events, which were advertised in various newspapers across Canada. Sears' advertisements contained representations of the price at which the Tires were ordinarily sold by Sears, compared with the sale prices on the Tires being promoted. The advertisements were placed in newspapers published across the country including, for example, the Vancouver Sun, the Montreal Gazette and the Calgary Sun.

[16] This application puts in issue the ordinary selling price representations made during three different national sales events in 1999, the first in effect between November 8 and November 14, the second in effect between November 22 and November 28, and the final event in effect on December 18 and 19.

[17] For the first sales event, Sears distributed nationally a flyer entitled "SEARS Shop Wish and Win" that advertised sale prices on the Response RST Touring '2000' and the Michelin RoadHandler "T" Plus tires. The following is an example of the advertisement found in the flyer promoting the sale:

> **MICHELIN®**
>
> **RoadHandler T Plus Tires**
>
> | **Size** | **Sears reg.** | **Sale, each** |
> |---|---|---|
> | P175/70R13 | 153.99 | 91.99 |
> | P185/70R14 | 168.99 | 99.99 |
> | P205/70R14 | 190.99 | 113.99 |
> | P205/70R15 | 203.99 | 121.99 |
> | P185/65R14 | 179.99 | 107.99 |
> | P195/65R15 | 188.99 | 112.99 |
> | P205/65R15 | 199.99 | 119.99 |
> | P225/60R16 | 219.99 | 131.99 |
>
> Other sizes also on sale
>
> **save 40%**
> **ALL MICHELIN ALL-SEASON PASSENGER TIRES**
> Shown: RoadHandler® T Plus tire is made for Sears by Michelin.
> Backed by a 6-year unlimited mileage Tread Wearout Warranty;
> details in store. #51000 series

[18] In support of the first sales event, Sears also published newspaper advertisements promoting the Michelin RoadHandler "T" Plus and/or the Response RST Touring '2000' in a number of large circulation newspapers across the country (including, for example, the Vancouver Sun and the Montreal Gazette). These newspaper advertisements were 5.625" x 9.625" in size or larger.

[19] The second sales event ran between November 22 and November 28, 1999. The event promoted a sale on Silverguard Ultra IV tires which was advertised in a weekly flyer, in newspaper advertisements and in leaflets distributed in-store at all Sears Retail Automotive Centres. The weekly flyer contained the following advertisement:

Silverguard Ultra IV Tires

Size	Sears reg.	Sale, each
P185/75R14	109.99	54.99
P195/75R14	116.99	58.49
P235/75R15XL	149.99	74.49
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99
P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Other sizes also on sale

½ PRICE

SILVERGUARD 'ULTRA IV' ALL-SEASON TIRES

Made for Sears by Bridgestone and backed by a 110,000 km Tread Wearout Warranty: details in store. #68000 ser. From **45**[**49**] each. P155/80R13. Sears reg. 90.99

[20] The third sales event was held on December 18 and 19, 1999. The BF Goodrich Plus and Weatherwise tires were promoted during this event. The event was advertised in a weekend flyer which was distributed nationally. The BF Goodrich Plus tire was advertised as "save 25%" while the flyer described the Weatherwise tire price as "save 40%".

(iv) Tire sales

[21] The parties agree that the following table represents the sales numbers and percentages of the Tires sold at Sears' regular selling price in the 12 month period preceding the relevant regular selling price representations:

Table 1: Summary of Sales volumes

		1	2	3	4	5
Line	Time-frame	Total number of the Tires sold by Sears in the year before the relevant Representation	Tires sold as "singles", that is, not as a part of a bundle of two or more	Percentage of the total number of Tires sold, which were sold singly (col. 2 as a % of col. 1)	Of all singles sold, the number sold at the Regular, Single Unit Selling Price	Percentage of the total Tires sold at the Regular, Single Unit Selling Price (col. 4 as a % of col. 1)
BF Goodrich Plus	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	6.53%	**[CONFIDENTIAL]**	**2.29%**
Michelin Roadhandler 'T' Plus	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.84%	**[CONFIDENTIAL]**	**1.30%**
Michelin Weatherwise RH Sport	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.81%	**[CONFIDENTIAL]**	**0.82%**
Response RST Touring 2000	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	2.19%	**[CONFIDENTIAL]**	**0.51%**
Silverguard Ultra IV	11/22/98 - 11/22/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.22%	**[CONFIDENTIAL]**	**1.21%**
Totals		**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	4.03%	**[CONFIDENTIAL]**	**1.28%**

[22] The following two tables show the number of days that the Tires were offered by Sears at

Sears' regular price, compared to the number of days the Tires were offered at a price below Sears' regular price. The first table reflects the six month period that preceded the representations, the second table reflects the prior twelve month period.

Table 2: Summary of Time Analysis
(For the Six Month Period Preceding the Relevant Representations)

	BF Goodrich Plus	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring '2000'	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 6 month period	June 18 to Dec. 17, 1999	May 9 to Nov.7, 1999	June 18 to Dec. 17, 1999	May 9 to Nov. 7, 1999	May 23 to Nov. 21, 1999
Total of Days	183	183	183	183	183
Number of days at reduced prices	100	113	148	99	73
% of days at reduced prices	**55%**	**62%**	**81%**	**54%* or 50.35%**	**40%**
Number of days at Regular Prices	83	70	35	84	110
% of Time at Regular Prices	**45%**	**38%**	**19%**	**46%* or 49.65%**	**60%**

* Sears argues that the correct figures are the second ones shown with respect to the Response RST Touring '2000'.

Table 3: Summary of Time Analysis
(For the Twelve Month Period Preceding the Relevant Representations)

	BF Goodrich	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring 2000	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 12 month period	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov.7, 1999	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov. 7, 1999	Nov. 23, 1998 to Nov. 21, 1999
Total of Days	365	365	365	365	365
Number of days at reduced prices	181	246	283	121	184
% of days at reduced prices	**49.59%**	**67.40%**	**77.53%**	**33.15%**	**50.41%**
Number of days at Regular Prices	184	119	82	244	181
% of Time at Regular Prices	**50.41%**	**32.60%**	**22.47%**	**66.85%**	**49.59%**

III. THE APPLICABLE LEGISLATION

[23] Subsection 74.01(3) of the Act is found in Part VII.1 of the Act which is entitled "Deceptive Marketing Practices". Part VII.1 of the Act permits the Commissioner to pursue administrative remedies, rather than criminal prosecution, in relation to deceptive marketing practices including misleading advertising.

[24] Under section 74.01 of the Act, a person engages in reviewable conduct where the person, for the purpose of promoting any product or business interest, makes a representation to the public that is false or misleading in a material respect. The general impression conveyed by a representation as well as its literal meaning is to be taken into account when determining whether or not the representation is false or misleading in a material respect.

[25] Subsection 74.01(3) of the Act deals with misleading representations with respect to a seller's own ordinary selling price. Subsection 74.01(3) reads as follows:

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or	74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit,

indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

[26] An ordinary selling price (“OSP”) representation will not constitute reviewable conduct under subsection 74.01(3) if either one of the following tests is satisfied:

(a) a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation (“volume test”); or

(b) the product was offered for sale, in good faith, at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation (“time test”).

In the present case, the period of time to be considered is the period before the making of the representations at issue because the representations relate to the price at which the Tires were previously sold (subsection 74.01(4) of the Act).

[27] The requirement that any false or misleading representation must be material is found in subsection 74.01(5) of the Act which provides:

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[28] The remedies available for a breach of subsection 74.01(3) of the Act are prescribed in section 74.1 of the Act. Subsection 74.1(1) provides that a court (defined to include the

Competition Tribunal ("Tribunal")) may, where it has determined that a person has engaged in reviewable conduct, order the person:

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish a corrective notice describing the reviewable conduct; and

(c) to pay an administrative monetary penalty.

[29] No order requiring the publication of a corrective notice or the payment of an administrative monetary penalty may be made where the person in question establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3) of the Act).

[30] Sections 74.01, 74.09 and 74.1 are set out in their entirety in the appendix to these reasons.

IV. THE CONSTITUTIONAL CHALLENGE

[31] As noted above, Sears alleges, and the Commissioner concedes, that subsection 74.01(3) of the Act infringes Sears' fundamental right of freedom of expression guaranteed under subsection 2(*b*) of the Charter. In my view, this is an appropriate concession.

[32] The Supreme Court of Canada has held with respect to the analysis of freedom of expression and its infringement that:

(i) The first step is to discover whether the activity which the affected entity wishes to pursue properly falls within "freedom of expression". Activity is expressive, and protected, if it attempts to convey meaning. If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the Charter guarantee (unless meaning is conveyed through a violent form of expression).

(ii) The second step in the inquiry is to determine whether the purpose or effect of the government action in question is to restrict freedom of expression.

See: *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, particularly at pages 967-979.

[33] Applying this analysis, the Supreme Court has previously held that prohibitions against engaging in commercial expression by advertising infringe subsection 2(*b*) of the Charter. See: *RJR Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 at paragraph 58.

[34] In the present case, Sears' OSP representations convey or attempt to convey meaning.

Those representations therefore have expressive content so as to fall, *prima facie*, within the sphere of conduct protected by subsection 2(*b*) of the Charter. The purpose of subsection 74.01(3) of the Act is to restrict or control attempts by Sears and others to convey a meaning by proscribing reviewable conduct and by imposing restrictions and controls in relation to OSP representations.

[35] It follows, as the Commissioner has conceded, that the impugned legislation limits the freedom of expression guaranteed to Sears by subsection 2(*b*) of the Charter. The next inquiry therefore becomes whether the impugned legislation is justified under section 1 of the Charter.

(i) Applicable principles of law

[36] To be justified under section 1 of the Charter, a limit on freedom of expression must be "prescribed by law". A limit is not prescribed by law within section 1 if it does not provide "an adequate basis for legal debate". See: *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606 at page 639. The onus of establishing that a limit is prescribed by law is on the state actor who claims that the limit is justified.

[37] The assessment of whether a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society is to be conducted in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Oakes,* [1986] 1 S.C.R. 103. There are two central criteria to be met:

1. The objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. To be characterized as sufficiently important, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

2. Assuming that a sufficiently important objective is established, the means chosen to achieve the objective must pass a proportionality test. To do so, the means must:

    a. Be rationally connected to the objective. This requires that the means chosen promote the asserted objective. The means must not be arbitrary, unfair or based on irrational considerations.

    b. Impair the right or freedom in question as little as possible. This requires that the measure goes no further than reasonably necessary in order to achieve the objective.

    c. Be such that the effects of the measure on the limitation of rights and freedoms are proportional to the objective. This requires that the overall benefits of the measure must outweigh the measure's

negative impact.

See also: *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519.

[38] Relevant considerations when conducting the analysis articulated in *Oakes, supra* are that:

1. The onus of proving that a limit on a right or freedom protected by the Charter is reasonable and demonstrably justified is borne by the party seeking to uphold the limitation. See: *Oakes* at page 137.

2. The standard of proof is the civil standard. Where evidence is required in order to prove the constituent elements of the section 1 analysis, the test for the existence of a balance of probabilities must be applied rigorously, recognizing, however, that within the civil standard of proof there exist different degrees of probability depending upon the case. See: *Oakes* at page 137.

3. The analysis taught in *Oakes* is not to be applied in a rigid or mechanical fashion. It is to be applied flexibly. See: *RJR Macdonald, supra,* at paragraph 63.

4. The analysis must be undertaken with close attention to the contextual factors. This is because the objective of the impugned measure can only be established by canvassing the nature of the problem it addresses, and the proportionality of the means used can only be evaluated in the context of the entire factual setting. See: *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877 at paragraph 87.

5. The context will also impact upon the nature of the proof required to justify the measure. While some matters are capable of empirical proof, others (for example, matters involving philosophical or social considerations) are not. In those latter cases, "it is sufficient to satisfy the reasonable person looking at all of the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has". Common sense and inferential reasoning may be applied to supplement the evidence. See: *Sauvé, supra,* at paragraph 18.

6. With respect to the minimal impairment test, where a legislative provision is challenged, the Supreme Court of Canada has held that Parliament need not choose the absolutely least intrusive means to attain its objectives, but rather must come within a range of means which impair guaranteed rights as little as reasonably possible.

(ii) A limit prescribed by law

[39] Turning to the application of these principles to the evidence which is before the Tribunal, I begin by considering whether the impugned legislation is a limit prescribed by law.

[40] Sears argues that the words used in subsection 74.01(3) of the Act are: i) excessively vague, uncertain and imprecise; ii) subject to unintelligible standards; and iii) subject to arbitrary application by the Commissioner. Particular reliance is placed on the fact that the Act provides no definition of the terms "substantial volume", "reasonable period of time", "substantial period of time" or "recently", which are all used in the impugned legislation. While subsection 74.01(3) provides that the nature of the product and the relevant geographic market are factors to be considered in determining whether a person engages in reviewable conduct, Sears argues that the Act does not define these factors, nor does the Act provide any assistance or direction as to what weight should be given to each of these factors, nor is guidance offered about how these factors affect the determination of whether a person has complied with the volume and time tests. In the result, Sears submits that it is not possible for the Tribunal to determine Parliament's intent by interpreting the words at issue using the ordinary tools of statutory interpretation.

[41] With respect to the Information Bulletin entitled "Ordinary Price Claims", published by the Commissioner to outline her approach to the enforcement of the ordinary price claims provisions of the Act ("Guidelines"), Sears states that, as non-legal and non-binding administrative guidelines, they may be amended or replaced at will by the Commissioner. As such, they are not criteria prescribed by law which can justify any limitation on expression. Indeed, Sears says that the existence and purpose of the Guidelines support Sears' contention that the impugned legislation is unconstitutionally vague and reflect the fact that subsection 74.01(3), standing alone, provides insufficient guidance.

[42] In short, Sears says that what is in issue is clarity; how much clarity should a statutory provision have and at what stage in the life of a statutory provision should clarity be evident?

[43] Two decisions of the Supreme Court of Canada provide significant assistance in dealing with Sears' submissions.

[44] In *Irwin Toy, supra,* at page 983, Chief Justice Dickson, writing for the majority, observed that absolute precision in the law exists rarely, "if at all". He said that the question to be asked is whether the legislation at issue provides an "intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies". However, where there is "no intelligible standard" and a "plenary discretion" has been given to do what "seems best", there is no limit prescribed by law.

[45] Subsequently, in *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court reviewed its jurisprudence on this point and, at pages 626 and 627, Mr. Justice Gonthier, for the

Court, set out the following propositions with respect to vagueness and its relevance to the Charter:

1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler, Irwin Toy* and the *Prostitution Reference*).

2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference* and *Committee for the Commonwealth of Canada*).

3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler, Irwin Toy, Prostitution Reference, Taylor* and *Osborne*).

4. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations (*Prostitution Reference* and *Committee for the Commonwealth of Canada*). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of over breadth (*Committee for the Commonwealth of Canada* and *Osborne*).

5. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 *in limine*, and will rather consider the scope of the disposition under the "minimal impairment" test (*Taylor* and *Osborne*).

[46] Justice Gonthier went on to confirm that the threshold for finding a law to be so vague that it does not qualify as a "law" is relatively high.

[47] With respect to the principles of fair notice to citizens and limitation of enforcement discretion referred to above at point 2, Justice Gonthier observed that fair notice comprises an understanding that certain conduct is the subject of legal restrictions (pages 633-635) and that limitation of enforcement discretion requires that a law must not be so devoid of precision that a conviction automatically follows from a decision to prosecute (pages 635-636).

[48] The Court concluded its comments about vagueness in the following terms at pages 638-640:

> Legal rules only provide a framework, a guide as to how one may behave, but certainty is

> only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.
>
> Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times, supra*, and especially the case of *Silver and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone, supra*, at pp.32-33.
>
> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law. [underlining added]

[49] With that direction, I now consider whether subsection 74.01(3) of the Act gives sufficient guidance for legal debate, bearing in mind the caution of the Supreme Court that a relatively high standard must be applied in order to find legislation to be impermissibly vague, and the stated reluctance of the Supreme Court to find a provision so vague as not to qualify as a "law". Rather, the Court will consider vagueness as it relates to minimal impairment and over breadth.

[50] As noted above, the main challenge to subsection 74.01(3) is based on the use of the undefined terms "substantial volume", "reasonable period of time", "substantial period of time" and "recently". While these terms are not defined in the Act, and they defy precise measurement, they are terms of common usage with a commonly understood meaning. The word "substantial" has been held in another context under the Act to carry its ordinary meaning so as to mean something more than just *de minimus*. (See: *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Tribunal); aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.)). As the Commissioner argues, there is no reason to conclude that the

Tribunal is not equally capable of interpreting and applying the meaning of "substantial" in the context of subsection 74.01.(3). The word "reasonable" is widely used in Canadian statutes and has an understood meaning at common law. Similarly, the word "recently" has, in the words of Mr. Justice Muldoon in *74712 Alberta Ltd. v. Canada (Minister of National Revenue)* (1994), 78 F.T.R. 259 at paragraph 12 "an inherently present tense connotation". It is defined in the Oxford English Dictionary to mean "at a recent date; not long before or ago; lately, newly". Thus, the terms about which Sears complains do carry commonly understood meanings.

[51] Further, the interpretation of subsection 74.01(3) is not constrained by a semantic inquiry into the meaning of each word used. In *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court considered whether paragraph 32(1)*(c)* of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (predecessor legislation to the Act) was a limit prescribed by law. That provision prohibited agreements to "prevent, or lessen, unduly, competition". The unanimous Court noted, at pages 647-648, that the interpretation of the provision was conditioned by the purposes of the legislation, by the rest of the section and the mode of inquiry adopted by the courts which had considered this provision.

[52] In the present case, the purpose of the impugned legislation is to prohibit deceptive ordinary price representations. This is a purpose within the general purpose of the Act. That general purpose, as stated in section 1.1 of the Act, is "to maintain and encourage competition in Canada" in order, among other things, "to provide consumers with competitive prices and product choices". Those policy objectives contribute to an understanding of whether, under the impugned legislation, a price qualifies as a legitimate OSP price.

[53] Subsection 74.01(3) also specifies two factors to be considered when applying the volume and time tests. Those factors are the nature of the product and the relevant geographic market. By providing factors which must be considered in applying the volume and time tests, the legislation provides further indication as to how the discretion it gives is to be exercised. Those two factors also provide needed flexibility. For example, the seasonal or perishable nature of a product may well require that a shorter time or smaller volume test be applied. Those factors ensure that the discretion contained in the impugned legislation is not unfettered with respect to application of the time and volume test.

[54] While Sears argues that neither the term "nature of the product" nor the term "relevant geographic market" are defined, and no guidance is given as to their application, it is my view that neither term could be defined too precisely because their meanings could vary depending upon the particular circumstances. I am confident, in the context of determining the reasonableness of an OSP representation, that the regard to be given to the nature of the product and the relevant geographic market contributes significantly to the adequacy of the basis for legal debate. It should be remembered that both the nature of a product and a geographic market are concepts which are commonly explored in the application of the Act.

[55] It follows, in my view, that the words used in the impugned legislation, when considered

in the context of the purpose of the impugned legislation and the purpose of the Act, are sufficiently precise as to constitute a limit prescribed by law. The Act provides a framework and an intelligible standard for legal debate and judicial interpretation. It does this by setting out, to paraphrase the words of the Supreme Court in *Nova Scotia Pharmaceutical Society*, *supra*, boundaries of permissible and non-permissible conduct which allow for discussion of their actualization. The boundaries limit enforcement discretion and sufficiently delineate an area of risk so as to give notice to potentially affected citizens. While providing a standard for legal debate, the legislation also provides flexibility in order to deal with the variety of circumstances which may arise (eg. seasonal goods, perishable goods) and evolving market practices.

[56] Confirmatory evidence that the impugned legislation provides an intelligible standard is, in my view, found in the "Report of the Consultative Panel on Amendments to the *Competition Act*" ("Consultative Panel") and in the legislation from other jurisdictions, put in evidence before the Tribunal.

[57] On June 28, 1995, the Minister of Industry announced the start of public consultations aimed at updating the *Competition Act*. As part of the consultation process, the Competition Bureau released a discussion paper which sought comments from interested parties on a number of potential amendments to the Act. Comment was specifically requested on misleading advertising and deceptive marketing practices, including the appropriate definition of an OSP for the purpose of assessing representations. A Consultative Panel, composed of eminent Canadian competition lawyers and academics, as well as representatives of Canadian consumer and retail associations, was established to review responses to the discussion paper. The recommendations of the Consultative Panel were set out in its report released on March 6, 1996 ("report").

[58] The report acknowledged that regular or ordinary price claims are common in the marketplace and that they can be a powerful and legitimate marketing tool because many consumers are attracted to promotions that promise a saving from the ordinary or regular price of a product. The Consultative Panel noted that the then current legislation prohibited materially misleading representations, but that most of those who commented on the discussion paper felt that the volume test applied by the Competition Bureau and the Attorney General under the existing legislation did not adequately reflect the reality of the marketplace. The Consultative Panel summarized the result of the public consultations on this point as follows at page 25 of its report:

> Some [commentators] asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.
>
> However, those supporting a time test generally were concerned that the offered price be *bona fide*. They believe a retailer should be required to demonstrate that it made *bona fide* efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a

> product.
>
> Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

[59] After discussion and consideration of several alternative proposals, the Consultative Panel concluded that revised legislative provisions "should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty". In its report, the Consultative Panel went on to say at page 26:

> Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.
>
> Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.
>
> [...]
>
> The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included "substantial volume", "good faith", "like products", "substantial time", "nature of the product" and "relevant market". Some Panel members cautioned against defining these terms too precisely, since their meanings could vary depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms. [underlining added]

[60] The following model provision was recommended by the Consultative Panel at page 28 of its report:

> (ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:
>
> > (A) recently sold a substantial volume of the product, or
> >
> > (B) recently offered the product for sale in good faith for a substantial period of time prior to the sale. [underlining added]

The model provided that, in making a determination under this test, regard should be had to the nature of the product and the relevant market.

[61] In the view of the expert Consultative Panel, salient terms, including the terms about which Sears now complains, could not be defined too precisely because their meaning could vary depending on the circumstances of each case. Clearly, the Consultative Panel was of the view

that the use of terms such as “recently”, “substantial volume”, and “substantial period of time” provided an intelligible standard for the exercise of discretion. It was the consensus of the Consultative Panel that existing and future jurisprudence could provide sufficient guidance regarding the meaning of the terms used. I take this to be recognition of: i) the need for flexibility and the interpretive role of the courts; and, ii) the impossibility of achieving absolute certainty. These are the factors to be considered in determining whether a law is too vague (*Nova Scotia Pharmaceutical Society*, *supra* at pages 626-627).

[62] With respect to comparable legislation from other jurisdictions, Sears called Mr. Stephen Mahinka, as an expert witness. Mr. Mahinka is a lawyer who is a partner in the law firm of Morgan, Lewis & Bockius LLP. There he manages the Antitrust Practice Group of the Washington, D.C. office. Mr. Mahinka has 28 years of experience advising clients with respect to pricing, marketing, advertising and consumer protection matters involving the U.S. Federal Trade Commission. He has advised clients regarding compliance with price comparison requirements under U.S. and state laws. He has defended clients whose pricing and advertising activities have been under investigation and he has acted as counsel in litigation asserting violations of state comparative pricing requirements. As well, he has published in the order of 60 articles concerning U.S. antitrust law and consumer protection issues.

[63] Over the Commissioner’s objection, the Tribunal ruled that Mr. Mahinka was qualified to opine upon comparative price advertising, consumer protection and antitrust law at the state level. The Tribunal also concluded that he was qualified to opine on U.S. federal comparative price advertising, consumer protection and antitrust law. The Commissioner conceded Mr. Mahinka’s expertise within the federal sphere.

[64] Mr. Mahinka testified as to his review of U.S. federal and state laws relating to the advertising of comparison prices. Included in his testimony was evidence that a number of U.S. jurisdictions have enacted legislation that contains broad general terms. For example, Florida’s Deceptive and Unfair Trade Practices Law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mr. Mahinka testified that regulations implementing these provisions were “repealed on the basis that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute”.

[65] New York’s General Business Law makes false advertising in the conduct of any business unlawful. “False advertising” is defined as advertising that is misleading in a material respect.

[66] Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a “substantial number of sales” were made in the “recent regular course of business”; (2) the former price was the price at which such goods or services or “substantially similar” goods or services were openly and actively offered for sale for a “reasonably substantial period of time” in the “recent regular course of business” honestly, in good faith and not for the

purpose of establishing a fictitious higher price on which a deceptive comparison might be based; (3) the former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services in the recent, regular course of business; or (4) the date on which "substantial sales" were made or the goods were openly and actively offered for sale is advertised in a clear and conspicuous manner. Mr. Mahinka testified that the term "substantial sales" is further defined in Virginia's statute as "a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison in the supplier's trade area" but that the other terms used are not further defined.

[67] I find this evidence to confirm that other legislators have recognized the need for flexibility in regulating deceptive trade practices in general and OSP representations in particular. This less specific legislation establishes general boundaries of non-permissible conduct which is adequate for enforcement purposes. The existence of such general legislation in my view supports the view that the impugned legislation is capable of adequately giving rise to legal debate.

[68] It is true that Mr. Mahinka's evidence included examples of very specific state legislation. However, the fact that some legislation attaches consequences to more precisely-defined acts does not lead to the conclusion that more general provisions are not capable of constituting a limit prescribed by law.

[69] In rejecting Sears' position that the legislation is not a limit prescribed by law, I have also considered its submission based on the existence of the Guidelines. In *Irwin Toy, supra at* page 983, the majority of the Supreme Court noted that one could not infer from the existence of guidelines, (in that case, promulgated by the Quebec Office of Consumer Protection in order to help advertisers comply with advertising restrictions) that there was no intelligible standard to apply. In the view of the majority, one could only infer that the Office of Consumer Protection found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism. Similarly, I do not infer from the existence of the Guidelines that there are no intelligible standards for a court or the Tribunal to apply. I note that the report of the Consultative Panel included a recommendation that the Competition Bureau issue enforcement guidelines in draft form at the same time as the new legislation was introduced. One can infer that the Commissioner considered this recommendation to be reasonable and the Guidelines helpful.

(iii) Is the infringement reasonable and demonstrably justified?

[70] Having found the impugned legislation to be a limit prescribed by law, the next step is to apply the principles articulated in *Oakes* to the evidence before the Tribunal.

(a) Contextual considerations

[71] As already noted, in *Oakes*, the Supreme Court noted that the analysis is to be conducted with close attention to the contextual factors. The contextual factors are relevant to establishing the objective of the impugned legislation and to evaluating the proportionality of the means used to fulfil the pressing and substantial objectives of the legislation. Characterizing the context of the impugned provision also touches upon the nature of the evidence required at each stage of the analysis in order to establish demonstrable justification.

[72] I believe that the relevant contextual considerations are as follows.

[73] First, it is relevant to consider the nature of the activity which is infringed. This is necessary because, where the right to expression is violated, the value of the expression that is limited affects the degree of constitutional protection (*Thomson Newspapers, supra* at paragraph 91).

[74] Here, what is restricted are representations by a seller of the seller's own ordinary selling prices where the representations do not satisfy either the volume or the time test, and where any false or misleading representation is material.

[75] The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: *RJR Macdonald, supra* at paragraph 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.

[76] In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values subsection 2(*b*) of the Charter is intended to protect. In the result, a lower a standard of justification is required.

[77] Second, it is a relevant contextual factor to consider the vulnerability of the group the legislation seeks to protect: *Thomson Newspapers*, at paragraphs 90 and 112.

[78] Both the Consultative Panel and the Guidelines recognize that OSP claims are a powerful and legitimate marketing tool. Sears, in its own document entitled "Guidelines for Savings Claims", notes that "[s]avings claims, properly used, are a powerful selling tool".

[79] Dr. Donald Lichtenstein testified as an expert for the Commissioner. He is a Professor of Marketing at the Leeds School of Business at the University of Colorado in Boulder. He holds a Ph. D. with a major in Marketing obtained in 1984 from the University of South Carolina. Dr. Lichtenstein has lectured extensively about Marketing at the graduate and undergraduate level. He has served on the Editorial Review Board of the Journal of Marketing, the Journal of Consumer Research, and the Journal of Business Research. He is a member of the Editorial Review Board for the Journal of Public Policy and Marketing. In 2001, he received the

Outstanding Reviewer Award from the Journal of Consumer Research. Dr. Lichtenstein continues to be an ad hoc reviewer for the Journal of Marketing and other publications. As well, has presented numerous papers relating to marketing at conferences, has applied research experience, and has been published extensively in refereed publications and nationally refereed proceedings.

[80] The Tribunal ruled that Dr. Lichtenstein was qualified to provide opinion evidence on two topics. The first was marketing matters, and particularly consumer behaviour as it relates to pricing and other stimuli. The second topic was research design and methodology within the social sciences. Dr. Lichtenstein provided two separate written opinions, one pertaining to the constitutional question, the other pertaining to the Commissioner's deceptive marketing allegations. He testified with respect to both issues.

[81] I was impressed by Dr. Lichtenstein's expertise. Much of his testimony with respect to marketing matters was unchallenged and I accept his testimony given with respect to the constitutional issue. Relevant to the contextual factors at issue was his evidence that:

- OSPs have a powerful influence on consumers.

- OSP advertising creates a general impression of savings for the average consumer, positively affects intentions to purchase from the advertiser and negatively affects intentions to search competitors for a lower price.

- The average consumer has low levels of price knowledge and engages in very little pre-purchase search to gain this knowledge,
  even for expensive items. Thus, the average consumer is vulnerable to deceptive OSP advertising.

- By signalling a temporary bargain, a seller's own OSP advertising affects not only consumers who are currently contemplating the purchase of a given product but, particularly for products where wear-out occurs on a visible continuum, may also pull some customers into the market sooner than otherwise would be the case.

- Misleading OSP advertising can lead consumers to believe that, by purchasing the advertised product, they will receive a quality level that is commensurate with the higher reference price, while only having to pay the lower sale price.

- The average consumer who purchases a product advertised with an inflated seller's own OSP is unlikely to become aware that he or she was mislead, and thus, he or she remains susceptible to subsequent reference price deceptions.

- Receiving a "good deal" in and of itself is a significant motivation for purchase

for many consumers who purchase OSP advertised items. This is referred to as "transaction utility".

- Retailers who misuse OSPs as a marketing tool capitalize on consumers who view OSP claims as "proxies" for a good deal.

- The deceptive OSP advertisements from one retailer can result in negative goodwill to competitors who advertise in a non-deceptive manner. In Dr. Lichtenstein's words:

> For consumers who do patronize a competitor and then encounter and encode a deceptive OSP from a high credibility source, they will be more prone to question the value from the retailer they patronized. They will be likely to experience cognitive dissonance and a loss of goodwill and future purchase intentions toward the retailer from [whom] they purchased.

- A retailer who uses inflated OSP advertising not only benefits from deceptive advertising on the products that are promoted in this manner, but the beneficial effect also extends to other non-promoted product/service categories. When the nature of the promoted price is misrepresented to consumers, for example, with an inflated seller's own OSP, retailers not only capture sales on the item that attracted consumers to the store, but also on other items consumers purchase once in the store. Thus, competitors operating in good faith lose the opportunity to compete on a level playing field not only for the promoted item, but for all items that the consumer purchases.

- When advertiser behaviour results in consumers purchasing products that provide less value for money, it motivates manufacturers to allocate factors of production to those items instead of to items that would otherwise be produced (i.e., those that "truly" provide higher value for money). This harms competition and distorts price signals which interfere with the optimal allocation of productive resources, so that total consumer welfare is decreased.

[82] A third related contextual factor, conceded in oral argument by Sears to be relevant, is the objective of the impugned legislation and the nature of the problem it seeks to address. The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.

[83] Sears argues that a centrally important contextual factor is that, prior to the enactment of the impugned legislation, stakeholders had "explicitly and forcefully lamented the vagueness and

lack of precision, certainty and understanding relating to the ordinary selling price legislation". I agree that clarity of legislation is relevant to considerations of vagueness (as that relates both to the "prescribed by law" and minimal impairment requirements) and, in that sense, clarity touches on the proportionality of the legislation. I am not satisfied on the evidence that clarity and certainty are otherwise relevant contextual factors, or that clarity is an over-arching contextual factor.

(b) Does the infringement achieve a constitutionally valid purpose or objective?

[84] Having set out the relevant contextual considerations, I move to the first step of the *Oakes* analysis. The question to be answered at this stage is whether the objective of the impugned legislation is sufficiently important that it is, in principle, capable of justifying a limitation on Sears' freedom of expression.

[85] Sears concedes that the objective is sufficiently important. Notwithstanding that concession, it is important at this stage to properly state, and not over-state, the objective of the impugned legislation. Improperly stating the objective of the legislation will compromise the analysis.

[86] Sears describes the objectives of the impugned legislation as follows:

> The evidence before the Tribunal in this proceeding has confirmed that the objectives of the Act include, *inter alia*, setting and making known the rules or parameters governing competition in Canada and, importantly, having the Act judicially enforced in a manner that is fair to all and in accordance with the rules previously established. Other objectives include the improvement of the quality and accuracy of marketplace information and discouraging deceptive marketing practices.

[87] In my view, the evidence of the legislative history of the provisions of the Act relating to ordinary price representations is relevant to determining the objectives of the impugned legislation. It is described below.

[88] In 1960, a criminal prohibition on the making of misleading ordinary price representations was added to what was then the *Combines Investigation Act*. The initial provision read as follows:

33C(1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence.

(2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

33c.(1) Quiconque, afin de favoriser la vente ou l'emploi d'un article fait au public un exposé essentiellement trompeur, de quelque façon que ce soit, en ce qui concerne le prix auquel ledit article ou des articles, semblables ont été, sont ou seront ordinairement vendus, est coupable d'une infraction punissable sur déclaration sommaire de culpabilité.

(2) Le paragraphe (1) ne s'applique pas à une personne qui fait paraître une annonce publicitaire qu'elle accepte de bonne foi en vue de la publication dans le cours de son entreprise.

[89] An explanation of the purpose of the criminal prohibition is found in remarks made to the House of Commons by the then Minister of Justice when he moved the second reading of the bill to amend the *Combines Investigation Act* to add the criminal prohibition. He said:

> The fourth and last amendment to which I wish to refer in this group is a new section forbidding anyone, for the purpose of promoting the sale or use of an article, to make a materially misleading representation to the public concerning the price at which the article is ordinarily sold. Quite a few instances have come to the attention of the combines branch, some of them occurring in the catalogues of so-called catalogue houses, but occurring in other places as well, where a merchant, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented to the public the price at which such article was ordinarily sold elsewhere. Besides being deceptive as far as the buying public is concerned this practice also constitutes an unfair method of competition with respect to other merchants.
>
> In summary, these amendments relating to discriminatory and predatory pricing and deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater honesty into all branches of trade. In some instances they also protect, or give a chance for protection, to merchants, usually the smaller merchants, against unfair competition which does not relate to competitive efficiency; they confirm to a manufacturer some right to prevent his product from being abused or used as a come-on device; and finally, but not least, they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself. [underlining added]

House of Commons Debates, Vol. IV (30 May 1960) at 4349 (Mr. Fulton).

[90] In 1976, the criminal prohibition was amended to read as follows:

36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

36.(1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques.

[...]	[...]
(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in a relevant market unless it is clearly specified to be the price at which the product has been sold by that person by whom or on whose behalf the representation is made.	(d) donner au public des indications notablement trompeuses sur le prix auquel un produit, ou des produits similaires ont été, sont ou seront habituellement vendus; aux fins du présent alinéa, les indications relatives au prix sont censées se référer au prix que les vendeurs ont généralement obtenu sur le marché correspondant, à moins qu'il ne soit nettement précisé qu'il s'agit du prix obtenu par la personne qui donne les indications ou au nom de laquelle elles sont données.

It was subsequently re-enacted as paragraph 52(1)(*d*) of the Act.

[91] As described in detail above, a discussion paper was released in 1995 seeking comments from interested persons with respect to amendments to the Act, including the appropriate definition of OSP. The Consultative Panel which was created to review the responses to the discussion paper made recommendations. Those recommendations are largely reflected in subsection 74.01(3) of the Act, which was originally contained in Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, 1st Sess., 36th Parl., 1997, (1st reading 20 November 1997). A dual track regime of civil and criminal enforcement procedures and remedies was created.

[92] The summary to Bill C-20 specifically provided that "[t]he enactment ... revises the treatment of claims made about regular selling prices to provide greater flexibility and clarity". The then Minister of Industry described the amendments in more detail in the following terms when he moved second reading to the bill:

> The regular price claims provisions of the Act will be amended for greater clarity and to better reflect what consumers and retailers understand by them. The legitimacy of regular price claims would be determined by an objective standard, a test based either on sales volume or the pricing of an article over time.
>
> Consumers will benefit from this clarification of the rules and merchants will have more freedom of choice in selecting pricing strategies and will be encouraged to innovate in ways beneficial to consumers and retailers alike.

House of Commons Debates, Edited Hansard, No. 074 (16 March 1998) (Hon. John Manley).

[93] On the basis of the legislative history and the evidence before the Tribunal, I am satisfied that the Commissioner has established, on a balance of probabilities, that the objectives of subsection 74.01(3) of the Act are to: i) protect consumers from deceptive ordinary selling price representations; ii) protect businesses from the anti-competitive effects of deceptive ordinary selling price representations; and, iii) protect competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations. These were the expressed objectives of the original criminal prohibitions and I am satisfied that the original

purpose remained pressing when the civil remedy was enacted. As Sears noted in its written argument, since the 1970's concerns were expressed about the inefficiencies associated with the criminal prosecution of misleading advertising. The Consultative Panel recommended that misleading advertising should normally be addressed through a civil regime but that a criminal regime should exist for egregious cases. Both regimes were directed at the same purpose.

[94] These legislative objectives are to be viewed in light of the evidence before the Tribunal concerning the significant harm caused to consumers, business and competition by deceptive OSP advertising (particularly the evidence of Dr. Lichtenstein described above).

[95] I conclude, on the totality of the evidence before the Tribunal, that Sears has fairly and properly conceded that the objectives of the impugned legislation are of sufficient importance that, in principle, they are capable of justifying a limitation on Sears' freedom of expression.

(c) The rational connection

[96] The next step in the inquiry is to question the proportionality of the measure. This analysis begins with consideration of the rationality of the measure at issue. The issue is whether there is a causal relationship between the objective of the impugned legislation and the measures enacted by the law. Direct proof of such causal relationship is not always required. In *RJR Macdonald, supra* at paragraphs 86, 156-158, and 184, the Supreme Court held that a causal relationship between advertising and tobacco consumption could be established based upon common sense, reason or logic.

[97] In *Irwin Toy, supra* at page 991, Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.

[98] In finding the impugned legislation to be rationally connected to the objectives of the legislation, I also rely upon the opinion of Dr. Lichtenstein. As noted above, I generally accept his testimony. I found him to be extremely knowledgeable on the subject of marketing and particularly consumer behaviour as it relates to pricing and other stimuli. I also found that he gave his testimony is an unhesitating, candid, clear and even-handed manner. His obvious enthusiasm for the subject matter left no suggestion of partisanship. His opinion, as it related to marketing in the context of the constitutional question, was not, in my view, effectively challenged or limited on cross-examination.

[99] Sears' expert, Mr. Mahinka, dealt with a review of the scope of U.S. legislation and the factors to be considered at law by sellers when making OSP representations. However, since Mr. Mahinka was not qualified to opine, and did not opine, on marketing matters, his evidence did not contradict that of Dr. Lichtenstein.

[100] The following evidence, taken from Dr. Lichtenstein's written expert report, is relevant to the issue of rational connection:

> 62. The heart of the problem with seller's own OSP advertising is that consumers believe that the OSP relates to the seller's own "ordinary" selling price. Consumer perceptions of what a seller's ordinary price [is] relate to two factors: (1) how long the product [has] been offered at the price (consistency over time), and (2) how many other consumers have purchased the product at that price (consensus). Consequently, in my opinion, there is definitely a rational [connection] between these two factors and consumer perceptions of a price as a bona fide OSP. Thus, any legislation that has the goal of addressing the potential for consumer deception with respect to OSP advertising necessarily must address time and volume considerations.
>
> 63. When thinking in terms of deception, it is helpful to ask the question, "what would consumers believe if they had full information?" If there is no difference between consumer perceptions with and without the full information, there is no problem with deception. In this case, consumer inferences from a seller's own OSPs would accurately reflect missing information. However, if consumers would respond differently if they had full information, then consumer inferences would not be accurate, and there would be a problem of deception. Consider the example of a consumer who encounters an OSP. If the consumers were provided with (a) the time schedule for when that product has been offered for sale at the OSP (time test criterion), and (b) the number of consumers who have purchased the product at the OSP (volume test criterion), would the consumer accept the encountered OSP as the real *bona fide* "ordinary" selling price? If the answer to this question is "no," then there is an issue of deception.
>
> 64. Because consumers will not have this information, legislation is required to institute time and volume standards to bring them in line with consumer expectations so that consumers will not be deceived. In essence, the legislation fills the consumer information void in that with the legislation, consumers will be better able to rely on OSPs as *bona fide* selling prices. That is, instituted in a good faith manner, meeting time or volume tests will bring retailer practices more in line with consumer expectations such that where retailers offer products at OSPs, consumers will be able to rely on the OSPs as representing either the ordinary price from a time or volume perspective. [footnotes omitted]

[101] In finding there to be a rational connection between the impugned legislation and its objectives, I reject Sears' submission that the impugned legislation fails the rational connection test because it is excessively vague, uncertain and imprecise, and has application to an unnecessary broad range of activity. In my view, those arguments are better considered when determining whether the legislation is over broad so that it does not minimally impair Sears' rights. Indeed, in oral argument, counsel for Sears dealt with the evidence that supported his submission that unclear legislation defeats the objective of accurate marketplace information (and so was not rationally connected to the legislative purpose) in the context of his submission on minimal impairment.

[102] I am satisfied that the impugned legislation, on its face, cannot be viewed as being so vague or arbitrary that it is not rationally connected to its objectives.

(d) Minimal impairment

[103] The next stage of the *Oakes* analysis requires consideration of whether the impugned legislation, while rationally connected to its objectives, impairs Sears' freedom of expression as little as reasonably possible in order to achieve the legislative objectives.

[104] The Supreme Court has recognized that legislative drafting is a difficult art and that Parliament cannot be held to a standard of perfection. See: *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 95. In *Sharpe*, the majority of the Court described the required analysis in the following terms:

> 96 The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see [...].
>
> 97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry – one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see [...]. [emphasis in original] [jurisprudence and citations omitted]

[105] Sears argues that the impugned legislation fails the minimal impairment test in two respects. First, Sears says that the legislation is over broad because it uses excessively vague, imprecise and broad terms (including "substantial volume", "reasonable period of time", "substantial period of time" and "recently"). Further, the legislation fails to include specific guidelines, standards, criteria or definitions concerning the volume of product sold or offered for sale, and the periods of time to be considered for the volume and time tests. The scope of the impugned legislation will, it is said, therefore frustrate or defeat its objectives. Second, Sears says that subsection 74.01(3) of the Act does not minimally impair its freedom of expression because there are practical legislative alternatives to the impugned legislation as it is now drafted. Those alternatives would, Sears argues, give greater clarity, advance the objectives of the legislation more effectively, and interfere less with Sears' right to commercial free speech.

[106] Turning to the first ground advanced by Sears in support of its argument that the

impugned legislation will frustrate or defeat the objectives sought to be achieved, Sears points to the evidence of the Commissioner's expert, Dr. Lichtenstein, that:

a) Placing the percentage requirement for sales and time tests at 51 % or higher (as the Guidelines do) is objectionable as a per se or equivalent per se rule;

b) Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some customers from receiving non-deceptive information that they may, in fact, value in making decisions. In turn, retailing efficiency would be adversely affected because retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers;

c) Requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to the price may deprive some customers of important information about both the product and the retailer;

d) If consumers believed that there was a time test at 51 % or higher, that test is objectionable;

e) Uncertain or unclear OSP advertising rules hinder OSP price advertising;

f) If the regulations are not clear, some retailers may choose not to engage in OSP advertising as much or at all;

g) If retailers chose not to engage in OSP advertising as much or at all, that could hinder price reduction;

h) If price reduction is hindered, that could result in competitors not having any pressure to lower their prices; and

i) If competitors do not lower their prices, the consumer will be harmed by higher prices.

[107] One legislative option available to deal with OSP claims is legislation that imposes specific per se standards, for example, the number of days a product must be on sale at a regular price, or the percentage of sales accepted as "substantial" for the volume test. Mr. Mahinka identified a number of state enactments in the U.S. which contained per se standards. It was Dr. Lichtenstein's opinion that such per se rules are not effective in addressing deception. He endorsed the following statement:

> "Per se rules relating to high-low pricing are not likely to detect all true deception nor exculpate all

> non-deceptive challenged pricing behavior. In the case of percentage of sales tests, few would argue with the presumption that if a retailer had 50% of its sales at the referenced price, that price had been set in good faith... A higher percentage test will certainly prevent deception, but at what cost? Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some consumers from receiving non-deceptive information that they may, in fact, value in making decisions. Retailing efficiency, in turn, would be affected adversely in that retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers... Similarly, percent of time tests can be thwarted easily by the manipulation of the pricing calendars of comparable brands within a store. If compliance with a set time at the regular price (even relatively long periods of time) demonstrates good faith, some deception will escape further scrutiny. On the other hand, requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to that price again may deprive some consumers of important information about both the product and the retailer. In either case, these per se tests seem to offer much more in terms of financial savings for the litigants (on both sides) than they do in terms of ensuring a balance between the direct consumer interest in good price information and the indirect consumer interest in efficient retail practice."

[108] Dr. Lichtenstein advanced a "Rule of Reason" analysis of a retailer's prices and advertising and effect on consumers, described as follows:

> "Such an approach requires the court to explore issues relating not only to the retailer's activities and consumer perceptions, but also to industry and product characteristics. It is informed by generic and case specific research in consumer behavior. Most important, it seeks to strike a balance between the direct interests of consumers in receiving clear, truthful information and the indirect interest in the lower prices derived from permitting retailers to operate efficiently. Evidentiary shortcuts such as percentage of sales made at the reference price or length of time the reference price was in effect are relevant but not dispositive".

[109] Dr. Lichtenstein went on to state:

> The situation at hand has direct correspondence to measurement issues that behavioral researchers deal with on a continual basis. From a measurement theory perspective, it is generally recognized to be poor measurement practice to equate a concept that is not directly observable (e.g., deception) with a single observable behavior (e.g., "if a seller does X, it is deception; if the seller does Y, it is not deception") (see Lichtenstein, Netemeyer, and Burton 1990). That is, when the concept construct of "deception" is reduced to terms of a per se time or volume test, the validity of just what is "deception" is sacrificed. As a result, there may be many situations where the following [of] per se rules leads to incorrect outcomes regarding determinations of deception that if the subjective factors (consistent with the "rule of reason" approach) were applied with its multiple criteria, this would not occur.

[110] Noting that, under the impugned legislation, the volume and time tests are not determined in a vacuum, but rather recognize both the market-based attributes of the product and the geographic market, Dr. Lichtenstein concluded that, in his opinion, subsection 74.01(3) of the Act could not be less burdensome and still be effective.

[111] In this context, I do not find that the portions of Dr. Lichtenstein's testimony relied upon by Sears fundamentally undermine his expert opinion that the legislation could not be less

burdensome and still be effective, or his opinion that clearer per se rules will neither detect all deception nor exculpate all non-deceptive OSP advertising. Because the impugned legislation is not per se legislation but rather requires consideration of good faith and materiality, I believe the impugned legislation meets the concerns of Dr. Lichtenstein articulated at points (a) through (d) in paragraph 106 above.

[112] Put another way, Sears relied on the portions of Dr. Lichtenstein's evidence which criticised the enactment of per se rules. However, his views do not support the conclusion that the impugned legislation, which is not per se legislation, is over broad.

[113] To the extent that Dr. Lichtenstein agreed that uncertain or unclear OSP advertising regulations hinder and discourage OSP advertising, the evidence before the Tribunal does not in my view establish that the impugned legislation has prevented or discouraged accurate OSP advertising.

[114] Turning to Sears' argument that there are other, more effective legislative options, Sears points to the legislation of 12 American states and argues orally as follows:

> Now, in terms of the 12 states that are highlighted here, it is set out, Your Honour - - I can tell you that, in terms of the criteria that are set out here, it really is a menu of alternative ways to enact a provision like the impugned legislation and, from that menu, Your Honour will note that there are various tests that are enunciated here, set out, which involve different volume tests, different time tests.
>
> You have got percentages that vary. You have got "reasonable" set at 5 per cent. You have got "reasonably substantial" set at 10 per cent. You have got time periods and volume periods anywhere from more than 10 per cent to - - well, it runs to 31.1 per cent, which is 28 out of 90 days in a few cases that is required to have it at that regular price.
>
> And you have got 51.6 per cent in the case of Ohio, which is 31 out of 60 days, and you have got South Dakota, for example, 7 out of 60 days, 11.6 per cent.
>
> The point of it is, is that I am not suggesting you have to pick a percentage here or a criteria that you feel should be imposed here. That is not your job and, frankly, it is not my job either.
>
> What the point here is is that there are other legislative alternatives which do provide for that certainty and clarity and that also provide for that flexibility that we are looking for here, in that there are also exceptions to these fixed criteria.
>
> There are exceptions for clearance sales, for example. There are exceptions for providing for rebuttable presumptions and that, therefore, Your Honour has before you clear evidence that Parliament could have done the same and that, had it done the same, Sears' rights would not have infringed as much as they have been.

[115] However, there was no evidence before the Tribunal that such legislation was either less intrusive or more effective in targeting OSP representations. With respect to whether more

precise legislation is less intrusive, it was Mr. Mahinka's evidence that it has been his experience (which has formed the basis of his advice to clients) that, where sellers carry on business in more than one jurisdiction, sellers will "commonly seek to comply with a more specific, relevant state statute or regulation governing price comparisons as this practice can be expected to result in compliance with more general state statutes". This evidence leads me to conclude that either the general and specific legislation are co-extensive, or the specific legislation is more intrusive. Otherwise, compliance with the specific legislation would not result in compliance with the more general legislation. Mr. Mahinka's evidence does not support Sears' contention that more specific legislation is less intrusive.

[116] With respect to the effectiveness of legislation regulating OSP claims, the following exchange in oral argument is illustrative. In response to a question from the Tribunal as to how the evidence of Mr. Mahinka, and particularly the state legislation he referenced, supports the submission that more precise legislation is more effective, counsel for Sears ultimately acknowledged that Mr. Mahinka's evidence did not say that precise legislation was more effective. The transcript on this point is as follows:

> **MR. M.J. HUBERMAN:** Well, if you are asking: Is that the approach he uses when he is dealing with a general statute only? He did not address that but, again, the general approach is illustrative and, I think, helpful in the sense that he is using precise standards and criteria to shape his advice to sellers who want to know what to do.
>
> The idea is that, if they know what to do, if they are going to comply with the specific standards, they are likely going to comply with the more general ones also.
>
> So to the extent that that advice would be appropriate in those circumstances, I take it that that is what the advice would be as well.
>
> **THE CHAIRPERSON:** But I don't recall his evidence to say that specific legislation is more effective than general legislation.
>
> **MR. M.J. HUBERMAN:** Well, it's more effective in letting the sellers know what to do in the sense of advertising. It is more effective in that sense.
>
> **THE CHAIRPERSON:** But he doesn't touch on whether it is more effective in discouraging objectionable advertising that is misleading with respect to ordinary selling price.
>
> **MR. M.J. HUBERMAN:** No.
> His point was a different point. His point was, I would suggest, the first branch of the unintelligible standard rationale, which is the fair notice part that we talked about yesterday.
>
> His point was, by looking at the more specific standards criteria tests, the citizen, i.e. the seller, would have greater guidance and knowledge of the law so that it could comply better with it. That was the gist of what he was saying and, in fact, that would, in my submission, show its effectiveness in accomplishing some of the objectives, certainly, of the Act that we talked about. [underlining added]

[117] Sears also complains that the Commissioner failed to explain why the model provision recommended by the Consultative Panel was not enacted. It is said by Sears to have been less intrusive and equally effective because of its "clarity and brevity".

[118] The model proposed by the Consultative Panel is set out at paragraph 60 above. The model provision proposed the use of terms such as "recently sold a substantial volume", "recently" and "substantial period of time". Regard was to be had to the nature of the product and the relevant market. I am not satisfied that the "clarity and brevity" of this model provision shows it to be less intrusive or more effective than the impugned legislation.

[119] Returning to the dicta of the Supreme Court of Canada in *Sharpe* quoted above, Parliament need not adopt the least restrictive measure. It is sufficient that the means adopted fall within a range of reasonable solutions, and the law must be reasonably tailored to its objectives.

[120] The evidence of Dr. Lichtenstein and the wording of the impugned legislation persuade me that the impugned legislation is reasonably tailored to its objectives. The legislation sets out time and volume tests which relate to consumer perceptions of a seller's ordinary price. An affirmative defence is provided whereby any representation that is not false or misleading in a material respect does not constitute reviewable conduct. There is a due diligence defence to most of the remedial measures.

[121] I am satisfied, on a balance of probabilities, that the impugned legislation falls within a range of reasonable alternatives. While the Act does not establish with precision whether any particular OSP representation will satisfy the time and volume test, the impugned legislation provides the necessary flexibility to ensure that it neither captures non-deceptive OSP advertising nor fails to capture deceptive OSP advertising.

(e) Proportionality of effects

[122] The final stage of the *Oakes* analysis requires:

> ... there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

See: *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at page 889; and *Thomson Newspapers*, *supra* at paragraph 59.

[123] I accept, based upon the report of the Consultative Panel, the evidence of Dr. Lichtenstein, and the existence of legislation in numerous American jurisdictions restricting OSP advertising, that subsection 74.01(3) of the Act addresses the pressing and substantial objective preventing of harm caused by deceptive ordinary price claims. False OSP claims, on the evidence of Dr. Lichtenstein, (unchallenged on this point) can harm consumers, business competitors and competition in general.

[124] In comparison, the negative effects of the restrictions which result from subsection 74.01(3) of the Act are not great. The speech that is restricted is commercial speech that is materially false or misleading.

[125] Sears points to its experience when it eliminated its "2-For" price as evidence of the deleterious effect of the impugned legislation. At that time, when Sears lowered and set its regular single unit price at the "2-For" price, sales declined. When Sears then increased its regular prices, its promotional sales substantially increased. I do not understand this to be evidence of a chill caused by the regulation of OSP claims, as Sears argues, particularly since Sears continued to use OSP claims.

[126] I therefore conclude that the negative effects of the restriction on commercial speech are outweighed by the benefits that ensue from sanctioning deceptive OSP representations.

(f) Conclusion

[127] For the reasons set out above, I have concluded that subsection 74.01(3) of the Act is: i) a limit "prescribed by law"; ii) addresses pressing and substantial objectives; iii) is rationally connected to its objectives; iv) restricts freedom of expression as little as is reasonably possible; and, v) carries salutary benefits that outweigh the restriction on freedom of expression.

[128] It follows that, while it is conceded that subsection 74.01(3) does infringe subsection 2(*b*) of the Charter, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society.

[129] Sears' request for constitutional remedies will, therefore, be dismissed.

V. THE ALLEGATION OF REVIEWABLE CONDUCT

(i) Standard of proof

[130] Having dismissed Sears' request for constitutional remedies, I now turn to consider whether the Commissioner has met the onus upon her to establish that Sears employed deceptive marketing practises which constitute reviewable conduct under subsection 74.01(3) of the Act.

[131] Neither party, in their written arguments, addressed submissions to the Tribunal with respect to the standard of proof. In oral argument, counsel agreed that the Commissioner must prove her case on a balance of probabilities, and acknowledged that within the civil standard of proof there exist different degrees of probability, depending upon the nature of the case. See also: *Oakes*, *supra*, at page 137. Counsel for the Commissioner agreed that, within the civil standard, the Commissioner would be obliged to prove her case at the higher end of the balance of probabilities.

[132] In light of the serious nature of the conduct alleged against Sears I am satisfied that, within the balance of probabilities, I should scrutinize the evidence with greater care and consider carefully the cogency of the evidence. See: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at page 170.

(ii) The elements of reviewable conduct and the issues to be determined

[133] For ease of reference, I repeat subsections 74.01(3) and 74.01(5) here :

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,	74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and	a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
(b) has not offered the product at that price or a higher price in good faith for a substantial period of	b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante

time recently before or immediately after the making of the representation, as the case may be.	précédant de peu ou suivant de peu la communication des indications.
[...]	[...]
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.	74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[134] Sears acknowledges that the evidence before the Tribunal establishes Sears to be: (i) a person; (ii) who, for the purpose of promoting, directly or indirectly, the supply or use of tires and for the purpose of promoting, directly or indirectly, its business interests generally; (iii) in 1999, made representations to the public as to tire prices that were clearly specified to be the prices at which the Tires were ordinarily supplied.

[135] Sears also acknowledges that the evidence establishes that Sears did not comply with the volume test contained in paragraph 74.01(3)(*a*) of the Act.

[136] Accordingly, the issues to be determined are:

i) Were Sears' regular prices for the Tires offered in good faith as required by the time test?

ii) Did Sears meet the frequency requirement of the time test?

iii) If Sears did not meet the good faith or frequency requirements of the time test, has Sears established that the representations were not false or misleading in a material respect?

iv) If Sears engaged in reviewable conduct, what administrative remedies should be ordered?

(iii) The witnesses

[137] Before turning to the substance of the deceptive marketing case, it will be helpful to introduce and describe briefly the witnesses who testified before the Tribunal.

(a) The expert witnesses

[138] Seven individuals testified as experts before the Tribunal, three on behalf of the Commissioner and four on behalf of Sears. The Commissioner's experts were Dr. Donald Lichtenstein, Dr. Sridhar Moorthy and Mr. Donald Gauthier.

[139] Dr. Lichtenstein's qualifications and area of expertise have already been described.

When Dr. Lichtenstein re-attended to give his opinion with respect to the deceptive marketing case, Sears agreed that he need not be re-qualified and that he could provide expert testimony with respect to "marketing and consumer behaviour and response to pricing advertised stimuli" and "research design and methodology within social sciences".

[140] Dr. Moorthy is the Manny Rotman Professor of Marketing at the Rotman School of Management, University of Toronto, and is a Research Associate at the Institute for Policy Analysis, University of Toronto. Sears did not challenge Dr. Moorthy's expertise to testify about "marketing and the use of economic principles and/or theory to understand marketing", "consumer response to marketing stimuli" and "marketing study design and implementation".

[141] Mr. Gauthier has worked in the tire industry in Canada since 1984 when he joined a company that was the predecessor corporation of Uniroyal Goodrich Canada Inc. He worked from 1984 to 1990 as its National Advertising Manager. In his later years with the company, he took on the additional role of Sales Manager for Atlantic Canada. From 1990 through 1995, Mr. Gauthier was with Michelin Tires Canada Inc. (after it acquired Uniroyal Goodrich), initially as National Advertising and Promotions Manager, then as Ontario Sales Manager for the Uniroyal Goodrich sales team, and finally as a Sales Manager in Ontario for the merged Michelin, Uniroyal and Goodrich lines. From 1995 to 2000, Mr. Gauthier was with Bridgestone/Firestone Canada Inc. successively as Director of Sales and Marketing, Vice-President Sales and Marketing, and Senior Vice-President Sales. From 2001, and at the time he testified before the Tribunal, Mr. Gauthier worked as the Sales and Marketing Manager/Vice-President of Retread Division of Al's Tire Service. Mr. Gauthier was found by the Tribunal to be qualified to provide opinion evidence touching upon "the practical application of marketing and retail strategies in the Canadian tire industry and Canadian tire market", "the marketing and sale of original equipment and replacement tires in Canada" and "the structure of the tire market in general in Canada", such expertise being recognized as being in existence as of 1999.

[142] While Sears did not challenge Mr. Gauthier's knowledge or expertise, it did object that Mr. Gauthier lacked the necessary independence because he now works for a company that sells tires in Ontario where Sears also sells tires.

[143] Without doubt, expert evidence must be seen as the independent product of an expert who is uninfluenced by the litigation, and an expert should provide independent assistance by objective, unbiased opinion. While Mr. Gauthier's employer does sell tires, Mr. Gauthier testified that he is paid a straight salary without performance bonuses, that he did not know where Sears Auto Centres were located, that, in his time with Al's Tires, no operator of any of its stores cited Sears as a competitor, and that, while he had dealt with some competitive situations (one example being competition from a Canadian Tire store), none of the competitive situations he had dealt with involved Sears.

[144] On that evidence, and on the basis of observing how Mr. Gauthier gave his evidence touching on his qualifications, I concluded that Mr. Gauthier had the required independence in

order to provide expert testimony. It was, and remains, my view that it is too tenuous for Sears to argue that Mr. Gauthier's testimony would be or was biased or coloured by the potential benefit to his employer of having Sears restricted in the content of its OSP advertising. My assessment of Mr. Gauthier's objectivity did not change, and was reinforced, as I observed his testimony in chief and his later testimony as a rebuttal witness.

[145] Sears' expert witnesses were Denis DesRosiers, John Winter, Dr. Kenneth Deal and Professor Michael Trebilcock.

[146] Mr. DesRosiers is the President of DesRosiers Automotive Consultants Inc. ("DAC"), an automotive market research and consulting group. The Commissioner argued that Mr. DesRosiers was not qualified to provide expert testimony. After hearing the examination and cross-examination of Mr. DesRosiers upon his qualifications, the Tribunal ordered that Mr. DesRosiers could testify and give opinion evidence touching upon "survey methodology and analysis relating to the Canadian after tire market", but that the Tribunal would reserve its decision as to whether he was properly qualified to give such testimony.

[147] In this regard, Mr. DesRosiers worked from 1974 to 1976 doing economic analysis for the Ontario Government related to the automotive sector. From 1976 to 1979, Mr. DesRosiers was the Senior Automotive Industry Analyst with the Economic Policy Branch of the Ministry of Treasury and Economics in Ontario. From 1979 to 1986, he was the Director of Research at the Automotive Parts Manufacturers Association of Canada. In 1985, Mr. DesRosiers started DAC. Since 1989, DAC has conducted annually a "Light Vehicle Study" in which 2,500 people across Canada are surveyed with respect to their automotive maintenance practices. Mr. DesRosiers wrote the original questionnaire used in this survey, with some professional advice as to how to properly ask a question for the purpose of a survey. Mr. DesRosiers testified that he understands the automotive industry "cold" so that he is able to design the "Light Vehicle Survey" and other surveys and to interpret the information collected. The interpretation he personally provides may include complex, strategic reports as to how a client company should respond to the market. Since its inception, DAC has conducted upwards of 200 surveys relating to the automotive sector, and every year, or second year, 3 or 4 tire companies buy tire survey data collected by DAC.

[148] Mr. DesRosiers initially provided an expert opinion for the Commissioner in this proceeding but, when the Commissioner decided not to call Mr. DesRosiers, Sears subpoenaed him and later commissioned a second expert report from him.

[149] I am satisfied that Mr. DesRosiers' involvement in the automotive sector, and specifically his involvement in the creation of surveys relevant to the automotive market and the interpretation of the results generated, allows Mr. DesRosiers to provide expert advice to the Tribunal based upon his own knowledge of Canadian consumers' buying habits and preferences, relating primarily to the Canadian after market for tires. I am satisfied that Mr. DesRosiers is, on the basis of his experience, a properly qualified expert to opine upon survey methodology and

analysis relating to the Canadian automotive industry, and specifically the after market for tires.

[150] John Winter is a retail consultant with expertise in advising retailers, institutions and governmental bodies on retail, development and commercial strategies. He has been previously qualified as an expert in these areas and has testified on at least 50 occasions before numerous tribunals, regulatory bodies and the Ontario Court of Justice. The Commissioner conceded that Mr. Winter's qualifications enabled him to provide expert evidence on "issues relating to retailing in Canada, including pricing strategies employed by retailers".

[151] Dr. Kenneth Deal is the Chairman of Marketing, Business Policy and International Business in the Michael G. DeGroote School of Business at McMaster University. He is also the President of marketPOWER research inc., a market research company. The Commissioner accepted the qualifications of Dr. Deal to provide expert testimony in the area of "the methodology and conduct of market research surveys and the analysis of data resulting from such surveys".

[152] Professor Michael Trebilcock is the Director of the Law and Economics Program, Professor of Law and cross-appointed to the Department of Economics at the University of Toronto. He has written extensively on competition policy, trade and economic regulation during his career. For the past 20 years, he has consulted widely to government and the private sector on matters of competition policy and economic and social regulations. The Commissioner accepted Professor Trebilcock to be qualified to give testimony as an expert on competition policy and economic regulation.

(b) The lay witnesses

[153] Each party called 3 lay witnesses. The Commissioner's lay witnesses were Mr. Christian Warren, Mr. Jim King and Mr. William Merkley. Sears called Mr. Paul Cathcart, Mr. Harry McKenna and Mr. William McMahon.

[154] Mr. Warren is a Competition Bureau Officer, through whom the Commissioner tendered documents gathered in her investigation.

[155] Mr. King was first employed by Bridgestone/Firestone Canada Inc. in October of 1997 as its Sales Manager for associate brands. In August of 1999, he became the Sales Manager for Corporate Accounts and Original Equipment. The corporate accounts he was responsible for were mass merchandisers such as Sears, Canadian Tire, Costco and Wal-Mart. Mr. King had provided an affidavit in response to an order obtained by the Commissioner under section 11 of the Act which was directed to Bridgestone/Firestone Canada Inc.

[156] Mr. Merkley has been employed by Michelin Canada since 1977, and in 1999, he was its National Director of Sales for the Corporate Accounts Group. Mr. Merkley provided an affidavit in response to a section 11 order obtained by the Commissioner directed to Michelin North

America (Canada) Inc.

[157] Mr. Cathcart has been employed by Sears since 1973. From 1997 through 2000, he served as the Retail Marketing Manager and 190 Service Operations Manager. As such, he was responsible for building a marketing plan for the Tires. At the time he testified, Mr. Cathcart was the Group Operations Manager and Process Improvement Manager for Sears Canada Home and Hardline.

[158] Mr. McKenna has been employed by Sears since 1981. From 1998 through to 2000, he was the Category Logistics Manager/Inventory Analyst for the Automotive Department. As such, he was responsible for supporting the buyer in visits to tire manufacturers and other vendors, and was responsible for ensuring the flow of merchandise to Sears Automotive Centres and the maintenance of proper inventory levels. When he testified, he was the Manager of Sales and Promotions for the off-mall channel of Sears.

[159] Mr. McMahon has been employed by Sears since 1977. In 1999, he was the Group Retail Marketing Manager of Group 700 - 2 at Sears. As such, he worked with the Corporate Marketing and Advertising Department and the Business Team in order to develop marketing strategies and events for merchandise which included the Tires at issue. At the time he testified, Mr. McMahon was the General Manager of Sears Automotive.

[160] Having introduced the witnesses, this may be the most convenient point to provide the Tribunal's reasons for its oral order, given during the course of the hearing, with respect to the Commissioner's request to adduce certain rebuttal evidence.

VI. RULING WITH RESPECT TO NON-EXPERT REBUTTAL EVIDENCE

[161] Near the conclusion of the evidence adduced by Sears in response to the Commissioner's allegations, the Commissioner advised Sears that, upon the close of Sears' case, she intended to introduce non-expert rebuttal evidence through Mr. Warren. Sears responded that it objected to such evidence being given and the Tribunal was advised of this dispute. In consequence, the Tribunal directed that the Commissioner serve Sears with a rebuttal will-say statement before Sears closed its case and advised that the Tribunal would hear argument on the issue of the admissibility of the proposed non-expert rebuttal evidence after Sears closed its case when the Commissioner endeavoured to call such evidence.

[162] The rebuttal will-say statement was served on Sears on January 27, 2004. On Monday, February 2, 2004 Sears closed its case and the Tribunal then heard submissions as to whether the proposed rebuttal evidence should be received. For reasons to be delivered later in writing, the Tribunal ruled during the hearing that a portion of the proposed rebuttal evidence could be admitted and a portion could not. What follows are the reasons for that ruling.

(i) The proposed rebuttal evidence

[163] The Commissioner sought to respond to two portions of the testimony of Mr. Cathcart.

[164] The first portion of Mr. Cathcart's testimony which the Commissioner sought to rebut was as follows ("the timing explanation"):

> MR. McNAMARA: Turning back to the checkerboards, there has been evidence before the Tribunal that some of the five tires that we are talking about were offered at regular prices for less than 50 per cent of the time, or were offered at sales prices for more than 50 per cent of the time.
>
> I am referring specifically to the RoadHandler T Plus and the Weatherwise tire.
>
> Can you offer any explanation as to why that would have been the case?
>
> And I am talking about 1999, of course.
>
> MR. CATHCART: Yes, I can.
>
> About mid-year of 1999 I began to receive communication from the field that when we advertised the Michelin T Plus it was not available in an 80 aspect ratio size. So beginning in about the third quarter, I chose to advertise the Weatherwise, not necessarily at the same price but at the same time as the T Plus.
>
> There were a number of customers who were coming in. We would advertise the Michelin tire, and in our advertising we could not indicate every size that was available in those tires. So they would come into our auto centres expecting to buy a Michelin tire, although if they had an 80 aspect ratio size requirement we were unable to sell them the AT Plus. It just was not available in that size.
>
> In a response to that, I offered the Weatherwise as a "go to" in the 80 aspect size for our sales associates and our customers.
>
> I knew very well that I would sell some. It certainly wasn't going to be the driving number of tires. Our T Plus would historically outsell the Weatherwise.
>
> What it did was it responded to the customer's request to have a Michelin tire in an 80 aspect ratio when we advertised it. That was my choice, and I did that for that reason.
>
> Second, there was in the fourth quarter of 1999 a situation around service and supply. What I mean by that is on snow tires we would place our orders and stagger our shipments, because on the Bridgestone snow tires they were made in the Orient. So we would have the first shipment arrive in August-September, a second shipment in October and a third shipment in November.
>
> In the fourth quarter of 1999 there were some labour issues in the Orient where we were unable to receive our third shipment, our promotional shipment -- because the deeper you get into that year obviously that is when the promotions start to happen of these snow tires.
>
> We found out very late in the year that we were not going to be able to get them because of labour issues in the Orient.

The problem was I had already booked space, newspaper space, preprint space. These were all completed programs in essence. So even in the preprints, if we were to pull out of there we would in essence be running a company-wide vehicle with a blank page.

What we did was I approached Stan and asked if he would approach Michelin, because they were the only other supplier that could give us a quantity of tires. That was our hope. They did respond and were able to switch the tires, the snow tire ads to Michelin.

What I mean when I say switch, when we advertise tires we would have a feature item on the page and then we would have sub-features. Historically the feature item, the lion's share of sales were created from that.

But because we had some snow tires in stock from our first and second shipment, we moved the feature item to a sub-feature, being the snow tire, and then featured the Michelin tires. That ran us over frequency in that fourth quarter.

It was purely in response to an offshore issue.

[165] The Commissioner proposed to rebut the timing explanation through testimony that the RoadHandler T Plus and the Weatherwise tires were on sale over 50 per cent of the time in each six-month period which preceded every day from July 3, 1999 to December 31, 1999. The Commissioner also sought to introduce into evidence a table entitled “Time Analysis-1999-Substantial Period” which illustrated this.

[166] The second portion of Mr. Cathcart’s testimony the Commissioner sought to rebut was as follows (“the third week of May advertising and promotions testimony”):

MR. McNAMARA: I would ask you to turn to Tab 9, to the checkerboard for the month of May.

MR. CATHCART: I am there, sir.

MR. McNAMARA: I would ask you to look at the Michelin T Plus tire and the Week 3 time column.

MR. CATHCART: Yes, sir.

MR. McNAMARA: Can you tell us what is going on there.

MR. CATHCART: In Week 3 the Michelin T Plus –

MR. McNAMARA: There is a reference there that says "NP" and then "ALB/BC" and the same thing for the Weatherwise.

MR. CATHCART: Yes. That was referring to a newspaper ad in Alberta and B.C. for those two lines of tires. But it was a newspaper ad only for those two provinces during that week.

MR. McNAMARA: Why was that?

MR. CATHCART: We would have promotions that would differ coast to coast

> depending on the market and the seasons.
>
> We would have snow tires running in Quebec in a newspaper ad in the fall, where we would have passenger tires in B.C. We wouldn't advertise snow tires in the Lower Mainland of B.C., although in northern B.C. and in Prince George we would have snow tires.
>
> We called them alts. We would alt our advertising, depending on the geographics of the product and of the country, weather and that.
>
> In this time frame we advertised these two tires only in Alberta and B.C. at these prices.

[167] The Commissioner proposed to rebut the third week of May advertising and promotions testimony by tendering, through the competition law officer, newspaper proofs and Sears pre-prints and flyers, all relating to the advertising and promotion of tires by Sears during the third week of May, 1999.

(ii) The objection to the rebuttal evidence

[168] Sears argued that the proposed rebuttal evidence should not be permitted because:

1. The Commissioner had failed to follow the procedure mandated by the rules of the Tribunal.

2. The proposed evidence was not proper rebuttal evidence.

3. The Commissioner had failed to cross-examine Mr. Cathcart upon that portion of his evidence which the Commissioner sought to rebut.

(iii) The ruling

[169] After hearing argument, the Tribunal ruled that the Commissioner would not be permitted to lead rebuttal evidence with respect to the timing explanation, but would be entitled to lead as rebuttal evidence Sears' newspaper proofs, pre-prints and flyers in order to rebut the third week of May advertising and promotions testimony.

(iv) The procedural objection

[170] Sears argued that before delivering the rebuttal will-say statement, which was in substance an amended will-say statement of the competition law officer, the Commissioner was obliged to bring a motion for leave to amend her disclosure statement. It was argued that, as the respondent, Sears puts in its case on the basis of the evidence adduced by the Commissioner as disclosed in her disclosure statement and in her rebuttal expert reports. Sears had adduced the bulk of its lay and expert evidence before it learned that the Commissioner sought to adduce rebuttal fact evidence. Requiring the Commissioner to move to amend her disclosure statement in this circumstance was said to be in accordance with the regulatory objectives of the Tribunal's rules, particularly the objective that the Commissioner's investigation be completed and her case be in final form at the time her application is filed with the Tribunal and the objective that the issues be clearly defined at the outset by having them set out in the parties' respective disclosure statements.

[171] In my view, the Commissioner was not obliged to move to amend her disclosure statement in order to adduce non-expert rebuttal evidence. The obligation of the Commissioner to file a disclosure statement is contained in section 4.1 of the *Competition Tribunal Rules*, SOR/94-290 which is as follows:

4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).

(2) The disclosure statement shall set out

(a) a list of the records on which the Commissioner intends to rely;

(b) the will-say statements of non-expert witnesses; and

(c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.

(3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).

(4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make

4.1 (1) Dans les quatorze jours suivant le dépôt de l'avis de demande autre qu'une demande d'ordonnance provisoire, le commissaire signifie la déclaration visée au paragraphe (2) à chacune des personnes contre lesquelles l'ordonnance est demandée.

(2) La déclaration relative à la communication de renseignements comporte :

a) la liste des documents sur lesquels le commissaire entend se fonder;

b) un sommaire de la déposition des témoins non experts;

c) un exposé concis de la théorie économique à l'appui de la demande, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.

(3) Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande.

copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.

(4) Le commissaire doit permettre à la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue.

[172] The obligation to apply for leave to amend the Commissioner's disclosure statement is contained in subsection 4.1(3) of the *Competition Tribunal Rules* which provides that leave shall be sought where "new information that is relevant to the issues in the application arises before the hearing" [underlining added].

[173] The parallel obligation upon a respondent to file a disclosure statement is contained in section 5.1 of the *Competition Tribunal Rules*, which similarly provides that the obligation to apply for leave to amend the disclosure statement arises when new information arises before the hearing.

[174] Together, these rules function to ensure that, prior to the commencement of the hearing, each side knows both the documents and the factual, non-expert testimony upon which the opposite side intends to rely. Section 47 of the *Competition Tribunal Rules* operates to ensure that, prior to the commencement of the hearing, each side knows the expert testimony the opposite party intends to rely upon, including any expert rebuttal evidence.

[175] With respect to non-expert rebuttal evidence, as discussed in more detail below, as a matter of law an applicant may only call rebuttal evidence after completion of the respondent's case where the respondent has raised some new matter which the applicant had no opportunity to deal with and which the applicant could not reasonably have anticipated. The fact that the need for rebuttal evidence becomes apparent only after the Commissioner has closed her case makes it inappropriate, in my view, to require amendment of the applicant Commissioner's disclosure statement.

[176] Instead, in my view, the right of the Commissioner to adduce rebuttal evidence is properly governed by application of the common-law rules governing rebuttal evidence.

[177] Further, in the present case the Tribunal's direction that the Commissioner serve Sears with a rebuttal will-say statement prior to Sears closing its case prevented any element of improper surprise or prejudice to Sears. In my view it does not follow, however, that in another case the failure to provide such a will-say statement on a timely basis would, by itself, preclude calling what would otherwise be proper rebuttal evidence.

(v) Applicable principles of law with respect to rebuttal evidence

[178] The general principles applicable to rebuttal evidence were set out by Mr. Justice McIntyre for the Supreme Court of Canada in *R. v. Krause*, [1986] 2 S.C.R. 466 at paragraphs 15, 16 and 17. There, Mr. Justice McIntyre wrote:

> 15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see R. v. Bruno (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd., [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page 74] the full case for the Crown so that it is known from the outset what must be met in response.
>
> 16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.
>
> 17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed. [underlining added]

[179] In *Halford v. Seed Hawk Inc.*, 2003 FCT 141; 24 C.P.R. (4th) 220 Mr. Justice Pelletier, then sitting in what was the Trial Division of the Federal Court, re-stated the principles governing the admissibility of rebuttal evidence. At paragraph 16, Mr. Justice Pelletier noted that evidence, which otherwise would be excluded because it should have been led as part of a plaintiff's case in chief, would nonetheless be examined in order to determine if it should be admitted in the exercise of the judge's discretion.

[180] Similarly, in *DRG v. Datafile Ltd.* (1987), 16 C.P.R. (3d) 155 (F.C.T.) Mr. Justice McNair observed that a judge has discretion to admit further confirmatory evidence in rebuttal either for the judge's own enlightenment or where the interests of justice require it.

(vi) Proposed rebuttal of the timing explanation

[181] Turning to the application of these principles to the proposed evidence, the nature of the proposed rebuttal evidence with respect to the timing explanation did not purport to contradict Mr. Cathcart's evidence that there was an issue in the last half of 1999 with respect to the availability of Michelin tires in an 80 aspect ratio size. Nor did it directly contradict his evidence that in the last quarter of 1999 there were labour issues which prevented Sears from receiving a promotional shipment. Rather, the Commissioner sought to adduce evidence with respect to the frequency with which RoadHandler T Plus and Weatherwise tires were on sale in the first two quarters of 1999 in order to attack Mr. Cathcart's conclusion that, in the last half of 1999, those tires were offered at sale prices for more than 50 per cent of the time because of the 80 aspect ratio size issue and the labour issues.

[182] With respect to the length of time tires were offered at sale prices, it is an essential element of the Commissioner's case to establish that Sears did not offer the Tires at the regular single unit price in good faith for substantial period of time recently before or immediately after making the representations in issue. The parties substantially agreed about the volume of tires sold by Sears both in the six months preceding the representations and in the 12 months preceding the representations. As part of her case the Commissioner adduced evidence (see for example Exhibits A-97 and CA98 - 102) with respect to the period of time each relevant tire was on sale.

[183] The evidence which the Commissioner wished to adduce in rebuttal was described by counsel for the Commissioner as an analysis of that data. Counsel further advised that there was "admittedly some overlap between what is on the record" and the proposed evidence, but stated that there "is added value [in the rebuttal evidence] in the sense that it explains and articulates in greater detail, significantly greater detail, what is, in a sense, beneath the documents that are now [in evidence]". Counsel for the Commissioner also noted that more evidence had not been adduced by the Commissioner in chief because of the agreement between the parties as to the volume of tires sold and the times the Tires were on promotion.

[184] In my view, the nature of the evidence which the Commissioner proposed to call to rebut the timing explanation is the type of evidence which should not be permitted as rebuttal evidence. When calling evidence in chief, the Commissioner was obliged to exhaust her evidence with respect to the length of time that the Tires were offered at sale prices. She ought not split her case by relying on some evidence with respect to when the Tires were on sale and closing her case, and then after Sears adduces evidence, seek to introduce further evidence confirming the time the Tires were offered for sale at sale prices.

[185] To the extent that there is, or may be, a discretion to allow confirmatory evidence in rebuttal, there is one significant factor which militates against the exercise of such discretion. That factor is the failure of the Commissioner to cross-examine Mr. Cathcart upon the evidence which the Commissioner sought to rebut. If the Commissioner sought to contradict Mr. Cathcart's testimony, fairness required that he be cross-examined on his testimony so that he could provide any available explanation.

(vii) Proposed rebuttal of the third week of May advertising and promotions testimony

[186] The representations at issue in this application were made in November and December of 1999. Whether two lines of tires were promoted as being on sale only in Alberta and British Columbia in the third week of May of 1999 is relevant to the issue of the appropriate geographic market. As noted below, the Commissioner asserts that Sears marketed its tires nationally, while Sears asserts that it marketed tires in local, geographic markets.

[187] In its pleading, Sears asserts that:

> 56. Sears Automotive distributed various advertising and promotional material to its customers with respect to the supply of the Tires in the local geographic market areas in which Sears Automotive Retail Centres competed during the Relevant Period.
>
> 57. Generally, there were no regional variations in the advertisements that Sears Automotive disseminated in both national and local newspapers across Canada during the Relevant Period with respect to the Tires.
>
> [...]
>
> 59. Sears Automotive offered the Tires for sale at the same prices in each specific market area in which a Retail Automotive Centre competed.

[188] I am satisfied that, on the state of its pleading where Sears admitted that generally there were no regional variations in its advertisements, it was not incumbent upon the Commissioner to lead evidence as part of her own case with respect to the advertisement and promotion of two specific lines of tires in the third week of May, 1999. Further, the Commissioner argued, and Sears did not dispute, that there was nothing in the will-say statement of Mr. Cathcart to suggest that the Commissioner ought to have reasonably anticipated that the advertising and promotion of two lines of tires in the third week of May would be disputatious. Thus, subject to one concern addressed in the next paragraph, I was satisfied that rebuttal evidence ought to be received on this issue in order to ensure that, at the end of the hearing, each party would have the same opportunity to hear and respond to the full case of the other.

[189] The one remaining concern arose from the failure of the Commissioner to cross-examine Mr. Cathcart upon his evidence that the two specific tire lines were only advertised on sale in

Alberta and British Columbia and that different promotions were offered during that week. This concern arose because the rule in *Browne v. Dunn* (1893), 6 R 67 at pages 70-71 requires that where a party intends to contradict an opponent's witness by presenting contradictory evidence, such evidence should be put to the witness. It is unfair to a witness for a court or tribunal to receive evidence that casts doubt on his or her veracity when the witness has not been given an opportunity to deal with the contradictory evidence and offer any explanation. Requiring that a witness be challenged with contradictory evidence also assists the trier of fact in the process of weighing the evidence.

[190] I have no doubt that the Commissioner ought to have put the newspaper proofs, pre-prints and flyers she sought leave to adduce as rebuttal evidence to Mr. Cathcart when he was cross-examined.

[191] Notwithstanding, the failure to comply with the rule in *Browne v. Dunn* is not necessarily determinative of the right to tender contradictory evidence. The extent and manner to which the rule is applied is to be determined by the trier of fact in light of all of the circumstances. See, for example, *Palmer v. R.*, [1980] 1 S.C.R. 759 at pp. 781-72.

[192] In the present case, the circumstances which I considered to be significant with respect to this rebuttal evidence are the nature of the rebuttal evidence (Sears' own advertising material) and the fact that the documents were disclosed in both parties' disclosure statements. In my view allowing Sears' own advertising documents, previously disclosed in this proceeding, to be tendered would not be prejudicial to Sears, would clarify testimony which was somewhat unclear, and would be in the interests of justice.

[193] For these reasons, the Commissioner was permitted to introduce into evidence the newspaper proofs, pre-prints and flyers relating to the third week of May, 1999.

VII. ANALYSIS OF THE ISSUES

[194] As discussed above, subsection 74.01(3) of the Act specifies two factors to be considered when applying the volume and the time tests. Therefore, before considering whether Sears' regular prices for the Tires were offered in good faith as required by the time test, one must consider the nature of the product and the relevant geographic market.

VIII. THE NATURE OF THE PRODUCT

[195] The Commissioner argues that the Tires have certain characteristics that are relevant to the analysis under subsection 74.01(3). Those characteristics are said to be:

i) Almost all tires are sold in multiples.

ii) Tire sales are fairly stable over time.

iii) Consumers do not spend much time searching for tires or evaluating alternative products.

iv) Consumers have a limited ability to evaluate the intrinsic qualities of tires.

v) Consumers engage in a passive search over time for tires.

[196] Each factor will be considered in turn.

(i) How tires are sold

[197] Tires are complementary goods in the sense that, for passenger cars, one tire must be used with three others. The following, in my view uncontroversial, facts flow from this:

- Tires are typically purchased in pairs, either one pair or two pairs at a time.
  Mr. DesRosiers expert report, paragraph 13
  Mr. Gauthier expert report, paragraph 38

- Survey data showed that in 1999, 89% of consumers purchased either two or four tires at the same time.
  Mr. DesRosiers expert report, paragraph 13

- Within the tire industry, at most, between 5% and 10% of tires are sold singly.
  Mr. Gauthier expert report, paragraph 38

- In 1999, Sears knew that it would sell between 5% and 10% of the Tires as single units.
  Mr. Cathcart, volume 14 at page 2486

- Consumers purchase a single tire for reasons that include tire failure (due to blow out, road hazard or defect) and the replacement of a space saver (or dummy) spare tire.
  Mr. DesRosiers expert report, paragraph 15
  Mr. McKenna, volume 19 page 3055
  Mr. Merkley, volume 10 page 1713

- Consumers who purchase single tires are typically constrained to purchase a model of tire that matches the tire which is on the same axle because, for safe handling, it is important to maintain the same traction capability on the axle.
  Dr. Lichtenstein expert report, paragraph 17
  Mr. Gauthier expert report, paragraph 38

- Where a tire is to be replaced due to a blow out or other damage, there may be a sense of urgency about replacing the tire.
  Mr. McKenna, volume 19, page 3055
  Dr. Lichtenstein expert report, paragraph 17.

(ii) Are tire sales stable over time?

[198] Dr. Lichtenstein testified that:

- by their nature, sales of "all-season" tires (such as those at issue) are less sensitive to seasonal variation.
  expert report paragraph 21

- tires are not a product category which people typically buy in advance to stockpile.
  expert report paragraphs 18 and 19

- while a sale price may pull a consumer into the market sooner than they would otherwise enter the market, a sale price will not lead to increased tire consumption.
  expert report paragraphs 18 and 19.

[199] This evidence was essentially unchallenged and I accept it.

[200] At the same time, as Dr. Lichtenstein acknowledged, there is an increase in tire sales in the Spring and Fall seasons. Mr. McKenna described this as a moderate increase in March, April and May, and a more dramatic shift in October and November.

[201] Mr. Winter also described a distinctive seasonal pattern based upon his analysis of Sears' retail daily tire sales data and from an analysis of a monthly retail trade survey conducted by Statistics Canada. It is important to note, however, that Mr. Winter's analysis of Sears' daily tire sales data included data with respect to the sale of winter tires, and that the Statistics Canada survey was based upon sales of tires, batteries, parts and accessories. Mr. Winter agreed that the sale of winter tires is more seasonal and he did not know if batteries exhibit a seasonal selling pattern. In consequence, while I accept Mr. Winter's evidence generally that tire sales increase in the Spring and Fall, I am concerned that his conclusion as to the magnitude of the fluctuation is flawed because it included data related to winter tires and non-tire products.

[202] On the whole, from all of this, I find that the sales of all-season tires are relatively stable

and predictable, with some predictable seasonal pattern.

(iii) Do consumers spend much time searching for tires or evaluating alternate products?

[203] In asserting that consumers do not spend much time searching for tires or evaluating alternatives, the Commissioner relies upon the evidence of Dr. Lichtenstein. Dr. Lichtenstein testified that consumers spend different amounts of time and effort searching for products, considering brand alternatives and comparing prices, depending on the nature of the item to be purchased. He said that items described as "convenience goods" are found at one end of a continuum and their purchases involve relatively little investigation. The purchase of "specialty goods", which are found at the other end of the continuum, involves a great deal of investigation. He describes tires as "shopping goods" and says that they fall at the mid-point of the continuum. This means, in his opinion, that many consumers of "shopping goods" have a pre-disposition for low levels of search and effort which means that a large number of consumers are not vigilant shoppers even when the shopping goods are expensive.

[204] Sears rejects this opinion and asserts that the best evidence on this point is that of Mr. DesRosiers and Dr. Deal. In Mr. DesRosiers' opinion, there is a significant opportunity for consumers to shop around for tire replacements. From August 27, 2003 to September 3, 2003, Dr. Deal surveyed Sears' customers who bought new replacement tires from Sears in 1999 in order to: survey their behaviour when buying tires in 1999 from Sears and when buying tires in general; determine their attitude toward purchasing tires; and, assess their perception of value of the 1999 tire purchases, their satisfaction with their purchases and their intention to consider Sears for future tire purchases. Dr. Deal's survey found that 57% of survey respondents said that they compared tire prices prior to purchasing their tires at Sears.

[205] I do not find Mr. DesRosiers' evidence to be of assistance on this point because the research he relied upon did not examine whether consumers actually exercised any opportunity available to them to shop around.

[206] When I compare the evidence of Drs. Lichtenstein and Deal, I am not satisfied that their evidence is that divergent. Dr. Lichtenstein does not quantify the proportion of consumers who, in his view, engage in a low level of search effort for goods such as tires. Dr. Deal's study would suggest that 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears.

[207] Dr. Deal's study results must, in my view, be approached with some caution for the following reasons. At the time Dr. Deal conducted his survey and swore his first expert affidavit, he believed that the persons surveyed were selected from among all the persons who bought the Tires in 1999. Put another way, the target population intended to be surveyed was consumers from all 67 Sears Retail Automotive Centres and Dr. Deal assumed that he had received data from all or almost all of the centres. By "all or almost all" of the centres, Dr. Deal

believed he had received data from 90 to 95% of the Sears stores that sold the Tires. Dr. Deal later became aware that he had only received data from the 28 stores that kept electronic records. Thus, the survey was not based upon a random probability sample of purchasers from all 67 Retail Automotive Centres.

[208] Dr. Deal agreed that results based upon non-probability sampling were less generalizable to the parent population but observed that sometimes one does obtain an accurate representation of the target population even when one does not abide by the strict rules of statistical inference and takes a non-random sample.

[209] In the present case, Dr. Deal did not undertake a formal analysis to determine whether the customers from the 28 stores were similar to or different from the customers of the other 39 stores (although such an analysis could have been performed). In his view, based upon a large number of other surveys he has done, there would not likely be significant differences between the customers. Thus, while, pursuant to principles of statistics, his survey would have to be limited to be representative of Sears' customers who bought tires in 1999 from the 28 stores for which he received records, in Dr. Deal's view, the findings between the 28 stores and the other 39 stores would not be significantly different.

[210] Obviously, the fact that the data provided to Dr. Deal emanated from only 28 of the 67 stores (and not from all or almost all of the stores) impairs the ability of Dr. Deal to scientifically generalize the survey results. I accept, however, his general expertise to provide an opinion as to whether it was more or less likely that the survey results would have been different had consumers from all, or almost all, of the Sears stores that sold the Tires been included as part of the target sample.

[211] Thus, while I approach Dr. Deal's survey results with caution, and am prepared to accept that the overall accuracy of the survey's findings may not be accurate within plus or minus four percentage points in 19 out of 20 samples, I do generally accept Dr. Deal's conclusions.

[212] I am therefore satisfied by the evidence of Drs. Lichtenstein and Deal that a very significant percentage of consumers, in the order of 42% (plus or minus at least 4%), do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores.

(iv) Do consumers have a limited ability to evaluate the intrinsic qualities of tires?

[213] The intrinsic attributes of tires are their physical attributes such as tread pattern and tire construction. It was Dr. Lichtenstein's opinion that most consumers do not have the ability to evaluate the quality of tires based on their intrinsic attributes. His opinion was based upon his experience with consumers in their evaluation of attributes for many categories of infrequently purchased shopping goods. He believed that he could reasonably generalize that experience to tires. His opinion was also supported, in his view, by reference to the evidence of both

Mr. Cathcart (given during his examination conducted under section 12 of the Act) and Mr. McMahon (given in his affidavit filed pursuant to section 11 of the Act).

[214] Mr. McMahon explained in his affidavit how Sears set its prices for its private label and flag brand tires. Flag brand tires are tires made by a manufacturer whose name appears on the sidewall of the tire (for example, the BF Goodrich Plus). A private label tire does not show the name of the manufacturer, but only shows the trade name owned by the retailer (for example, Silverguard Ultra IV and Response RST Touring). A tire is dual branded when it bears both the name of the manufacturer and the retailer's private name (for example, Michelin Weatherwise and Michelin RoadHandler T Plus). In the context of describing how private label prices were set, Mr. McMahon swore that:

> 251. For example, Sears Automotive compared its "BF Goodrich Plus" Relevant Product with **[CONFIDENTIAL]** "**[CONFIDENTIAL]**" tire. The BF Goodrich Plus tire was superior to the **[CONFIDENTIAL]** tire, however, consumers tended not to perceive the inherent value of the BF Goodrich Plus tire when Sears Automotive's opening price point was more than **[CONFIDENTIAL]** for the inferior **[CONFIDENTIAL]** tire. As a result, Sears Automotive set the price for its BF Goodrich tire in such a manner that consumers would compare the value of that tire against the value of **[CONFIDENTIAL]** tire.

[215] During Mr. Cathcart's examination, he confirmed that what had happened with the BF Goodrich Plus was that, even though Sears perceived, and he believed, the tire to be a superior tire to the comparable Canadian Tire offering, consumers were unable to perceive the qualities that justified the greater price for the superior tire.

[216] Mr. Cathcart also diminished the importance of needing to refresh Sears' tire product line, stating that people would not stop shopping because Sears was selling the same lines of tires. In Mr. Cathcart's words, "In tires, it – – you know, they are black and they are round, and there is not a lot of exciting tires". This is consistent with the view that consumers have a limited ability to evaluate tire's intrinsic qualities.

[217] In my view, Sears did not seriously impeach Dr. Lichtenstein's opinion as to the ability of consumers to evaluate tire quality for money based on the intrinsic qualities of the tire. Supported as it was by the evidence of Messrs. McMahon and Cathcart where they referred to Sears' own experience that consumers were unable to appreciate the intrinsic qualities of a specific tire and therefore compare true value for money, I accept Dr. Lichtenstein's opinion that consumers have a limited ability to evaluate the intrinsic attributes of tires.

[218] Before leaving this point, I also note that Sears tendered as an exhibit its Fall 2000 Automotive Review. When describing Sears' private label or brand structure, the Review described the assortment as "A quality private Brand structure that is totally Sears, allowing little comparison with competitor product". For this to be true, Sears must have been of the view that consumers lack the ability to assess the intrinsic qualities of non-identical tires.

(v) Do consumers engage in a passive search over time for tires?

[219] Dr. Lichtenstein opined that tires are usually replaced only when a consumer's existing tires become worn so that, except for the case of the purchase of a single tire, the timing of new tire purchases occurs on a continuum based on when the benefit of new tires exceeds the cost of obtaining them. Dr. Lichtenstein further opined that as consumers notice that their tires are becoming worn, they would likely go into a passive search mode during which they more readily perceive tire advertisements and are on the lookout for a good deal on tires.

[220] This opinion was not challenged and I accept it.

IX. RELEVANT GEOGRAPHIC MARKET

[221] Subsection 74.01(3) requires the Tribunal to have regard to the relevant geographic market when applying the time and volume tests. While the Commissioner asserts that the relevant geographic market for assessing the representation is Canada, Sears argues that, in the retail tire business, competition occurs at the local level so that the geographic market should be defined on no more than a regional basis.

[222] In support of this argument, Sears relies upon the evidence of a number of witnesses that, in 1999, the Canadian after tire market was highly competitive, with various channels of distribution, and the competitive nature of the after tire market varied across the country. Sears also relies upon the expert opinion of Professor Trebilcock to the effect that markets are more appropriately determined by considering the alternatives available to consumers, or by adopting a demand-side perspective. By asking what range of choices any given consumer would consider he or she had available to them, Professor Trebilcock concluded that the relevant geographic market for tires is a local, regional market. The analysis that led to this conclusion was based upon: a review of regional newspaper advertising that showed that the list of tire retailers is very different from one city to the next; a review of yellow pages listings for tire retailers in different regions which showed that retailers differed radically from one market to another; the DesRosiers' tire market study which showed that independent tire retailers are the most common source of tires and those retailers varied dramatically from one local market to the next; and information from Bridgestone/Firestone and Michelin that shows that the top dealers to vary significantly from one region to the next. Thus, the question of "where can I go to buy tires" is answered differently from one local market to the next.

[223] In considering the interpretation to be given to the term "relevant geographic market", I begin from the premise that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21).

[224] I have previously found, at paragraph 93, that the objectives of subsection 74.01(3) are:

to protect consumers from deceptive OSP representations; to protect businesses from the anti-competitive effects of such misrepresentations; and to protect competition from the anti-competitive effects and inefficiencies that result from such misrepresentations. The provision is designed to effect those objectives on the basis that, if acting in good faith, meeting the time or volume test will bring retailer practices in line with consumer expectations that an advertised OSP would relate to the seller's own ordinary selling price. The time and volume tests are to be applied having regard to the relevant geographic market.

[225] In light of the objectives of the provision, it is relevant to look at where Sears marketed the Tires and how Sears marketed the Tires in that geographic area so as to inform the view of whether an advertised OSP was really Sears' ordinary selling price. Because this is a misleading advertising case in which it is Sears' conduct that is at issue, I do not find, with respect, that Professor Trebilcock's traditional competition law approach to the definition of geographic market is relevant.

[226] In the traditional competition law context, geographic markets are defined as part of a determination about whether there has been a substantial lessening of competition. Dr. Trebilcock agreed, on cross-examination, that the concept of substantial lessening of competition is not relevant to the assessment of whether a representation is misleading.

[227] Turning to Sears' own conduct, I find the following to be relevant to the determination of the relevant geographic market:

- Sears' regular and promotional prices were set on a national basis without regional variation;

- Sears' internal documents, particularly its Spring and Fall Automotive Reviews, contained no discussion relating to local markets. These reviews were produced twice a year in order to present Sears' marketing strategy and tire product line to Sears' Chief Executive Officer and other executive officers;

- Sears did not produce or distribute separate marketing and promotional material for each region (with the exception of material relating to snow tires);

- The representations in issue were contained in flyers that were distributed nationally, without regional variation;

- Sears published advertisements in newspapers and there was no regional variation in the advertisements, except with respect to snow tires. The advertisements were distributed nationally through different newspapers;

- Sears tracked its pre-print distribution rates on a national basis; it could not track pre-prints on a regional basis;

- Sears determined what tires to offer for sale in a Sears' pre-print based upon factors which included "the current market trends and consumer preferences in Canada with respect to the sale of tires" [underlining added];

- Mr. Cathcart created "checkerboards" to, among other things, monitor the frequency with which tires were on promotion. Those checkerboards tracked sales volumes and promotional periods on a national basis only.

[228] In light of that evidence as to how Sears priced and marketed the Tires, and, in particular, that the regular prices for the Tires were set and advertised on a national basis, I find that it is most appropriate to consider Sears' compliance with the time test in the context of a geographic market that is Canada.

[229] This was also the conclusion reached by Drs. Lichtenstein and Moorthy.

[230] Having considered the nature of the product and the relevant geographic market, I turn to consider whether Sears' regular prices for the Tires were offered in good faith as required by the time test.

X. GOOD FAITH AS REQUIRED BY THE TIME TEST

[231] The Commissioner observes that the Act does not define "good faith", there are no other provisions in the Act that use the phrase, and there is no Canadian jurisprudence that has considered the concept of "good faith" in the context of OSP representations. There is, however, Canadian jurisprudence, which the Commissioner relies upon, which has considered the meaning of "good faith" in other legislative contexts.

(i) The subjective nature of "good faith"

[232] In *Dorman Timber Ltd. v. British Columbia* (1997), 152 D.L.R. (4th) 271, the British Columbia Court of Appeal considered whether a Crown employee was exempt from civil liability by virtue of legislation which exempted liability "for anything done or omitted to be done by a person acting reasonably and in good faith" while discharging certain responsibilities. The British Columbia Court of Appeal noted that the leading Supreme Court of Canada authority was *Chaput v. Romain*, [1955] S.C.R. 834 where the Supreme Court considered a provision that immunized police officers from liability where the officer exceeds his powers or jurisdiction but acts "in good faith in the execution of his duty". Mr. Justice Taschereau defined "good faith" to be "a state of mind consisting of the false belief that one's actions are in accordance with the law". Six judges of the Court adopted this definition. Mr. Justice Kellock, with Mr. Justice Rand concurring, wrote at page 856 that:

> What is required in order to bring a defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in

> acting as he did.

[233] Having reviewed this jurisprudence, the British Columbia Court of Appeal concluded, at paragraph 69, that:

> 69 Kellock J.'s formulation clearly tends towards a subjective understanding of honest belief, but Taschereau J.'s formulation removes all doubt. There is good faith when there is "a state of mind" that the acts are authorized. Kellock J.'s reasons give content to what this "state of mind" is: a "belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did." As was noted in Hermann, the reasonableness of the belief is a factor to consider in determining whether the belief was honestly held, but reasonableness is not the issue.

[234] To similar effect is the recent decision of the Saskatchewan Court of Queen's Bench in *Nelson v. Saskatchewan* (2003), 235 Sask. R. 250 at paragraphs 102-109.

[235] The principle that good faith is inherently subjective is consistent with its dictionary definition. Blacks Law Dictionary, 7th edition (St. Paul, Minn.: West Pub. Co., 1979) defines good faith as follows:

> **good faith,** *n.* A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. - Also termed *bona fides*. - **good-faith,** *adj.* Cf. BAD FAITH.

[236] A subjective view of good faith is also consistent with American jurisprudence that has considered legislative provisions similar to subsection 74.01(3) of the Act. In *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 76 F. Supp. 2d 868 (N.D. Ill. 1999) the U.S. District Court had before it a regulatory provision that provided:

> It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, [...] unless one of the following criteria is met:
>
> > (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or
> >
> > (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in good faith, with an intent to sell the product at that price(s). [underlining added]

[237] The Court found that the defendant Finlay did not, in good faith, intend to sell the relevant products at the regular price because:

> Finlay made little if any sales of the items at regular price over the course of several years at its Rockford stores. Finlay was obviously not concerned with the lack of sales at regular price, and in

> fact, intentionally chose not to monitor information of the number of gold jewelry items sold on a given day and at what price. Finlay calculates the regular and sale prices of its gold jewelry simultaneously with the objective that when an item is sold at a 50% discount it will yield the desired gross margin. Finlay monitors only whether a store is meeting its gross margin goal.

[238] Implicit in that finding is that the existence of a good faith intent to sell product is determined subjectively.

[239] I conclude therefore that good faith is to be determined on a subjective basis. In this case, the question to be asked is whether Sears truly believed that its regular prices were genuine and *bona fide* prices, set with the expectation that the market would validate those regular prices. As noted by the Court in *Dorman*, *supra*, the reasonableness of a belief is a factor to be considered in determining whether a belief is honestly held. I therefore also accept that other external, objective factors such as whether the reference price was comparable to prices offered by other competitors, and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether Sears truly believed its regular prices were genuine and *bona fide*.

[240] I believe this conclusion to be consistent with the description found in the Commissioner's Guidelines concerning the assessment of good faith in the context of the time test.

[241] I also understand Sears generally to accept that good faith is subjective. In oral argument, counsel for Sears observed that:

> The bottom line is that the Competition Bureau's Guidelines, the Commissioner's Guidelines, tell us that the analysis of good faith is going to be broadly based and will have regard for market conditions, not only those things perhaps, but those things will certainly be part of the mix. And the reason for that, in my submission, is - - the reason for that approach, I think, is obvious. <u>If there is no direct evidence of a subjective belief or ambivalent evidence of a subjective belief, or unclear evidence of a subjective belief, the Court will obviously refer to objective factors, or extrinsic factors which constitute evidence or can constitute evidence of the reasonableness of a subjective belief.</u> [volume 30, page 4811 line 23 to page 4812 line 10, underlining added]

[242] Counsel for Sears framed the question to be determined as follows:

> The only issue, in our submission, for Your Honour to decide is whether Sears reasonably expected to sell single tires at its regular single tire price and whether [it set] those prices in an intelligent manner, having regard to the regular prices of similar tires in the marketplace.

[243] However, the latter part of counsel's formulation is more objective. Shortly thereafter, counsel for Sears argued:

> In our submission, at the end of the day a good faith regular price is one which is reasonably credible and by that I mean looked at through the eyes of a reasonable person, is

credible given market conditions and is recognized as such by the market. And we submit that the Sears regular price clearly meets this definition.

[244] Sears cited no jurisprudence relevant to determining the nature of good faith.

[245] I remain satisfied, however, inspite of Sears' submissions about the reasonable person, that good faith is to be assessed on a subjective basis. I now move to consider the relevant evidence.

(ii) Sears' internal documents

[246] The Commissioner placed into evidence a number of documents provided by Sears to the Commissioner in response to a section 11 order. Documents that are particularly relevant to the assessment of good faith are:

a) Sears' competitive profiles for each of the Tires in issue; and

b) Sears' Automotive Reviews for the Spring and Fall of 1999.

[247] Section 69 of the Act provides that:

69(1) In this section, "agent of a participant" means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

69(1) "participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

69(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received,

69(1) Les définitions qui suivent s'appliquent au présent article. «agent d'un participant» Personne qui, selon un document admis en preuve en application du présent article, paraît être, ou qui, aux termes d'une preuve dont elle fait autrement l'objet, est identifiée comme étant un fonctionnaire, un agent, un préposé, un employé ou un représentant d'un participant.
69(1) «participant» Toute personne contre laquelle des procédures ont été intentées en vertu de la présente loi et, dans le cas d'une poursuite, un accusé et toute personne qui, bien que non accusée, aurait, selon les termes de l'inculpation ou de l'acte d'accusation, été l'une des parties au complot ayant donné lieu à l'infraction imputée ou aurait autrement pris part ou concouru à cette infraction.
69(2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :
a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce

as the case may be, with the authority of that participant; and
(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
(i) that the participant had knowledge of the record and its contents,
(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant. [underlining added]

participant;

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :
(i) que le participant connaissait le document et son contenu,
(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,
(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant. [Le souligné est de moi.]

[248] Sears concedes that all of the elements of subsection 69(2) of the Act are met but argues, correctly, that section 69 creates a limited, and rebuttable presumption to be applied to its documents and, in the case of paragraph 69(2)(*c*), the reference to *prima facie* proof speaks to proof absent credible evidence to the contrary.

[249] I accept that, as submitted by Sears, it is for the Tribunal to interpret Sears' documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.

[250] This means, I believe, that Sears' documents tendered in evidence are properly before the Tribunal and are *prima facie* proof that Sears said, did and agreed to the matters set out in the documents. For example, to the extent the automotive review sets out marketing strategies prepared by Mr. Cathcart and Sears' tire buyer, Mr. Keith, to be presented to Sears' chief executive officer for approval or ratification, the document is *prima facie* proof that such strategies were agreed upon to be presented to Sears' chief executive officer and that the Spring and Fall 1999 automotive reviews set out Sears' assessment of its significant competition and its responsive marketing strategy.

[251] To further illustrate, the Commissioner relies upon the buying plans prepared by the late Stan Keith, Sears' tire buyer, for the relevant period. The Commissioner argues that the year

2000 buying plans, created on June 19, 2000, and based on 1999 data for the Tires, did not forecast any sales at Sears' regular prices.

[252] It is true that the documents appear to be premised on the assumption that (based upon 1999 sales data) 10% of the Tires in each tire line would be sold at the 2For price and 90% would be sold on promotion. However, the Tribunal received credible evidence from Mr. McKenna that touched upon the interpretation to be given to the buying plans.

[253] Mr. McKenna identified "R & P Reports" which reported upon the regular and promotional sales of each line of a tire by month for 1999. The documents were tendered and received as exhibit CR-133 without objection. Mr. McKenna advised that he would receive this type of report on a monthly basis, as would Mr. Keith. Reviewing exhibit CR-133, Mr. McKenna testified that the breakdown between regular sales and 2For sales on the one hand, and promotional sales on the other, was as follows:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
BF Goodrich Plus	20-25%	75-80%
Michelin RoadHandler T Plus	25%	75%

The R & P Reports (to the extent they are wholly legible) reflect the following percentages for the remaining three tire lines:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
Michelin Weatherwise	13%	87%
Response RST Touring	20%	80%
Silverguard Ultra IV	23%	77%

[254] Turning then to the buying plans relied upon by the Commissioner, Mr. McKenna testified that he considered the buying plans with Mr. Keith in 2000 and that they were prepared in June 2000 as Mr. Keith prepared for the Fall presentation to Sears' chief executive officer. The buying plans, according to Mr. McKenna, were used to generate a conservative estimate of margin because "Stanley certainly was not one to want to position himself on being unable to deliver so he wouldn't [...] pigeon-hole himself on promising or committing to a margin that he wouldn't be able to deliver".

[255] Considering Mr. McKenna's explanation of the purpose of the buying plans, supported by the "R & P Reports" that showed the buying plans not to be based upon actual prior sales data, I am satisfied that Sears has provided credible evidence to displace any *prima facie* proof

based upon the buying plans that Sears was not forecasting sales at its regular, single unit, prices.

(iii) The competitive profiles

[256] Mr. Keith was acknowledged within Sears as "the expert" with respect to the tire market in Canada and tire pricing. Mr. Cathcart acknowledged that Mr. Keith "most certainly" knew the tire market better than he did and that, arguably, Mr. Keith knew the tire market better than the manufacturer's representatives from whom he bought tires. As the tire buyer, Mr. Keith was responsible for building Sears' tire line structure and for, in the first instance, setting Sears' tire prices.

[257] One document prepared for each tire line was a "competitive profile" which compared, for each tire, Sears' pricing at the 2For, normal promotional and great item prices, with a competitive tire offering identified by Mr. Keith. No comparison was made in these competitive profiles to Sears regular prices. To illustrate, the competitive profile for the Silverguard Ultra IV compared it with Canadian Tire's Motomaster Touring LXR tire. For tire size P185/75R14, Canadian Tire's every day low price was $67.99. Sears' prices and the percentage comparisons with the competitive offering were as follows for this tire size:

Price		**Percentage price comparison to competitive tire**
Regular	$109.99	no comparison
2For	$ 72.99	107.35%
Promotional	$ 65.99	97.06%
Great Item	$ 59.99	88.23%

[258] The Commissioner argues that Mr. Keith created these competitive profiles as he built Sears' tire line structure and that they evinced Sears' competitive response to what it identified as its major competitor. Because Sears' regular, single unit, price formed no part of the competitive response, the Commissioner submits that Sears could not have in good faith believed that the market would validate its regular, single unit, prices.

[259] In response, Sears argues that the competitive profiles are contained in a document entitled "1999 Automotive Training Program" and that the program and the competitive profiles contained therein were prepared by Mr. Keith to explain to Sears' field associates Sears' tire lines and its pricing strategies. The competitive profiles were not intended to show how the regular price stood up against the broad range of retailers, but rather to show how Sears would respond to competition from both EDLP and hi-low retailers.

[260] I do not accept Sears' submission that the competitive profiles were simply training tools on the basis of this excerpt from the cross-examination of Mr. Cathcart wherein he was speaking about the competitive profiles:

> We have some comparisons where he has shown the AW+ to a Sears brand, and he would

compare. The comparison was built to inform the associates how to respond to the Canadian Tire pricing.

So he would pick a Canadian Tire tire - - he could use one of their tires - - as a compare to say we are at this price in our tire, with a far better warranty package. And this is what Canadian Tire will be offering for the tire that closely resembles our tire.

These documents were his documents that he used as a response to our field people to inform them on how to respond to the competition, be it Canadian Tire, be it dealers, whomever.

He would never reference regular price in them, because they already knew the regular prices. They would have that information.

2:30 p.m.

MR. SYME: So is it your evidence, sir, that these were prepared solely to take on training missions, these cross-Canada training missions?

MR. CATHCART: Well, they are his documents, Mr. Syme. I recall them being in this cross-country package, but Stan - - Stan would create these documents as part of his own comparer during his line structure building and he would use these documents as part of the training package.

He would take those - - he would build these documents as he would build his lines because we would have to have - - he would have to have some sort of strategy in response to what the competition is doing. Canadian Tire, by sheer volumes, was our largest competitor - -

MR. SYME: Right.

MR. CATHCART: - - so he would build them for that. He would take them on the training mission, but I can't for sure say - - no, I would say he didn't build them specifically just for that reason.

MR. SYME: He built them as a competitive analysis to position Sears pricing and Sears product opposite the comparable Canadian Tire product. I think you have just said it.

MR. CATHCART: Right. He would build it to compare our product to Canadian Tire's product, but we know the pricing - - and the pricing would reflect that.

MR. SYME: Right. And he would come to you with a proposal with respect to a tire and he would show you these profiles, wouldn't he?

MR. CATHCART: Not usually. He would just provide me with the buying plan.

[underlining added]

[261] From this, I conclude that the competitive profiles were used by Mr. Keith when building Sears' tire line structure. At the least, the competitive profiles indicate Sears' knowledge that:

i) With respect to the BF Goodrich Plus, Silverguard Ultra IV, and RST Touring 2000 (which were compared with competitive Canadian Tire offerings), the regular price was not competitive

with the prices of Sears' largest competitor; and

ii) With respect to the Weatherwise and RoadHandler T Plus, the regular price was not competitive with the comparable competitive offerings selected by Mr. Keith.

[262] I also note, in passing, that the competitive profiles for the two tires manufactured by Michelin were in its possession and were produced in response to a section 11 order. The competitive profiles were produced as being documentation exchanged with Sears in relation to the development and establishment of retail prices. This, in my view, lends credence to the conclusion that the competitive profiles were strategic, competitive documents.

[263] Sears' beliefs about the nature of its competition and its competitive response are more clearly found in the Spring and Fall Automotive Reviews for 1999.

(iv) Automotive reviews

[264] The 1999 automotive reviews were prepared by Mr. Keith and Mr. Vince Power, the national business manager, for the purpose of presenting, twice yearly, Sears' strategies and product line to Sears' chief executive officer. In Mr. Cathcart's words:

> "Basically this whole communication to the CEO was to detail [...] what we were going to introduce as new commodities possibly and how we were going to address the competition".

[265] Contained in the Spring 1999 review were separate strategies for private label tires and national brand tires. Identical wording is found in the Fall 1999 review with respect to the strategies. Oral evidence confirmed that the reviews were presented to Sears' executives. There was no evidence that the strategies contained in the reviews were rejected.

[266] Sears argues that the Commissioner's reliance upon the 1999 automotive reviews is misplaced and points to Mr. Cathcart's evidence that he found more than one portion of the reviews to be confusing, and that, in places, he could not understand why Mr. Keith wrote what he did.

[267] I found such testimony to be incredible and unpersuasive when it was given, and remain unpersuaded by Mr. Cathcart's testimony as it touched on the automotive reviews for 1999. I so conclude because it is to be remembered that the automotive reviews formed part of a large and important presentation to Sears' chief executive officer (and others) about how Sears was to address the competition. In the past, some who had made presentations to the chief executive officer were summarily reassigned or let go if their presentations were found wanting. Mr. Keith was acknowledged to have a compendious knowledge of the tire market. Language contained in the Spring 1999 automotive review was repeated in the Fall 1999 automotive review. Weighing those facts against Mr. Cathcart's testimony that certain aspects of the automotive reviews were

confusing or incomprehensible, I reject Mr. Cathcart's testimony. I accept, as discussed below, that the 1999 automotive reviews set out Sears' assessment of its significant competition in the tire market and Sears' responsive marketing strategies for private label tires and national brand tires.

[268] I will deal first with Sears' strategy with respect to private label tires.

(a) Private label strategy

[269] Sears' strategy was expressed to be:

> "To increase our market share in Private Brand tires which represents almost 50% of the replacement tires sales in Canada. To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

[270] Among the tactics listed to implement this strategy was the following:

> "Index our every day pricing to **[CONFIDENTIAL]** (**[CONFIDENTIAL]** Private Brand retailer) to be equal to or within **[CONFIDENTIAL]** % of their every day low price with a better warranty package. On sale we will be lower than the equivalent tire at **[CONFIDENTIAL]**."

[271] **[CONFIDENTIAL]**, the competitive profiles built by Mr. Keith for the Silverguard Ultra IV and Response RST Touring compared each with Canadian Tire's comparable competitive offering. So too did the competitive profile for the BF Goodrich Plus. This was an entry-level tire, exclusive to Sears, that Mr. Keith compared to the Motomaster AW+. I accept, therefore, that while the BF Goodrich Plus was a flag brand tire, Sears chose internally to market it as if it were a private label tire.

[272] Mr. Cathcart admitted that Sears' "every day" strategy (**[CONFIDENTIAL]**) involved its 2For price, and not its regular price, because Sears' regular price was not competitive with Canadian Tire. Sears' 2For price was generally within 10% of Canadian Tire's pricing. Mr. Cathcart also confirmed that the "plan to sell price" referred to in the automotive review (for example at pages 1485-1488 and at page 1493) was the 2For price.

(b) National brand strategy

[273] The national brand strategy was expressed as follows:

> "To increase our market share in National Brands which represents over 50% of the Canadian replacement tire sales.
>
> To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

[274] The tactics to implement this strategy included:

> "Continue to index our every day pricing to be 90 to 95% of the equivalent National Brand normal discounted price. When on sale indexed to be **[CONFIDENTIAL]** to **[CONFIDENTIAL]** % of the National Brand price. In the case of **[CONFIDENTIAL]** [**[CONFIDENTIAL]**] equivalent items we will match price".

[275] Mr. Cathcart admitted that:

- Sears' dual branded tires (including the Weatherwise and RoadHandler T Plus) were marketed under the national brand strategy;
- the competitive profiles for each of these tires reflect the national brand strategy in terms of pricing;
- Sears' regular prices were close to or lower than the relevant manufacturer's suggested list price ("MSLP");
- with respect to the competitive profile for the Weatherwise that referenced the competitive offering to be the Michelin RainForce MXA and that showed a comparison price described as "35% off list 9/1/97": Sears' regular prices for tire size P155/80R13 would be in the order of 147.92% of the comparison price; and
- the 2For price was 95.53% of the comparison price. Thus the 2For price was how Sears responded to a dealer who was selling at 35% off the MSLP.

(c) Sears' view of the pricing structure of its competitors

[276] Mr. Keith, in the automotive review, described the pricing structure of Canadian Tire and the independent tire stores as follows:

Canadian Tire:	"Value priced every day with occasional off price promos"
Tire Stores:	"Value priced off list with off price promo and gimmick promos"

[277] Sears' pricing strategy was described in the same document to be "**[CONFIDENTIAL]**".

(d) The MSLP

[278] Sears relies heavily upon the existence of MSLPs as constituting an objective, independent mechanism to verify the *bona fides* of its regular prices for the Michelin Weatherwise, Michelin RoadHandler T Plus, and the BF Goodrich Plus tire. However, on the basis of the following evidence, I find as a fact that, in 1999, MSLPs were not widely or commonly used by tire dealers as their regular selling price.

[279] First, Mr. Gauthier testified that:

- tire retailers set their own prices in the marketplace and, based on his experience, they tended to establish this price as a percentage of the MSLP;
- dealer prices so set represented a typical everyday selling price;
- tire retail selling prices in 1999 were not at the list price level;
- MSLPs were used to establish the tire dealer's acquisition price from the manufacturer and then by the dealer to set the dealer's retail price;
- in his experience, transactions did not occur at or close to MSLP.

[280] Second, Mr. King testified that:

- the MSLP would serve as the starting point, or the starting price, that independent tire retailers would use in selling tires to individual consumers;
- in 1999, dealers typically sold for 35% off list;
- that 35% discount was arrived at either because it was the dealer's offering price or because it was the finally negotiated price;
- to his knowledge, tires were not sold to consumers at MSLP.

[281] Third, Mr. Merkley testified that:

- various dealers would use the MSLP in different ways;
- in 1999 the norm, within Michelin's dealer channel, was to sell tires 30% to 35% off Michelin's list price.

[282] Fourth, as noted above, in the Spring Automotive Review Mr. Keith described the pricing strategy of "Tire Stores" to be "Value priced off list with off price promo and gimmick promotions". The competitive profile for the Weatherwise tire compared that tire with the Michelin RainForce at a price described to be "35% off list 9/1/97" and the competitive profile for the RoadHandler T Plus compared that tire with the Michelin X One at a price described to be "New List less disc 40%". Mr. Cathcart confirmed these references to "list" in the competitive profiles to be to Michelin's MSLP. I take the Spring Automotive Review to evidence Mr. Keith's knowledge or belief that tire stores generally sold tires at a percentage off the MSLP. For the two Michelin tires it would appear that Sears' pricing, to be competitive, must compete with pricing 35% and 40% off Michelin's MSLP.

[283] Professor Trebilcock's expert report sheds some light on the use of the MSLP by tire dealers as well. At paragraph 37, he notes that:

> The *Toronto Star* article also suggests that discounting off the manufacturers' suggested retail prices was common practice in tire retailing. The retailers referred to in the *Toronto Star* article discounted off manufacturers' suggested retail prices by about 30-35%.

[284] Professor Trebilcock also appends to his expert report an article dated January 17, 2000 written by Chris Collins and published in "Tire Business". The article quoted the following statement by John Goodwin, the Executive Director of the Ontario Tire Dealers Association ("OTDA"):

> Mr. Goodwin said the OTDA has a committee investigating the ads auto makers and mass merchandisers are running. Some ads claim to sell tires at 50 percent off list price, but he asks rhetorically, "Who sells at list?"

[285] In my view, the weight of the evidence leads to the conclusion that MSLPs were not commonly used by tire dealers as a selling price, and that in 1999, tire dealers typically sold national brand tires at a price in the order of 35% off the MSLP.

[286] Sears argues that Mr. King's evidence should be discounted because neither he nor his employer sold tires at the retail level so that his evidence is "anecdotal at best". Mr. Gauthier's evidence is also discounted by Sears as being "anecdotal, overly broad, unsubstantiated and [...] not credible". Sears also argues that Mr. Gauthier is not truly an independent expert and, in oral argument, took great exception to his evidence, on cross-examination, that he disagreed with Mr. Winter when Mr. Winter concluded that Canadian Tire did not dominate the marketplace. In Mr. Gauthier's view, Canadian Tire is the dominant influence in the tire market in Canada.

[287] I have previously described, generally, the background of these gentlemen in the tire industry. Mr. Gauthier has extensive experience dating since 1984 with respect to the promotion and wholesale sale of tires to tire retailers and I reject the suggestion that his testimony was partial or biased. Mr. King has two years of experience as Bridgestone's sales manager for associate brands and, since 1999, he has worked as its sales manager for Corporate Accounts and

Original Equipment. He was responsible for the sale of tires to merchandisers such as Sears, Canadian Tire and Costco. In my view, their knowledge of the use dealers make of an MSLP can not be dismissed as anecdotal. Their evidence is confirmed to a significant extent by Mr. Merkley, and by Mr. Keith's description of the manner in which tire dealers priced tires and by the use he made of the MSLP in the two competitive profiles referred to above.

[288] To the extent it was argued that Mr. Gauthier's view that Canadian Tire was the dominant influence in the tire market was not credible, I note that, at paragraph 83 of Sears' responding statement of grounds and material facts, Sears asserted that "Canadian Tire was a dominant tire retailer in Canada (enjoying approximately a twenty-two per cent share of tire sales in Canada during the Relevant Period)".

(v) Conclusion: Good faith - private label tires

[289] Did Sears truly believe that its regular price for the Silverguard Ultra IV, Response RST Touring and BF Goodrich tires were genuine and *bona fide* prices set with the expectation that the market would validate them? The following evidence touches on Sears' belief:

i) Mr. Cathcart admitted that, going into 1999, Sears would have expected that it would only sell between 5 and 10% of the Tires at their regular price. This was because between 90 to 95% of the Tires would be sold as multiples. This made the regular price irrelevant to 90 to 95% of the Tires Sears expected to sell because, when a tire was not on promotion, a purchaser would be offered, without requesting it, the 2For price.

ii) Sears viewed Canadian Tire as its main competitor in the private label segment. The competitive profiles prepared for these three tires only compared Sears' 2For, normal promotional and great item pricing to the Canadian Tire pricing. Sears' regular price was known not to be competitive with Canadian Tire and fell well outside the range of price which Sears believed to be competitive with its main competitor in the private label market.

iii) Sears' 2For prices were described as its "every day pricing" in Sears' private label strategy. The Sears regular price was not.

iv) Sears did not and could not track the number of tires it sold at the regular price.

v) With respect to the 5 to 10% of tires that Sears expected to sell singly, if the distribution of single unit tire sales was constant over time, Sears could expect to sell a percentage of single tires on promotion equal to the percentage of time the Tires were offered on promotion. For example, if a tire was on sale 25% of the time, Sears could expect 25% of the single tires to be sold at a promotional price.

For the six month period preceding the representations at issue, the following tires were offered for sale at regular single unit prices for the indicated percentage of time:

Response RST Touring	46%
Silverguard Ultra IV	60%
BF Goodrich Plus	45%

Thus, Sears could only have expected to sell the following:

Response RST Touring	between 2.3 and 4.6% at its regular price
Silverguard Ultra IV	between 3 and 6% at its regular price
BF Goodrich Plus	between 2.25 and 4.5% at its regular price.

[290] On the basis of that evidence, I find that Sears could not have truly believed that its regular prices for the Response RST Touring, Silverguard Ultra IV, and BF Goodrich Plus tires were genuine and *bona fide* prices that the market would validate.

[291] Turning to the objective factor of actual sales at their regular prices, for each of these three tires respectively, for the 12 month period preceding the representations at issue, only 0.51%, 1.21% and 2.29% of the Tires sold were sold at their regular prices.

[292] On the whole of the evidence, I find that Sears' private label tires were not offered for sale at Sears' regular prices in good faith.

(vi) Conclusion: Good faith - national brands

[293] Did Sears truly believe that the regular prices for the Michelin Weatherwise and RoadHandler T Plus were genuine *bona fide* prices set with the expectation that the market would validate them? The following is relevant evidence:

i) Again, 90 to 95% of these tires were expected to be sold as multiples and so the regular price would be expected to be irrelevant to 90 to 95% of these tires sold by Sears.

ii) I have found that, in 1999, flag brand tires were typically being sold by tire dealers at 35% off the MSLP and were not generally being sold at list price. Sears knew this, as evidenced by Mr. Keith's description of tire store pricing. Sears' competitive pricing was its 2For price which was referred to as its "every day pricing" in its national brand strategy. Sears' regular prices were greatly in excess of what it knew to be the competitive price range.

iii) Sears did not and could not track the number of tires it sold at the regular price.

iv) In the six month period preceding the representations at issue, the Weatherwise and RoadHandler T Plus tires were offered for sale at their regular prices respectively at 19% and 38% of the time. It follows that, knowing that only 5 to 10% of the Tires would be sold singly, Sears could only have expected to sell (if single tire sales were constant over time)

- between 0.95 and 1.9% of the Weatherwise tire at its regular price
- between 1.9% and 3.8% of the RoadHandler T Plus at its regular price.

[294] On the basis of that evidence, I similarly find that Sears could not have truly believed that its regular prices for the Weatherwise and RoadHandler T Plus were genuine and *bona fide* prices that the market would validate.

[295] Turning again to actual sales, in the 12 month period preceding the representations, only 1.3% and 0.82% respectively of sales by Sears of the RoadHandler T Plus and the Weatherwise tire were made at their regular price.

[296] On the whole of the evidence I find that Sears' national brand tires were not offered for sale at Sears' regular prices in good faith.

(vii) The opposing view

[297] In concluding that neither Sears' private label nor national brand tires were offered for sale at Sears' regular prices in good faith, I have had regard to the expert evidence of Professor Trebilcock, noting that he was not qualified as an expert in marketing. It was his opinion that:

> The information available on regular prices in 1999 indicates that Sears' regular prices were similar to or less than the regular prices of some [not all] of its competitors for comparable tires. At least some of Sears' regular prices were also similar to or less than manufacturers' suggested retail prices for comparable tires. Such observations are not consistent with a claim that Sears' regular prices did not make economic sense.

[298] In Professor Trebilcock's view, comparison between Sears' regular prices and those of its competitors should include Sears' regular 2For prices. This is because the 2For price was always available on all multiple sales of regular priced tires; it was not a sale price.

[299] For the following reasons, I have not found Professor Trebilcock's opinion to be of assistance.

[300] To the extent Professor Trebilcock opined that Sears' regular prices were similar to or less than the regular prices of some, not all, of its competitors, he acknowledged that limited data was available. No data was available to him for either the Response RST Touring or the

Michelin RoadHandler Plus tires. For the other three tire lines at issue, for only one tire (the BF Goodrich Plus) was Sears' regular single unit price lower than that of its competitors. For both the Michelin Weatherwise and Silverguard Ultra IV, Sears' regular single unit prices were significantly higher than its competitors' prices for comparable tires (eg. for the Weatherwise, Sears' regular price of $181.99 compared to competitive offerings of $110, $98 and $99; for the Silverguard Ultra IV, Sears' regular price of $133.99 compared with a competitive offering of $105). The reference prices quoted by Professor Trebilcock were all prices that were discounted off the MSLP by 30% or more.

[301] Professor Trebilcock acknowledged that Canadian Tire's regular prices were consistently lower than Sears' regular prices, but referred to add-ons that Sears' included in its prices. However, he did not have any information that would allow him to quantify how much consumers might be prepared to pay for those add-ons.

[302] Professor Trebilcock concluded that Sears' regular prices were genuine in that approximately 21% of all of its tire sales took place at regular prices; such calculation included sales at both Sears' regular and 2For prices. However, subsection 74.01(3) of the Act is concerned only with the reference price. In this case, the reference price was Sears' regular single unit price.

[303] With respect to the absence of consumer harm referred to by Professor Trebilcock, as noted below, consumer harm is not relevant to the consideration of the materiality of any misrepresentations and hence is not relevant to the existence of reviewable conduct.

XI. DID SEARS MEET THE FREQUENCY REQUIREMENTS OF THE TIME TEST?

[304] There are two elements contained in the time test: the goods must be offered at the alleged OSP (or a higher price) in "good faith" for "a substantial period of time recently before" the making of the representation as to price. Both elements of the test must be met.

[305] My finding that the Tires were not offered at Sears' regular single unit price in good faith is, therefore, dispositive of the time test. However, for completeness, and in the event that I am in error in my conclusion as to good faith, I will deal briefly with the frequency requirements of the time test.

[306] The parties agree, I believe, that the first step in the application of the time test is to select the time frame within which to examine Sears' conduct. Sears says that the appropriate time frame is 12 months. The Commissioner argues that the appropriate period is six months. Once the appropriate time frame is selected, the next step is to determine within that time frame whether Sears offered the Tires at their regular prices for a substantial period of time.

(i) The reference period

[307] For the following reasons, I accept the submission of the Commissioner that the appropriate reference period is six months.

[308] First, paragraph 74.01(3)(*b*) of the Act requires the good faith offering to have occurred "recently" before the representation at issue. This means that there must be, as the Commissioner argues, reasonable temporal proximity between the impugned representations and the offering of the Tires at regular prices.

[309] The word "recent" is commonly understood to mean "that has lately happened or taken place" (The Shorter Oxford English Dictionary, 3rd ed. vol. II) or "not long passed" (The Concise Oxford Dictionary, 7th ed.). A 12 month time frame would not, in my view, be in accordance with the requirement that the reference period be in reasonable temporal proximity to the making of the representation.

[310] Second, after subsection 74.01(3) of the Act came into effect, Sears' legal department circulated a memorandum dated May 11, 1999 to all Sears vice presidents which described amendments to the Act. The memorandum advised that, with respect to the time test, in general "the time period to be considered will be the six months prior to [...] the making of the representation (this time period can be shorter if the product is seasonal in nature)". Thus, Sears did not posit internally the need for a 12 month reference period. Further, Mr. McMahon confirmed that, when he applied the policy set out in the May 11, 1999 memorandum, he looked to see whether the Tires were on sale at or above the comparison price more than 50% of the time in the six month period that pre-dated the representations at issue. While Sears now argues that a 12 month reference period is more appropriate in order to capture the seasonal nature of tire sales, in my view, its own internal practice of monitoring sale frequency over a six month period belies this argument.

[311] Finally, I accept the opinion of Dr. Lichtenstein that six months is an appropriate reference period as it provides an accurate picture of Sears' OSP behaviour. In his view, the substantial period of time provision relates to the amount of time a product should be offered at an OSP such that it has the opportunity to be verified by the market as the "regular price". A six month period would provide such opportunity, in Dr. Lichtenstein's view, because:

i) there is not much seasonal variation with respect to all-season tires;

ii) to the extent there are sales increases in the Spring and the Fall, any contiguous six month period would capture some of the higher and lower periods; and

iii) there is little reason to expect month-to-month variation in the percentage of tires sold at the OSP.

[312] I do not find Dr. Lichtenstein's opinion on this point to have been impaired in cross-examination.

(ii) The frequency with which the Tires were not on promotion.

[313] Having concluded that a six month reference period is appropriate, Table 2, which follows paragraph 22 above, depicts that, for the six month period preceding the relevant representations, the Tires were offered for sale at their regular single unit price as follows:

Tire	Percentage of time offered at Regular Prices
BF Goodrich Plus	45%
RoadHandler T Plus	38%
Weatherwise RH Sport	19%
Response RST Touring	46 or 49.65%
Silverguard Ultra IV	60%

[314] With respect to the Response RST Touring tire and the dispute with respect to the percentage of time that the tire was not on promotion, Sears' planning documents (that is the checkerboard and monthly pocket planners) show that the Response RST Touring tire was offered at regular prices 49.65% of the time. However, Sears' actual sales reports show that the Response RST Touring tire was sold at sale prices for one additional week. This would reduce the time the tire was offered at its regular price to 46% of the time. Mr. McKenna was unable to explain the discrepancy in these Sears' documents. Given his testimony that if Sears sold the product at promotional prices the product was on promotion, I find the information contained in the sales reports to provide the most accurate evidence as to when the Tires were actually on sale. It follows that the Response RST Touring tire was offered at regular prices 46% of the time.

(iii) "Substantial Period of Time"

[315] In order to determine what is meant by the phrase "substantial period of time", regard must be had to the statutory context. The time test functions to assess whether a specified price actually constitutes a price at which a product was "ordinarily supplied" by the person making the representation for a "substantial period of time".

[316] In this context, it seems to me that if a product is on sale half, or more than half, of the time, it can not be said that the product has been offered at its regular price for a substantial period of time. This conclusion is consistent with the decision of the Ontario County Court in *Regina v. T. Eaton Co. Ltd.* (1973), 11 C.C.C. (2d) 74. In the context of a prosecution under paragraph 33(*C*)(1) of the *Combines Investigation Act*, the Court there observed that, if a product was on sale 50% of the time, or thereabouts, the product could not be said to be ordinarily sold

for a regular, or any other price.

[317] In the present case, the following four lines of tires were on sale more than 50% of the time in the 6 month period pre-dating the relevant representations:

Tire	Percentage of time on sale
Weatherwise RH Sport	81%
RoadHandler T Plus	62%
BF Goodrich Plus	55%
Response RST Touring	54%

[318] I find, therefore, that Sears failed to offer those tires to the public at the regular price for a substantial period of time recently before making the representations.

[319] Having found that Sears did not meet the good faith requirement for all of the Tires, and did not meet the frequency requirements of the time test for four of the five tire lines, it is necessary to consider whether Sears has established that the representations were not false or misleading in a material respect.

XII. WERE THE REPRESENTATIONS FALSE OR MISLEADING IN A MATERIAL RESPECT?

[320] As an alternative to its position that it complied with the time test, Sears relies upon subsection 74.01(5) of the Act which relieves a person from liability under subsection 74.01(3) where the person establishes, in the circumstances, that a representation as to price is not false or misleading in a material respect. Subsection 74.01(5) must be read in conjunction with subsection 74.01(6) which requires that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect".

(i) What were the representations?

[321] Sears argues that subsection 74.01(3) deals only with a representation as to price so that the general impression conveyed by a representation must be confined to a representation as to price. I agree. This means that any aspect of the advertisements at issue not related to price, for example warranty information, is not relevant.

[322] Sears argues as well that the savings messages, or save stories, are also irrelevant because they are not representations as to price. I disagree. In my view, representations such as "save 40%" and "½ price" are properly characterized as representations as to price.

(ii) Were the representations false or misleading?

[323] Sears asserts that the representations as to price were neither false nor misleading. Therefore, it is necessary to first determine what impression the representations at issue created. This is consistent with the approach taken by the Court in *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (Ontario County Court). In *Kenitex*, the accused was charged under paragraph 36(1)(*a*) of the *Combines Investigation Act* which made it an offence to make any representation to the public that was false or misleading in a material respect. Subsection 36(4) of the *Combines Investigation Act* provided that:

36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.	36(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[324] Thus, the legislation considered by the Court in *Kenitex* is substantially the same as that now before the Tribunal.

[325] At page 107 of *Kenitex*, the Court considered the elements of the offence and wrote:

> In my view [...] the representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

[326] As to the concept of "ordinary citizen", the Court wrote:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

[327] Turning to the representations in this case, I find that the general impression conveyed by them to an ordinary citizen is that consumers who purchased the Tires at Sears' promotional prices would realize substantial savings over what they would have paid for the Tires had they not been on promotion. This impression is consistent with the literal meaning conveyed by the representations. For example, turning to the advertisement set out at paragraph 17 above, the advertisement stated that one could "save 40%" on Michelin RoadHandler T Plus tires. For the smallest size shown, Sears' regular price of $153.99 was compared with the promotional price of $91.99. For the largest size, the regular price of $219.99 was compared with the promotional price of $131.99.

[328] As to whether that impression was false or misleading, it is necessary to remember that:

- when the Tires were not on promotion, Sears' 2For price was always available if more than one tire was purchased;

- Sears' 2For price was always substantially lower than the regular (single unit) price;

- 90% to 95% of tires were sold in multiples; and

- Sears' regular (single unit) price would never have applied to sales of multiple tires.

[329] It follows, as conceded by Mr. Cathcart in cross-examination, that for tires purchased in multiples at Sears' promotional events, the savings realized by customers would not have been the difference between Sears' regular price and the promotional price. Rather, the savings would be the difference between the 2For price and the promotional price.

[330] Sears bears the onus under subsection 74.01(5) of the Act. It says that its representations as to price were not false or misleading because:

1. The representations accurately set out Sears' prices for a single unit of the Tires, and those were prices at which genuine sales took place.

2. The representations as to price were available to, and benefited, customers who purchased a single tire.

3. Averaged over the five Tires, 11% of purchasers would buy only one tire.

4. Any tire consumer to whom the representations were directed might choose to buy a single tire, so that the representations were true for 100% of the intended readers of the representations.

5. The representations as to price reflected prices that Sears used as a basis for calculating warranty adjustments and refunds.

[331] All of these points are literally correct. However, the general impression conveyed by the representations is that consumers (not just 11% of consumers) who purchased the Tires at Sears at promotional prices would realize substantial savings. For 89% of consumers and 90 to 95% of the Tires sold, this was not correct. I find, therefore, that representations as to price contained in both the regular/promotional price comparison and in the save stories were false or misleading.

[332] Before leaving this point, I note that a similar conclusion was reached in somewhat similar circumstances in *R. v. Simpsons Ltd.* (1988), 25 C.P.R. (3d) 34 (Ontario District Court).

There, Simpsons caused a number of "mini casino" cards to be printed and distributed. The cards advertised "you could save 10% to 25%" on practically everything in the store, and that the possible discounts were 10%, 15%, 20% or 25%. The mini casino cards each contained four tabs, under each tab was printed a symbol. When a tab was lifted, the symbol was revealed. There were four symbols, corresponding to each of the four percentage discounts available. Each card instructed a customer to lift one tab only in order to reveal the discount level available to them. Of the cards printed, 90% had the 10% discount symbol printed under all four tabs. The remaining 10% of the cards each contained all four symbols. On those facts, the Court found that the representation "you could save 10% to 25% on practically everything in the store" was
manifestly false and misleading. The Court wrote at pages 37-38:

> The cards had been printed in such a way as to ensure that 9 out of 10 of the recipients of the cards had no chance to obtain other than the minimum discount of 10%. Each card displayed all four discount symbols, and it is obvious from the get-up of the card that it was designed to leave the impression that a different symbol lay concealed under each of the four tabs. As a consequence of the design of the promotion, the representation that "you could save 10% to 25%" was false as to nine tenths of the cards. The recipients of those cards were misled and intentionally so.
>
> To make out the offence, it would be sufficient if a false or misleading representation had been made to one member of the public. Here, on the acknowledged facts, the misleading representation was made to 927,000 people, or 90% of the recipients. Of those, most were among the 750,000 Simpsons credit card holders who were the addressees of the mailing.
>
> The fact that the representation was true as to one-tenth of the recipients of the randomly distributed cards does nothing more than reduce the magnitude of the deception.

(iii) Were the representations as to price false or misleading in a material respect?

[333] Prior jurisprudence in the context of criminal prosecutions under the Act or its predecessor has interpreted what is meant by "misleading in a material respect". As noted above, in *Kenitex*, the Court found that a materially false or misleading impression would be conveyed if the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."

[334] In *R. v. Tege Investments Ltd.* (1978), 51 C.P.R. (2d) 216 (Alberta Provincial Court), the Court applied the dictionary meaning of "material" which was "much consequence or important or pertinent or germane or essential to the matter". The Court noted that it was not necessary to establish that any person was actually mislead by a representation. It was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

[335] Finally, in *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 (Vancouver Magistrate's

Court, B.C.), the Court concluded that the word "material" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase. Whether or not a consumer in fact obtained a bargain and may have paid less than he would ordinarily have paid was not the relevant criteria.

[336] The question to be determined, therefore, is whether the impression created by the price comparisons and/or the save stories would constitute a material influence in the mind of a consumer. Put another way, I accept the submission of Sears that the relevant inquiry is not whether the type of representation is a material one, but whether the element of misrepresentation is material.

[337] I believe that the following are relevant considerations.

[338] First, the magnitude of the exaggerated savings. Returning to the Michelin RoadHandler T Plus advertisement set out at paragraph 17 above, for the smallest tire size advertised, an ordinary citizen considering the purchase of four tires would reasonably believe, in my view, their savings to be $248.00 or ($153.99 - $91.99) x 4. In fact, the 2For price for each tire was $94.99. Accordingly, the actual savings would be $12.00 or ($94.99 - $91.99) x 4. In this example, the savings were substantially exaggerated. Because Sears' 2For price was always substantially lower than its regular price, it follows that the savings were similarly substantially overstated in every OSP representation made concerning the Tires.

[339] In my view, that magnitude of advertised savings would be a material influence or consideration upon a consumer.

[340] Second, I look to Sears' experience when it eliminated its 2For pricing on January 1, 2001 and lowered its regular prices for tires. Sears' Great Item and normal promotional prices remained unchanged. Following the reduction of its regular prices, Sears' sales volumes at promotional prices decreased. Mr. McMahon acknowledged in cross-examination that it was probably true that promotional sales decreased because Sears could not use as favourable save stories. As Sears argued, if savings are represented at all, consumers expect them to be of a certain magnitude and if the represented savings are incongruous with consumers' expectations concerning the deals typically offered, or typically offered by the particular retailer, the promotion will be less effective. In the circumstances where Sears was recognized to be a high-low retailer, where tires were sold in a competitive market, and where national brand tires were typically sold by tire dealers at a price 35% off the MSLP, I find that Sears' misrepresentation of the extent of the savings to be realized by purchasing the Tires on promotion was, more probably than not, likely to influence a consumer. This means that Sears' misrepresentation of the extent of the savings to be realized was misleading in a material respect.

[341] Finally, I have found that consumers have a limited ability to evaluate the intrinsic attributes of tires, and it is admitted that the five lines of Tires were exclusive to Sears. In those circumstances, the following evidence from Dr. Lichtenstein's expert report is germane:

45. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Consumers seek to maximize value (i.e., the quality they get for the price they pay) in purchase situations. When consumers need a product where there are several brand alternatives, there are various purchase strategies they may employ to maximize value. First, for product categories where intrinsic attributes are easy for the consumer to evaluate (i.e., those physical attributes that comprise the brand), consumers can simply evaluate brand alternatives within and across merchants on a "quality for the money" criterion and select that brand from that merchant that offers the best value.

46. However, where intrinsic product attributes are difficult for consumes to evaluate, consumers can at least turn to a second strategy that encompasses comparing prices for like brands across merchants. By doing so, they can at least purchase a brand that represents the lowest price for that brand across merchants. In this manner, while consumers would not explicitly know how much quality they received for their dollar, they would at least know that they received the most for their dollar for that particular brand. However, when consumers lack the ability to evaluate products on intrinsic attributes *and* competing retailers carry brands unique to them, neither of these strategies is open to consumers.

47. What strategy is left for consumers? Research shows that in cases where consumers cannot evaluate product quality based on intrinsic attributes, they will take "shortcuts", i.e., rely on "decision heuristics" in making quality assessments. Most commonly, they will rely on "extrinsic cues" to signal product quality and a good deal (e.g., OSP claim, store name, brand name). Thus, the likelihood increases that they would respond to a merchant advertising "exceptional values," and especially if the merchant is perceived to be credible. As noted by Kaufmann et al. (1994), there is widespread recognition that OSP representations are likely to be more impactful for product categories where intrinsic attributes are hard for consumers to assess.

[342] Having regard to those circumstances, as required by subsection 74.01(5) of the Act, I accept that Sears' OSP representations are more likely to be relied upon to reflect quality or value so misrepresentation of the OSP is more likely to impact upon or influence a consumer.

[343] Similarly, I have found that a very significant percentage of consumers do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores. Dr. Deal's study suggested that approximately 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears. This evidence also supports the conclusion that Sears' OSP representations and save stories were more likely to influence consumers.

[344] Thus, on the whole of the evidence, Sears has failed to establish that its OSP representations were not false or misleading in a material respect.

(iv) Sears' arguments about materiality

[345] In so concluding, I have had regard to Sears' submissions that the representations as to price were not false or misleading in a material respect because:

a) consumers are recognized to consistently discount OSP representations by about

25%;

b) Sears is a promotional retailer, and because its reference price is identified as "Sears reg.", consumers would interpret the reference price differently than OSP representations made by an EDLP marketer or suppliers generally;

c) Sears' ads that did not feature Sears' regular price representations produced more of an uplift in sales levels from non-promotional periods;

d) Mr. Winter testified that, in 1999, tires were sold in a highly competitive and highly promotional context which included a variety of pricing frameworks in which no single pricing framework or competitor dominated the market. Further, Dr. Deal found approximately 63% of consumers comparison shop even where they see ads that indicate reduced tire prices;

e) factors such as warranties, roadside assistance and the provision of a "satisfaction guaranteed or your money refunded" guarantee could enhance a consumer's perception of value and positively impact the decision to purchase a tire; and

f) Dr. Deal found that 78% of survey respondents were satisfied with the value they received and 93% were satisfied with their tire purchase.

[346] I will deal with each item in turn.

(a) Consumers consistently discount OSP representation by about 25%

[347] It is correct that it was Dr. Lichtenstein's opinion that consumers mentally discount advertised reference prices and that one study found that consumers consistently discount OSP offerings by about 25%. However, it remained Dr. Lichtenstein's opinion that:

> 33. However, even though knowledgeable/skeptical consumers appear to "discount the discount" more than the average consumer, they tend to perceive that some portion of advertised discount may be bona fide. That is, research findings show that even for consumer populations that are more knowledgeable about the product category (see Grewal et al. 1998), and even for consumers who are more skeptical of OSP claims (see Blair and Landon 1981; Urbany et al. 1988; Urbany and Bearden 1989), they are still influenced by OSP claims. For example, based on their findings, Urbany and Bearden (1989, p. 48) conclude "Our subject's perceptions were influenced significantly by the exaggerated reference price ... even though, on the whole, they were skeptical of its validity... Even though it is discounted, the reference price still apparently increases subject estimates of (the advertiser's normal selling price) over those who are presented with no reference price." Also, Urbany et al. (1988) found that although consumers mentally discount higher advertised reference prices at higher rates, the positive impact of the higher absolute level of the advertised reference price on consumer perceptions more than offsets the higher rate of mental discounting such that the outcome is that consumers perceive more savings for higher levels of advertised reference prices.

> 34. Moreover, given the value consumers place on their time, "if the advertised sale represents a large enough reduction from the retailer's regular price, the consumer might infer that another similar retailer...could not afford to put the item on sale with a noticeably greater discount" (Kaufmann et al. 1994, p. 121). From the consumer's point of view, the "worst case" is that although the reference price may not be a bona fide price, "it does assure that the consumer has not paid too much... and (thus) the consumer may use the limited information contained in high-low (reference price) sale advertising in an informed effort to find a satisfactory price for the product" (Kaufmann et al. 1994, p. 122). But even in cases where this occurs, a non-advertising competitor retailer offering the same product at the same purchase price would be injured in that a deceptive reference price was used to attract the customer to the advertiser's store. Moreover, the consumer's perceptions of transaction utility, which may actually be a significant influence in the decision to purchase, would not be based on bona fide perceptions. [underlining added]

[348] Moreover, on cross-examination it was Dr. Lichtenstein's evidence that there would be less discounting of a reference price where the OSP representation is made by a credible retailer such as Sears.

[349] Thus, I do not find Dr. Lichtenstein's evidence with respect to discounting of OSP representations establishes that Sears' OSP representations were not material.

(b) Sears' regular price representations must be seen in the context of consumers' knowledge that Sears is a promotional retailer

[350] Sears says that because it is known to be a promotional retailer, its customers would interpret its OSP representations in a different fashion from their interpretation of OSP representations made by ordinary suppliers or EDLP retailers. No evidence was cited to support this submission.

[351] It would seem to be equally likely that if influenced by Sears' reputation as a promotional retailer, a consumer would be influenced by its OSP representations and find them to be very material as signalling an appropriate time to purchase in order to obtain substantial savings from the price consumers would ordinarily pay at Sears if the Tires were not on promotion.

(c) Sears' ads that did not feature OSP representations

[352] Sears argues that:

> 172. Moreover, with respect to the relative regard paid by consumers to the advertised savings and the final transaction price, Mr. McKenna's evidence demonstrated the comparative success of Sears' tire advertisements, published during the Relevant Period, that did *not* feature "Sears reg." representations; that is, which informed the potential consumer of the selling price only. These advertisements produced more of an uplift in sales levels from non-promotional periods than did the "Sears reg." advertisements, even though the tires featured in them were not the lowest-priced tires offered by Sears.
>
> 173. Mr. McKenna's reasonable conclusion was:
>
> > *That the consumer or the customer recognized value when it was shown them. They recognized value without a price point or a comparative regular and certainly without a save story.*
>
> 174. The same or a similar point can be made from the "Tireland" advertisement that was the focus of an exchange between Sears and Michelin in 1999. As Mr. Merkley acknowledged in cross-examination, this advertisement relied on consumers' ability to discern value, without reference to a "save story" or a "percentage off".

[353] Mr. McKenna testified that, with respect to the Michelin Weatherwise and the Silverguard ST (not one of the tires at issue), he compared sales for those tires when they were not on promotion to their sales during a period when they were on promotion. The Silverguard ST had no regular price, it was simply priced based on rim size, starting at $44.99. Thus, the Silverguard ST was advertised with no regular comparison price or save story. The Michelin Weatherwise was advertised with its regular price shown together with a 40% save story.

[354] When the Michelin Weatherwise was advertised, its unit sales increased by approximately **[CONFIDENTIAL]** times over sales when it was not advertised. Sales volumes of the Silverguard ST, when advertised, increased by **[CONFIDENTIAL]** times over sales when not advertised. In this context, Mr. McKenna concluded that customers recognized value.

[355] This evidence is anecdotal, relating to a tire that had no regular price, and is in conflict with Mr. McMahon's evidence and Mr. Cathcart's evidence about Sears' experience with the BF Goodrich Plus tire set out at paragraphs 214 and 215 above.

[356] For this reason, I do not find the evidence relating to the Silverguard ST establishes that Sears' OSP representations were not material.

[357] To the extent that Sears relies on Mr. Merkley's acknowledgement in cross-examination that a "Tireland" advertisement relied upon a consumer's ability to discern value without reference to a save story, Mr. Merkley simply responded "I guess, yes" to the suggestion that the retailer in question assumed that his potential customers would recognize value. Further, the

particular price advertised by Tireland was sufficiently low that it caused Sears to write to Michelin expressing its concern and caused Michelin to respond to Sears that it shared Sears' concern at the pricing. However, Michelin said that it found this to be an isolated case where the dealer intended to have a weekend sale for the fifth consecutive year.

[358] This evidence does not establish that Sears' OSP representations were immaterial.

(d) Mr. Winter's and Dr. Deal's evidence

[359] Sears relies upon Mr. Winter's evidence that, in 1999, tires were sold in a highly competitive and promotional context and Dr. Deal's evidence that his survey found that 63% of consumers comparison shop even when they see ads that show reduced tire prices.

[360] However, comparison shopping would seem to be directed to final transaction prices, and not necessarily the materiality of OSP representations. For those consumers who say they comparison shop, the OSP representations could nonetheless have: drawn the consumer into the market; attracted the consumer to Sears; and caused the consumer to purchase from Sears if no lower final transaction price was located in the consumer's search.

(e) The consumers' perception of value based upon factors such as warranties and the guarantee of satisfaction

[361] Sears relies upon Dr. Lichtenstein's acknowledgement that factors such as warranties, roadside assistance programs, and Sears' guarantee could enhance consumers' perception of value and positively impact upon the decision to purchase a tire. This is said to reduce the effect of Sears' OSP representations because response to price is context dependent.

[362] Given Professor Trebilcock's acknowledgement that he did not have information that would allow him to quantify how much consumers might be willing to pay for add-ons provided by Sears relative to add-ons provided by Canadian Tire, and the rather amorphous nature of Dr. Lichtenstein's acknowledgement, I am not persuaded that the value consumers attach to add-ons is sufficient to make Sears' OSP representations immaterial. Even with add-ons, the extent of the savings misrepresentation could still be influential to the consumer's decision to purchase.

(f) Sears' consumer satisfaction

[363] Sears says that even if consumers purchased their tires from Sears solely upon the strength of the representations at issue, 78% of respondents to Dr. Deal's survey indicated that they had received good value for their money.

[364] There are, I believe, two responses to this.

[365] First, harm is not a necessary element of reviewable conduct. As the Court noted in *Kellys on Seymour, supra*, at page 26, the "criteria is, did in fact the person think that what he was buying was, to the ordinary purchaser, in the ordinary market, worth the price it is purported to be worth, and from which it is reduced". Whether or not a consumer in fact got a bargain or paid less than what the consumer would ordinarily have paid is not the criteria. See also: *R. v. J. Pascal Hardware Co. Ltd.* (1972), 8 C.P.R. (2d) 155 at page 159 (Ont. Co. Crt).

[366] Second, I accept Dr. Lichtenstein's evidence, which I find was not substantially challenged on the point, that:

> 39. When consumers are deceived by an inflated OSP, the level of harm could be limited if they became aware of the deception. With a liberal return policy, the injury may be limited to the time, effort, and aggravation of returning the product to the store (assuming the store would accept the used product on return). However, in my opinion, most consumers are unlikely to recognize that they were deceived by an OSP representation. The reason for this is that for them to become aware of deception, they must become aware that the OSP price is, in the case of a seller's own OSP representation, not in truth the seller's own bona fide OSP.
>
> 40. Several factors work against consumers becoming price aware. First, as the research evidence (cited above in paragraph 29) strongly suggests that consumers are not willing to engage in much pre-purchase search, it is reasonable to conclude that most consumers are unwilling to expend time/effort necessary to engage in post-purchase price search. Thus, they are unlikely to monitor that seller's prices after the fact. Second, consumers have a built-in desire to maintain "cognitive consistency" and thus, they avoid encountering price information that indicates that they were duped, thereby creating cognitive inconsistency (called "cognitive dissonance," or "buyer's remorse/regret" in this specific domain). Since this mental state creates discomfort for the consumer, they are motivated to engage in "selective exposure to information" by actively avoiding information that would suggest that they did not receive the value represented by the OSP (Eagly and Chaiken 1993, p. 478; Engel, Blackwell, Miniard, 1995). [underlining added]

[367] Thus, for all these reasons, Sears failed to establish that its OSP representations were not false or misleading to a material extent.

(v) Conclusion

[368] Sears admitted that it did not meet the requirements of the volume test and I have found that the Tires were not offered at Sears' regular price in good faith and that Sears failed to meet requirements of the time test for four of the five tire lines. I have also found that Sears failed to establish that the representations at issue were not false or misleading in a material respect. It follows that the allegations of reviewable conduct have been made out and the Tribunal finds Sears to have engaged in reviewable conduct. It is therefore necessary to consider what administrative remedies should be ordered.

XIII. WHAT ADMINISTRATIVE REMEDIES SHOULD BE ORDERED?

[369] Section 74.1 of the Act sets out the range of remedies available and the circumstances in which the remedies may be ordered. Section 74.1 of the Act is as follows:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and
(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.
74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.
74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.
74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

74.1 (1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement susceptible d'examen,
(ii) la période et le secteur géographique auxquels le comportement est afférent,
(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;
c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :
(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,
(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.
74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.
74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.
74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.
74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

(a) the reach of the conduct within the relevant geographic market;
(b) the frequency and duration of the conduct;
(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
(d) the materiality of any representation;
(e) the likelihood of self-correction in the relevant geographic market;
(f) injury to competition in the relevant geographic market;
(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.
74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or
(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part. [underlining added]

a) la portée du comportement sur le marché géographique pertinent;
b) la fréquence et la durée du comportement;
c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
d) l'importance des indications;
e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
f) le tort causé à la concurrence sur le marché géographique pertinent;
g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
h) toute autre circonstance pertinente.
74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :
a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;
b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;
c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;
d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie. [Le souligné est de moi.]

[370] Each of the three available remedies shall be considered in turn.

(i) An order not to engage in the conduct or substantially similar reviewable conduct

[371] The Commissioner seeks an order prohibiting Sears and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns, or any other person or corporation acting on its behalf, from engaging in conduct contrary to subsection 74.01(3) of the Act for a period of 10 years.

[372] In support of this submission, the Commissioner relies upon:

- Sears' admission that it is primarily a hi-low retailer which relies extensively on OSP representations in its advertising;

- Sears used hi-low marketing for 27 of the 28 lines of tires it sold in 1999 and continues to use hi-low marketing techniques to sell automotive products;

- Sears continues to use hi-low marketing techniques generally throughout its business;

- Sears has engaged in deceptive marketing behaviour in the past as reflected in the following decisions:

  R. v. Simpsons-Sears Ltd. (1969), 58 C.P.R. 56 (Ont. Prov. Ct. (Crim. Div.));
  R. v. Simpsons-Sears Ltd. (1976), 28 C.P.R. (2d) 249 (Ont. County Ct. (Crim. Div.)); and
  R. v. Simpsons-Sears Limited and H. Forth and Co. Limited (1983), unreported (Ont. County Ct.).

[373] Sears argues that no administrative remedy is warranted. It points to the following:

- The representations at issue were made in November and December of 1999. Section 74.01 of the Act came into force in March of that year. The Guidelines were not published until late September, 1999, and there was no interpretive jurisprudence relating to the time and volume tests.

- OSP advertising is a legitimate practice and Sears should not be punished for depending upon promotional events to market its products.

- Sears turned its mind to complying with subsection 74.01(3) of the Act. It created and distributed a written policy and Mr. Cathcart maintained a checkerboard for planning and promoting the sale of the Tires.

- The convictions the Commissioner relies upon are old, going back 21, 28 and 35 years. The last two mentioned convictions relate to a catalogue advertisement for multi-vitamins and to the advertisement of a particular refrigerator in Ottawa.

- It is reasonable to assume that there have been significant changes in Sears' ownership, management and control since the early 1980's when the most recent conviction was entered.

[374] In the alternative, Sears says that any cease and desist order should relate only to tires. Sears points to the Tribunal's decision in *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (2002), 19 C.P.R. (4th) 129; aff'd (2004), 31 C.P.R. (4th) 331 (F.C.A.) wherein the order prohibited the making of misrepresentations related to "PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device".

[375] In light of the false or misleading impression given by Sears in its advertisements with respect to the OSP representations at issue concerning the Tires, I have concluded that it is appropriate to issue an order pursuant to paragraph 74.1(1)(*a*) of the Act. Such an order will address the harm subsection 74.01(3) was created to address. As the order will be directed only to OSP representations which do not conform with the Act, and will not be directed to all OSP representations, it cannot be said that such an order "punishes" Sears for depending upon promotional events.

[376] I am satisfied by virtue of Sears' internal memorandum of May 11, 1999 to its vice-presidents concerning the amendments to the Act that the timing of the enactment of the relevant statutory provision and the issuance of the Guidelines gave sufficient notice to Sears' employees of the requirements of the Act. Therefore, it is not inappropriate to make an order under paragraph 74.1(1)(*a*).

[377] As to the duration of the order, I see no reason to depart from the general provision found

in subsection 74.1(2) of the Act that an order under paragraph 74.1(1)(*a*) applies for a period of 10 years unless otherwise specified. That 10 year period will commence when an order is issued. In this regard see paragraph 389 of these reasons.

[378] As to the scope of the order, I believe that it construes the intent of the Act too narrowly to limit any order so as to apply only to Sears' promotion of tires. The scope of the order issued by the Tribunal in *P.V.I., supra,* is distinguishable, in my view, because there misrepresentations as to the performance of a product relating to fuel savings, emission reduction and government approval were at issue. There was no basis on which the order should have applied to any other product other than an allegedly similar gas-saving, emission-reducing and/or performance-enhancing device (as the orders provided).

[379] Equally, however, I have not been persuaded that it is necessary that the order to apply to all goods marketed by Sears through its various business channels. In this regard, I note the relatively long period of time that has elapsed since Sears was last convicted of deceptive marketing behaviour.

[380] Here Sears has stated in its responding statement of grounds and material facts, at paragraph 39, that Sears automotive is the business division of Sears responsible for the supply of the Tires and other automotive-related products and services and for the operation of Sears' retail automotive centres. From this I conclude that it is appropriate for the order to be directed to the business division which was responsible for the misrepresentations at issue. Therefore, the order will apply only to tires and other automotive-related products and services.

(ii) A corrective notice

[381] The Commissioner requests an order requiring Sears to publish or otherwise disseminate a corrective notice or notices that shall:

a. bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the Respondent carries on business and the determination made by the Tribunal with respect to the Application, including:

   i. a description of the reviewable conduct,
   ii. the time period and geographical area to which it relates, and
   iii. a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.

b. be published in the following media:

   i. <u>in flyers</u> ("pre-prints") by the Respondent as follows:

      (1) in two weekly ("core") flyers as ordinarily distributed by the Respondent and in one weekend flyer as ordinarily distributed by the Respondent.

   (2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in a manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:
      (a) 84% to be distributed through newspapers;
      (b) 15% to be distributed door-to-door; and
      (c) 1% to be distributed in-store.

   (3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches X 9.5 inches in size.

   ii. <u>in newspapers</u> by the Respondent as follows:

      (1) in the language appropriate to the newspaper;
      (2) within the first nine pages of the Wednesday edition of each of the newspapers listed in paras. 26 and 27 of ***Exhibit CA-9***, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said

newspaper;

(3) the newsprint advertisements shall be no less than 5.625 inches X 9.625 inches in size.

[382] Sears submits that temporal concerns alone mitigate against the publication of a written notice. Sears also points to the evidence of Dr. Trebilcock that consumers who purchased the Tires at Sears during the sales events at issue received very good deals. Finally, Sears submits that it exercised due diligence in order to prevent the reviewable conduct from occurring.

[383] In *PVI, supra*, the Federal Court of Appeal, at paragraph 26, considered that the time elapsed from the making of false or misleading representations was a relevant factor to consider when assessing the appropriateness of a corrective notice.

[384] In the present case, five years have elapsed since the representations at issue were made. In my view, that length of time alone militates against the issuance of a corrective notice.

[385] The report of the Consultative Panel contemplated that the purpose of a corrective notice was to inform marketplace participants about deceptive practices where those practices may have left residual mistaken impressions in the marketplace. I do not accept that, after 5 years, any residual mistaken impression exists which arises from the representations at issue. To require a corrective notice in that circumstance would, in my view, be punitive and not remedial.

[386] In view of this conclusion, it is not necessary for me to consider, and I do not consider, whether Sears has established that it exercised due diligence in order to prevent the reviewable conduct from occurring.

(iii) An administrative monetary penalty

[387] By its reasons for order and order dated August 5, 2004, the Tribunal ordered that, if it determined that Sears had engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act, Sears was given leave to present evidence and make submissions at a future hearing relating to the factors to be taken into account pursuant to subsection 74.1(5) of the Act. Accordingly, the issues of whether an administrative monetary penalty should be imposed, and if so, its amount are reserved. See in this regard, paragraph 390 of these reasons.

XIV. COSTS

[388] The issue of costs is also reserved.

XV. ORDER

[389] Once the issues of administrative monetary penalty and costs are finally decided by the

Tribunal, an order will issue reflecting these reasons together with the Tribunal's rulings with respect to an administrative monetary penalty and costs.

XVI. DIRECTIONS TO THE PARTIES

[390] In light of these confidential reasons for order, the parties are directed as follows:

1) To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Wednesday, January 19, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

2) If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from the reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 21, 2005.

3) Following the issuance of these reasons the Registry will contact counsel to set a date for a case management conference to address the following:

   i) The time required for the further hearing concerning the factors relevant to subsection 74.1(5) of the Act.

   ii) The number of any proposed witnesses to be called.

   iii) The provision of any required will-say statements and or expert reports.

   iv) The extent of the Commissioner's participation in this further hearing.

   v) Potential dates for such hearing.

   vi) The manner, nature and timing of the submissions as to costs.

   DATED at Edmonton, this 11th day of January 2005.

   SIGNED on behalf of the Tribunal by the presiding judicial member.

Public

XVII. APPENDIX

[391] Sections 74.01, 74.09 and 74.1 are as follows:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
(a) makes a representation to the public that is false or misleading in a material respect;
(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or
(c) makes a representation to the public in a form that purports to be
(i) a warranty or guarantee of a product, or
(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,
if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

74.01(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
a) ou bien des indications fausses ou trompeuses sur un point important;
b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, don’t la preuve incombe à la personne qui donne les indications;
c) ou bien des indications sous une forme qui fait croire qu'il s'agit :
(i) soit d'une garantie de produit,
(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,
si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.
74.01(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :
a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au

representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
74.01(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to
(a) the price at which products have been or are supplied; or
(b) the price at which products will be supplied.
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.
74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[...]

74.09 In sections 74.1 to 74.14 and 74.18, "court" means the Tribunal, the Federal Court or the superior court of a province.

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,

public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.
74.01(6) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important, il est tenu compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[...]

74.09 Dans les articles 74.1 à 74.14 et 74.18, « tribunal » s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

74.1(1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) injury to competition in the relevant geographic market;

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.

74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.

74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

a) la portée du comportement sur le marché géographique pertinent;

b) la fréquence et la durée du comportement;

c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

d) l'importance des indications;

e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;

f) le tort causé à la concurrence sur le marché géographique pertinent;

g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;

h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02,

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

APPEARANCES:

For the applicant:

The Commissioner of Competition

John L. Syme
Leslie Milton
Arsalaan Hyder
Geneviève Léveillée

For the respondent:

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Susan Rothfels

Competition Tribunal | Tribunal de la concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6
File No.: CT-2016-015
Registry Document No.: 429

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)

Dates of hearing: October 2-5, 9-10, 15-17 and 30-31, November 1-2 and 13-15, 2018
Before: D. Gascon (Chairperson), P. Crampton C.J. and Dr. D. McFetridge
Date of Reasons for Order and Order: October 17, 2019

REASONS FOR ORDER AND ORDER

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I. EXECUTIVE SUMMARY

[1] On September 29, 2016, the Commissioner of Competition ("**Commissioner**") filed a Notice of Application ("**Application**"), seeking relief against the Vancouver Airport Authority ("**VAA**") under section 79 of the *Competition Act*, RSC 1985, c C-34 ("**Act**"), commonly referred to as the abuse of dominance provision of the Act. The Application concerns VAA's decision to allow only two in-flight caterers to operate at the Vancouver International Airport ("**YVR**" or "**Airport**") and its refusal to grant licences to new providers of in-flight catering services. VAA is responsible for the management and operation of YVR.

[2] The Commissioner claims that, by limiting the number of providers of in-flight catering services at YVR, and by excluding new-entrant firms and denying the benefits of competition to the in-flight catering marketplace at the Airport, VAA has engaged in a practice of anti-competitive acts that have prevented or lessened competition substantially, and are likely to continue to do so. In the Commissioner's view, in-flight catering comprises the sourcing and preparation of the food served to passengers on commercial aircraft ("**Catering**") as well as the loading and unloading of such food on the airplanes ("**Galley Handling**").

[3] VAA responds that, at all times, it has been acting in accordance with its statutory mandate to manage and operate YVR in furtherance of the public interest, and that the regulated conduct doctrine ("**RCD**") shields the challenged practices from the operation of section 79 of the Act. VAA further asserts that it does not control the alleged markets for Galley Handling services or for access to the airside at YVR, and that since it has no involvement with in-flight catering services, it does not have any plausible competitive interest ("**PCI**") in the market for Galley Handling services. VAA adds that it has a legitimate business justification for not allowing additional in-flight caterers to operate at YVR. In brief, it states that this would imperil the viability of the two firms currently operating at the Airport. It maintains that it did not have an anti-competitive purpose, and that its decision to restrict the number of caterers at YVR has not prevented or lessened competition substantially in any relevant market, and is not likely to do so.

[4] For the reasons that follow, the Tribunal will dismiss the Application brought by the Commissioner. The Commissioner has failed to establish, on a balance of probabilities, that all three elements of section 79 have been satisfied. The Tribunal[1] first concludes that, in the circumstances of this case, the RCD does not shield VAA from the application of section 79 to its impugned conduct. The Tribunal further finds that VAA substantially or completely controls the supply of Galley Handling services at YVR, within the meaning of paragraph 79(1)(*a*) of the Act. However, even though the judicial members of the Tribunal consider that VAA has a PCI in the relevant market, the Tribunal unanimously concluded that VAA has not engaged in a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). The Tribunal is satisfied that VAA had and continues to have a legitimate business justification for its decision to limit the number of in-flight catering firms at YVR. This latter finding is sufficient to dismiss the

[1] Where the words "Tribunal" or "panel" are used and the decision relates to a matter of law alone, that decision has been made solely by the judicial members of the Tribunal.

Commissioner's Application. The Tribunal also concludes that the Commissioner has not established that VAA's conduct has prevented or lessened competition substantially, or is likely to do so, as contemplated by paragraph 79(1)(*c*). The Tribunal reaches that conclusion after finding that VAA's conduct has not materially reduced the degree of price or non-price competition in the supply of Galley Handling services at YVR, relative to the degree that would likely have existed in the absence of such conduct.

II. INTRODUCTION AND OVERVIEW

A. The parties

[5] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the enforcement and administration of the Act.

[6] VAA is a not-for-profit corporation established in 1992 pursuant to Part II of the *Canada Corporations Act*, RSC 1970, c C-32, and continued in 2013 under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23. It manages and operates YVR pursuant to a ground lease entered into on June 30, 1992 with the Government of Canada, represented by the Minister of Transport ("**1992 Ground Lease**").

B. Section 79 of the Act

[7] Pursuant to subsection 79(1) of the Act, the Tribunal may make an order prohibiting all or any of the persons described in paragraph 79(1)(*a*) from engaging in a practice described in paragraph 79(1)(*b*), where it finds, on a balance of probabilities, that the three elements articulated in that subsection have been met. Those are that:

> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

[8] The foregoing three elements must each be independently assessed. In *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 233 ("***Canada Pipe FCA***"), leave to appeal to SCC refused, 31637 (10 May 2007), the Federal Court of Appeal ("**FCA**") stressed that, in abuse of dominance cases, the Tribunal must avoid "the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests" (*Canada Pipe FCA* at para 28). However, the same evidence can be relevant to more than one element (*Canada Pipe FCA* at paras 27-28).

[9] Pursuant to subsection 79(2), if an order is not likely to restore competition in a market, the Tribunal may, in addition to or in lieu of making an order under subsection 79(1), make an order directing any or all of the persons against whom an order is sought to take such actions as are reasonable and necessary to overcome the effects of the practice in a market in which the Tribunal has found the three above-mentioned elements to have been met.

[10] The Commissioner bears the burden of satisfying the three elements of subsection 79(1), and the Tribunal must make a positive determination in respect of each of those elements before it may issue an order (*Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 ("***TREB FCA***") at para 48, leave to appeal to SCC refused, 37932 (23 August 2018); *Canada Pipe FCA* at paras 27-28). The burden of proof with respect to each element is the civil standard, that is, the balance of probabilities (*TREB FCA* at para 48; *Canada Pipe FCA* at para 46).

[11] The full text of section 79 of the Act, and of section 78, which sets forth a non-exhaustive list of anti-competitive acts, is reproduced in Schedule "A" to this decision.

C. The parties' pleadings

[12] In his Application, the Commissioner alleges that each of the three elements that must be satisfied under subsection 79(1) of the Act has been met.

[13] With respect to paragraph 79(1)(*a*), the Commissioner contends that there are two relevant product markets in this Application: (1) the market for the supply of Galley Handling services at YVR ("**Galley Handling Market**"), as these services are defined by the Commissioner; and (2) the market for airport airside access for the supply of Galley Handling services ("**Airside Access Market**"). The Commissioner further submits that the relevant geographic market is YVR. The Commissioner claims that VAA substantially or completely controls the Airside Access Market at YVR, as well as the Galley Handling Market at the Airport.

[14] With respect to paragraph 79(1)(*b*) of the Act, the Commissioner asserts that VAA has engaged in and is engaging in a practice of anti-competitive acts through two forms of exclusionary conduct (together, "**Practices**"). First, through its ongoing refusal to grant access to the airside at YVR to new-entrant firms for the supply of Galley Handling services at the Airport ("**Exclusionary Conduct**"). Second, through its continued tying of access to the airport airside for the supply of Galley Handling with the leasing of airport land from VAA for the operation of catering kitchen facilities. As it turned out, the Commissioner's focus in this proceeding was primarily on the first alleged practice of anti-competitive acts, namely, the Exclusionary Conduct. The Tribunal notes that in early 2018, VAA granted a licence to a new provider of in-flight catering services, dnata Catering Services Ltd. ("**dnata**"), who was scheduled to start operating in 2019 with a flight kitchen located outside of YVR's airport land.

[15] The Commissioner alleges that until dnata received a licence in 2018, no new entry in the in-flight catering marketplace had occurred at YVR in more than 20 years. He further maintains that in 2014, VAA refused requests from two new-entrant firms which are both well established at other Canadian airports. The Commissioner submits that VAA refused to authorize new

entrants over the objections of several airlines, which expressed to VAA their desire to see greater competition in in-flight catering services at YVR. The Commissioner also maintains that VAA has a competitive interest in excluding competition in the market for the supply of Galley Handling services at YVR, given the rent payments and concession fees it receives from the in-flight caterers. As to VAA's explanations for its Exclusionary Conduct, the Commissioner submits that none constitutes a legitimate business justification.

[16] Finally, the Commissioner argues that VAA's conduct has had, is having and is likely to have the effect of substantially preventing or lessening competition in the relevant market. The Commissioner submits that, "but for" VAA's Exclusionary Conduct, the market for the supply of Galley Handling services at YVR would be substantially more competitive, including by way of materially lower prices, materially enhanced innovation and/or materially more efficient business models, and materially higher service quality.

[17] Having regard to the foregoing, the Commissioner asks the Tribunal to remedy VAA's alleged substantial prevention or lessening of competition in three general ways. First, by prohibiting VAA from directly or indirectly engaging in the Practices. Second, by requiring VAA to authorize airside access, on non-discriminatory terms, to any in-flight catering firm that meets customary health, safety, security and performance requirements, for the purposes of supplying Galley Handling services. Third, by ordering VAA to take any action, or to refrain from taking any action, as may be required to give effect to the foregoing prohibitions and requirements. The Commissioner also seeks an order from the Tribunal directing VAA to pay his costs and to establish (and thereafter maintain) a corporate compliance program.

[18] In its response, VAA requests that the Tribunal dismiss the Commissioner's Application, with costs. In brief, VAA submits that: (1) the Application fails to take into account that VAA has been acting in accordance with its statutory mandate to operate YVR in furtherance of the public interest and, as such, section 79 of the Act does not apply in light of the RCD; (2) VAA does not substantially or completely control the alleged Airside Access Market for the purpose of providing Galley Handling services; (3) VAA does not itself provide Galley Handling services nor does it have a commercial interest in any entity that provides these services at YVR and, thus, it does not substantially or completely control the Galley Handling Market; (4) VAA does not have any PCI in that market; (5) VAA was at all times motivated by a desire to preserve and foster competition and had a valid business justification to limit the number of in-flight caterers that was both pro-competitive and efficiency-enhancing; and (6) VAA's Practices did not, and are not likely to, prevent or lessen competition substantially.

[19] In his Reply, the Commissioner challenges the legitimate business justification advanced by VAA and its claim that it was acting in the "public interest." The Commissioner maintains that the RCD does not apply, in part because no legislative provision specifically requires or authorizes VAA to engage in the Practices. The Commissioner further submits that VAA's explanations for its Exclusionary Conduct do not constitute credible efficiency or pro-competitive rationales that are independent of the anti-competitive and exclusionary effects of its conduct. The Commissioner also underscores that open competition, not VAA, should determine the number and the identity of in-flight catering firms operating at YVR. The Commissioner finally disputes VAA's position that a less competitive market for in-flight catering services, with only a limited number of suppliers, is more competitive because the incumbents would

arguably be in a more solid financial situation and be able to offer a full range of in-flight catering services to airlines.

D. Procedural history

[20] The Tribunal's decision in this proceeding follows a long procedural history punctuated by numerous interlocutory motions and orders dealing with the pre-hearing disclosure of documents by the Commissioner and discovery issues.

[21] In accordance with the scheduling order initially issued by the Tribunal in December 2016, the Commissioner served VAA with his affidavit of documents in February 2017. The Commissioner's affidavit of documents listed all records relevant to matters in issue in this Application which were in the Commissioner's possession, power or control. It was divided into three schedules: (i) Schedule A for records that do not contain confidential information; (ii) Schedule B for records that according to the Commissioner, contain confidential information and for which no privilege is claimed or for which the Commissioner has waived privilege for the purpose of the Application; and (iii) Schedule C for records that the Commissioner asserts contain confidential information and for which at least one privilege (i.e., solicitor-client, litigation or public interest) is being claimed. The original affidavit of documents was amended and supplemented on a number of occasions by the Commissioner (collectively, "**AOD**").

[22] In March 2017, VAA challenged the Commissioner's claims of public interest privilege over documents contained in Schedule C of the AOD and requested disclosure of those documents. VAA argued that the Commissioner's privilege claims had an adverse effect on VAA's right to make a full answer and defence, and on its right to a fair hearing. This resulted in a Tribunal decision dated April 24, 2017 (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 ("***CT Privilege Decision***")). In that decision, the Tribunal upheld the Commissioner's claim of a class-based public interest privilege over the disputed documents. VAA appealed that decision to the FCA and, in a decision dated January 24, 2018, the FCA overturned the Tribunal's previous findings, and remitted the motion for disclosure to the Tribunal for redetermination (*Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 ("***FCA Privilege Decision***")). The FCA ruled that the Commissioner's claims of public interest privilege should be evaluated on a case-by-case basis.

[23] In the meantime, the Commissioner produced to VAA summaries of the facts obtained by him from third-party sources during his investigation leading up to the Application and contained in the records over which the Commissioner had claimed public interest privilege ("**Summaries**"). The first version of the Summaries was produced in April 2017. As it was not satisfied with the level of detail provided in the Summaries, VAA brought a motion to challenge the adequacy and accuracy of the Summaries. In July 2017, the Tribunal released its decision on VAA's summaries motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 8). In the decision, the Tribunal dismissed VAA's motion and concluded that VAA had not made the case for further and better disclosure of source identification in the Summaries, even in a limited form or under limited access.

[24] In September 2017, VAA brought a motion seeking to compel the Commissioner to answer several questions that were refused during the examination for discovery of the Commissioner's representative. In October 2017, the Tribunal released its decision on VAA's refusals motion (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16). That decision granted the motion in part and ordered that some questions be answered by the Commissioner's representative along the lines developed in that decision.

[25] After the Commissioner had waived his public interest privilege on all relevant information provided by the witnesses appearing on his behalf, both helpful and unhelpful to the Commissioner, including information not relied on by the Commissioner, VAA brought a motion in December 2017 to conduct a further examination of the Commissioner's representative. In its decision (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 20), the Tribunal granted VAA's motion in part. It ruled that, given the late disclosure of the waived documents by the Commissioner, coupled with the magnitude of the number of documents at stake, considerations of fairness commanded that VAA be given more time to review and digest the information in order to be able to adequately prepare its case in response.

[26] After the FCA issued its *FCA Privilege Decision* in late January 2018 and rejected the class-based public interest privilege of the Commissioner, the Tribunal suspended the scheduling order and adjourned the hearing which was scheduled to start in early February 2018. The hearing was postponed to October and November 2018.

[27] In September 2018, VAA filed a motion objecting to the admissibility of certain portions of two witness statements filed by the Commissioner, on the basis that they constituted improper opinion evidence by lay witnesses and/or inadmissible hearsay. This motion related to the witness statements of Ms. Barbara Stewart, former Senior Director of Procurement at Air Transat A.T. Inc. ("**Air Transat**"), and of Ms. Rhonda Bishop, Director for In-flight Services and Onboard Product of Jazz Aviation LP ("**Jazz**"). The Tribunal dismissed VAA's motion, and stated that it would be better placed at the hearing to determine whether or not the disputed evidence constitutes improper lay opinion evidence and/or inadmissible hearsay (*The Commissioner of Competition v Vancouver Airport Authority*, 2018 Comp Trib 15 ("***Admissibility Decision***")). VAA's motion was therefore denied, but without prejudice to bring another motion at the hearing, further to the cross-examinations of Ms. Stewart and Ms. Bishop, with respect to the admissibility of their evidence.

[28] The hearing took place in Ottawa and Vancouver, between October 2 and November 15, 2018.

III. FACTUAL BACKGROUND

A. YVR

[29] YVR is located on Sea Island, approximately 12 kilometres from downtown Vancouver. Sea Island is only accessible from the City of Vancouver by one bridge, and from the City of Richmond by three bridges. These bridges often act as bottlenecks, significantly slowing access to the Airport, particularly during rush hour traffic. In addition, vehicles that access the Airport

airside must first pass through a security check-point and individuals in the vehicle are also subject to security checks.

[30] YVR is the second busiest airport in Canada by aircraft movements and passengers. In 2017, it served over 24 million passengers, 55 airlines and had connections to 127 destinations. YVR had the highest rate of passenger destination growth among major Canadian airports in the last four years. In recent years, there has been strong growth in passengers from China, and more Chinese airlines now operate at YVR than at any other airport in the Americas or Europe.

[31] When YVR was established, the City of Vancouver owned the land. The City operated the Airport from 1931 to 1962. In 1962, Vancouver sold the land and the airport facility to the Government of Canada. From 1962 to 1992, the Government of Canada operated the Airport. In 1992, VAA was created and the Government of Canada transferred to it the responsibility for operating the Airport. This transfer was made as part of a policy choice by the federal government to cede operational control of major airports to community-based organizations.

B. VAA

[32] On March 19, 1992, by Order-in-Council No. P.C. 1992-18/501 ("**1992 OIC**"), the Governor in Council authorized the Minister of Transport to enter into an agreement to transfer the management, operation and maintenance of the Airport to VAA. On May 21, 1992, the Governor in Council issued Order-in-Council No. P.C. 1992-1130 under the *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5 ("**Airport Transfer Act**"), designating VAA as the corporation to which the Minister of Transport was authorized to transfer the Airport. Then, on June 18, 1992, the Governor in Council issued Order-in-Council No. P.C. 1992-1376 authorizing the Minister of Transport to enter into a lease with VAA in the terms and conditions of a document annexed as a schedule to the Order-in-Council. That document was a draft ground lease between the Minister of Transport and VAA for a lease of YVR for a term of 60 years. The provisions of the draft ground lease are identical to the 1992 Ground Lease ultimately executed on June 30, 1992. Since that date, VAA has been operating YVR pursuant to the 1992 Ground Lease.

[33] VAA's Statement of Purposes is set forth in VAA's Articles of Continuance dated January 21, 2013 ("**Articles of Continuance**"). The "purposes" that are relevant to this proceeding are as follows:

> (a) to acquire all of, or an interest in, the property comprising the [Airport] to undertake the management and operation of the [Airport] in a safe and efficient manner for the general benefit of the public;
>
> (b) to undertake the development of the lands of the [Airport] for uses compatible with air transportation;
>
> […]

(d) to generate, suggest and participate in economic development projects and undertakings which are intended to expand British Columbia's transportation facilities, or contribute to British Columbia's economy, or assist in the movement of people and goods between Canada and the rest of the world;

[…]

[34] VAA operates in a commercial environment where it needs to and does obtain revenues in excess of its costs of operating YVR. VAA's audited consolidated financial statements indicate that VAA generated an excess of revenues over expenses of approximately $131.5 million in the fiscal year ended December 31, 2015, $85.1 million in fiscal year 2016 and $88.6 million in fiscal year 2017. As a not-for-profit corporation, and pursuant to its mandate, VAA re-invests any excess of revenue over expenses that may accrue in any given year in capital projects for the Airport.

[35] According to VAA, it is responsible for managing and operating YVR in the public interest. The Commissioner accepts that VAA has a contract with the Minister of Transport to operate YVR for the general benefit of the public. However, the Commissioner maintains that this does not mean that VAA acts in the public interest for all purposes.

[36] According to VAA, it has been remarkably successful in fulfilling its public interest mandate. By any measure – whether growth in passengers, growth in Pacific Rim passengers, growth in flights, growth in destinations served, operating efficiency (measured either by revenues per passenger, by revenues per flight, by operating expenses per passenger, or by operating expenses per flight), green initiatives, investments in public transportation, commitments to First Nations peoples, or industry and governmental awards –, VAA has fulfilled its mandate to operate YVR in a safe and efficient manner for the general benefit of the public, to expand British Columbia's transportation facilities, to contribute to the economy of British Columbia and, more broadly, to assist in the movement of people and goods between Canada and the rest of the world.

[37] VAA has no shareholders and most of the members of its Board of Directors are nominated by various levels of government and local professional organizations, including the Government of Canada, the City of Vancouver, the City of Richmond, Metro Vancouver, the Greater Vancouver Board of Trade, the Law Society of British Columbia, the Institute of Chartered Accountants of British Columbia, and the Association of Professional Engineers and Geoscientists of British Columbia. In addition, there are currently five members who serve as "at large" directors (one of whom is VAA's Chief Executive Officer ("**CEO**") while the others are local business people).

C. Airport revenues and fees

[38] Airport authorities such as VAA generate revenues from various sources. These include aeronautical revenues, non-aeronautical revenues and airport improvement fees.

[39] Aeronautical revenues are fees that airport authorities charge to airlines to land at the airport and use airport services. They include landing fees and terminal fees. The Tribunal understands that the aeronautical fees charged by VAA to airlines are lower than what other major airports charge in North America.

[40] Non-aeronautical revenues include revenues from concession fees charged by airport authorities to various service providers operating at the airport, car parking revenues and terminal and land rents. The fees charged to in-flight catering firms form part of these non-aeronautical revenues.

[41] Access to the airport airside is necessary to provide services such as baggage handling and Galley Handling services. The airport airside comprises that portion of an airport's property that lies inside the security perimeter. It includes runways and taxiways, as well as the "apron," where, among other things, an aircraft is parked, Catering products and ancillary supplies, as well as baggage and cargo, are loaded and unloaded, and passengers board. Airport authorities are the only entities from which a service provider may obtain authorization to access the airport airside. Typically, agreements or arrangements are concluded whereby firms pay a fee to the airport authority in exchange for this authorization. The fee is commonly composed of a percentage of the gross revenues generated by the firm at the Airport. As far as in-flight caterers at YVR are concerned, the fees paid to VAA are composed of (i) a percentage of the revenues earned from services provided on the property of YVR, **[CONFIDENTIAL]** "**Concession Fees**"). The Concession Fees are usually passed on to the airlines in the form of a "port fee," as part of the total invoice charged for in-flight catering services.

[42] Airport improvement fees are fees charged by airport authorities to passengers. The Tribunal understands that these airport improvement fees are typically added to the price of airplane tickets. VAA charges an airport improvement fee of $5 per enplaned passenger per flight for in-province travel and of $20 for all other flights. Most other airports in Canada also charge an airport improvement fee.

[43] In 2017, VAA reported total gross revenues of approximately $531 million, comprising $136 million in aeronautical revenues, $235 million in non-aeronautical revenues and $159 million in airport improvement fees. The revenues generated by the Concession Fees and the rents paid by in-flight caterers at YVR (which are included in the non-aeronautical revenues) represent approximately **[CONFIDENTIAL]** of VAA's total gross revenues.

D. Airlines

[44] More than 55 airlines operate at YVR. These include domestic, U.S. and international airlines.

[45] The four major domestic airlines in Canada (i.e., Air Canada, Jazz, WestJet and Air Transat) all operate at YVR.

[46] Air Canada is Canada's largest domestic, U.S. trans-border and international airline. Air Canada provides passenger transportation services through its main airline (Air Canada), its lower-cost leisure airline (Air Canada Rouge), and capacity purchase agreements with regional

airlines such as Jazz. Air Canada flies from 64 airports in Canada, including its main hubs located at YVR, Toronto Pearson International Airport ("**YYZ**") and Montreal Trudeau International Airport ("**YUL**"). In 2016, Air Canada (together with Rouge and its regional carriers) operated, on average, 150 daily departures at YVR. In 2016, Air Canada (including Rouge and Jazz) carried 10.8 of the 22.3 million passengers who travelled through YVR.

[47] Jazz provides passenger air transportation services to Air Canada under the "Air Canada Express" brand. As of August 2017, Jazz used a fleet of 117 aircraft with more than 660 departures per weekday to 70 destinations across Canada and the United States. YVR represents Jazz's busiest station by flight volumes.

[48] WestJet is an Alberta partnership. Its parent company, WestJet Airlines Ltd., is incorporated under the laws of Alberta. WestJet offers commercial air travel, vacation packages, and charter and cargo services to leisure and business guests. WestJet is currently Canada's second-largest airline. In 2017, it carried more than 24 million passengers (up by over 2 million from 2016) and generated revenue of over $4.5 billion. WestJet uses YVR, Calgary International Airport ("**YYC**") and YYZ as its main hubs in Canada. In 2016, 4.6 of the 22.3 million passengers who travelled through YVR were on WestJet.

[49] Air Transat is a holiday travel airline, carrying approximately four million passengers per year to more than 60 destinations in 30 countries. Air Transat is a subsidiary of Transat A.T. Inc., a holiday travel specialist, headquartered in Montreal and is publicly traded on the Toronto Stock Exchange. Air Transat flies from up to 22 airports in Canada, including YVR. In the 2018 winter season, Air Transat had 18 departures per week from YVR, primarily to southern sun destinations. In 2016, Air Transat carried 323,000 passengers at YVR.

[50] Though they only represent a small fraction of the overall number of airlines (i.e., 55) operating at YVR, the four major domestic airlines account for the vast majority of air traffic at the Airport.

E. In-flight catering

[51] This Application concerns Catering and Galley Handling services at YVR. However, the Commissioner and VAA have differing views on what these services actually cover and how they should be defined.

[52] According to the Commissioner, the industry recognizes a distinction between Catering and Galley Handling services. Catering refers to the sourcing and preparation of meals and snacks. It consists primarily of the preparation of meals for distribution, consumption or use on-board a commercial aircraft by passengers and crew, and includes buy-on-board ("**BOB**") offerings and snacks. Galley Handling refers to the logistics of getting that food onto the airplane. It consists primarily of the loading and unloading of Catering products, commissary products (typically non-food items and non-perishable food items) and ancillary products (duty-free products, linen and newspapers) on a commercial aircraft. It also includes warehousing; inventory management; assembly of meal trays and aircraft trolley carts (including bar and boutique assembly); transportation of Catering, commissary and ancillary products between aircraft and warehouse or Catering kitchen facilities; equipment cleaning; handheld point-of-sale

device management; and trash removal. Galley Handling is sometimes referred to as "last mile logistics" or "last mile provisioning" by airlines or providers of in-flight catering services. It appears that these terms refer essentially to the same bundle of products that the Commissioner defines as Galley Handling services. While the exact contours of the demarcation between Catering and Galley Handling services vary from firm to firm, the Tribunal understands that the core of Galley Handling services requires airside access.

[53] The Commissioner defines "In-flight Catering" as comprising two bundles of products and services, namely, what he defines as Catering and Galley Handling.

[54] VAA takes a different approach to the definition of the services subject to this Application. It segments the in-flight catering business based on the type of food being offered to the passengers: specifically, it distinguishes between "fresh catering" and "standard catering." VAA defines fresh catering as including the preparation and loading onto aircraft of fresh meals and other perishable food offerings. Thus, VAA includes much of what the Commissioner defines as "Galley Handling" in what it calls "fresh catering." It takes a similar approach to what it calls "standard catering." VAA considers that it includes the provision and loading onto aircraft of non-perishable food items and beverages, as well as other items such as duty-free products.

[55] For the purpose of this decision, and in order to avoid any confusion in the terminology used, the Tribunal will adopt the definitions of Catering and Galley Handling proposed by the Commissioner. The Tribunal also underlines that VAA does not itself provide any in-flight catering services, whether Catering or Galley Handling.

[56] Virtually all commercial airlines operating out of YVR offer some type of food (perishable and/or non-perishable) and/or beverages (alcoholic and/or non-alcoholic) service on every flight. Food items provided by airlines may be served to passengers in a cold or uncooked state, such as cheese or nuts, or in a cooked state, such as a casserole or hot entrée. Perishable food items may also be fresh or frozen. The level of food and/or beverages service varies by airlines, by route and by seat class, with the offerings ranging from beverages and peanuts or pretzels, at one extreme, to high end freshly prepared meals, including hot entrées, at the other extreme. Airlines provide food and beverages to their passengers on a complimentary basis and/or on a for-purchase basis (known as BOB).

[57] Over the years, food served by airlines on domestic and cross-border flights has gradually moved away from fresh food towards frozen food. Freshly prepared meals, once served to all passengers, were virtually eliminated from the economy cabins in the early 2000s and are now largely reserved for those passengers travelling in business or first class (also known as the front cabins). Economy class passengers are increasingly served lower-cost frozen meals, sometimes sourced from food services firms on a national basis. For the vast majority of flights operated out of YVR, freshly cooked meals are now offered in only two situations: on overseas flights and to business/first class passengers (who are particularly important to airlines' profitability) on certain other types of flights.

[58] Despite this new trend of switching towards frozen meals, VAA considers that its ability to ensure a competitive choice of freshly prepared meals is important to attract and retain airlines and routes at YVR, especially for Asia-based international airlines.

[59] The Tribunal understands that, while in-flight catering is an important service for both airlines and passengers, it only represents a very small fraction of the overall operating costs of airlines.

F. In-flight catering providers

[60] There are currently six main firms that directly or indirectly supply Catering and/or Galley Handling services in Canada. They are Gate Gourmet Canada Inc. ("**Gate Gourmet Canada**"), CLS Catering Services Ltd. ("**CLS**"), dnata Catering Canada Inc. ("**dnata Canada**"), Newrest Holding Canada Inc. ("**Newrest Canada**"), Strategic Aviation Services Ltd. ("**Strategic Aviation**") and Optimum Stratégies / Optimum Solutions ("**Optimum**").

[61] Gate Gourmet Canada is a subsidiary of Gate Gourmet International Inc. ("**Gate Gourmet**"). Gate Gourmet currently operates at more than 200 locations in more than 50 countries. Gate Gourmet Canada was created in 2010, when it purchased Cara Airline Solutions ("**Cara**"), which had been providing in-flight catering to airlines at Canadian airports since 1939. Gate Gourmet Canada operates at nine Canadian airports, including YVR. In 2017, Gate Gourmet Canada had **[CONFIDENTIAL]** airline customers in Canada and provided catering to more than **[CONFIDENTIAL]** flights annually, with reported revenues of more than $**[CONFIDENTIAL]**.

[62] CLS is a joint venture between Cathay Pacific Airways Ltd. and LSG Sky Chefs ("**LSG**"), the world's largest airline caterer and provider of integrated service solutions. CLS has provided in-flight catering in Canada for 20 years. It currently operates at YVR, YYC and YYZ.

[63] dnata is a global provider of air services to over 300 airlines in 35 countries with more than 41,000 employees. dnata provides four types of air services via separate business arms, which include ground handling, cargo and logistics, catering, and travel services. dnata's catering services include: in-flight catering services, in-flight retail services, airport food and beverage services and pre-packaged solutions services. dnata's food division serves customers at 60 airports across 12 countries. In Canada, YVR is the first airport at which dnata, through its subsidiary dnata Canada, will offer in-flight catering services, starting in 2019.

[64] Newrest Group Holding S.A. ("**Newrest**") is the ultimate parent company of Newrest Canada. Newrest is a global provider of multi-sector catering, with operations in 49 countries and more than 30,000 employees. Newrest operates in four catering and related hospitality sectors, servicing approximately 1.1 million meals each day: (i) in-flight catering; (ii) rail carrier catering; (iii) catering for restaurants and institutions; and (iv) catering at the retail level. Newrest's in-flight unit represented approximately 41% of Newrest's turnover in 2016-2017. This business unit provides in-flight catering, logistics and supply-chain services for on-board products and airport lounge management to approximately 234 airlines in 31 countries. Newrest Canada began operations in Canada in 2009 and offers a full line of in-flight catering services in Canada, comprising both Catering and Galley Handling, at YYC, YYZ and YUL.

[65] Strategic Aviation Holdings Ltd. is the parent company of Strategic Aviation and Sky Café Ltd. ("**Sky Café**"). Strategic Aviation provides in-flight catering services at ten airports in Canada, including YYC, YYZ and YUL. Strategic Aviation offers airlines a "one-stop shop" for Galley Handling and outsourced Catering. It provides Galley Handling services with its own personnel. However, for Catering services, Strategic Aviation partners with specialized third parties responsible for the food preparation and packaging. Its principal Catering partner is Optimum.

[66] The Optimum group comprises Optimum Solutions and its subsidiary Optimum Stratégies. Optimum does not directly provide any in-flight catering service but functions as an amalgamator. Optimum Stratégies specializes in "provisioning" (i.e., Galley Handling) through sub-contracts with **[CONFIDENTIAL]**. Optimum Solutions also offers Catering services to airlines through a network of independent third-party providers. In essence, it serves as an intermediary between food providers and airlines.

[67] In-flight catering firms can operate on-airport or off-airport. Leasing premises "off-airport" to house in-flight catering facilities is generally at a significantly lower cost than the rate paid for leasing land from the airport.

[68] In-flight catering firms can be "full-service" or "partial-service." The Tribunal understands that being a "full-service" firm typically includes being able to offer freshly prepared meals, other perishable food items such as frozen meals and snacks, and non-perishable food items. "Partial-service" firms do not offer fresh meals to the airlines. Notwithstanding the foregoing, the industry also refers to "full-service" in-flight catering firms as those who are able to provide both Catering and Galley Handling services. Conversely, "partial-service" firms provide only one of either Catering or Galley Handling services and outsource the other. The Tribunal notes that "full-service" in-flight caterers are sometimes also referred to as the "traditional" flight kitchen operators.

[69] Historically, in-flight caterers were full-service firms offering both Catering and Galley Handling services, including a full spectrum of fresh meals, frozen meals and non-perishable food items. This is the case for Gate Gourmet at most airports in Canada, for CLS in YVR and YYZ, and for Newrest in YYC, YYZ and YUL (since 2009). dnata also appears to be viewed as a full-service in-flight caterer.[2] However, Strategic Aviation and Optimum are not considered to be full-service providers.

[70] According to the Commissioner, new and different business models have emerged recently in the in-flight catering services business. As airplane food has moved away from fresh meals, in-flight catering has also evolved away from the traditional, full-service flight kitchens located at airports, towards off-airport options, the separation of Catering and Galley Handling (when provided by different providers), and the outsourcing of the preparation of frozen meals and non-perishable BOB food items to specialized firms. The Commissioner submits that with

[2] In this decision, the Tribunal will use the terms Gate Gourmet, Newrest and dnata to refer to the activities of each of those entities in Canada, even though they are sometimes acting through their respective Canadian subsidiaries, namely, Gate Gourmet Canada, Newrest Canada and dnata Canada, respectively.

changing demand in the market, in-flight catering firms can deliver efficiencies through specializing in the provisions of either Catering or Galley Handling services. For example, certain firms source freshly prepared meals from local restaurants proximate to airports, and then deliver these goods to Galley Handling firms or full-service in-flight catering firms. Strategic Aviation, for one, seeks to provide Galley Handling services and is partnering with Optimum for off-airport food supply.

[71] According to the Commissioner, this has resulted in significant savings as well as new product choices and models for airlines. The Tribunal further understands that with the migration towards frozen meals and pre-packaged food items, even the full-service in-flight catering firms like Gate Gourmet and CLS focus primarily on delivering, warehousing and storing pre-packaged meals and non-perishable food items to airlines. Stated differently, although they are still expected to be able to provide fresh meals for international flights and for the front cabins on certain other flights, their focus is less on preparing and providing freshly prepared meals and more on logistics, inventorying and delivering food on airplanes.

[72] Airlines can therefore use various methods to source or purchase food and/or beverages for distribution, consumption or use on-board a commercial aircraft by passengers and/or airline crew. The Tribunal understands that these methods include but are not necessarily limited to: (1) purchasing one or more food and/or beverage items from in-flight catering firms; and (2) purchasing one or more food and/or beverage items from specialized third-party firms having commercial kitchen operations or directly from manufacturers, distributors or wholesalers.

[73] VAA maintains that, in addition to purchasing their in-flight catering needs from third-party providers, airlines can also use "double catering" or "self-supply" to source food and/ or beverages for their flights.

[74] Double catering refers to the activity whereby an airline loads and transports extra food and/or beverages on an aircraft at one airport for use on one or more subsequent commercial flights by that aircraft departing from a second (or third, etc.) airport ("**Double Catering**"). By loading such extra food, beverages and non-food commissary products on in-bound flights to an airport for use on a subsequent flight by the same aircraft, the airline can avoid the need for Galley Handling services at that second (or third, etc.) airport. Double Catering is also sometimes referred to as "ferrying," "return catering" or "round-trip catering."

[75] Self-supply refers to the practice of an airline itself sourcing meals and provisions from its own facilities, or wherever else it may choose, and loading itself all meals and provisions that are served to passengers on the aircraft ("**Self-supply**"). All airlines are free to Self-supply at YVR and do not need to be granted specific access by VAA for this purpose.

[76] The Tribunal understands that the number of in-flight catering firms authorized to operate at airports varies but that there are typically two or three in-flight caterers operating at most Canadian airports. There are however three airports in Canada with four in-flight caterers: YYC, YYZ and YUL.

G. In-flight caterers at YVR

[77] At the time of the Commissioner's Application, Gate Gourmet and CLS were the only firms authorized by VAA to provide in-flight catering at YVR. Gate Gourmet and CLS (and their respective predecessors) have operated at YVR since approximately 1970 and 1983 respectively, under long-term leases first entered into by the Minister of Transport and later assumed by VAA. In early 2018, dnata became the third provider of in-flight catering services authorized to operate at YVR.

[78] Until 2003, there had been three in-flight caterers operating at YVR: Cara (which became Gate Gourmet Canada), CLS and LSG. LSG's major customer was Canadian Airlines International Ltd. ("**Canadian Airlines**"). After the acquisition of Canadian Airlines by Air Canada, LSG's catering business was redirected to Cara. As a result of the downturn in its business that followed that acquisition, LSG exited YVR. At the time, no other caterer took over LSG's flight kitchen and none sought to replace it at the Airport. According to VAA, LSG's departure and the lack of any replacement indicated that, in 2003, the in-flight catering business at YVR was not able to support three in-flight caterers.

[79] Gate Gourmet, CLS and dnata are full-service in-flight catering firms providing both Catering and Galley Handling services at YVR. As such, they all prepare and offer freshly prepared meals. Each company operates a full kitchen, in respect of which each has made significant investments on-site at the Airport (in the case of Gate Gourmet and CLS) or off-Airport (in the case of dnata). In addition to fresh meals, Gate Gourmet, CLS and dnata each provide a full range of other food (such as frozen meals, fresh snacks and other BOB offerings), and beverages.

[80] Like all suppliers at YVR needing access to the airside, in-flight catering firms must obtain authorization from VAA to access the YVR airside. Gate Gourmet and CLS each entered into licence agreements with VAA many years ago that set out the terms and conditions under which they operate and obtain access to the airside. Under those licence agreements, Gate Gourmet and CLS pay Concession Fees to VAA, calculated on the basis of a percentage of their respective revenues from the sale of Catering and Galley Handling services, **[CONFIDENTIAL]**. Upon beginning to operate in 2019, dnata also has to pay Concession Fees to VAA further to the in-flight catering licence agreement it entered into with VAA ("**dnata Licence**").

[81] Gate Gourmet and CLS have each entered into long-term leases with VAA for the land they rent from VAA on Airport property, for terms of **[CONFIDENTIAL]**. Pursuant to both leases, **[CONFIDENTIAL]**.

H. The 2013-2015 events

[82] The particular events that led to the Commissioner's Application can be summarized as follows.

[83] In December 2013, Newrest made a request to VAA to be granted a licence to supply in-flight catering services at YVR, with a flight kitchen located off-Airport. Newrest renewed its request in March 2014. In April 2014, Strategic Aviation submitted a similar request for a licence to offer Galley Handling services. These requests were made following the issuance of a Request for Proposal ("**RFP**") process that Jazz launched in respect of its in-flight catering needs.

[84] VAA denied Newrest's as well as Strategic Aviation's requests in April 2014. The licences were refused because VAA believed that the local market demand for in-flight catering services at YVR could not support a new entrant at the time. According to VAA, the decision to deny access to Newrest and Strategic Aviation in 2014 was motivated by concerns about the precarious state of the in-flight catering business at YVR. VAA was of the view that the market was not large enough to support the entry of a third in-flight caterer, and that the entry of a third caterer might cause one (or even both) of the incumbent caterers to exit the market. Among other things, VAA was concerned that this would give rise to a significant disruption at YVR, and adversely affect its reputation.

[85] In 2015, Newrest and Strategic Aviation made further licence requests, which were denied by VAA.

[86] [CONFIDENTIAL].

I. The 2017 RFP

[87] In January 2017, Mr. Craig Richmond, the President and CEO of VAA, requested a study of the current state of the market for in-flight catering services at YVR. The purpose of that study was to determine whether a third in-flight caterer should be licenced at YVR ("**In-flight Kitchen Report**"). The study was launched after the Commissioner had filed his Application. The In-flight Kitchen Report concluded that in light of the increase in passenger traffic and the addition of several new airlines at YVR, the size of the in-flight catering market at the Airport had grown sufficiently compared to 2013-2014 to justify a recommendation that at least one additional licence be provided.

[88] As a result, in September 2017, VAA issued a RFP for a new in-flight catering licence at YVR. VAA also recommended that the RFP be open to off-site full-service and non-full-service operators, with responses to be judged based upon a set of guiding principles and evaluation criteria. In November 2017, VAA retained a fairness advisor who concluded that the RFP process had been fair and reasonable.

[89] VAA received responses to the RFP from **[CONFIDENTIAL]** firms: **[CONFIDENTIAL]**. The evaluation committee at VAA unanimously recommended to VAA's executive team that dnata be selected as the preferred proponent for an in-flight catering licence at the Airport.

[90] The dnata Licence has a term of **[CONFIDENTIAL]** years, which began on **[CONFIDENTIAL]** and will end on **[CONFIDENTIAL]**. dnata does not lease land from VAA. Instead, it will operate a flight kitchen located off-Airport. On February 19, 2018, VAA publicly

announced that it had granted a new in-flight catering licence to dnata. At the time of the hearing, dnata expected to begin its operations in the **[CONFIDENTIAL]**.

IV. EVIDENCE -- OVERVIEW

[91] The evidence considered by the Tribunal came from 14 lay witnesses, three expert witnesses and exhibits filed by the parties.

A. Lay witnesses

(1) The Commissioner

[92] The Commissioner led evidence from the following five lay witnesses associated with the four major domestic airlines operating in Canada:

- Andrew Yiu: Mr. Yiu has been the Vice President, Product, at Air Canada since 2017. Mr. Yiu is responsible for the design of Air Canada's products, services and amenities experienced by customers at airports and onboard all flights worldwide. In this capacity, he knows about Air Canada's in-flight catering operations. He is the direct supervisor of Mr. Mark MacVittie, who signed two witness statements filed by the Commissioner but subsequently resigned from his position prior to the hearing. Mr. Yiu reviewed and reaffirmed Mr. MacVittie's witness statements.

- Barbara Stewart: until her retirement on June 1, 2017, Ms. Stewart worked as the Senior Director, Procurement, for Air Transat. In this capacity, she was responsible for all procurement activities at Air Transat as they relate to in-flight catering, ground handling and fuel, together with managing the relationship between Air Transat and the major airports it serves.

- Rhonda Bishop: Ms. Bishop has been the Director, In-flight Services and Onboard Product of Jazz since 2010. In this capacity, she is responsible for the oversight of four business units: (1) Inflight Services, where she performs the duties of Flight Attendant Manager; (2) Regulatory & Standards, where she is responsible for the operation and implementation of the *Canadian Aviation Regulations*, SOR/96-433 ("**Canadian Aviation Regulations**") including airline operations; (3) Inflight Training, where she is responsible for the professional standards of cabin crews; and (4) Onboard Product, where she oversees the efficient operation of the Inflight Services Department.

- Simon Soni: Mr. Soni has been the Director of Catering Services for WestJet since November 2017. In this capacity, he is responsible for development selection and safe provision of WestJet's on-board Catering products. He reviewed and adopted parts of the witness statements signed by Mr. Colin Murphy, who was the Director of Inflight Cabin Experience for WestJet and was responsible for WestJet Aircraft Catering operations,

onboard product development and delivery, and inflight standards and procedures, prior to leaving the company.

- Steven Mood: Mr. Mood has been the Senior Manager Operations Strategic Procurement for WestJet since January 2017. In this capacity, he is responsible for leading a team of sourcing specialists supporting WestJet and WestJet Encore Domestic, Trans-border and International operations, which includes WestJet Aircraft Catering operations, Fleet Management and Maintenance services, as well as Ground Handling and Cargo services. Mr. Mood also reviewed and reaffirmed parts of Mr. Murphy's witness statements.

[93] The Commissioner also led evidence from the following six lay witnesses associated with firms that directly or indirectly supply Catering and/or Galley Handling services:

- Ken Colangelo: Mr. Colangelo has been the President and Managing Director of Gate Gourmet Canada since 2012. In this capacity, he is responsible for all of Gate Gourmet Canada's operations, including those with respect to commercial, financial, legal and regulatory matters.

- Maria Wall: Ms. Wall has been the Financial Controller for CLS since 2008. She is responsible for the financial management and reporting of CLS. The Commissioner filed a very cursory witness statement prepared by Ms. Wall which did not address any of the issues in dispute in this proceeding. She was not called to testify at the hearing.

- Jonathan Stent-Torriani: Mr. Stent-Torriani is the Co-Chief Executive Officer of Newrest. He, along with Mr. Olivier Sadran, co-founded Newrest in 2005-2006.

- Geoffrey Lineham: Mr. Lineham has been the President and co-owner of Optimum Stratégies since 2015. He is also the Vice President of Business Development at Optimum Solutions.

- Mark Brown: Mr. Brown has been the President and CEO of Strategic Aviation since 2012. He oversees all the activities of Strategic Aviation, including its ground handling and Catering businesses.

- Robin Padgett: Mr. Padgett is the Divisional Senior Vice President of dnata. In this capacity, he has run the catering division of dnata for the past four years and has full responsibility of the operational and strategic direction of the division.

[94] The Tribunal generally found Messrs. Yiu, Soni, Mood, Colangelo, Stent-Torriani, Lineham, Brown and Padgett, as well as Mss. Stewart and Bishop, to be credible, forthright, helpful and impartial.

(2) VAA

[95] VAA led evidence from the following four lay witnesses, who are or were all employed at VAA:

- Craig Richmond: Mr. Richmond has been the President and CEO of VAA since June 18, 2013 and has over 40 years of experience in aviation, including as CEO of seven airports in four different countries (Bahamas, England, Cyprus and Canada). Mr. Richmond initially joined VAA in 1995 and spent the following 11 years there in various roles (including Manager of Airside Operations and Vice President of Operations).

- Tony Gugliotta: Mr. Gugliotta has held various roles at the managerial level for VAA, including Senior Vice President, Marketing and Business Development, from 2007 to 2014. He retired from VAA in 2016. Mr. Gugliotta's responsibilities included: all land and property management at YVR, including commercial real estate and retail development; YVR's marketing to airlines and passengers; and ground transportation.

- Scott Norris: Mr. Norris has been the Vice President of Commercial Development of VAA since September 2016. He is responsible for oversight of areas such as: terminal leasing; parking and ground transportation operations and business development; and airport estate lease management and development. Mr. Norris formerly held various positions in airport operations and management at several airports in Australia.

- John Miles: Mr. Miles has been the Director, Corporate Finance at VAA since 2007. Prior to that, he was Manager, Corporate Finance. Mr. Miles is responsible for oversight of the annual budget preparation, financial statement preparation, corporate financing, investment analyses and enterprise risk management at VAA. Budget and financial statement preparation includes monitoring the revenues derived from the flight kitchens.

[96] The Tribunal generally found Messrs. Richmond, Gugliotta, Norris and Miles to be credible, forthcoming, helpful and impartial.

B. Expert witnesses

(1) The Commissioner

[97] Dr. Gunnar Niels testified on behalf of the Commissioner. Dr. Niels is a professional economist with nearly 25 years of experience working in the field of competition analysis and policy. He is a Partner at Oxera, an independent economics consultancy based in Europe specializing in competition, regulation and finance. He holds a Ph.D. in economics from Erasmus University Rotterdam in the Netherlands. Dr. Niels' mandate was to determine: (1) whether VAA is dominant in a market for airside access at YVR for one or more components of in-flight catering; (2) whether there exists any economic justification for the refusal by VAA to permit additional competition in one or more components of in-flight catering at YVR; (3)

whether VAA's refusal to permit additional competition in in-flight catering or its tying of airside access to the provision of an on-site kitchen facility has prevented or lessened competition substantially; (4) whether additional providers of in-flight catering services can operate profitably at YVR; and (5) whether VAA's continuing policy to restrict entry at YVR, in respect of one or more components of in-flight catering, is having or is likely to have the effect of preventing or lessening competition substantially in a relevant market.

[98] Dr. Niels was accepted as an expert qualified to give opinion evidence in industrial organization and competition economics. The Tribunal generally found Dr. Niels to be credible, forthright, objective and impartial, and willing to concede weaknesses/shortcomings in his evidence or in the Commissioner's case.

(2) VAA

[99] Two expert witnesses testified on behalf of VAA: Dr. David Reitman and Dr. Michael W. Tretheway.

[100] Dr. Reitman is a Vice President at Charles River Associates, an economics and business consulting firm. Prior to that, he was an economist with the Antitrust Division of the U.S. Department of Justice and served on the faculty in the economics department at Ohio State University and the Graduate School of Management at UCLA. He holds a Ph.D. in Decision Sciences from Stanford University in the United States. Dr. Reitman indicates in his report that he was retained "to conduct an economic analysis relating to an allegation made by the Commissioner of Competition that the activities of VAA have resulted in, or are likely to result in, an abuse of dominant position in the flight catering market" at YVR. In undertaking this analysis, his mandate was as follows: (1) to define the relevant antitrust markets for flight catering; (2) to determine whether VAA had an incentive to restrict competition in those markets; (3) to determine whether there has been or is likely to be a substantial lessening of competition in those markets; and (4) to review and respond to the report of Dr. Niels.

[101] With the parties' agreement, Dr. Reitman was qualified as an expert in industrial organization and antitrust economics. For the most part, the Tribunal found Dr. Reitman to be credible, forthright, objective and helpful. As indicated in the reasons below, where the evidence of Dr. Niels and Dr. Reitman was inconsistent, the Tribunal sometimes preferred Dr. Niels' evidence, and at other times preferred Dr. Reitman's evidence, depending on the particular issue being considered.

[102] Dr. Tretheway is currently Executive Vice President, Chief Economist and Chief Strategy Officer of the InterVISTAS Consulting Group, which forms part of Royal Haskoning DHV, a global provider of consultancy and engineering services in the areas of aviation, transportation, water, environment, building and manufacturing, mining and hydropower. Dr. Tretheway holds a Ph.D. in Economics from the University of Wisconsin-Madison in the United States. Dr. Tretheway's mandate was as follows: (1) to explain how the demand for in-flight catering services evolved in North America since 1992 and the supply conditions affecting the structure of the industry; (2) to explain the significance of in-flight catering services to airlines; (3) to explain the incentives (objectives) of airport authorities in general, and the incentives of VAA,

both in general and with respect to the provision of access to in-flight catering operators; and (4) to provide an opinion regarding VAA's rationale for refusing to issue licences to new in-flight caterers in 2014.

[103] VAA sought to qualify Dr. Tretheway as an expert in airline and airport economics. The Commissioner objected in part to the qualification of Dr. Tretheway as an expert and asked the Tribunal to declare inadmissible and strike from his report those portions that dealt with items 2, 3 and 4 of his mandate. The Commissioner made this objection on the basis that Dr. Tretheway was not properly qualified to testify on those issues and that his expert evidence was not necessary for the Tribunal. The Tribunal declined to strike the responses to questions 2 and 3, as the panel was satisfied that they met the "necessity" and "properly qualified expert" factors established by the Supreme Court of Canada ("**SCC**") in *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 ("***Mohan***") and *R v Bingley*, 2017 SCC 12 ("***Bingley***"), and could therefore be properly accepted as expert evidence. However, the Tribunal declared inadmissible those portions of Dr. Tretheway's report dealing with item 4 above, after concluding that Dr. Tretheway's opinion did not contribute to the determination of the issues that the panel had to decide.

[104] Ultimately, Dr. Tretheway was accepted by the Tribunal as an expert qualified to give opinion evidence in airline and airport economics. At the hearing, the Tribunal indicated that, since the objections voiced by the Commissioner raised a number of elements regarding the applicability of the *Mohan* factors and the Tribunal's approach to expert evidence, it would provide more detail in its final decision. What follows are the Tribunal's reasons for its ruling on Dr. Tretheway's expert evidence.

(a) Admissibility of expert evidence

[105] In court proceedings, the admissibility of expert opinion evidence is determined by the application of a two-stage test, as confirmed by the SCC in *Bingley* and *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("***White Burgess***"). The test may be summarized as follows.

[106] The first step (the threshold stage) requires the party putting forward the proposed expert evidence to establish that it satisfies the four requirements established in *Mohan*, namely, (i) logical relevance, (ii) necessity in assisting the trier of fact, (iii) the absence of an exclusionary rule, and (iv) a properly qualified expert. Each of these conditions must be established on a balance of probabilities in order for an expert's evidence to meet the threshold for admissibility. The second step (the gatekeeping stage) involves the discretionary weighing of the benefits, or probative value, of admitting evidence that meets the preconditions to admissibility, against the "costs" of its admission, including considerations such as consumption of time, prejudice and the risk of causing confusion (*White Burgess* at para 16). This is a discretionary exercise, and the cost-benefit analysis is case-specific. Should the costs be found to outweigh the benefits, the evidence may be deemed inadmissible despite the fact that it met all the *Mohan* factors.

[107] In its proceedings, the Tribunal has consistently applied the principles articulated by the SCC in *Mohan* and its progeny when considering the admissibility of expert evidence (see for

example: *Commissioner of Competition v Imperial Brush Co Ltd and Kel Kem Ltd (cob as Imperial manufacturing Group)*, 2007 Comp Trib 22 ("***Imperial Brush***") at para 13; *B-Filer Inc et al v The Bank of Nova Scotia*, 2006 Comp Trib 42 ("***B-Filer***") at para 257; *Commissioner of Competition v Canada Pipe Company*, 2003 Comp Trib 15 ("***Canada Pipe 2003***") at para 36).

[108] In the case of Dr. Tretheway's opinion, the only two factors at stake are the "necessity" and "properly qualified expert" requirements. With respect to the "necessity" requirement, the SCC has insisted that in order to be admissible, the proposed expert opinion evidence must be necessary to assist the trier of fact, bearing in mind that necessity should not be judged strictly. The proposed evidence must be "reasonably necessary" in the sense that "it is likely outside the [ordinary] experience and knowledge of the [trier of fact]" (*Mohan* at pp 23-24). This is notably the case where the expert evidence is needed to assist the court due to its technical nature, or where it is required to enable the court to appreciate a matter at issue and to help it form a judgment on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge.

[109] However, evidence that provides legal conclusions or opinions on issues and questions of fact to be decided by the court is inadmissible because it is unnecessary and usurps the role and functions of the trier of fact: "[t]he role of experts is not to substitute themselves for the court but only to assist the court in assessing complex and technical facts" (*Quebec (Attorney General) v Canada*, 2008 FC 713 at para 161, aff'd 2009 FCA 361, 2011 SCC 11; *Mohan* at p 24).

[110] The requirements of a "properly qualified expert" are also well established. A party proposing an expert has to indicate with precision the scope and nature of the expert testimony and what facts it is intending to prove. Expertise is established when the expert witness possesses specialized knowledge and experience going beyond that of the trier of fact, relating to the specific subject area on which the expertise is being offered (*Bingley* at para 15). The witness must therefore be shown "to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (*Mohan* at p 25).

[111] The admissibility of expert evidence does not depend upon the means by which the skill or the expertise was acquired. As long as the court or the Tribunal is satisfied that the witness is sufficiently experienced in the subject area at issue, it will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence. Nor is it necessary for the expert witness to have the best qualifications imaginable in order for his or her evidence to be admissible. As long as the expert witness has specialized knowledge not available to the trier of fact, deficiencies in those qualifications go to the weight of the evidence, not to its admissibility.

[112] While expertise can be described as a modest standard, it is important that the expert possesses the kind of special knowledge and experience appropriate to the subject area. This is why the precise field of expertise of the expert witness has to be defined. Expert witnesses should not give opinion evidence on matters for which they possess no special skill, knowledge or training, nor on matters that are commonplace, for which no special skill, knowledge or training is required.

[113] Finally, the fact that an expert's opinion is based in whole or in part on information that has not been proven before the trier of fact does not render the opinion inadmissible. Instead, the extent to which the factual foundation for the expert opinion is not supported by admissible evidence will affect the weight it will be given by the trier of fact.

(b) Dr. Tretheway's evidence

[114] For the reasons that follow, the Tribunal was satisfied that the responses to questions 2 and 3 of Dr. Tretheway's report meet the factors established in *Mohan* and *Bingley*, and that the costs-benefits analysis prescribed by the SCC weighs in favour of admitting this evidence. Even though Dr. Tretheway was not qualified as an expert in "in-flight catering" as such, the Tribunal finds that he was properly qualified to provide expert opinions on those questions and that his evidence was necessary to the work of the panel.

[115] The issues raised in question 2 of Dr. Tretheway's report relate to the significance of in-flight catering for airlines, including questions such as the impact that delays can have on airlines in the provision of in-flight catering services. The issues raised in question 3 relate to incentives of airport authorities and to VAA's particular incentives in the context of what other airport authorities have been doing.

[116] In this case, Dr. Tretheway was accepted and qualified by the Tribunal as an expert in airline and airport economics. VAA submitted that air transportation economics includes the economics of how airports and airlines interact with complementary services, namely, services located at airports that are provided not to the airport itself, but to airlines. VAA further argued that these complementary services include in-flight catering services, not in terms of their inner workings but in terms of how they relate to airlines' costs and to airport operations. The Tribunal agrees.

[117] Dr. Tretheway's report and his credentials demonstrate that he is an expert in the air transportation industry. That expertise includes airlines' use, and airports' provision, of access to complementary services such as in-flight catering, among others. Dr. Tretheway is one of the most published and experienced air transportation economists in the world, a field that includes the incentives of airports and how airlines and airports deal with complementary services. The Tribunal further notes that Dr. Tretheway studied in-flight catering and used in-flight catering data as part of his Ph.D. thesis. Moreover, Dr. Tretheway provided expertise on the incentives of airport authorities for an investigation by the New Zealand Commerce Commission. He also has experience working as a consultant for various airports around the world. Dr. Tretheway testified on the basis of his expertise and experience as a consultant for many airlines and many airport authorities. He considered in-flight catering to be part of airport economics and as a component of airlines' costs.

[118] In light of the foregoing, the Tribunal has no hesitation in concluding that Dr. Tretheway possesses special knowledge and experience going beyond that of the panel as the trier of fact, relating to the specific subject area on which his expertise is being offered for questions 2 and 3. The Tribunal is also satisfied that the expert evidence of Dr. Tretheway on those two questions is "reasonably necessary" in the sense that it is outside the experience and knowledge of the panel.

[119] Turning to the issues raised in question 4, they relate to VAA's "rationale" for declining to issue licences to new entrants at YVR. In his report, Dr. Tretheway was providing an opinion on one of the ultimate issues that the Tribunal has to decide, namely, the credibility and reliability of VAA's business justification for its Exclusionary Conduct. As stated above, such expert evidence is clearly inadmissible as it breaches the "necessity" rule of admissibility described in *Mohan* (*Mohan* at p 24). The Tribunal does not need expert evidence on the appropriateness or reliability of the business justification raised by VAA or on the reasonability of the business decisions made by VAA. These are issues to be determined by the panel as the trier of fact, on the basis of the evidence before it. For that reason, the portions of Dr. Tretheway's report dealing with question 4 are inadmissible and have been struck from his report.

[120] In his challenge to the admissibility of Dr. Tretheway's expert evidence and his qualifications on questions 2, 3 and 4, the Commissioner insisted on the fact that Dr. Tretheway's opinion should be set aside because he was properly qualified as an airline and airport "economist," but not properly qualified as an airline or airport "industry expert." The Tribunal does not accept this argument, and fails to see how the mere labelling of an expert as an "economist" or an "industry expert" could suffice to support a finding of inadmissibility. Labelling Dr. Tretheway as an air transportation "economist," as VAA did, rather than as an industry expert, does not alter his qualifications nor is it determinative of his status as a properly qualified expert.

[121] The Tribunal agrees that there is a general distinction between industry experts and economists. Typically, an industry expert opines "on facets of the industry in which the respondent is situated and/or the product and geographic market at issue, including market practices and conditions, pricing, supply, and demand." By comparison, an economic expert typically opines "on the anticompetitive effects, or lack thereof, of a reviewable practice and/or the relevant geographic and product market" (Antonio Di Domenico, *Competition Enforcement and Litigation in Canada*, (Toronto: Emond Montgomery Publications Limited, 2019) at p 753). However, in both cases, the expert provides evidence based on his or her qualifications and the evidence on the record.

[122] The Tribunal acknowledges that if an economist has no particular knowledge of an industry, he or she may not be qualified to provide expert opinion on that industry specifically. However, the Tribunal is aware of no authority standing for the proposition that simply describing an expert as an "economist" disqualifies him or her from providing evidence on an industry, as would an industry expert. What is relevant to determine whether an expert can properly testify on a given subject area is whether he or she has the required knowledge and experience outside the experience and knowledge of the trier of fact. This is what will determine whether he or she is a properly qualified expert (*Bingley* at para 19; *Mohan* at p 25).

[123] As such, if an economist has expertise in a particular industry that goes beyond the experience and knowledge of the Tribunal, nothing prevents that witness from providing expert opinion with regards to that industry, provided the other *Mohan* requirements are met. Whether the expert is labelled as an industry expert or an economist is not the determinative factor. It is the extent and nature of the expertise that counts.

[124] The Tribunal adds that the absence of econometric analysis or quantitative evidence is certainly not enough to disqualify Dr. Tretheway as an "economic" expert. Any expert, including economists, can provide qualitative evidence or quantitative evidence. Both types of evidence can be relied on by the Tribunal (*TREB FCA* at para 16; *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 ("***TREB CT***") at paras 470-471), and the same test applies whether the expert evidence provided is quantitative or qualitative. That test is whether the evidence provided is sufficiently clear and convincing to meet the balance of probabilities standard.

[125] That being said, the fact that Dr. Tretheway's expert evidence was found to be admissible on questions 2 and 3 of his report does not mean that there were no problems or issues with his analysis or with the evidence he relied on for his conclusions. However, this goes to the reliability and weight of his expert evidence, and will be addressed below in the Tribunal's reasons.

[126] More generally, the Tribunal did not find Dr. Tretheway to be as reliable and helpful as the two other expert witnesses. The Tribunal had concerns about Dr. Tretheway's impartiality and independence in light of his close business relationship with VAA. In addition, Dr. Tretheway was not as familiar as one would have expected with the evidence from airlines and in-flight caterers in this proceeding. The Tribunal also found Dr. Tretheway to be somewhat evasive and less forthcoming at several points during his cross-examination, and to have made unsupported, speculative assertions at various points in his written expert report and in his testimony. Where his evidence was inconsistent with that provided by Dr. Niels, Dr. Reitman or lay witnesses, the Tribunal found his evidence to be less persuasive, objective and reliable.

C. Documentary evidence

[127] Attached at Schedule "B" is a list of the exhibits that were admitted in this proceeding.

V. PRELIMINARY ISSUES

[128] Two preliminary matters must be addressed before dealing with the main issues in dispute in the Commissioner's Application. They are: (1) the admissibility of certain evidence from Air Transat and Jazz; and (2) VAA's concerns with late amendments allegedly made to the Commissioner's pleadings in his closing submissions. Each will be dealt with in turn.

A. Admissibility of evidence

[129] As indicated in Section II.D above, in a motion prior to the hearing, VAA challenged the admissibility of evidence to be given by two of the Commissioner's witnesses, Ms. Stewart from Air Transat and Ms. Bishop from Jazz, on the ground that it constituted improper lay opinion evidence and/or inadmissible hearsay. In the *Admissibility Decision*, the Tribunal deferred its ruling on the admissibility of this evidence until after Ms. Stewart and Ms. Bishop had testified at the hearing, noting that their testimonies will provide a better factual context to assist the Tribunal in assessing the disputed evidence.

[130] In her witness statement and in her testimony, Ms. Stewart stated that in 2015, Air Transat completed a RFP process for in-flight catering ("**Air Transat 2015 RFP**"). She then testified as to the savings allegedly realized or expected to be realized by Air Transat at airports across Canada, except for YVR, following a change from Gate Gourmet to Optimum. She also testified as to increased expenses allegedly incurred or expected to be incurred by Air Transat at YVR as a result of its inability to make a similar switch at that Airport.

[131] In her witness statement and in her testimony, Ms. Bishop stated that in 2014, Jazz conducted a RFP process for in-flight catering ("**Jazz 2014 RFP**"). Ms. Bishop testified as to Jazz's expected savings associated with switching away from Gate Gourmet to Newrest and Sky Café at YVR and eight other airports, based on an internal bid evaluation document attached as Exhibit 10 to her witness statement. She also testified as to the actual savings that would have occurred at YVR if Jazz had switched from Gate Gourmet to **[CONFIDENTIAL]**, based on a pricing analysis of actual flights volume, attached as Exhibit 13 to her witness statement.

[132] VAA claimed that the conclusions reached by both Ms. Stewart and Ms. Bishop, with respect to their evidence of alleged missed savings and increased expenses at YVR, are not within their personal knowledge and that they did not perform the calculations underlying their testimonies. VAA therefore submitted that their evidence on these issues constitutes inadmissible lay opinion evidence and/or inadmissible hearsay. At the hearing, VAA's allegations of inadmissible hearsay evidence essentially related to Ms. Bishop's reliance on Exhibits 10 and 13 of her witness statement. VAA relied on the usual civil rules of evidence in support of its position.

[133] The Tribunal does not agree with VAA. Having heard the testimonies of Ms. Stewart and Ms. Bishop, and after having cautiously reviewed their evidence, the Tribunal finds that the evidence of both Ms. Stewart and Ms. Bishop is admissible. The concerns raised by VAA with respect to their evidence go to the probative value and to the weight that the Tribunal should give to it, not to admissibility. The Tribunal will address those issues of reliability and weight later in its decision.

(1) Rules of evidence at the Tribunal

[134] At the outset, the objections voiced by VAA regarding the witness statements of Mss. Stewart and Bishop implicate the rules of evidence to be applied by the Tribunal in its proceedings, and give rise to the need for the Tribunal to clarify its approach in that respect.

[135] In *Canadian Recording Industry Association v Society of Composers, Authors & Music Publishers of Canada*, 2010 FCA 322 ("***SOCAN***"), the FCA confirmed the general principle that the strict rules of evidence do not apply to administrative tribunals (*SOCAN* at para 20). In that decision, the FCA stated that no specific exemption in legislation is needed for an administrative tribunal to deviate from the formal rules of evidence, as long as nothing in its enabling statute expresses contrary intentions.

[136] This was recognized in the *FCA Privilege Decision* where, in a matter involving the Tribunal, the FCA reiterated that the law of evidence before administrative decision-makers "is not necessarily the same as that in court proceedings" (*FCA Privilege Decision* at para 25).

However, the FCA enunciated an important caveat: "the rigorous evidentiary requirements in court proceedings do not necessarily apply in certain administrative proceedings: it depends on the text, context and purpose of the legislation that governs the administrative decision-maker" [emphasis added] (*FCA Privilege Decision* at para 87). As such, an administrative decision-maker's power to admit or exclude evidence "is governed exclusively by its empowering legislation and any policies consistent with that legislation" (*FCA Privilege Decision* at para 25).

[137] In *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 ("***Pfizer Canada***"), the FCA also cautioned that the increased flexibility in rules of evidence that has developed in courts does not mean that a court or an administrative tribunal can depart from the rules of evidence at its leisure. In what can be considered as *obiter* comments (since the FCA was dealing with a Federal Court decision), the FCA had indicated that legislative authority is required in order for an administrative decision-maker to depart from the rules of evidence, such as the hearsay rule (*Pfizer Canada* at para 88):

> It is true that some administrative decision-makers can ignore the hearsay rule […]. But that is only because legislative provisions have explicitly or implicitly given them the power to do that. Absent a specific legislative provision speaking to the matter, all courts must apply the rules of evidence, including the hearsay rule.
>
> [citations omitted]

[138] It is well accepted that the Tribunal has flexible rules of procedure and is master of its own procedure. The Tribunal is specifically directed, by subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) ("**CT Act**"), to deal with proceedings before it "as informally and expeditiously as the circumstances and considerations of fairness permit." The same wording is used in subsection 2(1) of the *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**").

[139] However, contrary to many other administrative tribunals (see for example: *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 at subsection 15(1) or *Canadian Human Rights Act*, RSC 1985, c H-6 at subsection 48.3(9)), there is no specific provision, whether in the CT Act or in the CT Rules, relaxing the rules of evidence to be applied by the Tribunal. Nor is there a provision explicitly or implicitly stating that the Tribunal is not bound by the ordinary rules of evidence in conducting matters before it. True, there are provisions in the CT Rules dealing with the tendering of evidence at the hearing, witness statements and expert evidence (e.g., CT Rules at sections 71-80). But, to borrow the words of the FCA in *Pfizer Canada*, there is no specific legislative provision speaking to evidentiary rules before the Tribunal. Put differently, while subsection 9(2) of the CT Act and Rule 2 of the CT Rules direct the Tribunal to have a flexible approach to its proceedings, no specific provisions in those enabling legislation and regulation direct the Tribunal to adopt flexible rules of evidence.

[140] As the Tribunal stated in *B-Filer* in the context of admissibility of expert evidence, the direction couched in subsection 9(2) of the CT Act is not sufficient to preclude the general application of the usual civil rules of evidence in Tribunal proceedings, especially when those

evidentiary rules have evolved, at least in part, so as to ensure fairness (*B-Filer* at para 258). Indeed, in many cases, the Tribunal has effectively followed the ordinary rules of evidence. For example, in *B-Filer*, the Tribunal stated that the principles of evidence applicable to court proceedings also applied to the Tribunal in the context of its assessment of the admissibility of expert evidence (*B-Filer* at para 257). In *Imperial Brush*, the Tribunal decided to strike hearsay evidence of a witness who simply repeated observations of others regarding the effectiveness of a product, on the basis that it did not meet the requirements of reliability and necessity, thus applying the principled approach governing this evidentiary rule (*Imperial Brush* at para 13). Similarly, in *Canada Pipe 2003*, the Tribunal applied the *Mohan* factors to strike a witness's affidavit on the basis that it was "not necessary and contribute[d] nothing to the determination of the issues" (*Canada Pipe 2003* at para 36).

[141] The Tribunal also underscores that the legislative history of the Tribunal, and its enabling legislation, reflect an intention to judicialize, to a substantial degree, the processes of the Tribunal. This is notably reflected in: the Tribunal's status as a "court of record" by virtue of subsection 9(1) of the CT Act; the presence of judicial members who, as Federal Court judges, have the necessary expertise to deal with evidentiary questions; the requirement that a judicial member preside over the Tribunal's hearings; and appeal rights to the FCA as if a decision of the Tribunal was a judgment of the Federal Court (*B-Filer* at para 256). In addition, subsection 9(2) of the CT Act imposes a specific limit on the Tribunal's overall flexibility, as it provides that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit" [emphasis added]. Furthermore, it has been repeatedly recognized in recent decisions that the judicial-like nature of the Tribunal, and the important impact that its decisions can have on a party's interests, mean that the Tribunal must act with the highest degree of concern for procedural fairness: "[t]he Tribunal resides very close to, if not at, the 'judicial end of the spectrum', where the functions and processes more closely resemble courts and attract the highest level of procedural fairness" (*FCA Privilege Decision* at para 29; *CT Privilege Decision* at para 169).

[142] In *B-Filer*, the Tribunal stated that the language of subsection 9(2) of the CT Act is "consistent with the fact that the Tribunal is not precluded from departing from a strict rule of evidence when it considers that to be appropriate" (*B-Filer* at para 258). The Tribunal considers that this general principle remains valid. However, considering the recent decisions of the FCA in *Pfizer Canada* and *FCA Privilege Decision*, the significance that the legislative framework places on the rules of fairness, and the absence of specific provisions allowing the Tribunal to depart from the ordinary rules of evidence, the Tribunal is of the view that the range of circumstances where it will be appropriate to adopt more relaxed rules of evidence in its proceedings is now more narrow. Having regard to those considerations, a more cautious approach needs to be favoured. In short, the Tribunal considers that in the absence of an agreement between the parties, it must adhere more strictly and more closely to the usual rules of evidence applied in court proceedings. This is especially the case with respect to evidentiary rules that appear to be anchored in a concern for procedural fairness.

[143] As such, absent consent, the Tribunal will be reluctant to depart from the regular and usual rules of evidence when the underlying rationale for the evidentiary rules is procedural fairness, as is the case for the hearsay rule or for the rules governing expert evidence (*Pfizer Canada* at paras 95-98; *Imperial Brush* at para 13). In the same vein, the more critical the

evidence will be and the more it will go to the core of the issue before the Tribunal, the more closely the Tribunal will adhere to the rules of evidence. When applying other evidentiary rules that are not based on procedural fairness, the Tribunal may be prepared to be more flexible (*FCA Privilege Decision* at para 87), considering that regular admissibility rules have been increasingly liberalized by the courts (*Pfizer Canada* at para 83).

[144] In the case at hand, even considering and applying the ordinary civil rules of evidence governing lay opinion evidence and hearsay evidence, the Tribunal is satisfied that the evidence of Mss. Stewart and Bishop disputed by VAA is admissible.

(2) Lay opinion evidence

[145] Turning first to VAA's argument on lay opinion evidence, the general rule is that a lay witness may not give opinion evidence but may only testify to facts within his or her knowledge, observation and experience (*White Burgess* at para 14; *TREB FCA* at para 78). The main rationale for excluding lay witness opinion evidence is that it is not helpful to the decision-maker and may be misleading (*White Burgess* at para 14). This principle is reflected in Rules 68(2) and 69(2) of the CT Rules, which both state that "[u]nless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents."

[146] The SCC has however recognized that "[t]he line between 'fact' and 'opinion' is not clear" (*Graat v The Queen*, [1982] 2 SCR 819, 144 DLR (3d) 267 at p 835). The courts have thus developed greater freedom to receive lay witnesses' opinions when the witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions. In that respect, the FCA recently stated, again in the context of a Tribunal proceeding, that opinion from a lay witness is acceptable "where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts" (*TREB FCA* at para 79). As such, when a witness has personal knowledge of observed facts such as a company's relevant, real world, operations, its evidence may be accepted by a court or the Tribunal even if it is opinion evidence (*TREB FCA* at para 80; *Pfizer Canada* at paras 105-108).

[147] Furthermore, it has been recognized that lay witnesses can provide opinions about their own conduct and their own business (*TREB FCA* at paras 80-81). The FCA however specified that there are limits to such lay opinion evidence: "lay witnesses cannot testify on matters beyond *their own conduct* and that of *their businesses* in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence" [emphasis in original] (*TREB FCA* at para 81).

[148] In other words, when a witness had "an opportunity for observation" and was "in a position to give the Court real help," the evidence may be admissible and the real issue will be the assessment of weight (*Imperial Brush* at para 11). In the same vein, the SCC has stated, in

the context of expert opinion evidence, that the lack of an evidentiary basis affects the weight to be given to an opinion, not its admissibility (*R v Molodowic*, 2000 SCC 16 at para 7; *R v Lavallée*, [1990] 1 SCR 852, 108 NR 321 at pp 896-897).

[149] In this case, the Tribunal is satisfied that both Mss. Stewart and Bishop had the required personal knowledge, observation and experience to testify on the issues challenged by VAA.

[150] Ms. Stewart was responsible for all procurement activities regarding in-flight catering at Air Transat from 2014 to 2017, including the Air Transat 2015 RFP process. She also set out the background information and testified about her role in this RFP process, and she notably stated that she had "personal knowledge of the matters" discussed in her evidence. In her testimony, it was clear that Ms. Stewart was testifying about Air Transat's own business, that she was intimately involved in the RFP process, and that she had the experiential competence to help the panel.

[151] Turning to Ms. Bishop, she had day-to-day responsibility for the Jazz 2014 RFP process and provided strategic direction to the 2014 RFP process team. She also mentioned that she conducted monthly reviews to maintain targets and costs in all areas and oversaw the budget and billings for all in-flight catering. Furthermore, she provided some background information with respect to the missed savings and increased expenses allegedly incurred by Jazz at YVR. Like Ms. Stewart, Ms. Bishop also stated that she had "personal knowledge of the matters" discussed in her evidence.

[152] With regards to Ms. Bishop's statements about the expected savings from switching away from Gate Gourmet, she had personal knowledge of the RFP bid evaluation and of the actual savings that would have resulted from switching away from Gate Gourmet at YVR. As the director of in-flight catering services and on-board products at Jazz, she ran and oversaw the RFP process and supervised a team of people involved in the process. She attended meetings and calls with the bidders and reviewed all the supporting documentation. Her testimony demonstrated that the bid evaluation was prepared at her request and that she was familiar with how the bids were evaluated. More specifically, Exhibit 10 was prepared at her request by three persons directly reporting to her (i.e., Mr. Keith Lardner, Mr. Trevor Umlah and Ms. Pamela Craig), in order to evaluate the bids that were received and to determine who would be awarded the stations at stake. In her testimony before the Tribunal, Ms. Bishop was able to discuss the document. Similarly, Exhibit 13 was prepared by a person reporting to her (i.e., Ms. Craig), at her request, in order to determine the foregone in-flight catering cost savings or losses and to do the pricing analysis. While Ms. Bishop "did not get into the weeds" of the numbers, she was familiar enough with both Exhibits to testify extensively about their contents and to explain how the analyses contained in them were performed (Transcript, Conf. B, October 3, 2018, at p 128).

[153] The Tribunal acknowledges that Ms. Bishop confirmed that she did not prepare Exhibits 10 and 13 herself and did not directly perform the calculations that underlay the conclusions reached in those two Exhibits. However, the Tribunal considers that the fact that she could not reconcile many figures or explain the discrepancies with other numbers cited solely affects the weight to be given to the evidence, not its admissibility.

[154] Having heard the two witnesses, their examination by counsel for the Commissioner, their cross-examination by counsel for VAA and the questioning by the panel, the Tribunal is not persuaded that the evidence disputed by VAA was not within the respective knowledge, understanding, observation or experience of Mss. Stewart and Bishop, or that those witnesses did not observe the facts contained in their respective witness statements with respect to the disputed evidence. There is therefore no ground to declare any portion of their evidence inadmissible as improper lay opinion evidence.

(3) Hearsay evidence

[155] VAA further argued that Ms. Bishop's evidence concerning Exhibits 10 and 13 constitutes inadmissible hearsay.

[156] It is not disputed that hearsay evidence is presumptively inadmissible. The essential defining features of hearsay are "(1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant" (*R v Khelawon*, 2006 SCC 57 ("***Khelawon***") para 35). As such, statements that are outside the witness' personal knowledge are hearsay (*Canadian Tire Corp Ltd v PS Partsource Inc*, 2001 FCA 8 at para 6). Moreover, documentary evidence that is adduced for the truth of its contents is hearsay, given that there is no opportunity to cross-examine the author of the document contemporaneously with the creation of the document (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th edition (Toronto: LexisNexis Canada, 2018) at §18.9). The fundamental objection to hearsay evidence is the inability to test the reliability of hearsay statements through proper cross-examination. It is a procedural fairness concern.

[157] The presumptive inadmissibility of hearsay may nevertheless be overcome when it is established that what is being proposed falls under a recognized common law or statutory exception to the hearsay rule. For example, business records are a recognized exception under both section 30 of the *Canada Evidence Act*, RSC 1985, c C-5 and the common law (*Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at paras 25-26). Hearsay evidence may also be admissible when it satisfies the twin criteria of "necessity" and "reliability" under the principled approach developed by the SCC and the courts (*R v Bradshaw*, 2017 SCC 35 ("***Bradshaw***") at para 23; *R v Mapara*, 2005 SCC 23 at para 15). These hearsay exceptions are in place to facilitate the search for truth by admitting into evidence hearsay statements that are reliably made or can be adequately tested.

[158] Under the principled approach, the onus is on the person who seeks to tender the evidence to establish necessity and reliability on a balance of probabilities (*Khelawon* at para 47). "Necessity" relates to the relevance and availability of the evidence. The "necessity" requirement is satisfied where it is "reasonably necessary" to present the hearsay evidence in order to obtain the declarant's version of events. "Reliability" refers to "threshold reliability," which is for the trier of fact to determine. Threshold reliability "can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability)" (*Bradshaw* at para 27). The function of the trier of fact is to determine whether the particular hearsay statement exhibits sufficient indicia of necessity and

reliability so as to afford him or her a satisfactory basis for evaluating the truth and trustworthiness of the statement.

[159] The principles of necessity and reliability are not fixed standards. They are fluid and work together in tandem. If specific evidence exhibits high reliability, then necessity can be relaxed; similarly, if necessity is high, then less reliability may be required.

[160] In this case, having heard the testimony of Ms. Bishop, the Tribunal is satisfied that Ms. Bishop's evidence with respect to Exhibits 10 and 13 of her witness statement meets the criteria of necessity and reliability and does not amount to inadmissible hearsay. Even assuming that the documents constitute hearsay evidence (as Ms. Bishop was not the author of these tables), the Tribunal notes that they were prepared and recorded in the usual and ordinary course of business, in the context of the Jazz 2014 RFP process, at the request of Ms. Bishop. In her supervising capacity, Ms. Bishop had sufficient personal knowledge and understanding of their contents. The testimony and cross-examination of Ms. Bishop at the hearing demonstrate that VAA had the required opportunity to test the truth and accuracy of the two tables relied on by Ms. Bishop in support of her testimony regarding alleged missed savings and increased expenses at YVR. In addition, the Tribunal finds that this evidence was relevant, and that Ms. Bishop was sufficiently familiar with it to afford the panel a satisfactory basis for evaluating the truth of the evidence. Stated differently, the circumstances in which the documents were created give the panel the necessary comfort that they are sufficiently reliable to be admitted in evidence. Those circumstances offered a sufficient basis to assess the documents' trustworthiness and accuracy, namely, through the testimony and cross-examination of Ms. Bishop.

(4) Conclusion

[161] In light of the foregoing, the Tribunal concludes that the portions of Ms. Stewart's and Ms. Bishop's evidence disputed by VAA are not inadmissible. However, as will be detailed in Section VII.E below in the discussion pertaining to paragraph 79(1)(*c*), the Tribunal has serious concerns with respect to the weight to be given to this particular evidence in light of the numerous inaccuracies and discrepancies in the figures and analyses that were revealed on cross-examination.

B. Alleged late amendments to pleadings

[162] The second preliminary issue relates to late amendments allegedly made by the Commissioner to his pleadings.

[163] In his closing submissions, counsel for the Commissioner advanced the alternative argument that a bundled "In-flight Catering" market, comprising both Catering and Galley Handling services, may be relevant for the purposes of his abuse of dominance allegations. Counsel for VAA objected and argued that the Commissioner very clearly pleaded two and only two relevant markets in his Application, namely, the Airside Access Market and the Galley Handling Market. Counsel for VAA raised an issue of procedural fairness, and submitted that liability under section 79 could only be imposed on VAA if the Tribunal finds that Galley

Handling, not In-flight Catering, is the relevant market, as the latter was not a relevant market pleaded by the Commissioner.

[164] Counsel for VAA also took issue with the fact that, in his closing submissions and final argument, the Commissioner referred to a third ground demonstrating the existence of VAA's PCI in the relevant market. In support of his position on VAA's PCI, the Commissioner pointed to evidence showing that VAA would earn additional aeronautical revenues from the new flights or the incremental additional flights that it would be able to attract as a result of avoiding a disruption of competition in the relevant market and ensuring a stable and competitive supply of in-flight catering services. Counsel for VAA argued that the Commissioner has only pleaded two facts supporting VAA's competitive interest in the Galley Handling Market at YVR, namely, the Concession Fees and the land rents it receives from in-flight catering firms. Counsel for VAA thus submitted that the Commissioner cannot suddenly rely on a third fact in final argument, as it was not part of his pleadings. VAA therefore asked the Tribunal to disregard any attempt by the Commissioner to prove a PCI based on facts other than the Concession Fees and the land rents that were pleaded.

[165] The Tribunal does not agree with either of these two objections advanced by VAA.

(1) Analytical framework

[166] It is well established that, as long as there is no "surprise" or "prejudice" to the parties when an issue that was not clearly pleaded is raised, a court or a decision-maker like the Tribunal can issue a decision on a question that does not fit squarely into the pleadings. In other words, a court or the Tribunal may raise and decide on a new issue if the parties have been given a fair opportunity to respond to it. A breach of procedural fairness will only arise if considering a new issue inflicts prejudice upon a party.

[167] In *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 ("***Tervita FCA***"), rev'd on other grounds 2015 SCC 3, the FCA provided a useful summary of this principle, at paragraphs 71-74:

> [71] In the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues joined in the pleadings. This is because when a trial court steps outside the pleadings to decide a case, it risks denying a party a fair opportunity to address the related evidentiary issues. […]
>
> [72] However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced. […]
>
> [73] A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the

> pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it. […]
>
> [74] These principles also apply to contested proceedings before the Tribunal. It acts as a judicial body: section 8 and subsection 9(1) of the *Competition Tribunal Act*. Though the proceedings before the Tribunal are to be dealt with informally and expeditiously, they are nevertheless subject to the principles of procedural fairness: subsection 9(2) of the *Competition Tribunal Act*. […]
>
> [citations omitted]

[168] Furthermore, in order to analyze whether there is a "new issue," courts have considered all aspects of the trial and have not limited themselves to what was pleaded in the statement of claim and other pleadings. This includes the evidence adduced during the hearing and the arguments made at the hearing, as long as the parties have been given a fair opportunity to respond.

(2) Expansion of relevant markets

[169] In this case, the Tribunal has no hesitation to conclude that a bundled "In-flight Catering" market was a live issue throughout the case at hand, even though it was not specifically pleaded by the Commissioner.

[170] Although the Commissioner did not identify a market broader than Galley Handling services in his initial pleadings, an expanded market comprised of Catering and Galley Handling was put in play by VAA in its Amended Response to the Commissioner's Application, as well as in its Concise Statement of Economic Theory and in its final written argument. Moreover, in his Reply to VAA's initial pleadings, the Commissioner asserted that "VAA has engaged in and continues to engage in an abuse of dominant market position relating to the supply of In-flight Catering at the Airport" [emphasis added] (Commissioner's Reply, at para 19), which he defined to include both Galley Handling and Catering services.

[171] The issue of a bundled or combined "In-flight Catering" market was also discussed at various stages in the evidentiary portion of the hearing. In his first report, Dr. Niels considered the issue of separate or bundled Galley Handling and Catering markets. Dr. Niels opined that it did not matter how one delineates the downstream markets because the essential input of airside access was required no matter what definition was adopted to be able to put food on an airplane. He therefore left the issue open. During the hearing, Dr. Niels was explicitly cross-examined on the issue of whether the relevant product market is for Galley Handling and Catering bundled together, rather than each constituting a separate relevant market.

[172] In addition, Dr. Reitman recognized the issue and commented on it in his report, ultimately concluding that if the Commissioner's definitions are accepted, he viewed Galley Handling and Catering services as being in separate markets.

[173] Moreover, as a result of the differences between the parties concerning the linkage between Galley Handling and Catering services, the panel explicitly requested the parties to clarify the legal and factual link between those complementary services, at the outset of the hearing of this Application. The Tribunal further observes that on discovery, VAA asked whether or not the Commissioner considered "catering services provided to airlines" to be a relevant market and whether the contention was that VAA had restricted competition in that market. The Commissioner's representative replied in the negative to both of those questions (Exhibits R-190, CR-188 and CR-189, Brief of Read-Ins from the Examinations for Discovery and Answers to Undertakings of Kevin Rushton (Volume 1 of 3), at pp 129-130).

[174] In summary, VAA cannot say that it was taken by surprise by the relevancy of this expanded "In-flight Catering" market. Rather, it actually maintained that some form of a bundled "In-flight Catering" market, including both the preparation of food and its loading/unloading onto the aircraft, was the relevant market based on the evidence provided by the market participants. In the circumstances, the Tribunal is satisfied that VAA had a fair opportunity to address the issue of whether the relevant market in which Galley Handling services are supplied includes some or all Catering services, and that VAA was not prejudiced by the fact that the Commissioner did not plead such a broader relevant market in the alternative to a relevant market consisting of Galley Handling alone (*Tervita FCA* at paras 72-73; *Husar Estate v P & M Construction Limited*, 2007 ONCA 191 at para 44).

[175] The cases cited by VAA in support of its objection can be distinguished. First, the *Kalkinis (Litigation Guardian of) v Allstate Insurance Co of Canada* (1998), 41 OR (3d) 528, 117 OAC 193 (ONCA) matter dealt with a failure to plead a particular "cause of action." In the present case, VAA does not argue that a cause of action has not been pleaded by the Commissioner but complains about the different definitions of the relevant product market proposed by the Commissioner. In the case at hand, VAA has always maintained that the Commissioner's distinction between Catering and Galley Handling was artificial and arbitrary. In fact, it has proposed that the two functions of preparing the food and loading it into the aircraft are inextricably linked and should be in the same product market, whether that be a "Premium Flight Catering" market or a "Standard Flight Catering" market. The outcome of a Tribunal's finding in favour of a bundling of the Catering and Galley Handling components has been a real possibility based on the evidence and argument advanced by VAA itself.

[176] VAA also cites the FCA's decision in *Weatherall v Canada (Attorney General)*, [1989] 1 FC 18, 41 CRR 62 at pages 30-35. However, this precedent is not of much assistance to VAA as it relates to an issue (i.e., the constitutional validity of a particular regulatory provision) that the appellant had not had the opportunity to address at trial as it was not put in play at all. Again, in the present case, whether or not the relevant market should be defined in terms of a bundled Catering and Galley Handling market was in issue throughout the hearing before the Tribunal.

[177] Finally, the Tribunal observes that it is aware of no case in which the proposition advanced by VAA has been accepted based on the fact that the initial pleading pertaining to a relevant market was subsequently modified, whether to a smaller or larger market.

(3) Additional ground for VAA's PCI

[178] Turning to the additional fact raised by the Commissioner in his closing argument to anchor VAA's competitive interest, this is simply evidence that emerged during the hearing and which arose from the expert opinion provided by VAA's own witness, Dr. Tretheway.

[179] It bears reiterating that a trier of fact like the Tribunal can not only decide a case on a basis other than those set out in the pleadings, but it can also rely on all the facts in evidence before it, even when those particular facts have not been specifically mentioned in the pleadings. In other words, the Tribunal is allowed to make findings arising directly from the evidence and the final submissions of the parties at trial. In fact, it routinely happens in hearings before the courts or the Tribunal that examinations or cross-examinations reveal the existence of evidence supporting the position of one party, and that was not necessarily contemplated in the pleadings. Nothing prevents a party, a court or the Tribunal from relying on additional elements revealed by the evidence in support of an argument (*Tervita FCA* at paras 73-74).

[180] Once again, it is not disputed that the question of VAA's competitive interest in the Galley Handling Market has been a central issue in this proceeding and the Commissioner did not raise a "new issue" unknown to VAA by pointing out to other elements in the evidence supporting, in his view, the existence of VAA's PCI. The Commissioner simply made reference to another piece of relevant evidence in the record which supports his position on this front. Moreover, this evidence arose from one of VAA's own witnesses. The Tribunal is aware of no evidentiary rule or principle that could lead it to disregard or set aside such evidence in its assessment of VAA's PCI.

[181] The Tribunal considers that what occurred in this case is far different from instances where a party raised a new issue or argument in respect of which the other side did not have an opportunity to respond. Referring to new or unexpected evidence in the record does not amount to raising a new issue and certainly does not raise a potential breach of procedural fairness.

(4) Conclusion

[182] For all the foregoing reasons, the Tribunal concludes that there is no merit to VAA's objections regarding the Commissioner's closing submissions.

VI. ISSUES

[183] The following broad issues are raised in this proceeding:

- Does the RCD apply to exempt or shield VAA from the application of section 79 on the basis that the impugned conduct was undertaken pursuant to a validly enacted legislative or regulatory mandate?;

- What is or are the relevant market(s) for the purpose of this proceeding?;

- Does VAA substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act?;

- Has VAA engaged in, or is it engaging in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*) of the Act? More specifically:

    a. Does VAA have a PCI in the relevant market in which the Commissioner has alleged that competition has been, is being or is likely to be prevented or lessened substantially by a practice of anti-competitive acts?;

    b. Was the "overall character" of VAA's impugned conduct anti-competitive or legitimate? If the latter, does that continue to be the case?;

- Has the impugned conduct had the effect of preventing or lessening competition substantially in the market that is relevant for the purposes of paragraph 79(1)(*c*) of the Act, or is it having or likely to have that effect?;

- What costs should be awarded?

[184] Each of these issues will be discussed in turn.

VII. ANALYSIS

A. Does the RCD apply to exempt or shield VAA from the application of section 79 on the basis that the impugned conduct was undertaken pursuant to a validly enacted legislative or regulatory mandate?

[185] A threshold issue to be determined in this proceeding is whether the RCD can serve to exempt or shield VAA from the application of section 79. On this issue, the burden is on the party relying on the RCD, namely, VAA.

[186] For the reasons set forth below, the Tribunal concludes that, as a matter of law, the RCD does not apply to section 79 of the Act, as this provision does not contain the "leeway" language required to allow the doctrine to be invoked and the rationales which supported the development of the doctrine are not present in respect of section 79. Furthermore, as a matter of fact in this case, no validly enacted statute, regulation or subordinate legislative instrument required, directed or authorized VAA, expressly or by necessary implication, to engage in the impugned conduct. Moreover, even if a federal regulation or other subordinate legislative instrument had required, directed or authorized the impugned conduct, the RCD would not have been available because the conflict between such subordinate instrument and the Act would have to be resolved in favour of the Act.

(1) The RCD

[187] At its origin, the RCD began as a common law doctrine that provided a form of immunity from certain provisions in the precursors of the Act for persons alleged to have contravened these provisions. The doctrine evolved to be applied where the conduct giving rise to the alleged contravention was required, directed or authorized, expressly or impliedly, by other validly enacted legislation.

[188] In practice, the RCD developed as a principle of statutory interpretation to resolve an apparent conflict between criminal provisions of the federal competition legislation (i.e., the Act and its predecessor statutes) and validly enacted provincial regulatory regimes (*Hughes v Liquor Control Board of Ontario*, 2018 ONSC 1723 ("***Hughes***") at para 202, aff'd 2019 ONCA 305; *Law Society of Upper Canada v Canada (Attorney General)* (1996), 28 OR (3d) 460, 134 DLR (4th) 300 ("***LSUC***") at p 468 (ONSC)). The general purpose of the doctrine was to avoid "criminalizing conduct that a province deems to be in the public interest" (*Hughes v Liquor Control Board of Ontario*, 2019 ONCA 305 ("***Hughes CA***") at para 38).

[189] In that context, the principle underlying the RCD is that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Garland v Consumers' Gas Co*, 2004 SCC 25 ("***Garland***") at para 76, quoting *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307, 72 OR (3d) 80 ("***Jabour***") at p 356).

[190] There are two general preconditions to the application of the RCD. First, Parliament must have indicated, either expressly or by necessary implication, a clear intention to grant "leeway" to those acting pursuant to a valid provincial regulatory scheme (*Garland* at para 77; *Hughes* at paras 204-205). In other words, the language of the federal legislation must leave room for the provincial legislation to operate and for conduct that otherwise would be prohibited to escape the operation of the prohibition (*Hughes CA* at para 16; *Hughes* at para 200). Such leeway has been found to have been provided by words such as "in the public interest" or "unduly" (preventing or lessening competition) contained in the federal legislation in question (*Garland* at para 75; *Jabour* at p 348; *R v Chung Chuck*, [1929] 1 DLR 756, 1 WWR 394 ("***Chung Chuck***") at pp 759-761 (BCCA)). Where such words have been present, the courts have said in various ways that compliance with the edicts of a validly enacted provincial measure can hardly amount to something that is "contrary to the public interest" or to something that is "undue" (*Jabour* at p 354). Conversely, in the absence of such leeway language, the RCD is not available, even in respect of conduct that may advance the public interest, as defined or implicitly contemplated by a province (*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 ("***PHS***") at paras 54-56).

[191] When it can be determined that the federal enactment, through such leeway language, leaves room for the provincial legislation or the provincially-regulated activity to operate without being criminalized, there is no conflict between the federal criminal enactment and the provincial legislation or regulatory regime (*Hughes* at paras 201, 204). In that sense, the RCD effectively seeks to reconcile federal and provincial jurisdictions to ensure that the Act serves its objectives without interfering with validly enacted provincial regulatory schemes.

[192] Where the requisite leeway language in the federal legislation is found to exist, the analysis must turn to the assessment of the second precondition to the application of the RCD. This precondition requires that the conduct that would otherwise be prohibited by the Act be required, compelled, mandated or at least authorized by validly enacted provincial legislation (*Jabour* at pp 354-355; *Hughes CA* at paras 19-20; *R v Independent Order of Foresters* (1989), 26 CPR (3d) 229, 32 OAC 278 ("***Foresters***") at pp 233-234 (ONCA); *Hughes* at para 220; *Fournier v Mercedes-Benz Canada*, 2012 ONSC 2752 ("***Fournier Leasing***") at para 58; *Industrial Milk Producers Assn v British Columbia (Milk Board)*, [1989] 1 FC 463, 47 DLR (4th) 710 ("***Milk***") at pp 484-485 (FCTD); *LSUC* at pp 467-468).

[193] In this regard, the impugned conduct must be specifically required, directed or authorized, whether "expressly or by necessary implication," by or pursuant to a validly enacted legislative or regulatory language (*Hughes CA* at paras 20-21, 23; *Hughes* at para 200). A general power to regulate an industry or a profession will not suffice (*Jabour* at pp 341-342; *Fournier Leasing* at para 58). Thus, "[i]f individuals involved in the regulation of a market situation use their statutory authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes then such individuals will be in breach of the [Act]" (*Milk* at pp 484-485). In other words, "[s]imply because an industry is regulated does not mean that all anti-competition practices are authorized within that industry" (*Cami International Poultry Incorporated v Chicken Farmers of Ontario*, 2013 ONSC 7142 ("***Cami***") at para 52; see also *R v Canadian Breweries Ltd*, [1960] OR 601, 34 CPR 179 at p 611). This is so even where the power to regulate exists. Unless the power has been exercised by requiring, compelling, mandating or specifically authorizing particular activities, those activities will not benefit from the protection of the RCD.

[194] The level of specificity necessary for the requirement, direction or authorization is not particularly high. In *Jabour*, the enabling provincial legislation did not specifically authorize the law society to prohibit advertising by lawyers and did not contain provisions directly limiting advertising. The SCC nevertheless concluded that the general broad powers and broad mandate the law society had to govern the legal profession in the public interest and to ensure good professional conduct was a sufficient basis to give the law society the power to control and ban advertising by lawyers (*Jabour* at p 341; *Hughes CA* at paras 20, 23, 27). This determination of specificity is highly contextual and will depend on how the particular conduct or activities are regulated, and on the specific wording of the relevant provisions in question.

[195] In determining whether particular conduct or activities have been required, compelled, mandated or authorized, "one must have regard not only for the relevant statutes, but also for the Orders-in-Council and the Regulations" (*Sutherland v Vancouver International Airport Authority*, 2002 BCCA 416 ("***Sutherland***") at para 68). That is to say, the requirement, direction or authorization can come from subordinate legislation. Although this principle was articulated in the context of a discussion of the tort law defence of statutory authority, the Commissioner has not identified a principled basis for excluding it from the scope of the RCD.

[196] The Tribunal observes that, in recent years, the RCD has been extended beyond the area of competition law (*Garland* at paras 76, 78).

[197] It bears underscoring that the RCD essentially developed in the context of alleged contravention of the criminal provisions of the Act and of other federal criminal statutes. Whether the doctrine can be extended to the civil or non-criminal provisions of the Act has remained an open question. In one case, the RCD was applied to prevent an inquiry into allegations that a provincial law society may have engaged in conduct contemplated by various non-criminal provisions of the Act (*LSUC* at pp 463, 474). However, that case proceeded on the basis of the parties' agreement that the RCD could in fact be applied to resolve an apparent conflict between the non-criminal provisions of the Act and validly enacted provincial legislation (*LSUC* at pp 468, 471-472). (The only issues in dispute appear to have been whether the Law Society of Upper Canada's application for a declaration that the Act did not apply to its impugned activities was premature, and whether those activities were in fact authorized, as contemplated by the RCD.) The Tribunal is not aware of any precedents, and the parties have not cited any, where a court has clearly considered and recognized, in a contested proceeding, that the RCD could be applied in the context of the civil provisions of the Act. Conversely, to the Tribunal's knowledge, no case has expressly found that the RCD could not be applied to conduct challenged under the civil provisions of the Act.

[198] In *LSUC*, the effect and explicit intention of the court's ruling to prevent the inquiry from continuing was to invoke the RCD to exempt the impugned conduct from the operation of the Act, rather than to provide a defence. Likewise, in *Society of Composers, Authors & Music Publishers of Canada v Landmark Cinemas of Canada Ltd*, 45 CPR (3d) 346, 60 FTR 161 ("***Landmark***") at p 353 (FCTD), the court applied the RCD to "exempt" an impugned conduct from the operation of the conspiracy provision of the Act. This is how VAA would like the RCD to be applied in this case.

[199] Although some courts have characterized the RCD as an exemption (see e.g., *Waterloo Law Association et al v Attorney General of Canada* (1986), 58 OR (2d) 275, 35 DLR (4th) 751 at p 282; *Foresters* at pp 233-234; *Wakelam v Johnson & Johnson*, 2011 BCSC 1765 ("***Wakelam***") at para 99, rev'd on other grounds, 2014 BCCA 36, leave to appeal to SCC refused, 35800 (4 September 2014)), others maintain that the RCD is or may be a defence (*Milk* at pp 484-485; *Hughes* at para 205). The term "defence" is also employed in subsection 45(7) of the Act.

[200] Notwithstanding that the RCD evolved to address conflicts between the Act and provincial legislation, it has also been applied on at least one occasion to resolve an apparent conflict between two federal statutes (*Landmark* at pp 353-354). Other courts have also entertained or identified the possibility that the RCD may be available in a context where the authorizing legislation is federal (*Rogers Communications Inc v Shaw Communications Inc*, 2009 CanLII 48839, 63 BLR (4th) 102 ("***Rogers***") at para 63 (ONSC); *Fournier Leasing* at para 58; *Hughes* at para 220; *Milk* at p 475). However, one court has observed that the availability of the RCD where the authorizing legislation is federal "is not free from doubt" (*Wakelam* at para 100).

(2) The parties' positions

(a) VAA

[201] Relying on the RCD, VAA submits that section 79 of the Act does not apply to the Practices that the Commissioner is challenging. In this regard, VAA asserts that it has been broadly authorized to engage in the Practices, and in particular the Exclusionary Conduct, both as part of its public interest mandate and pursuant to its specific authority to control access to the airside at YVR.

[202] With respect to its public interest mandate, VAA relies on four distinct sources in support of its RCD claim, namely, (i) VAA's Statement of Purposes, which is set forth in its Articles of Continuance; (ii) the 1992 OIC; (iii) the 1992 Ground Lease; and (iv) the membership of VAA's Board of Directors. In addition, VAA asserts that its not-for-profit nature reinforces its mandate to manage the Airport in the public interest and that this mandate is further reflected in its "mission," its "vision" and its "values." In this latter regard, it states that its mission is to connect British Columbia proudly to the world, its vision is to be a world-class sustainable gateway between Asia and the Americas, and its values are to promote safety, teamwork, accountability and innovation. More broadly, VAA maintains that when an entity acts pursuant to a legislative mandate, as VAA has always done, its actions are deemed to be in the public interest and not subject to the Act.

[203] With specific regard to its control over airside access, VAA also relies on section 302.10 of the Canadian Aviation Regulations.

[204] In its closing submissions and final argument, VAA also submitted that section 79 contains sufficient leeway language to allow the RCD to be available in this case.

[205] The Tribunal pauses to note that VAA's public interest arguments will also be addressed in the context of the assessment of its legitimate business justifications, in Section VII.D.2 below.

(b) The Commissioner

[206] In response to VAA's submissions, the Commissioner advances five principal arguments.

[207] First, he submits that the RCD does not apply to the non-criminal provisions of the Act pertaining to "reviewable matters," which are also sometimes referred to as the Act's "civil" provisions.

[208] Second, he asserts that even if the RCD could be available for some reviewable matters, Parliament did not provide the requisite leeway language in section 79 to enable VAA to avail itself of the RCD in this proceeding.

[209] Third, he maintains that the RCD does not apply where the impugned conduct is alleged to be authorized by federal, as opposed to provincial, legislation.

[210] Fourth, he submits that VAA's conduct has not been required, directed or authorized (expressly or impliedly) by any statute, regulation or subordinate legislative instrument, as contemplated by the RCD jurisprudence.

[211] Finally, the Commissioner states that VAA cannot avail itself of the RCD because it is a corporation (specifically, a not-for-profit corporation), rather than a regulator.

[212] The Tribunal notes that the first two arguments of the Commissioner relate to the first component of the RCD (i.e., the leeway language) whereas the following two concern the second component (i.e., the requiring, directing or authorizing legislation or regulatory regime).

(3) Assessment

(a) Is the required leeway language present?

[213] Throughout this proceeding, VAA's position with respect to the RCD essentially focused on the second precondition to the operation of the RCD, namely, how VAA's public interest mandate (and the legislative and regulatory regime framing it) authorizes it to engage in the Exclusionary Conduct. However, in its closing submissions, VAA also submitted that the wording of section 79 contains the requisite leeway to meet the first precondition to the operation of the doctrine.

[214] In this latter regard, VAA submits that it cannot be found to have engaged in "a practice of anti-competitive acts" because those words contemplate an anti-competitive purpose, which VAA cannot have if it is simply acting pursuant to its public interest mandate. VAA acknowledges that the kind of language that has been held to provide such leeway has been somewhat different, namely, the word "unduly" or the words "in the public interest." However, it maintains that subsection 79(1) contains what can be considered as analogous language.

[215] The Tribunal disagrees. The Tribunal accepts the Commissioner's position that section 79 does not contain the required leeway language. In addition, the Tribunal finds more generally that the principal rationales underlying the development of the RCD do not apply in the context of section 79.

(i) The wording of section 79

[216] In *Garland*, the SCC noted that the leeway language that had always provided scope for the application of the RCD were the words "unduly" or "in the public interest" (*Garland* at paras 75-76). Whenever the federal legislation contained such wording, the courts held that conduct that was required, compelled, mandated or authorized by a validly enacted provincial statute could not be said to be "undue" or to operate "to the detriment or against the interest of the public," as contemplated by the criminal competition law (*Chung Chuck* at pp 759-760; *Re The Farm Products Act (Ontario)*, [1957] SCR 198, 7 DLR (2d) 257 ("***Farm Products***") at pp 205, 239, 258; *Jabour* at pp 348-349, 353-354; *Milk* at pp 476-477). In the absence of those words, or other language indicating that Parliament had, expressly or by necessary implication, intended to

grant leeway to persons acting pursuant to a valid regulatory scheme, the application of the RCD was precluded (*Garland* at paras 75-76, 79).

[217] There is no merit to VAA's argument that its general public interest mandate can serve to shield it from the application of section 79. Acting pursuant to a public interest mandate does not preclude the possibility that an entity such as VAA may take actions that have an exclusionary, disciplinary or predatory purpose. One needs to look no further than *Arriva The Shires Ltd v London Luton Airport Operations Ltd*, [2014] EWHC 64 (Ch) ("***Luton Airport***"), where the English High Court of Justice noted that the defendant airport operator had an incentive to favour one bus service operator to the exclusion of another, because it could thereby derive an important commercial and economic benefit by doing so. The court proceeded to find that the defendant had engaged in conduct that constituted an abuse of dominant position, assuming that it was in fact a dominant entity (*Luton Airport* at para 166).

[218] To the extent that the mandate of an entity such as VAA may include generating revenues to fund capital expenditures, the entity may well consider it to be consistent with that mandate to engage in similar or other conduct that has an exclusionary purpose. This is not to suggest in any way that VAA has done so in relation to the Galley Handling Market. This is a matter that will be assessed later in this decision.

[219] It bears reiterating that, in and of itself, acting in the public interest pursuant to a provincial regulatory regime does not necessarily preclude the application of the Act or exempt a conduct from the operation of criminal law. To trigger the application of the RCD, it is necessary to demonstrate, among other things, that Parliament has "expressly or by necessary implication […] granted leeway to those acting pursuant to a valid provincial regulatory scheme" [emphasis added] (*PHS* at para 55, quoting *Garland* at para 77). Put differently, Parliament's intent to exempt activities that fall within the scope of the RCD from the operation of the Act "must be made plain" in the federal legislation (*R v Jorgensen*, [1995] 4 SCR 55, 129 DLR (4th) 510 at para 118). No such plain intent appears in the language of section 79, whether in paragraph 79(1)(*b*) or elsewhere.

[220] In contrast to the jurisprudence having applied the RCD or to the language contained in subsection 45(7) of the Act, which explicitly preserves the RCD in respect of the offences established by subsection 45(1), there is no language that expressly grants the requisite leeway in relation to subsection 79(1) of the Act.

[221] The situation here is different from what it was when courts were confronted with, on the one hand, criminal competition law provisions that required a demonstration that competition had been prevented or lessened "unduly," and on the other hand, conduct engaged in pursuant to a validly enacted provincial regulatory regime. The courts were able to resolve the conflict by finding that Parliament could not have intended such conduct to be within the scope of the competition law provisions, having regard to the fact that the word "unduly" had been interpreted to mean "improperly, excessively, inordinately" and even "wrongly" (*R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36 ("***PANS***") at p 646; *R v Elliott* (1905), 9 CCC 505, OLR 648 at p 520 (ONCA)). In essence, the courts were unwilling to find that conduct required, compelled, mandated or authorized by a valid provincial statute could be characterized as being improper, inordinate, excessive, oppressive or wrong.

[222] The Tribunal further finds no merit to the argument that the required leeway language could flow from the language of paragraph 79(1)(*b*), and that the anti-competitive purpose contemplated by the provision can be said to constitute a type of leeway language analogous to "unduly." For greater certainty, the Tribunal further notes that the required leeway language is not provided by the words "substantially" or "may" in subsection 79(1). The Tribunal acknowledges that the words "undue" and "substantial" both contemplate a degree of importance and convey a sense of seriousness or significance. But the word "unduly" has other connotations that are not associated with the word "substantially." In particular, the latter does not have the nuances that have troubled the courts in the past, namely, those of "improper, inordinate, excessive, oppressive" or "wrong." Another important difference between subsection 79(1) and the former criminal provisions that contained the word "unduly" and that were at issue in the seminal RCD cases is that paragraph 79(1)(*c*) is not based on the same "substratum of values" as those latter provisions (*PANS* at p 634). While "substantially" may arguably be considered as an imprecise flexible word, the Tribunal does not find that it is comparable to the types of words which, according to the SCC in *Garland*, need to be present to indicate an express or implied intention to leave room to those acting pursuant to a valid provincial legislative scheme.

[223] Moreover, it does not appear to the Tribunal that such leeway can be found to exist by necessary implication in section 79. The situation here is different from what it was in cases where the courts had to determine whether activities taken pursuant to a validly enacted provincial statute could be said to operate "to the detriment or against the interest of the public," as was expressly set forth in previous versions of the Act and in its predecessor statute, namely, the *Combines Investigation Act*, RSC 1927, c 26. In those cases, the courts understandably concluded that, by necessary implication, Parliament could be taken to have intended that such activities do not operate to the detriment of the public interest. That conclusion was required in order to resolve what would otherwise have been a conflict between the federal statute, which criminally penalized certain conduct that operated "to the detriment or against the interest of the public," and the provincial legislation, which was deemed to be in the public interest.

[224] In the legal and factual matrix presented in the current case, the conflict between paragraph 79(1)(*b*) and the manner in which VAA interprets its mandate does not require a finding that Parliament intended, by necessary implication, that paragraph 79(1)(*b*) give way to such a mandate. The provisions set forth in paragraph 79(1)(*b*) can be readily interpreted in a manner that permits the various objectives underlying the Act to be largely achieved. Indeed, the presumption that Parliament has enacted legislation that is coherent requires such an interpretation (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) ("***Sullivan***") at §11.2). The same applies to the legislation, subordinate legislation and other instruments upon which VAA relies in asserting the RCD.

[225] The Tribunal recognizes that interpreting the Act and VAA's mandate in this way may impose a limit on the ability of VAA and other entities exercising statutory powers to pursue their respective public interest mandates. However, that limit is very narrow and simply precludes such entities from engaging in a practice of anti-competitive acts that prevents or lessens competition substantially, or is likely to do so in the future. By contrast, allowing entities to rely on the RCD to avoid the remedies contemplated by subsections 79(1) and (2) would undermine the operation of "a complete regulatory scheme aimed at eliminating commercial practices which are contrary to healthy competition across the country, and not in a specific

place, in a specific business or industry" [emphasis in original] (*General Motors of Canada Ltd v City National Leasing Ltd*, [1989] 1 SCR 641, 58 DLR (4th) 255 ("***General Motors***") at p 678, quoting *R v Miracle Mart Inc* (1982), 68 CCC (2d) 242, 67 CPR (2d) 80 at p 259 (QCCS)).

[226] The Tribunal pauses to add that, given that "[t]he deleterious effects of anti-competitive practices transcend provincial boundaries" (*General Motors* at p 678), the fact that an entity such as VAA may operate in a highly local environment cannot be relied upon to justify resolving in its favour any conflict between its mandate and the Act, which is a national law of general application.

[227] The Tribunal's conclusion that section 79 does not include the leeway language discussed in the jurisprudence provides a sufficient basis upon which to reject VAA's reliance on the RCD.

(ii) The rationales underlying the RCD

[228] The Tribunal further considers that the two rationales which supported the development of the RCD do not apply to the abuse of dominance provision and, by extension, to the other reviewable matters provisions of the Act more generally.

[229] The first of those two rationales is that "to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state" (*Farm Products* at p 239, quoted with approval in *Jabour* at p 352; *Chung Chuck* at p 756). This may be characterized as the "criminal law" rationale. In other words, "the idea that individuals could be guilty of a criminal offence for engaging in conduct specifically mandated to them by a legislature was not one which the courts were willing to accept" (*Milk* at p 476).

[230] Given that there is no need to establish criminal intent under section 79, and given that this provision does not contemplate criminal consequences or criminal stigma, this rationale is inapplicable in this context. It is one thing to expose someone to potential consequences such as imprisonment and the social stigma associated with a criminal conviction for engaging in conduct that is contrary to the Act. It is quite another to merely allow for the issuance of an administrative monetary penalty or an order requiring a respondent to cease engaging in such conduct, or to take other action contemplated by the remedial provisions in section 79 and the other reviewable matters sections of the Act, when such conduct has anti-competitive effects.

[231] The second rationale that underpinned the development of the RCD was based on specific wording of criminal competition provisions that no longer exists. That wording required a demonstration of conduct that "unduly" prevented or lessened competition, that had other specified "undue" effects, or that operated to the "detriment of or against the interest of the public" (*Garland* at paras 75-76; *Jabour* at p 352). Given the analogy that some courts have made between these latter words and the word "unduly," this may be characterized as the "public interest" rationale. Considering that the words "unduly" and "to the detriment of or against the interest of the public" are not present in section 79, or indeed in any of the other reviewable matters provisions of the Act, this second rationale for the RCD is also not available to support the application of the doctrine to conduct contemplated by those provisions.

[232] It has been suggested that one of the underlying purposes of the Act as a whole is to promote the public interest in competition, and the various objectives set forth in section 1.1 of the Act. From this, it is further suggested that the RCD could be available in respect of all of the provisions of the Act, civil or criminal. However, if that were so, the same would be true with respect to all legislation that is animated by a concern for the public interest. The Tribunal does not consider that the "leeway" doctrine was intended to apply in the absence of specific language, such as "unduly" or "to the detriment of the public interest."

[233] In the absence of the principal justifications that underpinned the courts' resort to the RCD in respect of the criminal provisions of the Act in past cases, any conflict between section 79 (or other reviewable matters) and the provisions of validly enacted provincial or federal legislation would fall to be resolved in accordance with other principles of statutory interpretation. These include the principles discussed at paragraphs 257-262 below. VAA has not identified any different principles that support its position.

[234] Notwithstanding the foregoing, VAA relies on *LSUC*, various cases in which the courts have recognized the potential application of the RCD in a civil action for damages brought pursuant to section 36 of the Act, and *Edmonton Regional Airports Authority v North West Geomatics Ltd*, 2002 ABQB 1041 ("***Edmonton Airports***").

[235] For the reasons set forth at paragraph 197 above, the Tribunal does not consider *LSUC* to be particularly strong authority for the proposition that the RCD is available to shield conduct pursued under the reviewable matters provisions of the Act. In brief, that aspect of the case proceeded on consent, so that the court could focus on other issues. The Tribunal's conclusion in this regard is reinforced by the fact that *LSUC* preceded the SCC's decision in *Garland*, where the requirement of leeway language for the application of the RCD was established.

[236] Regarding the cases that involved section 36 of the Act, they are distinguishable on the basis that, in each case, the underlying conduct in respect of which damages were sought by the plaintiffs was not a civilly reviewable conduct but conduct to which one or more of the criminal provisions of the Act would have applied, but for the RCD. In that context, it would have made no sense to deprive the defendants of the benefit of that RCD, when it provided a defence or an exemption to a prosecution under the criminal provisions of the Act for the same conduct. As one court observed:

> […] an aggrieved party cannot bring a successful civil action based on a breach of s. 45 of the *Competition Act* if the accused party has a complete defence to a prosecution under s. 45. In such a case there would be no misconduct on which to base the civil action. Thus, if the regulated conduct defence provides a complete defence to a prosecution under s. 45, then a civil action under s. 36 cannot succeed.

Cami at para 50. See also *Milk* at p 476 and *Hughes* at paras 223-230.

[237] Turning to *Edmonton Airports*, VAA relies on the statement therein to the effect that the Act cannot "apply to legal entities incorporated by statute and required by statute to operate in

the public interest" (*Edmonton Airports* at para 127). However, that statement was made in the context of a discussion of the court's assessment of a defence to a claim of tortious conspiracy that appears to have been based on a breach of the criminal conspiracy provisions of the Act. Moreover, it has subsequently been made clear that in the absence of leeway language in the Act, the RCD does not operate to shield conduct engaged in pursuant to provincial legislative schemes, even where they are designed to advance the public interest (*PHS* at paras 54-56).

[238] In summary, the Tribunal considers that the RCD is not available to exempt or shield conduct that is challenged under section 79. This conclusion provides a second distinct basis upon which to reject VAA's reliance on the RCD.

[239] The Tribunal notes that, in his submissions, the Commissioner more generally argued that the RCD is not available, as a matter of law, to conduct pursued not only under section 79 but under all of the reviewable matters provisions of the Act. The Tribunal does not have to decide this larger issue in this Application; this will be for another day. The Tribunal nonetheless offers the following remarks.

[240] To begin, although the wording of each reviewable matter differs and varies, none of the provisions pertaining to those matters contains the words "unduly" or "in the public interest," discussed above.

[241] In addition, the Tribunal notes that the amendments made to the conspiracy provisions of the Act in 2009 appear to reflect Parliament's intent not to extend the RCD to the most recently enacted reviewable matter provision of the Act, namely, section 90.1 on "agreements or arrangements that prevent or lessen competition substantially." While the 2009 amendments related to one specific civil provision of the Act and not to the "reviewable matters" generally, they are nonetheless instructive. The Tribunal underlines that, as is the case for other reviewable matters under Part VIII of the Act, such as abuse of dominance or mergers, the presence of anti-competitive effects attributable to the conduct is a key and essential feature of the impugned practice subject to review before the Tribunal under section 90.1.

[242] When the new section 45 was adopted, Parliament included subsection 45(7), which reads as follows:

Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) […]	**45 (1)** [...]
Common law principles — regulated conduct	Principes de la common law — comportement réglementé
(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of	**(7)** Les règles et principes de la common law qui font d'une exigence ou d'une autorisation prévue par une autre loi

Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).	fédérale ou une loi provinciale, ou par l'un de ses règlements, un moyen de défense contre des poursuites intentées en vertu du paragraphe 45(1) de la présente loi, dans sa version antérieure à l'entrée en vigueur du présent article, demeurent en vigueur et s'appliquent à l'égard des poursuites intentées en vertu du paragraphe (1).

[243] The 2009 amendments thus expressly provided for a statutory RCD for the criminal provisions under section 45, despite the absence of the word "unduly." However, no parallel, companion provision was enacted to complement the new section 90.1 on civil conspiracies. Stated differently, Parliament did not see fit to provide for the application of the RCD for the civil collaborations between competitors; it only did so for the new criminal *per se* conspiracy offence.

[244] If Parliament had intended to extend the RCD to the civil agreements between competitors governed by section 90.1, it would have said so expressly by adding language similar to subsection 45(7) in structuring this new civil provision. It did not. The plain wording and structure of section 90.1 speak for themselves. Under the implied exclusion rule of statutory interpretation, and even under the plain meaning rule, it is apparent that Parliament's intent was not to extend the RCD to this most recent civil provision and to make it available for this reviewable matter.

(iii) Conclusion on the leeway language

[245] For the reasons set forth above, the Tribunal finds that section 79 of the Act does not contain the leeway language required to open the door to the potential application of the RCD in the context of this Application.

(b) Is the conduct required, directed or authorized by a validly enacted legislation or regulatory regime?

[246] The Tribunal now turns to the second precondition to the application of the RCD, namely, the requirement that the impugned conduct be required, directed or authorized, expressly or by necessary implication, by a validly enacted statute, regulation or subordinate legislative instrument.

[247] From the outset of this proceeding, VAA primarily relied on the alleged public interest mandate under which it manages and operates YVR to support its position that the Act does not apply to its conduct. To anchor its claim that the RCD is available to it and authorizes its Exclusionary Conduct, VAA essentially invoked its Statement of Purposes, the 1992 OIC, the

1992 Ground Lease, the membership of VAA's Board of Directors and other general aspects of its mission, values and vision. In its closing submissions, VAA also submitted that it was relying on section 302.10 of the Canadian Aviation Regulations.

[248] The Tribunal is not persuaded by VAA's arguments. For the reasons set forth below, the Tribunal instead finds that VAA has been unable to point to any express provision or necessary implication in the regulatory regime in place that requires, directs or authorizes it to engage in the Exclusionary Conduct, as contemplated by the RCD jurisprudence. Put differently, no specific aspect of either VAA's mandate or the regulatory regime under which VAA operates required, directed or authorized it to refrain from licensing one or more additional in-flight caterers, whether for the reasons it has identified, or otherwise.

(i) Conduct authorized by a federal legislative regime

[249] Before turning to the specific sources identified by VAA, the Tribunal observes that the legislative regime upon which VAA relies to avail itself of the RCD is federal. The Commissioner maintains that, as a matter of principle, the RCD does not apply where the impugned conduct is alleged to be authorized by federal, as opposed to provincial, legislation.

[250] The Tribunal disagrees with the Commissioner on this point. However, given the conclusions that the Tribunal has reached in this case with respect to the two preconditions to the application of the RCD, nothing turns on this.

[251] To begin, the Tribunal notes that several courts have entertained or identified the possibility that the RCD can be available in a context where the authorizing legislation is federal (*Rogers* at para 63; *Fournier Leasing* at para 58; *Hughes* at para 220; *Milk* at p 475), and at least one has even applied it in such context (*Landmark* at pp 353-354).

[252] Furthermore, with the adoption of subsection 45(7), Parliament has now clarified that the RCD can be applied in the context of federal legislation. Subsection 45(7) expressly states that the "rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act […] continue in force and apply in respect of a prosecution under subsection (1)" [emphasis added]. This most recent legislative amendment thus explicitly recognizes that the "rules and principles" of the RCD encompass situations where conduct is regulated by federal laws, just as it applies for conduct regulated by provincial laws.

[253] Indeed, even the September 2010 Bureau's bulletin entitled *"Regulated" Conduct* ("***RCD Bulletin***") implicitly acknowledges that the RCD could be available in a context where the conduct is authorized by a federal legislative regime. In this regard, the *RCD Bulletin* mentions that the Bureau's enforcement approach would not be similar and would not be conducted in the same manner for conduct regulated by federal laws, compared to conduct regulated by provincial laws (*RCD Bulletin* at pp 1, 7).

[254] However, the fact that the RCD is potentially available to resolve an apparent conflict between the Act and other federal legislation is not the end of the analysis. The particular circumstances and context governing the federally-regulated regime have to be considered to

determine whether, in each particular case, the RCD is required to resolve a conflict between the two federal legislative schemes.

[255] The Commissioner submits that the RCD is not available in the particular context of a federal regulatory regime like the one invoked by VAA. He maintains that, where conduct challenged under section 79 of the Act is allegedly authorized by a federal legislative regime, the Tribunal should apply the ordinary principles of statutory interpretation to resolve any conflict that may arise between such regime and a provision of the Act. The Commissioner adds that, according to those ordinary principles, federal statutes applicable to the same facts will concurrently apply absent some unavoidable conflict (*Sullivan* at §11.30-§11.33). The Commissioner also submits that on the particular facts of the current case, there is no such unavoidable conflict.

[256] The Tribunal agrees with this aspect of the Commissioner's position. Where there is an apparent conflict between a provision of the Act and other federal legislation (including any subordinate legislative provisions), the Tribunal should first apply the ordinary principles of statutory interpretation, rather than the RCD, to try to resolve the conflict. In this regard, the Tribunal should begin by applying the fundamental principle that legislation should be interpreted in its entire context, and in its grammatical and ordinary sense, harmoniously with its objects, the legislative scheme and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21).

[257] If that initial step does not resolve the conflict, the Tribunal should next seek to ascertain whether the conflict can be resolved "by adopting an interpretation which would remove the inconsistency" (*Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at para 58). In other words, an interpretation that permits two federal statutes to operate and to achieve their respective objectives is to be preferred to an interpretation that yields a conflict (*Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at paras 22-23, 28, 32). This is simply another way of stating the principle that Parliament is presumed to have legislated coherently (*Friends of Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 ("***Oldman River***") at p 38). The Tribunal observes in passing that this presumption has been described as being "virtually irrebuttable" (*Sullivan* at §11.4).

[258] Where the conflict still cannot be resolved, and arises between an Act of Parliament and subordinate federal legislation, the Tribunal must give precedence to the former (*Oldman River* at p 38; *Sullivan* at §11.56).

[259] Where the application of the foregoing principles fails to resolve the conflict, the availability of the RCD would appear to depend on whether the conflict concerns a criminal or a non-criminal provision of the Act. For the reasons set forth at paragraphs 216-245 above, the Tribunal considers that the RCD is not available in respect of section 79. For the present purposes, it is unnecessary to say more, particularly given that the application of the principles described above with respect to the second component of the RCD is sufficient to resolve the alleged conflict between subsection 79(1) of the Act and the legislative regime upon which VAA relies to assert the RCD, as explained immediately below.

[260] The Tribunal pauses to observe that in the *RCD Bulletin*, the following is stated:

> [T]he Bureau will not pursue a matter under any provision of the Act where Parliament has articulated an intention to displace competition law enforcement by establishing a comprehensive regulatory regime and providing a regulator the authority to itself take, or to authorize another to take, action inconsistent with the Act, provided the regulator has exercised its regulatory authority in respect of the conduct in question.

[261] The Tribunal further observes in passing that, in the criminal context, one of the two principal rationales that have supported the application of the RCD in the past would continue to support its application. That is to say, it could be inferred that Parliament did not intend that conduct required, directed or authorized by federal legislation be subject to criminal sanction under the Act (see paragraphs 228-230 above). This may be why Parliament saw fit to preserve, in subsection 45(7) of the Act, the RCD for conduct prohibited by subsection 45(1), notwithstanding the elimination of the word "unduly" from the latter provision. The Tribunal recognizes that the absence, in the other criminal provisions of the Act, of language similar to that found in subsection 45(7) presents a complicating factor that will likely have to be addressed by the courts at some point in the future.

(ii) The grounds invoked by VAA

[262] The Tribunal now turns to the various sources relied on by VAA to demonstrate that its Exclusionary Conduct has been required, directed or authorized, expressly or by necessary implication, by a validly enacted legislation.

- <u>VAA's Statement of Purposes</u>

[263] VAA's Statement of Purposes is set forth in VAA's Articles of Continuance. For convenience, the Tribunal will repeat the "purposes" that are potentially relevant to this proceeding. They are :

> (a) to acquire all of, or an interest in, the property comprising the Vancouver International Airport to undertake the management and operation of [that airport] in a safe and efficient manner for the general benefit of the public;
>
> (b) to undertake the development of the lands of the [airport] for uses compatible with air transportation;
>
> […]
>
> (d) to generate, suggest and participate in economic development projects and undertakings which are intended to expand British Columbia's transportation facilities, or contribute to British Columbia's economy, or assist in the movement of people and goods between Canada and the rest of the world;

[…]

[264] The Tribunal considers that none of the three foregoing "purposes" explicitly requires, directs or authorizes VAA to engage in the Exclusionary Conduct. Further, they can readily be interpreted in a way that does not give rise to any irreconcilable conflict with the Act and that permits VAA's purposes to be achieved.

[265] With respect to paragraph (a), the only language that may be said to relate to the Exclusionary Conduct are the words "to undertake the management and operation of [YVR] in a safe and efficient manner for the general benefit of the public" [emphasis added].

[266] As will be discussed in Section VII.D below, in relation to paragraph 79(1)(*b*), VAA's justifications for engaging in the Exclusionary Conduct did not include any considerations related to safety. Moreover, the relief sought by the Commissioner is specifically confined "to any firm that meets customary health, safety, security and performance requirements." Thus, if that relief was granted by the Tribunal, VAA would not in any way be constrained to pursue the safety aspect of its mandate.

[267] Turning to VAA's "purpose" to "undertake the management and operation of [YVR] in […] [an] efficient manner for the general benefit of the public" [emphasis added], there are at least three problems with VAA's reliance on this language.

[268] First, the words "in […] [an] efficient manner" are insufficiently specific to meet the requirements of the RCD. Put differently, they are "a far cry" from the specificity that is required to reach a conclusion that activities taken in furtherance of the "purpose" have been "authorized," as contemplated by the RCD (*Jabour* at pp 341-342; *Fournier Leasing* at para 58; *Milk* at 478-479, 483; *LSUC* at p 474; *Hughes* at paras 144-145, 163-164, 198, 240-244. See also *Sutherland* at paras 77-84, 107, 117). The Tribunal is not aware of any case which would support VAA's position that such a general "purpose" has the sufficient degree of specificity to provide what is, in essence, an exemption from the requirements of the Act.

[269] Second, the reference to efficiency can readily be interpreted in a manner that leaves VAA broad latitude to fulfill that "purpose" without conflicting with the Act, and in particular with subsection 79(1) of the Act (*Garland* at para 76). In other words, there is no irreconcilable conflict between those words and the Act.

[270] Third, the Tribunal is not aware of any authority for the proposition that a statement of purposes or any other provision in an entity's Articles of Continuance or its other corporate documents, taken alone, can provide the basis for the assertion of the RCD.

[271] Insofar as paragraph (b) of VAA's Statement of Purposes is concerned, the entire provision is potentially relevant to the allegation that VAA has tied access to the airside to the leasing of land at YVR. However, VAA's justifications for engaging in the Exclusionary Conduct did not include any considerations related to the development of the lands of YVR for uses compatible with air transportation, although Mr. Richmond testified that VAA has a preference for in-flight catering firms to be located at YVR.

[272] With respect to paragraph (d) of VAA's Statement of Purposes, essentially the same problems exist. That is to say, those words are not sufficiently specific to meet the requirements of the RCD, there is no irreconcilable conflict between the words of that provision and section 79 of the Act, and the Tribunal is not aware of any authority for the proposition set forth in paragraph 270 above.

- The 1992 OIC and the 1992 Ground Lease

[273] One of the recitals in the 1992 OIC states that Her Majesty in right of Canada desired to transfer to local authorities in Canada the management, operation and maintenance of certain airports "in order to foster the economic development of the communities that those airports serve and the commercial development of those airports through local participation." With respect to VAA in particular, the operative provision in the 1992 OIC "authorizes the Minister of Transport, on behalf of Her Majesty in right of Canada, to enter into an Agreement to Transfer with [VAA] substantially in accordance with the draft agreement annexed hereto," namely, the 1992 Ground Lease. In turn, one of the provisions in the latter document states that VAA shall "manage, operate, and maintain the Airport […] in an up-to-date and reputable manner befitting a First Class Facility and a Major International Airport, in a condition and at a level of service to meet the capacity demands for airport services from users within seventy-five kilometres." VAA states that since it was established, it has re-invested all revenues net of expenses back into the Airport.

[274] The Tribunal agrees that, in principle, subordinate legislation like Orders-in-Council may provide a basis for the authorization contemplated by the RCD (*Sutherland* at para 68). However, having regard to a contrary observation made by the SCC in *Oldman River*, at page 38, the language in the subordinate legislation would have to be very clear. Even then, the issue is by no means free from doubt. In any event, insofar as VAA's reliance on the RCD is concerned, the 1992 OIC and the 1992 Ground Lease suffer from some of the same shortcomings as the Statement of Purposes in VAA's Articles of Continuance.

[275] First, the wording upon which VAA relies from the 1992 OIC and the 1992 Ground Lease is once again insufficiently specific to meet the requirements of the RCD. There is nothing in these two instruments that can be read as expressly or by necessary implication, requiring, directing or authorizing the impugned conduct.

[276] Second, there is no irreconcilable conflict between the words quoted above from those two documents and the Act (*Garland* at para 76). On the contrary, those words can readily be interpreted in a manner that gives broad latitude to VAA to foster the economic development of the local community it serves, to foster the commercial development of YVR, and to "manage, operate, and maintain [YVR] […] in an up-to-date and reputable manner," as described above. It is difficult to imagine how this mandate might be undermined to any material degree by VAA having to refrain from conduct that is contemplated by section 79 of the Act. The Tribunal's position in this regard is reinforced by the fact that the 1992 OIC was issued pursuant to subsection 2(2) of the Airport Transfer Act, which simply provides that the Governor in Council may, by order:

(a) designate any corporation or other body to which the Minister is to sell, lease or otherwise transfer an airport as a designated airport authority; and

(b) designate the date on which the Minister is to sell, lease or otherwise transfer an airport to a designated airport authority as the transfer date for that airport.

[277] Moreover, section 8.06.01 of the 1992 Ground Lease explicitly stipulates that VAA must "observe and comply with any applicable law now or hereafter in force." The Tribunal observes that Mr. Richmond conceded during discovery that this means that VAA has to comply with the laws of Canada. The laws of Canada include the Act.

[278] Third, even if it could be said that there is an irreconcilable conflict between the Act and the 1992 OIC or the 1992 Ground Lease, precedence would have to be given to the Act, which ranks above subordinate federal legislation and contracts entered into by the federal government (*Oldman River* at p 38).

[279] The Tribunal notes that the situation is quite different from *Sutherland*, relied on by VAA. In *Sutherland*, there was no doubt that the statutory scheme had expressly authorized the construction of the specific airport runway at issue at YVR, in the exact location it occupies. The precise location and configuration of the runway were clearly identified in the lease and in the airport certificate (*Sutherland* at paras 78, 107). No such level of specificity exists in the sources put forward by VAA to support its claim that the RCD should be available to exempt its Exclusionary Conduct from section 79 of the Act.

- VAA's Board of Directors

[280] VAA asserts that its public interest mandate is also reflected in the fact that most of the members sitting on its Board of Directors are nominated by various levels of government and local professional organizations.

[281] However, the Tribunal is unable to ascertain how this fact assists VAA to establish that the conduct that is the subject of this proceeding has been "authorized" by validly enacted legislation or by subordinate legislation.

- VAA's additional public interest arguments

[282] VAA's reliance on the RCD is also not assisted by the other arguments that it has advanced with respect to its public interest mandate. More specifically, VAA's "mission," "vision" and "values," as described in paragraph 202 above, do not even remotely authorize VAA to engage in the Exclusionary Conduct. Moreover, as corporate statements, they cannot displace the Act.

[283] VAA also asserts that its actions can be deemed to be in the public interest and therefore not subject to the Act, because it acts pursuant to a legislative mandate. However, this is not

sufficient to enable VAA to avail itself of the RCD. Conduct that is contemplated by the Act must be required, compelled, mandated or specifically authorized, expressly or by necessary implication, before it may be shielded from the operation of the Act by the RCD (see cases cited at paragraphs 192-200 above).

- The Canadian Aviation Regulations

[284] In its closing argument at the hearing, VAA also relied upon section 302.10 of the Canadian Aviation Regulations, which provides as follows:

> 302.10 No person shall
>
> […]
>
> (c) walk, stand, drive a vehicle, park a vehicle or aircraft or cause an obstruction on the movement area of an airport, except in accordance with permission given
>
> (i) by the operator of the airport, and
>
> (ii) where applicable, by the appropriate air traffic control unit or flight service station.

[285] VAA asserts that this provision specifically authorizes it to control access to the airside at YVR, and that this authorization is sufficient to permit VAA to avail itself of the RCD. The Tribunal disagrees. Although paragraph 302.10(c) of the Canadian Aviation Regulations specifically grants VAA the authority to control access, it does not specifically authorize VAA, directly or indirectly, to limit the number of in-flight catering firms and to engage in the Exclusionary Conduct that is the subject of this proceeding. Indeed, it is difficult to see how that provision even broadly or implicitly authorizes VAA to engage in such conduct.

[286] It bears reiterating that regulators and others who exercise statutory authority cannot use such "authority as a springboard (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statutes" (*Milk* at pp 484-485). As the Tribunal has observed, the relief sought by the Commissioner is specifically confined "to any firm that meets customary health, safety, security and performance requirements." Thus, if that relief were to be granted by the Tribunal, VAA would not be prevented from controlling access to the airside at YVR in a manner that ensures that these legitimate requirements are met. However, VAA cannot use these or other considerations as a pretext to engage in conduct that is contemplated by section 79 of the Act.

[287] As with the other provisions upon which VAA relies in asserting the RCD, there is no irreconcilable conflict between section 79 of the Act and paragraph 302.10(c) of the Canadian Aviation Regulations. In brief, the latter can easily be interpreted to allow VAA to control access to the airside at YVR in a manner that is based on the types of considerations that guide such

decisions at other airports in Canada, and that does not contravene the Act. Contrary to VAA's assertions, subjecting it to the Act will not require it to "agree to any and all requests for access" (VAA's Amended Response, at para 22). Like others, VAA simply has to abide by the Act.

[288] Finally, as subordinate federal legislation, paragraph 302.10(c) cannot be relied upon to shield anti-competitive conduct that is contemplated by the Act.

(iii) Conclusion on the second component of the RCD

[289] For all those reasons, the Tribunal finds that there is no statute, regulation or other subordinate legislative instrument that requires, directs, mandates or authorizes VAA, expressly or by necessary implication, to engage in the impugned conduct. Therefore, as with the first precondition to the application of the RCD, the second precondition is also not satisfied.

(4) Conclusion

[290] For all of the above reasons, the Tribunal concludes that VAA cannot avail itself of the RCD in this proceeding.

[291] In summary, section 79 does not provide the requisite leeway language that must be present before the RCD may be relied upon to exempt or shield conduct from the application of the Act. Furthermore, the two rationales that have historically supported the application of the RCD are not present in the context of section 79. In addition, the legislation, subordinate legislation and other provisions upon which VAA relies to assert the RCD do not require, compel, mandate or authorize the Exclusionary Conduct, in the manner required by the jurisprudence. In each case, the broad language in those provisions is not sufficiently specific to permit VAA to avail itself of the RCD in this proceeding. Moreover, those provisions can be interpreted in a manner that gives VAA broad latitude to fulfill its mandate, without conflicting with section 79. Finally, those provisions are found in subordinate federal legislation or other instruments that cannot displace the Act.

[292] Given the foregoing conclusion, it is unnecessary to address the Commissioner's argument with respect to VAA's status as a not-for-profit corporation.

[293] The Tribunal pauses to underscore that even though the RCD does not apply in this case, a respondent's compliance with a statutory or regulatory requirement may nonetheless constitute a legitimate business justification, under paragraph 79(1)(*b*), for conduct that is potentially anti-competitive. In *TREB FCA*, the FCA held that if a respondent engages in a practice that is required by a statute or regulation, this could constitute a legitimate business justification and allow the Tribunal to conclude that the conduct is not an "anti-competitive" act under paragraph 79(1)(*b*) (*TREB FCA* at para 146). In *TREB*, the respondent's argument failed because the evidence demonstrated that it did not implement the impugned conduct in order to comply with the privacy statute invoked to justify the restrictions being imposed.

[294] This issue will be addressed in more detail in Section VII.D.2 below in the Tribunal's discussion of VAA's claims that it had legitimate business considerations to support its Exclusionary Conduct.

B. What is or are the relevant market(s) for the purposes of this proceeding?

[295] The next issue to be determined by the Tribunal is the identification of the relevant market(s) for the purposes of this proceeding. For the reasons set below, the Tribunal concludes that there are two relevant markets, namely, the Airside Access Market and the Galley Handling Market at YVR. Each of those markets is a class or species of business for the purposes of paragraph 79(1)(*a*) of the Act, while only the Galley Handling Market is relevant for the purposes of paragraph 79(1)(*c*).

[296] The Tribunal recognizes that there are considerations that support viewing the market in which such Galley Handling services are offered as including at least some Catering services. However, other considerations support confining that market to Galley Handling services. In the Tribunal's view, it does not matter whether the relevant market for the purposes of paragraph 79(1)(*c*) is confined solely to Galley Handling services or includes some Catering services, because Galley Handling and Catering services are complements, rather than substitutes.

(1) Analytical framework

[297] Paragraph 79(1)(*a*) contemplates a demonstration that one or more persons substantially control, throughout Canada or any area thereof, a class or species of business. The underlined words have consistently been interpreted to mean the geographic and product dimensions of the relevant market in which the respondent is alleged to have "substantial or complete control" (*Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 236 ("***Canada Pipe FCA Cross Appeal***") at paras 16, 64, leave to appeal to SCC refused, 31637 (10 May 2007); *TREB CT* at para 164).

[298] As the Tribunal has previously discussed, the relevant market for the purposes of paragraph 79(1)(*a*) can be different from the relevant market contemplated by paragraph 79(1)(*c*) (*TREB CT* at para 116). Indeed, one of the markets that VAA is alleged to control in this proceeding, the Airside Access Market, is different from the market in which a substantial prevention or lessening of competition has been alleged for the purposes of paragraph 79(1)(*c*), namely, the Galley Handling Market. Accordingly, it will be necessary for the Tribunal to assess each of those alleged markets.

[299] In most proceedings brought under section 79 of the Act, the Tribunal's approach to market definition has focused upon whether there are close substitutes for the products "at issue" (*TREB CT* at para 117). However, in this proceeding, the principal focus of the Tribunal's assessment has been upon whether the supply of Galley Handling services constitutes a distinct relevant market, or should be expanded to include complementary services that are typically sold together with Galley Handling services, namely, some or all Catering services.

[300] In assessing the extent of the product and geographic dimensions of relevant markets in the context of proceedings under section 79 of the Act, the Tribunal considers it helpful to apply the hypothetical monopolist analytical framework. In *TREB CT* at paragraphs 121-124, the Tribunal embraced the following explanation of that framework set forth in the Bureau's 2011 *Merger Enforcement Guidelines*:

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

[301] In applying the SSNIP test, the Tribunal will typically use a test of a 5% price increase lasting one year. In other words, if sellers of a product or of a group of products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a 5% price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power. Essentially the same approach is applied to identify the geographic dimension of relevant markets.

[302] Given the practical challenges associated with determining the base price in respect of which the SSNIP assessment must be conducted in a proceeding brought under section 79 of the Act, market definition in such proceedings will largely involve assessing indirect evidence of substitutability, including factors such as functional interchangeability in end-use; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; physical and technical characteristics; and price relationships and relative price levels (*TREB CT* at para 130).

[303] In a case where the focus of the Tribunal's assessment is upon whether to include complements within the same relevant market, additional factors to consider include whether the products in question are typically offered for sale and purchased together, whether they are sold at a bundled price, whether they are produced together, whether they are produced by the same firms and whether they are used in fixed or variable proportions.

[304] In the geographic context, transportation costs and shipment patterns, including across Canada's borders, should also be assessed.

[305] In defining the scope of the product and geographic dimensions of relevant markets, it will often neither be possible nor necessary to establish those dimensions with precision. However, an assessment must ultimately be made (at the paragraph 79(1)(*c*) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition and act as constraining factors to the products and locations that have been included in the market (*TREB CT* at para 132).

(2) The product dimension

(a) The parties' positions

[306] In his Application, the Commissioner alleges that VAA substantially or completely controls both the Airside Access Market and the Galley Handling Market.

[307] The Commissioner describes airside access as comprising access to runways and taxiways, as well as the "apron" where, among other things, an aircraft is parked, Catering products and ancillary supplies, as well as baggage and cargo, are loaded and unloaded, and passengers board.

[308] The Commissioner characterizes the Galley Handling Market as consisting primarily of the loading and unloading of Catering products, commissary products (typically non-food items and non-perishable food items) and ancillary products (such as duty-free products, linen and newspapers) on commercial aircraft, as well as warehousing; inventory management; assembly of meal trays and aircraft trolley carts (including bar and boutique assembly); transportation of Catering, commissary and ancillary products between an aircraft and warehouse or Catering kitchen facilities; equipment cleaning; handheld point-of-sale device management; and trash removal. In providing the foregoing description, the Commissioner observes that Galley Handling services and Catering are the two principal bundles of products that together comprise In-flight Catering.

[309] In its amended response, VAA takes issue with this approach to the two bundles of complementary products that the Commissioner described as Galley Handling and Catering, respectively. In essence, as explained by Dr. Reitman, whereas the Commissioner defined separate markets for two bundles of horizontal complements, VAA maintains that the relevant markets ought to be defined in terms of vertical bundles of products, namely, (i) the preparation of fresh meals and other perishable food items, and the loading of those meals/items onto the aircraft (which it described in terms of "**Premium Flight Catering**"); and (ii) the provision of non-perishable food items and drinks, including other items such as duty-free products, as well as the loading of those products onto the aircraft (which it characterized as "**Standard Flight Catering**"). In adopting that position, VAA appears to assume that pre-packaged meals, including frozen meals, are not perishable food items and are not substitutable for fresh meals.

[310] With respect to the Airside Access Market, VAA denies that it is in a position of "substantial or complete control," which is something that will be addressed separately in Section VII.C below, in relation to paragraph 79(1)(*a*). However, it does not appear to have taken issue with the Commissioner's definition of that market. Indeed, in its Concise Statement of Economic Theory, VAA stated that one of its key responsibilities in executing its public interest mandate is to control access to the airside at VAA. It explained: "[i]n addition to ensuring safety at the airport, this control allows [it] to authorize an efficient number of providers across the full range of complementary service providers, including Catering and Galley Handling." It further characterized airside access as being "an input to Catering" and to "any Galley Handling that occurs at the Airport" (VAA's Concise Statement of Economic Theory, at paras 3, 5).

[311] The parties maintained their respective positions throughout the proceeding. However, in his final argument, the Commissioner took the position that it did not matter whether the market was defined in terms of Galley Handling or as In-flight Catering. In either case, he asserted that this is a relevant market that VAA substantially or completely controls.

[312] For VAA's part, in addition to maintaining the distinction between Premium Flight Catering and Standard Flight Catering, it emphasized that Galley Handling and Catering (as defined by the Commissioner) are inextricably linked and comprise imprecise bundles of complementary services that are difficult, if not impossible, to precisely identify and circumscribe.

(b) The Airside Access Market

[313] The Commissioner submits that there is a distinct Airside Access Market situated immediately upstream from the Galley Handling Market. In support of this position, he maintains that firms supplying Galley Handling services must first source access to the tarmac, and more specifically to the "apron," where aircraft are parked. To obtain such access, they must enter into an In-flight Catering licence agreement with VAA.

[314] Among other things, the terms and conditions of such licence agreements provide for the payment of **[CONFIDENTIAL]**. Under the existing licence agreements that VAA has entered into with in-flight caterers, the Concession Fees are presently set at **[CONFIDENTIAL]%** of gross revenues earned from services provided at YVR, **[CONFIDENTIAL]**. As previously noted, it appears that those Concession Fees are usually passed on, in whole or in part, by in-flight caterers to their airline customers, in the form of a "port fee" that they charge, over and above the cost of their Galley Handling and Catering services.

[315] In addition, VAA's in-flight catering licences provide for the payment of rent in respect of any facilities leased by the in-flight caterer at YVR. Generally speaking, the amount of rent payable pursuant to the licence is a function of the market value of the space rented by VAA, if any. (VAA does not require in-flight caterers to operate a flight kitchen at YVR in order to obtain an in-flight catering licence. In this regard, while Gate Gourmet and CLS operate a flight kitchen at YVR, dnata does not.) For the purposes of this analysis of the alleged Airside Access Market, it is not necessary to further discuss the rental payments charged by VAA.

[316] Based on the foregoing, the Commissioner's position is that the upstream "product" supplied to in-flight caterers is access to the airside of aircraft landing and departing at YVR, and that the price at which that product is supplied is **[CONFIDENTIAL]** Concession Fees described above. The Commissioner maintains that there are no acceptable substitutes for access to the airside for the supply of Galley Handling services, and that therefore, an actual or hypothetical monopolist would have the ability to profitably impose and sustain a SSNIP in respect of the supply of airside access.

[317] Dr. Niels supported the Commissioner's position regarding the existence of a distinct Airside Access Market based on the fact that access to the airside is "a very important (or even essential) input for the provision of in-flight catering services at YVR" (Exhibits A-082, CA-083 and CA-084, Expert Report of Dr. Gunnar Niels ("**Niels Report**"), at para 2.64). Put differently,

he maintained that Galley Handling "clearly requires airside access" (Niels Report, at para 2.71). He asserted that a hypothetical substitute would require Catering to be loaded and unloaded from an aircraft at an off-Airport location, which would imply the transport of the aircraft out of the airport's premises. He stated that, for "logistical, financial (and probably legal) reasons, this would not be possible" (Niels Report, at para 2.71, footnote 34).

[318] In his report, Dr. Reitman took the position that it is not necessary to define a distinct upstream market for the supply of airside access, in order to assess whether control of airside access gives VAA substantial control of the downstream market. Accordingly, he explicitly declined to analyze the alleged Airside Access Market. Instead, he conceded that "[s]ince VAA controls airside access at YVR, and since Premium Flight Catering at YVR is a relevant antitrust market, VAA would have control over the premium flight catering market" (Exhibits R-098, CR-099 and CR-100, Supplementary Expert Report of Dr. David Reitman ("**Reitman Report**"), at para 69). Dr. Reitman maintained that position on cross-examination.

[319] Given that airside access can legitimately be characterized as an input into the alleged Galley Handling Market, and given that VAA charges a price for that input, in the form of Concession Fees, the Tribunal is prepared to find that there is a market for airside access at YVR. Having regard to the fact that there are no substitutes for that input, the Tribunal is satisfied that the alleged Airside Access Market is indeed a relevant market, for the purposes of paragraph 79(1)(*a*) of the Act. That said, the Tribunal observes that nothing turns on this, as it is also satisfied that Galley Handling is a market that is controlled by VAA, for the reasons that will be discussed below.

(c) The Galley Handling Market

[320] In support of the position that there is a distinct relevant Galley Handling Market, the Commissioner advances three principal arguments. First, he states that the hypothetical monopolist test can be met without including Catering products, which are complements for Galley Handling services in the relevant market. Second, he asserts that airlines can purchase Catering products separately from Galley Handling services, and that they have been increasingly doing so in recent years. Third, he maintains that industry documentation, as well as the terminology used within the industry, distinguishes between Galley Handling and Catering, and supports the proposition that Galley Handling and Catering are viewed as different products.

[321] In response, VAA submits that the evidence demonstrates that airlines generally demand, and in-flight caterers generally supply, a bundle of services that includes both Catering and Galley Handling. For this reason, Dr. Reitman maintained that it would be arbitrary to define separate markets for Catering and Galley Handling. VAA adds that the evidence also demonstrates that airlines consider Catering and Galley Handling together, particularly in considering the costs they incur for these services. In addition, VAA asserts that the bundle of products around which the Commissioner defined the Galley Handling Market is imprecise, and that this makes it difficult, if not impossible, to precisely define which products do and do not fall within the boundaries of that market. Finally, VAA submits that, if any distinction is to be made within the overall in-flight catering business, it should be the distinction proposed by Dr. Reitman, namely, between Premium Flight Catering and Standard Flight Catering.

[322] The Tribunal acknowledges that the evidence relied upon by VAA suggests that airlines continue to prefer to purchase Catering and Galley Handling services together. The Tribunal further acknowledges that this factor, together with the weak level of demand substitution between fresh/perishable foods and frozen/non-perishable foods on certain types of flights operated out of YVR, would support the position advanced by VAA.

[323] Nevertheless, for the reasons that follow, the Tribunal considers that the evidence as a whole demonstrates, on a balance of probabilities, that the Galley Handling Market, as defined by the Commissioner, is a relevant market for the purposes of section 79 of the Act. More specifically, the application of the hypothetical monopolist framework, with the support of extensive evidence with respect to the following assessment factors, supports this conclusion: the behaviour, views and strategies of airlines and in-flight caterers; the manner in which Galley Handling and Catering services are produced; and the price relationships and relative price levels between these categories of services.

(i) The hypothetical monopolist framework

[324] The Commissioner asserts that the test at the heart of the hypothetical monopolist framework can be met by applying that framework solely to the bundle of products that he claims comprises the Galley Handling Market. The Tribunal agrees.

[325] Pursuant to that framework, and for the purposes of section 79 of the Act, the product dimension of a relevant market is defined in terms of the smallest group of products in respect of which a hypothetical monopolist would have the ability to impose and sustain a SSNIP above levels that would likely exist in the absence of an impugned practice.

[326] The "smallest group" principle is an important component of the test because, without it, there would be no objective basis upon which to draw a distinction between a smaller group of products in respect of which a hypothetical monopolist would have the ability to profitably impose a SSNIP and a larger group of products in respect of which that monopolist may also have such an ability (*TREB CT* at para 124). For example, in the absence of the smallest group principle, there would be no objective basis upon which to choose between a group of products A, B, C and D, in respect of which a hypothetical monopolist would have the ability to profitably impose a SSNIP, and a larger group of products consisting of products A, B, C, D, E and F, in respect of which the monopolist may also have such an ability. In such circumstances, the choice between the smaller group and the larger group would be arbitrary, assuming that other considerations remained equal.

[327] Accordingly, as Dr. Reitman acknowledged during the hearing, even if it were established that a hypothetical monopolist of two separate bundles of products would have the ability to profitably impose and sustain a SSNIP, the smallest market principle requires the product dimension of the relevant market to be limited to the smallest group of products in respect of which that monopolist would have such an ability. In this proceeding, that would be the bundle of products that comprises Galley Handling services. This is so even though a hypothetical monopolist of both that bundle and the additional bundle of Catering services would

also have the ability to impose a SSNIP in respect of those two bundles of complementary products, combined.

[328] The Tribunal pauses to observe that although Dr. Niels testified that he applied the logic of the hypothetical monopolist approach throughout his analysis, he stated that he considered it to be unnecessary to reach a conclusion as to whether Galley Handling and Catering services, respectively, are separate relevant markets.

[329] VAA maintains that Dr. Niels' failure to explicitly conclude that Galley Handling is a separate relevant market should be fatal to the Commissioner's case. VAA further submits that the Tribunal should draw an adverse inference from Dr. Niels' failure to provide a specific opinion as to whether Galley Handling is a relevant market, as asserted by the Commissioner. Specifically, VAA maintains that because Dr. Niels confirmed on cross-examination that he considered this issue, the Tribunal should infer that had he provided an opinion, it would have been that Galley Handling is not a relevant market.

[330] The Tribunal disagrees. In brief, the Tribunal has no difficulty determining, without the benefit of Dr. Niels' evidence on this particular point, that the Commissioner has established on a balance of probabilities that Galley Handling is a relevant product market. The Tribunal would simply add that Dr. Niels stated that the conclusions he reached in his report would remain the same, regardless of whether Galley Handling and Catering services are separate relevant markets, or form a single combined relevant market.

[331] During cross-examination, Dr. Niels clarified that although he considered this issue, he rapidly concluded that it did not matter whether Galley Handling is a distinct relevant market or formed part of a broader relevant market that includes Catering services. In either case, the conclusions he reached in his report would remain the same. For this reason, he explained that he did not address in any detail whether the relevant market should be defined in terms of Galley Handling alone, or Galley Handling plus Catering. He stated that this, together with the fact that the Commissioner did not allege any anti-competitive effects in respect of Catering, also explains why he did not conduct any analysis on Catering prices.

[332] Given the foregoing explanation provided by Dr. Niels, the Tribunal does not consider it to be appropriate to draw an adverse inference from Dr. Niels' failure to explicitly state that Galley Handling services is a relevant market. It is readily apparent from the testimony discussed above that he did not spend much time on that particular issue or consider it in any detail, as he viewed it to be unnecessary.

(ii) Evidence supporting a distinct relevant market

[333] The Tribunal now turns to the assessment factors that are typically considered in defining the product dimension of relevant markets.

- Functional interchangeability

[334] The Tribunal has previously observed that "functional interchangeability in end-use is a necessary but not sufficient condition for products to be included in the same relevant market" (*TREB CT* at para 130). However, this statement applied only to the assessment of alleged product substitutes. It does not apply to the assessment of whether product complements should be included in the same relevant market. This is because product complements are by definition not functionally interchangeable. Accordingly, in the context of assessing whether product complements are in the same relevant market, the absence of functional interchangeability between them is not relevant. In other words, this assessment factor merits a neutral weighting.

- The behaviour of airlines and in-flight caterers

[335] The evidence regarding the manner in which airlines purchase Catering and Galley Handling services, respectively, was largely provided by the four domestic carriers who participated in the hearing. As discussed in greater detail below, that evidence demonstrates that their behaviour varies, depending to a large extent on whether they are sourcing fresh or frozen/non-perishable products. In brief, while they appear to continue to prefer a "one-stop" approach for the former, they are increasingly sourcing the latter directly from multiple suppliers. With respect to foreign airlines, the little evidence provided to the Tribunal indicates that they prefer to obtain their Catering and Galley Handling needs together, in a "one-stop shop."

[336] As for in-flight caterers, the evidence suggests that full-service entities prefer to supply Catering and Galley Handling services together. However, they are increasingly prepared to unbundle those services, in part at the behest of domestic airlines, and in part as a competitive response to innovative new, lower-cost, service providers.

Air Canada

[337] According to Mr. Yiu, Air Canada sources a broad range of non-perishable and perishable products (e.g., BOB sandwiches and meal items) directly from third-party suppliers. This includes the frozen meals and bread that it serves to business class passengers on all North American and Caribbean flights, as well as to economy class passengers on international flights. Those meals are sourced from **[CONFIDENTIAL]**, and shipped to airports across Canada. Air Canada also directly sources the meals that it provides to people with dietary restrictions. At YVR and several other airports, these perishable and non-perishable products are loaded onto Air Canada's airplanes for a fee by Gate Gourmet. However, **[CONFIDENTIAL]**.

[338] Mr. Yiu testified that sourcing products directly from third parties, rather than from in-flight catering firms, enables Air Canada to save on its catering costs. In this regard, he confirmed that "[b]y sourcing **[CONFIDENTIAL]**, Air Canada has been able to improve its cost structure and stay competitive with domestic, North American and international airlines who are undertaking the same or similar practices" (Exhibits A-010 and CA-011, Witness Statement of Andrew Yiu ("**Yiu Statement**"), at Exhibit 1, para 27). Among other things, this

[CONFIDENTIAL] has enabled Air Canada and other domestic airlines to substitute high-quality frozen meals for fresh meals, for premium passengers, except on very long-haul international (i.e., overseas) routes.

Jazz

[339] Turning to Jazz, it appears to have sourced a broad range of Catering products directly from a large number of third parties, prior to when it assigned its Catering supply contracts to Air Canada in May 2017. However, at nine airports in Canada, including YVR, it also sourced certain fresh and other products **[CONFIDENTIAL]**. Specifically, pursuant to contracts awarded to Strategic Aviation and Gate Gourmet in 2014, Jazz sourced fresh meals for business class passengers on certain types of aircraft, some perishable BOB items (such as sandwiches), snacks for crew members and certain other products as part of broader arrangements that included the procurement of Galley Handling services.

WestJet

[340] With respect to WestJet, for several years after it launched operations in 1996, it did not provide meals on any of its flights. It simply provided free snacks and non-alcoholic beverages. However, beginning in 2004, it began offering BOB food (e.g., sandwiches, fruit bowls and non-perishable snacks) on flights that were longer than 2.5 hours in duration. At that time, it sourced that food directly, from local delicatessens and other third parties. It did the same for its non-food in-flight commissary products.

[341] For many years, WestJet also self-supplied its Galley Handling requirements at its busiest airports, through its Air Supply division ("**Air Supply**"). However, at airports where it did not make sense for WestJet to invest in Galley Handling equipment and staff, it was more cost-effective for WestJet to obtain its Galley Handling services from in-flight catering firms, such as Gate Gourmet or "whoever was available" (Transcript, Public, October 10, 2018, at p 372).

[342] [CONFIDENTIAL], it conducted a nationwide RFP in 2013. In that RFP, **[CONFIDENTIAL]**. Ultimately, it awarded a national catering contract to Optimum, which does not directly provide Galley Handling services. **[CONFIDENTIAL]**.

[343] As WestJet continued to evolve from a low-cost carrier to an international airline, it added longer routes to its network and wider-body aircraft to its fleet. **[CONFIDENTIAL]**, it began to contract with Gate Gourmet to provide the Galley Handling services that had traditionally been supplied by Air Supply. As at the date of the hearing in this proceeding, WestJet obtained those Galley Handling requirements from Gate Gourmet at its five principal airports (including YVR), while it procured Galley Handling services from other third parties at nine smaller airports in Canada. **[CONFIDENTIAL]**.

[344] The foregoing varied approaches to meet its Galley Handling needs **[CONFIDENTIAL]**. WestJet does not procure any Catering services at approximately **[CONFIDENTIAL]** smaller airports at which it operates.

Air Transat

[345] Air Transat directly sources from manufacturers, distributors and wholesalers its non-perishable food and beverage requirements, disposable products that are used in connection with the provision of in-flight catering, reusable items that need to be cleaned before reuse and duty-free products.

[346] With respect to perishable food, it has now replaced its fresh long-haul meals, including for premium passengers, with frozen meals that are prepared by Fleury Michon in Quebec and shipped to airports across Canada for loading onto its aircraft. However, it continues to source sandwiches, sushi, fruit and certain other fresh food from in-flight caterers at the airports where it operates.

[347] Between 2009 and 2015, for the ten larger airports at which it operates in Canada, Air Transat sourced its local Catering requirements together with Galley Handling services from Gate Gourmet and its predecessor Cara. At another eight airports, Air Transat obtained those Catering and Galley Handling requirements from local firms, but not necessarily from the same supplier.

[348] Subsequent to a competitive bidding process that it conducted in 2015, Air Transat began to source its Catering and Galley Handling needs from Optimum at nine of the ten airports where it had previously sourced those needs from Gate Gourmet Canada. In turn, Optimum sub-contracts Air Transat's Catering and Galley Handling needs to third parties. (In the case of Galley Handling, that third party is primarily Sky Café.) At YVR, it continues to source Catering and Galley Handling services from Gate Gourmet.

Firms supplying Catering and Galley Handling services

[349] As noted above, the Tribunal heard evidence from representatives of five firms that directly or indirectly supply Catering and/or Galley Handling services: Gate Gourmet, Strategic Aviation, Optimum, Newrest and dnata.

[350] According to Mr. Colangelo, Gate Gourmet **[CONFIDENTIAL]**. He believes that most airlines prefer to deal with a single supplier for Catering and Galley Handling services. In his experience, most airlines also conduct a single RFP for those services, although some conduct separate RFPs for Catering and Galley Handling services, respectively. In any event, for airlines that are participating in the trend away from serving fresh food towards serving frozen food, **[CONFIDENTIAL]**, together with other food or non-food products that the airline may have sourced directly. Gate Gourmet also appears to be prepared to supply Galley Handling services alone, without Catering services, as it does so for WestJet and for Air Transat.

[351] With respect to Strategic Aviation, Mr. Brown, its CEO, testified that airlines prefer to have a "one-stop shop," although they are less concerned about whether the Catering and Galley Handling services are actually produced by the entity with which they contract, or are sub-contracted to third parties. **[CONFIDENTIAL]**. He added that this model enables airlines to obtain their Galley Handling and Catering needs at lower cost. **[CONFIDENTIAL]**. Mr. Brown

echoed Mr. Colangelo's evidence that where airlines purchase frozen meals and BOB directly from third-party suppliers, they then simply engage someone to provide Galley Handling services in respect of those items, at the airport.

[352] Optimum is essentially a logistics firm that coordinates the supply of Catering and Galley Handling services through an extended network of third parties with whom Optimum sub-contracts. According to Mr. Lineham, Optimum "simply acts as its customers' point of contact" for Catering and Galley Handling services (Exhibits A-008 and CA-009, Witness Statement of Geoffrey Lineham ("**Lineham Statement**"), at para 10). It does not have **[CONFIDENTIAL]** or equipment. As of the date of the hearing in this proceeding, Optimum serviced **[CONFIDENTIAL]** airline customers in Canada, namely, Air Transat, **[CONFIDENTIAL]**. As noted above, for one of those customers, Air Transat, Optimum contracted to supply Catering and Galley Handling services together at **[CONFIDENTIAL]** airports, **[CONFIDENTIAL]**. For its other customers, the situation in this regard is less clear.

[353] Turning to Newrest, Mr. Stent-Torriani testified that Newrest provides a one-stop supply of Catering and Galley Handling services to its customers approximately 90% of the time. Given that Newrest's customers are primarily foreign airlines, the Tribunal inferred that those carriers tend to purchase Catering and Galley Handling services together. Mr. Stent-Torriani added that when Newrest responds to tenders, it normally offers to supply all of its services together. Although Newrest is prepared to offer just Catering, it is not prepared to offer just Galley Handling services.

[354] Insofar as dnata is concerned, its representative Mr. Padgett testified that the firm **[CONFIDENTIAL]**. The Tribunal understood that for those customers, dnata typically provides a "one-stop shop" for the full range of Catering and Galley Handling services that may be required. Nevertheless, Mr. Padgett stated **[CONFIDENTIAL]** (Transcript, Conf. A, October 2, 2018, at pp 17-18). This may explain why dnata supplies "last-mile logistics" alone to customers "in many cases" (Transcript, Public, October 2, 2018, at p 143). **[CONFIDENTIAL]**. However, he added that it is not common for firms to provide only last-mile logistics services, with no Catering services, at larger airports; although this is more common at small or secondary airports, i.e., airports that have fewer than 5-10 million passengers annually and do not service trans-continental flights.

Summary

[355] Based on the foregoing, the evidence suggests that the behaviour of airlines varies, depending upon whether they are domestic or foreign. Domestic airlines prefer to source, and usually do source, a broad range of food and non-food products directly from various suppliers. These include frozen meals, which are increasingly being substituted for fresh meals, including in business class. Those suppliers then ship those products to various airports, where the airlines then pay a small fee to have them warehoused, assembled onto trays and loaded onto their aircraft by in-flight catering firms or new types of competitors, such as Strategic Aviation. In these circumstances, the airlines are essentially obtaining a Galley Handling service at the airport. This appears to be part of what Dr. Niels characterized as "a trend towards separating catering from the galley-handling function" (Niels Report, at para 2.87). However, for the longer

haul flights (which represent a small proportion of the flights they offer), domestic airlines combine the purchase of fresh meals for their premium customers, and perhaps other items, together with the purchase of Galley Handling services. In other words, for those needs on those flights, domestic airlines prefer a "one-stop shop" approach. That said, the situation appears to be fluid and complex, and is rapidly evolving.

[356] For foreign airlines, which are significantly more numerous than domestic carriers at Canada's gateway airports,[3] including YVR, the evidence provided by Messrs. Padgett and Stent-Torriani suggests that the airlines tend to obtain the full range of their Catering and Galley Handling needs together, from an in-flight caterer. To the extent that Mr. Colangelo may have been referring, at least in part, to foreign carriers when he expressed the belief that most airlines prefer to deal with a single supplier for Catering and Galley Handling services, this would provide further support for the views expressed by Messrs. Padgett and Stent-Torriani.

[357] Considering all of the foregoing, the Tribunal considers that the "one-stop shop" preference of foreign carriers, together with the similar preference of domestic carriers in relation to fresh meals and Galley Handling services on overseas routes, support the view that the relevant market should be defined as being broader than just Galley Handling services. However, the Tribunal does not consider that support to be particularly strong, because domestic carriers, which account for the vast majority of flights in Canada, unbundle their Catering requirements from their Galley Handling requirements for the substantial majority of their flights.

- The views and strategies of airlines and in-flight caterers

[358] The fact that airlines and in-flight caterers appear to generally recognize a distinction between Catering and Galley Handling services is a factor that weighs in favour of treating those services as being in different relevant markets. The Tribunal considers this to be so, even though some industry participants refer to Galley Handling as "last-mile logistics," and even though there seem to be some differences at the margins, between what is viewed as being included in Catering and what is viewed as being included in Galley Handling. At their core, Catering is the preparation of food, and Galley Handling is the provision of the various logistical services related to getting the food and the products associated with its consumption onto an airplane. Regardless of the differences in the specific terminology used and the precise contours of those respective bundles of services, a clear distinction between them appears to be recognized widely within the in-flight catering industry.

[359] A further factor that weighs in favour of treating Catering and Galley Handling services as being in different relevant markets is that they are priced differently. In particular, Catering and Galley Handling services are priced pursuant to different methodologies. For example, **[CONFIDENTIAL]**, prior to transferring its in-flight catering contracts to Air Canada in 2017, **[CONFIDENTIAL]**.

[360] The Tribunal pauses to observe that while Mr. Colangelo testified that most airlines appear to continue to conduct a single RFP for their Catering and Galley Handling needs, he also

[3] For clarity, Air Canada and WestJet account for the overwhelming majority of air traffic in Canada.

noted that some airlines are increasingly conducting separate RFPs for those respective bundles of services. **[CONFIDENTIAL]**. Thus, while the fact that most airlines continue to issue a single RFP in respect of their Catering and Galley Handling service needs weighs in favour of concluding that there is a single market for the supply of those services, this factor will be given reduced weight, in light of **[CONFIDENTIAL]**. In reducing the weight given to this factor, the Tribunal will remain mindful that Jazz ultimately awarded both its Catering and Galley Handling services requirements to the same entity at each of the airports that were the subject of its 2014 RFP.

[361] In addition to the foregoing, the evidence suggests that Catering and Galley Handling services are treated by at least some market participants as separate work streams. In this regard, Mr. Soni of WestJet stated that Galley Handling is a "distinct and separate" stream of work from what WestJet calls "In-flight Services," namely, "the preparation and provision of perishable and non-perishable food and beverages served to guests onboard WestJet's aircraft" (Exhibits A-080 and CA-081, Amended and Supplemental Witness Statement of Simon Soni ("**Soni Statement**"), at para 9). Similarly, Mr. Lineham of Optimum testified that "catering" and "provisioning" are "severable and distinct work streams" (Lineham Statement, at para 12).

[362] In summary, the Tribunal considers that the views and strategies of airlines and in-flight caterers weigh in favour of viewing the supply of Galley Handling services as a distinct relevant market. However, given that most airlines continue to issue single RFPs for their Catering and Galley Handling service needs, combined, and that even the airlines who have issued separate RFPs seem to end up awarding both scopes to the same service provider, this factor merits less weight than would otherwise be the case.

- Physical and technical characteristics

[363] When assessing whether two alleged substitutes ought to be included in the same relevant market, it is appropriate to consider their respective physical and technical characteristics (*TREB CT* at para 130). However, this factor, in and of itself, is not pertinent when considering whether product complements should be included in the same relevant market.

- The production of Galley Handling and Catering services

[364] A factor that is related to the physical and technical characteristics of products is how they are produced. Where two products or groups of complementary products are produced together, that may weigh in favour of a finding that they should be grouped together in the same relevant market. Conversely, where they are produced separately, that may weigh in favour of the opposite finding, particularly if they are produced by different firms.

[365] With respect to Catering and Galley Handling services, the fact that they are produced separately, and sometimes by firms that only produce one or the other of those bundles of services, is a factor that weighs in favour of concluding that they are supplied into different relevant markets.

[366] In brief, in addition to being produced with different equipment and personnel, the food products that are at the heart of Catering are increasingly being directly sourced by airlines from different entities, who then ship those products to airports for warehousing, assembly onto trays and trolleys, and loading onto airplanes by Galley Handling service providers. Indeed, full-service in-flight catering firms such as Gate Gourmet and dnata are prepared to provide, and have in fact provided, this Galley Handling service function for airlines, when airlines source their Catering requirements elsewhere. Strategic Aviation's affiliate Sky Café also bid to provide Galley Handling services alone, and to sub-contract Jazz's Catering needs to **[CONFIDENTIAL]**. Conversely, some firms are prepared to provide Catering services alone, without Galley Handling services. For example, **[CONFIDENTIAL]**. The Tribunal understands that other airlines have explored sourcing Catering services from independent caterers and restaurants located outside YVR. **[CONFIDENTIAL]**.

- Price relationships and relative prices

[367] Additional factors that are typically considered when assessing whether products should be included in the same relevant market are their price relationships and their relative price levels (*TREB CT* at para 130). In determining whether two or more product complements should be included in the same relevant market, further factors that are relevant to consider are whether the products are sold together, and if so, at a bundled price.

[368] With respect to price relationships, no persuasive evidence was provided to the Tribunal regarding the relationship between the prices of Galley Handling services and Catering services over time.

[369] However, there is evidence to suggest that when airlines are comparing responses to their RFPs, they are more concerned with the aggregate price they would pay for Catering and Galley Handling services combined, than with the prices they would pay for each of those two bundles of services, separately. **[CONFIDENTIAL]**.

[370] This evidence weighs in favour of concluding that there is a single relevant market for the bundle of Galley Handling and Catering services that were the subject of Air Transat's and Jazz's RFPs.

[371] Notwithstanding the foregoing, other evidence provided by Dr. Niels, pertaining to Jazz's savings at the airports where it switched providers, weighs in favour of concluding that there is a separate relevant market for Galley Handling services. In particular, in the course of analyzing Jazz's **[CONFIDENTIAL]**, he found that in the year after the switch occurred, Jazz saved approximately $**[CONFIDENTIAL]**, and that "[t]his saving is largely attributable to **[CONFIDENTIAL]**" (Niels Report, at para 1.42).

[372] Turning to relative prices, the Tribunal observes that this factor typically is more relevant to an assessment of two alleged product substitutes than it is to an assessment of two alleged product complements. For example, if it were claimed that all cars or all pens were part of a single market, the fact that the prices of luxury cars far exceed the prices of economy cars, or the fact that the prices of premium pens far exceed the price of a discount disposable pen, would

suggest that the far more expensive products are not in the same market as the economy/discount products. For product complements, the situation is less straightforward, as it may be common to purchase one or more relatively inexpensive ancillary products when purchasing an expensive complement. For example, it may be common to purchase a garage door opener when buying a new garage door. The large difference in their relative prices is not necessarily a factor that weighs in favour of a conclusion that there they are sold in different markets. If the bundled price is significantly less than the sum of their separate prices, they may well be considered to be sold in the same relevant market.

[373] In this proceeding, there was no persuasive evidence to establish that Galley Handling services are priced lower when they are sold together with Catering, than when they are purchased separately, for loading at a particular airport. The sole exception is when firms bid on multi-airport RFPs. In those cases, it appears that it is common practice to bid a lower price for Galley Handling and/or Catering services than if those services were supplied at fewer airports. Without more, that evidence is not particularly relevant to the issue of whether there is a separate relevant market for Galley Handling services, or a broader relevant market for Galley Handling and Catering services, combined.

[374] In summary, the evidence pertaining to price relationships weighs in favour of a conclusion that Galley Handling services are supplied in a broader market that includes at least some Catering services. However, the evidence that Jazz's savings from switching to Strategic Aviation were **[CONFIDENTIAL]** weighs in favour of a conclusion that Galley Handling services are supplied in a distinct relevant market. On balance, the Tribunal considers that all of this pricing evidence combined weighs in favour of the former conclusion.

- Fixed or variable proportions

[375] When considering whether two product complements, or bundles of product complements, should be grouped in the same relevant market, a final factor that is relevant to consider is whether they are used in fixed or variable proportions.

[376] In this case, the evidence demonstrates that airlines can and do source their needs for Galley Handling and Catering services, respectively, in variable proportions. In brief, airlines can and do source variable proportions of Catering services, when they consider that it is in their interest to do so. As discussed in greater detail at paragraphs 338-349 above, this is demonstrated by the behaviour of each of the domestic airlines. This weighs in favour of a conclusion that Galley Handling and Catering services, respectively, are supplied in different relevant markets.

(iii) Conclusion on the Galley Handling Market

[377] As is readily apparent from the foregoing, the various practical indicia that are relevant to the assessment of the product dimension of the relevant market do not all weigh in favour of a particular conclusion. Rather, they point to a conclusion that is very much in the "gray zone."

[378] The factors that weigh in favour of a conclusion that the market in which Galley Handling services are supplied comprises at least some Catering services (i.e., those that tend to be purchased together with Galley Handling services) include the following:

- Foreign airlines continue to purchase Galley Handling and Catering services together, on a "one-stop shop" basis, and pursuant to a single RFP, while domestic airlines also continue to buy at least some (i.e., premium) Catering services on the same basis, even where they are aware that the winning bidder may be planning to sub-contract the supply of Galley Handling services (and even the Catering services in question), to one or more third parties; and

- Airlines appear to be more concerned with the aggregate price they would pay for Catering and Galley Handling services combined, than with the prices they would pay for each of those two bundles of services, separately.

[379] However, the considerations that weigh in favour of a conclusion that there is a distinct relevant market for the supply of Galley Handling services include the following:

- The "smallest market" principle that is part of the hypothetical monopolist approach to market definition;

- The trend towards airlines purchasing an increasingly broad range of Catering products, including frozen meals, separately from their purchase of Galley Handling services;

- The willingness of in-flight catering firms to unbundle the supply of Catering and Galley Handling services, and to simply charge a small fee to warehouse, assemble and load onto airplanes Catering products that are sourced from third parties by airlines;

- The clear distinction that is widely made in the industry between Galley Handling and Catering services, notwithstanding differences in the specific terminology used and in the precise contours of those respective bundles of services;

- Airlines are increasingly conducting separate RFPs for Galley Handling and Catering services, respectively;

- Galley Handling and Catering services are treated by at least some market participants as separate work streams;

- Galley Handling and Catering services are produced and priced differently;

- Firms that bid to supply both Galley Handling and Catering services can and sometimes do choose to load certain costs, presumably common costs, into the prices they bid for

one of those bundles of services, versus the other. The evidence suggests that they are primarily loading the costs in Galley Handling, where the airlines have less choice;

- In the year following its switch to Strategic Aviation at eight airports, Jazz's alleged savings were **[CONFIDENTIAL]**. (Although the Tribunal does not consider the extent of these savings to have been demonstrated on a balance of probabilities, **[CONFIDENTIAL]** provides some support for the proposition that the latter services are distinct from Catering services;

- Galley Handling and Catering services are supplied in variable, rather than fixed, proportions, at least for domestic carriers in Canada, who account for the vast majority of airline traffic in this country.

[380] Considering all of the foregoing, and based on the evidence on the record in this proceeding, the Tribunal concludes that the Commissioner has established, on a balance of probabilities, that there is a distinct relevant market for the supply of Galley Handling services. Although this conclusion is not free from doubt, the Tribunal considers it to have been demonstrated to be more likely than not.

(3) The geographic dimension

(a) The parties' positions

[381] The Commissioner maintains that the geographic dimension of both the Airside Access Market and the Galley Handling Market is limited to YVR. VAA disagrees, although its position on this issue is not entirely clear.

[382] With respect to the geographic scope of the Airside Access Market, neither VAA nor Dr. Reitman took a specific position. However, in its Amended Response, VAA maintained that it is constrained in its ability to dictate the terms upon which it sells or supplies access to the airside for the supply of Galley Handling services at YVR. It stated that this constraint is provided by VAA's need to remain competitive with other airports, in attracting airlines. Dr. Niels characterized this constraint as being provided by an upstream "airports market," in which airports compete for the business of passengers and airlines. VAA did not subsequently pursue this "airports market" theory to any material degree during the hearing or in its final submissions. This may have been because its expert, Dr. Reitman, did not consider it necessary to assess the Airside Access Market or to address VAA's alleged upstream "airports market," other than to suggest that Dr. Niels had measured the wrong thing, and therefore had reached the wrong conclusion in his analysis. Dr. Reitman added that as a matter of economics, if the Commissioner's theory is that the purpose behind VAA's actions was to increase the revenues collected from the Concession Fees and rents charged to Galley Handling providers, then "competition between airports for airline service cannot constrain VAA's behaviour in the flight catering market" (Reitman Report, at para 63). He explained that this is because VAA could extract revenue from in-flight caterers while simultaneously reducing other fees paid by airlines, such that airlines would be no worse off and airport competition would be unaffected.

[383] Given the foregoing, and in the absence of any material evidence to suggest that any influences provided by other airports would be sufficient to constrain VAA from materially increasing the level of the Concession Fees it charges to its in-flight caterers, the Tribunal considers it unnecessary to further address VAA's alleged "airports market" in this decision.

[384] The Tribunal pauses to add for the record that Dr. Niels concluded that "competition from other airports for Pacific Rim traffic does not pose a significant constraint at YVR, because the size of the contestable market is small," and that YVR also "does not face a significant level of competition for [origin and destination] passengers from other airports" (Niels Report, at paras 2.38, 2.60).

[385] Turning to the Galley Handling Market, VAA stated in its Amended Response that YVR "is the relevant geographic market for the provision of Catering to airlines using the Airport," and that "[t]he relevant geographic market for Galley Handling is broader than" YVR, because airlines can and do (i) engage in what is known as Double Catering, and (ii) Self-supply of Galley Handling services (VAA's Concise Statement of Economic Theory, at para 4). In this connection, it appears that the term "Catering" may have been intended to connote what Dr. Reitman defined as being Premium Flight Catering, and that the term "Galley Handling" may have been intended to connote what he defined to be Standard Flight Catering.

[386] In its final written submissions, VAA took the position that if "Catering" and "Galley Handling" are considered to be supplied into distinct relevant markets, YVR is not a market for Standard Flight Catering, due to the opportunities for airlines to Self-supply and to double cater at other airports. It did not take an explicit position on the geographic scope of Dr. Reitman's "Premium Flight Catering" market. However, Dr. Reitman conceded in his report that the geographic dimension of that "market" is limited to YVR.

(b) The Airside Access Market

[387] In the absence of any geographic substitutes for the provision of airside access to aircraft on the apron at YVR, the Tribunal is satisfied that the geographic extent of the Airside Access Market at YVR is limited to YVR. By definition, airside access at YVR can only be given at YVR.

(c) The Galley Handling Market

[388] The Commissioner maintains that there are no acceptable substitutes for the purchase of Galley Handling services at YVR. With specific regard to Double Catering and Self-supply, the Commissioner asserts that they are not feasible or preferable substitutes for Galley Handling for the vast majority of airlines, including for logistical and financial reasons. In his closing argument, the Commissioner added that airlines are already "pushing the limits" as far as they can in availing themselves of these options, such that there would not be a significant amount of additional substitution to these alternatives in response to a SSNIP. For the reasons set forth below, the Tribunal agrees.

(i) Double Catering

[389] The representatives of airlines who testified in this proceeding all stated that Double Catering is not possible for certain types of flights and that there are logistical difficulties associated with increasing the use of Double Catering on other types of flights.

[390] According to Mr. Yiu, Air Canada already attempts to optimize the use of Double Catering. This is because **[CONFIDENTIAL]**, when it is able to double cater. In addition, Double Catering reduces risks for damage to an aircraft, due to the reduced number of times that Galley Handling firms approach the aircraft. Moreover, Double Catering can provide time savings by reducing ground time at the second airport, and can reduce the risk of a delayed departure at that airport.

[391] Together with Air Canada Rouge, Air Canada double caters approximately **[CONFIDENTIAL]**% of its flights departing from the **[CONFIDENTIAL]** airports where it procures in-flight catering from Gate Gourmet. (**[CONFIDENTIAL]**) This percentage is not higher because Double Catering is not possible or can present challenges in a range of situations. For example, to abide by the Public Health Agency of Canada's *Guidelines for Time and Temperature Requirements for Ready-to-Eat, Potentially Hazardous Foods*, Air Canada is not able to double cater on most international flights, or on certain domestic and U.S. trans-border flights where fresh and/or frozen foods would be onboard an aircraft for more than 12 hours total (air and ground time), and/or where the ground time is greater than three hours. In addition, if a double-catered flight is rerouted, swapped or changed to another aircraft due to a mechanical issue, certain fresh and/or frozen food items could be spoiled and Air Canada would require *ad hoc* re-servicing to the aircraft before the flight departs. Similarly, if a flight is significantly delayed, some of the food, beverages and supplies would need to be re-catered.

[392] Air Canada is further restricted in its ability to double cater by the amount of galley space available onboard an aircraft, which in most cases is already maximized on single-catered international flights.

[393] With respect to YVR, Air Canada has to originate in-flight catering at that Airport **[CONFIDENTIAL]**. Flights passing through/departing from YVR, for which Double Catering is not an option include: **[CONFIDENTIAL]**.

[394] **[CONFIDENTIAL]**. In addition, given Jazz's route structure, it "would present significant logistical complexity and burden Jazz with substantial additional costs" for Jazz to double cater into YVR from one of the nine larger airports that were the subject of the Jazz 2014 RFP (Exhibits A-004 and CA-005, Witness Statement of Rhonda Bishop ("**Bishop Statement**"), at para 26).

[395] Insofar as WestJet is concerned, Mr. Soni stated that WestJet double caters "where possible," including on flights from YVR to the south, where it may be difficult to obtain requirements to match its onboard menus (Soni Statement, at para 26). However, despite the advantages offered by Double Catering, **[CONFIDENTIAL]**, including where there are space or weight constraints on the aircraft and where it may be challenging to maintain appropriate food

safety temperatures or to ensure that fresh products remain fit for consumption. In addition, **[CONFIDENTIAL]**.

[396] With respect to Air Transat, Ms. Stewart stated that Catering is not available at four of the 22 airports from which it flies in Canada and that for flights departing from the other 18, Catering must be loaded at those locations for a number of reasons. First, most flights departing from those locations are parked overnight. Second, the airplanes then generally travel on a point-to-point route to a foreign destination, and Air Transat does not procure in-flight catering at its foreign destinations (other than ice, milk and dairy products). Third, it is more cost effective for Air Transat to procure in-flight catering in Canada, at its hub airports, than at foreign destinations. Fourth, loading in Canada reduces Air Transat's ground time at its foreign destinations, thereby allowing it to maximize its flying and aircraft utilization, while respecting noise abatement requirements at its major airports. In this latter regard, Ms. Stewart added that Air Transat tries to plan for all of its downtime to occur in Canada, where it has its own technical support staff. Finally, Air Transat often changes the aircraft it was planning to use, such that if Catering is already loaded, Air Transat would incur additional costs to switch the food from that aircraft to another aircraft. Concerning YVR in particular, Ms. Stewart added that Double Catering into that Airport "is not feasible" (Exhibits A-035 and CA-036, Witness Statement of Barbara Stewart ("**Stewart Statement**"), at para 20).

[397] In addition to these airline representatives, a number of other witnesses addressed Double Catering. In particular, Mr. Richmond from VAA stated **[CONFIDENTIAL]** (Exhibits R-108 and CR-109, Witness Statement of Craig Richmond ("**Richmond Statement**"), at paras 73-74). In this regard, it appears that he may have been using the term "Double Catering" to mean "Self-supply." With respect to **[CONFIDENTIAL]**, Mr. Gugliotta of VAA explained that those airlines double cater in **[CONFIDENTIAL]** so that they do not need catering services at YVR. The Tribunal observes that **[CONFIDENTIAL]** are small airlines representing a marginal portion of total flights departing from YVR and of total passengers at the Airport.

[398] More generally, Mr. Colangelo of Gate Gourmet stated that "[a]irlines do not typically [Double Cater] transcontinental or international flights" and the flights for which Gate Gourmet Canada provides Double Catering service "typically originate from **[CONFIDENTIAL]**" (Exhibits A-039, CA-040 and CA-041, Witness Statement of Ken Colangelo ("**Colangelo Statement**"), at paras 40, 42). He added that Gate Gourmet also double caters flights departing from YVR to **[CONFIDENTIAL]** destinations. In terms of numbers, he stated that out of a total of approximately **[CONFIDENTIAL]** flights per day out of YVR, Gate Gourmet has roughly **[CONFIDENTIAL]** "must cater" flights and approximately **[CONFIDENTIAL]** flights that it double caters on the way into that Airport. In addition, a number of other flights into YVR are double catered by other in-flight caterers. On cross-examination by counsel for VAA, Mr. Colangelo conceded that airlines will endeavour to double cater wherever they can. **[CONFIDENTIAL]**.

[399] In addition to the foregoing, Mr. Padgett of dnata testified that he typically sees Double Catering on short-to-medium haul flights of about four hours and below, although he added that Double Catering is possible for longer flights. Mr. Padgett's observations are consistent with Dr. Niels' assessment of Double Catering at YVR. Dr. Niels found that "double catering is really only feasible on flight durations of less than 200 minutes" and that "the vast majority of flights

(excluding WestJet) that run for more than 200 minutes are catered from YVR, indicating that double catering may not be feasible for such longer flights" [emphasis added] (Niels Report, at para 2.82). More specifically, he found that "for flight durations of over 400 minutes on all airlines, only a small proportion of flights departing from YVR (around 15%) are not catered at YVR, indicating that catering at YVR is necessary for a large proportion of these longer flights" [emphasis added] (Niels Report, at para 2.81). For flight durations of less than 200 minutes, he found that Double Catering is used on approximately 47% of flights, many of which are between YVR and smaller airports in British Columbia.

[400] Having regard to these results and to some of the considerations that have been identified by the airlines, including the fact that "airlines try to double cater whenever they can," Dr. Niels concluded that the existing extent of Double Catering at YVR "is probably a fair reflection of the maximum double catering that can be done in the market" (Transcript, Conf. B, October 16, 2018, at p 576). Put differently, he opined that there is a low likelihood of airlines expanding their use of Double Catering to constrain the exercise of market power by in-flight caterers at YVR.

[401] In response to questioning from the panel, Dr. Reitman agreed. Specifically, he was asked how much more airlines would likely increase their use of Double Catering in response to a SSNIP at YVR, if they are already Double Catering as much as they can right now. Dr. Reitman replied: "So I agree that if all the airlines are doing it as much as they can right now, then that probably doesn't move the needle very much" (Transcript, Conf. A, October 17, 2018, at p 391). He added that if some airlines are not currently maximizing their use of Double Catering, they could possibly do more.

[402] Finally, Dr. Tretheway stated that Double Catering is "strongly not preferred by airlines" for long-haul flights and that for continental flights, "the general preference is for origin station catering" (Exhibits R-133 and CR-134, Supplementary Expert Report of Dr. Michael W. Tretheway, at paras 2.1.7-2.1.9).

[403] Having regard to all of the foregoing, the Tribunal concludes that: (i) airlines have a strong incentive to maximize their use of Double Catering; (ii) they are already likely doing so; and (iii) they are not likely to increase their use of Double Catering on flights into YVR to a degree that would constrain a potential SSNIP in the supply of Galley Handling services at that Airport. Indeed, if the base price in respect of which such SSNIP were postulated was significantly (e.g., 5-10%) lower than prevailing prices, as one would expect if competition has already been substantially prevented (as alleged by the Commissioner), the prevailing level of Double Catering would already reflect the responses of airlines to that SSNIP.

[404] In any event, given these conclusions, the Tribunal finds that the potential for Double Catering to be increased on in-bound flights to YVR is not such as to warrant a conclusion that the geographic dimension of the market for the supply of Galley Handling services extends beyond YVR.

(ii) Self-supply

[405] Given that Self-supply is a form of countervailing power, the Tribunal considers that it would be more logical to address Self-supply in the post market definition stage of the analysis. However, because Self-supply was raised by VAA in response to the Commissioner's assertion that there is a relevant market for Galley Handling services at YVR, it will be addressed in this section of the Tribunal's reasons.

[406] The Commissioner submits that Self-supply is not a feasible or preferable substitute for Galley Handling services for most airlines, including for logistical and financial reasons. More specifically, he argues that the potential for airlines to Self-supply does not pose a sufficient constraint on providers of Galley Handling services at YVR to render unprofitable a SSNIP in respect of those services.

[407] In response, VAA maintains that the ability of airlines to Self-supply effectively limits the ability of existing in-flight caterers at YVR to impose a SSNIP in respect of what it defines to be Catering and Galley Handling services. In this regard, VAA observes that airlines are free to Self-supply at YVR without the need to obtain specific permission to do so from VAA. To the extent that they may require services such as warehousing, inventory management and trolley-loading, they can retain a third party located outside the Airport who does not require access to the airside. Dr. Reitman added that the fact that WestJet and other airlines, **[CONFIDENTIAL]**, have self-supplied **[CONFIDENTIAL]** their Galley Handling needs at YVR suggests "that self-supply would be a credible threat to constrain a price increase for standard flight catering products" (Reitman Report, at paras 55-57). However, he conceded that Self-supply is less likely to be a feasible option in relation to what he defined to be Premium Flight Catering, which includes the Galley Handling services that are required in respect of those Premium Flight catered foods.

[408] Having regard to the evidence discussed below, the Tribunal concludes that airlines operating out of YVR would not likely turn to the option of Self-supply in response to a SSNIP, at least not to a degree that would render an attempted SSNIP unprofitable.

[409] With respect to WestJet, the Tribunal discussed at paragraphs 340-344 above the fact that it previously self-supplied Galley Handling services at various airports, including YVR, through its Air Supply division. As the Tribunal noted, WestJet shut down that division and began sourcing its Galley Handling requirements from Gate Gourmet, **[CONFIDENTIAL]**. Mr. Mood testified that Air Supply neither had the expertise nor the scalability to meet WestJet's evolving needs, **[CONFIDENTIAL]** (Transcript, Conf. B, October 10, 2018, at p 449). He added that because the shut-down of the Air Supply was the first time in WestJet's history it had closed down a part of its operations, this decision was "a big thing for WestJet" (Transcript, Conf. B, October 10, 2018, at p 450). Given the foregoing, the Tribunal considers that WestJet would not likely return to self-supplying its Galley Handling requirements at YVR in response to a 5-10% price increase in its Galley Handling services.

[410] Turning to Air Canada, Mr. Yiu stated that although Air Canada self-supplied its in-flight catering needs prior to the mid-1980s, "**[CONFIDENTIAL]**" (Yiu Statement, at para 48). He explained that Air Canada **[CONFIDENTIAL]**. In this regard, he observed:

"**[CONFIDENTIAL]**" (Yiu Statement, at paras 48-49). In testimony, Mr. Yiu added that Air Canada **[CONFIDENTIAL]**. Considering all of the foregoing, the Tribunal considers that Air Canada would not likely return to self-supplying its Galley Handling requirements at YVR in response to a 5-10% price increase it its Galley Handling services.

[411] Regarding Air Transat, Ms. Stewart stated that the option of self-supplying in-flight catering services at YVR is "not feasible." She explained that in addition to not having the required expertise, it would "simply be cost-prohibitive" for Air Transat to pursue this option (Stewart Statement, at para 20(b)).

[412] Insofar as Jazz is concerned, during its 2014 RFP process, **[CONFIDENTIAL]** (Exhibit CR-007, Email from **[CONFIDENTIAL]** dated May 29, 2014, at p 3). **[CONFIDENTIAL]**, Jazz ultimately decided to remain with Gate Gourmet at that Airport. In her witness statement, Ms. Bishop explained Jazz's decision as follows (Bishop Statement, at para 46):

> It is important to note that Jazz could not "self-supply" its In-flight Catering requirements at YVR, as an alternative to paying the high prices of Gate Gourmet. Jazz's **[CONFIDENTIAL]**. Further, Jazz would have incurred substantial up-front capital costs (e.g., equipment, etc.) to set up an In-flight Catering operation at YVR. Overall, the cost to Jazz of self-supplying In-flight Catering would have **[CONFIDENTIAL]**.

[413] Although the foregoing explanation covers both Catering and Galley Handling, the Tribunal is satisfied that Jazz considered the costs and other considerations associated with self-supplying its Galley Handling requirements at YVR, and decided that they were such that Jazz's best option was to remain with Gate Gourmet. The Tribunal is satisfied that Jazz would not likely Self-supply its Galley Handling requirements in response to a further 5-10% increase in the price of its Galley Handling requirements at YVR.

[414] In addition to the above-mentioned evidence provided on behalf of WestJet, Air Canada, Air Transat and Jazz, Mr. Stent-Torriani stated in cross-examination that although there are some airlines in the world that provide some forms of Galley Handling services themselves, "they're really the exception" (Transcript, Public, October 4, 2018, at p 235). In the same vein, Mr. Colangelo stated that while Gate Gourmet is aware that a number of airlines previously self-supplied many of their in-flight catering needs, they "have since transitioned away from this line of business and contracted with caterers and/or last mile provisioning companies, or with specialized firms like Gate Gourmet Canada that can provide both services" (Colangelo Statement, at para 44). The Tribunal considers that this evidence of Mr. Stent-Torriani and Mr. Colangelo generally supports its view that airlines are unlikely to resort to self-supplying their Galley Handling requirements at YVR, in response to a SSNIP in the cost of those requirements there. In any event, that evidence does not support VAA's position on this point.

[415] The Tribunal's finding on this issue is also broadly supported by Dr. Niels, who testified that "[a]irlines cannot really avoid having or making use of the services of caterers and galley handlers who have access to the airsides of the airport." He added that his analysis of this issue is consistent with his "understanding of what the witnesses have said about [the] feasibility of

double catering and self-supply, in particular the airline witnesses" (Transcript, Conf. B, October 15, 2018, at pp 418-419).

[416] Although Dr. Reitman took the position that airlines would likely choose to Self-supply some Standard Catering Products in response to a SSNIP, he based this view primarily on the fact that airlines have chosen to Self-supply at YVR in recent years. However, based on the evidence provided by those airlines, and discussed above, the Tribunal is not persuaded by Dr. Reitman's position on this issue.

[417] In summary, in light of the evidence provided on behalf of WestJet, Air Canada, Air Transat and Jazz, as well as the evidence provided by Mr. Stent-Torriani, Mr. Colangelo and Dr. Niels, the Tribunal concludes that airlines would not likely begin to Self-supply their Galley Handling requirements at YVR, in response to a SSNIP in the prices they pay for those services there.

(iii) Conclusion on the Galley Handling Market

[418] Given the conclusions that the Tribunal has made in respect of Double Catering and Self-supply, the Tribunal concludes that the geographic dimension of the Galley Handling Market is limited to YVR.

(4) Conclusion

[419] For all the foregoing reasons, the Tribunal concludes that the relevant market for the purpose of this proceeding is the supply of Galley Handling services at YVR ("**Relevant Market**").

C. Does VAA substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act?

[420] The Tribunal now turns to the first substantive element of section 79, namely, whether VAA substantially or completely controls a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act. For the reasons set forth below, the Tribunal finds, on a balance of probabilities, that VAA substantially or completely controls both the Airside Access Market and the Galley Handling Market at YVR.

[421] Given this conclusion, and as noted at paragraphs 313-319 of Section VII.B dealing with the relevant markets, nothing turns on whether there is a distinct market for airside access at YVR. In brief, the Tribunal's finding that VAA controls the Galley Handling Market, by virtue of its control over a critical input to that market (airside access), is sufficient to meet the requirements of paragraph 79(1)(*a*) of the Act.

(1) Analytical framework

[422] The analytical framework for the Tribunal's assessment of paragraph 79(1)(*a*) was extensively addressed in *TREB CT*, at paragraphs 162-213. It does not need to be repeated here. For the present purposes, it will suffice to simply highlight the following.

[423] Paragraph 79(1)(*a*) requires the Tribunal to find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. The Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions, respectively, of the relevant market in which the respondent is alleged to have "substantial or complete control" (*TREB CT* at para 164). The Tribunal has also consistently interpreted the words "substantially or completely control" to be synonymous with market power (*TREB CT* at para 165). In *TREB CT* at paragraph 173, it clarified that paragraph 79(1)(*a*) contemplates a substantial degree of market power.

[424] The words used in paragraph 79(1)(*a*) are sufficiently broad to bring within their purview a firm that does not compete in the market that it allegedly substantially or completely controls. This includes a not-for-profit entity (*TREB CT* at paras 179, 187-188; *Commissioner of Competition v Toronto Real Estate Board*, 2014 FCA 29 ("***TREB FCA 2014***") at paras 14, 18). It also includes a firm that controls a significant input for firms competing in the relevant market (*TREB FCA 2014* at para 13).

[425] The power to exclude can be an important manifestation of market power. This is because "it is often the exercise of the power to exclude that facilitates a dominant firm's ability to profitably influence the dimensions of competition" that are of central importance under the Act. These dimensions include the ability to directly or indirectly influence price, quality, variety, service, advertising and innovation (*TREB CT* at paras 175-176).

[426] To the extent that a firm situated upstream or downstream from a relevant market has the ability to insulate firms competing in that market from additional sources of price or non-price dimensions of competition, it may be found to have the substantial degree of market power contemplated by paragraph 79(1)(*a*) of the Act (*TREB CT* at paras 188-189).

(2) The parties' positions

(a) The Commissioner

[427] The Commissioner submits that VAA substantially controls both the Airside Access Market and the Galley Handling Market at YVR.

[428] With respect to the Airside Access Market, the Commissioner maintains that VAA is a monopolist, as it is the only entity from which a firm seeking to supply Galley Handling services, or more broadly in-flight catering services, may obtain approval to access the airside at YVR. The Commissioner further asserts that barriers to entry and expansion in the Airside Access Market are absolute, because no entity other than VAA may sell or otherwise supply access to

the airside at YVR. Entry of an alternative source of supply of access to the airside at YVR simply is not possible. Moreover, the Commissioner submits that VAA is generally able to dictate the terms upon which it sells or supplies access to the airside at YVR.

[429] Having regard to the foregoing, the Commissioner advances the position that VAA has a substantial degree of market power in the Airside Access Market.

[430] Given VAA's control of a critical input into the Galley Handling Market, namely, airside access, and its corresponding ability to exclude new entrants into the Galley Handling Market, the Commissioner further argues that VAA controls the Galley Handling Market as well as the broader product bundle of Galley Handling and Catering services combined. Put differently, the Commissioner submits that VAA controls the Galley Handling Market because it not only controls the terms upon which in-flight caterers can obtain authorization to access the airside at YVR, but also because it has the power to decide whether they can carry on business in the Galley Handling Market at all.

(b) VAA

[431] VAA denies that it substantially or completely controls either the Airside Access Market or the Galley Handling Market.

[432] Regarding the Airside Access Market, VAA maintains that it is not able to dictate the terms upon which it sells or supplies access to the airside at YVR, primarily because airlines are free to wholly or partially Self-supply and/or can resort to Double Catering. VAA also asserts that it is constrained, by competition with other airports, in its ability to set the terms upon which it sells or supplies access to the airside at YVR for the supply of Galley Handling services.

[433] Turning to the Galley Handling Market, once again, VAA encourages the Tribunal to reject the Commissioner's position on the basis that airlines can wholly or partially Self-supply and/or resort to Double Catering. In addition, it relies on the fact that it does not provide any Galley Handling services or own any interest in, or represent, any provider of Galley Handling services.

[434] Notwithstanding the foregoing, in its closing submissions, VAA clarified that "[f]or the purposes of argument," it assumed that it controls the provision of the specific services of loading and unloading Catering products. In making this concession, it acknowledged that without VAA's authorization, a firm other than an airline cannot access the airside to provide these services. However, it maintained that the Commissioner's definition of Galley Handling services includes a wide range of services that do not require access to the airside. In this regard, it stated that "none of warehousing, inventory management, assembly of meal trays and aircraft trolley carts, equipment cleaning, and handheld point-of-sale device management require access to the airport airside or any other authorization by VAA" (VAA's Closing Submissions, at para 33). Therefore, it asserted that VAA cannot be said to control the market for those services.

(3) Assessment

(a) The Airside Access Market

[435] For the following reasons, the Tribunal concludes that VAA controls or substantially controls the Airside Access Market, due to its control over who can access the airside at YVR.

[436] VAA does not dispute that absent its authorization, a firm other than an airline cannot access the airside at YVR to load and unload Catering products. Indeed, at paragraph 69 of his report, Dr. Reitman explicitly recognized that "VAA controls airside access at YVR," although he later clarified that he simply made this assumption. Dr. Niels also concluded that VAA controls the Airside Access Market.

[437] VAA does not allege that there are any possible substitutes for VAA's authorization for airside access at YVR. However, it maintains that it does not control airside access because airlines can wholly or partially Self-supply Galley Handling services, or resort to Double Catering.

[438] For the reasons set forth at paragraphs 388-417 of Section VII.B above, the Tribunal has determined that the potential for airlines to wholly or partially Self-supply, or to make increasing use of Double Catering, does not exercise a material constraining influence on the prices of Galley Handling services at YVR. For the same reasons, the Tribunal has also determined that those alleged alternatives do not constrain the terms upon which VAA supplies airside access, including the Concession Fees that it charges for such access.

[439] Regarding VAA's assertion that it is constrained by the fact that it must compete with other airports to attract airlines to YVR, this position was advanced in VAA's Amended Response. However, as noted earlier, VAA did not subsequently pursue this theory to any material degree during the hearing or in its final submissions. As the Tribunal also observed, Dr. Reitman did not consider it necessary to address this theory, other than to suggest that Dr. Niels had measured the wrong thing, and therefore had reached the wrong conclusion, in addressing this aspect of VAA's position. In this latter regard, Dr. Niels concluded that "competition from other airports for Pacific Rim transfer traffic does not pose a significant constraint on YVR, because the size of the contestable market is small," and that YVR also "does not face a significant level of competition for [origin and destination] passengers from other airports" (Niels Report, at paras 2.38, 2.60).

[440] In support of its assertion regarding competition from other airports, VAA stated that the constraining influence that they exert upon it is demonstrated by the fact that it "chose not to raise the rates of the [Concession Fees] it charges to Gate Gourmet and CLS for more than a 10-year period […]" [emphasis added] (VAA's Amended Response, at para 68). However, VAA did not submit that it was unable to raise its Concession Fees without risking the loss of any particular airlines, or airline routes. Indeed, its assertion amounted to nothing more than just that – a bald assertion, without evidentiary support to demonstrate what actual or potential business it might lose, in response to any attempted increase in its Concession Fees. In the absence of such evidence, the Tribunal is unable to agree with VAA's position that other airports provide a

sufficient constraining influence on VAA to warrant a finding that VAA does not substantially control the Airside Access Market at YVR.

[441] Indeed, the Tribunal considers that the link VAA makes between the level of its Concession Fees and competition from other airports is inconsistent with evidence provided by Messrs. Richmond and Gugliotta.

[442] In particular, Mr. Richmond stated that "VAA has routinely foregone opportunities to increase its revenues – by as much as $150 million annually – because VAA's management and Board concluded that doing so was in the best interests of YVR and the communities it serves" [emphasis added] (Richmond Statement, at para 26). With respect to its Concession Fees, he added the following (Richmond Statement, at para 80):

> The current Concession Fee for both Gate Gourmet and CLS is set at **[CONFIDENTIAL]**% of gross revenues. Prior to 2006, the Concession Fee was set at **[CONFIDENTIAL]**%. It was raised to **[CONFIDENTIAL]**% following a comprehensive review of YVR's concession fees, which found that the rate charged at YVR was below the low-end of the market. The current rate of **[CONFIDENTIAL]**% is the same or lower than the fees charged at other major airports in Canada and the United States. For example, Edmonton and Portland set their concession fees at **[CONFIDENTIAL]**%, while Toronto, Calgary and Montreal all set their concession fees at **[CONFIDENTIAL]**%.

[443] Mr. Gugliotta provided a more in-depth history of the Concession Fees charged at YVR by VAA and its predecessor, Transport Canada. In so doing, he explained why VAA refrained from raising the level of those fees from **[CONFIDENTIAL]** for a period of time, when "in-flight caterers at other airports were often paying […] around **[CONFIDENTIAL]** of gross revenues" and others "were paying concession fees between **[CONFIDENTIAL]**" (Exhibits R-159, CR-160 and CA-161, Witness Statement of Tony Gugliotta ("**Gugliotta Statement**"), at para 67). The principal reason appears to have been concerns "about the viability of CLS and Cara" (Gate Gourmet Canada's predecessor) (Gugliotta Statement, at para 72). After deciding to "bring [its Concession Fees] in line with the minimum fee being charged at all other major Canadian airports," it ultimately negotiated a phased-in approach, pursuant to which its Concession Fees were **[CONFIDENTIAL]** (Gugliotta Statement, at para 74). Nowhere in his explanation did Mr. Gugliotta make any reference to a concern about losing any actual or potential business to another airport, should VAA raise the level of its Concession Fees more rapidly, or to a greater degree.

[444] The foregoing evidence from Messrs. Richmond and Gugliotta makes it readily apparent that VAA benevolently refrained for a period of time from raising the level of its Concession Fees, rather than having been constrained to do so by competition from other airports. Mr. Richmond's evidence further suggests that the existing level of the Concession Fees is not primarily attributable to the constraining influence of competition from other airports. Instead, the Tribunal finds that it is primarily attributable to VAA's pursuit of what it perceives to be the best interests of YVR and the communities that it serves. In the absence of any persuasive evidence that the existing level of the Concession Fees is primarily attributable to the

constraining influence of competition from other airports, the Tribunal rejects this assertion by VAA.

[445] In summary, considering all of the foregoing, the Tribunal concludes that VAA controls or substantially controls the Airside Access Market at VAA.

(b) The Galley Handling Market

[446] For the following reasons, the Tribunal also concludes that VAA controls or substantially controls the Galley Handling Market.

[447] VAA's position that airlines can wholly or partially Self-supply and/or resort to Double Catering is addressed at paragraphs 388-417 of Section VII.B and in this section above. It does not need to be repeated. In brief, those possibilities do not exercise a material constraining influence on the prices of Galley Handling services at YVR.

[448] This leaves VAA's assertion that it does not control or substantially control the Galley Handling Market because many of the services that are included in that market do not require access to the airside.

[449] The Tribunal acknowledges that services such as warehousing, inventory management, assembly of meal trays and aircraft trolley carts, equipment cleaning, and handheld point-of-sale device management can be provided outside of YVR. Indeed, the Tribunal recognizes that dnata will be providing at least some of those services at its off-Airport kitchen facilities near YVR, when it enters the Galley Handling Market there in 2019.

[450] Nevertheless, in the absence of an ability to load and unload Catering products onto and off aircraft at YVR, it does not appear that any firms can actually enter the Galley Handling Market there. To date, none have done so. Moreover, Mr. Padgett confirmed that if dnata had not received airside access, it would not have come to YVR to only provide the warehousing functions associated with Galley Handling.

[451] VAA emphasizes that in 2014, **[CONFIDENTIAL]**.

[452] In the absence of any more persuasive evidence that airlines would be prepared to switch to a new entrant that is not authorized to have airside access at YVR, and to Self-supply the loading and unloading functions that require such access, the Tribunal concludes that airside access is something that a new entrant requires in order to compete in the Galley Handling Market. In other words, airside access is a critical input into the Galley Handling Market. The Tribunal agrees with Dr. Niels' assessment that airlines are unlikely to switch from one of the incumbent firms (i.e., Gate Gourmet and CLS) to a new entrant that is not authorized by VAA to access the airside at YVR.

[453] Firms that are not able to obtain VAA's authorization to access the airside at YVR do not, and cannot, compete in the Galley Handling Market there. The Tribunal agrees with the Commissioner that, by virtue of its control over airside access, VAA is able to control who competes and who does not compete, as well as how many firms compete, in that market.

Indeed, it has specifically and successfully sought to do so. Through this control, VAA is also in a position to indirectly influence the degree of rivalry in the Galley Handling Market, and therefore the price and non-price dimensions of competition in that market.

[454] The Tribunal pauses to note that, in his report, Dr. Reitman assumed that "a firm that supplies a significant input can substantially control a market in which it does not compete, in the sense required for section 79 of the *Competition Act*" (Reitman Report, at para 60). Dr. Reitman also concluded that "VAA would be considered to have 'control' over the provision of premium flight catering services at YVR by virtue of its control over a key input required to provide premium flight catering services at YVR," namely, airside access (Reitman Report, at para 61). The Tribunal considers that this logic applies equally to the Galley Handling Market.

[455] Having regard to all of the foregoing, the Tribunal concludes that VAA controls or substantially controls the Galley Handling Market by virtue of its control over a critical input into that market, namely, the supply of airside access (*Canada Pipe FCA Cross Appeal* at para 13).

(4) Conclusion

[456] For the reasons set forth above, the Tribunal concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*a*) are met and that VAA substantially or completely controls, throughout Canada or any area thereof, a class or species of business, namely, both the Airside Access Market and the Galley Handling Market at YVR. As the Tribunal has observed, the latter finding alone is sufficient to meet the requirements of paragraph 79(1)(*a*).

D. Has VAA engaged in, or is it engaging in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*) of the Act?

[457] The Tribunal now turns to the determination of whether VAA has engaged in, or is engaging in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*) of the Act. Since VAA does not compete in the Relevant Market, the Tribunal has approached its analysis of this issue in two steps. In the first step, the Tribunal has assessed whether VAA has a PCI in the Galley Handling Market. In the absence of such a PCI, a presumption arises that conduct challenged under section 79 generally will not have the required predatory, exclusionary or disciplinary purpose contemplated by paragraph 79(1)(*b*) (*TREB CT* at paras 279-282). In any event, where, as here, a PCI has been found to exist, the Tribunal will proceed to the second step of the analysis, namely, the assessment of whether the "overall character" of the impugned conduct was anti-competitive or rather reflected a legitimate overriding purpose.

(1) Does VAA have a PCI in the Relevant Market in which the Commissioner has alleged that competition has been, is being or is likely to be prevented or lessened substantially by a practice of anti-competitive acts?

[458] For the reasons set forth below, the judicial members of the Tribunal find, on the balance of probabilities, that VAA has a PCI in the Relevant Market.

(a) Meaning of "plausible"

[459] In *TREB CT* at paragraph 279, the Tribunal observed that "before a practice engaged in by a respondent who does not compete in the relevant market can be found to be *anti-competitive*, the Commissioner will be required to satisfy the Tribunal that the respondent has a plausible *competitive interest* in the market" [emphasis in original]. The Tribunal elaborated as follows:

> [281] In the case of an entity that is upstream or downstream from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases. Among other things, this will ensure that garden-variety refusals to supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(*b*).
>
> [282] For greater certainty, if a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, other than as described immediately above, its practices generally will not be found to fall within the purview of paragraph 79(1)(*b*). This is so regardless of whether that entity's conduct might incidentally adversely impact upon competition. For example, an upstream supplier who discontinues supply to a customer because the customer consistently breaches agreed-upon terms of trade typically would not be found to have engaged in a practice of anti-competitive acts solely because that customer is no longer able to obtain supply (perhaps because of its poor reputation) and is forced to exit the market, or becomes a weakened competitor in the market.

[460] In essence, the requirement to demonstrate that a respondent who does not compete in the relevant market nonetheless has a PCI in such market serves as a screen. It is intended to filter out at an early stage of the Tribunal's assessment conduct that is unlikely to fall within the purview of paragraph 79(1)(*b*). In brief, in the absence of a PCI, a presumption arises that the impugned conduct does not have the requisite anti-competitive purpose contemplated by paragraph 79(1)(*b*). Unless the Commissioner is able to displace this presumption by clearly and

convincingly demonstrating the existence of such an anti-competitive purpose even though the respondent has no PCI, the Tribunal expects that it will ordinarily conclude that the requirements of paragraph 79(1)(*b*) have not been met. The Tribunal further expects that, in the absence of a PCI, a respondent would ordinarily be able to readily demonstrate the existence of a legitimate business justification for engaging in the impugned conduct, and that the "overall character" of the conduct, or its "overriding purpose," was not and is not anti-competitive, as contemplated by paragraph 79(1)(*b*) (*Canada Pipe FCA* at paras 67, 73, 87-88).

[461] In addition to the foregoing recalibration of the role of the PCI, the present Application gives rise to the need for the Tribunal to elaborate upon the meaning of the word "plausible."

[462] The Lexico online dictionary defines the word "plausible" as something that is "reasonable or probable." Lexico's online thesaurus provides the following synonyms: "credible, reasonable, believable, likely, feasible, probable, tenable, possible, conceivable, imaginable, within the bounds of possibility, convincing, persuasive, cogent, sound, rational, logical, acceptable, thinkable" (*Lexico Dictionary powered by Oxford*, "plausible," online: <https://www.lexico.com/en/synonym/plausible>). By comparison, the Merriam-Webster defines "plausible" as something that is "superficially fair, reasonable, or valuable, but often specious;" something that is "superficially pleasing or persuasive;" or something that appears "worthy of belief" (*Merriam-Webster Dictionary*, "plausible," online : <https://www.merriam-webster.com/dictionary/plausible>).

[463] Both definitions have a wide-ranging scope, and some of the foregoing synonyms would permit the PCI screen to be set at a level that would deprive it of much of its utility, either because it would screen too much conduct into the potential purview of paragraph 79(1)(*b*), or because it would have the opposite effect. It could have the former outcome by screening in a potentially significant range of conduct that is unlikely to be ever found to have the anti-competitive purpose contemplated by that provision. It could have the latter outcome by screening out conduct that may well in fact have such an anti-competitive purpose.

[464] The Tribunal considers it appropriate to calibrate the meaning of the word "plausible," as used in the particular context of section 79, to connote <u>something more than</u> simply "possible," "conceivable," "imaginable," "thinkable" or "within the bounds of possibility." At the same time, the Tribunal considers that it would not be appropriate to set the bar as high as to require a demonstration of a "likely," "convincing" or "persuasive" competitive interest in the relevant market. The Tribunal is also reluctant to require an interest to be demonstrated to be "economically rational," as people and firms do not always act in economically rational ways, and the purpose of the PCI screen would be undermined if businesses had to wonder about whether an economist would consider a potential course of conduct to be economically rational.

[465] To serve as a meaningful screen, without inadvertently screening out conduct that may well in fact have an anti-competitive purpose, the Tribunal considers that the word "plausible" should be interpreted to mean "reasonably believable." To be reasonably believable, there must be <u>some credible, objectively ascertainable basis in fact</u> to believe that the respondent has a competitive interest in the relevant market. However, in contrast to the "reasonable grounds to believe" evidentiary standard, the factual basis need not rise to the level of "compelling" mentioned in the immigration cases cited and relied on by the Commissioner (*Mugesera v*

Canada (Minister of Citizenship and Immigration), 2005 SCC 40 at para 114; *Mahjoub v Canada (Citizenship and Immigration*), 2017 FCA 157 at para 89). Such a requirement could inadvertently screen out a meaningful range of potentially anti-competitive conduct that merits more in-depth assessment.

[466] It bears underscoring that the mere fact that the PCI test has been satisfied in any particular case does not imply that the impugned conduct will likely be found to meet the elements in section 79. The demonstration of a PCI simply means that the conduct will not be screened out at an early stage. The impugned conduct will then be reviewed in much the same way as would otherwise have been the case, had the Tribunal not introduced the PCI test to screen out cases that are very unlikely to warrant the time, effort and resources required to assess each of the elements of section 79.

(b) The parties' positions

(i) The Commissioner

[467] At the outset of the hearing in this proceeding, the Commissioner took the position that the Tribunal does not need to use the PCI screen in a case such as this where the express purpose of the impugned conduct "is manifestly the exclusion of a competitor from a market" (Transcript, Public, October 2, 2018, at p 26). In the circumstances, and in the presence of such a clear exclusionary intent, he asserted that there is no need for the PCI screen. In the alternative, he maintained that if the PCI test is employed, it should have an attenuated role in determining whether the overall purpose of the impugned conduct is exclusionary.

[468] Later in the hearing, the Commissioner asserted that the PCI screen ought not to require proof that the impugned conduct could possibly or plausibly lessen competition in the relevant market. He submitted that such a requirement would effectively conflate the elements contemplated by paragraphs 79(1)(*b*) and (*c*), contrary to *Canada Pipe FCA* at paragraph 83.

[469] In response to a specific question raised by the panel, the Commissioner stated that if the Tribunal finds that VAA has a conceptual PCI in pursuing a course of action that may maintain or enhance its revenues, this would be sufficient for the purposes of the PCI screen. It would not be necessary for the Tribunal to further find, on the specific facts of this case, that VAA in fact has a competitive interest in the Galley Handling Market.

[470] Quite apart from all of the foregoing, the Commissioner submits that VAA has a competitive interest in the Galley Handling Market at YVR for two principal reasons, relating to land rents and Concession Fees, respectively.

[471] Regarding land rents, the Commissioner's position appears to be that by licensing one or more additional in-flight catering firms, VAA would be exposed to the possibility that Gate Gourmet and/or CLS would have less need for some of their existing facilities, such that VAA's revenues from rental income would decline.

[472] With respect to Concession Fees, the Commissioner's position is that, in contrast to a typical upstream supplier who would suffer from a less competitive downstream market, VAA benefits (through increased Concession Fees) by excluding additional in-flight caterers. In this regard, Dr. Niels posited that the total revenues obtained by the incumbent in-flight caterers are higher, and therefore VAA's total revenues from Concession Fees are higher, under the *status quo* than if additional in-flight caterers were permitted to enter the Galley Handling Market. In his closing submissions, the Commissioner noted that this "participation in the upside" distinguishes VAA from a typical supplier, whose profits are not formulaically linked to the revenues of the downstream supplier (Commissioner's Closing Submissions, at para 62).

[473] In his closing argument, the Commissioner also added a third ground to support VAA's PCI: the fact that VAA would earn additional aeronautical revenues from the incremental additional flights that it would be able to attract to the Airport as a result of ensuring a stable and competitive supply of in-flight catering services.

(ii) VAA

[474] VAA submits that a landlord and tenant relationship, such as the one it has with Gate Gourmet and CLS, cannot suffice to give rise to a PCI in adversely impacting competition in the market in which the tenant competes. In this regard, VAA notes that any influence that it may have on prices charged by in-flight caterers is solely through its Concession Fees, which are no different in kind from percentage-based fees charged to retailers by a shopping mall owner. VAA adds that its status as a non-profit corporation operating in the public interest is such that it cannot have a PCI in adversely impacting competition in the Galley Handling Market. It states that this is particularly so given that it is not involved in, and has no commercial interest in, that market. With the foregoing in mind, it maintains that it has no economic incentive to engage in anti-competitive conduct, and that it was not in fact motivated by a desire to increase or maintain the level of its Concession Fees.

[475] Moreover, VAA asserts that it can derive no benefit from restricting competition in the Galley Handling Market, if such restriction would render the market structure inefficient. In this regard, and as further discussed below, Dr. Reitman explained that if VAA were assumed to act rationally, and to seek to maximize fees and rents from in-flight catering firms, there are other courses of action available to it that would leave it and airlines better off. As a result, he maintained that VAA would never choose to restrict entry as an alternative to one of those other courses of action.

[476] With respect to land rents, VAA submits that Gate Gourmet and CLS each have binding long-term lease agreements that impose obligations from which they would not be entitled to be relieved in the event that they have less need of some of their facilities. In addition, VAA states that the unchallenged evidence of Mr. Richmond is that VAA would have no difficulty in finding a replacement tenant willing to pay a comparable rent for any space at YVR that Gate Gourmet or CLS might wish to give up.

[477] Finally, VAA notes that its total revenues from Concession Fees and land rents paid by in-flight caterers represent **[CONFIDENTIAL]**% of its overall revenues.

(c) Assessment

[478] The Tribunal will first address the Commissioner's submissions and then address the submissions of VAA that remain outstanding. At the outset, the Tribunal observes that the very particular factual matrix with which it has been presented in this proceeding does not fit comfortably within the purview of section 79 of the Act. Nevertheless, the Tribunal must take each situation with which it is presented, and perform its role. For the reasons set forth below, the judicial members of the Tribunal have concluded that VAA does in fact have a PCI in the Galley Handling Market, although that PCI falls very close to the lower limit of what the Tribunal considers a PCI to be.

(i) The Commissioner's submissions

[479] The Commissioner's position that the Tribunal does not need to use the PCI screen in a case such as this reflects a misunderstanding of the nature of that test. As explained above, the screen is intended to filter out, at an early stage of the Tribunal's assessment, conduct that does not appear to have a plausible basis for finding the anti-competitive intent required by paragraph 79(1)(*b*). The mere fact that an impugned practice may appear to be exclusionary on its face does not serve to eliminate the utility of the screen. This is because there may be other aspects of the factual matrix that demonstrate the absence of a credible, objectively ascertainable factual basis to believe that the respondent has any plausible competitive interest in the relevant market. The Tribunal makes this observation solely to indicate that there may be situations where conduct that is exclusionary on its face does not pass the PCI test.

[480] The Tribunal does not accept the Commissioner's alternative position that the PCI should have an attenuated role in this case, for essentially the same reason. Moreover, in its capacity as a screen, the PCI test is conducted prior to the assessment of the overall character, or overriding purpose, of the impugned conduct. It is not conducted together with that assessment.

[481] Turning to the Commissioner's position that the PCI screen does not require proof that the impugned conduct could possibly or plausibly lessen competition in the relevant market, the Tribunal agrees. Such a requirement would effectively conflate the elements contemplated by paragraphs 79(1)(*b*) and (*c*) (*Canada Pipe FCA* at para 83). However, the Tribunal does not agree with the Commissioner's position that the establishment of a conceptual PCI in the Galley Handling Market is sufficient for the purposes of that test. The Commissioner needs to go further and establish a credible, objectively ascertainable factual basis to believe that VAA has a competitive interest in that market.

[482] Regarding the Commissioner's position with respect to VAA's interest in the land rents that it receives from Gate Gourmet and CLS, the Tribunal agrees with VAA's position. That is to say, the Tribunal accepts Mr. Richmond's evidence that VAA would have no difficulty in finding one or more replacement tenants willing to pay a comparable rent for any space that Gate Gourmet or CLS may wish to give up, if they were to lose business to one or more new entrants, and therefore no longer need as much land at YVR. The Tribunal pauses to add that dnata was recently granted a licence to provide airside access at YVR, notwithstanding the fact that its flight kitchen will be located outside the Airport. In addition, pursuant to the terms of their lease

agreements, the rents paid by Gate Gourmet and CLS **[CONFIDENTIAL]**. Moreover, the Commissioner was not able to explain how Gate Gourmet or CLS might be able to escape from their obligations towards VAA under their long-term leases with VAA. Considering the foregoing, the remainder of this section will deal solely with VAA's alleged interest in its revenues from Concession Fees.

[483] With respect to VAA's Concession Fees, the Tribunal agrees with the Commissioner that VAA's "participation in the upside" of overall revenues generated by in-flight caterers at YVR, together with its ability to exclude additional suppliers from the Galley Handling Market there, distinguishes VAA's position from a typical upstream supplier who would suffer from a less competitive downstream market. As observed by the U.K.'s High Court of Justice in *Luton Airport* at paragraph 100: "[Luton Operations' stake in the downstream market] constitutes a commercial and economic interest in the state of competition on the downstream market: Luton Operations are not a neutral or indifferent upstream provider of facilities."

[484] The Tribunal does not accept VAA's position that the foregoing holding in *Luton Airport* can be distinguished on the basis of the facts in that case, or on the basis that that case did not address the issue of whether a defendant had a PCI in adversely affecting competition in the relevant market. Regarding the facts, Luton Operations, like VAA, was the operator of an airport. Furthermore, like VAA, it had the ability to decide who could compete to supply certain services at the airport. Ultimately, it was found to have abused its dominant position in the market for the grant of rights to operate a bus service at the airport, by granting an exclusive seven-year concession to a particular entity to supply those services. Contrary to VAA's assertion, the Tribunal does not consider the fact that there had previously been open access for bus service providers at Luton Airport as providing a basis for distinguishing that case from the present proceeding. In addition, the fact that the magnitude of Luton Operations' gain from the impugned conduct was far greater than what is being alleged in the current proceeding does not provide a principled basis for distinguishing that case from the case now before the Tribunal.

[485] Regarding the issue of Luton Operations' commercial and economic interest in adversely affecting competition, the Court explicitly noted that Luton Operations "share[d] in the revenue generated in the downstream market" and would "also benefit if the protection from competition conferred on National Express by the grant of exclusivity result[ed] in National Express being able to charge customers higher prices than would otherwise prevail" (*Luton Airport* at para 100).

[486] In the Tribunal's view, it is the link to this latter benefit that distinguishes the particular factual matrix in this proceeding from a typical landlord and tenant relationship, and from a range of other situations in which an upstream party leases, licenses or grants a benefit to a downstream party in exchange for a percentage of the latter's revenues from sales. That is to say, unlike VAA and Luton Operations, the typical landlord, franchisor, licensor, etc. is not in a position to potentially prevent or lessen competition substantially in a downstream market, solely through its power to refuse to license additional third parties to operate in that market. This alleged ability to benefit from a restriction on competition also distinguishes the case before the Tribunal from the situation in *Interface Group, Inc v Massachusetts Port Authority*, 816 F.2d 9, cited by VAA, where the complainant advanced no such theory, or indeed any other theory of antitrust harm.

[487] Given that VAA has this potential ability, the Tribunal considers that its status as a non-profit organization with a broad mandate to operate in the public interest does not, as a matter of law, exclude it and other similarly mandated monopolists from the purview of section 79 of the Act, unless it is able to meet the requirements of the RCD. As discussed above in Section VII.A. of these reasons, the RCD requirements are not met in this case.

(ii) VAA's submissions

[488] The Tribunal will now turn to VAA's assertion that it can derive no benefit from restricting competition in the Galley Handling Market, if such restriction would render the market structure inefficient. As noted at paragraphs 474-475 above, this assertion is based on the fact that VAA has other, allegedly more efficient, options available to it to increase its revenues from in-flight caterers. In particular, Dr. Reitman maintained that if VAA were assumed to act rationally, and to seek to maximize the fees from in-flight catering firms, then as a matter of economic theory it would never choose to restrict entry as an alternative to one of those other courses of action.

[489] The particular option that Dr. Reitman maintains would be more rational and efficient for VAA to pursue, if one makes the two assumptions he mentions, would be to raise its Concession Fees. The point of departure for Dr. Reitman's position appears to be as follows (Reitman Report, at para 85):

> [I]f VAA is a rational economic agent and if (as I have presumed) its objective is to maximize port fee revenues, then VAA would increase its port fee rate until market demand is sufficiently elastic to make any further port fee rate increases unprofitable. At that point, economic theory indicates that the profit-maximizing quantity would be on an elastic portion of the demand curve.

[490] From this proposition, Dr. Reitman proceeds to the further proposition that "if demand is elastic, then revenues would not increase by restricting entry" (Reitman Report, at para 86). However, this ignores that the Commissioner's principal theory of harm is that competition in the Galley Handling Market has been, and is being, prevented, and is likely to be prevented in the future. Pursuant to that theory, VAA's exclusion of additional in-flight catering firms from the Galley Handling Market has prevented the reduction of prices of Galley Handling services, relative to the levels that currently prevail and will continue to prevail in the absence of the impugned conduct. In turn, this prevention of the reduction of prices in the Galley Handling Market has prevented a reduction in the Concession Fee revenues that VAA receives from Gate Gourmet and CLS.

[491] In any event, the Commissioner has not alleged that one of VAA's objectives is to maximize its Concession Fee revenues. He has simply alleged that VAA benefits financially, through its Concession Fees, from the protection from competition that it confers to Gate Gourmet and CLS.

[492] In this regard, Mr. Richmond stated that VAA's mandate is not to maximize revenues, but rather to manage YVR in the interests of the public. Moreover, the Tribunal notes that on

cross-examination, Dr. Reitman conceded that being a rational, profit-maximizing entity would be inconsistent with VAA's public interest mandate. Moreover, Dr. Tretheway testified that he does not believe that VAA is a "revenue maximizer" (Transcript, Conf. B, October 31, 2018, at pp 900-901). In any event, the Tribunal accepts Dr. Niels' evidence that it would not logically flow from the fact that a firm does not maximize profits, that it disregards profits entirely. The Tribunal also accepts Dr. Niels' evidence that VAA can have an incentive to restrict competition in the Galley Handling Market, even if it does not seek to extract maximum revenues from the incumbent in-flight caterers. The Tribunal has no reason to doubt Dr. Niels' testimony that it is "quite normal […] for not-for-profit entities to nonetheless seek commercially advantageous deals in markets," even though they may not seek profit-maximizing levels of revenues from firms in downstream markets (Transcript, Public, October 15, 2018, at p 429).

[493] The Commissioner has also not alleged that VAA is a rational economic agent.

[494] The foregoing observations also assist in responding to Dr. Reitman's proposition that there could not have been sufficient profits available in the Galley Handling Market at YVR to sustain three viable in-flight catering firms. Dr. Reitman based that proposition on the theory that VAA would already have extracted all of the economic rents available in that market, leaving Gate Gourmet and CLS with only "enough return to keep them in the market" (Reitman Report, at para 87). However, that theory depended on the two unproven assumptions addressed above. The same is true of Dr. Reitman's theory that even if the market could only support two in-flight caterers, VAA would have no incentive to limit entry, because it would thereby preclude itself from being able to extract the additional revenues that a lower-cost entrant would earn, relative to a less efficient incumbent.

[495] In addition to all of the above, Dr. Reitman maintained that even if VAA charges port fees that are low enough that demand for Galley Handling services at YVR is still on the inelastic portion of the demand curve, it would have a better alternative than to limit competition in that market. He asserted that a simpler, and superior strategy that would generate at least as much revenue for VAA, while being better for airlines and consumers, would be to allow entry and increase the Concession Fees (i.e., the port fees). The Tribunal observes that in advancing this position, Dr. Reitman did not take the position that VAA does not have any economic rationale to restrict entry into the Galley Handling Market. On cross-examination, he clarified that VAA simply has "an alternative strategy that would be even better" (Transcript, Conf. B, October 17, 2018, at p 692).

[496] In this regard, Dr. Reitman hypothesized that if one assumed a price effect of **[CONFIDENTIAL]** from the entry of a third caterer, as suggested in one of Dr. Niels' analyses, and if one assumes that market demand is inelastic, then the entry of a third caterer in 2014 would have resulted in a reduction in total catering spending by airlines of **[CONFIDENTIAL]**. In turn, Dr. Reitman estimated that this would have reduced VAA's revenues by **[CONFIDENTIAL]**, which corresponds to only **[CONFIDENTIAL]** of VAA's 2014 total gross revenues of approximately $465 million. Dr. Reitman then estimated that VAA could have recouped that loss by increasing its on-Airport Concession Fee from **[CONFIDENTIAL]**% to **[CONFIDENTIAL]**%. He observes that this would result in VAA suffering no loss of revenues, while permitting airlines to save over **[CONFIDENTIAL]**– a much more efficient outcome. (The Tribunal assumes that Dr. Reitman used the words "**[CONFIDENTIAL]**" instead of

"**[CONFIDENTIAL]**" because he assumed that in-flight caterers would pass on to airlines the small increase in the Concession Fee, as they do with existing Concession Fees.)

[497] Given the foregoing, VAA maintains that it is not credible for the Commissioner to suggest that VAA would have an economic incentive to adversely affect competition in the Galley Handling Market. Put differently, VAA states that maintaining the level of its revenues from Concession Fees would not provide a rational economic actor in its position with an incentive to exclude a third caterer from that market, and could not provide it with a PCI to adversely affect competition in that market.

[498] The judicial members of the panel find that, as appealing as the foregoing economic argument may appear at first blush, it is not consistent with certain important facts in evidence before the Tribunal.

[499] In particular, VAA's Master Plan – YVR 2037 states: **[CONFIDENTIAL]** [emphasis added] (Richmond Statement, at Exhibit 10). **[CONFIDENTIAL]** (Richmond Statement, at Exhibit 10). **[CONFIDENTIAL]**.

[500] Likewise, in its 2018-2020 Strategic Plan, VAA states: **[CONFIDENTIAL]** [emphasis added] (Richmond Statement, at Exhibit 9). In response to a question posed by the panel, Mr. Richmond stated that **[CONFIDENTIAL]** (Transcript, Conf. B, October 30, 2018, at p 874).

[501] Consistent with the foregoing, Dr. Tretheway confirmed during cross-examination that the paradox of the not-for-profit governance model is that it generally requires such entities to generate a surplus of revenues over costs, to yield "profits" that are needed to fund ongoing investments (Transcript, Public, November 1, 2018, at pp 846-847). For this reason, Mr. Norris confirmed that notwithstanding that Concession Fees represent only approximately **[CONFIDENTIAL]**% of VAA's revenues, **[CONFIDENTIAL]** (Transcript, Conf. B, November 1, 2018, at pp 1134-1135).

[502] The level of VAA's interest in its Concession Fees **[CONFIDENTIAL]** [emphasis added].

[503] In addition, evidence provided by Mr. Brown, from Strategic Aviation, in the form of an email that he sent on **[CONFIDENTIAL]** (Brown Statement, at Exhibit 9).

[504] Moreover, **[CONFIDENTIAL]** (Norris Statement, at Exhibit 30). Similarly, **[CONFIDENTIAL]** [emphasis added] (Richmond Statement, at Exhibit 19). The Tribunal notes that the above-mentioned **[CONFIDENTIAL]**.

[505] The lay member of the panel, Dr. McFetridge, takes issue with the characterization of Dr. Reitman's evidence mentioned at paragraph 496 above as being inconsistent with other evidence before the Tribunal. In Dr. McFetridge's opinion, the essence of Dr. Reitman's evidence on this point is that any revenue loss avoided by preventing entry would be small (i.e., **[CONFIDENTIAL]** or **[CONFIDENTIAL]** of VAA's 2014 total gross revenues) and could be offset by a marginal change in Concession Fees (i.e., an increase […by a trivial amount…]). Dr. McFetridge is of the view that this evidence is not contingent on assumptions about rational

maximizing behaviour nor does it require a trained economist for its explication. In addition, Dr. McFetridge does not see the documentary evidence in paragraphs 499-504 above as being inconsistent with the evidence of Dr. Reitman, although he does acknowledge that these paragraphs could be read as hinting that VAA's management might have viewed the matter differently.

[506] The judicial members of the Tribunal consider that the evidence discussed above supports the Commissioner's position that VAA has a PCI in the Galley Handling Market, because it has an interest in the overall level of the Concession Fee revenues that it obtains from in-flight caterers. In the Tribunal's view, that evidence, taken as a whole, provides some credible, objectively ascertainable basis in fact to believe that VAA has a competitive interest in the Galley Handling Market. As **[CONFIDENTIAL]** quoted at paragraph 504 above, VAA "**[CONFIDENTIAL]**". At this screening stage of its assessment, the judicial members of the Tribunal consider this, together with the other evidence discussed above, to be sufficient to meet the PCI threshold and to warrant moving to the assessment of the elements set forth in paragraphs 79(1)(*b*) and (*c*). Dr. McFetridge does not share this opinion. In his view, while VAA has an interest both in growing or at least maintaining the Concession Fee revenues it derives from the service providers operating at YVR and in their competitive performance, the revenue loss that might be avoided by preventing entry into the Galley Handling Market is too speculative, too small (indeed trivial in relative terms) and too easily offset by marginal changes in Concession Fees to qualify as a PCI for the purposes of section 79.

[507] In light of the foregoing conclusions, the Tribunal does not need to address the Commissioner's late argument that VAA's PCI is also grounded in its incentive to increase aeronautical revenues by providing a stable competitive environment for the existing in-flight catering firms.

[508] Contrary to VAA's position, the Tribunal considers that it would not be appropriate, at this screening stage of its assessment, to go further and determine whether VAA was, in fact, motivated by a desire to increase or maintain the level of its Concession Fee revenues. This is because such a requirement would draw the Tribunal deeply into the analysis of VAA's alleged legitimate business justification. In brief, a determination of whether VAA was, in fact, motivated by a desire to increase or maintain its Concession Fee revenues is inextricably linked with the assessment of the alleged business justification. The same is true with respect to evidence that VAA has benevolently refrained from raising the Concession Fees to levels charged at other airports in North America. Accordingly, the evidence that VAA has provided to support its position on this point will be assessed in connection with the Tribunal's evaluation of whether the overall character or overriding purpose of VAA's impugned conduct was anti-competitive, as contemplated by paragraph 79(1)(*b*) of the Act.

[509] In addition to all of the foregoing, VAA maintains that the Commissioner failed to adduce any economic evidence in support of his position that it has a PCI in the Galley Handling Market, and that this failure, in and of itself, is fatal to his case. The Tribunal disagrees with both of those propositions. First, Dr. Niels did provide the expert evidence referenced at paragraphs 472 and 492 above. Second, the evidence from other sources discussed above was sufficient to enable the Tribunal to conclude that VAA has a PCI in the Galley Handling Market. Dr. Niels' evidence was not necessary to enable the Tribunal to reach that conclusion.

(d) Conclusion

[510] For the reasons set forth above, the judicial members of the Tribunal conclude that VAA has a PCI in the Galley Handling Market because the evidence, taken as a whole and on a balance of probabilities, provides some credible, objectively ascertainable factual basis to believe that VAA has a competitive interest in that market.

(2) Was the "overall character" of VAA's impugned conduct anti-competitive or legitimate? If the latter, does it continue to be the case?

[511] The Tribunal now moves to the second step of its analysis under paragraph 79(1)(*b*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that the impugned conduct does not constitute an anti-competitive practice contemplated by this provision. This is because the "overall character" of VAA's refusal to authorize Newrest and Strategic Aviation to access the airside at YVR was, and continues to be legitimate, rather than anti-competitive.

[512] In brief, although VAA intended to, and continues to intend to, exclude Newrest, Strategic Aviation and other potential new entrants into the Galley Handling Market, the evidence demonstrates that VAA has predominantly been concerned that granting authorization to one or more new entrants would give rise to three very real risks. First, VAA has been concerned that CLS or Gate Gourmet would exit the Galley Handling Market, leaving only the other incumbent as a full-service provider. VAA had reasonable grounds to believe that if that were to happen, neither Newrest nor Strategic Aviation would fully replace the departed incumbent, at least not for a significant period of time. Second, VAA has been concerned that some airlines and consumers would suffer a significant disruption of service for a transition period of at least several months. Third, VAA has been concerned that if the first two risks materialized, its ability to compete with other airports to attract new airlines, as well as new routes from existing airline customers, would be adversely impacted, and that the overall reputation of YVR would suffer.

[513] Collectively, these concerns were and are linked to cognizable efficiency or pro-competitive considerations that are independent of any anti-competitive effects of the impugned conduct. Having regard to the conclusions reached in Section VII.E below in relation to paragraph 79(1)(*c*), the Tribunal finds that any such actual and reasonably foreseeable anti-competitive effects of the impugned conduct are not disproportionate to those efficiency and pro-competitive rationales. Indeed, the Tribunal is satisfied that, when weighed against the exclusionary negative effects of VAA's conduct, these legitimate business considerations are sufficient to counterbalance them.

(a) Analytical framework

[514] The analytical framework for the Tribunal's assessment of paragraph 79(1)(*b*) was extensively addressed in *TREB CT* at paragraphs 270-318. The FCA confirmed that this was the correct framework (*TREB FCA* at para 55). It does not need to be repeated here. For the present

purposes, it will suffice to simply reiterate the following principles, with appropriate modification to account for the fact that VAA does not compete in the Galley Handling Market.

[515] The most basic parameters of the analytical framework applicable to paragraph 79(1)(*b*) are described as follows in *TREB CT*:

> [272] […] the focus of the assessment under paragraph 79(1)(*b*) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor (*Canada Pipe FCA* at paras 67-72 and 77).
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> [273] The term "practice" in paragraph 79(1)(*b*) is generally understood to contemplate more than an isolated act, but may include an ongoing, sustained and systemic act, or an act that has had a lasting impact on competition (*Canada Pipe FCA* at para 60). In addition, different individual anti-competitive acts taken together may constitute a "practice" (*NutraSweet* at p. 35).
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> [274] In this context, subjective intent will be probative and informative, if it is available, but it is not required to be demonstrated (*Canada Pipe FCA* at para 70; *Laidlaw* at p. 334). Instead, the Tribunal will assess and weigh all relevant factors, including the "reasonably foreseeable or expected objective effects" of the conduct, in attempting to discern the "overall character" of the conduct (*Canada Pipe FCA* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257).
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> [275] It bears underscoring that the assessment is focused on determining whether the respondent subjectively or objectively intended a predatory, exclusionary or disciplinary negative effect on a competitor, as opposed to on competition. While adverse effects on competition can be relevant in determining the overall character or objective purpose of an impugned practice, it is not necessary to ascertain an actual negative impact on competition in order to conclude that the practice is anti-competitive, within the meaning contemplated by paragraph 79(1)(*b*). The focus at this stage is upon whether there is the requisite subjective or objective intended negative impact on one or more competitors. An assessment of the actual or likely impact of the impugned practice on competition is reserved for the final stage of the analysis, contemplated by paragraph 79(1)(*c*) (*Canada Pipe FCA* at paras 74-78).
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> [emphasis in original]

[516] In discerning the overall character of an impugned practice, it is important to take into account and weigh all relevant factors (*Canada Pipe FCA* at para 78). This includes any legitimate business considerations that may have been advanced by the respondent. Those considerations must then be weighed against any subjectively intended and/or reasonably

foreseeable predatory, exclusionary or disciplinary negative effects on a competitor that have been established (*Canada Pipe FCA* at para 67; *TREB CT* at para 285).

[517] In *TREB CT*, the Tribunal elaborated upon this aspect of the assessment as follows:

> [293] In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by subjective anti-competitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anti-competitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were more important to the respondent than the desire to achieve efficiencies or to pursue other pro-competition goals.
>
> [emphasis added]

[518] For the purposes of paragraph 79(1)(*b*), a legitimate business justification "must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts" (*Canada Pipe FCA* at para 73; *TREB FCA* at para 148). Stated differently, to be considered legitimate in this context, a business justification must not only provide either a credible efficiency or a credible pro-competitive rationale for the impugned practice, it must also be linked to the respondent (*TREB FCA* at para 149; *Canada Pipe FCA* at para 91). Such a link can be established by, among other things, demonstrating one or more types of efficiencies likely to be attained by the respondent as a result of the impugned practice, establishing improvements in quality or service, or otherwise explaining how the impugned practice is likely to assist the respondent to better compete (*TREB FCA* at para 149; *TREB CT* at paras 303-304). Although this requirement was previously articulated in terms of better competing in the relevant market, that would obviously not be possible where the respondent does not compete in that market. Accordingly, this requirement must be understood as applying to the market(s) in which the respondent competes.

[519] The business justification must also be independent of the anti-competitive effects of the impugned practice, must involve more than a respondent's self-interest, and must include more than an intention to benefit customers or the ultimate consumer (*Canada Pipe FCA* at paras 90-91; *TREB CT* at para 294).

[520] The existence of one or more legitimate business justifications for an impugned conduct must be established, on a balance of probabilities, by the party advancing those justifications (*TREB CT* at paras 429-430). That party also has the burden of demonstrating that the legitimate business justifications outweigh any exclusionary negative effect of the conduct on a competitor and/or the subjective intent of the act, such that the overall character or overriding purpose of the impugned conduct was not anti-competitive in nature (*Canada Pipe FCA*, at paras 67, 73, 87-88; *TREB CT* at para 429).

(b) The parties' positions

(i) The Commissioner

[521] In his initial pleadings, the Commissioner submitted that VAA has engaged in and is engaging in Practices of anti-competitive acts through: (i) its ongoing refusal to authorize firms, including Newrest and Strategic Aviation, to access the airside for the purposes of supplying Galley Handling services at YVR, and (ii) the continued tying of access to the airside for the supply of Galley Handling services to the leasing of land at YVR from VAA, for the operation of Catering kitchen facilities. However, as stated before, his focus throughout the hearing of this Application was on the former of those two allegations, i.e., the Exclusionary Conduct. Indeed, the latter of those allegations was not addressed by the Commissioner during the hearing or in his closing written submissions.

[522] The Commissioner maintains that the intended purpose and effect of the Practices have been, and are, to exclude new entrants wishing to supply Galley Handling services at YVR. He further asserts that this effect was and continues to be reasonably foreseeable. He notes that one or both of Newrest and Strategic Aviation has been granted access to the airside at several other airports in Canada.

[523] In addition, the Commissioner submits that none of the explanations advanced by VAA to justify the Practices are credible efficiency or pro-competitive rationales that are independent of their anti-competitive effects. In this regard, the Commissioner asserts that VAA has not provided any evidence of cost reductions or other efficiencies that it has attained as a result of the Practices. He further asserts that prior to refusing to provide airside access to Newrest and Strategic Aviation, VAA conducted an inadequate and superficial analysis upon which it then relied on to justify its refusals. More specifically, he states that VAA did not seek information that was readily available from airlines and elsewhere and that would have demonstrated that its concerns with respect to the viability of Gate Gourmet and CLS in the face of new entry were not well-founded.

[524] In any event, the Commissioner states that such explanations are not supported by evidence and do not outweigh VAA's subjective intention to exclude potential entrants, or the reasonably foreseeable or expected exclusionary effects of the Practices. Accordingly, he asserts that the overall character of the Practices is anti-competitive.

(ii) VAA

[525] VAA submits that it has not engaged in a practice of anti-competitive acts, within the meaning of paragraph 79(1)(*b*) of the Act.

[526] Rather, VAA maintains that it had (and continues to have) valid, efficiency enhancing, pro-competitive business justifications for not permitting new entry, prior to its 2017 decision to authorize dnata to access the airside at YVR for the purposes of providing Galley Handling services there. VAA underscores that in the exercise of its business judgment, informed by its expertise and experience, it was (and remains) concerned that there is insufficient demand to justify the entry of additional firms into the Galley Handling Market at YVR. When VAA initially refused to grant airside access to Newrest and Strategic Aviation in 2014, it was concerned that the state of the Galley Handling Market remained "precarious," largely as a result of the dramatic decline in the overall revenues in that market over the previous 10-year period. Although VAA subsequently conducted a study of that market in 2017 and concluded that it could then support a third firm, it continues to be of the view that the market cannot support further new entry at this particular time.

[527] VAA asserts that its overriding concern has been to ensure that the two incumbent in-flight caterers at YVR (namely, Gate Gourmet and CLS) are able to continue to operate efficiently at YVR. Having experienced the exit of one firm (LSG) from the Galley Handling Market in 2003, VAA states that it was and has been concerned that if one or more additional firms were permitted to provide Galley Handling services at YVR, one or both of the incumbent firms would no longer be viable. Moreover, VAA has believed and continues to believe that if one or both of those firms were to exit the market, it would be difficult to attract another "on-site," full-service provider of Galley Handling services at YVR, and that quality and service levels in the market would therefore decline.

[528] VAA adds that its paramount purpose at all times was to ensure that it is able to retain and attract additional airline business to YVR by providing those airlines – in particular, long-haul carriers – with a competitive choice of at least two full-service in-flight catering firms at YVR. Stated differently, VAA maintains that it has always reasonably believed that the presence of full-service in-flight catering firms on-site at YVR is important to ensure optimal levels of quality and service to airlines. It further considers the latter to be important to ensuring the efficient operation of the Airport as a whole, including achieving VAA's public interest mandate, mission and vision. Moreover, VAA has been concerned that if airlines at YVR were unable to obtain their in-flight catering needs, YVR would suffer serious operational and reputational harm. It maintains that this would adversely impact VAA's efforts to attract new routes and new carriers, including Asian carriers.

[529] With respect to the allegation that it has tied airside access to the rental of land, VAA states that this is untrue and unsupported by any factual or legal foundation.

[530] VAA further maintains that any exclusionary negative effect on Newrest and/or Strategic Aviation is outweighed by its legitimate business justifications for refusing to authorize airside access to additional entrants into the in-flight catering business at YVR.

[531] Regarding the allegation that it failed to seek information that was readily available from airlines and elsewhere, VAA states that none of that information could have assisted it to assess the financial position of Gate Gourmet and CLS at YVR. In any event, VAA states that it had regular interactions with airlines, and that the airlines were generally not reticent to raise any concerns with VAA. More fundamentally, VAA maintains that any failure on its part to obtain additional information before making its decision to refuse to authorize airside access to additional in-flight caterers does not undermine the legitimacy of its stated purpose and does not render that purpose anti-competitive.

(c) Assessment

(i) "Practice"

[532] The Commissioner submits that VAA's sustained refusal to authorize Newrest and Strategic Aviation to access the airside at YVR constitutes a "practice." The Tribunal agrees and observes in passing that VAA did not dispute this particular point.

(ii) Intention to exclude and reasonably foreseeable effects

[533] The Commissioner submits that VAA expressly intended to exclude Newrest and Strategic Aviation from the Galley Handling Market, and that the reasonably foreseeable effect of its refusal to authorize them to access the airside to load and unload Catering products was and remains that they are excluded from the Galley Handling Market.

[534] The Tribunal agrees and does not understand VAA to be taking issue with these particular submissions.

[535] It is clear from the evidence provided by Messrs. Richmond and Gugliotta that they subjectively intended to exclude Newrest and Strategic Aviation from the Galley Handling Market at YVR, both prior to and after deciding to authorize a third caterer (dnata) to access the airside to provide Galley Handling services. It is also readily apparent that the reasonably foreseeable effect of VAA's conduct was and remains that Newrest, Strategic Aviation and other potential entrants have been excluded from the Galley Handling Market.

[536] However, that does not end the enquiry under paragraph 79(1)(*b*). The Tribunal must proceed to assess whether the "overall character," or "overriding purpose," of VAA's Exclusionary Conduct was and remains efficiency-enhancing or pro-competitive in nature (*Canada Pipe FCA* at paras 73 and 87-88). In that regard, VAA can avoid a finding that it has engaged in a practice of anti-competitive acts within the meaning of paragraph 79(1)(*b*) of the Act by demonstrating one of two things: (i) that it was motivated more by efficiency or pro-competitive considerations than by subjective or deemed anti-competitive considerations (*TREB CT* at para 293); or (ii) that the actual and reasonably foreseeable anti-competitive effects of the impugned conduct are not disproportionate to the efficiency or pro-competitive rationales identified by the respondent. That demonstration must be made with clear and convincing evidence, on a balance of probabilities.

[537] The Tribunal will address the justifications advanced by VAA for engaging in the Exclusionary Conduct, in Section VII.D.2.c.iv of these reasons below.

(iii) The tying of airside access to the leasing of land at YVR

[538] In his Notice of Application, the Commissioner submitted that VAA has maintained a practice of tying its authorization of access to the airside at YVR for the purposes of supplying Galley Handling services, to the leasing of land at the Airport for the operation of Catering kitchen facilities.

[539] In support of this position, the Commissioner stated that VAA's airside access agreements with Gate Gourmet and CLS terminate if and when each entity, as the case may be, ceases to rent land at YVR from VAA for the operation of a Catering kitchen facility. The Commissioner further asserted that VAA has consistently and purposely intended to exclude new-entrant firms from the Galley Handling Market by requiring that they lease Airport land, rather than less expensive off-Airport land, for the operation of Catering kitchen facilities.

[540] However, as stated above, the Commissioner did not address this tying allegation during the hearing, and he did not refer to it at all in his closing written and oral submissions.

[541] For VAA's part, Mr. Richmond stated that VAA has never required in-flight caterers to operate a flight kitchen at YVR in order to obtain an in-flight catering licence. He maintained that VAA simply has a preference in this regard, based on its belief that locating at YVR offers advantages for the operational efficiency of the Airport as a whole. This includes ensuring optimal levels of quality and service to the airlines and their passengers. Mr. Richmond's evidence is corroborated by the fact that VAA selected dnata during the recent RFP process that it conducted after deciding to authorize a third in-flight caterer at YVR. It did so notwithstanding the fact that dnata's flight kitchen will be located outside YVR.

[542] In the absence of evidence to the contrary, the Tribunal accepts Mr. Richmond's evidence and rejects this allegation. The balance of the decision will therefore focus solely on the Exclusionary Conduct.

(iv) VAA's justifications for the Exclusionary Conduct

- <u>The evidence</u>

[543] The evidence of VAA's justifications for excluding Newrest and Strategic Aviation from the Galley Handling Market was provided primarily by Messrs. Richmond and Gugliotta, although they attached correspondence from others as exhibits to their respective witness statements. In addition, their evidence was broadly corroborated by other industry participants, including Messrs. Stent-Torriani and Brown, as well as in an internal email exchanged between two of Jazz's employees. (Dr. Reitman and Dr. Niels were not asked to assess VAA's justifications, and so were not particularly helpful on this issue.) Although VAA requested

Dr. Tretheway to address this issue, his evidence on this point was found to be inadmissible, as explained above in Section IV.B.2. of these reasons.

The April 2014 events

[544] Mr. Richmond stated that he first became aware of Newrest's interest in entering the Galley Handling Market, and its related request for information about the authorization process, on March 31, 2014. At that time, Mr. Olivier Sadran, the Co-CEO of Newrest, wrote to him to follow up on a request that Newrest's Country Manager in Canada, Mr. Frederic Hillion, had made in that regard in December 2013. Mr. Richmond explained that after receiving Mr. Sadran's letter, he felt that it was important to refamiliarize himself with the "in-flight catering market at YVR" so that he could properly consider and respond to Newrest's inquiry (Richmond Statement, at para 93). To that end, later that same day (March 31, 2014), he requested two individuals within VAA who had expertise in that regard to advise him as to the state of that market.

[545] The first of the two individuals in question was Mr. Gugliotta, who first started working at YVR in 1985 and had developed extensive knowledge and expertise in all aspects of YVR's operations, including in respect of in-flight catering. The second individual was Mr. Raymond Segat, who had nearly 20 years' experience as Director of Cargo and Business Development at YVR, including in overseeing of the in-flight catering concessions at the Airport.

[546] The day following Mr. Richmond's request, Mr. Gugliotta sent Mr. Richmond an email. Attached to that email was a string of other emails, including from Mr. Segat and Mr. Eccott, that had been sent earlier that day (April 1, 2014) and the prior day.

[547] Among other things, Mr. Eccott's email described **[CONFIDENTIAL]** [emphasis added], Mr. Eccott stated "**[CONFIDENTIAL]**" (Richmond Statement, at Exhibit 19).

[548] These views were consistent with previous views that Mr. Eccott had expressed in an internal email dated December 12, 2013, after VAA received the initial request on behalf of Newrest from Mr. Hillion. At that time, Mr. Eccott stated the following (Richmond Statement, at Exhibit 15):

> The concession fee is the same for both current operators, and generates a lot of revenue for us. Nevertheless, over the past 8 years the flight kitchen business has been slammed with cutbacks, shrinking markets etc. the [*sic*] decision to allow a third flight kitchen operation into YVR would likely need to be made at the Sr. level, although, in all likelihood, we would recommend against it.

[549] According to Mr. Richmond, he met with Mr. Gugliotta for approximately one hour later in the day on April 1, 2014, to discuss Newrest's request. Mr. Richmond summarized the meeting as follows: "Mr. Gugliotta expressed serious concerns about how the introduction of a third caterer could affect the market for in-flight catering services at YVR" (Richmond Statement, at para 98). According to Mr. Richmond, those concerns were shared by others at VAA, including Messrs. Segat and Eccott. More specifically, "Mr. Gugliotta expressed concern

that there was not enough demand at the Airport to support three caterers and that, accordingly, the entry of a third caterer might cause one or even both of the incumbent caterers to exit the market at YVR, in whole or in part, without a comparable replacement" [emphasis added]. Mr. Richmond added: "Based on the information available to us at the time, we considered the risk of that occurring to be significant" (Richmond Statement, at para 99). Mr. Richmond added that "one factor that did not affect [his] decision was whether the entry or exclusion of a third caterer would have any impact on VAA's revenues" and noted that VAA's revenues "were never considered or discussed in [his] meeting with Mr. Gugliotta" (Richmond Statement, at para 118).

[550] By way of background and explanation, Mr. Richmond provided the following information, which represents the most fulsome account of VAA's thinking and intentions at the time, as well as the context in which its decisions with respect to Newrest Canada and Strategic Aviation were taken (Richmond Statement, at paras 101-118):

> 101. The in-flight catering market was fulfilling an important objective for VAA, namely, to provide a reliable supply of full-service in-flight catering at competitive prices. In doing so, it helped attract airlines to YVR and grow the Airport for the benefit of the public, which is at the core of VAA's mandate.
>
> 102. At the same time, there were compelling reasons to believe that the state of the in-flight catering market at YVR was precarious. The previous ten years had been tumultuous for the in-flight catering industry in Canada, which experienced significant declines in the demand for in-flight catering services. During that period, many airlines decided to eliminate fresh meal service for economy passengers and short-haul flights (where fresh meals had previously been standard) and replace them with "buy-on-board" offerings. Service of fresh meals was increasingly limited to overseas flights and the much smaller number of premium passengers (i.e. first class or business class). That contributed **[CONFIDENTIAL]**.
>
> 103. In addition, the airline industry had recently experienced several economic downturns, which significantly impacted airline traffic and passenger volumes. For example, over the previous decade, the airline industry in Canada faced significant challenges maintaining passenger volumes following events such as the September 11 terrorist attacks in 2001, the outbreak of SARS in 2003-2004, and the great recession in 2008. While there were indications that passenger volumes may have been stabilizing by late 2013, that was still uncertain given the information we had in early 2014.
>
> 104. There had previously been three in-flight caterers operating at YVR, but not since 2003. Those caterers were Cara Airline Solutions (now Gate Gourmet), CLS and LSG Sky Chefs ("Sky Chefs"). Sky Chefs primarily supplied Canadian Airlines, which was then Canada's second-largest carrier. After Canadian Airlines was acquired by Air Canada in the early 2000s, a large portion of Sky Chefs' business was redirected to Air Canada's preferred caterer at the time, Cara. As a result of a downturn in its business that followed, Sky Chefs decided to leave YVR.

105. Mr. Gugliotta advised me that, after Sky Chefs left the market in 2003, it attempted to lease the flight kitchen it had operated to another in-flight caterer. No in-flight caterer took over Sky Chefs' lease and, even more concerning, no caterer replaced Sky Chefs at YVR. The departure of Sky Chefs, without any equivalent replacement, indicated to us that, as at 2003, the in-flight catering market at YVR was not able to support three caterers.

106. After Sky Chefs left the Airport, VAA continued to have concerns about the in-flight catering market, even with two caterers. Mr. Gugliotta noted that, for several years after Sky Chefs' departure, VAA maintained Concession Fees for the two remaining in-flight caterers at rates below what many other airports were charging, in part due to concerns over the financial viability of Gate Gourmet and CLS.

107. In light of that history, Mr. Gugliotta and I discussed the **[CONFIDENTIAL]**. In that regard, attached as Exhibit "20" is a table showing revenues of in-flight caterers at YVR from 1999 to 2013.

108. Mr. Gugliotta and I noted that **[CONFIDENTIAL]**.

109. There were other factors highlighted by Mr. Gugliotta. For example, he noted that **[CONFIDENTIAL]**.

110. **[CONFIDENTIAL]**.

111. In light of all of that information, Mr. Gugliotta and I considered how the introduction of a new caterer would impact the in-flight catering market at YVR and, more broadly, the Airport as a whole. Based on the information available to us, we concluded that the in-flight catering market at YVR remained precarious and that the entry of a third caterer would result in a significant risk that one or even both of the incumbent caterers would leave YVR.

112. The consequences of an incumbent caterer leaving YVR would have been highly problematic and not in the best interests of the Airport.

113. At a minimum, it would have caused significant disruption in the availability of full-service in-flight catering at YVR. In particular, a sudden or unexpected departure of an existing caterer would leave dozens of airlines scrambling to find a new supplier for hundreds of flights. There are over 400 flights that depart YVR every day, almost all of which rely on some form of in-flight catering. For most international flights and flights with first class passengers, full-service catering is a requirement, not an option. Airlines cannot fly those routes without full-service in-flight catering, including fresh meals. Moreover, airlines cannot shut down or suspend operations on those flights while they find a new supplier.

114. Finding a new in-flight caterer is not an easy task for an airline, especially in cases where its existing caterer leaves the market abruptly or unexpectedly.

> Other caterers at the Airport, even if they do offer the full range of services required by the airline, may not have capacity to absorb all the business of the departing caterer. And even if it is possible for one of the remaining in-flight caterers to increase its capacity or expand its service offerings, that could take a significant period of time – even months – while the caterer hires and trains new workers or expands its facilities. During that time period, the supply of in-flight catering would be disrupted.
>
> 115. In addition, it is not a simple or quick process for a new caterer to enter the market under any circumstances, including to replace a departing caterer. There are many steps that a new caterer must follow before it can begin supplying airlines at YVR, including going through multiple security checks, obtaining the requisite permits, hiring and training employees, including drivers who will access the airside, and establishing a new catering facilities [*sic*] or taking over an existing facility. Again, this process takes a considerable amount of time.
>
> 116. In light of those issues, Mr. Gugliotta and I were concerned that, given the circumstances that existed at the time, the departure of a full-service in-flight caterer would risk significant disruption in the supply of catering services at YVR. That would have been highly problematic for airlines, damaged YVR's reputation, and made it much more difficult for VAA to attract and retain airlines and routes to YVR, which is a key component of VAA's public interest mandate.
>
> 117. Having considered all the factors above, Mr. Gugliotta and I concluded that it was not in the best interests of the Airport to grant an additional in-flight catering licence at that time.
>
> 118. I should note that one factor that did not affect my decision was whether the entry or exclusion of a third caterer would have any impact on VAA's revenues. VAA's revenues were never considered or discussed in my meeting with Mr. Gugliotta. We were focused on maintaining competition, choice and reliability in in-flight catering at YVR, which was and is far more important to VAA than the relatively small amount of revenue it receives from in-flight caterers through Concession Fees and rent.

[551] According to the "table" mentioned at paragraph 107 of Mr. Richmond's witness statement above, **[CONFIDENTIAL]**.

[552] During the hearing of this Application, there was a dispute between the parties as to whether the aforementioned "table" (which was also referred to as a "spreadsheet") had in fact been prepared prior to Mr. Richmond's meeting with Mr. Gugliotta on April 1, 2014. Although both of those individuals maintained that this was in fact the document they discussed, the Commissioner demonstrated that it had been created no earlier than May 9, 2014, long after the meeting. Nevertheless, based on Mr. Gugliotta's explanation that VAA prepares similar spreadsheets on an ongoing basis, the Tribunal is satisfied that, at their April 1st meeting, Mr. Richmond and Mr. Gugliotta reviewed some form of spreadsheet containing combined revenue information of the incumbent caterers going back a number of years. The Tribunal

observes that regardless of when that particular spreadsheet was created, it confirmed the general impression and general recollection that Messrs. Richmond and Gugliotta had of the financial situation of the incumbent in-flight caterers at the April 1, 2014 meeting.

The exchanges with Newrest and Strategic Aviation

[553] On April 2, 2014, the day following his meeting with Mr. Gugliotta, Mr. Richmond wrote an email to Mr. Stent-Torriani of Newrest that stated as follows (Richmond Statement, at Exhibit 21):

> Jonathan,
>
> I have re-familiarized myself with the state of our in-flight catering, and unfortunately I can't see the need for another provider at this time. The market has been essentially flat for 10 years, with two providers, and our airlines are happy with the state of competition.
>
> I would still be happy to meet with you on the 9th or the 10th if you would like to discuss further. Please contact […] to set a time.
>
> Kind regards,
>
> Craig Richmond

[554] Later that month, Mr. Eccott wrote another internal email to Mr. Segat regarding a second request for airside access to provide Galley Handling services at YVR, this time from Mr. Brown at Strategic Aviation. At first, Mr. Richmond was not made aware of that request. (For a period of time following his initial request on April 1, 2014, Mr. Brown dealt with other individuals at VAA.) For the present purposes, the relevant passages from that email are as follows (Richmond Statement, at Exhibit 24):

> Ray - further to our earlier discussion, Brett forwarded an email from Mark Brown of Strategic Aviation Services. Mark Brown is with a company interested in bidding on an RFP Jazz (not Westjet) recently put out for their flight Kitchen business across Canada. My understanding is the contract would essentially be the loading of prepackaged food onto Jazz aircraft. As it stands at YVR only CLS and Gate Gourmet have a concession license that allows that service.
>
> Mark apparently contacted Steve Hankinson with a question about the possibility of obtaining a third concession license to carry out the work. Unfortunately, this goes to the root of the concern we had previously with the inquiry from the Newrest Grp. That is, based on past history we don't believe that YVR could support a third flight Kitchen operator. This latest inquiry from Strategic Aviation

> Services is along the same lines and would amount to a third Flight Kitchen operator at YVR.

[555] During the month of May 2014, Mr. Richmond wrote letters to Mr. Stent-Torriani as well as to the President and CEO of Air Canada and to Jazz, that provided a similar explanation for VAA's decision not to authorize a third in-flight caterer to access the airside at YVR.

[556] Mr. Richmond's evidence regarding VAA's initial refusal to provide airside access licences to Newrest and to Strategic Aviation was corroborated by Mr. Gugliotta, both in his written evidence and in his testimony before the Tribunal.

[557] The nub of Mr. Gugliotta's evidence is provided in the following passage of his witness statement (Gugliotta Statement, at paras 94-96):

> 94. Among other things, we were concerned about the significant disruptions of service that would follow the exit of either of the existing catering firms from the Airport. The departure from the Airport of a provider of in-flight catering services is disruptive to the airlines served by the departing provider. Those airlines are left in a situation of having to contract with a new provider at a time when the airline has less bargaining power due to its acute need. A new firm must also secure the necessary permits for its drivers to access the airport airside to serve airlines, and must also ramp up its capacity to serve those airlines formerly served by the departing firm.
>
> 95. Replacing a service provider that has departed involves transactional costs for the Airport, including the costs of licensing and setting up accounting systems for a new firm. As well, the departure of a service provider who is suffering difficult financial circumstances will often create significant transitional disruption as the Airport is forced to deal with creditors and competing claims on the departing firm's assets.
>
> 96. Furthermore, the abrupt or unexpected departure of such an important service provider can negatively affect an airport's reputation for stable, reliable and efficient operations, something that can adversely impact its efforts to encourage airlines to establish new routes.

[558] The Tribunal pauses to observe that considerations relating to logistics, safety and security did not feature significantly in the evidence provided by Messrs. Richmond and Gugliotta regarding VAA's intentions at that time.

[559] As noted at paragraph 543 above, the evidence provided by Messrs. Richmond and Gugliotta regarding VAA's asserted justification for refusing to grant airside access to Newrest and Strategic Aviation was broadly corroborated by Messrs. Stent-Torriani and Brown. While those individuals did not accept VAA's stated reasons for refusing access to the airside, they confirmed that these were, in fact, the reasons given by VAA at the relevant time period. In brief, Mr. Stent-Torriani explained that, when he met with Mr. Richmond, he was told that

[CONFIDENTIAL] (Stent-Torriani Statement, at para 46). **[CONFIDENTIAL]** (Stent-Torriani Statement, at para 46).

[560] Turning to Mr. Brown, **[CONFIDENTIAL]**, he stated the following (Transcript, Conf. B, October 5, 2018, at p 342):

> The point was – the discussion always was, in my mind, was, to protect the revenue, they couldn't allow – they thought that because there was less demand, in their words, for catering at the airport, because LSG had pulled out, they had to protect the two incumbent catering companies and they were worried that a third company would make one of those companies no longer viable.

[561] The Tribunal acknowledges that Mr. Brown also stated that **[CONFIDENTIAL]** (Exhibit CR-031, Email from **[CONFIDENTIAL]** dated June 27, 2014).

[562] In the ensuing months, Messrs. Stent-Torriani and Brown continued to press Mr. Richmond and others at VAA for authorization to access the airside at YVR. Notwithstanding their repeated requests for airside access at YVR, VAA maintained its position that the level of demand for in-flight catering services at the Airport was not sufficient to support a third caterer.

[563] Among other things, the correspondence during that time period includes an email to Messrs. Richmond, Gugliotta and Hankinson, dated August 13, 2014, in which Mr. Brown underscored that "Strategic Aviation/Sky Café will never compete" with Gate Gourmet and CLS for the business class and first class meals offered by large international airlines. With that in mind, Mr. Brown maintained that Strategic Aviation's entry into the Galley Handling Market would "[m]inimize any negative impact to the existing licence holders, while sending a signal that service levels an [*sic*] pricing need to improve" (Richmond Statement, at Exhibit 37). In response to questioning from the panel, Mr. Brown explained that he would be **[CONFIDENTIAL]** (Transcript, Conf. B, October 5, 2018, at pp 342-343). On cross-examination, Mr. Brown added that **[CONFIDENTIAL]**. For the present purposes, the Tribunal notes that this evidence validates VAA's concern that if Strategic Aviation's entry resulted in the exit of either CLS or Gate Gourmet, only one full-service caterer would remain in the Galley Handling Market at YVR. In this regard, Mr. Richmond stated that **[CONFIDENTIAL]** (Richmond Statement, at para 142).

[564] The Tribunal observes in passing that, on August 5, 2014, Messrs. Richmond and Gugliotta spoke by telephone with the President and CEO of Jazz, Mr. Joseph Randell, to "hear Jazz's concerns directly." Mr. Richmond stated that while he did not have a clear recollection of that telephone call, he knew that what Mr. Randell had told them did not change his "view as to whether it would be in the best interests of the Airport to license a third caterer generally, or to license Strategic specifically" (Richmond Statement, at para 149). Mr. Gugliotta added that he and Mr. Richmond explained to Mr. Randell that "the in-flight catering market at YVR was not viable enough to support a third caterer and […] that, if part of CLS's and Gate Gourmet's business was taken by a third caterer, they would not be able to remain financially viable."

Mr. Gugliotta added that "Mr. Randell did not push back in response to those points" (Gugliotta Statement, at para 125). **[CONFIDENTIAL]** (Bishop Statement, at Exhibit 14).

The August 2014 Briefing Note

[565] Later in August 2014, Mr. Gugliotta prepared a briefing note for Mr. Richmond entitled *Flight Kitchen Operations at YVR* ("**August 2014 Briefing Note**"). The conclusion of that document stated the following:

- Two flight kitchen operators at YVR seem to be the sustainable number at this point in time.
- Current flight kitchens have significant capacity to address additional business.
- A competitive environment exists at YVR as both operators indicated they would aggressively bid on any airport opportunities.
- Catering business model has undergone significant changes and YVR needs to carefully ensure that a sustainable framework remain [*sic*] in place so that the existing operators can be successful and airlines continue to receive competitive world-class service at YVR.
- It appears that Jazz's concerns and requirements will be met by Gate Gourmet.
- We will need to address Newrest's claim that YVR's refusal to grant them a license is anticompetitive.

[emphasis added]

[566] Mr. Richmond stated that he agreed with the foregoing conclusions and that the additional information contained in the August 2014 Briefing Note did not alleviate his overarching concerns about the level of demand for catering services at YVR. More specifically, that information did not alleviate his concerns about "whether the demand was sufficient to support three caterers" and "the potential adverse consequences for the Airport as a whole if VAA were to grant an [*sic*] third in-flight catering licence at that time, and if one of the existing caterers were to fail as a result" (Richmond Statement, at para 165).

[567] That said, Mr. Richmond added that it was "always [his] view that, if there were changes in the market which indicated that YVR could sustain three in-flight caterers, then three caterers would be [his] preference, as that would provide more choice for airlines while advancing VAA's objective of maintaining a competitive and sustainable in-flight catering market" (Richmond Statement, at para 166).

[568] That same month (August 2014), **[CONFIDENTIAL]** (Richmond Statement, at para 161). **[CONFIDENTIAL]**.

[569] With respect to CLS, Mr. Gugliotta stated that the Managing Director of CLS, Mr. David Wainman, informed him that CLS "**[CONFIDENTIAL]**" (Gugliotta Statement, at para 133).

[570] The Tribunal pauses to note that VAA's concerns regarding the ability of CLS and Gate Gourmet to withstand a loss of some of their business to one or more new entrants into the Galley Handling Market were also corroborated in **[CONFIDENTIAL]** (Exhibit CR-075, Email from Ken Colangelo dated August 8, 2014). In cross-examination, he confirmed that **[CONFIDENTIAL]**.

[571] In August of the following year, Mr. Stent-Torriani again wrote to Mr. Richmond. At that time, Newrest was seeking access to the airside at YVR so that it could bid on Air Transat's business there, as part of the latter's 2015 RFP process. In response to that correspondence, Mr. Richmond stated, among other things, that VAA needed "to assure competitive and financially sustainable situations are established in several areas, particularly services to airlines" (Richmond Statement, at Exhibit 41). In reply to Mr. Stent-Torriani's suggestion that Newrest would be willing to serve the airlines from facilities located outside of YVR, and pay "equivalent airport access fees that the two current providers are paying to VAA," Mr. Richmond stated (Richmond Statement, at Exhibit 41):

> […] this model would significantly undercut the very valuable investments made by these two providers at the Airport, which the VAA has determined to be efficient, and for the benefit of the public. As such, the model proposed by Newrest would significantly adversely affect the ability of the current providers to compete with Newrest, and threaten the continued investment and service levels contracted for by the VAA in furtherance of the public interest.

The 2017 events

[572] In January 2017, Mr. Richmond directed Mr. Norris, Vice President of Commercial Development at VAA, to conduct a study of the in-flight catering "market" at VAA and provide a recommendation as to whether it was in the best interests of VAA to maintain only two in-flight caterers or authorize additional caterers. (Mr. Norris succeeded Mr. Gugliotta, who retired from VAA in 2016.) This action was taken after the Commissioner filed the present Application with the Tribunal, and after passenger traffic at VAA had increased from approximately 18 million passengers (in 2013) to approximately 22.3 million (in 2016).

[573] Ultimately, the study undertaken by Mr. Norris led to the preparation of the In-flight Kitchen Report, which recommended that VAA consider providing at least one additional licence to an in-flight caterer at YVR. More specifically, the draft In-flight Kitchen Report recommended that **[CONFIDENTIAL]** (Richmond Statement, at Exhibit 48, p 3). According to Mr. Richmond, the only substantive comment he made to the draft In-flight Kitchen Report prior to forwarding it to VAA's Board of Directors, was to replace the words "consider providing" with the word "provide," to make the recommendation more definitive (Richmond Statement, at para 186).

[574] After **[CONFIDENTIAL]** firms responded to a request for expressions of interest, they were each invited to participate in a formal RFP process. Those firms were **[CONFIDENTIAL]**.

[575] Among other things, the evaluation criteria developed by VAA's evaluation committee included factors such as **[CONFIDENTIAL]**.

[576] In November 2017, the evaluation committee unanimously recommended that dnata be selected as the preferred proponent, subject to due diligence activities that remained to be conducted by the committee. That same month, an external fairness advisor reviewed VAA's 2017 RFP process and concluded that it had been fair and reasonable. dnata was therefore recommended by the evaluation committee, and then approved by Mr. Richmond and VAA's Board of Directors, notwithstanding that it was proposing to operate from a facility located outside the Airport.

[577] During the hearing of this Application, Messrs. Richmond and Norris testified that dnata was expected to commence operations at YVR in early 2019.

- The legitimacy of VAA's justifications

[578] The Commissioner submits that none of the explanations advanced by VAA to justify the Exclusionary Conduct constitutes a cognizable efficiency or a pro-competitive rationale that accrued to VAA and is independent of the anti-competitive effects of that conduct. The Tribunal disagrees.

[579] With respect to efficiencies, the Commissioner asserts that VAA failed to adduce any evidence to establish that its exclusion of new entrants (including Newrest and Strategic Aviation) into the Galley Handling Market would likely result in its attainment of any cost reductions, improvements in technology or production processes, or improvements in service. Likewise, with respect to competition, the Commissioner states that VAA did not adduce any evidence to demonstrate how excluding new entrants from the Galley Handling Market allowed VAA to offer better prices or better service to airlines. The Commissioner adds that VAA's desire to avoid disruption is simply based on its self-interest in increasing its revenues by attracting new routes.

[580] However, the evidence adduced by Messrs. Richmond and Gugliotta reflects that VAA was concerned with more than attracting new routes. As discussed below, the evidence reflects that there were three distinct aspects to its justification for refusing to grant airside access at YVR to Newrest and Strategic Aviation. The Tribunal acknowledges that VAA's motivations may not have included the attainment of efficiencies in its own operations, for example relating to cost reductions in production or operation, improvements in technology or production processes, product enhancement or improvements in the quality of services. However, legitimate business justifications can also take other incarnations, including pro-competitive explanations for why impugned conduct was undertaken. All circumstances need to be considered (*TREB CT* at para 295).

Preservation of competition

[581] The first, and principal, aspect of VAA's justification was best articulated by Mr. Richmond during the discovery phase of this proceeding. When asked what VAA's intention was when it decided not to issue licences to Newrest and Strategic, Mr. Richmond replied as follows (Exhibit CA-096, Read-in Brief of the Commissioner, Volume I, at p 1783):

> The intention was to preserve two caterers at [YVR] in order it [*sic*] preserve that competition and not suffer the very real possibility of – in our opinion, of a failure in one of those full caterers.

[582] This evidence is consistent with Mr. Richmond's testimony before the Tribunal that VAA was concerned with being "stuck with a full-service caterer and a partial-service caterer, if you will. And then you would have one caterer that dominates the market, [and] may or may not be able to pick up all of the requirements for all of the other airlines […]" (Transcript, Conf. B, October 30, 2018, at pp 885-886). In his witness statement, Mr. Richmond explained that, in his meeting with Mr. Gugliotta on April 1, 2014, "Mr. Gugliotta expressed concern that there was not enough demand at the Airport to support three caterers and that, accordingly, the entry of a third caterer might cause one or even both of the incumbent caterers to exit the market at YVR, in whole or in part, without a comparable replacement" [emphasis added] (Richmond Statement, at para 99).

[583] To the extent that VAA was concerned with preserving two full-service caterers, and avoiding the risk of winding up with only one full-service caterer in the Galley Handling Market, its motivation for refusing to grant airside access to Newrest and Strategic Aviation was pro-competitive, rather than anti-competitive, in nature. Its concern was not with maintaining two full-service firms instead of allowing for three or more such firms to emerge. Rather, its concern was with maintaining two full-service firms instead of taking the risk of finding itself in a position where there was only one such firm, even for a short period of time. In other words, it believed that it was preserving competition, choice and reliability for airlines.

Protecting YVR's reputation

[584] The first aspect of VAA's justification was and remains linked to a second consideration: VAA was very concerned that its reputation would suffer if the airlines experienced significant adverse consequences as a result of the entry of another caterer and the possible exit of CLS or Gate Gourmet Canada. As reflected at paragraphs 112-116 of Mr. Richmond's witness statement (reproduced at paragraph 550 above), VAA was concerned that a "significant disruption in the supply of catering services at YVR […] would have been highly problematic for airlines, damaged YVR's reputation, and made it much more difficult for VAA to attract and retain airlines and routes to YVR, which is a key component of VAA's public interest mandate" (Richmond Statement, at para 116). Regarding YVR's reputation, Mr. Gugliotta elaborated that VAA was concerned that the disruption that might be associated with the abrupt or unexpected departure of one of the incumbent in-flight caterers could adversely impact VAA's "reputation for stable, reliable and efficient operations," and thereby its "efforts to encourage airlines to

establish new routes" at YVR (Gugliotta Statement, at para 96). With this in mind, they "concluded that it was not in the best interests of the Airport to grant an additional in-flight catering licence at that time" (Richmond Statement, at para 117).

[585] In brief, by avoiding the significant disruption that it believed would be associated with the exit of Gate Gourmet or CLS from the Galley Handling Market, VAA wished to avoid the harm to its reputation that would have been associated with what amounts to a reduction in the level of service/quality provided to airlines and their customers at YVR. The levels of service and quality provided to airlines in the Galley Handling Market are important dimensions of competition that VAA was concerned would be adversely impacted by the exit of Gate Gourmet or CLS. Indeed, it can reasonably be inferred from VAA's concern about the prospect of there being only one "full-service" in-flight caterer at YVR, that VAA also had a more general concern about how a monopoly in the supply of Galley Handling services to international airlines would adversely impact its reputation. In turn, VAA was concerned that these adverse impacts on its reputation would harm its ability to induce airlines to establish new routes at YVR, rather than elsewhere.

[586] To the extent that this concern implicates YVR's ability to compete with other airports for such new routes, it constitutes a second legitimate pro-competitive rationale that is unrelated to an anti-competitive purpose and has a link to VAA that goes beyond VAA's mere self-interest (*Canada Pipe FCA* at paras 90-91).The Tribunal pauses to note that Dr. Niels conceded on cross-examination that it is not necessary to find that VAA is constrained by competition with other airports, to conclude that it wants to attract new airlines to YVR.

Avoiding disruption for airlines

[587] The third aspect of VAA's legitimate justification concerned its desire to avoid the prospect of airplanes departing without sufficient meals, or high-quality meals, onboard. The Tribunal considers this to be a cognizable efficiency-related rationale for engaging in the Exclusionary Conduct. The same applies to VAA's desire to avoid some of the other transactional costs associated with exit that were identified by Messrs. Richmond and Gugliotta, e.g., at paragraphs 114-115 and 94-96 of their respective witness statements (which are reproduced at paragraphs 550 and 557 above). These pro-competitive and efficiency rationales were and remain unrelated to an anti-competitive purpose.

[588] In contrast to the benefits of the Stocking Distributor Program that were at issue in *Canada Pipe FCA*, these rationales did not solely relate to improved consumer welfare (*Canada Pipe FCA* at para 90). As noted above, there was and remains an important link to VAA that goes beyond VAA's own self-interest.

[589] The Tribunal recognizes that VAA did not adduce any direct evidence from the airlines themselves to establish that the prospect of a disruption of the level of service or quality in the Galley Handling Market was a concern for any airlines operating at YVR, or that the ongoing presence of two full-service caterers affected the decision of any airline to fly out of YVR or to establish one or more new routes there. Such evidence could have been helpful. VAA similarly did not adduce any evidence to establish that LSG's exit from the Galley Handling Market at

YVR in 2003, or the exit of an in-flight caterer at Edmonton's airport between 2015 and 2017, gave rise to any adverse disruptive effects. However, the absence of such evidence does not negate the legitimacy of what the Tribunal considers to be VAA's genuine concern about preserving two full-service caterers, avoiding disruption in the supply of in-flight catering services to the airlines and their customers, and avoiding harm to its reputation.

[590] The Tribunal observes in passing that other evidence adduced in this proceeding corroborates VAA's position that a disruption in the level of in-flight catering services at an airport can have a significant adverse impact on airlines and their customers. In particular, **[CONFIDENTIAL]** (Transcript, Conf. B, October 9, 2018, at p 348). On cross-examination, **[CONFIDENTIAL]** (Transcript, Conf. B, October 3, 2018, at p 147).

[591] [CONFIDENTIAL] (Transcript, Conf. B, October 5, 2018, at p 304). **[CONFIDENTIAL]** (Exhibit CR-032, Letter from **[CONFIDENTIAL]** dated July 14, 2016).

[592] In addition to the foregoing, Ms. Stewart described a range of potential adverse impacts that Air Transat faced when Gate Gourmet was involved in a labour dispute in the summer of 2016. Those adverse impacts were sufficiently important to Air Transat that it requested that VAA grant a temporary authorization to Strategic Aviation's Sky Café division, to enable it to provide in-flight catering services at YVR. In this regard, Ms. Stewart stated (Stewart Statement, at para 40):

> I explained to Mr. Parson [at VAA] the very disruptive health, safety and passenger experience implications that would arise were a Gate Gourmet service disruption to occur. I mentioned that arriving long-haul Air Transat flights would have a large quantity of international garbage that would be without an authorized disposal option upon arrival at YVR that would need to be back hauled to Europe, and that the most Air Transat could accomplish in terms of self-supply would be to offer passengers a modest brown-bag snack of some sort. I further explained that, in such circumstances, Air Transat would be compelled to evaluate whether it could continue long-haul flight operations at YVR during the period of any in-flight catering disruption.

[593] The Tribunal pauses to note that if dnata in fact commenced operations at YVR in January 2019, this would amount to approximately 11 months from the time it was selected as the successful participant in VAA's RFP process. **[CONFIDENTIAL]** (Transcript, Conf. B, October 4, 2018, at p 213). In this regard, **[CONFIDENTIAL]** (Transcript, Conf. B, October 3, 2018, at p 126). Indeed, Mr. Brown testified that it can sometimes take "upwards of six months" just for an in-flight caterer to obtain a security clearance from the Canadian Security Intelligence Service (Transcript, Conf. B, October 5, 2018, at p 315).

[594] This evidence corroborates VAA's view that the departure of an airline catering firm and its replacement by a new entrant can give rise to significant disruptive effects on airlines and their customers.

- The adequacy and credibility of VAA's justifications

[595] The Commissioner asserts that the explanations advanced by VAA are not adequate or credible because VAA conducted only a superficial analysis and failed to consider or seek information that was readily available from airlines and elsewhere. The Commissioner maintains that such information would have demonstrated that VAA's concerns with respect to the viability of Gate Gourmet and CLS in the face of new entry were not well-founded.

[596] In particular, the Commissioner asserts that the decision not to authorize Newrest and Strategic Aviation to have airside access in the Galley Handling Market was taken after a single meeting that lasted only one hour, **[CONFIDENTIAL]**. While explicitly not suggesting that VAA's decision to deny airside access to Newrest and Strategic Aviation was taken in bad faith, the Commissioner maintains that the decision was made on such a superficial basis that the justification that VAA has advanced cannot be considered credible or given significant weight. In support of his submission, the Commissioner underscores that VAA failed to seek the views of any of its airline customers, other than Jazz. He maintains that if VAA had been truly concerned about the potential adverse consequences to the airlines of allowing one or more additional entrants into the Galley Handling Market at YVR, it would have sought their views.

[597] In addition, the Commissioner submits that VAA failed to consider other readily available information that would have demonstrated that its concerns about the ability of the incumbent caterers at YVR to survive additional competition were not well-founded. In this regard, the Commissioner conceded in response to questions from the panel that firms in VAA's position do not necessarily "have to Google … [or] conduct a market analysis," or "retain an expert to conduct a study." However, the Commissioner maintains that a firm cannot simply say: "Just trust us, we knew what we were doing." In any event, the Commissioner asserts that the extent of due diligence conducted by a firm that wishes to justify its conduct is relevant in assessing the credibility of the justification, and should be sufficient to be able to justify a rationally held belief. The Commissioner adds that VAA's failure to consider readily information before refusing to grant airside access to Newrest and Strategic Aviation vitiates the credibility of its justification for doing so. He maintains that this is particularly the case because VAA conceded on cross-examination that that decision was a "major" one.

[598] The readily available information that the Commissioner states ought to have been considered by VAA before making its decision includes a 2013 report published by the International Air Transport Association ("**2013 IATA Report**") as well as information that had been publicly filed by Gategroup Holding AG (Gate Gourmet's parent company) and LSG. Moreover, the Commissioner notes that VAA prepared the August 2014 Briefing Note well after it initially declined the requests that Newrest and Strategic Aviation had made for an airside access licence, and only after **[CONFIDENTIAL]** (Stent-Torriani Statement, at Exhibit 13). He adds that the 2017 In-flight Kitchen Report "was clearly conducted at least in part because the Commissioner had commenced this application" and was in any event "fundamentally flawed" (Commissioner's Closing Submissions, at para 45).

[599] For the reasons set forth below, the Tribunal does not agree with the Commissioner and considers that, in the very particular circumstances of this case, VAA's justifications for engaging in the Exclusionary Conduct are in fact adequate and credible.

[600] Before explaining its reasons in this regard, the Tribunal makes the following observation. It agrees with the general proposition that an asserted business justification for engaging in anti-competitive conduct will not suffice for the purposes of paragraph 79(1)(*b*) unless the evidence is sufficiently clear, convincing and cogent to support the justification, on a balance of probabilities (*FH v McDougall*, 2008 SCC 53 at paras 45-47; *TREB CT* at paras 288-289). For example, in *TREB CT* at paragraph 390, the Tribunal concluded that the privacy concerns relied upon by the respondent in that case were an afterthought and a pretext for its adoption and maintenance of the anti-competitive practices that were challenged in that case. Accordingly, those considerations did not suffice to demonstrate that the overall character of the impugned conduct was legitimate. However, in the present case, the Tribunal is satisfied, based on the evidence before it, that the justifications that VAA has advanced in this case are in fact sufficient in that regard. Those justifications were present from the outset and dominated VAA's motivations since April 1, 2014, when it first decided to reject Newrest's request for airside access at YVR. They were not a pretext or an after-the-fact fabrication. While VAA's failure to seek additional information from the airlines and other readily available sources may raise questions about its decision-making processes, it does not, on the specific facts of this case, negate the credibility and adequacy of its justifications. Having heard the testimonies of Messrs. Richmond and Gugliotta, both of whom the panel found to be persuasive and reliable witnesses, the Tribunal is satisfied, on a balance of probabilities, that VAA's business justification is credible and adequate.

[601] Regarding the Commissioner's position that VAA made its initial decision after a meeting of only one hour on April 1, 2014, the Tribunal considers that this is not necessarily an indication that its decision not to authorize one or more additional in-flight caterers to access the airside at YVR was "superficial" in nature. Leaders of complex organizations make numerous decisions every day, sometimes in meetings that are even shorter than one hour. Indeed, counsel for the Commissioner noted that the Commissioner may well decide to bring an application before the Tribunal after "a quick 30-minute briefing from the staff" (Transcript, Public, November 13, 2018, at p 972).

[602] In this proceeding, Mr. Richmond testified that his one-hour meeting with Mr. Gugliotta was "very, very intense and in-depth" (Transcript, Conf. B, October 30, 2018, at p 830). He also noted that VAA had been "continuously close to the [the In-flight Catering] file for many years" due to its discussions with the caterers regarding the level of the Concession Fees (Transcript, Conf. B, October 30, 2018, at p 829). Turning to Mr. Gugliotta, when pressed on this point during cross-examination, he pointed out that he "had been dealing with the flight kitchens for the past 20 years at the airport […] so it wasn't just that one hour. It's – it was the totality of our experience in managing the airport that led us to that conclusion" (Transcript, Conf. B, November 1, 2018, at pp 1014-1015). Moreover, Mr. Richmond specifically requested to be briefed for the meeting and received the information described at paragraph 550 above from Mr. Eccott, together with a spreadsheet **[CONFIDENTIAL]**.

[603] Mr. Richmond explained that he needed to "refamiliarize" himself with the "in-flight catering market at YVR," so he sought the input of the individuals who had the expertise that would assist him to make an informed decision (Richmond Statement, at para 93). This is precisely what one would expect a leader in his position to do. After reviewing the information received from Messrs. Gugliotta (who appears to have been the most knowledgeable person at

VAA on the subject), Segat and Eccott, and then discussing it in a "very intense and in-depth" fashion over the course of an hour, he and Mr. Gugliotta jointly decided not to authorize Newrest to access the airside at YVR. Mr. Eccott then relied on that decision to make a similar determination a few weeks later in respect of Strategic Aviation's similar request. In the absence of any suggestion or evidence that they willfully ignored information that might not support their decision, the Tribunal is reluctant to impose a greater burden of pre-decision research, study or due diligence upon those individuals, and upon others who may find themselves in their position in the future.

[604] Based on the foregoing evidence, the Tribunal does not accept the Commissioner's position that the one-hour duration of the meeting, in and of itself, supports the view that VAA's decision was superficial in nature or lacking in credibility.

[605] VAA's decision not to consult airlines or third-party sources may look cavalier or complacent to outside observers. However, the Tribunal is satisfied that this cannot be equated with an anti-competitive purpose or willful blindness. In determining whether explanations from business people amount to legitimate business justifications, as contemplated by paragraph 79(1)(*b*), the Tribunal considers that it should not insert itself into or second-guess the decision-making process of businesses and impose upon them an arbitrary burden that they would not otherwise impose upon themselves, when acting in good faith The Tribunal instead has to be persuaded, based on its assessment of the evidence, that the justifications are credible and adequate on a balance of probabilities. Here, the combined evidence regarding the internal deliberations among Messrs. Richmond, Gugliotta, Eccott and others, their regular contacts and exchanges with airlines and the declining revenues of in-flight caterers, collectively demonstrates that VAA conducted a sufficient exercise of due diligence to allow the Tribunal to find that VAA had a rationally-held belief to support its decision to limit the number of in-flight caterers. Given the considerable experience of Mr. Gugliotta in particular, the Tribunal is reluctant to conclude that the due diligence conducted by VAA before it engaged in the Exclusionary Conduct was insufficient.

[606] Collectively, the VAA leadership team might have been wrong in their assessment that the airlines would be better off, and more likely to establish new routes at YVR, if VAA refrained from permitting Newrest and Strategic Aviation to enter the Galley Handling Market. Indeed, the Tribunal acknowledges that it might look somewhat surprising to some observers that VAA failed to contact a single airline other than Jazz, before making its decisions regarding Newrest's and Strategic Aviation's subsequent requests later in 2014 and 2015. In the same vein, the fact that the airlines had not previously complained about the number of caterers may not look, to some observers, as a sufficient justification for failing to seek their views, particularly given their letters of support for Newrest and Strategic Aviation. The Tribunal however notes that, according to Messrs. Richmond and Gugliotta, VAA had continuous and regular interactions with airlines operating at YVR, that airlines were not shy to flag issues to YVR, and that no airline had raised directly with VAA a specific concern with respect to in-flight catering services at the Airport.

[607] Some observers might also have drawn conclusions different than VAA's based on **[CONFIDENTIAL]** that Messrs. Richmond and Gugliotta assessed during their one-hour meeting. The same might further be said regarding the significance of LSG's exit from the

market in 2003, because that occurred after the company lost its principal customer in Canada, following Canadian Airlines' acquisition by Air Canada, rather than as a result of any weakness on LSG's part. In addition, at that time, LSG had a 40 percent ownership interest in CLS, which was increased to 70 percent in 2008.

[608] However, the question is not whether VAA's senior management was as correct and as thorough as the Commissioner would have preferred or some observers might expect. Rather, it is whether the individuals in question made a genuine and good faith decision on the basis of information that was sufficiently robust to withstand an allegation of having been so superficial that it lacked credibility or was otherwise inadequate. On the basis of the information set forth above, the Tribunal finds in favour of VAA on this issue.

[609] The Tribunal considers that the adequacy and credibility of VAA's justification strengthened after it took its initial decision in April 2014. This is because, after Newrest and Strategic Aviation continued to press VAA for an authorization to enter the Galley Handling Market, Mr. Richmond requested Mr. Gugliotta to prepare the August 2014 Briefing Note. This was followed by the more detailed 2017 In-flight Kitchen Report, which was prepared after the Commissioner had filed the present Application, and after VAA had three additional years of data reflecting the recovery trend towards increased in-flight catering revenues at YVR.

[610] Turning to the Commissioner's submission that VAA's failure to conduct additional "due diligence" vitiated the credibility of its justifications for excluding Newrest, Strategic Aviation and others from the Galley Handling Market, the Tribunal is not persuaded by the Commissioner's position.

[611] As noted at paragraph 598 above, the readily available information that the Commissioner maintains ought to have been considered by VAA included the 2013 IATA Report as well as information that the Gate Group and LSG had publicly filed. Among other things, the 2013 IATA Report stated that in-flight caterers and other airline suppliers around the world had earned an average return of approximately 11% over the period 2004-2011, while having a weighted average cost of capital of approximately 7-9%. In addition, that document reported that the volatility of in-flight caterers' returns, on a global basis, was much less over that period than it was for the airlines. In this regard, the report noted that the in-flight caterers studied represented approximately 40-50% of total global revenues of all in-flight caterers (Exhibit A-151, IATA Economics Briefing N.4: Value Chain Profitability, at pp 19, 27, 47).

[612] Regarding information reported by the Gate Group, the Commissioner noted that its Annual Results 2013 projected an increase in revenue growth of 2% to 4% and an earnings before interest, tax, depreciation and amortization ("**EBITDA**") margin of 6% to 7% for its North American operations, as well as expected total revenue growth out to 2016 of 8% to 10% and expected EBITDA in the range of 8% to 9% for that region. (Exhibit A-152, Profitability and the Air Transportation Value Chain, June 2013, at pp 23, 25). In addition, the Commissioner noted that in the Gate Group's Annual Report 2013, it was stated that "[a]ll parts of the Group contributed to the positive result" for 2013, and that "the business in North America continued to experience revenue growth at international hub locations through the increase in volume from international carriers" (Exhibit A-154, Gategroup Annual Report 2013, at pp 4, 19).

[613] With respect to LSG, the Commissioner similarly noted that its Annual Review 2013 reported that the company had increased its revenues "in every one of [its] regions, even in the mature markets of Europe and North America." That document also expressed confidence in the future, in part based on an expectation that "passenger volumes will continue to climb" and in part based on a forecast "that market volume will increase in conventional airline catering […]" (Exhibit A-157, LSG Sky Chefs 2013 Annual Review, at pp 2, 6).

[614] The Commissioner maintains that the foregoing information was readily available and demonstrated that VAA's concerns about the potential exit of either Gate Gourmet or CLS (which is a subsidiary of LSG) were not well-founded or credible. The Commissioner adds that **[CONFIDENTIAL]**.

[615] The Tribunal does not agree with the Commissioner's position that VAA's failure to obtain the foregoing information vitiated the credibility of its justifications for refusing to authorize airside access at YVR for Newrest and Strategic Aviation. As with VAA's failure to contact any of its international airline customers, its omission to take the little amount of time that would have been required to seek out and review the foregoing information may look surprising to some observers. However, it does not vitiate the credibility of the justifications that it had and continues to have for refusing to authorize airside access to Newrest, Strategic Aviation or other potential entrants (apart from dnata). Once again, in the absence of any suggestion (or evidence) that it willfully ignored information that might not support its decision, the Tribunal is reluctant to find that VAA had a burden to conduct research for additional information that might undermine or contradict the genuine decision that it reached. This reluctance is based on (i) the substantial knowledge and expertise of multiple members of its senior management, who participated in the decisions to refuse to authorize new entrants; (ii) VAA's on-going business relationship and contacts with airlines; and (iii) the information that VAA had received from Gate Gourmet and CLS, including in relation to their revenues and other aspects of their financial circumstances. VAA's due diligence did not have to be perfect or even comprehensive; it needed to be credible and adequate. The Tribunal finds that it met that standard.

[616] Regarding the passenger and revenue data that was relied upon by Messrs. Richmond and Gugliotta, the Tribunal observes that Dr. Niels conducted a viability analysis that led him to conclude that the available catering business at YVR could have supported a third firm as far back in time as 2014. The panel did not find this aspect of Dr. Niels' evidence to be robust. Among other things, the Tribunal notes that the average profitability of three providers would have been below Dr. Niels' benchmarks for viability in his extended static analysis of effects of a new entrant with kitchen, with a price effect of **[CONFIDENTIAL]**%. That said, the analysis conducted by Messrs. Richmond and Gugliotta was not very robust either. The Tribunal is therefore left with the sense that reasonable people could differ on the issue of whether the markets for in-flight catering services and Galley Handling services at YVR could support a third competitor as far back as 2014.

[617] The Commissioner further maintains that the scope of VAA's 2017 In-flight Kitchen Report was also not adequate or credible. In this regard, he notes that VAA **[CONFIDENTIAL]**.

[618] However, for the same reasons provided above, and even though the Tribunal acknowledges that there were some shortcomings in this study (for example, **[CONFIDENTIAL]**), the Tribunal is reluctant to find that VAA had a burden to ensure that the 2017 In-flight Kitchen Report was more robust.

[619] The Tribunal pauses to observe that, for many years now, **[CONFIDENTIAL]**. It was not unreasonable for Messrs. Richmond and Gugliotta to have considered this trend to be reflective of a weakening or uncertain situation for those firms at YVR.

(v) The "overall character" of VAA's conduct

[620] The Commissioner maintains that even if VAA's justifications for engaging in the Exclusionary Conduct may be said to be legitimate, the overall character or overriding purpose of that conduct is and remains anti-competitive, given VAA's intent to exclude competitors and the reasonably foreseeable exclusionary effects of that practice.

[621] The Tribunal disagrees. Based on the evidence summarized in the preceding sections above, the Tribunal considers that VAA's overarching, overriding purpose in refusing to authorize airside access to Newrest and Strategic Aviation was and remains legitimate in nature. From the very outset, dating back to April 1, 2014, VAA's consistent and predominant concerns have been to (i) ensure that airlines operating at YVR are served by at least two full-service caterers; (ii) avoid the disruptive effects that it believes would be associated with the exit of one of the incumbent caterers; and (iii) avoid harm to its reputation. In turn, VAA has consistently believed that such harm to its reputation would adversely impact its ability to compete for and attract new routes to YVR. For greater certainty, the evidence does not establish that the impugned practice was primarily motivated by a predatory, exclusionary or disciplinary intent towards a competitor. Moreover, the Tribunal finds that VAA was not motivated by a desire to adversely impact competition in order to increase or maintain its Concession Fees or rent revenues.

[622] The mere fact that a practice may be exclusionary is not a sufficient basis upon which to conclude that the practice has an overriding anti-competitive purpose or character. It all depends on the factual context and on the evidence of each particular case.

[623] The Tribunal acknowledges that, in this case, VAA intended to exclude, and is in fact continuing to exclude Newrest and Strategic Aviation from the Galley Handling Market. However, the evidence establishes, on a balance of probabilities, that VAA's overriding purpose has never been to exclude those entities from the Galley Handling Market. Its focus has always been on the legitimate considerations described above. The Tribunal considers that those considerations have always neutralized and outweighed VAA's subjective intention to exclude Newrest and Strategic Aviation from the Galley Handling Market. For this reason, they establish a valid business justification for excluding those entities from that market (*Canada Pipe FCA*, at paras 73 and 87-88).

[624] Therefore, the Tribunal concludes that the "overall character" of VAA's conduct was legitimate, and not anti-competitive, in nature.

[625] The Tribunal considers it appropriate to reiterate that the exercise of pre-existing market power to exclude entry (or even to raise prices) does not necessarily constitute an anti-competitive act, as contemplated by paragraph 79(1)(*b*). As the Tribunal has previously observed, "[…] section 79 is not intended to condemn a firm merely for having market power. Instead, it is directed at ensuring that dominant firms compete with other firms on merit and not through abusing their market power" (*Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc et al*, [1997] CCTD No 8, 73 CPR (3d) 1 (Comp Trib) at p 179). In this regard, Dr. McFetridge notes that any limitation in the supply of licences for airside access by VAA could be construed as the mere exercise of its pre-existing market power in the Airside Access Market.

(d) Conclusion

[626] For the reasons set forth above, the Tribunal concludes that the Exclusionary Conduct is not anti-competitive in nature. Although VAA has consistently intended to exclude, and has in fact excluded, Newrest and Strategic Aviation from the Galley Handling Market since April 2014, it has provided legitimate business justifications for such exclusion. VAA has also established that those justifications were more important in its decision-making process than any subjective or deemed anti-competitive intent, or any reasonably foreseeable anti-competitive effects of the Exclusionary Conduct. In other words, the evidence that was adduced in support of the alleged legitimate business justifications that VAA has demonstrated outweighs the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects of the impugned conduct. Accordingly, the overall character, or overriding purpose, of the Exclusionary Conduct was not anti-competitive, as contemplated by paragraph 79(1)(*b*).

[627] The Tribunal's conclusion in this regard is reinforced by its view that VAA's business justifications for limiting the number of in-flight caterers made economic and business sense. In this regard, the Tribunal was provided with persuasive evidence demonstrating that, leaving aside the anti-competitive effects of VAA's Exclusionary Conduct, its decision to exclude in-flight caterers conferred what were considered to be important benefits to the Airport (*TREB CT* at paras 430-431).

[628] Based on the foregoing, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*b*) have been met and that VAA has engaged in, and continues to engage in, a practice of anti-competitive acts. This conclusion provides a sufficient basis upon which to dismiss the Commissioner's Application.

[629] Nevertheless, for completeness, the Tribunal will provide its views on the assessment of the third element of section 79, namely, whether the impugned conduct has prevented or lessened competition substantially, or is likely to do so in the future.

E. Has the impugned conduct had the effect of preventing or lessening competition substantially in the market that is relevant for the purposes of paragraph 79(1)(*c*) of the Act, or is it having or likely to have that effect?

[630] The Tribunal now turns to the third element of the abuse of dominance provision, namely, whether VAA's Exclusionary Conduct has prevented or lessened competition, is preventing or lessening competition, substantially, or is likely to have that effect, in the Relevant Market as contemplated by paragraph 79(1)(*c*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that the Commissioner has not demonstrated this to be the case.

[631] As stated above in Section VII.B above, only the Galley Handling Market at YVR is relevant for the purposes of paragraph 79(1)(*c*).

(1) Analytical framework

[632] The analytical framework for the Tribunal's assessment of paragraph 79(1)(*c*) was extensively addressed in *TREB CT*, at paragraphs 456-483. It does not need to be repeated here. For the present purposes, it will suffice to simply highlight the following.

[633] In brief, paragraph 79(1)(*c*) requires the Tribunal to conduct a two-stage assessment. First, it must compare, on the one hand, the level of competition that exists, or would likely exist, in the presence of the impugned practice and, on the other hand, the level of competition that likely would have prevailed in the past, present and future in the absence of the impugned practice. In other words, the Tribunal must determine what likely would have occurred "but for" the impugned practice (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 ("***Tervita SCC***") at paras 50-51; *TREB FCA* at para 86; *Canada Pipe FCA* at paras 44, 58). To make this assessment, the Tribunal must compare the state of competition in the relevant market with a counter-factual scenario in which the impugned practice did not take place. The Tribunal's approach under paragraph 79(1)(*c*) thus contemplates an assessment that emphasizes the comparative and relative state of competition in past, present and future time frames, as opposed to the absolute state of competition at any of these points in time (*TREB FCA* at para 66; *Canada Pipe FCA* at paras 36-37).

[634] At the second stage of the analysis, the Tribunal must determine whether the difference between the level of competition in the presence of the impugned conduct, and the level that would have existed "but for" the impugned conduct, is substantial. The issue is whether competition likely would have been or would likely be substantially greater, for example as a result of even more entry or innovation, "but for" the implementation of the impugned practice (*Canada Pipe FCA* at paras 36-37, 53 and 57-58). In conducting this exercise, the Tribunal looks at the general level of competition in the relevant market, in the actual world and in the hypothetical "but for" world (*TREB FCA* at para 70).

[635] Paragraph 79(1)(*c*) has two distinct and alternative branches. The first requires the Tribunal to determine whether an impugned practice has had, is having or is likely to have the effect of preventing competition substantially in a market. The second requires the Tribunal to

ascertain whether the practice has had, is having or is likely to have the effect of lessening competition substantially in a market.

[636] Despite the similarity in the general focus of the Tribunal when considering the two branches of paragraph 79(1)(*c*), there are nevertheless important differences in its assessment of the "prevent" and "lessen" branches (*Tervita SCC* at para 55). Specifically, in assessing whether competition has been, is or is likely to be lessened, the more particular focus of the assessment is upon whether the impugned practice has facilitated, is facilitating or is likely to facilitate the exercise of new or increased market power by the respondent(s). Where the respondent does not compete in the relevant market, this focus is upon the firms that do so compete in that market. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry has been, is being or is likely to be diminished or reduced, as a result of the impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition has not been, is not and is not likely to be lessened at all, let alone substantially.

[637] By contrast, in assessing whether competition is likely to be prevented, the Tribunal's particular focus is upon whether the impugned practice has preserved, is preserving or is likely to preserve any existing market power enjoyed by the respondent(s), by preventing or impeding new competition that otherwise likely would have materialized in the absence of the impugned practice. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry likely would have increased, "but for" the implementation of that practice. As noted immediately above, where the respondent does not compete in the relevant market, the focus is on the firms that do so compete in that market. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition has not been, is not and is not likely to be prevented at all, let alone substantially.

[638] The extent of an impugned practice's likely effect on market power is what determines whether its effect on competition is likely to be "substantial" (*Tervita SCC* at para 45; *TREB FCA* at paras 82, 86-92). Again, the test is relative and requires an assessment of the difference between the level of competition in the actual world and in the "but for" world (*TREB FCA* at para 90).

[639] "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence, or both (*TREB CT* at paras 469-471). The Commissioner must however always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition has been, is or is likely to be prevented or lessened substantially (*Tervita SCC* at para 65; *TREB FCA* at para 87; *Canada Pipe FCA* at para 46).

[640] In conducting its assessment of substantiality under paragraph 79(1)(*c*), the Tribunal will assess both the degree of the prevention or lessening of competition as well as its duration (*Tervita SCC* at paras 45, 78). Where a prevention or lessening of competition does not extend throughout the relevant market, the Tribunal will also assess its scope and whether it extends throughout a "material" part of the market (*The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14 ("***CCS***") at paras 375, 378, rev'd 2013 FCA 28, rev'd 2015 SCC 3).

[641] With respect to degree, or magnitude, the Tribunal assesses whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise materially greater market power than in the absence of the practice (*Tervita SCC* at paras 50-51, 54). The Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. What constitutes "materially" greater market power will vary from case to case and will depend on the facts of the case (*Tervita SCC* at para 46; *TREB FCA* at para 88). In assessing whether the degree or magnitude of prevention or lessening of competition is sufficient to be considered "substantial," the Tribunal will consider the overall economic impact of an impugned practice in the relevant market. With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether this material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained for, approximately two years (*Tervita SCC* at para 80; *CCS* at para 123).

[642] For greater certainty, when assessing whether competition with respect to prices has been, is or is likely to be prevented or lessened substantially, the test applied by the Tribunal is to determine whether prices were, are or likely would be materially higher than in the absence of the impugned practice. With respect to non-price dimensions of competition, such as quality, variety, service 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 (*Tervita SCC* at para 80; *CCS* at paras 123-125, 376-377).

[643] Where it is alleged that future competition has been, is or is likely to be prevented by an impugned practice, this period will run from the time when that future competition would have likely materialized, in the absence of the impugned practice. If such future competition cannot be demonstrated to have been, or to be, likely to materialize in the absence of the impugned practice, the test contemplated by paragraph 79(1)(*c*) will not be met. To be likely to materialize, the future competition must be demonstrated to be more probable than not to occur in the absence of the impugned practice (*Tervita SCC* at para 66). To meet this test, the Commissioner is required to demonstrate that the future competition, whether in the form of entry by new competitors or expansion by existing competitors (including in the form of the introduction of new product offerings), likely would have materialized within a discernible time frame. This time frame need not be precisely calibrated. However, it must be based on evidence of when the entry or expansion in question realistically would have occurred, having regard to the typical lead time for new entry or expansion to occur in the relevant market in question.

[644] It bears emphasizing that the burden to demonstrate both the substantial nature of the alleged prevention or lessening of competition, and the basic facts of the "but for" scenario that are required to make that demonstration, lies with the Commissioner (*Tervita FCA* at paras 107-108).

(2) The parties' positions

(a) The Commissioner

[645] The Commissioner argues that VAA's conduct has had, is having and is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market. In

support of this position, the Commissioner asserts that, "but for" VAA's Exclusionary Conduct, the market for the supply of Galley Handling services at YVR would be substantially more competitive, including by way of materially lower prices, materially enhanced innovation and/or materially more efficient business models, and materially higher service quality.

[646] The Commissioner submits that in the absence of VAA's impugned conduct, significant new entry into the Galley Handling Market at YVR likely would have occurred, and likely would occur in the future. In this regard, he notes that potential new entrants have already sought authorization to access the airside to provide in-flight catering at the Airport, and would likely have begun operations at the Airport in the absence of VAA's Practices. The Commissioner therefore maintains that VAA's conduct insulates the incumbent in-flight catering firms at the Airport from these new sources of competition, enabling those incumbent firms to exercise a materially greater degree of market power, through materially higher prices and materially lower levels of service quality, than would otherwise prevail in the absence of VAA's practice.

[647] The Commissioner claims that the ability of airlines seeking Galley Handling services at YVR to contract with alternatives to the incumbent providers would allow them to realize at YVR the price and non-price benefits that they have enjoyed at other airports in Canada where new entry has been permitted to occur.

[648] The Commissioner further contends that new entry would also bring to YVR the introduction of innovative and/or more efficient Galley Handling business models. For example, airlines would gain the ability to procure Galley Handling services from a less than full-service in-flight catering firm, or from in-flight catering firms with a lower-cost off-Airport location, delivering efficiencies to service providers and savings to airlines.

[649] In support of his position, the Commissioner relies on the evidence of the market participants directly impacted by VAA's Exclusionary Conduct, namely several airlines and in-flight catering firms, as well as on the expert evidence of Dr. Niels. Dr. Niels' evidence includes: (i) the analysis of switching by airlines at Canadian airports; (ii) Jazz's gains from switching at airports other than YVR; (iii) the price effects for airlines that did not switch; and (iv) **[CONFIDENTIAL]**. The Commissioner claims that, on their own and certainly in the aggregate, these various sources of evidence demonstrate that VAA's anti-competitive conduct has caused, is causing and is likely to cause a substantial prevention and lessening of competition in the supply of Galley Handling at YVR. Specifically, the Commissioner maintains that, "but for" VAA's Exclusionary Conduct, there would likely have been in 2014-2015 and would likely be in the future: (i) entry by new competitors for the supply of Galley Handling at YVR; (ii) switching and threats of switching from airlines at YVR to new competitors for the supply of Galley Handling; (iii) lower prices for airlines for the supply of Galley Handling services at YVR; and (iv) a greater degree of dynamic competition for Galley Handling at YVR.

[650] Finally, the Commissioner argues that the alleged prevention or lessening of competition would be substantial in terms of magnitude, duration and scope: it adversely impacts competition to a degree that is material, the duration of the adverse effects is substantial and the adverse effects impact a substantial part of the Relevant Market.

[651] As stated before, the Commissioner's focus throughout the hearing of this Application was on one of VAA's two alleged impugned Practices, namely, the Exclusionary Conduct. Indeed, the other allegation regarding continued tying of access to the airside for the supply of Galley Handling services to the leasing of land at YVR from VAA was not addressed by the Commissioner during the hearing or in his closing written submissions.

(b) VAA

[652] VAA responds that its Practices do not, and are not likely to, prevent or lessen competition substantially in any market. More specifically, VAA submits that the Commissioner has failed to meet his burden to prove, on a balance of probabilities, that VAA's refusal to license Newrest and Strategic Aviation has had, is having or is likely to have the effect of substantially preventing or lessening competition in the Galley Handling Market.

[653] In its Amended Response, VAA submitted that its decision to limit the number of in-flight caterers at the Airport has not enabled the incumbent firms to exercise materially greater market power than they would have been able to exercise in the absence of the acts. VAA further claimed that there is vigorous competition between Gate Gourmet and CLS, that the presence of two full-service in-flight catering firms is consistent with the number of such competitors at other comparable North American airports, and that airlines can and do change firms in response to price and service competition.

[654] VAA further argued that the airlines (and their large international alliances) have considerable countervailing market power. Finally, VAA submitted that the licensing of dnata and the arrival of this third in-flight caterer at YVR will eliminate any prevention or lessening of competition that could have resulted from VAA's refusal to grant licences to Newrest and Strategic Aviation.

[655] In its closing submissions, VAA elaborated by stating that, on the unique facts of this case where it does not compete in the Relevant Market (i.e., the Galley Handling Market), the Commissioner must prove that its actions materially created, enhanced or maintained the market power of both Gate Gourmet and CLS, in the supply of Galley Handling at YVR. VAA argued that the evidence on the record does not establish that "the market at issue would be substantially more competitive" (*TREB FCA* at para 88), "but for" the Exclusionary Conduct.

[656] VAA reiterated that in evaluating whether its conduct materially enhanced the market power of either Gate Gourmet or CLS, the Tribunal must also consider the interaction between the effect of the denial of licences to Newrest and Strategic Aviation and the countervailing market power exercised or exercisable by the airline customers of Gate Gourmet and CLS.

[657] VAA also maintains that the evidence provided by the Commissioner, whether from the market participants or from Dr. Niels, is not sufficient to meet the test under paragraph 79(1)(*c*). More specifically, VAA submits that the anecdotal evidence from Jazz and Air Transat is unreliable and open to serious question following the cross-examination of the Commissioner's witnesses. VAA further asserts that the Commissioner's evidence is limited to two small carriers. Furthermore, VAA claims that the economic evidence from Dr. Niels suffers from numerous

flaws. For example, it states that the alleged price effects only occur for "small" airlines, that they are largely associated with entry at airports going from a monopoly position to two in-flight caterers, and that these small airlines account only for about **[CONFIDENTIAL]**% of the flights at YVR, with no indication of the proportion they represent of the Galley Handling Market at YVR.

[658] VAA acknowledges that the Tribunal can assess both the quantitative and qualitative effects of the impugned conduct and that the qualitative effects are more relevant to an assessment of dynamic competition in innovation markets, in the sense that innovation or technology plays a key role in the competitive process. However, VAA submits that the Galley Handling Market is not such a market, and that there is no clear and convincing evidence of any adverse effect on innovation in this case.

[659] Finally, VAA adds that the factual circumstances relevant to the consideration of whether there has been or will likely be a substantial prevention or lessening of competition should be updated to the date of the hearing. In this instance, given the imminent entry of dnata, VAA maintains that the Commissioner has to prove that VAA's conduct is likely to have the effect of substantially preventing or lessening competition from a forward-looking perspective. VAA contends that, if any negative price effects have resulted from the impugned conduct, those effects will be remedied and cured with the entry of dnata at YVR.

(3) Assessment

[660] The Tribunal notes at the outset that most of the evidence adduced by the Commissioner was quantitative evidence relating to the alleged price effects of VAA's Exclusionary Conduct. As part of its assessment, the Tribunal has therefore focused significantly on whether prices likely would have been, or would likely be materially lower, "but for" VAA's Exclusionary Conduct. The Tribunal has also evaluated whether entry likely would have been, or would likely be materially greater in the absence of that conduct, whether switching between suppliers of Galley Handling services likely would have been, or would likely be materially more frequent, and whether innovation in terms of Galley Handling services offered likely would have been, or would likely be substantially greater.

[661] For the reasons discussed below, the Tribunal concludes that the Commissioner has not demonstrated that the incremental adverse effect of VAA's Exclusionary Conduct on competition in the Galley Handling Market has been, is or is likely to be material, relative to the "but for" world in which that conduct did not occur. Therefore, the Commissioner has not established that competition has been or is prevented or lessened substantially as a result of the Exclusionary Conduct, or that it is likely to be prevented or lessened substantially in the future.

(a) Alleged anti-competitive effects

(i) Entry

[662] In assessing whether competition has been, is or is likely to be substantially prevented or lessened by a practice of anti-competitive acts, one of the factors to consider is whether entry or expansion into the relevant market likely would have been, likely is or likely would be, substantially faster, more frequent or more significant "but for" that practice (*Canada Pipe FCA* at para 58; *TREB CT* at para 505).

[663] According to the Commissioner, VAA's Exclusionary Conduct constitutes a significant barrier to entry for new providers of Galley Handling services who otherwise would have entered into the Relevant Market.

[664] The Tribunal is satisfied that several of the Commissioner's witnesses provided credible and persuasive evidence regarding the exclusionary impact that VAA's conduct has had on them in terms of entry. Based on that evidence, the Tribunal accepts that this conduct has prevented the development of at least some new competition in the Galley Handling Market. Indeed, VAA does not dispute that Newrest, Strategic Aviation and Optimum would like to compete at YVR. Witnesses from each of these firms (Mr. Stent-Torriani for Newrest, Mr. Brown for Strategic Aviation and Mr. Lineham for Optimum) testified that, "but for" VAA's Exclusionary Conduct, their companies would have entered YVR in 2014-2015 and would have competed for airline business. The evidence shows that they participated in RFPs launched by Jazz and Air Transat in the 2014-2015 timeframe, and were unsuccessful at YVR because of their inability to obtain a licence from VAA to offer their Galley Handling services.

[665] Considering the foregoing, the Tribunal is satisfied that there would have been somewhat more new entry into the Relevant Market than there has in fact been, "but for" the impugned conduct (*Canada Pipe FCA* at para 58).

[666] The representatives of Newrest, Strategic Aviation and Optimum all testified that, despite the entry of dnata at YVR, they would still be interested in commencing operations at YVR and in competing for airline business in the Galley Handling Market. There is also evidence, notably from the witnesses who appeared on behalf Air Canada (Mr. Yiu) and WestJet (Mr. Soni), indicating that airlines are still generally looking for more competition in the in-flight catering business. However, apart from general statements from Newrest, Strategic Aviation and Optimum regarding their continued interest in operating at YVR, and similar statements from Air Canada and WestJet regarding the benefits of increased competition in Galley Handling services, the Commissioner has provided limited evidence regarding the incremental benefits that past, current or future new entry would have yielded in the Galley Handling Market. Normally, as part of an analysis of likely past, present or future entry, the Commissioner is expected to provide evidence regarding the proportion of the market that was, is or is likely to be available to new entrants. As part of this exercise, it is incumbent upon the Commissioner to identify concrete market opportunities that would likely have been, are or would likely be available to new entrants. In other words, the Commissioner has the burden to establish that new entrants would likely have entered or expanded in the relevant market, or would be likely to do so, "within a

reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market" (*Tervita FCA* at para 108). Such evidence has not been provided in this proceeding. Among other things, the Commissioner has not addressed the fact that the contracts between the incumbent in-flight caterers and the airlines are typically long-term contracts, varying between three to five years.

[667] As a result, the Tribunal is not satisfied that there is clear and convincing evidence to support the conclusion that there were, are or would likely be sufficient opportunities available to new entrants to support entry on a scale that would likely have been or would likely be sufficient to have a material impact on the price and non-price dimensions of competition in the Galley Handling Market.

[668] The Tribunal underscores that the situation is now different from the 2014-2015 and 2017 periods when there were RFPs for Galley Handling services initiated by airlines such as Air Transat, Jazz or Air Canada, and when Newrest, Strategic Aviation and/or Optimum offered their services and participated in the process. No evidence was adduced to demonstrate that new contracts for Galley Handling services are currently available or would soon be available for any airlines at YVR. When relying on an allegation that impugned conduct prevents or would likely prevent new entrants from having a material impact on the price or non-price dimensions of competition, the Commissioner must demonstrate more than the existence of firms that are interested in entering the relevant market. The Commissioner must go further and demonstrate that those firms are likely to be successful and that they are likely to achieve a scale of operations that permitted or would permit them to materially impact one or more important dimensions of competition. He has not done so for present or future entry. Likewise, as to the 2014-2015 and 2017 periods mentioned above, the Commissioner has not established that entry by Newrest, Strategic Aviation and/or Optimum likely would have been on a sufficient scale to result in materially lower prices or a materially higher level of innovation, quality, service or other non-price effects in a substantial part of the market.

[669] Based on the foregoing, the Tribunal finds that the Commissioner has not demonstrated, with clear and convincing evidence, that successful and sufficient entry at YVR has been or is prevented, or will likely be prevented in the foreseeable future, "but for" the Exclusionary Conduct.

(ii) Switching

[670] The Commissioner maintains that, had entry been permitted, switching from Gate Gourmet or CLS likely would have taken place to a materially higher degree than in the presence of VAA's Exclusionary Conduct. He adds that airlines would likely have resorted, and would likely turn in the future, to new providers of Galley Handling services at YVR. VAA replies that the evidence on switching does not demonstrate that VAA's Exclusionary Conduct has had, or is likely to have, the effect of limiting competition in the Galley Handling Market at YVR, let alone substantially.

- Switching by airlines

[671] On this issue, the Commissioner relied on Dr. Niels' analysis of the extent of switching at various Canadian airports. Dr. Niels' switching analysis consisted of counting the number of switches of in-flight catering providers made by the airlines at different airports over the period 2013-2017. In his analysis, Dr. Niels identified **[CONFIDENTIAL]** instances in which airlines switched in-flight caterers during that period. Of these, **[CONFIDENTIAL]** occurred at YVR, **[CONFIDENTIAL]**. Of the other **[CONFIDENTIAL]** which took place at other airports, **[CONFIDENTIAL]** involved switches to new entrants. A little more than half of these changes in in-flight caterers (i.e., **[CONFIDENTIAL]**) were made by **[CONFIDENTIAL]**.

[672] The evidence from Dr. Niels also showed an important change in the average yearly percentage of total airline purchases of in-flight catering services from in-flight caterers who were switched in the period from 2013 to 2017. That percentage was at **[CONFIDENTIAL]**% at YVR whereas it was much higher at every other airport in Canada, ranging from **[CONFIDENTIAL]**% to **[CONFIDENTIAL]**%, including YYZ at **[CONFIDENTIAL]**%. In other words, Dr. Niels found that the proportion of airline spending on in-flight catering that was switched during the period 2013-2017 was much lower at YVR than at other large Canadian airports. Dr. Niels added in reply to Dr. Reitman that **[CONFIDENTIAL]**, implying that VAA's refusal to permit entry has resulted in weaker competitive dynamics at YVR.

[673] According to the Commissioner, this analysis by Dr. Niels demonstrates that: (i) there was very little switching by airlines among the incumbent providers of in-flight catering services at YVR; (ii) comparatively, substantial switching occurred at airports other than YVR; and (iii) switching is often associated with the entry of new in-flight caterers.

[674] The Commissioner submits that this disparity in switching at YVR compared to other airports is relevant for two reasons. First, would-be entrants across Canada were ready to enter in 2014 and they remain ready to enter the Galley Handling Market. Therefore, "but for" VAA's Exclusionary Conduct, more switching would likely have occurred at YVR in the past and more would likely occur in the future. Second, the Commissioner suggests that Dr. Niels and Dr. Reitman agree that it is reasonable to presume that airlines benefit when they switch in-flight catering providers. Based on this, he maintains that there is a direct link between the fact of switching and benefits to airlines, and a direct link between a lack of switching and increased costs and/or reduced quality of service to airlines.

[675] The Tribunal acknowledges that there likely would have been at least some additional switching at YVR, "but for" the Exclusionary Conduct. However, the Tribunal considers that the switching analysis conducted by Dr. Niels has some important shortcomings. First, as pointed out by VAA, the switches counted by Dr. Niels in his analysis were for Catering and Galley Handling together. It is not possible to discern specific effects in the Galley Handling Market, *per se*, or to determine whether the switches observed related to that market or in respect of catering services. Second, Dr. Niels' analysis was incomplete. As Dr. Niels acknowledged, he did not factor into his analysis instances of partial switching made by airlines for their Galley Handling services. Third, apart from the fact that there has been more entry at some other airports than at YVR, it is not clear that there is any material difference between the intensity of

competition in the provision of Galley Handling services at YVR, relative to other airports. Dr. Niels essentially conceded this point.

[676] That said, further to its assessment of Dr. Niels' evidence on this point, and considering also the evidence provided by Air Transat and Jazz showing that they would have switched to a new in-flight caterer further to their respective 2014 and 2015 RFPs, the Tribunal agrees with the Commissioner that, on a balance of probabilities, switching would have been and would likely be greater and more frequent in the absence of VAA's Exclusionary Conduct. However, that is not the end of the analysis. As discussed above, the Commissioner must also address whether such switching likely would have been sufficient to result in materially lower prices, or materially higher levels of non-price benefits, in a substantial part of the market, "but for" the Exclusionary Conduct. For the reasons discussed in Section VII.E.3.b below, he has not satisfied his burden in this regard.

- Entry by dnata

[677] The Commissioner also submits that dnata's entry as a third provider of in-flight catering services at YVR in 2019 will have limited impact on the Galley Handling Market. The Commissioner argues that, unlike the situation for Newrest, Strategic Aviation and Optimum, there is limited evidence that dnata will likely be an effective competitor at YVR.

[678] The Commissioner claims that dnata has no presence in Canada and virtually none in North America (being only present in Orlando, Florida). He submits that dnata's limited presence in North America will be an obstacle to its success at YVR, as it will be unable to offer "network" pricing and satisfy airlines' preferences for a single caterer supplier across Canada.

[679] The Commissioner also contends that **[CONFIDENTIAL]** (Commissioner's Closing Argument, at para 78). The Commissioner further notes that, **[CONFIDENTIAL]**. Stated differently, despite the fact that domestic flights account for 67% of flights per week at YVR, **[CONFIDENTIAL]**. The Commissioner submits that since international flights account for a smaller proportion of flights per week at YVR, **[CONFIDENTIAL]**.

[680] The Commissioner further argues that VAA's process for selecting dnata – namely, the In-Flight Kitchen Report and the 2017 RFP itself – was fundamentally flawed in many respects, as were the results of the process.

[681] Finally, the Commissioner contends that dnata is a "**[CONFIDENTIAL]**" type of new competitor vis-à-vis the two incumbent caterers at YVR, in an in-flight catering environment where innovative business models exist and benefit airlines everywhere but YVR (Commissioner's Closing Argument, at para 77).

[682] The Tribunal disagrees with the Commissioner's position with respect to dnata. In brief, the evidence does not support the Commissioner's contention that dnata is unlikely to be an effective competitor.

[683] Regarding the scope of dnata's presence, the evidence does not support the Commissioner's suggestion that dnata's entry will be limited and targeted. In his cross-examination by counsel for VAA, **[CONFIDENTIAL]**.

[684] As to the RFP conducted by VAA in 2017, the Tribunal is not convinced by the Commissioner's arguments. The Tribunal agrees with VAA that, in light of the evidence regarding the In-Flight Kitchen Report and the RFP itself, the RFP was beyond reproach. The Tribunal does not find that the process was flawed or geared towards a given result. The Commissioner has not pointed to any persuasive evidence in that regard. Indeed, the RFP process was found to be fair by a third-party fairness advisor. It was expressly open to both full-service and non-full-service in-flight catering firms. It was also open to firms operating a kitchen on-Airport as well as those operating off-Airport. And the criteria for analyzing the bids were extremely detailed and objective. Contrary to the Commissioner's suggestion, the Tribunal finds no evidence showing that the RFP process was geared towards a "full-flight kitchen" operator or against providers like Strategic Aviation or Optimum.

[685] The Tribunal also disagrees with the Commissioner's comment that dnata is "**[CONFIDENTIAL]**" and will not be considering "innovative" new business models. On the contrary, the testimony of Mr. Padgett showed that dnata is ready and able to go after any type of in-flight catering work, whether that consists of catering or last-mile logistics or both. In other words, dnata has left the door open to the possibility of providing only Galley Handling services for airline customers who may not wish to source their catering services from dnata.

[686] The Tribunal considers that there is every indication that dnata will enter and compete fully with Gate Gourmet and CLS in the Galley Handling Market at YVR. In fact, Dr. Niels acknowledged that the entry of dnata will bring increased rivalry to the Galley Handling Market at YVR, as his evidence suggests that at least some switches occur upon the entry of new in-flight catering firms. Dr. Niels further accepted that, with the entry of dnata and the presence of three caterers at YVR going forward, there will be stronger competition than with two, though he qualified this increased competition as being a matter of degree. **[CONFIDENTIAL]**.

[687] In light of the foregoing, the Tribunal is not persuaded that dnata will not be an effective competitor. On the contrary, the Tribunal is inclined to accept Mr. Padgett's testimony that **[CONFIDENTIAL]**.

[688] That said, the Tribunal agrees with the Commissioner that as far as paragraph 79(1)(*c*) is concerned, the appropriate "but for" analysis is to compare outcomes with VAA's exclusionary practice in place to outcomes that would likely be realized absent that practice. It is not to compare outcomes with the presence of the two incumbent competitors to outcomes with those same two competitors plus dnata. However, the entry of dnata has made it more difficult for the Commissioner to demonstrate that, "but for" VAA's Exclusionary Conduct, prices likely would be materially lower, or non-price levels of competition likely would be materially greater, relative to the levels of prices and non-price competition that are in fact likely to prevail now that dnata has entered the Relevant Market.

(iii) Price effects

[689] The main focus of the Commissioner's arguments pertaining to alleged anti-competitive effects was on the price dimensions of VAA's Exclusionary Conduct and on how prices for Galley Handling services would likely have been and would likely be lower "but for" the impugned conduct. The Commissioner relied on evidence from a number of market participants, notably the various airlines called to testify, and on the expert evidence of Dr. Niels, to support his position that prices in the Galley Handling Market at YVR are materially higher than they would likely have been or would likely be, "but for" the Exclusionary Conduct. The Commissioner maintains that the aggregate savings resulting from reduced prices of Galley Handling services would likely have been and would likely be in the future, substantial.

[690] VAA responds that the Commissioner has not demonstrated that airlines would likely have benefitted from, or would likely be offered, materially lower prices in the Relevant Market in the absence of VAA's Exclusionary Conduct.

[691] The Tribunal agrees with VAA. Further to its review of the evidence, the Tribunal is not persuaded that VAA's Exclusionary Conduct has increased, is increasing or will likely increase the prices for Galley Handling services to a non-trivial degree in the Relevant Market, relative to the prices that likely would have existed "but for" the Exclusionary Conduct. Stated differently, the Commissioner has not demonstrated that, "but for" VAA's Exclusionary Conduct, the prices of the Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

[692] The Tribunal pauses to underscore, at the outset, that the Commissioner's evidence is essentially limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues at YVR. This, says VAA, is a fatal flaw in the Commissioner's case, as he has not alleged any form of collusion between Gate Gourmet and CLS. The Tribunal agrees that this significantly weakens the Commissioner's case on paragraph 79(1)(*c*). In the circumstances of this case, the evidence does not allow the Tribunal to infer or imply anything with respect to **[CONFIDENTIAL]** in the absence of the Exclusionary Conduct.

[693] With respect to the alleged anti-competitive price effects of VAA's Exclusionary Conduct, the Commissioner relied on: (i) Dr. Niels' economic analyses of the price effects for airlines that did not switch providers, Jazz's gains from switching, and **[CONFIDENTIAL]**; and (ii) evidence provided directly by various airlines (i.e., Jazz, Air Transat, Air Canada and WestJet, and the eight airlines having provided letters of complaint).

- Prices to the non-switchers

[694] The main economic analysis relied upon by the Commissioner is a regression analysis conducted by Dr. Niels for airline customers that did not switch in-flight caterers. This is the only econometric evidence relied upon by the Commissioner.

[695] Dr. Niels used an event study methodology to analyze the effect of the entry of Strategic Aviation and/or Newrest on the average monthly price paid by a given airline customer **[CONFIDENTIAL]**, for a given Galley Handling product, at various airports other than YVR between 2014 and 2016. He compared the prices paid **[CONFIDENTIAL]** for Galley Handling services before and after entry by Strategic Aviation (**[CONFIDENTIAL]**) and Newrest (**[CONFIDENTIAL]**), for airlines that did not switch to the new entrants. Dr. Niels' analysis was essentially a comparison of prices paid **[CONFIDENTIAL]** over the two years prior to entry at the airport concerned with the average prices paid during the two years after entry. It yielded what Dr. Niels considered to be an estimate of the average effect of new entry on the prices paid by the airline customers who remained with **[CONFIDENTIAL]** and did not switch.

[696] This regression analysis **[CONFIDENTIAL]**. Dr. Niels also did not look at Catering prices, even though he recognized that he had the data to do so.

[697] Dr. Niels first found that the entry of new competitors did not have a statistically significant effect on the prices paid **[CONFIDENTIAL]** over the period 2013-2017. However, he found that **[CONFIDENTIAL]** "smaller airlines" customers by **[CONFIDENTIAL]**% if price observations are equally weighted, by **[CONFIDENTIAL]**% if they are revenue weighted and by **[CONFIDENTIAL]**% if they are quantity weighted. These results were statistically significant at the 5% level for unweighted and revenue-weighted results, and at the 1% level for quantity-weighted results. **[CONFIDENTIAL]**% if they are revenue-weighted but this result was statistically insignificant. Dr. Niels concluded that the analysis showed "robust evidence of a reduction **[CONFIDENTIAL]** galley handling prices for the smaller airlines in response to the entry of **[CONFIDENTIAL]**, despite these airlines not actually switching themselves" (Niels Report, at para 1.43).

[698] Dr. Niels indicated during his testimony that he had first performed the regression for all airline customers **[CONFIDENTIAL]** that did not switch, **[CONFIDENTIAL]**. He explained that he found no price effect for this "all airlines" sample and then proceeded to re-do the analysis, using a narrower sample for the "smaller airlines."

[699] Dr. Reitman criticized Dr. Niels' regression analysis at three levels.

[700] First, he stated that Dr. Niels' regression was based on a shorter time period than that for which Dr. Niels had the relevant data. Dr. Niels used data for a window of two years preceding and following entry, but had such data for periods of three years before and after entry.

[701] Second, Dr. Reitman criticized Dr. Niels' failure to distinguish between markets where **[CONFIDENTIAL]** a monopoly and markets where **[CONFIDENTIAL]** competition. In other words, Dr. Niels' regression did not differentiate between entry events that reflect the competitive situation at YVR (i.e., two competing in-flight caterers) and those that do not (i.e., monopoly situations). Instead, Dr. Niels' analysis gave the same weight to the impact on **[CONFIDENTIAL]** a monopoly prior to **[CONFIDENTIAL]** entry, as to the impact at other airports which already had pre-existing competition. Of the **[CONFIDENTIAL]** instances in which entry occurred over the period 2014-2016, **[CONFIDENTIAL]** involved the entry of a **[CONFIDENTIAL]**. These all related to airports where **[CONFIDENTIAL]** entered. A number

of other instances (e.g., **[CONFIDENTIAL]**) involved situations where a caterer entered into an airport where two or more incumbents were already present.

[702] Third, Dr. Niels did not define his entry event windows in a manner that ensured that the price changes at airports experiencing entry are compared with the price changes at airports at which no entry occurred. According to Dr. Reitman, Dr. Niels "does not perform a properly designed study that tests the impact of entry in markets where entry occurred against a control group where entry did not occur. […] Instead, he conflates entry effects in multiple markets and periods without a valid control sample" (Reitman Report, at para 196).

[703] Dr. Reitman adapted the regression model used by Dr. Niels to estimate the respective price effects of entry into previously monopolized markets and entry into markets with pre-existing competition. Dr. Reitman compared the pre- and post-entry differences in Galley Handling prices between airports in which entry occurred and a control group of airports in which no entry occurred for three different entry events. In this manner, Dr. Reitman estimated the respective price impacts of **[CONFIDENTIAL]** entry into monopoly airports **[CONFIDENTIAL]**, and **[CONFIDENTIAL]** into airports where there was pre-existing competition. Dr. Reitman did this for an "all airlines" sample and for a "small airlines" sample.

[704] For the all airlines sample, the results for entry that occurred at airports where there were already at least two incumbent caterers provided no statistically significant evidence that prices fell following entry. Dr. Reitman concluded that "there is no evidence that entry at airports that already had at least two providers had any substantial downward effect on pricing" (Reitman Report, at para 210). Dr. Reitman also found that **[CONFIDENTIAL]** with revenue-weights and **[CONFIDENTIAL]** with equal weights, although these estimates were statistically significant only at the **[CONFIDENTIAL]** level.

[705] With his sample confined to "small airlines" customers, Dr. Reitman found that, in the case of entry into a monopoly situation, **[CONFIDENTIAL]** was not statistically significant, except in the case of quantity-weighted prices where there was a statistically significant **[CONFIDENTIAL]**. By comparison, Dr. Reitman found a revenue-weighted **[CONFIDENTIAL]** and an equally-weighted **[CONFIDENTIAL]**, neither of which is statistically significant, **[CONFIDENTIAL]**. Notwithstanding **[CONFIDENTIAL]** of two of his estimates of the **[CONFIDENTIAL]** and **[CONFIDENTIAL]** quantity-weighted estimate, Dr. Reitman averaged the three and stated that**[CONFIDENTIAL]** (Reitman Report, at para 211).

[706] In one case of entry **[CONFIDENTIAL]**, Dr. Reitman found that **[CONFIDENTIAL]**.

[707] The Tribunal is persuaded that Dr. Reitman's critique of Dr. Niels' analysis seriously undermines the conclusions Dr. Niels derived from that analysis. In brief, in view of Dr. Reitman's critique, the Tribunal is of the view that Dr. Niels' analysis does not provide clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely have been lower at YVR. The Tribunal considers that, for the following reasons, it cannot give much weight to Dr. Niels' regression analysis in assessing the likely adverse price effects of VAA's Exclusionary Conduct.

[708] First, regarding the time frame used for his regression analysis, Dr. Niels was unable to provide, further to questions from the panel, a justification for his curtailment of the study window to a period of two years before and after entry. Dr. Niels conceded that his estimate of the price reduction following new entry becomes statistically insignificant if a longer six-year window (i.e., three years before entry and three after) is chosen.

[709] Second, regarding the statistical results, Dr. Reitman persuasively testified that revenue-weighted figures ranked higher than equally-weighted or quantity-weighted figures when it comes to estimating what happened to prices paid by airlines for in-flight catering. Dr. Reitman also mentioned that both he and Dr. Niels prefer revenue weights to quantity weights (Reitman Report, at para 212). The Tribunal agrees and considers that the revenue-weighted figures of the various regression analyses are the most relevant for its analysis. Dr. Niels' "blended estimate" of the price effects **[CONFIDENTIAL]** but when revenue weights are considered, **[CONFIDENTIAL]**. For his part, when revenue-weighted figures are considered, Dr. Reitman finds **[CONFIDENTIAL]**.

[710] Third, and most importantly, the Tribunal considers that the results relating to entry into markets where there were competing incumbents (as opposed to monopoly situations) are the relevant ones for its analysis, as they better reflect the situation that prevails at YVR. The Tribunal agrees with VAA that observed price effects of entry into previously monopolized markets is not particularly relevant for an assessment of price effects at YVR, which had two competing incumbents in the 2014-2016 timeframe. Likewise, the Tribunal agrees that any effects **[CONFIDENTIAL]** cannot be extrapolated to YVR. Generally speaking, one would expect that the price effect of introducing competition into a monopoly situation may well be different from the price effect of adding a third competitor to a duopoly situation. Indeed, Dr. Reitman's analysis suggests that this is in fact the case. Dr. Niels accepted that, as a matter of theory, the price-reducing effect of entry should decline as the number of incumbent competitors in the market concerned increases. However, he maintained that this decline is "a matter of degree" (Transcript, Conf. B, October 15, 2018, at pp 491-492). Dr. Niels further conceded, upon questioning from the panel, that he could have measured the effects separately for airports that went from one to two providers from those that went from two to three providers, but did not.

[711] Given that dnata has now entered the Galley Handling Market at YVR, it is even more difficult to see how the impact of entry into a monopoly situation can be extrapolated to the Relevant Market at YVR. The effect of the entry of a third competitor (prior to dnata's recent entry) is what is relevant to the case at hand. Moreover, the Tribunal must concern itself with the effect of entry on the prices paid by all airlines, or at least by those accounting for a substantial part of the relevant market, rather than a small and arbitrary subset of them. Only two revenue-weighted parameter estimates qualify to meet those two requirements. The first is Dr. Reitman's parameter for **[CONFIDENTIAL]**. The second is Dr. Reitman's parameter for **[CONFIDENTIAL]**.

[712] The Tribunal notes that on this issue, Dr. Niels responded that there were other factors in addition to the number of competitors that affected the intensity of competition. He cited evidence to the effect that **[CONFIDENTIAL]**. The Tribunal does not accept such statement because the evidence on the record does not establish, on a balance of probabilities, that **[CONFIDENTIAL]**.

[713] For all the above reasons, the Tribunal accepts Dr. Reitman's finding that the effect of the entry of a third competitor on the Galley Handling prices paid by all airlines is not statistically significant. For greater certainty, Dr. Niels's econometric analysis of the prices to non-switchers therefore does not constitute clear and reliable evidence supporting a conclusion that, "but for" VAA's Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower, let alone "materially" lower.

- Jazz's gains from switching

[714] The Commissioner also relies on another economic analysis conducted by Dr. Niels, with respect to Jazz's gains from switching subsequent to its 2014 RFP ("**Jazz Analysis**"). This analysis **[CONFIDENTIAL]** Jazz's own estimated gains from switching done by Ms. Bishop, which is discussed later in this section.

[715] Dr. Niels used in-flight caterer data to determine Jazz's savings from switching in-flight caterers in 2015 (from Gate Gourmet to Strategic Aviation and Newrest at eight different airports other than YVR). Dr. Niels' analysis identified specific cost benefits enjoyed by Jazz when entry was not excluded. Dr. Niels found that Jazz saved approximately **[CONFIDENTIAL]** the year following the switch, **[CONFIDENTIAL]** resulted from savings in Galley Handling. Dr. Niels' conclusion was that the savings earned by Jazz resulted from the competition that was introduced by the new entrants.

[716] The Commissioner maintains that the lower prices Jazz paid after switching reflect a change in the competitive position of entrant in-flight caterers and the benefits of competition. The Commissioner submits that **[CONFIDENTIAL]** represent substantial savings with respect to the market for in-flight catering in 2015 at those airports.

[717] VAA responded that the Jazz Analysis is limited to Gate Gourmet, and therefore completely ignores CLS.

[718] Dr. Reitman added that Dr. Niels overstated the savings realized by Jazz. Dr. Reitman submitted that Dr. Niels ignored the savings that Jazz would have realized had it renewed its contract with Gate Gourmet. According to Dr. Reitman, Gate Gourmet initially offered Jazz **[CONFIDENTIAL]** on its new contract, which represented a saving of **[CONFIDENTIAL]**, and **[CONFIDENTIAL]**. Therefore, had Jazz stayed with Gate Gourmet, it would have **[CONFIDENTIAL]**. Dr. Niels responded that **[CONFIDENTIAL]**.

[719] Dr. Reitman also maintained that in any event, the savings realized at other airports do not apply to YVR as prices at YVR may not have been **[CONFIDENTIAL]** as they were at other airports (Reitman Report, at paras 188-190). Stated differently, the other airports where the savings were achieved may not be entirely comparable to YVR. Dr. Reitman testified that the **[CONFIDENTIAL]**. By contrast, he noted that the evidence from Jazz **[CONFIDENTIAL]**. He therefore concluded that the savings in those **[CONFIDENTIAL]** do not reflect the market conditions at YVR.

[720] Furthermore, VAA submitted that the Jazz Analysis is not confined to Galley Handling prices, and so does not control for the possibility that any savings in Galley Handling costs were

partially or entirely offset through higher costs for catering. Therefore, VAA says that these results are not reliable as evidence of lower overall costs from switching. The Tribunal observes that Dr. Niels also performed a similar analysis for Galley Handling prices alone, and cautioned that the "galley handling only result should be interpreted with care" (Niels Report, at para 4.55).

[721] VAA further stated that the Jazz Analysis employed the incorrect "but for" scenario and is therefore not indicative of the actual savings relative to choosing Gate Gourmet. It measured the difference in costs incurred by Jazz at eight stations by comparing what Gate Gourmet had charged Jazz in 2014 to what Jazz paid to Strategic Aviation or Newrest in 2015. However, the contract renewal terms offered by Gate Gourmet for 2015 **[CONFIDENTIAL]**. The relevant "but for" would have compared what Jazz would have paid to Gate Gourmet the next year, if it had not switched, to what Jazz instead paid to the other caterers.

[722] VAA added that the evidence showed that **[CONFIDENTIAL]**.

[723] Further to its assessment of the evidence, the Tribunal agrees with the Commissioner and accepts Dr. Niels' evidence on the **[CONFIDENTIAL]** savings identified in this Jazz Analysis. The fact that Jazz **[CONFIDENTIAL]**. Furthermore, while it is true that the savings are not all confined to Galley Handling, Dr. Niels acknowledged that **[CONFIDENTIAL]** related to Galley Handling. In addition, regarding his statement that **[CONFIDENTIAL]**.

[724] For all the above reasons, the Tribunal concludes that Dr. Niels' Jazz Analysis on the savings obtained by Jazz at airports other than YVR constitutes reliable evidence supporting a conclusion that, "but for" the Exclusionary Conduct, the prices of Jazz's Galley Handling services would likely have been or would likely be somewhat lower. However, that alone is not sufficient to discharge the Commissioner's burden under paragraph 79(1)(*c*), particularly considering that **[CONFIDENTIAL]**.

- **[CONFIDENTIAL]**

[725] A third piece of economic evidence prepared by Dr. Niels and relied upon by the Commissioner at the hearing is evidence relating to the renegotiation of a contract between **[CONFIDENTIAL]** in 2014.

[726] [CONFIDENTIAL].

[727] In his Reply Report, Dr. Niels analyzed **[CONFIDENTIAL]**.

[728] Dr. Reitman provided two critiques of Dr. Niels' analysis: (i) **[CONFIDENTIAL]**; and (ii) with no change in the number of competitors at YVR, the price increase could not have resulted from an increase in market power.

[729] The Tribunal accepts the Commissioner's submission that even though **[CONFIDENTIAL]**.

[730] However, the Tribunal remains unpersuaded that **[CONFIDENTIAL]** resulted from the exercise of market power that **[CONFIDENTIAL]** would not likely have been able to exercise,

"but for" VAA's Exclusionary Conduct. **[CONFIDENTIAL]** was competing against **[CONFIDENTIAL]** both before and after the change, and the Commissioner has not demonstrated that the presence of Newrest, Strategic Aviation and/or Optimum likely would have prevented **[CONFIDENTIAL]** from being able to impose the price increase in question. Moreover, insofar as **[CONFIDENTIAL]** is concerned, the Tribunal reiterates that Dr. Niels' claim that **[CONFIDENTIAL]** was shown to be unsupported by the available evidence, including the **[CONFIDENTIAL]** at YVR. It was also contradicted by the **[CONFIDENTIAL]** at YVR.

[731] The Tribunal therefore concludes that the Commissioner has not demonstrated with clear and convincing evidence that, "but for" VAA's Exclusionary Conduct, **[CONFIDENTIAL]** for Galley Handling services at YVR likely would have been or would likely be lower, let alone "materially" lower.

- Jazz

[732] In support of its argument regarding the anti-competitive price effects of VAA's conduct, the Commissioner also relied on evidence provided directly by certain airlines. One of these airlines was Jazz, which provided evidence in relation to the RFP it launched in 2014. In that 2014 RFP, **[CONFIDENTIAL]**.

[733] Ms. Bishop from Jazz testified that further to the RFP, Jazz switched from Gate Gourmet to Newrest at YYZ, YUL and YYC, and from Gate Gourmet to Strategic Aviation at five other airports. In her witness statement and in her examination in chief, Ms. Bishop provided evidence regarding the increased expenses that Jazz allegedly incurred as a result of being constrained to contract with Gate Gourmet, as opposed to **[CONFIDENTIAL]**, at YVR. She also provided evidence regarding savings allegedly realized by Jazz as a result of contracting with Newrest and Sky Café at the eight other airports across the country. She testified that the switching at those eight airports generated savings of $2.9 million (or 16%) for Jazz, in 2015 alone. As it was unable to switch at YVR, Jazz had to accept a bid from Gate Gourmet that was approximately **[CONFIDENTIAL]** greater than what Jazz would have paid at that airport had its preferred provider, **[CONFIDENTIAL]**, been allowed airside access at YVR. Accounting for material changes to Jazz's fleet since 2015, Jazz estimated that it was forced to pay approximately **[CONFIDENTIAL]** over a period of 2 years and three months, or **[CONFIDENTIAL]**, for in-flight catering at YVR than it would have had to pay had it been able to use its preferred provider.

[734] All of the evidence given by Ms. Bishop in that regard was based on Exhibits 10 and 13 to her witness statement.

[735] Ms. Bishop further testified that, when it became aware that Jazz intended to switch to other in-flight caterers at other airports in Canada, Gate Gourmet submitted a bid for YVR that ultimately reflected an **[CONFIDENTIAL]** increase over its 2014 prices to Jazz at YVR. Despite this increase and **[CONFIDENTIAL]**, Ms. Bishop stated that Jazz had no choice but to award the **[CONFIDENTIAL]** contract to Gate Gourmet.

[736] However, on cross-examination, Ms. Bishop testified that she had no role in performing the calculations that underlay the figures set out in Exhibits 10 and 13. Nor did she have any detailed understanding as to how the figures were calculated. Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those appearing in an email sent by her colleague, Mr. Umlah. Similarly, Ms. Bishop was unable to reconcile inconsistencies between the figures in Exhibit 10 and those derived following an attempt to recreate the figures in Exhibit 10, using the explanation provided by Jazz's counsel and adopted by Ms. Bishop. Ms. Bishop was invited by counsel for VAA to reconcile several other inconsistencies and, on each occasion, she stated that she could not do so. The Tribunal observes that there were significant discrepancies in the figures resulting from those calculations, compared to what was reported in Exhibit 10. Ms. Bishop was similarly unable to offer complete information as to how the figures in Exhibit 13 were calculated.

[737] Further to the cross-examination of Ms. Bishop, and having listened to how Ms. Bishop gave her evidence and responded to cross-examination at the hearing, and having observed her demeanour, the Tribunal is not satisfied that either the numbers used in her statement or her testimony regarding those numbers can be considered as reliable. While Ms. Bishop could explain how some arithmetic calculations were made, she could not clarify the apparent discrepancies with other documentation that emanated from Jazz. The Tribunal thus concludes that the evidence in Ms. Bishop's witness statement with respect to Exhibits 10 and 13 and the alleged missed savings or increased expenses at YVR does not constitute reliable, credible and probative evidence, and can only be given little weight. The figures she put forward cannot be verified, and are contradicted by the evidence.

[738] For all of the foregoing reasons, the evidence regarding Jazz's 2014 RFP does not assist the Commissioner to demonstrate anti-competitive price effects linked to VAA's Exclusionary Conduct.

- Air Transat

[739] The Commissioner referred to similar evidence from Air Transat, in relation to a 2015 RFP for in-flight catering at a total of 11 airports serviced by Air Transat. As part of the RFP, Air Transat received proposals from **[CONFIDENTIAL]**.

[740] Similarly to Ms. Bishop, Air Transat's witness, Ms. Stewart, testified as to the alleged increased expenses that Air Transat expected to incur at YVR as a result of contracting with Gate Gourmet, as opposed to Optimum. She also testified regarding the alleged savings by Air Transat as a result of contracting with Optimum, as opposed to Gate Gourmet, at other airports across the country.

[741] Ms. Stewart stated that the actual prices of Optimum represented cost savings of approximately **[CONFIDENTIAL]**, or **[CONFIDENTIAL]**, over **[CONFIDENTIAL]** years for stations across the country, compared to the actual costs being paid by Air Transat to **[CONFIDENTIAL]**. Ms. Stewart further stated that at YVR, the fact that it contracted with Gate Gourmet at only that airport caused Air Transat to pay approximately **[CONFIDENTIAL]**

% more at YVR than it expected to pay Optimum, its preferred in-flight caterer for service at YVR.

[742] Furthermore, Ms. Stewart indicated that **[CONFIDENTIAL]**. Nevertheless, **[CONFIDENTIAL]** were not quantified by Ms. Stewart in her witness statement.

[743] With respect to the alleged increased expenses at YVR, Ms. Stewart affirmed in her witness statement that "Air Transat determined that Optimum's bid for YVR was superior to that of Gate Gourmet from both a price and service perspective" (Stewart Statement, at para 33). However, on cross-examination, Ms. Stewart agreed that **[CONFIDENTIAL]**.

[744] On cross-examination, Ms. Stewart also acknowledged an important error in her witness statement, relating to her affirmation that as a result of contracting with Gate Gourmet at YVR, Air Transat paid "approximately **[CONFIDENTIAL]** than what it would have paid to Optimum for service at YVR" (Stewart Statement, at para 35). Ms. Stewart clarified that Air Transat paid approximately **[CONFIDENTIAL]**, not **[CONFIDENTIAL]** than what it would have paid to Optimum.

[745] The Tribunal agrees with VAA that, even as corrected, Ms. Stewart's statement is not particularly persuasive evidence of likely increased prices relating to Galley Handling at YVR. First, Ms. Stewart's claim of a **[CONFIDENTIAL]**% increase in costs paid to Gate Gourmet encompasses both food and Galley Handling together. Second, in her testimony, Ms. Stewart acknowledged that she was not able to identify whether the cost savings offered by Optimum were coming from the Galley Handling services or from the Catering services. Third, even if it is assumed that **[CONFIDENTIAL]**'s bid for Galley Handling services **[CONFIDENTIAL]**, that price **[CONFIDENTIAL]** for Galley Handling services **[CONFIDENTIAL]**. Finally, comparing the prices **[CONFIDENTIAL]** would have charged at YVR **[CONFIDENTIAL]** with the prices it charged **[CONFIDENTIAL]** does not provide persuasive evidence of any market power **[CONFIDENTIAL]** at YVR. In both cases, **[CONFIDENTIAL]**.

[746] There were similar problems with respect to Ms. Stewart's evidence relating to Air Transat's alleged savings as a result of contracting with Optimum, as opposed to Gate Gourmet, at airports other than YVR. Ms. Stewart admitted on cross-examination that, when only the prices for Galley Handling services are considered, **[CONFIDENTIAL]**. Air Transat's costing analysis further revealed that **[CONFIDENTIAL]**.

[747] The Tribunal pauses to observe that even Dr. Niels, the Commissioner's expert, acknowledged that **[CONFIDENTIAL]**, it was not possible to accurately determine the amounts of any gains resulting from that airline's switch from Gate Gourmet to Optimum.

[748] In summary, for the reasons set forth above, and having heard Ms. Stewart during her testimony and having observed her demeanour, the Tribunal does not consider that her evidence on Air Transat's alleged increased expenses and expected savings constitutes clear, compelling and reliable evidence in this regard. The Tribunal concludes that this evidence does not merit much weight in terms of the alleged anti-competitive price effects of VAA's Exclusionary Conduct, compared to the "but for" world.

- Testimony from Air Canada and WestJet

[749] The Commissioner also referred to the testimonies of witnesses from Air Canada (Mr. Yiu) and WestJet (Mr. Soni), regarding the price effects of VAA's Exclusionary Conduct. The Commissioner submits that this evidence demonstrates that, "but for" that conduct, those airlines would have likely had, and in the future would have, access to more competitively priced in-flight catering options at YVR.

[750] However, the Tribunal notes that the evidence relied on by the Commissioner consists of general and generic statements contained in the witness statements about the lack of competition and the benefits of increased competition in Galley Handling services, with no specific concerns or examples given by these two major airlines, which accounted for nearly 70% of all flights at YVR in 2016 and 2017. In the same vein, and as further discussed in the next section below, the Air Canada **[CONFIDENTIAL]**, expressing concerns about the refusals to grant licences to Newrest and Strategic Aviation, do not provide any specific examples or concerns with respect to Galley Handling services at YVR, despite the fact that Air Canada is, by far, the major airline operating at YVR, and **[CONFIDENTIAL]** across Canada and **[CONFIDENTIAL]** at YVR.

[751] The Tribunal considers that this generic evidence from Air Canada and WestJet does not provide clear, convincing and non-speculative evidence, with a sufficient degree of particularity, with respect to adverse price effects of VAA's Exclusionary Conduct.

[752] The Tribunal appreciates that airlines would prefer more, rather than less, in-flight catering options. But, to constitute evidence that is sufficiently clear and convincing to meet the standard of balance of probabilities, and to support a finding of a likely prevention or lessening of competition in the Galley Handling Market attributable to VAA's Exclusionary Conduct, the evidence from these two major airlines would have needed to be more precise and particularized.

- Airlines' letters

[753] During the hearing, the Commissioner put much emphasis on letters from eight airlines that expressed their support for more competition in Galley Handling services at YVR. These consist of four letters sent in April 2014 by each of Air Canada, Jazz, Air France / KLM and British Airways, and five letters sent in November and December 2016 by **[CONFIDENTIAL]**, Korean Air, Delta Airlines and Air France.

[754] For the following reasons, the Tribunal does not find these letters from the airlines to be particularly convincing and considers that it can only give them limited weight in terms of evidence of likely anti-competitive effects in the Galley Handling Market due to VAA's Exclusionary Conduct.

[755] With respect to the first four letters written in April 2014, the Tribunal notes that they were sent by the airlines at the request of Newrest, in the context of Newrest's application to be granted a licence for in-flight catering services at YVR. Only two of those letters (i.e., those from Air Canada and Jazz) were addressed to VAA. (The other two were addressed to Newrest.) The letters were short, expressed the airlines' support for Newrest's (and Strategic Aviation's)

requests for catering licences at YVR, and stated that competition was not optimized at YVR, where there were only two major in-flight caterers. Apart from their general support for new entry, none of the letters mentioned particular concerns with respect to the Galley Handling services at YVR.

[756] In their witness statements and in their testimonies before the Tribunal, Mr. Richmond and Mr. Gugliotta underlined that the letters were limited to a few sentences expressing each airline's general support for Newrest's request. They noted that none contained particular information or complaints specific to in-flight catering at YVR that VAA had not considered. Likewise, the letters did not provide any reasons to reconsider VAA's decision.

[757] During the month of May 2014, Mr. Richmond wrote response letters to the President and CEO of Air Canada and to Jazz (the only two airlines which had written directly to VAA), providing VAA's explanation for its decision not to authorize a third in-flight caterer to access the airside at YVR. With one exception, there is no evidence that, following Mr. Richmond's response and explanation for VAA's decision not to grant a licence to Newrest and Strategic Aviation, Air Canada or Jazz replied to VAA regarding the situation of in-flight catering at YVR. The Tribunal notes that, in her witness statement prepared for this Application, Ms. Bishop stated that Jazz disagreed with VAA's assessment of the in-flight catering marketplace at YVR, as expressed by Mr. Richmond at the time. However, the evidence from 2014-2015 does not show that those two airlines voiced particular concerns to VAA further to the May 2014 response. The exception is a telephone conversation with Jazz's CEO mentioned by Mr. Richmond in his witness statement, about which Mr. Richmond had no clear recollection and which did not change VAA's views.

[758] There is also no evidence on the record of specific concerns or complaints expressed to VAA by Air France / KLM or British Airways (i.e., the two airlines that wrote the other 2014 letters) regarding the Galley Handling services at YVR.

[759] As to the five letters from late November and early December 2016, the Tribunal observes that they were sent in the context of the Commissioner's Application, shortly after the Commissioner had filed the Application in late September 2016. The Tribunal further notes that the letters are all fairly succinct, they again contain only general statements about the benefits of competitive markets, and they do not refer to any particular issues or problems regarding in-flight catering services at YVR. In addition, they are very similarly worded (with some sentences being virtually identical), even though they come from airlines spread all across the globe (i.e., **[CONFIDENTIAL]**, Air France, Delta Airlines and Korean Airlines).

[760] Each letter starts with a paragraph stating that the letter is sent in the context of the Application made by the Commissioner. It then indicates that competition is always "most welcome" at airports where the airline operates and that competition is insufficient or not optimized at YVR, as there are only two in-flight catering firms. Finally, it affirms the airline's support for Newrest's request for a catering licence at YVR. Turning more specifically to **[CONFIDENTIAL]** save for an added introductory reference to the Commissioner's Application.

[761] These general letters (and the evidence provided by witnesses who appeared on behalf of these airlines, namely, Air Canada and Jazz) have to be balanced against the evidence from Mr. Richmond and Mr. Gugliotta which demonstrates that VAA had regular and continuous interactions with all airlines operating at YVR and that, during these interactions in the relevant time frame, airline executives with whom Mr. Richmond and Mr. Gugliotta dealt did not raise concerns with VAA relating to in-flight catering services or competition at YVR (except for the telephone conversation with Jazz mentioned above). More specifically, there is no evidence to indicate that, **[CONFIDENTIAL]** voiced any concerns with VAA about the price or quality of Galley Handling services at YVR.

[762] Mr. Richmond further noted that in his experience, when airlines have a serious problem about airport operations, they do not hesitate to raise it immediately with airport management. Mr. Richmond also testified that in April 2014, no airlines had raised operational or financial concerns about catering, and that "no airline either before or since has called [him] about catering at the airport" (Transcript, Conf. B, October 30, 2018, at p 818). Mr. Gugliotta added that there is a formal mechanism at YVR, the Airline Consultative Committee, where VAA and the airlines meet on a frequent basis. However, no airlines have raised any issues there, or in the other regular interactions between VAA and the airlines, with respect to the service quality or the pricing of in-flight catering services.

[763] Mr. Gugliotta also referred to the regular meetings that VAA has with the senior management of Air Canada and WestJet, the two biggest airlines operating at YVR. He stated that "this flight kitchen issue in terms of either service or pricing was never raised" by either of these airlines during those regular meetings (Transcript, Conf. B, November 1, 2018, at p 1036). This specific evidence provided by VAA was not contradicted by the witnesses who appeared on behalf of Air Canada and WestJet, namely, Mr. Yiu and Mr. Soni, respectively.

[764] The Tribunal found the testimony of Mr. Richmond and Mr. Gugliotta on this point to be credible and reliable. The Tribunal attributes more weight to their specific evidence regarding their interactions with airline customers than to the general statements made by the eight airlines in the 2014 and 2016 letters sent at the request of Newrest or in the context of these proceedings, which simply expressed a general preference for more competition in catering services at YVR.

[765] To support a finding of likely adverse price or non-price effects, relative to the required "but for" scenario, the Commissioner must adduce sufficient clear, convincing and cogent evidence to satisfy the balance of probabilities test. Letters and documents from customers affected by the impugned conduct can of course be highly relevant and probative in that context. However, where sophisticated customers are involved, it is not unreasonable to expect the letters in question to provide a minimum level of detail regarding the actual or anticipated effects of the impugned conduct on their respective business or on the market in general. The Tribunal finds that the particular letters discussed above do not materially assist in meeting that test. When the Commissioner relies on letters from sophisticated industry participants such as the airlines in this case, the Tribunal needs more than boiler-plate statements supporting increased competition.

[766] In the circumstances, the Tribunal is of the view that the letters produced by the Commissioner from the airlines do not amount to clear and convincing evidence supporting a

conclusion that, "but for" VAA's Exclusionary Conduct, the prices of Galley Handling services at YVR would likely have been or would likely be lower.

[767] The Tribunal pauses to observe that VAA argued that the countervailing power of airlines has to be taken into account as a constraining factor on any exercise of market power by the in-flight catering firms. However, in the absence of specific evidence to that effect, the Tribunal is not prepared to give much weight to this argument.

- VAA's Pricing Analyses

[768] The Tribunal makes one additional comment regarding the pricing analyses submitted by VAA. In response to Dr. Niels' switching analysis, Dr. Reitman conducted regression analyses to compare Galley Handling prices at YVR with prices for those services at other Canadian airports.

[769] Dr. Reitman tendered two econometric models of his own (using data from Gate Gourmet prepared by Dr. Niels). In them, he compared the prices paid for all in-flight catering products by all airlines at YVR with the corresponding prices paid at other Canadian airports. He also compared prices across airports for all in-flight catering and Galley Handling products, as well as for just Galley Handling, for all airline customers from 2013-2017. In addition, he estimated the effect of entry on the difference between the prices charged **[CONFIDENTIAL]** at airports where entry occurred and the prices at airports where no entry occurred.

[770] In his analyses, Dr. Reitman found that the prices charged to airlines at YVR **[CONFIDENTIAL]**, than at the other airports. In other words, he found **[CONFIDENTIAL]** at YVR relative to prices at other airports. Dr. Reitman's conclusion was robust to numerous sensitivity tests including confining the sample to Galley Handling products and smaller airline customers. He reached the same conclusion when he confined his analysis to comparing the period before there was any entry at the airports concerned to the period after all entry had taken place. With respect to all in-flight catering and Galley Handling products, he concluded that "[t]he regression results **[CONFIDENTIAL]** coefficients on the variables for other airports" (Reitman Report, at para 163). With respect to just Galley Handling, he observed that **[CONFIDENTIAL]** (Reitman Report, at para 171). Dr. Reitman also ran different variations of the model to test whether there were price differences between YVR and other airports for in-flight catering products and services in the period before those other airports experienced additional entry by flight caterers **[CONFIDENTIAL]**, as well as in the period after the last entry of **[CONFIDENTIAL]**. Dr. Reitman concluded that **[CONFIDENTIAL]**.

[771] In response to this evidence, the Commissioner submitted that Dr. Reitman's opinion reflects a fundamental misunderstanding of the relevant economic assessment to be made.

[772] Dr. Niels argued that Dr. Reitman did not properly control for inter-airport differences in wages, prices of relevant inputs and taxes. For example, **[CONFIDENTIAL]** used by Dr. Reitman does not reflect inter-city differences in prices. As a result, the effect of VAA's entry restrictions on **[CONFIDENTIAL]** at YVR relative to other airports may be obscured by other influences for which he has not controlled. To control for that, Dr. Niels compared

[CONFIDENTIAL] EBITDA margins across airports instead of its prices across airports. Dr. Niels found that these margins **[CONFIDENTIAL]** at YVR. Dr. Reitman agreed that margins were a better measuring tool than prices. However, he criticized Dr. Niels for using EBITDA margins instead of variable cost margins to assess competition. When variable cost margins are used, Dr. Reitman found that the differences in variable cost margins being earned **[CONFIDENTIAL]** across Canadian airports **[CONFIDENTIAL]**.

[773] More fundamentally, the Commissioner submitted that Dr. Reitman's methodology does not address the anti-competitive effects of VAA's Exclusionary Conduct, because the appropriate "but for" question is not to ask whether prices or margins at YVR are low relative to other airports, but whether they would likely have been lower absent VAA's conduct.

[774] The Tribunal agrees with the Commissioner on this point and finds that Dr. Reitman's pricing analyses are not of much assistance with respect to the assessment of the actual and likely effects of VAA's Exclusionary Conduct that is contemplated by paragraph 79(1)(*c*). Dr. Reitman did not assess price changes in his analysis. He looked at price levels overall, as well as during the before and after periods, and concluded that prices at YVR **[CONFIDENTIAL]** than at other airports, either before or after entry had occurred at them. However, his analysis did not properly hold constant other sources of differences in price levels across airports. Nor does it test to see whether the difference in prices between YVR and the other airports changed between the pre- and post-entry periods. Accordingly, this aspect of his analysis failed to persuasively address the effect of entry on prices. As a result, this evidence merits little, if any, weight.

- Conclusion on price effects

[775] In light of the foregoing, the Tribunal is left with unpersuasive and insufficient evidence regarding the alleged price effects of VAA's Exclusionary Conduct in the Galley Handling Market. The Tribunal therefore concludes that the Commissioner has not demonstrated that VAA's Exclusionary Conduct has had, is having or is likely to have the effect of adversely impacting the prices charged for Galley Handling services in the Relevant Market.

(iv) Innovation and dynamic competition

[776] Turning to the non-price effects of VAA's Exclusionary Conduct, the Commissioner submits that VAA's conduct has stifled innovation or shielded the airlines from innovative forms of competition, by excluding new in-flight catering business models from the Relevant Market and by preventing in-flight caterers from offering innovative hybrid or mixed-model services to the airlines. The Commissioner argues that market participants have confirmed that innovation in in-flight catering is an important dimension of competition, which has created (and is creating) substantial price and non-price benefits to customers through new business models and processes. The Commissioner states that, "but for" VAA's Exclusionary Conduct, airlines would have the option to choose to procure Galley Handling at YVR from firms other than the full-service incumbent in-flight caterers and that as a result, innovation and dynamic competition would be substantially greater at YVR.

[777] Relying on an article from the economist Carl Shapiro (Carl Shapiro, "Competition and innovation: Did Arrow Hit the Bull's Eye?" in Josh Lerner and Scott Stern, eds, *The Rate and Direction of Inventive Activity Revisited*, (Chicago: University of Chicago Press, 2012) at pp 376-377), the Commissioner emphasizes that innovation encompasses a wide range of improvements and efficiencies, not just the development of novel processes and products. He claims that there is overwhelming evidence of improvements in efficiency and business models for existing products and services, and that these are just as important for dynamic competition and innovation as the products and service offerings themselves.

[778] The Commissioner relies on four sources of evidence on this issue, namely, the testimonies of in-flight catering firms Strategic Aviation, Optimum and Newrest, as well as the evidence provided by the representative of Air Transat, Ms. Stewart.

[779] According to the Commissioner, Strategic Aviation has introduced a differentiated and cost-efficient business model, namely, a "one-stop-shop" for both Catering and Galley Handling. Unlike traditional firms, Strategic Aviation provides Galley Handling using its own personnel but partners with specialized third parties to source Catering for those airlines that require it. This model allows airlines to procure the specific mix of Galley Handling and Catering that they require, without being forced to absorb their share of fixed overhead costs for in-flight catering services that they do not want. This new business approach was itself spurred by the emergence of a new airline business model, namely, the low-cost carrier model and its focus on BOB. Mr. Brown from Strategic Aviation testified that there was an opportunity to take advantage of the emerging airline model of providing improved food to passengers. He further stated that these more flexible business models not only allow for airlines to source a particular type of food more easily, they also result in important increases in economic efficiency and lower prices to airlines by, essentially, offering them the possibility to use outside kitchens having excess capacity.

[780] Another example relied on by the Commissioner is Optimum. Optimum does not operate Catering facilities nor does it provide Galley Handling. It subcontracts all these services to independent third-party providers. In essence, it acts as an intermediary to find the best providers for each airline's needs at each airport. Mr. Lineham from Optimum testified that its business model allows airlines to "find the right kitchens that can make food that's appropriate" (Transcript, Public, October 3, 2018, at p 180).

[781] Turning to Newrest, Mr. Stent-Torriani testified that innovation falls into two categories: (i) the "front end customer side" and (ii) the production side. With respect to the "front end customer side," Mr. Stent-Torriani testified that there is "a great deal that can be done with respect to point of sales, i.e., digital, pre order, et cetera" (Transcript, Public, October 4, 2018, at p 239). With respect to the production side, he added that there are also technological improvements that can be pursued in terms of robotics, giving customers a higher level of traceability and quality.

[782] The representative of Air Transat also testified that Air Transat values fresh approaches to doing business spurred by entry and competition. Ms. Stewart testified that **[CONFIDENTIAL]** (Transcript, Conf. B, October 9, 2018, at p 356).

[783] VAA responds that the Galley Handling Market is not a "dynamic market" in the sense of featuring significant technological change or innovation, the two hallmarks of a market in which it states that qualitative effects are of particular relevance. VAA submits that Galley Handling is an activity into which the major inputs are labour, physical facilities such as warehouses, and equipment such as trucks. According to VAA, Strategic Aviation was not proposing to "innovate;" rather, it was proposing to follow a business model of providing only the Galley Handling component of in-flight catering services, while partnering with Optimum or others for the provision of food. During cross-examination, **[CONFIDENTIAL]**.

[784] As it affirmed in *TREB CT*, the Tribunal considers that dynamic competition, including innovation, is the most important dimension of competition (*TREB CT* at para 712). To echo the words of the economist Joseph Schumpeter, competition is, at its core, a dynamic process "wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers" (*TREB CT* at para 618). The Tribunal also does not dispute that innovation can take multiple incarnations and that it encompasses more than the development of new products or novel processes or the introduction of cutting-edge new technology. It can indeed extend to competing firms coming up with different or improved business models.

[785] However, in the present case, the evidence pertaining on innovation falls short of the mark. The Tribunal is not persuaded that the evidence on the record demonstrates that, "but for" the Exclusionary Conduct, there would likely have been, or would likely be, a realistic prospect of material changes in innovation linked to the arrival of new entrants in the Galley Handling Market.

[786] First, apart from one reference made by **[CONFIDENTIAL]**, there is no clear and convincing evidence of qualitative benefits, distinct and separate from a reduction of input costs, that would likely be brought by Strategic Aviation, Optimum or Newrest. The evidence from these three in-flight caterers did not provide persuasive examples of materially more innovative products or approaches to be offered to airlines.

[787] Second, Strategic Aviation's and Optimum's business models of offering Catering and Galley Handling separately are not new. The evidence shows that Gate Gourmet and other full-service in-flight caterers have also evolved in that direction and can and do provide Galley Handling services separately. In other words, the allegedly innovative Galley Handling services that Strategic Aviation is proposing to provide (i.e., to provide only the Galley Handling portion of in-flight catering) are currently being provided by Gate Gourmet at YVR and may well be provided by dnata once it commenced operations.

[788] There is evidence that Gate Gourmet is prepared to offer the Galley Handling subset of its full-line services to airlines that do not wish to take advantage of Gate Gourmet's ability to prepare the food. Notably, since 2017, Gate Gourmet has provided WestJet solely with Galley Handling services at YVR. Similarly, Gate Gourmet provides services to Air Canada that involve loading and unloading pre-packaged frozen food prepared by Air Canada's **[CONFIDENTIAL]** and Optimum. As evidenced by the success of **[CONFIDENTIAL]** and the trend of airlines moving more Catering operations off-airport, these options already exist and the in-flight catering incumbents already offer evolving business models and processes, adaptable to the

needs of airline customers. Incumbent in-flight catering firms are also using their kitchens to supply non-airline customers.

[789] [CONFIDENTIAL].

[790] [CONFIDENTIAL].

[791] The Tribunal recognizes that the business models of Gate Gourmet, CLS and dnata are not identical to those of Strategic Aviation and Optimum, as the latter focus on sourcing from different restaurants with excess capacity. But, as far as Galley Handling services are concerned, the Commissioner has not demonstrated that, "but for" the Exclusionary Conduct, new entrants likely would have brought, or would likely bring, materially new models or particularly significant incremental innovations to the Relevant Market. Put differently, with respect to this non-price dimension of competition, the Tribunal does not find that innovation or the range of services offered in the Galley Handling Market was, is or likely would be significantly lower than it would have been in the absence of VAA's Exclusionary Conduct.

[792] Indeed, Mr. Brown from Strategic Aviation and Ms. Bishop from Jazz confirmed that the Galley Handling services provided by Strategic Aviation were no different from Gate Gourmet or other full-service in-flight catering firms.

[793] The evidence reveals that the only firm that explicitly stated that it would hesitate to provide Galley Handling services on a stand-alone basis to airline customers at YVR was one of the new entrants, namely Newrest. In his testimony, Mr. Stent-Torriani indicated that Newrest might offer catering services without Galley Handling, but that this was not its preference, and that it would "almost certainly" not provide such Galley Handling services separately (Transcript, Public, October 4, 2018, at pp 236-237).

[794] There is also no clear and convincing evidence of lower service quality in the Galley Handling Market at YVR, relative to the "but for" scenario in which VAA did not engage in the Exclusionary Conduct. Apart from one example from the witness from Air Transat in the context of the 2015 RFP (referred to above), no evidence was adduced to demonstrate that there were material service or product quality improvements as a result of airlines switching to the "innovative" catering providers at other airports.

[795] For the above reasons, the Tribunal finds no clear and convincing evidence that VAA's decision not to license Newrest or Strategic Aviation resulted in less innovation or a lower quality of services, than would likely have existed in the absence of the Exclusionary Conduct. Moreover, the evidence demonstrates that dnata intends to provide the full range of in-flight catering services from its flexible, modern kitchen located off-airport, in proximity to YVR in Richmond. Therefore, particularly when one considers dnata's entry as part of the existing factual circumstances, there is no persuasive evidence of reduced choice, service or innovation at YVR as a result of the Exclusionary Conduct. In other words, it has not been established that the levels of such non-price dimensions of competition would not likely have been, and would not likely be ascertainably greater "but for" VAA's Exclusionary Conduct.

[796] The Tribunal underscores that the incumbent in-flight catering firms have developed new types of offerings and other innovations that provide new and valuable offerings to airlines, as

food served on airplanes has moved away from fresh meals and more towards frozen meals and pre-packaged food. This has had an important impact on the Tribunal's assessment of whether innovation would likely be, or would likely have been, materially greater in the absence of VAA's Exclusionary Conduct, and whether the elimination of the Exclusionary Conduct likely would permit innovative in-flight catering firms with new business models to advance the Galley Handling Market substantially further on the innovation ladder. The Tribunal is not persuaded that this is more likely than not to be the case in this Application.

(v) Conclusion

[797] Having regard to all of the foregoing, the Tribunal therefore concludes that, "but for" the Exclusionary Conduct, there may have been some fairly limited and positive price and/or non-price effects on competition in the Galley Handling Market at YVR. In this regard, there likely would have been some new entry into the Galley Handling Market; there likely would have been some additional switching; and Jazz may have paid somewhat lower prices to Gate Gourmet, including at airports other than YVR. However, those effects are far less than what the Commissioner alleged. Moreover, the conclusion stated above does not represent the end of the required analysis.

(b) Magnitude, duration and scope

[798] The Tribunal will now address whether the limited anti-competitive effects identified above, taken together, rise to the level of "substantiality," as required by paragraph 79(1)(*c*) of the Act. The Tribunal finds that this is not the case. In brief, the aggregate impact of the limited anti-competitive effects that have been demonstrated to result from VAA's Exclusionary Conduct does not constitute an actual or likely substantial prevention or lessening of competition in the Relevant Market. In other words, the Tribunal is not satisfied, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, the prices for Galley Handling services would likely have been, or would likely be, materially lower in the Galley Handling Market, or that there would likely have been, or would likely be, materially greater non-price competition in that market, for example in respect of service levels or innovation.

[799] The Tribunal is not persuaded that the evidence regarding the likelihood of additional entry and regarding the likelihood of additional switching in the Relevant Market is sufficient to enable the Commissioner to discharge his burden under paragraph 79(1)(*c*). Without a link between, on the one hand, such additional entry and switching and, on the other hand, some material impact on the price or non-price dimensions of competition in a material part of the Galley Handling Market (*Tervita FCA* at para 108), the Commissioner's evidence falls short of the mark. In this regard, the Tribunal agrees with VAA that the Commissioner's evidence does not provide clear and compelling evidence that there would likely have been, or would likely be, materially greater price or non-price competition at YVR "but for" VAA's Exclusionary Conduct.

[800] In his closing submissions, the Commissioner made a general statement that the anti-competitive effects attributable to VAA's Exclusionary Conduct rise to the level of substantiality "because VAA has, and continues to, foreclose rivalry in the market for the supply of Galley

Handling at YVR" and because "Gate Gourmet, CLS and, soon, dnata service airlines at YVR without threat of entry" (Commissioner's Closing Argument, at para 112). The Commissioner further referred to the Tribunal's statement in *TREB CT* to the effect that "[i]n the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential competition is particularly strong" (*TREB CT* at para 462).

[801] However, the anti-competitive effects attributable to VAA's Exclusionary Conduct cannot necessarily be said to rise to the level of substantiality simply because VAA has foreclosed entry in the market for the supply of Galley Handling services at YVR.

[802] As the SCC stated in *Tervita*, it is not enough that a potential competitor must be likely to enter the market. "[T]his entry must be likely to have a substantial effect on the market. […] [A]ssessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market" (*Tervita* at para 78). Accordingly, the Commissioner must demonstrate that entry likely would have decreased the market power of the incumbent firms, or that it would be likely to have this effect in the future. In the absence of such evidence, the impugned conduct cannot be said to prevent competition substantially (*Tervita* at para 64). In this case, the Commissioner has not demonstrated the extent to which either of the two incumbents had market power, and how VAA's Exclusionary Conduct has permitted those market participants to maintain their market power, or is likely to have this effect in the future.

[803] There has to be evidence that the prevention of entry or of increased switching translates into likely and material price or non-price effects in the Relevant Market. This evidence has not been provided in this case. This is a fatal shortcoming in the Commissioner's case.

[804] With respect to Jazz's gains from switching, the fact that there is evidence of savings in the order of **[CONFIDENTIAL]** is of limited use to the Tribunal's analysis under paragraph 79(1)(*c*), because it relates to one airline's savings at airports other than YVR. Moreover, no evidence was provided by the Commissioner with respect to the size of the Galley Handling markets at those other airports, or of Jazz's total expenditures on Galley Handling services at those airports. Therefore, even though the **[CONFIDENTIAL]** figure estimated by Dr. Niels **[CONFIDENTIAL]**, the Tribunal does not have the necessary evidence to determine the relative significance and magnitude of these savings made by Jazz from its switching of in-flight caterers at other airports, and to determine the materiality of these savings. The measure has to be a relative one, compared to the size of the market as a whole and to Jazz's overall expenditures for Galley Handling services at those airports other than YVR. That evidence has not been provided, and the Tribunal cannot therefore determine the relative materiality of this alleged price effect and how much of it ought to be attributed to the Exclusionary Conduct at YVR.

[805] Even if the Tribunal was to consider that some of the other evidence adduced by the Commissioner regarding the price effects of VAA's conduct could be interpreted as having established an actual or likely prevention or lessening of competition in the Relevant Market, the Tribunal would not conclude, on the evidence before it, that the Galley Handling Market would likely have been, or would likely be, substantially more competitive, "but for" VAA's Exclusionary Conduct. For example, the Commissioner's evidence regarding

[CONFIDENTIAL] and the **[CONFIDENTIAL]**% price decrease for non-switching "smaller" airlines do not significantly assist the Commissioner to demonstrate a prevention or lessening of competition that rises to the level of "substantial," either in terms of magnitude or scope.

[806] With respect to **[CONFIDENTIAL]**, this evidence related to one very small airline at YVR and a **[CONFIDENTIAL]**, for a specific product. The only evidence provided by Dr. Niels of an increase to the Galley Handling prices charged to **[CONFIDENTIAL]** was an increase to the price of "**[CONFIDENTIAL]**", which represented **[CONFIDENTIAL]**. And this airline is a **[CONFIDENTIAL]** operating at YVR.

[807] Similarly, regarding the evidence of price decreases at other airports for smaller airlines, the Tribunal considers the revenue-weighted **[CONFIDENTIAL]** found by Dr. Niels to be fairly modest and hardly material, in the context of this particular Relevant Market. Even Dr. Niels qualified this as "evidence of **[CONFIDENTIAL]** of entry for the smaller airlines" (Exhibits A-085, CA-086 and CA-087, Reply Report of Dr. Gunnar Niels, at para 5.89). Furthermore, it relates solely to "smaller airlines" which, in the aggregate, represent approximately **[CONFIDENTIAL]** of the traffic (in terms of flights) at YVR. Even in his "blended" analysis which included entries into monopoly situations, Dr. Niels did not find significant price effects for an "all airlines" sample comprising the **[CONFIDENTIAL]** airline customers of **[CONFIDENTIAL]**. Moreover, no evidence was provided on the proportion that these "smaller airlines" account for in the Galley Handling Market, as opposed to the number of flights at YVR. The above-mentioned "**[CONFIDENTIAL]**" figure does not reflect a share of passengers, nor does it necessarily reflect a share of Galley Handling expenditures at YVR. As mentioned by Dr. Reitman, the appropriate metric for the assessment of an alleged substantial prevention or lessening of competition is the fraction of the Galley Handling expenditures at YVR represented by those airlines, not the fraction of flights at YVR that they represent. As Dr. Niels himself reported, the **[CONFIDENTIAL]** airlines **[CONFIDENTIAL]** that were excluded from his smaller sample represent a significant proportion of **[CONFIDENTIAL]**.

[808] It bears emphasizing that there is no evidence indicating that the percentage of flights accounted for by an airline is a good proxy of the percentage of the Galley Handling services it purchases. Indeed, the evidence instead suggests that airlines having a larger proportion of international flights likely account for a larger share of the Galley Handling services than their actual proportion of flights. This further undermines the significance of Dr. Niels' evidence with respect to "smaller airlines".

[809] The Tribunal pauses to observe that one problem with the Commissioner's argument regarding the alleged substantial prevention or lessening in the Galley Handling Market is that the Commissioner has not provided clear, convincing and reliable evidence regarding the relative significance of the various airlines in the Galley Handling Market.

[810] In addition, as stated above, the Commissioner's evidence regarding the price effects of VAA's Exclusionary Conduct is limited to **[CONFIDENTIAL]** of the total revenues generated by the in-flight catering firms operating at YVR, from 2013 to 2017. No evidence specifically addressed **[CONFIDENTIAL]** of in-flight catering revenues.

[811] In light of all of the foregoing, the Tribunal is not satisfied that the above-mentioned anti-competitive price or non-price effects which could be attributable to VAA's Exclusionary Conduct are, individually or in the aggregate, "substantial" as required by paragraph 79(1)(*c*) of the Act. The evidence does not allow the Tribunal to conclude that VAA's Exclusionary Conduct has adversely affected or is adversely affecting, price or non-price competition in the Relevant Market, to a degree that is material, or that it is likely to do so in the future.

(4) Conclusion

[812] For the reasons set forth above, the Tribunal concludes that the Commissioner has not demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met. In brief, the Tribunal is not satisfied that there is clear and convincing evidence demonstrating, on a balance of probabilities, that "but for" VAA's Exclusionary Conduct, prices for Galley Handling services would likely be materially lower in the Relevant Market, that there would likely be a materially broader range of services in the Relevant Market, or that there would likely be materially more innovation in the Relevant Market.

VIII. CONCLUSION

[813] For all the above reasons, the Commissioner's Application is dismissed. In light of this conclusion, no remedial action will be ordered.

IX. COSTS

[814] At the end of the hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions on costs in due course. The Tribunal reaffirms that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs before they know the outcome is more likely to result in a reasonable and expeditious resolution of the question of costs. The Tribunal further reiterates that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

[815] By way of letter dated December 14, 2018, counsel for the Commissioner and for VAA notified the Tribunal that they had reached an agreement with respect to counsel fees as well as a partial agreement with respect to disbursements. According to that agreement, if the Tribunal awarded costs payable by VAA to the Commissioner, VAA would pay $101,000 to the Commissioner for counsel fees, whereas the Commissioner would pay $103,000 to VAA, if costs were payable to VAA. However, the parties were unable to reach an agreement on disbursements, except for travel costs and transcript costs, which they both agreed should be $73,314 and $35,258, respectively. The parties were unable to agree on the balance of the disbursements, and notably on their respective expert fees. They each submitted detailed bills of costs.

[816] As VAA is the successful party in this matter, it is entitled to recover at least some of its costs.

[817] Section 8.1 of the CT Act gives jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106 ("**FC Rules**"). Accordingly, pursuant to FC Rule 400(1), the Tribunal has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out in FC Rule 400(3). It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff'd (2001), 199 FTR 320 (FCA)).

[818] In *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 ("***Maple Leaf Meats***"), the FCA described the approximation of costs as a matter of judgment rather than an accounting exercise. An award of costs is not an exercise in exact science. It is only "an estimate of the amount the Court considers appropriate" (*Maple Leaf Meats* at para 8). The costs ordered should not be excessive or punitive, but rather reflect a fair relationship to the actual costs of litigation. The question for the Tribunal is therefore to determine what, in the circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

[819] With respect to legal costs, there is agreement between the parties on the amount to be paid to the successful party. However, in this case, the success on the issues in dispute has been divided; the Commissioner has prevailed on the product and geographic market definitions, on paragraph 79(1)(*a*) and on the PCI. A fair amount of time was spent by VAA disputing those issues. In the circumstances, the Tribunal is of the view that the legal costs to be paid to VAA should be reduced, by about a third. This is particularly so given that VAA persisted in spending time on market definition, paragraph 79(1)(*a*) and PCI, notwithstanding the Tribunal's encouragement to move along to the issues in respect of which VAA ultimately proved to be the successful party. The Tribunal thus fixes the Tariff B legal costs to be paid to VAA by the Commissioner at $70,000.

[820] Turning to disbursements, in addition to the travel and transcript costs agreed upon, VAA claims expert fees of $1,834,848 for Dr. Reitman and of $379,228 for Dr. Tretheway, as well as electronic discovery and document management fees of $291,290, for a total exceeding $2.6 million. The Commissioner submits that these disbursement amounts are excessive and should be substantially reduced.

[821] The Tribunal is satisfied that both parties have provided, in their respective bills of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of their various claims. The bills of costs were prepared in accordance with Column III of Tariff B of the FC Rules, and evidence has been provided regarding the billing, payment and justifications of the services provided and expenses incurred. With respect to experts, details regarding the tasks performed by each expert (and their teams), as well as the amount of time spent per task, have been provided. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary and justified.

[822] The Tribunal notes that the expert fees claimed by VAA are substantially higher than the fees of the Commissioner's sole expert witness, Dr. Niels, which totalled $1,333,209 for his two

reports. Since Dr. Reitman did not have to construct his own data set to perform his analyses and was essentially responding to Dr. Niels' analysis, the Tribunal agrees with the Commissioner that his total fees should be reduced. Expert-related costs are not automatically recoverable in their entirety, and can be adjusted by the Tribunal when they do not appear reasonable. With respect to the expert fees of Dr. Tretheway, the Tribunal is also of the view that they should be reduced as they include expenses incurred prior to the Application and the Tribunal struck a portion of his report (i.e., question 4) on the ground that it was inadmissible expert evidence.

[823] Turning to the disbursements claimed by VAA for electronic discovery and document management, they essentially relate to the fees charged by a third-party provider. The Tribunal agrees with VAA that it would be unfair to expect a party to comply with the requirements of electronic discovery and document management for an electronic hearing, without allowing for a recovery of the fees incurred for that purpose. The use of an effective document management system is essential to the seamless functioning of electronic hearings before the Tribunal, and it has a fundamental impact at each step of the proceedings (whether it is oral discoveries, motions, preparation of witness statements and expert reports, document production, or the hearing itself). Fees incurred in that respect are disbursements which, in principle, should be recoverable by the successful party.

[824] However, there are nonetheless limits to such disbursements. Only the amounts incurred after the filing of the Application can be properly claimed. In this regard, the e-discovery charges incurred by a party to comply with compulsory production orders under section 11 of the Act as part of the Bureau's prior, underlying investigation should not form part of claimed disbursements, even though many documents produced in that context may end up being directly related to subsequent filings before the Tribunal. In *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 17 ("***Canada Pipe 2005***"), the Tribunal held that it would be against public policy to order costs against the Commissioner for "the expense of complying with an order mandated by the Act and ratified by a Court of competent jurisdiction" (*Canada Pipe 2005* at para 12). Accordingly, the amount of disbursements claimed by VAA for electronic discovery and document management will need to be reduced to exclude such amounts.

[825] As stated above, the Tribunal favors lump sum awards as it simplifies the assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the "just, most expeditious and least expensive determination" of proceedings, as provided by FC Rule 3, which echoes the direction found in subsection 9(2) of the CT Act to deal with matters as informally and expeditiously as the circumstances and considerations of fairness permit.

[826] In his submissions on costs, the Commissioner argued that the Tribunal should consider FC Rule 400(3)(h) in making its assessment, and the broad public interest in having proceedings litigated before the Tribunal. Relying on *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("***Visa Canada***"), where the Tribunal made no award on costs as there was a broad public interest in bringing the case, the Commissioner submits that there was a similarly broad public interest in bringing the present case as it would clarify the interpretation of section 79 of the Act, its defenses, and its application to entities such as VAA.

The Tribunal disagrees. The Tribunal does not find the "public interest" argument in this case to be as "compelling" as it was in *Visa Canada*, where the matter before it was more novel (*Visa Canada* at paras 405, 407). All cases brought forward by the Commissioner have a public interest dimension and contribute to clarify contentious competition law matters, but that does not mean that the Commissioner can escape costs awards in all cases.

[827] In light of the foregoing, and taking into consideration the conditions of reasonableness and necessity, the Tribunal concludes that $1,850,000 would be an acceptable amount for VAA's disbursements, instead of the total exceeding $2.6 million claimed by VAA. However, as with the legal costs, success on the issues in dispute in this case should be taken into account. The Tribunal is of the view that the disbursements to be paid to VAA should also be reduced by about a third. The Tribunal thus fixes the disbursements to be paid to VAA by the Commissioner at $1,250,000.

[828] The Commissioner will therefore be required to pay to VAA a total lump sum amount of $70,000 in respect of Tariff B legal costs, and of $1,250,000 in respect of disbursements.

X. ORDER

[829] The Application brought by the Commissioner is dismissed.

[830] Within 30 days from the date of this Order, the Commissioner shall pay to VAA an amount of $70,000 in respect of legal costs, and of $1,250,000 in respect of disbursements.

[831] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on October 31, 2019, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on October 31, 2019.

DATED at Ottawa, this 17th day of October, 2019.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Chairperson)
(s) Paul Crampton C.J.
(s) Dr. Donald McFetridge

Schedule "A" – Relevant provisions of the Act

Abuse of Dominant Position	Abus de position dominante
Definition of *anti-competitive act*	**Définition de *agissement anti-concurrentiel***
78 (1) For the purposes of section 79, ***anti-competitive act***, without restricting the generality of the term, includes any of the following acts:	**78 (1)** Pour l'application de l'article 79, ***agissement anti-concurrentiel*** s'entend notamment des agissements suivants :
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;	**a)** la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;	**b)** l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;
(c) freight equalization on the plant of a competitor for the purpose of impeding or	**c)** la péréquation du fret en utilisant comme base l'établissement d'un

preventing the competitor's entry into, or eliminating the competitor from, a market;

concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

(f) buying up of products to prevent the erosion of existing price levels;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

(i) selling articles at a price

i) le fait de vendre des articles

lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

(j) and (k) [Repealed, 2009, c. 2, s. 427]

j) et k) [Abrogés, 2009, ch. 2, art. 427]

[…]

[…]

Prohibition where abuse of dominant position

Ordonnance d'interdiction dans les cas d'abus de position dominante

79 (1) Where, on application by the Commissioner, the Tribunal finds that

79 (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Additional or alternative order

Ordonnance supplémentaire ou substitutive

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Restriction

(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

Administrative monetary penalty

Sanction administrative pécuniaire

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(a) the effect on competition in the relevant market;

(b) the gross revenue from sales affected by the practice;

(c) any actual or anticipated profits affected by the practice;

(d) the financial position of the person against whom the order is made;

(e) the history of compliance with this Act by the person against whom the order is made; and

(f) any other relevant factor.

Facteurs à prendre en compte

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

a) l'effet sur la concurrence dans le marché pertinent;

b) le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;

c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;

d) la situation financière de la personne visée par l'ordonnance;

e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

f) tout autre élément pertinent.

Purpose of order

(3.3) The purpose of an order made against a person under

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à

subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Superior competitive performance

Efficience économique supérieure

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

Exception

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur,* de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

Limitation period

Prescription

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la

has ceased.

pratique en question a cessé depuis plus de trois ans.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

(a) proceedings have been commenced against that person under section 45 or 49; or

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

Schedule "B" – List of Exhibits

A-001	Witness Statement of Robin Padgett (dnata Catering Services Ltd.)
CA-002	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level A)
CA-003	Witness Statement of Robin Padgett (dnata Catering Services Ltd.) (Confidential - Level B)
A-004	Witness Statement of Rhonda Bishop (Jazz Aviation LP)
CA-005	Witness Statement of Rhonda Bishop (Jazz Aviation LP) (Confidential - Level B)
CR-006	Email from **[CONFIDENTIAL]** dated March 31, 2014 (Confidential - Level B)
CR-007	Email from **[CONFIDENTIAL]** dated May 29, 2014 (Confidential - Level A)
A-008	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.)
CA-009	Witness Statement of Geoffrey Lineham (Optimum Stratégies Inc.) (Confidential - Level B)
A-010	Witness Statement of Andrew Yiu (Air Canada)
CA-011	Witness Statement of Andrew Yiu (Air Canada) (Confidential - Level B)
R-012	News release dated August 31, 2017 – Air Canada to Launch New International 787 Dreamliner Routes from Vancouver
R-013	Calin's Column dated October 2017 – Our Love for Vancouver
CR-014	**[CONFIDENTIAL]** (Confidential - Level A)
CA-015	**[CONFIDENTIAL]** (Confidential - Level A)
A-016	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)
CA-017	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-018	Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
A-019	Supplemental Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.)

CA-020	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level A)
CA-021	Supplementary Witness Statement of Jonathan Stent-Torriani (Newrest Group Holdings S.A.) (Confidential - Level B)
CR-022	Email from Jonathan Stent-Torriani dated March 7, 2015 (Confidential - Level B)
CR-023	Email from Trevor Umlah dated July 9, 2014 **[CONFIDENTIAL]** (Confidential - Level B)
A-024	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-025	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-026	Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
A-027	Supplemental Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.)
CA-028	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level A)
CA-029	Supplementary Witness Statement of Mark Brown (Strategic Aviation Holdings Ltd.) (Confidential - Level B)
CR-030	Letter from Sky Café dated September 5, 2014 (Confidential - Level B)
CR-031	Email from **[CONFIDENTIAL]** dated June 27, 2014 (Confidential - Level B)
CR-032	Letter from **[CONFIDENTIAL]** dated July 14, 2016 (Confidential - Level B)
CR-033	Letter from **[CONFIDENTIAL]** dated April 30, 2015 (Confidential - Level B)
CR-034	Letter from **[CONFIDENTIAL]** dated September 29, 2015 (Confidential - Level B)
A-035	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CA-036	Witness Statement of Barbara Stewart (Air Transat A.T. Inc.) (Confidential - Level B)
A-037	Supplemental Witness Statement of Barbara Stewart (Air Transat A.T. Inc.)
CR-038	Final Canadian RFP Catering Cost Analysis dated July 28 2016 (Confidential - Level A)

A-039	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-040	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-041	Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
A-042	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.)
CA-043	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level A)
CA-044	Supplemental Witness Statement of Ken Colangelo (Gate Gourmet Canada Inc.) (Confidential - Level B)
CA-045	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level A)
CA-046	**[CONFIDENTIAL]** dated February 22, 2012 (Confidential - Level B)
A-047	GG Canada document dated February 22, 2012
CA-048	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level A)
CA-049	**[CONFIDENTIAL]** dated January 21, 2014 (Confidential - Level B)
A-050	GG Strategy Review dated January 21, 2014
CA-051	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level A)
CA-052	**[CONFIDENTIAL]** dated July 3, 2014 (Confidential - Level B)
A-053	GG Executive Review dated July 3, 2014
CA-054	Canada In-Flight Catering Market Size & Share (Confidential - Level A)
CA-055	Canada In-Flight Catering Market Size & Share (Confidential - Level B)
A-056	Canada In-Flight Catering Market Size & Share
CA-057	**[CONFIDENTIAL]** (Confidential - Level A)
CA-058	**[CONFIDENTIAL]** (Confidential - Level B)
A-059	**[CONFIDENTIAL]**
CA-060	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level A)
CA-061	**[CONFIDENTIAL]** dated November 21, 2013 (Confidential - Level B)

A-062	GG document dated November 21, 2013
CA-063	**[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level A)
CA-064	**[CONFIDENTIAL]** dated March 24, 2014 (Confidential - Level B)
A-065	GG document dated March 24, 2014
CA-066	**[CONFIDENTIAL]** (Confidential - Level A)
CA-067	**[CONFIDENTIAL]** (Confidential - Level B)
A-068	**[CONFIDENTIAL]**
CA-069	**[CONFIDENTIAL]** (Confidential - Level A)
CA-070	**[CONFIDENTIAL]** (Confidential - Level B)
A-071	**[CONFIDENTIAL]**
CA-072	**[CONFIDENTIAL]** dated May 2015 (Confidential - Level A)
CA-073	**[CONFIDENTIAL]** dated May 2015 (Confidential - Level B)
A-074	GG document dated May 2015
CR-075	Email from Ken Colangelo dated August 8, 2014 (Confidential - Level B)
A-076	Witness Statement of Maria Wall (CLS Catering Services Ltd.)
A-077	Amended and Supplemental Witness Statement of Steven Mood (WestJet)
CA-078	Amended and Supplemental Witness Statement of Steven Mood (WestJet) (Confidential - Level B)
CR-079	**[CONFIDENTIAL]** dated April 4, 2017 (Confidential - Level B)
A-080	Amended and Supplemental Witness Statement of Simon Soni (WestJet)
CA-081	Amended and Supplemental Witness Statement of Simon Soni (WestJet) (Confidential - Level B)
A-082	Expert Report of Dr. Gunnar Niels
CA-083	Expert Report of Dr. Gunnar Niels (Confidential - Level A)
CA-084	Expert Report of Dr. Gunnar Niels (Confidential - Level B)
A-085	Reply Report of Dr. Gunnar Niels

CA-086	Reply Report of Dr. Gunnar Niels (Confidential - Level A)
CA-087	Reply Report of Dr. Gunnar Niels (Confidential - Level B)
A-088	Expert Datapack – July 2018
A-089	Expert Datapack – August 2018
A-090	Dr. Gunnar Niels – Presentation Deck
CA-091	Dr. Gunnar Niels – Presentation Deck (Confidential – Level A)
CA-092	Dr. Gunnar Niels – Presentation Deck (Confidential – Level B)
R-093	Enforcement Guidelines - The Abuse of Dominance Provisions - Sections 78 and 79 of the *Competition Act*
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Thanh Tam Tran *Appellant*

v.

Minister of Public Safety and Emergency Preparedness *Respondent*

and

Attorney General of British Columbia, Canadian Association of Refugee Lawyers, British Columbia Civil Liberties Association and African Canadian Legal Clinic *Interveners*

Thanh Tam Tran *Appelant*

c.

Ministre de la Sécurité publique et de la Protection civile *Intimé*

et

Procureur général de la Colombie-Britannique, Association canadienne des avocats et avocates en droit des réfugiés, British Columbia Civil Liberties Association et Clinique juridique africaine canadienne *Intervenants*

Indexed as: Tran *v.* Canada (Public Safety and Emergency Preparedness)

2017 SCC 50

File No.: 36784.

2017: January 13; 2017: October 19.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Répertorié : Tran *c.* Canada (Sécurité publique et Protection civile)

2017 CSC 50

N° du greffe : 36784.

2017 : 13 janvier; 2017 : 19 octobre.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Inadmissibility and removal — Permanent residents — Serious criminality — Permanent resident convicted of federal offence receiving 12-month conditional sentence — Maximum sentence for offence increased after offence committed but before conviction and sentencing — Whether conditional sentence is "term of imprisonment" for purposes of assessing permanent resident's inadmissibility to Canada on grounds of serious criminality under s. 36(1)(a) of Immigration and Refugee Protection Act — Whether "maximum term of imprisonment" referred to in s. 36(1)(a) is maximum sentence that could have been imposed at time of commission of offence or of admissibility determination — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(1)(a).

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Interdiction de territoire et renvoi — Résidents permanents — Grande criminalité — Résident permanent déclaré coupable d'une infraction fédérale et condamné à une peine d'emprisonnement avec sursis de 12 mois — Peine maximale accrue après la commission de l'infraction, mais avant la déclaration de culpabilité et l'infliction de la peine — Une peine d'emprisonnement avec sursis constitue-t-elle un « emprisonnement » pour l'évaluation de l'interdiction de territoire au Canada pour grande criminalité en application de l'art. 36(1)a) de la Loi sur l'immigration et la protection des réfugiés? — L'« emprisonnement maximal » dont il est question à l'art. 36(1)a) correspond-il à la peine maximale qui aurait pu être infligée au moment de la commission de l'infraction ou de la décision relative à l'interdiction de territoire? — Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27, art. 36(1)a).

T, a permanent resident in Canada, was charged with a federal offence for which, at the time of the commission of the offence, the maximum penalty was seven years of imprisonment. After he was charged, but prior to his conviction, the maximum penalty for that offence was increased to 14 years of imprisonment. T was convicted of the charge against him, and received a 12-month conditional sentence of imprisonment to be served in the community.

Following T's conviction and sentencing, immigration officers prepared a report stating that T was inadmissible to Canada on grounds of serious criminality, under s. 36(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*"). This provision provides that a permanent resident is inadmissible to Canada for having been convicted in Canada of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed. The report was then submitted to a delegate of the Minister of Public Safety and Emergency Preparedness, who decided to adopt it and refer the matter to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing. T applied for judicial review of the delegate's decision. The reviewing judge allowed the application, finding that the offence of which T was convicted did not come within s. 36(1)(a) of the *IRPA* and that the delegate's decision to the contrary was unreasonable. The Court of Appeal allowed the Minister's appeal.

Held: The appeal should be allowed, the decision of the Minister's delegate quashed and the matter remitted to a different delegate.

The modern principle of statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Applying this approach, the interpretation of s. 36(1)(a) of the *IRPA* by the Minister's delegate cannot stand under either standard of review.

Conditional sentences are not captured in the meaning of the phrase "term of imprisonment" in s. 36(1)(a) of the *IRPA*. The purpose of s. 36(1)(a) is to define "serious criminality" for permanent residents convicted of an offence in Canada. It is clear from the wording of the provision that whether or not an imposed sentence can

T, un résident permanent au Canada, a été accusé d'une infraction fédérale passible, au moment de sa commission, d'une peine maximale de sept ans d'emprisonnement. Après que T a été accusé, mais avant qu'il soit déclaré coupable, la peine maximale dont était passible ceux qui se rendaient coupables de l'infraction a été portée à 14 ans d'emprisonnement. T a été déclaré coupable de l'accusation portée contre lui et il a été condamné à une peine de 12 mois d'emprisonnement avec sursis à purger dans la communauté.

Après que T a été déclaré coupable et que sa peine lui a été infligée, des agents d'immigration ont préparé un rapport selon lequel il était interdit de territoire au Canada pour grande criminalité, en application de l'al. 36(1)a) de la *Loi sur l'immigration et la protection des réfugiés* (« *LIPR* »). Suivant cette disposition, un résident permanent est interdit de territoire au Canada s'il a été déclaré coupable au Canada d'une infraction fédérale punissable d'un emprisonnement maximal d'au moins 10 ans, ou d'une infraction fédérale pour laquelle il a été condamné à une peine d'emprisonnement de plus de 6 mois. Le rapport a ensuite été soumis à un délégué du ministre de la Sécurité publique et de la Protection civile, qui a décidé de l'adopter et de déférer l'affaire à la Section de l'immigration de la Commission de l'immigration et du statut de réfugié pour enquête. T a demandé un contrôle judiciaire de la décision du délégué. Le juge qui a procédé au contrôle a accueilli la demande, puisqu'il a conclu que l'infraction dont T avait été reconnu coupable ne tombe pas sous le coup de l'al. 36(1)a) de la *LIPR* et que la décision contraire du délégué était déraisonnable. La Cour d'appel a fait droit à l'appel interjeté par le ministre.

Arrêt : L'appel est accueilli, la décision du délégué du ministre est annulée et l'affaire est renvoyée à un autre délégué.

Le principe moderne d'interprétation législative veut qu'il faille lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, son objet et l'intention du législateur. Suivant cette approche, que l'on applique l'une ou l'autre des normes de contrôle, l'interprétation de l'al. 36(1)a) de la *LIPR* adoptée par le délégué du ministre ne peut être maintenue.

Les peines d'emprisonnement avec sursis ne sont pas visées par le terme « emprisonnement » de l'al. 36(1)a) de la *LIPR*. L'objet de l'al. 36(1)a) est de définir la « grande criminalité » pour les résidents permanents déclarés coupables d'une infraction au Canada. Clairement, selon le libellé de la disposition, la question de savoir si une peine

establish serious criminality depends on its length — it must be "more than six months". However, the seriousness of criminality punished by a certain length of jail sentence is not the same as the seriousness of criminality punished by an equally long conditional sentence. Conditional sentences, even with stringent conditions, will usually be more lenient than jail terms of equivalent duration, and generally indicate less serious criminality than jail terms. Since a conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders, interpreting "a term of imprisonment of more than six months" as including both prison sentences and conditional sentences undermines the efficacy of using length to evaluate the seriousness of criminality.

Furthermore, the meaning of "term of imprisonment" varies according to the statutory context. Its meaning in ss. 36(1)(a) and 64 of the *IRPA* has been interpreted by this Court to mean "prison". This interpretation avoids absurd results. Since more serious crimes may be punished by jail sentences that are shorter than conditional sentences imposed for less serious crimes, it would be an absurd outcome if less serious and non-dangerous offenders who received conditional sentences were deported, while more serious offenders receiving jail terms shorter than those conditional sentences were permitted to remain in Canada. Public safety, as an objective of the *IRPA*, is not enhanced by deporting less culpable offenders while allowing more culpable persons to remain in Canada.

The phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refers to the maximum term of imprisonment available at the time of the commission of the offence, and is to be understood as referring to the circumstances of the actual offender or of others in similar circumstances. This interpretation aligns with the purpose of the *IRPA*, as outlined in s. 3. The *IRPA* aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents. The obligation of permanent residents to behave lawfully includes not engaging in "serious criminality" as defined in s. 36(1); however, that obligation must be communicated to them in advance. While Parliament is entitled to change its views on the seriousness of a crime, it is not entitled to alter the mutual obligations between

infligée peut établir la grande criminalité dépend de sa durée — elle doit être « de plus de six mois ». Cependant, la gravité de la criminalité punie par une durée donnée d'incarcération n'est pas la même que la gravité de la criminalité punie par une peine d'emprisonnement avec sursis de la même durée. Une ordonnance d'emprisonnement avec sursis, même assortie de conditions rigoureuses, est généralement une peine plus clémente qu'un emprisonnement de même durée et est généralement une indication d'une moins grande criminalité que les peines d'incarcération. Comme la peine d'emprisonnement avec sursis constitue une solution de rechange à l'incarcération de certains délinquants moins et non dangereux, interpréter un « emprisonnement de plus de six mois » comme incluant à la fois des peines d'incarcération et des peines d'emprisonnement avec sursis réduit l'à-propos d'utiliser la durée pour évaluer la gravité de la criminalité.

En outre, le sens du terme « emprisonnement » varie selon le contexte législatif. Dans le cas de l'al. 36(1)a) et l'art. 64 de la *LIPR*, la Cour a jugé qu'il renvoie à la notion de « prison ». Cette interprétation évite de donner lieu à des résultats absurdes. Puisque des crimes plus graves sont punissables de peines d'incarcération qui sont plus courtes que les peines d'emprisonnement avec sursis infligées pour des crimes moins graves, il serait absurde qu'un délinquant moins et non dangereux condamné à un emprisonnement avec sursis soit expulsé, tandis qu'un délinquant ayant commis une infraction plus grave qui s'est vu infliger une peine d'incarcération plus courte que cet emprisonnement avec sursis puisse demeurer au Canada. Expulser des contrevenants ayant commis des infractions moins graves tout en permettant à des personnes ayant commis des infractions plus graves de demeurer au Canada ne contribuerait pas à accroître la sécurité publique, qui constitue un objectif de la *LIPR*.

L'expression « punissable d'un emprisonnement maximal d'au moins dix ans » de l'al. 36(1)a) de la *LIPR* se rapporte à la peine maximale que l'accusé aurait pu se voir infliger au moment de la commission de l'infraction et doit être comprise en fonction des circonstances relatives au contrevenant visé, ou à d'autres personnes dans des situations semblables. Cette interprétation est conforme à l'objet de la *LIPR* énoncé à l'art. 3. La *LIPR* vise à permettre au Canada de profiter des avantages de l'immigration, tout en reconnaissant la nécessité d'assurer la sécurité et d'énoncer les obligations des résidents permanents. L'obligation de ces derniers de se conformer à la loi comprend celle de ne pas se livrer à des activités de « grande criminalité » comme le prévoit le par. 36(1); cette obligation doit toutefois leur être communiquée à l'avance. Bien que le législateur puisse changer de

permanent residents and Canadian society without clearly and unambiguously doing so. Section 36(1)(a) must be interpreted in a way that respects these mutual obligations. In the absence of an indication that Parliament has considered the retrospectivity of this provision and the potential for it to have unfair effects, the presumption against retrospectivity applies. Accordingly, the relevant date for assessing serious criminality under s. 36(1)(a) is the date of the commission of the offence, not the date of the admissibility decision.

Cases Cited

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Criminal Code, R.S.C. 1985, c. C-46, ss. 742 to 742.7.
Immigration Act, 1976, S.C. 1976-77, c. 52, s. 27(1)(*d*).
Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3, 36(1), 44(1), (2), 45(a), (c), (d), 46(1)(c), 50(b), 63(3), 64(2) [am. 2013, c. 16, s. 24], 74(d).

position au sujet de la gravité d'un crime, il ne peut changer les obligations mutuelles entre les résidents permanents et la société canadienne sans le faire clairement et sans équivoque. Il faut interpréter l'al. 36(1)a) d'une manière qui respecte ces obligations mutuelles. En l'absence d'une indication selon laquelle le législateur a envisagé qu'une loi soit rétrospective et ainsi possiblement inéquitable, la présomption du caractère non rétrospectif s'applique. Par conséquent, la date pertinente pour évaluer la grande criminalité dont il est question à l'al. 36(1)a) est la date de la commission de l'infraction, et non la date de la décision quant à l'interdiction de territoire.

Jurisprudence

Arrêts examinés : *Medovarski c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 51, [2005] 2 R.C.S. 539; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; **arrêts mentionnés :** *Halifax (Regional Municipality) c. Nouvelle-Écosse (Human Rights Commission)*, 2012 CSC 10, [2012] 1 R.C.S. 364; *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61; *R. c. Shah*, 2003 BCCA 294, 182 B.C.A.C. 142; *R. c. Saundercook-Menard*, 2008 ONCA 493; *R. c. Chapman*, 2007 YKSC 55; *R. c. Jacobson* (2006), 207 C.C.C. (3d) 270; *R. c. Keller*, 2009 ABCA 418, 469 A.R. 151; *R. c. Sandhu*, 2014 ONCJ 95; *R. c. Kasakan*, 2006 SKCA 14, [2006] 8 W.W.R. 23; *R. c. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263; *R. c. Knoblauch*, 2000 CSC 58, [2000] 2 R.C.S. 780; *R. c. Wu*, 2003 CSC 73, [2003] 3 R.C.S. 530; *R. c. Middleton*, 2009 CSC 21, [2009] 1 R.C.S. 674; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271; *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473; *Black-Clawson International Ltd. c. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906; *R. c. Pham*, 2013 CSC 15, [2013] 1 R.C.S. 739; *R. c. Vine* (1875), L.R. 10 Q.B. 195; *In re A Solicitor's Clerk*, [1957] 1 W.L.R. 1219; *R. c. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81.

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APPEAL from a judgment of the Federal Court of Appeal (Gauthier, Ryer and Near JJ.A.), 2015 FCA 237, [2016] 2 F.C.R. 459, 478 N.R. 165, 392 D.L.R. (4th) 351, 38 Imm. L.R. (4th) 175, [2015] F.C.J. No. 1324 (QL), 2015 CarswellNat 5677 (WL Can.), setting aside a decision of O'Reilly J., 2014 FC 1040, 31 Imm. L.R. (4th) 160, [2014] F.C.J. No. 1106 (QL), 2014 CarswellNat 4405 (WL Can.). Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Gauthier, Ryer et Near), 2015 CAF 237, [2016] 2 R.C.F. 459, 478 N.R. 165, 392 D.L.R. (4th) 351, 38 Imm. L.R. (4th) 175, [2015] A.C.F. nº 1324 (QL), 2015 CarswellNat 9252 (WL Can.), qui a infirmé une décision du juge O'Reilly, 2014 CF 1040, 31 Imm. L.R. (4th) 160, [2014] A.C.F. nº 1106 (QL), 2014 CarswellNat 4866 (WL Can.). Pourvoi accueilli.

Peter H. Edelmann, *Aris Daghighian* and *Erin C. Roth*, for the appellant.

Peter H. Edelmann, *Aris Daghighian* et *Erin C. Roth*, pour l'appelant.

François Joyal and *Kathryn Hucal*, for the respondent.

François Joyal et *Kathryn Hucal*, pour l'intimé.

Written submissions only by *Christina Drake*, for the intervener the Attorney General of British Columbia.

Argumentation écrite seulement par *Christina Drake*, pour l'intervenant le procureur général de la Colombie-Britannique.

John Norris, for the intervener the Canadian Association of Refugee Lawyers.

John Norris, pour l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés.

Lorne Waldman and *Warda Shazadi Meighen*, for the intervener the British Columbia Civil Liberties Association.

Lorne Waldman et *Warda Shazadi Meighen*, pour l'intervenante British Columbia Civil Liberties Association.

Faisal Mirza, *Dena Smith* and *Danardo Jones*, for the intervener the African Canadian Legal Clinic.

The judgment of the Court was delivered by

[1] CÔTÉ J. — Canada's *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), recognizes that there are important social, cultural and economic benefits to immigration. It also recognizes that successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian society.

[2] This appeal concerns the obligation of permanent residents to avoid "serious criminality", as set out in s. 36(1)(a) of the *IRPA*. This obligation is breached when a permanent resident is convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed.

[3] The appellant, Thanh Tam Tran, was convicted of a federal offence and received a 12-month conditional sentence. At issue in this appeal is whether a conditional sentence consists of a "term of imprisonment" for the purposes of s. 36(1)(a) and whether, when the maximum sentence for an offence has changed over time, the "maximum term of imprisonment" referred to at s. 36(1) should be taken to be the maximum sentence that could have been imposed at the time of the commission of the offence, of the conviction, of sentencing or of the determination as to the permanent resident's admissibility to Canada.

[4] For the reasons that follow, I would allow the appeal.

Faisal Mirza, *Dena Smith* et *Danardo Jones*, pour l'intervenante la Clinique juridique africaine canadienne.

Version française du jugement de la Cour rendu par

[1] LA JUGE CÔTÉ — La *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, c. 27 (« *LIPR* »), reconnaît les importants avantages sociaux, culturels et économiques de l'immigration. Elle reconnaît également que le succès de l'intégration des résidents permanents implique des obligations mutuelles pour les nouveaux arrivants et pour la société canadienne.

[2] Le présent pourvoi porte sur l'obligation des résidents permanents d'éviter la « grande criminalité » comme le prévoit l'al. 36(1)a) de la *LIPR*. Il y a violation de cette obligation lorsque le résident permanent est déclaré coupable d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins 10 ans, ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de 6 mois lui a été infligé.

[3] L'appelant, Thanh Tam Tran, a été déclaré coupable d'une infraction à une loi fédérale et a été condamné à une peine de 12 mois d'emprisonnement avec sursis. Les questions que nous sommes appelés à trancher en l'espèce sont celles de savoir si une peine d'emprisonnement avec sursis constitue un « emprisonnement » pour l'application de l'al. 36(1)a) et si, lorsque la peine maximale pour une infraction a changé avec le temps, l'« emprisonnement maximal » dont il est question au par. 36(1) renvoie à celle qui aurait pu être infligée au moment de la perpétration de l'infraction, de la déclaration de culpabilité, du prononcé de la peine ou d'une décision concernant l'interdiction de territoire du résident permanent au Canada.

[4] Pour les motifs qui suivent, j'accueillerais le pourvoi.

I. Background

[5] Section 36(1)(a) of the *IRPA* provides the basis for finding a permanent resident inadmissible to Canada on grounds of "serious criminality":

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

> **(a)** having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

Inadmissibility can lead to loss of status and removal from Canada.

[6] If a Canada Border Services Agency ("CBSA") officer is of the opinion that a permanent resident is inadmissible, that officer may prepare a report setting out the relevant facts and transmit that report to the Minister of Public Safety and Emergency Preparedness ("Minister") (*IRPA*, s. 44(1)). If the Minister is of the opinion that the report is well founded, the Minister may refer the report to the Immigration Division of the Immigration and Refugee Board ("Immigration Division") for an admissibility hearing (s. 44(2)). However, even if he is of the opinion that the report is well founded, the Minister retains some discretion not to refer it to the Immigration Division.

[7] If the Minister does refer the report to the Immigration Division, an admissibility hearing is held for the permanent resident, and the Immigration Division must either recognize that person's right to enter Canada (*IRPA*, s. 45(a)), authorize him or her to enter Canada for further examination (s. 45(c)), or make a removal order against that person (s. 45(d)). If a removal order is made, that person's permanent resident status is lost (*IRPA*, s. 46(1)(c)). Although a right to appeal to the Immigration Appeal Division exists against a decision to make a removal order against a permanent resident (*IRPA*, s. 63(3)), there is no right to appeal by a permanent resident who has been found inadmissible on grounds of serious criminality if the finding of inadmissibility was "with respect to a crime that was punished in

I. Contexte

[5] L'alinéa 36(1)a) de la *LIPR* prévoit le fondement de l'interdiction de territoire au Canada d'un résident permanent pour « grande criminalité » :

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

> **a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

L'interdiction de territoire peut entraîner une perte de statut et le renvoi du Canada.

[6] Si un agent de l'Agence des services frontaliers du Canada (« ASFC ») estime qu'un résident permanent est interdit de territoire, il peut établir un rapport circonstancié qu'il transmet au ministre de la Sécurité publique et de la Protection civile (« ministre ») : *LIPR*, par. 44(1). Si le ministre estime le rapport bien fondé, il peut déférer l'affaire à la Section de l'immigration de la Commission de l'immigration et du statut de réfugié (« Section de l'immigration ») pour enquête : par. 44(2). Toutefois, même s'il estime le rapport bien-fondé, le ministre conserve un certain pouvoir discrétionnaire de ne pas déférer l'affaire à la Section de l'immigration.

[7] Si le ministre défère l'affaire à la Section de l'immigration, celle-ci tient une enquête et elle doit soit reconnaître le droit d'entrer de la personne au Canada (*LIPR*, al. 45a)), soit autoriser la personne à entrer au Canada pour contrôle complémentaire (al. 45c)), soit prendre une mesure de renvoi à son égard (al. 45d)). La prise d'une mesure de renvoi emporte perte du statut de résident permanent de cette personne : *LIPR*, al. 46(1)c). S'il est vrai qu'il est possible d'interjeter appel devant la Section d'appel de l'immigration d'une mesure de renvoi prononcée contre un résident permanent (*LIPR*, par. 63(3)), un tel résident ne peut faire appel d'une décision qui l'a déclaré interdit de territoire pour grande criminalité si sa déclaration de culpabilité « vise [. . .] l'infraction punie au Canada par

Canada by a term of imprisonment of at least six months" (*IRPA*, s. 64(2)).

[8] This appeal concerns the judicial review of a decision by the Minister to refer a report concerning Mr. Tran's admissibility to the Immigration Division.

[9] Mr. Tran is a citizen of Vietnam. In 1989, he acquired permanent resident status in Canada. In March 2011, he was involved in a marihuana grow operation containing approximately 915 plants and was charged with production of a controlled substance, contrary to s. 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). At the time of the commission of the offence, the maximum penalty if convicted was seven years of imprisonment (s. 7(2)(b)).

[10] On November 6, 2012, legislation came into effect (*Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 41) increasing the maximum sentence for this offence to 14 years of imprisonment and providing for a new minimum sentence of 2 years of imprisonment if the number of plants produced was more than 500 (*CDSA*, s. 7(2)(b)(v)).

[11] On November 29, 2012, Mr. Tran was convicted of the charge against him. On January 18, 2013, he received a 12-month conditional sentence of imprisonment, to be served in the community.

II. Decisional History

A. *Administrative Decisions*

[12] On July 26, 2013, a CBSA officer prepared a report stating that Mr. Tran was inadmissible to Canada under s. 36(1)(a) of the *IRPA*. A delegate of the Minister referred Mr. Tran's case to the Immigration Division for an admissibility hearing. This referral was withdrawn on September 10, 2013, in view of legislative changes to appeal rights under s. 64(2) of the *IRPA*. Mr. Tran was given an opportunity to

un emprisonnement d'au moins six mois » : *LIPR*, par. 64(2).

[8] Le présent pourvoi porte sur le contrôle judiciaire d'une décision du ministre de déférer l'affaire concernant M. Tran à la Section de l'immigration.

[9] M. Tran est un citoyen du Vietnam. En 1989, il a obtenu le statut de résident permanent au Canada. En mars 2011, il a été impliqué dans une exploitation de culture de marihuana de quelque 915 plants et a été accusé de production d'une substance désignée, infraction prévue au par. 7(1) de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, c. 19 (« *LRCDAS* »). Au moment de la commission de l'infraction, une condamnation pouvait entraîner une peine maximale de sept ans d'emprisonnement : al. 7(2)b).

[10] Le 6 novembre 2012, est entrée en vigueur une disposition législative (*Loi sur la sécurité des rues et des communautés*, L.C. 2012, c. 1, art. 41) augmentant la peine maximale pour cette infraction à 14 ans d'emprisonnement et prévoyant une nouvelle peine minimale de 2 ans pour un nombre de plants en cause supérieur à 500 : *LRCDAS*, sous-al. 7(2)b)(v).

[11] Le 29 novembre 2012, M. Tran a été déclaré coupable de l'accusation portée contre lui. Le 18 janvier 2013, il a été condamné à une peine de 12 mois d'emprisonnement avec sursis à purger dans la communauté.

II. Historique des décisions

A. *Décisions administratives*

[12] Le 26 juillet 2013, un agent de l'ASFC a préparé un rapport selon lequel M. Tran était interdit de territoire au Canada en application de l'al. 36(1)a) de la *LIPR*. Un délégué du ministre a déféré le cas de M. Tran à la Section de l'immigration pour que celle-ci procède à une audition quant à son admissibilité. Cette mesure prise par le délégué a toutefois été annulée le 10 septembre 2013, étant donné les

make additional submissions as to why a removal order should not be sought against him.

[13] On October 4, 2013, Mr. Tran provided written submissions in which he argued that he did not fall within the purview of s. 36 because: (1) the conditional sentence order made against him was not a "term of imprisonment", and therefore a "term of imprisonment of more than six months" had not been imposed; and (2) the *CDSA* amendments raising the maximum sentence for the offence for which he was convicted were not retroactively applicable to him, and therefore the offence, at the time he committed it, was not "punishable by a maximum term of imprisonment of at least 10 years". Mr. Tran also made submissions on various discretionary factors in support of his position that his case did not warrant referral to the Immigration Division.

[14] On October 7, 2013, a second CBSA officer submitted another report ("Report") regarding Mr. Tran to a delegate of the Minister. The Report states, in part:

I recommend that this report be referred to an admissibility hearing and a deportation order be issued.

. . .

I have reviewed counsel's submissions carefully and thoroughly, and given thought to each relevant point. Many are legal arguments that do not fall into the scope of my duties in this matter. In looking at my responsibility under the Act, I am guided by CIC Enforcement Manual ENF 6, which states I should consider the following non-exhaustive list of factors. I address each of them below, with consideration to additional and relevant points raised by counsel. [Emphasis added.]

(A.R., vol. I, at p. 1)

modifications législatives apportées aux droits d'appel prévus au par. 64(2) de la *LIPR*. M. Tran a alors été invité à présenter des observations additionnelles au soutien de sa thèse selon laquelle il ne devait pas faire l'objet d'une mesure de renvoi.

[13] Le 4 octobre 2013, M. Tran a présenté des observations écrites pour faire valoir qu'il n'était pas visé par l'art. 36 en raison des éléments suivants : (1) la peine d'emprisonnement avec sursis à laquelle il avait été condamné ne constituait pas un « emprisonnement », de sorte qu'aucun « emprisonnement de plus de six mois » n'avait été infligé; et (2) les modifications à la *LRCDAS* qui augmentaient la peine maximale pour l'infraction dont il avait été déclaré coupable ne lui étaient pas applicables rétroactivement et, par conséquent, l'infraction, au moment où il l'avait commise, n'était pas « punissable d'un emprisonnement maximal d'au moins dix ans ». M. Tran a également présenté des observations relatives à divers facteurs discrétionnaires au soutien de sa position voulant que son dossier ne devait pas être déféré à la Section de l'immigration.

[14] Le 7 octobre 2013, un deuxième agent de l'ASFC a soumis un rapport (« Rapport ») relatif à M. Tran à un délégué du ministre. Ce Rapport énonçait notamment ce qui suit :

[TRADUCTION] Je recommande que le présent rapport soit déféré à la Section de l'immigration pour enquête et qu'une mesure d'expulsion soit ordonnée.

. . .

J'ai examiné attentivement et en détail les observations de l'avocat, et j'ai étudié chaque élément pertinent. Plusieurs sont des arguments juridiques qui n'entrent pas dans le cadre de mes fonctions dans ce dossier. Dans l'exercice de ma responsabilité aux termes de la Loi, je me fonde sur le chapitre ENF 6 du Guide d'application de la loi de CIC, qui prévoit que je dois prendre en compte la liste non exhaustive de facteurs qui suit. J'aborde chacun de ces facteurs ci-dessous, tout en tenant compte des points additionnels pertinents soulevés par l'avocat. [Je souligne.]

(d.a., vol. I, p. 1)

The Report then canvasses conditions in Mr. Tran's home country of Vietnam, his degree of establishment in Canada, and the best interests of his children. Notably, the Report lists a series of arrests and charges without conviction, and a conviction for impaired driving, which are cited in support of a conclusion that Mr. Tran

tends to get arrested every couple of years. By failing to acknowledge any of his past problems, particularly his very recent conviction, it is my opinion that [Mr. Tran] is not accepting responsibility for his actions. Based on the little information before me, I can only assume he will reoffend because he has done so in the past and because he has not demonstrated any inclination to take responsibility for anything beyond what he thinks immigration officials are aware of. . . .

. . .

Based on all of the above information, and in consideration of the submissions made by counsel, it is my opinion that this report should be referred to a hearing. [Mr. Tran] has been involved in a serious criminal offence. The evidence provided is that he has been involved in criminal activity in the past and that he is not taking full responsibility for his actions. The mitigating factors (establishment, family, hardship in Vietnam, etc.) are overshadowed by the seriousness of the offence, [Mr. Tran]'s conduct in society, and the lack of any indication his behaviour will improve.

(A.R., vol. I, at p. 3)

[15] On October 10, 2013, the Minister's delegate endorsed the Report and referred the matter for an admissibility hearing before the Immigration Division. Mr. Tran then applied for judicial review of the delegate's decision.

B. *Judicial Review in the Federal Court, 2014 FC 1040, 31 Imm. L.R. (4th) 160*

[16] Justice O'Reilly found the decision to be unreasonable. He allowed Mr. Tran's application for judicial review and ordered that another officer consider the question of Mr. Tran's inadmissibility. The

Le Rapport fait ensuite état des conditions de vie au Vietnam, le pays d'origine de M. Tran, de son degré d'établissement au Canada et de l'intérêt supérieur de ses enfants. Plus particulièrement, le Rapport dresse la liste des arrestations et des accusations sans condamnation dont M. Tran a fait l'objet et d'une déclaration de culpabilité pour conduite avec facultés affaiblies, qui sont toutes citées à l'appui de la conclusion suivant laquelle M. Tran

[TRADUCTION] tend à se faire arrêter toutes les quelques années. Parce qu'il refuse de reconnaître ses problèmes passés, notamment sa condamnation très récente, je conclus qu'il n'assume pas la responsabilité de ses actes. À la lumière du peu de renseignements dont je dispose, je ne peux que supposer qu'il récidivera probablement parce que c'est ce qu'il a fait auparavant et parce qu'il n'a montré aucune volonté d'assumer de responsabilité à l'égard de quoi que ce soit, mis à part de ce qu'il croit être connu des agents d'immigration. . .

. . .

En me fondant sur l'ensemble de l'information précitée, et compte tenu des observations présentées par l'avocat, je suis d'avis que cette affaire devrait être déférée pour enquête. [M. Tran] a été impliqué dans une infraction criminelle grave. Selon la preuve fournie, il a participé à des activités criminelles dans le passé et il n'assume pas l'entière responsabilité de ses actes. Les circonstances atténuantes (établissement, famille, difficultés au Vietnam, etc.) sont éclipsées par la gravité de l'infraction, la conduite de M. Tran dans la société et l'absence d'indication que son comportement s'améliorera.

(d.a., vol. I, p. 3)

[15] Le 10 octobre 2013, le délégué du ministre a endossé le Rapport et a déféré l'affaire à la Section de l'immigration pour enquête. M. Tran a ensuite demandé un contrôle judiciaire de la décision du délégué.

B. *Contrôle judiciaire en Cour fédérale, 2014 CF 1040*

[16] Selon le juge O'Reilly, la décision était déraisonnable. Il a accueilli la demande de contrôle judiciaire de M. Tran et ordonné qu'un autre agent examine la question de l'interdiction de territoire.

judge found that whether a conditional sentence is a "term of imprisonment" varies according to the statutory context; that conditional sentences are meant as an alternative to incarceration for less serious offences; and that Mr. Tran's conditional sentence was not a "term of imprisonment" under the *IRPA*. Ergo, Mr. Tran had not been sentenced to a "term of imprisonment of more than six months". On the maximum term of imprisonment question, O'Reilly J. found that s. 36(1)(a) referred to the maximum punishment available at the time of conviction (para. 20):

The maximum sentence at the time of his conviction was 7 years. While the maximum sentence was subsequently raised to 14 years, Mr. Tran was not punishable by a sentence of that duration. Therefore, the offence of which he was convicted did not come within s. 36(1)(*a*), and the officer's decision to the contrary was unreasonable.

The judge also found the officer's reliance on unproven allegations of criminal activity to be unreasonable.

[17] Justice O'Reilly certified two questions of general importance, thus permitting an appeal to the Federal Court of Appeal under s. 74(d) of the *IRPA*:

1. Is a conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* [R.S.C. 1985, c. C-46] a "term of imprisonment" under s. 36(1)(a) of the *IRPA*?

2. Does the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refer to the maximum term of imprisonment available at the time the person was sentenced or to the maximum term of imprisonment under the law in force at the time admissibility is determined?

(2015 FC 899)

Le juge a conclu que la réponse à la question de savoir si une peine d'emprisonnement avec sursis constitue un « emprisonnement » varie selon le contexte législatif; que l'emprisonnement avec sursis constitue une solution de rechange à l'incarcération pour les infractions moins graves; et que la peine d'emprisonnement avec sursis à laquelle M. Tran a été condamné ne constitue pas un « emprisonnement » pour l'application de la *LIPR*. Par conséquent, M. Tran n'avait pas été condamné à un « emprisonnement de plus de six mois ». En ce qui a trait à la question de l'emprisonnement maximal, le juge O'Reilly a conclu que l'al. 36(1)a) renvoyait à la peine maximale applicable au moment de la condamnation (par. 20 (CanLII)) :

La peine maximale à l'époque de la condamnation était une peine de 7 ans d'emprisonnement. Certes la peine maximale a par la suite été augmentée à 14 ans, mais M. Tran n'était pas passible d'une peine de cette durée. L'infraction à l'égard de laquelle il a été reconnu coupable ne tombe donc pas sous le coup de l'alinéa 36(1)*a*), et la décision contraire de l'agent est déraisonnable.

Le juge a également conclu qu'il était déraisonnable que l'agent se soit fondé sur des allégations d'activités criminelles non prouvées.

[17] Le juge O'Reilly a certifié deux questions de portée générale, permettant ainsi que l'appel soit instruit devant la Cour d'appel fédérale aux termes de l'al. 74d) de la *LIPR* :

1. Une peine d'emprisonnement avec sursis infligée dans le cadre du régime établi aux art. 742 à 742.7 du *Code criminel* [L.R.C. 1985, c. C-46] constitue-t-elle un « emprisonnement » au sens de l'al. 36(1)a) de la *LIPR*?

2. L'expression « punissable d'un emprisonnement maximal d'au moins dix ans » employée à l'al. 36(1)a) de la *LIPR* vise-t-elle l'emprisonnement maximal en vigueur au moment où la personne a été condamnée ou l'emprisonnement maximal selon la loi en vigueur au moment de l'enquête?

(2015 CF 899)

C. *Federal Court of Appeal, 2015 FCA 237, [2016] 2 F.C.R. 459*

[18] Justice Gauthier, for a unanimous Federal Court of Appeal, allowed the Minister's appeal. She found that even if the reviewing judge's interpretation of s. 36(1)(a) was correct, he had nevertheless failed to do what he was required to do under a reasonableness standard on judicial review: to assess whether the interpretation adopted by the administrative decision maker fell within the range of interpretations defensible on the law and facts.

[19] Gauthier J.A. found that the interpretation of s. 36(1)(a) adopted by the Minister's delegate was not unreasonable. Regarding the actual term of imprisonment imposed (the first certified question), she held that it was not unreasonable to construe a conditional sentence as a "term of imprisonment" under s. 36(1)(a). She added that to say that a conditional sentence is more lenient than similar terms of incarceration does not mean that Parliament does not nevertheless consider the offence in question serious enough to warrant inadmissibility. She noted that the parliamentary committee debates about lowering the threshold of the term of imprisonment beyond which there is no right to appeal inadmissibility findings to the Immigration Appeal Division (*IRPA*, s. 64(2)) included three proposals to exclude conditional sentences, each of which was defeated. She explained that if Parliament considers a conditional sentence of at least six months to be sufficiently serious to warrant the loss of appeal rights, it was not unreasonable for the Minister's delegate to interpret a conditional sentence as a "term of imprisonment" under s. 36(1)(a).

C. *Cour d'appel fédérale, 2015 CAF 237, [2016] 2 R.C.F. 459*

[18] La juge Gauthier, qui a rendu l'arrêt unanime de la Cour d'appel fédérale, a accueilli l'appel du ministre. À son avis, même si l'interprétation que le juge qui a procédé au contrôle avait faite de l'al. 36(1)a) était correcte, il a néanmoins fait défaut d'appliquer la norme de la décision raisonnable en cas de contrôle judiciaire comme il devait le faire, soit en déterminant si l'interprétation retenue par le décideur administratif faisait partie de la gamme des interprétations justifiables au regard des faits et du droit.

[19] La juge Gauthier a conclu que l'interprétation de l'al. 36(1)a) adoptée par le délégué du ministre n'était pas déraisonnable. En ce qui a trait à la peine d'emprisonnement réelle imposée (la première question certifiée), elle a conclu qu'il n'était pas déraisonnable d'interpréter l'emprisonnement avec sursis comme étant un « emprisonnement » au sens où il faut l'entendre pour l'application de l'al. 36(1)a). Elle a ajouté qu'affirmer qu'une peine d'emprisonnement avec sursis est plus clémente qu'une peine d'incarcération de la même durée ne signifie toutefois pas que le législateur ne considère pas l'infraction en question suffisamment grave pour justifier l'interdiction de territoire. La juge Gauthier a ensuite souligné que les débats du comité parlementaire quant à l'opportunité d'abaisser le seuil de la durée de l'emprisonnement au-delà duquel il n'y a aucun droit d'appel à l'égard des conclusions d'interdiction de territoire devant la Section d'appel de l'immigration (par. 64(2) de la *LIPR*) ont porté notamment sur trois propositions visant à exclure les peines d'emprisonnement avec sursis, lesquelles ont toutes été ultimement rejetées. Elle a en outre expliqué que si le législateur avait jugé qu'une peine d'emprisonnement avec sursis d'au moins six mois est suffisamment grave pour justifier la perte des droits d'appel, il n'était pas déraisonnable que le délégué du ministre considère la peine d'emprisonnement avec sursis comme un « emprisonnement » au sens où il faut l'entendre pour l'application de l'al. 36(1)a).

[20] With respect to "punishable by a maximum term of imprisonment of at least 10 years", Gauthier J.A. found that "punishable" refers to the offence under the Act of Parliament and not to what could be imposed on any particular offender. She was of the view that the context of s. 36(1)(a) supports a conclusion that the test is objective rather than subjective. She found that it was not unreasonable to conclude that the relevant point in time is when admissibility is being assessed, since admissibility should be assessed against Canada's prevailing views of the seriousness of the offence in question. She was also of the view that s. 11(*i*) of the *Canadian Charter of Rights and Freedoms* did not apply because proceedings before the Minister's delegate are neither criminal nor penal.

[20] Quant à l'expression « punissable d'un emprisonnement maximal d'au moins dix ans », la juge Gauthier a conclu que le mot « punissable » renvoie à l'infraction prévue dans la loi fédérale, et non à la peine qui pourrait être infligée à un contrevenant en particulier. Selon elle, le contexte de l'al. 36(1)a) étaye la conclusion selon laquelle le critère est objectif plutôt que subjectif. Ainsi, il n'était pas déraisonnable de conclure que le moment pertinent est celui où l'admissibilité est analysée puisque l'interdiction de territoire doit être évaluée à l'aune des perceptions qui prévalent au Canada à l'égard de la gravité de l'infraction en question. Par ailleurs, la juge Gauthier s'est dite d'avis que l'al. 11*i*) de la *Charte canadienne des droits et libertés* ne s'applique pas, car la procédure qui se déroule devant le délégué du ministre n'est ni criminelle ni pénale.

III. Preliminary Matters

[21] Prior to tackling the statutory interpretation questions at the heart of this appeal, I will address two preliminary matters. First, to be clear, the decision under review is that of the Minister's delegate, taken pursuant to s. 44(2) of the *IRPA*, to refer the matter to the Immigration Division for an admissibility hearing. While the Minister's delegate merely adopted the Report — and that Report is all that is available in support of the decisions taken at the s. 44(1) and s. 44(2) stages — it is nevertheless the Minister's delegate's decision that was under review and not that of the officer.

[22] Second, while courts have the discretion to hear an application for judicial review prior to the completion of the administrative process and the exhaustion of appeal mechanisms, they should exercise restraint before doing so (*Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at paras. 35-36; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 3:4100). In this case, the parties have not asked this Court to revisit the decisions of the

III. Questions préliminaires

[21] Avant de m'attaquer aux questions d'interprétation législative qui sont au cœur du présent pourvoi, je me pencherai sur deux questions préliminaires. D'abord, précisons que la décision examinée est celle que le délégué du ministre a prise en application du par. 44(2) de la *LIPR* de déférer l'affaire à la Section de l'immigration afin que celle-ci tienne une audition sur l'admissibilité. Bien que le délégué du ministre ait simplement adopté le Rapport — et que ce Rapport est tout ce qui existe à l'appui des décisions prises prévues aux par. 44(1) et 44(2) — c'est néanmoins la décision du délégué du ministre qui fait ici l'objet d'une analyse et non celle de l'agent.

[22] Deuxièmement, bien que les tribunaux disposent du pouvoir discrétionnaire d'entendre une demande de contrôle judiciaire avant que le processus administratif soit terminé et que les mécanismes d'appel soient épuisés, ils doivent faire preuve de retenue avant de l'exercer : *Halifax (Regional Municipality) c. Nouvelle-Écosse (Human Rights Commission)*, 2012 CSC 10, [2012] 1 R.C.S. 364, par. 35-36; D. J. M. Brown et J. M. Evans, avec le concours de D. Fairlie, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), rubrique 3:4100. En l'espèce, les parties n'ont pas demandé à la Cour de

courts below to hear the application, and I am of the view that this Court should respect those decisions.

IV. Analysis

[23] The modern principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Applying this approach, I am of the view that, under either standard of review, the assumed interpretation of s. 36(1)(a) by the Minister's delegate cannot stand.

A. *Conditional Sentences Are Not Included in "Term of Imprisonment"*

[24] I cannot, on either standard of review, accept the interpretation that conditional sentences are captured in the meaning of "term of imprisonment". Such an interpretation must be rejected for at least three reasons.

[25] First, the purpose of s. 36(1)(a) is to define "serious criminality" for permanent residents convicted of an offence in Canada. It is clear from the wording of the provision that whether or not an imposed sentence can establish "serious criminality" depends on its length. Length is the gauge. It must be "more than six months". However, the seriousness of criminality punished by a certain length of jail sentence is not the same as the seriousness of criminality punished by an equally long conditional sentence. In other words, length of the sentence alone is not an accurate yardstick with which to measure the seriousness of the criminality of the permanent resident.

[26] Chief Justice Lamer explained in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 44, that "a conditional sentence, even with stringent conditions, will usually be a more lenient sentence than

réexaminer les décisions des tribunaux d'instances inférieures d'entendre la demande, et j'estime que la Cour doit respecter ces décisions.

IV. Analyse

[23] Le principe moderne d'interprétation législative veut qu'il [TRADUCTION] « faille lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, son objet et l'intention du législateur » : E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87. Suivant cette approche, à mon avis, que l'on applique l'une ou l'autre des normes de contrôle, l'interprétation de l'al. 36(1)a) adoptée par le délégué du ministre ne peut être maintenue.

A. *Le terme « emprisonnement » ne vise pas les peines d'emprisonnement avec sursis*

[24] Je ne peux, que l'on applique l'une ou l'autre des normes de contrôle, accepter l'interprétation voulant que les peines d'emprisonnement avec sursis soient visées par le terme « emprisonnement ». Une telle interprétation doit être rejetée pour au moins trois raisons.

[25] Premièrement, l'objet de l'al. 36(1)a) est de définir la « grande criminalité » pour les résidents permanents déclarés coupables d'une infraction au Canada. Clairement, selon le libellé de la disposition, la question de savoir si une peine infligée peut établir la « grande criminalité » dépend de sa durée. En effet, c'est la durée qui sert d'indicateur; elle doit être « de plus de six mois ». Cependant, la gravité de la criminalité punie par une durée donnée d'incarcération n'est pas la même que la gravité de la criminalité punie par une peine d'emprisonnement avec sursis de la même durée. Autrement dit, la durée de la peine, à elle seule, n'est pas un bon critère pour mesurer la gravité de la criminalité du résident permanent.

[26] Dans *R. c. Proulx*, 2000 CSC 5, [2000] 1 R.C.S. 61, le juge en chef Lamer a affirmé ce qui suit au par. 44 : « . . . une ordonnance d'emprisonnement avec sursis, même assortie de conditions rigoureuses,

a jail term of equivalent duration". He elaborated as follows (at para. 52):

> A judge does not impose a fixed sentence of "x months" in the abstract, without having in mind where that sentence will be served. Furthermore, when a conditional sentence is chosen, its duration will depend on the type of conditions imposed. Therefore, the duration of the sentence should not be determined separately from the determination of its venue. [Citations omitted.]

[27] The dissymmetry between the length of jail terms and the length of conditional sentences was usefully illustrated by counsel for Mr. Tran. On the one hand, there are cases in which *mitigating* factors prompted courts to replace jail terms of less than six months with conditional sentences longer than six months (e.g. *R. v. Shah*, 2003 BCCA 294, 182 B.C.A.C. 142; *R. v. Saundercook-Menard*, 2008 ONCA 493; *R. v. Chapman*, 2007 YKSC 55; *R. v. Jacobson* (2006), 207 C.C.C. (3d) 270 (Ont. C.A.)). On the other hand, there are cases in which *aggravating* factors led courts to replace conditional sentences longer than six months with jail terms shorter than six months (e.g. *R. v. Keller*, 2009 ABCA 418, 469 A.R. 151; *R. v. Sandhu*, 2014 ONCJ 95; *R. v. Kasakan*, 2006 SKCA 14, [2006] 8 W.W.R. 23; *R. v. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263). Notably, in the case at bar, Mr. Tran asked the Court of Appeal for British Columbia to replace his 12-month conditional sentence with a custodial sentence of less than 6 months (A.F., at para. 18).

[28] Not only is length an unreliable indicator of "serious criminality" when comparing jail sentences to conditional sentences, but it may not even be a reliable measure across conditional sentences because of the disparate conditions attached to them. More fundamentally, conditional sentences generally indicate less "serious criminality" than jail terms. As Lamer C.J. said, a "conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders" (*Proulx*, at para. 21; see also *R. v. Knoblauch*, 2000 SCC 58, [2000] 2

est généralement une peine plus clémente qu'un emprisonnement de même durée. . . » Il a poursuivi en précisant (au par. 52) :

> Le juge n'inflige pas un emprisonnement de « x mois » dans l'abstrait, sans se demander où cette peine sera purgée. De plus, lorsque le tribunal opte pour l'emprisonnement avec sursis, sa durée dépend du genre de conditions dont elle est assortie. La durée de la peine ne peut donc pas être déterminée indépendamment du lieu où celle-ci sera purgée. [Références omises.]

[27] L'avocat de M. Tran a illustré de façon utile la dissymétrie entre la durée des peines d'incarcération et celle des peines d'emprisonnement avec sursis. D'une part, il y a des affaires où des facteurs *atténuants* ont incité les tribunaux à remplacer les peines d'incarcération de moins de six mois par des peines d'emprisonnement avec sursis de plus de six mois : p. ex. *R. c. Shah*, 2003 BCCA 294, 182 B.C.A.C. 142; *R. c. Saundercook-Menard*, 2008 ONCA 493; *R. c. Chapman*, 2007 YKSC 55; *R. c. Jacobson* (2006), 207 C.C.C. (3d) 270 (C.A. Ont.). D'autre part, il y a des affaires où des facteurs *aggravants* ont poussé les tribunaux à remplacer les peines d'emprisonnement avec sursis de plus de six mois par des peines d'incarcération de moins de six mois : p. ex. *R. c. Keller*, 2009 ABCA 418, 469 A.R. 151; *R. c. Sandhu*, 2014 ONCJ 95; *R. c. Kasakan*, 2006 SKCA 14, [2006] 8 W.W.R. 23; *R. c. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263. D'ailleurs, dans le cas qui nous occupe, M. Tran a demandé à la Cour d'appel de la Colombie-Britannique de substituer une peine de détention de moins de 6 mois à la peine d'emprisonnement avec sursis de 12 mois qui avait été prononcée contre lui : m.a., par. 18.

[28] Non seulement la durée n'est-elle pas un indicateur fiable de « grande criminalité » lorsqu'on compare des peines d'incarcération et des peines d'emprisonnement avec sursis, mais elle n'est peut-être pas non plus une mesure fiable lorsqu'on compare entre elles les peines d'emprisonnement avec sursis, compte tenu des conditions disparates dont elles sont assorties. Plus fondamentalement, les peines d'emprisonnement avec sursis sont généralement une indication d'une moins « grande criminalité » que les peines d'incarcération. Comme le

S.C.R. 780, at para. 102). Thus, interpreting "a term of imprisonment of more than six months" as including both prison sentences and conditional sentences undermines the efficacy of using length to evaluate the seriousness of criminality.

[29] Second, the meaning of "term of imprisonment" varies according to the statutory context. In some instances, the word "imprisonment" is used in the *Criminal Code* to capture conditional sentences (*R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 25; *Proulx*, at para. 29). But that is not always the case. In *R. v. Middleton*, 2009 SCC 21, [2009] 1 S.C.R. 674, at para. 14, Justice Fish concluded that there is no consistent meaning for the word "imprisonment" in the *Criminal Code*:

> . . . "imprisonment" in the phrases "sentence of imprisonment" and "term of imprisonment" does not bear a uniform meaning for all purposes of the *Criminal Code*. In several instances, these terms necessarily contemplate incarceration.

Nor is there a consistent meaning across other statutes. Critically, its meaning in ss. 36(1)(a) and 64 of the *IRPA* was interpreted by this Court in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at paras. 11 and 13, to mean "prison":

> . . . the *IRPA* creates a new scheme whereby persons sentenced to more than six months in prison are inadmissible: *IRPA*, s. 36(1)(*a*). If they have been sentenced to a prison term of more than two years then they are denied a right to appeal their removal order: *IRPA*, s. 64. Provisions allowing judicial review mitigate the finality of these provisions, as do appeals under humanitarian and compassionate grounds and pre-removal risk assessments. However, the Act is clear: a prison term of over six months will bar entry to Canada; a prison term of over two years bans an appeal.

. . .

juge en chef Lamer l'a affirmé, « [l]a peine d'emprisonnement avec sursis [. . .] constitue une solution de rechange à l'incarcération de certains délinquants non dangereux » : *Proulx*, par. 21; voir aussi *R. c. Knoblauch*, 2000 CSC 58, [2000] 2 R.C.S. 780, par. 102. En conséquence, interpréter un « emprisonnement de plus de six mois » comme incluant à la fois des peines d'incarcération et des peines d'emprisonnement avec sursis réduit l'à-propos d'utiliser la durée pour évaluer la gravité d'un acte criminel.

[29] Deuxièmement, le sens d'« emprisonnement » varie selon le contexte législatif. Parfois, ce terme est utilisé dans le *Code criminel* pour viser les peines d'emprisonnement avec sursis : *R. c. Wu*, 2003 CSC 73, [2003] 3 R.C.S. 530, par. 25; *Proulx*, par. 29. Mais ce n'est pas toujours le cas. Dans *R. c. Middleton*, 2009 CSC 21, [2009] 1 R.C.S. 674, le juge Fish a conclu, au par. 14, que le terme « emprisonnement » n'avait pas un seul et même sens dans l'ensemble du *Code criminel* :

> . . . le mot « emprisonnement » dans les termes « peine d'emprisonnement » et « période d'emprisonnement » n'est pas toujours employé dans le même sens, toutes fins confondues, dans le *Code criminel*. Dans plusieurs cas, ces termes supposent nécessairement l'incarcération.

Le sens de ce terme n'est pas non plus toujours le même dans d'autres lois. Fait à noter, la Cour a conclu dans *Medovarski c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 51, [2005] 2 R.C.S. 539, par. 11 et 13, que l'al. 36(1)a) et l'art. 64 de la *LIPR* renvoient à la notion de « prison » :

> . . . la *LIPR* crée un nouveau régime par lequel la peine d'emprisonnement de plus de six mois emporte interdiction de territoire : al. 36(1)*a*) *LIPR*. La personne condamnée à une peine d'emprisonnement de plus de deux ans ne peut pas interjeter appel d'une mesure de renvoi la visant : art. 64 *LIPR*. Les dispositions autorisant le contrôle judiciaire atténuent le caractère définitif de ces dispositions, tout comme le font les appels fondés sur des motifs d'ordre humanitaire et l'évaluation du risque préalable à un renvoi. Toutefois, la Loi est claire : un emprisonnement de plus de six mois emporte interdiction de territoire; un emprisonnement de plus de deux ans emporte interdiction d'appel.

. . .

In summary, the provisions of the *IRPA* and the Minister's comments indicate that the purpose of enacting the *IRPA*, and in particular s. 64, was to efficiently remove criminals sentenced to prison terms over six months from the country. [Emphasis added.]

While not necessarily determinative, this existing interpretation of "term of imprisonment" in the context of the *IRPA* fortifies my conclusion in this case.

[30] The Minister says that, in recent amendments to ss. 50(b) and 64(2) of the *IRPA*, the exclusion of conditional sentences from the meaning of "term of imprisonment" was explicitly rejected. I do not agree with this interpretation of legislative history. It is useful to note as a starting point that the six-month threshold originated in the *Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 27(1)(*d*) — before the introduction of conditional sentences as a sentencing option in Canada — and was later kept in the *IRPA* in 2002. In 2013, the threshold for denial of appeal rights set out in s. 64(2) was reduced from a "term of imprisonment" of at least two years to a "term of imprisonment" of at least six months (S.C. 2013, c. 16, s. 24). The Minister points to committee debates surrounding those amendments — debates in which proposals to exclude conditional sentences from counting toward the s. 64(2) threshold were rejected. Specifically, the Minister's argument rests on the rejection of three proposals by the House of Commons and Senate committees tasked with examining amendments. However, since the proposed amendments addressed more than just conditional sentences[1] and had to do with changes to s. 64(2) rather than to s. 36(1)(a), I cannot draw any meaningful inferences from the rejection of those proposals.

[1] It was also proposed that there be thresholds related to the length of time a foreign national had resided in Canada (House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 064, 1st Sess., 41st Parl., November 28, 2012, at pp. 4-5 (K. Lamoureux, Lib.)); that access to appeals be restored for those convicted of crimes outside Canada (pp. 2-3 (J. J. Sims, NDP)); and that amendments be made concerning the Canadian Security Intelligence Service interview, compassionate and humane grounds, misrepresentations, reports to the House, and retroactivity (*Debates of the Senate*, vol. 148, No. 168, 1st Sess., 41st Parl., May 30, 2013, at p. 4081 (Hon. A. Eggleton)).

En résumé, les dispositions de la *LIPR* et les commentaires de la ministre indiquent que l'adoption de la *LIPR*, et de l'art. 64 en particulier, visait à renvoyer diligemment du pays les criminels condamnés à une peine d'emprisonnement de plus de six mois. [Je souligne.]

Même si elle n'est pas nécessairement déterminante, cette interprétation du terme « emprisonnement » dans le contexte de la *LIPR* renforce ma conclusion en l'espèce.

[30] Le ministre soutient que lors de l'adoption récente de modifications à l'al. 50b) et au par. 64(2) de la *LIPR*, l'exclusion des peines d'emprisonnement avec sursis du sens d'« emprisonnement » a été expressément rejetée. Je ne suis pas d'accord avec cette interprétation de l'historique législatif. Tout d'abord, il est utile de souligner que le seuil de six mois provenait de la *Loi sur l'immigration de 1976*, S.C. 1976-77, c. 52, al. 27(1)*d*) — avant l'adoption des peines avec sursis au Canada — et a été maintenu dans la *LIPR* en 2002. En 2013, le seuil prévu au par. 64(2) pour la restriction des droits d'appel est passé d'un « emprisonnement » d'au moins deux ans à un « emprisonnement » d'au moins six mois : L.C. 2013, c. 16, art. 24. Le ministre attire l'attention sur les débats des comités entourant ces modifications — soit les débats qui ont mené au rejet des propositions visant l'exclusion des peines d'emprisonnement avec sursis du seuil prévu au par. 64(2). Plus précisément, l'argument du ministre est fondé sur le rejet de trois propositions par les comités de la Chambre des communes et du Sénat chargés de l'examen des amendements. Cependant, puisque les modifications proposées ne portaient pas uniquement sur les peines d'emprisonnement avec sursis[1] et qu'elles étaient liées aux modifications au par. 64(2) plutôt qu'à l'al. 36(1)a), je ne peux tirer de conclusions utiles du rejet de ces propositions.

[1] Il a aussi été proposé qu'il y ait des seuils relatifs à la période que l'étranger a passée au Canada (Chambre des communes, Comité permanent de la citoyenneté et de l'immigration, *Témoignages*, nº 064, 1re sess., 41e lég., 28 novembre 2012, p. 2-5 (K. Lamoureux, lib.)); que la possibilité d'interjeter appel soit rétablie pour les étrangers déclarés coupables de crimes à l'extérieur du Canada (p. 2-3 (J. J. Sims, NPD)); et que des modifications soient apportées concernant l'entrevue du Service canadien du renseignement de sécurité, les motifs d'ordre humanitaire, les fausses déclarations, les rapports à la Chambre et la rétroactivité (*Débats du Sénat*, vol. 148, nº 168, 1re sess., 41e lég., 30 mai 2013, p. 4081 (l'hon. A. Eggleton)).

[31] Finally, my interpretation avoids absurd results. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27, Justice Iacobucci explained the presumption that the legislature does not intend absurd consequences:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile ([R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).

[32] If s. 36(1)(a) is interpreted such that a conditional sentence is a "term of imprisonment", absurd consequences will follow. As previously mentioned, conditional sentences are "for less serious and non-dangerous offenders" (*Proulx*, at para. 21). Thus, more serious crimes may be punished by jail sentences that are *shorter* than conditional sentences imposed for less serious crimes — shorter because they are served in jail rather than in the community. It would be an absurd outcome if, for example, "less serious and non-dangerous offenders" sentenced to seven-month conditional sentences were deported, while more serious offenders receiving six-month jail terms were permitted to remain in Canada. Public safety, as an objective of the *IRPA* (s. 3(1)(h)), is not enhanced by deporting less culpable offenders while allowing more culpable persons to remain in Canada.

[33] It would also be absurd for offenders to seek prison sentences instead of conditional sentences so that they can remain in Canada, as Mr. Tran has

[31] En dernier lieu, mon interprétation évite de donner lieu à des résultats absurdes. Dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 27, le juge Iacobucci a expliqué la présomption selon laquelle le législateur ne peut vouloir de conséquences absurdes :

> Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté [P.-A. Côté, *Interprétation des lois* (2e éd. 1990)], on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile ([R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994)], à la p. 88).

[32] Or, l'interprétation de l'al. 36(1)a) selon laquelle une peine d'emprisonnement avec sursis constitue un « emprisonnement » entraînerait des conséquences absurdes. Je le répète, les ordonnances d'emprisonnement avec sursis visent « certains délinquants [moins et] non dangereux » : *Proulx*, par. 21. Par conséquent, des crimes plus graves sont punissables de peines d'incarcération qui sont *plus courtes* que les peines d'emprisonnement avec sursis infligées pour des crimes moins graves — elles sont plus courtes parce qu'elles sont purgées en prison plutôt que dans la collectivité. Il serait absurde, par exemple, qu'un « délinquant [moins et] non dangereux » condamné à un emprisonnement avec sursis de sept mois soit expulsé, tandis qu'un délinquant ayant commis une infraction plus grave qui s'est vu infliger une peine d'incarcération de six mois puisse demeurer au Canada. Expulser des contrevenants ayant commis des infractions moins graves tout en permettant à des personnes ayant commis des infractions plus graves de demeurer au Canada ne contribuerait pas à accroître la sécurité publique, qui constitue un objectif de la *LIPR* : al. 3(1)h).

[33] Il serait également absurde que les contrevenants souhaitent être condamnés à l'incarcération plutôt qu'à l'emprisonnement avec sursis afin

done in this case. Conditional sentences are designed as an alternative to incarceration in order to encourage rehabilitation, reduce the rate of incarceration, and improve the effectiveness of sentencing (*Proulx*, at para. 20). These objectives would be sabotaged if individuals who are subject to conditional sentences sought to replace them with prison terms, thinking the latter to be their only path for a future in the Canadian communities from which incarceration would remove them.

de pouvoir demeurer au Canada, comme l'a fait M. Tran en l'espèce. Les peines d'emprisonnement avec sursis constituent une solution de rechange à l'incarcération, en ce qu'elles visent à encourager la réinsertion sociale, à réduire le taux d'incarcération et à accroître l'efficacité du processus de détermination de la peine : *Proulx*, par. 20. Ces objectifs ne seraient pas atteints si des individus condamnés à purger des peines de ce type cherchaient à y faire substituer des peines d'incarcération parce qu'ils seraient d'avis qu'il s'agit du seul moyen dont ils disposent pour avoir un futur dans les collectivités canadiennes, collectivités dont ils seraient par ailleurs exclus le temps de leur incarcération.

[34] For these reasons, the phrase "term of imprisonment" in s. 36(1)(a) of the *IRPA* cannot, by either standard of review, be understood to include conditional sentences.

[34] Pour ces raisons, je conclus que le terme « emprisonnement » de l'al. 36(1)a) de la *LIPR* ne peut être interprété de façon à viser les peines d'emprisonnement avec sursis et ce, que l'on applique l'une ou l'autre des normes de contrôle.

B. *The Maximum Term Is Determined as of the Time of the Commission of the Offence*

B. *La peine maximale est celle qui s'applique au moment de la commission de l'infraction*

[35] Turning to the interpretation of "punishable by a maximum term", in my view, a contextual reading of s. 36(1)(a) supports only one conclusion: the phrase "punishable by a maximum term of imprisonment of at least 10 years" refers to the maximum sentence that the accused person could have received at the time of the commission of the offence.

[35] À mon avis, une interprétation contextuelle de l'al. 36(1)a) n'étaye qu'une seule conclusion : l'expression « punissable d'un emprisonnement maximal d'au moins dix ans » renvoie à la peine maximale que la personne accusée aurait pu se voir infliger au moment de la commission de l'infraction.

[36] Section 36(1)(a) begins with "having been convicted", which sets the temporal marker at the time of conviction. As counsel for Mr. Tran underscored during oral argument, the fact of a conviction precedes the two disjunctive clauses: the maximum term and the actual term imposed. Both are rooted in the fact of having been convicted. It is at the moment of conviction that the two disjunctive clauses become operable, and it is with reference to that time that the clauses are to be understood.

[36] L'alinéa 36(1)a) commence par l'expression « être déclaré coupable », qui établit le marqueur temporel au moment de la déclaration de culpabilité. Comme l'avocat de M. Tran l'a souligné durant sa plaidoirie, la déclaration de culpabilité comme telle précède les deux clauses disjonctives : l'emprisonnement maximal et la peine réelle imposée. Ces derniers tirent tous les deux leur source dans le fait que la personne a été déclarée coupable. C'est au moment de la déclaration de culpabilité que les deux clauses disjonctives deviennent applicables, et c'est en fonction de ce moment que les clauses doivent être interprétées.

[37] By the time of Mr. Tran's conviction (November 29, 2012) and sentencing (January 18, 2013),

[37] Entre la déclaration de culpabilité de M. Tran (le 29 novembre 2012) et le prononcé de sa peine (le

the maximum sentence for an offence under s. 7(1) of the *CDSA* had increased from imprisonment for 7 years to imprisonment for 14 years. However, in view of s. 11(*i*) of the *Charter*, Mr. Tran, or anyone else in his position, could not receive a sentence greater than seven years. This is so because production of a controlled substance, contrary to s. 7(1) of the *CDSA*, is a criminal offence. Hence, sentences for convictions under that provision must not offend s. 11(*i*) of the *Charter* which provides:

11. Any person charged with an offence has the right

. . .

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Accordingly, the maximum sentence Mr. Tran could have been sentenced to upon his conviction is limited by the maximum sentence available at the time of the commission of the offence. Mr. Tran was not punishable by a term of imprisonment of at least 10 years.

[38] The Court of Appeal held that "punishable by a maximum term of imprisonment of at least 10 years" could be interpreted without reference to Mr. Tran or to a person in his position. I disagree. The criterion cannot simply be the abstract maximum penalty divorced from the actual "permanent resident . . . convicted" in a particular case. In my view, "punishable by a maximum term of imprisonment of at least 10 years" is to be understood as referring to the circumstances of the actual offender or of others in similar circumstances.

[39] This interpretation aligns with the purpose of the *IRPA*, as outlined in s. 3:

3 (1) The objectives of this Act with respect to immigration are

18 janvier 2013), la peine maximale pour l'infraction prévue au par. 7(1) de la *LRCDAS* est passée d'une peine d'emprisonnement de 7 ans à une peine d'emprisonnement de 14 ans. Toutefois, l'al. 11*i*) de la *Charte* limitait la peine de M. Tran, ou de quiconque dans la même situation, à une peine maximale de sept ans, puisque la production d'une substance désignée est une infraction criminelle selon le par. 7(1) de la *LRCDAS*. Les peines découlant de condamnations fondées sur cette disposition ne doivent donc pas contrevenir à l'al. 11*i*) de la *Charte*, qui prévoit ce qui suit :

11. Tout inculpé a le droit :

. . .

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

En conséquence, la peine maximale à laquelle M. Tran aurait pu être condamné à la suite de sa déclaration de culpabilité est limitée à la peine maximale prévue par la loi au moment de la commission de l'infraction. M. Tran n'était donc pas passible d'une peine d'emprisonnement d'au moins 10 ans.

[38] La Cour d'appel a conclu que l'expression « punissable d'un emprisonnement maximal d'au moins dix ans » peut être interprétée sans référence à M. Tran ou à quiconque dans sa situation. Je ne suis pas d'accord. Le critère ne peut être simplement la peine maximale dissociée du résident permanent « déclaré coupable » dans un cas donné. À mon avis, l'expression « punissable d'un emprisonnement maximal d'au moins dix ans » doit plutôt être comprise en fonction des circonstances relatives au contrevenant visé, ou à d'autres personnes dans des situations semblables.

[39] Cette interprétation est conforme à l'objet de la *LIPR* énoncé à l'art. 3 :

3 (1) En matière d'immigration, la présente loi a pour objet :

(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

. . .

(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(d) to see that families are reunited in Canada;

(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

. . .

(h) to protect public health and safety and to maintain the security of Canadian society;

(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

[40] As stated above, the *IRPA* aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents. The Minister emphasizes the *IRPA*'s security objective. Yet, as the Chief Justice explained in *Medovarski*, the security objective in the *IRPA* "is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada" (para. 10). The obligation under the *IRPA* to behave lawfully includes not engaging in "serious criminality" as defined in s. 36(1). So long as this obligation is met, the *IRPA*'s objectives related to "successful

a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;

b) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel;

. . .

c) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;

d) de veiller à la réunification des familles au Canada;

e) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;

. . .

h) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;

i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

j) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire connaître leurs titres de compétence et à s'intégrer plus rapidement à la société.

[40] Comme je l'ai mentionné, la *LIPR* vise à permettre au Canada de profiter des avantages de l'immigration, tout en reconnaissant la nécessité d'assurer la sécurité et d'énoncer les obligations des résidents permanents. Le ministre met l'accent sur l'objectif de sécurité visé par la *LIPR*. Or, comme la Juge en chef l'a expliqué dans *Medovarski*, pour réaliser cet objectif, « il faut empêcher l'entrée au Canada des demandeurs ayant un casier judiciaire et renvoyer ceux qui ont un tel casier, et insister sur l'obligation des résidents permanents de se conformer à la loi pendant qu'ils sont au Canada » : par. 10. L'obligation prévue dans la *LIPR* de se conformer à la loi comprend celle de ne pas se livrer à des activités de « grande criminalité » comme le prévoit le

integration" will remain relevant to permanent residents, and the *IRPA*'s objectives related to the "benefits of immigration" and "security" will be furthered.

[41] A similar interaction between the mutual obligations of the state and of individuals, in the criminal law context, has been described as follows:

> The state's duty to provide a framework for security may be presented as part of a bargain between the state and its citizens, a bargain in which a measure of security is provided in return for a measure of obedience. . . .
>
> . . .
>
> . . . The fundamental duty of justice requires the state to recognise certain rights of individuals in its dealings with them; notably, in the sphere of criminal law, the state should respect the rule of law and the principle of legality, so that citizens as rational agents may plan their lives so as to avoid criminal conviction.
>
> (A. Ashworth, *Positive Obligations in Criminal Law* (2013), at pp. 100-101)

This description is apposite in the immigration law context. Permanent residents too must be able to "plan their lives". Their obligations must be communicated to them in advance. As Lon Fuller warned, a legal system must "publicize, or at least . . . make available to the affected party, the rules he is expected to observe" (*The Morality of Law* (rev. ed. 1969), at p. 39). When Mr. Tran committed his offence, he could not have been aware that doing so was an act of "serious criminality" that might breach his obligations and lead to deportation.

[42] The Minister relies on *Medovarski*, at para. 47, for the proposition that permanent residents cannot expect that "the law will not change from time to time". The Minister argues that admissibility under s. 36(1)(a) must be tested against Parliament's views

par. 36(1). Aussi longtemps que cette obligation est respectée, les objectifs de la *LIPR* liés à l'« intégration » demeurent applicables aux résidents permanents, et la réalisation des objectifs portant sur les « avantages de l'immigration » et la « sécurité » est favorisée.

[41] Une interaction similaire entre les obligations mutuelles de l'État et d'individus, dans le contexte du droit criminel, a été décrite de la façon suivante :

> [TRADUCTION] L'obligation de l'État d'établir un cadre de sécurité peut être vue comme la part d'un marché entre l'État et ses citoyens, dans le cadre duquel une certaine sécurité est assurée en échange de l'obéissance. . .
>
> . . .
>
> . . . En effet, l'obligation fondamentale de justice exige que l'État reconnaisse certains droits aux particuliers dans ses négociations avec eux; en particulier, dans le domaine du droit criminel, l'État doit respecter la primauté du droit et les principes de légalité, de sorte que les citoyens, en tant qu'agents rationnels, puissent organiser leur vie de façon à éviter une condamnation criminelle.
>
> (A. Ashworth, *Positive Obligations in Criminal Law* (2013), p. 100-101)

Cette description est pertinente dans le contexte du droit de l'immigration. Les résidents permanents doivent aussi être en mesure d'« organiser leur vie ». Ils doivent être informés à l'avance de leurs obligations. La mise en garde suivante de Lon Fuller le précise : un système juridique doit [TRADUCTION] « publiciser, ou à tout le moins [. . .] mettre à la disposition de la partie visée, les règles qu'elle doit observer » : *The Morality of Law* (éd. rév. 1969), p. 39. Lorsque M. Tran a commis l'infraction, il ne pouvait pas savoir que cette infraction représentait un acte de « grande criminalité » pouvant contrevenir à ses obligations et mener à son renvoi.

[42] Le ministre invoque *Medovarski*, par. 47, plus précisément la proposition selon laquelle les résidents permanents doivent s'attendre à ce que « la loi change à l'occasion ». Il soutient que l'interdiction de territoire aux termes de l'al. 36(1)a)

of the seriousness of the offence at the time of the admissibility decision. I do not agree. While Parliament is entitled to change its views on the seriousness of a crime, it is not entitled to alter the mutual obligations between permanent residents and Canadian society without doing so clearly and unambiguously. In this case, it has failed to do so. As such, s. 36(1)(a) must be interpreted in a way that respects these mutual obligations. The right to remain in Canada is conditional, but it is conditional on complying with *knowable* obligations. Accordingly, the relevant date for assessing serious criminality under s. 36(1)(a) is the date of the commission of the *offence*, not the date of the admissibility decision.

[43] The presumption against retrospectivity lends further support to this conclusion. While I agree with the Court of Appeal that s. 11(*i*) of the *Charter* does not apply to the decision of the Minister's delegate because the proceedings were neither criminal nor penal, the presumption against retrospectivity is a rule of statutory interpretation that is available in the instant case. The purpose of this presumption is to protect acquired rights and to prevent a change in the law from "look[ing] to the past and attach[ing] new prejudicial consequences to a completed transaction" (Driedger (1983), at p. 186). The presumption works such that "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act" (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279; see also *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 71).

[44] The presumption against retrospectivity engages the rule of law. Lord Diplock explained that the rule of law "requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" (*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*,

doit être évaluée à l'aune des positions du législateur concernant la gravité de l'infraction au moment de la décision concernant l'interdiction de territoire. Je ne suis pas d'accord. Bien que le législateur puisse changer de position au sujet de la gravité d'un crime, il ne peut changer les obligations mutuelles entre les résidents permanents et la société canadienne sans le faire clairement et sans équivoque. Il ne l'a pas fait. Il faut plutôt interpréter l'al. 36(1)a) d'une manière qui respecte ces obligations mutuelles. Le droit de demeurer au Canada est conditionnel, mais il dépend du respect des obligations qui *peuvent être connues*. Par conséquent, la date pertinente pour évaluer la grande criminalité dont il est question à l'al. 36(1)a) est la date de la commission de l'*infraction*, et non la date de la décision quant à l'interdiction de territoire.

[43] La présomption du caractère non rétrospectif confirme la justesse de cette conclusion. Bien que je partage l'opinion de la Cour d'appel selon laquelle l'al. 11*i*) de la *Charte* ne s'applique pas à la décision du délégué du ministre, parce que la procédure n'est ni criminelle ni pénale, la présomption du caractère non rétrospectif est une règle d'interprétation législative applicable dans la présente affaire. Cette présomption vise à protéger les droits acquis et à éviter une modification de la loi qui découle d'un regard [TRADUCTION] « orient[é] vers le passé et [qui] joi[gne] de nouvelles conséquences préjudiciables à une transaction complétée » : Driedger (1983), p. 186. Selon cette présomption, « les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation » : *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271, p. 279; voir aussi *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 71.

[44] La présomption du caractère non rétrospectif fait intervenir la primauté du droit. Comme le lord Diplock l'a expliqué, la primauté du droit [TRADUCTION] « exige qu'un citoyen, avant d'adopter une ligne de conduite, puisse connaître à l'avance les conséquences qui en découleront sur le plan juridique » : *Black-Clawson International Ltd. c.*

[1975] A.C. 591 (H.L.), at p. 638). As this Court explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70, the rule of law "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs".

[45] The presumption against retrospectivity also bespeaks fairness (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 25). For example, sentencing judges are required to consider immigration consequences (*R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739). It would raise issues of fairness to introduce a new collateral consequence *after* sentencing that would have been relevant *before* sentencing. As Mr. Tran points out, a permanent resident convicted of marihuana production 25 years ago would suddenly find themselves inadmissible years after having served the associated sentence. Such an outcome would not only offend fairness and the rule of law, but would also undermine the decision of the sentencing judge who decades ago crafted an appropriate sentence without knowledge of additional deportation consequences.

[46] The Minister argues that the presumption against retrospectivity cannot assist Mr. Tran because this Court's decision in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, precludes its application. I disagree.

[47] In *Brosseau*, this Court held that the presumption will not apply if the new prejudicial consequence at issue is designed to protect the public rather than as a punishment for a prior event. The fact that s. 36(1)(a) of the *IRPA* reflects "an intent to prioritize security" (*Medovarski*, at para. 10) is not, in itself, sufficient to bring it within the "public protection" exception contemplated in *Brosseau*. To interpret the public protection exception as inclusive of *all* legislation that can be said to be *broadly* aimed at public protection would ignore the purpose underlying the presumption against retrospectivity.

Papierwerke Waldhof-Aschaffenburg A.G., [1975] A.C. 591 (H.L.), p. 638. Comme la Cour l'a expliqué dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 70, la primauté du droit « assure aux citoyens et résidents une société stable, prévisible et ordonnée où mener leurs activités ».

[45] La présomption du caractère non rétrospectif est également un signe d'équité : *R. c. K.R.J.*, 2016 CSC 31, [2016] 1 R.C.S. 906, par. 25. Par exemple, les juges qui déterminent une peine doivent tenir compte des conséquences en matière d'immigration : *R. c. Pham*, 2013 CSC 15, [2013] 1 R.C.S. 739. Adopter une nouvelle conséquence indirecte *après* le prononcé de la peine, conséquence qui aurait été pertinente *avant* le prononcé, soulèverait des questions d'équité. Comme M. Tran le fait remarquer, un résident permanent déclaré coupable de production de marihuana il y a 25 ans se retrouverait soudainement interdit de territoire des années après avoir purgé sa peine. Un tel résultat irait non seulement à l'encontre de l'équité et de la primauté du droit, mais minerait également la décision du juge chargé de la détermination de la peine qui a façonné, il y a plusieurs décennies, une peine appropriée sans savoir qu'il y aurait des conséquences additionnelles quant à la déportation.

[46] Selon le ministre, la présomption du caractère non rétrospectif n'est d'aucun secours pour M. Tran en raison de la décision de la Cour dans *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301, qui en empêche l'application. Je ne suis pas d'accord.

[47] Dans *Brosseau*, la Cour a conclu que la présomption ne s'applique pas si les nouvelles conséquences préjudiciables en cause visent à protéger le public plutôt qu'à punir pour un fait passé. Le fait que l'al. 36(1)a) de la *LIPR* reflète « une intention de donner priorité à la sécurité » (*Medovarski*, par. 10) n'est pas suffisant, en soi, pour qu'il soit visé par l'exception de la « protection du public » envisagée dans *Brosseau*. Si l'on interprétait cette exception de telle sorte qu'elle englobe *toute* la législation dont on peut dire qu'elle vise *globalement* la protection du public, cela reviendrait à faire fi de l'objectif sous-jacent à la présomption du caractère non rétrospectif.

[48] The presumption is a tool for discerning the intended temporal scope of legislation. In the absence of an indication that Parliament has considered retrospectivity and the potential for it to have unfair effects, the presumption must be that Parliament did not intend them:

> The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev.* 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity (or retrospectivity) outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268. [Emphasis added.]

(*Imperial Tobacco*, at para. 71, per Major J.)

[49] The presumption exists to ensure that laws will only apply retrospectively where Parliament has clearly signaled that it has weighed the benefits of retrospectivity with its potential unfairness. Otherwise, we presume that Parliament did not intend such effects.

[50] Ordinarily, express language or necessary implication (*Gustavson Drilling*, at p. 279) provides this necessary indication that Parliament has turned its mind to the issue of retrospectivity. The "public protection" exception permits protective legislation to operate retrospectively absent express language or necessary implication, provided that legislative intent otherwise supports doing so. But, in accordance with the underlying purpose of the presumption, the exception is only triggered where the design of the penalty itself signals that Parliament has weighed the benefits of retrospectivity against its potential for unfairness. This will be the case where there is a clear nexus between the protective measure and the risks to the public associated with the prior conduct to which it attaches. In such cases, as in *Brosseau*,

[48] La présomption est un outil pour cerner la portée temporelle voulue de la loi. En l'absence d'une indication selon laquelle le législateur a envisagé qu'une loi soit rétrospective et ainsi possiblement inéquitable, il faut présumer qu'il n'a souhaité ni l'un ni l'autre :

> Il n'existe aussi aucune exigence générale que la législation ait une portée uniquement prospective, même si une loi rétrospective et rétroactive peut renverser des expectatives bien établies et être parfois perçue comme étant injuste : voir E. Edinger, « Retrospectivity in Law » (1995), 29 *U.B.C. L. Rev.* 5, p. 13. Ceux qui partagent cette perception seront peut-être rassurés par les règles d'interprétation législative qui imposent au législateur d'indiquer clairement les effets rétroactifs ou rétrospectifs souhaités. Ces règles garantissent que le législateur a réfléchi aux effets souhaités et [TRADUCTION] « a conclu que les avantages de la rétroactivité (ou du caractère rétrospectif) l'emportent sur les possibilités de perturbation ou d'iniquité » : *Landgraf c. USI Film Products*, 511 U.S. 244 (1994), p. 268. [Je souligne.]

(*Imperial Tobacco*, par. 71, le juge Major)

[49] La présomption existe pour garantir que les lois ne s'appliquent rétrospectivement que lorsque le législateur a clairement indiqué qu'il a mis en balance les avantages du caractère rétrospectif, d'une part, et l'iniquité potentielle, d'autre part. Sans cela, il faut présumer que le législateur n'a pas souhaité de tels effets.

[50] Règle générale, un texte exprès ou nettement implicite en ce sens (*Gustavson Drilling*, p. 279) donne l'indication nécessaire que le législateur a réfléchi à la question de la rétrospectivité. L'exception relative à la « protection du public » permet que la législation protective ait un effet rétrospectif même en l'absence d'un texte de loi exprès ou nettement implicite en ce sens, dans la mesure où il ressort autrement de l'intention du législateur qu'il en soit ainsi. Cela dit, conformément à l'objectif sous-jacent de la présomption, l'exception s'applique uniquement lorsque la structure de la pénalité elle-même illustre que le législateur a mis en balance les avantages du caractère rétrospectif, d'une part, et ses effets inéquitables potentiels, d'autre part. Ce sera le cas lorsqu'il y a clairement un lien entre la

the scope of protection is aligned with the specific risks posed by persons who have engaged in specific harmful conduct and is tailored to preventing those risks prospectively (see *Brosseau*, at pp. 319-20, citing *R. v. Vine* (1875), L.R. 10 Q.B. 195, at p. 199; see also *In re A Solicitor's Clerk*, [1957] 1 W.L.R. 1219 (Q.B.)).

[51] Section 36(1)(a) of the *IRPA* fails to provide such a clear nexus for two reasons, both of which are tied to the fact that Parliament relied on criminal sentences as a gauge for "serious criminality". First, by not associating "serious criminality" with specific offences and instead relying on the sentences they attract, Parliament contemplated that the range of offences constituting "serious criminality" can expand and contract over time. This suggests that Parliament intended to tailor the penalty to prevailing views about a particular conduct, not to the prevention of risks associated with that conduct (F.C.A. reasons, at para. 58). Second, as "serious criminality" is defined by reference to criminal sentences, the scope of public protection it affords necessarily captures criminal sentencing considerations that extend beyond "public protection", including punishment (see *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, at para. 42; *K.R.J.*, at paras. 31-32).

[52] As such, s. 36(1)(a) does not engage the "public protection" exception because — in the absence of a clear nexus between the risk and the protective measures available in response — it does not signal that Parliament weighed the potential for unfairness and the protective benefits of requiring that the class of non-citizens inadmissible for serious criminality remain perfectly aligned with the class of offences that s. 36(1)(a) deems "serious" at any point in time.

mesure protective et les risques encourus par le public associés à la conduite antérieure à laquelle ils se rattachent. Dans de tels cas, comme dans *Brosseau*, l'étendue de la protection doit s'aligner avec les risques précis engendrés par ceux qui ont eu une conduite dommageable spécifique et elle est façonnée pour prévenir ces risques pour l'avenir : voir *Brosseau*, p. 319-320, citant *R. c. Vine* (1875), L.R. 10 Q.B. 195, p. 199; voir également *In re A Solicitor's Clerk*, [1957] 1 W.L.R. 1219 (Q.B.).

[51] L'alinéa 36(1)a) de la *LIPR* n'établit pas un lien clair de ce type et ce, pour deux raisons, liées l'une et l'autre au fait que le législateur s'est fondé sur les peines criminelles comme étalon pour établir l'existence d'une « grande criminalité ». Premièrement, en n'associant pas la « grande criminalité » à des infractions précises et en se fondant plutôt sur les peines qu'elles entraînent, le législateur a envisagé que l'éventail des infractions qui constituent de la « grande criminalité » peut s'agrandir ou se réduire au fil du temps. Ceci indique que le Parlement a souhaité façonner la pénalité en fonction des vues du moment relativement à une conduite en particulier, et non pas pour prévenir les risques associés à cette conduite : motifs de la C.A.F., par. 58. Deuxièmement, comme la « grande criminalité » est définie en fonction des peines criminelles, la portée de la protection qui en découle tient nécessairement compte de considérations relatives à l'infliction de peines en matière criminelle qui vont au-delà de la « protection du public », soit notamment des considérations relatives à l'élément punitif qu'elles recèlent : voir *R. c. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, par. 42; *K.R.J.*, par. 31-32.

[52] Ainsi, l'al. 36(1)a) n'entraîne pas l'application de l'exception fondée sur la « protection du public » parce que — en l'absence d'un lien clair entre le risque et les mesures protectives pour le contrer — il n'indique pas que le législateur a mis en balance les conséquences potentiellement inéquitables, d'une part, et les avantages sur le plan de la protection, d'autre part, d'exiger que la catégorie de personnes non citoyennes interdites de territoire pour grande criminalité reste parfaitement conforme à la catégorie d'infractions que l'al. 36(1)a) considère « sérieuses » à tout moment dans le temps.

[53] For these reasons, I am of the view that "punishable by a maximum term of imprisonment of at least 10 years" refers to the maximum sentence that the accused person could have received at the time of the commission of the offence. The maximum sentence that Mr. Tran could have received at that time was only seven years. Thus he was not convicted of an offence "punishable by a maximum term of imprisonment of at least 10 years".

C. *Decision by the Minister's Delegate to Refer*

[54] The Minister's delegate formed the opinion that the Report on Mr. Tran's inadmissibility for serious criminality was well founded, and he referred the Report to the Immigration Division on that basis. Because that opinion was premised on an untenable interpretation of the grounds for inadmissibility under s. 36(1)(a), his decision to refer the Report cannot be sustained. It is therefore unnecessary for me to consider whether he properly exercised his discretion under s. 44(2).

V. Conclusion

[55] I would allow the appeal, quash the decision of the Minister's delegate, and remit the matter to a different delegate.

[56] Additionally, while this Court's analysis is not limited to the certified questions, in the interest of providing guidance on the legal questions addressed by the Federal Court and Federal Court of Appeal, I would answer those questions as follows:

1. Is a conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* a "term of imprisonment" under s. 36(1)(a) of the *IRPA*?

– No.

2. Does the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refer to the maximum term of imprisonment available at the time the person was sentenced

[53] Pour ces motifs, j'estime que l'expression « punissable d'un emprisonnement maximal d'au moins dix ans » se rapporte à la peine maximale que l'accusé aurait pu se voir infliger au moment de la commission de l'infraction. En l'espèce, pour M. Tran, cette peine maximale était un emprisonnement de seulement sept ans. En conséquence, il n'a pas été déclaré coupable d'une infraction « punissable d'un emprisonnement maximal d'au moins dix ans ».

C. *Décision du délégué du ministre de déférer l'affaire*

[54] Le délégué du ministre a conclu que le Rapport relatif à l'interdiction de territoire de M. Tran pour grande criminalité était bien fondé et il a déféré l'affaire à la Section de l'immigration sur ce fondement. Comme cette opinion était fondée sur la prémisse d'une interprétation erronée des motifs d'interdiction de territoire en application de l'al. 36(1)a), sa décision de déférer l'affaire ne peut être maintenue. Il n'est donc pas nécessaire que je décide s'il a bien exercé le pouvoir discrétionnaire que lui confère le par. 44(2).

V. Conclusion

[55] Je suis d'avis d'accueillir le pourvoi, d'annuler la décision du délégué du ministre et de renvoyer l'affaire à un autre délégué.

[56] En outre, bien que l'analyse de la Cour ne soit pas limitée aux questions certifiées, dans le but de donner des directives quant aux questions juridiques traitées par la Cour fédérale et la Cour d'appel fédérale, je répondrais ainsi à ces questions :

1. Une peine d'emprisonnement avec sursis infligée dans le cadre du régime établi aux art. 742 à 742.7 du *Code criminel* constitue-t-elle un « emprisonnement » au sens de l'al. 36(1)a) de la *LIPR*?

– Non.

2. L'expression « punissable d'un emprisonnement maximal d'au moins dix ans » employée à l'al. 36(1)a) de la *LIPR* vise-t-elle l'emprisonnement maximal en vigueur au moment où la personne a été condamnée

or to the maximum term of imprisonment under the law in force at the time admissibility is determined?

– It refers to the maximum term of imprisonment available at the time of the commission of the offence.

Appeal allowed.

Solicitors for the appellant: Edelmann & Co., Vancouver; Green & Spiegel, Toronto.

Solicitor for the respondent: Attorney General of Canada, Montréal and Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Canadian Association of Refugee Lawyers: John Norris, Barrister, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Waldman & Associates, Toronto.

Solicitors for the intervener the African Canadian Legal Clinic: Mirza Kwok, Mississauga; African Canadian Legal Clinic, Toronto.

ou l'emprisonnement maximal selon la loi en vigueur au moment de l'enquête?

– Elle vise l'emprisonnement maximal possible au moment de la commission de l'infraction.

Pourvoi accueilli.

Procureurs de l'appelant : Edelmann & Co., Vancouver; Green & Spiegel, Toronto.

Procureur de l'intimé : Procureur général du Canada, Montréal et Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés : John Norris, Barrister, Toronto.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Waldman & Associates, Toronto.

Procureurs de l'intervenante la Clinique juridique africaine canadienne : Mirza Kwok, Mississauga; Clinique juridique africaine canadienne, Toronto.

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess *Appellants*

v.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited *Respondents*

and

Attorney General of Canada and Criminal Lawyers' Association (Ontario) *Interveners*

White Burgess Langille Inman, faisant affaire sous la raison sociale WBLI Chartered Accountants et R. Brian Burgess *Appelants*

c.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, auparavant Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. faisant affaire sous la raison sociale T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited et Woodland Building Supplies Limited *Intimées*

et

Procureur général du Canada et Criminal Lawyers' Association (Ontario) *Intervenants*

Indexed as: White Burgess Langille Inman *v.* Abbott and Haliburton Co.

2015 SCC 23

File No.: 35492.

2014: October 7; 2015: April 30.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Evidence — Admissibility — Expert evidence — Basic standards for admissibility — Qualified expert — Independence and impartiality — Nature of expert's duty to court — How expert's duty relates to admissibility of expert's evidence — Forensic accountant providing opinion on whether former auditors were negligent in performance of duties — Former auditors applying to strike out expert's affidavit on grounds she was not impartial expert witness — Whether elements of expert's duty to court go to admissibility of evidence rather than simply to its weight — If so, whether there is a threshold admissibility requirement in relation to independence and impartiality.

The shareholders started a professional negligence action against the former auditors of their company after they had retained a different accounting firm, the Kentville office of GT, to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained M, a forensic accounting partner at the Halifax office of GT, to review all the relevant materials and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out M's affidavit on the grounds that she was not an impartial expert witness.

The motions judge essentially agreed with the auditors and struck out M's affidavit in its entirety. The majority of the Court of Appeal concluded that the motions judge erred in excluding M's affidavit and allowed the appeal.

Répertorié : White Burgess Langille Inman *c.* Abbott and Haliburton Co.

2015 CSC 23

N° du greffe : 35492.

2014 : 7 octobre; 2015 : 30 avril.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Preuve — Admissibilité — Preuve d'expert — Normes fondamentales d'admissibilité — Expert qualifié — Indépendance et impartialité — Nature de l'obligation de l'expert envers le tribunal — Rapport entre l'obligation de l'expert et l'admissibilité de son témoignage — Opinion d'une juricomptable sur la négligence possible des vérificateurs précédents dans l'exercice de leurs fonctions — Requête en radiation de l'affidavit de l'expert présentée par les vérificateurs précédents au motif que l'expert n'était pas un témoin expert impartial — Les éléments de l'obligation de l'expert envers le tribunal jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci? — Dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie après avoir engagé un autre cabinet comptable, GT, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M, une associée en juricomptabilité du cabinet GT de Halifax, pour qu'elle examine tous les documents pertinents et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M au motif qu'elle n'était pas un témoin expert impartial.

Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M et ont accueilli l'appel.

Held: The appeal should be dismissed.

The inquiry for determining the admissibility of expert opinion evidence is divided into two steps. At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four factors set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence that does not meet these threshold requirements should be excluded. At the second discretionary gatekeeping step, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. Absent challenge, the

Arrêt : Le pourvoi est rejeté.

La démarche qui permet de déterminer l'admissibilité du témoignage d'opinion de l'expert est scindée en deux. Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *R. c. Mohan*, [1994] 2 R.C.S. 9, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en déterminant si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission.

L'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services. Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de son obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. S'il ne satisfait pas à ce critère d'admissibilité, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. En l'absence d'une

expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

In this case, there was no basis disclosed in the record to find that M's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. The majority of the Court of Appeal was correct in concluding that the motions judge committed a palpable and overriding error in determining that M was in a conflict of interest that prevented her from giving impartial and objective evidence.

Cases Cited

Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **adopted:** *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; **referred to:** *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th)

contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Toutefois, si la partie qui s'oppose à l'admission démontre un motif réaliste de croire que l'expert ne peut ou ne veut s'acquitter de son obligation, il revient à la partie qui produit la preuve d'en établir l'admissibilité. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

En l'espèce, le dossier ne révèle aucun élément qui permette de conclure que le témoignage de M devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. La majorité de la Cour d'appel a eu raison de conclure que le juge des requêtes avait commis une erreur manifeste et dominante en estimant que M était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Jurisprudence

Arrêts appliqués : *R. c. Mohan*, [1994] 2 R.C.S. 9; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3; **arrêt adopté :** *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, autorisation d'appel refusée, [2010] 2 R.C.S. v; **arrêts mentionnés :** *Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358; *R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275; *Graat c. La Reine*, [1982] 2 R.C.S. 819; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. c.*

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Alan D'Silva, *James Wilson* and *Aaron Kreaden*, for the appellants.

Jon Laxer and *Brian F. P. Murphy*, for the respondents.

Michael H. Morris, for the intervener the Attorney General of Canada.

Matthew Gourlay, for the intervener the Criminal Lawyers' Association (Ontario).

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Alan D'Silva, *James Wilson* et *Aaron Kreaden*, pour les appelants.

Jon Laxer et *Brian F. P. Murphy*, pour les intimées.

Michael H. Morris, pour l'intervenant le procureur général du Canada.

Matthew Gourlay, pour l'intervenante Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction and Issues

[1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

[2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[3] Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

II. Overview of the Facts and Judicial History

A. *Facts and Proceedings*

[4] The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction et questions en litige

[1] Le témoignage d'expert peut constituer la pièce maîtresse dans la recherche de la vérité tout comme il peut présenter des dangers particuliers. Pour se prémunir contre ces dangers, la Cour depuis une vingtaine d'années resserre graduellement les règles d'admissibilité et renforce le rôle de gardien du juge de première instance. Ainsi, l'admission du témoignage d'expert est subordonnée au respect de certaines normes fondamentales. La question à trancher dans le cadre du présent pourvoi est de savoir si l'indépendance et l'impartialité de l'expert que l'on se propose de citer comme témoin devraient compter au nombre de ces normes fondamentales d'admissibilité. À mon avis elles devraient l'être.

[2] Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale. La personne que l'on se propose de citer à ce titre, mais qui ne peut ou ne veut se conformer à cette obligation, n'a pas la qualification pour témoigner à titre d'expert et ne devrait pas y être autorisée. Des réserves moins fondamentales quant à l'indépendance et à l'impartialité de l'expert devraient jouer dans l'analyse globale des coûts et des bénéfices de l'admission du témoignage.

[3] Appliquant ces principes, je partage la conclusion à laquelle sont parvenus les juges majoritaires de la Cour d'appel de la Nouvelle-Écosse et suis d'avis de rejeter le présent pourvoi avec dépens.

II. Rappel des faits et historique judiciaire

A. *Les faits et la procédure*

[4] Le présent pourvoi découle d'une action pour négligence professionnelle intentée par les intimées (ci-après « les actionnaires ») contre les appelants, les anciens vérificateurs de leur compagnie (ci-après « les vérificateurs »). Les actionnaires ont intenté cette poursuite après avoir engagé un autre cabinet

Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

[5] The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action, and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

[6] The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

comptable, Grant Thornton srl, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les actionnaires reprochent essentiellement aux vérificateurs de ne pas avoir appliqué les normes de vérification et comptables généralement reconnues et de leur avoir ainsi causé une perte. La principale question dans le cadre de l'action est de savoir si les vérificateurs ont fait preuve de négligence dans l'exercice de leurs fonctions.

[5] En août 2010, les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M^me^ Susan MacMillan, une associée en juricomptabilité du cabinet Grant Thornton de Halifax, pour qu'elle examine tous les documents pertinents, notamment ceux déposés dans le cadre de l'action, et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M^me^ MacMillan au motif qu'elle n'était pas un témoin expert impartial. Ils ont fait valoir que l'action se résumait à une bataille d'opinions entre deux cabinets comptables, en l'occurrence celui des vérificateurs et celui du témoin expert. Le cabinet de M^me^ MacMillan pourrait être tenu responsable si sa démarche n'était pas acceptée par le tribunal et, en tant qu'associée, M^me^ MacMillan pourrait être tenue personnellement responsable. Sa responsabilité potentielle — si son opinion n'était pas acceptée — se traduit par un intérêt financier personnel dans le règlement du litige; or, de l'avis des vérificateurs, cela devrait suffire à la rendre inhabile à témoigner.

[6] Depuis, l'instance a été tout sauf sommaire et ne s'est toujours pas soldée par un jugement. Le litige a plutôt porté sur la question du témoignage de l'expert; la requête en jugement sommaire n'a pas encore été entendue sur le fond.

B. *Judgments Below*

(1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (Pickup J.)

[7] Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert . . . does not meet the threshold requirements for admissibility": para. 101.

(2) Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S. Dissenting)

[8] The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

[9] MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

III. Analysis

A. *Overview*

[10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met,

B. *Les juridictions inférieures*

(1) Cour suprême de la Nouvelle-Écosse : 2012 NSSC 210, 317 N.S.R. (2d) 283 (le juge Pickup)

[7] Le juge Pickup s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M^me^ MacMillan (par. 106). Il était d'avis que, pour être admissible, le témoignage de l'expert [TRADUCTION] « doit être indépendant et impartial et être perçu comme tel » (par. 99) et, partant, a conclu qu'il s'agissait de l'un des « cas les plus évidents où la fiabilité de l'expert [. . .] ne satisfait pas aux critères d'admissibilité » (par. 101).

(2) Cour d'appel de la Nouvelle-Écosse : 2013 NSCA 66, 330 N.S.R. (2d) 301 (le juge Beveridge, avec l'appui de la juge Oland; le juge en chef MacDonald est dissident)

[8] Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M^me^ MacMillan. Le juge Beveridge a écrit que, si le tribunal peut, en vertu de son pouvoir discrétionnaire, écarter le témoignage de l'expert pour cause de partialité réelle, le critère retenu par le juge des requêtes, en l'occurrence que l'expert « doit être indépendant et impartial et être perçu comme tel », était mal fondé en droit. Il n'aurait pas dû déclarer inadmissible le témoignage de M^me^ MacMillan ni radier son affidavit.

[9] Le juge en chef MacDonald, dissident, était d'avis de confirmer la décision du juge des requêtes, parce que ce dernier avait selon lui exposé et appliqué correctement les principes juridiques pertinents.

III. Analyse

A. *Aperçu*

[10] Selon moi, l'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. S'il ne satisfait pas à ce critère, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait,

however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. *Expert Witness Independence and Impartiality*

[11] There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358, at p. 374.

[12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right

les réserves quant à l'indépendance ou à l'impartialité du témoin expert devraient être examinées dans l'évaluation globale des coûts et des bénéfices de l'admission du témoignage. Cette démarche issue de la common law cède le pas bien sûr aux dispositions législatives et connexes établissant dans certains cas des règles d'admissibilité différentes.

B. *Impartialité et indépendance du témoin expert*

[11] Les préoccupations quant à savoir si les témoins experts retenus par les parties sont impartiaux — c'est-à-dire s'ils expriment leur opinion professionnelle sans parti pris — et indépendants — c'est-à-dire si leur opinion est le fruit des conclusions auxquelles ils sont parvenus de façon indépendante en se fondant sur leurs propres connaissances et jugement — ne datent pas d'hier (voir, p. ex., G. R. Anderson, *Expert Evidence* (3e éd. 2014), p. 509; S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (4e éd. 2014), p. 783). Comme le soulignait Sir George Jessel, maître des rôles, dans les années 1870, [TRADUCTION] « [i]l existe indubitablement une tendance naturelle à faire quelque chose d'utile pour celui qui nous emploie et nous rémunère bien. C'est tout à fait naturel et si infaillible que nous voyons constamment des personnes qui se considèrent, non pas comme des témoins, mais comme les mandataires rémunérés de la personne qui les emploie » (*Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358, p. 374).

[12] L'expérience récente n'a fait qu'aviver ces préoccupations; nous savons que trop bien que le manque d'indépendance et d'impartialité d'un expert peut donner lieu à de très graves erreurs judiciaires (*R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275, par. 52). Comme l'a souligné le juge Beveridge dans la présente affaire, la *Commission sur les poursuites contre Guy Paul Morin : Rapport* (1998), rédigé par l'honorable Fred Kaufman, et le *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (2008), de l'honorable Stephen T. Goudge, donnent deux exemples concrets de cas où [TRADUCTION] « [l]'opinion apparemment solide et impartiale, mais erronée, d'un scientifique expert a joué un rôle de premier plan dans des erreurs judiciaires » (par. 105). D'autres rapports mettent en évidence la nécessité cruciale que l'expert

Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

[13] To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. *The Legal Framework*

(1) The Exclusionary Rule for Opinion Evidence

[14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, [1982] 2

soit impartial et indépendant dans les procès civils (*ibid.*, par. 106; voir le très honorable lord Woolf, *Access to Justice : Final Report* (1996); l'honorable Coulter A. Osborne, *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (2007)).

[13] Pour déterminer la meilleure solution en droit de la preuve à ces préoccupations, il nous faut nous poser plusieurs questions. Est-ce que les réserves au sujet du parti pris possible d'un expert jouent au regard de l'admissibilité de son témoignage ou seulement de la valeur probante de ce dernier? Dans le premier cas, devrait-on y répondre par un critère d'admissibilité, par un pouvoir discrétionnaire permettant d'écarter la preuve ou les deux? Quand justifient-elles que soit exclu un témoignage? Enfin, comment la solution s'inscrit-elle dans le cadre juridique actuel régissant l'admissibilité des témoignages d'experts? Pour répondre à ces questions, nous devons d'abord nous pencher sur ce cadre juridique, circonscrire les obligations du témoin envers le tribunal, puis voir comment ces dernières s'intègrent le mieux dans le cadre juridique.

C. *Le cadre juridique*

(1) La règle d'exclusion des témoignages d'opinion

[14] La règle générale moderne selon laquelle toute preuve pertinente est admissible est assortie de nombreuses exceptions. L'une d'elles a trait au témoignage d'opinion, lequel fait l'objet d'une règle d'exclusion complexe. La déposition des témoins doit relater les faits qu'ils ont perçus, et non présenter les inférences, ou opinions, qu'ils en tirent. Comme l'a dit il y a longtemps un éminent spécialiste de la preuve, [TRADUCTION] « c'est au jury de se faire une opinion et de tirer des inférences et des conclusions, pas au témoin » (J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; réimprimé 1969), p. 524; voir également C. Tapper, *Cross and Tapper on Evidence* (12e éd. 2010), p. 530). Même si plusieurs raisons ont été avancées pour expliquer cette règle d'exclusion, la plus convaincante est probablement celle selon laquelle ces inférences toutes faites ne sont

S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

[15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

[16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[17] We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather

pas utiles au juge des faits et peuvent même l'induire en erreur (voir, p. ex., *Graat c. La Reine*, [1982] 2 R.C.S. 819, p. 836; *Halsbury's Laws of Canada : Evidence* (2014 réédition), par. HEV-137 « General rule against opinion evidence »).

[15] Cependant, ce ne sont pas tous les témoignages d'opinion qui sont exclus. L'exception qui nous intéresse plus particulièrement dans le présent pourvoi est celle qui s'applique au témoignage d'opinion d'un expert sur des questions qui exigent des connaissances spécialisées. Pour reprendre les propos du professeur Tapper, [TRADUCTION] « le droit reconnaît que, dans la mesure où les questions exigent des connaissances ou des compétences particulières, les juges et les jurés ne sont pas forcément en mesure de tirer une véritable conclusion d'après les faits relatés par les témoins. Le témoin est par conséquent admis à faire part de son opinion sur ces questions, pourvu qu'il soit un expert en la matière » (p. 530; voir également *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 42).

(2) Le cadre juridique actuel régissant le témoignage d'opinion d'un expert

[16] Depuis au moins le milieu des années 1990, la Cour a répondu à nombre de préoccupations concernant l'incidence d'une preuve d'expert d'une valeur douteuse sur le déroulement de l'instance. La jurisprudence a clarifié et resserré les critères d'admissibilité, établi de nouvelles exigences de fiabilité, notamment en ce qui concerne la preuve issue de sciences nouvelles, et renforcé l'important rôle de « gardien » du juge qui consiste à écarter d'emblée les témoignages dont la valeur ne justifie pas la confusion, la lenteur et les frais que leur admission risque de causer.

[17] Nous pouvons prendre comme point de départ de cette nouvelle tendance la décision de la Cour dans l'affaire *R. c. Mohan*, [1994] 2 R.C.S. 9. Cet arrêt a mis en lumière les dangers du témoignage d'expert et établi un critère à quatre volets pour en évaluer l'admissibilité. Ces dangers sont bien connus. Il y a notamment le risque que le juge des faits

than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.)

[18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility

s'en remette inconsidérément à l'opinion de l'expert au lieu de l'évaluer avec circonspection. Comme le souligne le juge Sopinka dans l'arrêt *Mohan* :

> La preuve d'expert risque d'être utilisée à mauvais escient et de fausser le processus de recherche des faits. Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d'être considérée par le jury comme étant pratiquement infaillible et comme ayant plus de poids qu'elle ne le mérite. [p. 21]

(Voir également *D.D.*, par. 53; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600, par. 25-26; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 46.)

[18] Il s'agit de préserver le procès devant juge et jury, et non pas d'y substituer le procès instruit par des experts. Il y a un risque que le jury [TRADUCTION] « soit incapable de faire un examen critique et efficace de la preuve » (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 90, autorisation d'appel refusée, [2010] 2 R.C.S. v). Le juge des faits doit faire appel à son « jugement éclairé » plutôt que simplement trancher la question sur le fondement d'un « acte de confiance » à l'égard de l'opinion de l'expert (*J.-L.J.*, par. 56). Le danger de « s'en remettre à l'opinion de l'expert » est également exacerbé par le fait que la preuve d'expert est imperméable au contre-interrogatoire efficace par des avocats qui ne sont pas des experts dans ce domaine (*D.D.*, par. 54). La jurisprudence aborde un certain nombre d'autres problèmes connexes : le préjudice qui pourrait éventuellement découler d'une opinion d'expert fondée sur des informations qui ne sont pas attestées sous serment et qui ne peuvent pas faire l'objet d'un contre-interrogatoire (*D.D.*, par. 55); le danger d'admettre en preuve de la « science de pacotille » (*J.-L.J.*, par. 25); le risque qu'un « concours d'experts » ne distraie le juge des faits au lieu de l'aider (*Mohan*, p. 24). Un autre danger bien connu associé à l'admission de la preuve d'expert est le fait qu'elle peut exiger un délai et des frais démesurés (*Mohan*, p. 21; *D.D.*, par. 56; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387, par. 76).

[19] Pour parer à ces dangers, la Cour dans l'arrêt *Mohan* a établi une structure de base à deux volets

of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

[20] *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

[21] So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis

définissant les règles d'admissibilité du témoignage d'opinion d'un expert. En premier lieu, celui qui cherche à faire admettre une preuve d'opinion émanant d'un expert doit démontrer qu'elle satisfait à quatre critères : (1) la pertinence; (2) la nécessité d'aider le juge des faits; (3) l'absence de toute règle d'exclusion; (4) la qualification suffisante de l'expert (*Mohan*, p. 20-25; voir également *Sekhon*, par. 43). L'arrêt *Mohan* insiste par ailleurs sur le rôle important du juge du procès pour déterminer si une preuve d'expert par ailleurs admissible devrait être exclue parce que sa valeur probante est surpassée par son effet préjudiciable — un pouvoir discrétionnaire résiduel permettant d'exclure une preuve à l'issue d'une analyse coût-bénéfices (p. 21). Il s'agit du second volet de la structure, mis en évidence par la jurisprudence ultérieure (Lederman, Bryant et Fuerst, p. 789-790; *J.-L.J.*, par. 28).

[20] L'arrêt *Mohan* et la jurisprudence ultérieure ne précisent toutefois pas comment cette analyse « du coût et des bénéfices » s'inscrit dans l'analyse globale. La Cour dans cet arrêt procède à l'analyse coût-bénéfices relativement à certains des quatre critères, mais elle fait aussi observer qu'une telle analyse peut relever de l'exercice d'un pouvoir discrétionnaire général qui permet d'exclure une preuve dont la valeur probante ne justifie pas son admission, compte tenu de ses effets potentiellement préjudiciables (p. 21). Depuis l'arrêt *Mohan*, la jurisprudence s'est également intéressée à des aspects particuliers du témoignage d'opinion d'un expert, mais souvent sans expliciter la place qu'occupent ces autres préoccupations dans l'analyse. Cependant, la jurisprudence, dans son ensemble, tend indubitablement à resserrer les critères d'admissibilité et à renforcer le rôle de gardien du juge.

[21] Par exemple, le critère de nécessité a été mis en évidence dans des décisions telles que *D.D.* La majorité y souligne que l'exigence de nécessité « vise à ce que les dangers liés à la preuve d'expert ne soient pas traités à la légère », ajoutant que « [l]a simple pertinence ou "utilité" ne suffit pas » (par. 46). D'autres décisions ont abordé la fiabilité des principes scientifiques à la base d'une opinion et, en fait, des éléments de preuve techniques en général (*J.-L.J.*; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239). Toutefois, on ne sait toujours pas où exactement,

and concerns such as those about reliability fit into the overall analysis.

[22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

dans l'analyse globale, s'inscrivent l'analyse coût-bénéfices et les préoccupations comme celles relatives à la fiabilité.

[22] L'arrêt *Abbey* (ONCA) a apporté des précisions utiles en scindant la démarche en deux temps. Je suis d'avis de l'adopter, à peu de choses près.

[23] Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *Mohan*, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. De plus, dans le cas d'une opinion fondée sur une science nouvelle ou contestée ou sur une science utilisée à des fins nouvelles, la fiabilité des principes scientifiques étayant la preuve doit être démontrée (*J.-L.J.*, par. 33, 35-36 et 47; *Trochym*, par. 27; Lederman, Bryant et Fuerst, p. 788-789 et 800-801). Le critère de la pertinence, à ce stade, s'entend de la pertinence logique (*Abbey* (ONCA), par. 82; *J.-L.J.*, par. 47). Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Il est à noter qu'à mon avis, la nécessité demeure un critère (*D.D.*, par. 57; voir D. M. Paciocco et L. Stuesser, *The Law of Evidence* (7e éd. 2015), p. 209-210; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, par. 13; *R. c. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, par. 72).

[24] Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en soupesant les risques et les bénéfices éventuels que présente l'admission du témoignage, afin de décider si les premiers sont justifiés par les seconds. Cet exercice nécessaire de pondération a été décrit de plusieurs façons. Dans l'arrêt *Mohan*, le juge Sopinka parle du « facteur fiabilité-effet » (p. 21), tandis que, dans l'arrêt *J.-L.J.*, le juge Binnie renvoie à « la pertinence, la fiabilité et la nécessité par rapport au délai, au préjudice, à la confusion qui peuvent résulter » (par. 47). Le juge Doherty résume bien la question dans l'arrêt *Abbey*, lorsqu'il explique que [TRADUCTION] « le juge du procès doit décider si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission » (par. 76).

[25] With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. *The Expert's Duty to the Court or Tribunal*

[26] There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

[27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . . .

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise . . . . An expert witness in the High Court should

[25] Le cadre analytique ainsi délimité, penchons-nous sur la nature de l'obligation de l'expert envers le tribunal et voyons comment elle s'inscrit dans ce cadre.

D. *L'obligation de l'expert envers le tribunal*

[26] Les grandes lignes de l'obligation du témoin expert envers le tribunal sont peu contestées. Comme Anderson l'écrit : [TRADUCTION] « L'obligation de fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris a été énoncée à de nombreuses reprises par les tribunaux de common law un peu partout dans le monde » (p. 227). J'ajouterais qu'une obligation semblable existe en droit civil québécois (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), par. 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), c. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non en vigueur); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), p. 14 et 121).

[27] On trouve dans l'arrêt anglais *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.), un énoncé des éléments de cette obligation qui fait autorité. Au terme d'un procès de 87 jours, le juge Cresswell a conclu qu'une méconnaissance des obligations et responsabilités des témoins experts avait contribué à prolonger le procès. Il a dressé, dans une remarque incidente, une liste des obligations et responsabilités des experts, dont les deux premiers points ont particulièrement influencé l'évolution du droit canadien :

[TRADUCTION]

1. Le témoignage de l'expert présenté à la Cour devrait être le produit indépendant de l'expert n'ayant subi quant à la forme ou au fond aucune influence dictée par les exigences du litige et être perçu comme tel . . .

2. Le rôle du témoin expert consiste à fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris sur des questions relevant de son champ d'expertise [. . .] La personne qui témoigne

never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

[28] Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

[29] There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules* (Saskatchewan), r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of*

comme expert devant la Haute Cour ne doit jamais s'arroger le rôle de défenseur. [Je souligne; référence omise; p. 81.]

(La Cour d'appel a confirmé ces obligations ([1995] 1 Lloyd's Rep. 455 (C.A.), p. 496).)

[28] Plusieurs provinces et territoires ont des directives expresses en ce qui concerne l'obligation du témoin expert. En Nouvelle-Écosse, par exemple, les *Règles de procédure civile* prévoient que le rapport d'expert, signé par ce dernier, déclare notamment qu'il fournit une opinion objective pour prêter assistance à la cour; qu'il est disposé à se former un jugement indépendant dans l'assistance qu'il prête à la cour; que son rapport comprend tout ce qu'il considère comme pertinent par rapport à l'opinion exprimée et attire l'attention sur tout ce qui pourrait mener raisonnablement à une conclusion différente (al. 55.04(1)a), b) et c)). Même si ces exigences n'ont aucune incidence sur les règles de preuve sur l'admissibilité d'une opinion d'expert, elles résument bien la conception assez largement partagée de l'obligation d'un témoin expert envers le tribunal.

[29] L'obligation de l'expert est définie de façon similaire dans les règles de procédure civile d'autres provinces et territoires du Canada (Anderson, p. 227; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, règle 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 11-2(1); *Règles de procédure civile*, R.R.O. 1990, Règl. 194, par. 4.1.01(1); *Règles de procédure*, Y.D. 2009/65, par. 34(23); *Loi instituant le nouveau Code de procédure civile*, art. 22). De plus, les règles de la Saskatchewan, de la Colombie-Britannique, de l'Ontario, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard, du Québec et des Cours fédérales en la matière exigent que les experts certifient qu'ils sont informés de leur obligation envers le tribunal et s'en acquitteront (Anderson, p. 228; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, par. 5-37(3); *Supreme Court Civil Rules* de la Colombie-Britannique, par. 11-2(2); *Règles de procédure civile* de l'Ontario,

Civil Procedure, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(*c*).

[30] The formulation in the Ontario *Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan (r. 4.1.01(1)(a)). The *Rules* are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure* of Quebec explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

[31] Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in Nova Scotia, the *Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's

par. 53.03(2.1); *Règles de procédure civile* de la Nouvelle-Écosse, al. 55.04(1)a); *Rules of Civil Procedure* de l'Île-du-Prince-Édouard, al. 53.03(3)(g); *Loi instituant le nouveau Code de procédure civile*, art. 235 (non en vigueur); *Règles des Cours fédérales*, DORS/98-106, al. 52.2(1)*c*)).

[30] Les *Règles de procédure civile* de l'Ontario énoncent sans doute le plus succinctement et complètement l'obligation de l'expert envers le tribunal, en l'occurrence celle de rendre un témoignage d'opinion qui soit équitable, objectif et impartial (al. 4.1.01(1)a)). Les *Règles* prévoient également expressément que cette obligation l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé (par. 4.1.01(2)). De même, la *Loi instituant le nouveau Code de procédure civile* du Québec prévoit expressément, parmi ses principes directeurs, que la mission première de l'expert envers le tribunal prime les intérêts des parties et qu'il doit l'accomplir « avec objectivité, impartialité et rigueur » (art. 22; Chamberland, p. 14 et 121).

[31] Bon nombre de règles de procédure ne font que reprendre l'obligation à laquelle le témoin expert est tenu envers le tribunal en common law (Anderson, p. 227). À mon avis, c'est le cas des *Règles* de la Nouvelle-Écosse en la matière. Bien sûr, il est loisible à chaque province ou territoire d'établir des règles d'admissibilité différentes, mais à défaut d'indication claire en ce sens, ce sont les règles de la common law qui s'appliquent dans les affaires de common law. Je souligne qu'en Nouvelle-Écosse, les *Règles de procédure civile* disposent expressément qu'elles n'ont aucune incidence sur les règles de preuve servant à déterminer si l'opinion d'expert est admissible (par. 55.01(2)).

[32] Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas

position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev*. 635, p. 638-639). Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire. Les experts sont généralement engagés, mandatés et payés par l'un des adversaires. Ces faits, à eux seuls, ne compromettent pas l'indépendance, l'impartialité ni l'absence de parti pris de l'expert.

E. *The Expert's Duties and Admissibility*

E. *Les obligations de l'expert et l'admissibilité de son témoignage*

[33] As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

[33] Comme nous l'avons vu, il existe un large consensus quant à la nature de l'obligation de l'expert envers le tribunal. Il n'en va toutefois pas de même du rapport entre cette obligation et l'admissibilité du témoignage de l'expert. Deux questions importantes se posent : les éléments de l'obligation de l'expert jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci et, dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

[34] In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

[34] Dans la présente section, j'explique pourquoi je réponds par l'affirmative à ces deux questions : l'indépendance et l'impartialité de l'expert proposé jouent au regard de l'admissibilité de son témoignage plutôt que simplement de la valeur probante de celui-ci, et l'obligation de l'expert constitue un critère d'admissibilité. Une fois qu'il est satisfait à ce critère, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

(1) Admissibility or Only Weight?

(1) Admissibilité ou valeur probante?

(a) *The Canadian Law*

a) *Le droit canadien*

[35] The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

[35] La jurisprudence dominante appuie solidement la conclusion qu'il convient, à un certain point, de juger inadmissible le témoignage de l'expert qui fait preuve d'un manque d'indépendance ou d'impartialité.

[36] Our Court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).
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> (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106)

[37] I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (expert was also a party to the litigation); *Handley v. Punnett*,

[36] La Cour vient de confirmer cette position dans un arrêt dont ne disposaient pas les juridictions inférieures :

> Il est acquis que l'expert doit fournir une opinion indépendante, impartiale et objective, en vue d'aider le décideur (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), nº 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), chap. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non encore en vigueur)). Par contre, ces facteurs influencent généralement la valeur probante de l'opinion de l'expert et ne sont pas toujours des obstacles incontournables à l'admissibilité de son témoignage. Ils ne rendent pas non plus le témoin expert nécessairement « inhabile » (L. Ducharme et C.-M. Panaccio, *L'administration de la preuve* (4e éd. 2010), nos 590-591 et 605). Pour qu'un témoignage d'expert soit inadmissible, il faut plus qu'une simple apparence de partialité. La question n'est pas de savoir si une personne raisonnable considérerait que l'expert n'est pas indépendant. Il faut plutôt déterminer si le manque d'indépendance de l'expert le rend de fait incapable de fournir une opinion impartiale dans les circonstances propres à l'instance (D. M. Paciocco, « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565, p. 598-599).
>
> (*Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 106)

[37] Je renvoie à plusieurs autres affaires pour étayer mon opinion. Je procède ainsi pour illustrer mon propos, sans émettre d'avis sur l'issue des affaires en question. Dans certaines, l'intérêt de l'expert dans le procès ou ses liens avec l'une des parties ont mené à l'exclusion (voir, p. ex., *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Div. gén.) (l'expert proposé était l'avocat de la défenderesse dans une affaire connexe et, dès le début de son mandat, il avait monté un dossier en vue d'une poursuite pour négligence contre la demanderesse); *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187 (C.S.J.) (l'expert était l'avocat d'une des parties dans une instance connexe introduite aux États-Unis); *R. c. Docherty*, 2010 ONSC 3628 (l'expert était le père de l'avocat de la défense); *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC

2003 BCSC 294 (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL) (S.C.J.) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19.

[38] Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

[39] Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920. Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case

315, 293 N.S.R. (2d) 394 (l'expert était également partie au litige); *Handley c. Punnett*, 2003 BCSC 294 (l'expert était également partie au litige); *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL) (C.S.J.) (l'expert était effectivement « coentrepreneur » dans cette affaire, notamment en raison du fait que 40 p. 100 de sa rémunération dépendait de l'issue favorable du procès (par. 7)); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (les termes du mandat de l'expert étaient discutables); *Hutchingame c. Johnstone*, 2006 BCSC 271 (la responsabilité de l'expert risquait d'être engagée, selon l'issue du procès)). Dans d'autres affaires, l'attitude ou le comportement de l'expert, qui s'était fait le défenseur d'une partie, a justifié l'exclusion (voir, p. ex., *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19).

[38] Dans un grand nombre d'autres affaires, les tribunaux, tout en acceptant en principe qu'un manque d'indépendance ou d'impartialité pouvait mener à l'exclusion du témoignage de l'expert, ont néanmoins estimé qu'il n'y avait pas lieu d'écarter ce témoignage eu égard aux faits particuliers de l'espèce (voir, p. ex., *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594 (C.S.J.)). C'est le point de vue qu'a adopté la Cour d'appel dans le cas qui nous occupe (par. 109; voir également par. 121).

[39] Toutefois, certains tribunaux canadiens étaient d'avis que ces questions jouaient exclusivement au regard de la valeur de la preuve, et non au regard de son admissibilité. Les décisions les plus souvent citées à cet égard sont sans doute *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, et *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. Dans la première, le tribunal a déclaré admissible tout témoignage d'expert qui satisfaisait aux critères énoncés dans l'arrêt *Mohan* et précisé que le parti pris n'entrait en jeu que lorsqu'il s'agissait de déterminer la valeur probante du témoignage de l'expert (voir également

or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

[40] I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) *Other Jurisdictions*

[41] Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

[42] For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003]

R. c. Violette, 2008 BCSC 920). De même, dans la deuxième, la cour a statué que la contestation du témoignage de l'expert fondée sur l'existence d'un rapport entre ce dernier et l'une des parties ou une question en litige ou sur une préconception de sa part ne pouvait être formulée à l'étape de l'admissibilité (par. 89).

[40] Je conclus que selon la conception prédominante en common law canadienne, l'indépendance et l'impartialité ont une incidence non seulement sur la valeur de la preuve, mais aussi sur son admissibilité. Je signale que, même s'ils soutiennent que les questions concernant l'indépendance de l'expert ne devraient jouer qu'au regard de la valeur probante, les actionnaires invoquent des affaires comme *INCO*, dans laquelle le tribunal reconnaît expressément qu'une conclusion quant au manque d'indépendance ou d'impartialité peut entraîner l'inadmissibilité dans certaines circonstances (m.i., par. 52-53).

b) *Ailleurs dans le monde*

[41] À l'extérieur du Canada, les questions d'indépendance et d'impartialité ont été abordées de diverses façons, dont certaines s'apparentent à la démarche canadienne.

[42] Par exemple, résumant les principes applicables en droit britannique, le juge Nelson, dans l'arrêt *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), a souligné que lorsque l'expert a un intérêt dans un litige ou un rapport avec celui-ci ou avec une partie, l'exclusion est justifiée s'il est établi que l'expert ne peut ou ne veut pas s'acquitter de sa principale obligation envers la cour (voir également H. M. Malek et autres, dir., *Phipson on Evidence* (18e éd. 2013), p. 1158-1159). Le simple fait d'avoir un intérêt ou un rapport ne rend pas quelqu'un inhabile à témoigner, sauf dans certaines circonstances, selon la nature et l'importance de l'intérêt ou du rapport. Comme lord Phillips de Worth Matravers, maître des rôles, l'explique dans un arrêt de principe : [TRADUCTION] « Il est toujours souhaitable qu'un expert n'ait aucun intérêt réel ou apparent dans l'issue d'un procès dans lequel il témoigne, mais une telle neutralité n'est pas automatiquement essentielle à l'admissibilité de son témoignage »

Q.B. 381, at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), at paras. 312-17.

[43] In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the State of Victoria put it: ". . . to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33, at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), at p. 1321. This also seems to be a fair characterization of the situation in the states (*Corpus Juris Secundum*, vol. 32 (2008), at p. 325: "The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

(c) *Conclusion*

[45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to

(*R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381, par. 70; voir également *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), par. 312-317).

[43] En Australie, l'objectivité et l'impartialité de l'expert jouent généralement au regard de la valeur de la preuve, et non de son admissibilité (I. Freckelton et H. Selby, *Expert Evidence : Law, Practice, Procedure and Advocacy* (5e éd. 2013), p. 35). Pour reprendre les propos de la Cour d'appel de l'État de Victoria : [TRADUCTION] « . . . dans la mesure où il est souhaitable que les témoins experts aient l'obligation d'aider le tribunal, on ne devrait pas juger inhabile à témoigner un expert du seul fait qu'il est "intéressé" » (*FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33, par. 26 (AustLII); voir également Freckelton et Selby, p. 186-188; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] Aux États-Unis, au niveau fédéral, l'indépendance de l'expert joue au regard de la valeur de la preuve, et une partie peut témoigner à son propre procès à titre d'expert (*Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), p. 1019; *Tagatz c. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), p. 1321). Il semble que la situation soit à peu près la même à l'échelle des États (*Corpus Juris Secundum*, vol. 32 (2008), p. 325 : [TRADUCTION] « Le parti pris ou l'intérêt du témoin n'influe pas sur son habilité à témoigner, mais seulement sur la valeur probante de son témoignage. »).

c) *Conclusion*

[45] Conformément à ce qui me semble le courant prédominant dans la jurisprudence canadienne, je suis d'avis que le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du

the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

(2) The Appropriate Threshold

[46] I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

[47] Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my

témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale de notre droit en ce qui concerne les témoignages d'experts et l'importance que notre jurisprudence accorde au rôle de gardien exercé par les juges de première instance. Le juge Binnie cerne bien l'optique canadienne dans l'arrêt *J.-L.J.* : « La question de l'admissibilité d'une preuve d'expert devrait être examinée minutieusement au moment où elle est soulevée, et cette preuve ne devrait pas être admise trop facilement pour le motif que toutes ses faiblesses peuvent en fin de compte avoir une incidence sur son poids plutôt que sur son admissibilité » (par. 28).

(2) Teneur du critère

[46] J'ai déjà exposé l'obligation du témoin expert envers le tribunal : il doit être juste, objectif et impartial. Selon moi, le critère d'admissibilité découle de cette obligation. Je suis d'accord avec le professeur Paciocco (maintenant juge de la Cour de justice de l'Ontario), selon qui [TRADUCTION] « la common law en est venue à concevoir [. . .] que les témoins experts ont l'obligation d'aider le tribunal, qui l'emporte sur celle qu'ils doivent à la partie qui les cite. Le témoin qui ne peut ou ne veut s'acquitter de cette obligation n'est pas habile à exercer son rôle d'expert et devrait être exclu » (« Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135, p. 152 (note de bas de page omise)). Par conséquent, les témoins experts doivent être conscients de leur obligation principale envers le tribunal et pouvoir et vouloir s'en acquitter.

[47] L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Comme le souligne le professeur Paciocco, à raison : [TRADUCTION] « . . . si les débats sur la partialité deviennent chose courante pendant un voir-dire de type *Mohan*, le témoignage qui sera donné au procès ne sera plus qu'une répétition inefficace de l'audience sur l'admissibilité » (« Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565 (« Jukebox »), p. 597). Sans aller jusqu'à affirmer qu'il faut présumer l'indépendance

view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise,

et l'impartialité de l'expert si elles ne sont pas contestées, je pense qu'en l'absence d'une telle contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte.

[48] Une fois que l'expert a produit cette attestation ou a déposé sous serment en ce sens, il incombe à la partie qui s'oppose à l'admission du témoignage de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. Si elle n'y parvient pas, le témoignage, ou les parties de celui-ci qui sont viciées par un manque d'indépendance ou d'impartialité, devrait être exclu. Cette démarche est conforme à la règle générale du cadre établi dans l'arrêt *Mohan*, et généralement en droit de la preuve, selon laquelle il revient à la partie qui produit la preuve d'en établir l'admissibilité.

[49] Ce critère n'est pas particulièrement exigeant, et il sera probablement très rare que le témoignage de l'expert proposé soit jugé inadmissible au motif qu'il ne satisfait pas au critère. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. Par exemple, c'est la nature et le degré de l'intérêt ou des rapports qu'a l'expert avec l'instance ou une partie qui importent, et non leur simple existence : un intérêt ou un rapport quelconque ne rend pas d'emblée la preuve de l'expert proposé inadmissible. Dans la plupart des cas, l'existence d'une simple relation d'emploi entre l'expert et la partie qui le cite n'emporte pas l'inadmissibilité de la preuve. En revanche, un intérêt financier direct dans l'issue du litige suscite des préoccupations. Il en va ainsi des liens familiaux étroits avec une partie et des situations où l'expert proposé s'expose à une responsabilité professionnelle si le tribunal ne retient pas son opinion. De même, l'expert qui, dans sa déposition ou d'une autre manière, se fait le défenseur d'une partie ne peut ou ne veut manifestement pas s'acquitter de

assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[51] Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. *Situating the Analysis in the Mohan Framework*

(1) The Threshold Inquiry

[52] Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one

sa principale obligation envers le tribunal. Je tiens à souligner que la décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

[50] Comme nous l'avons vu en examinant la jurisprudence anglaise, la décision de permettre ou non à un expert de témoigner malgré son intérêt dans un litige ou son rapport avec celui-ci dépend de leur importance et des faits. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

[51] Nous avons posé le cadre analytique, défini l'obligation de l'expert et établi que le respect de cette dernière joue au regard de l'admissibilité, et non simplement de la valeur probante. Voyons ensuite où cette obligation s'inscrit dans le cadre analytique régissant l'admissibilité du témoignage d'opinion d'un expert.

F. *L'analyse au sein du cadre établi par l'arrêt Mohan*

(1) L'analyse fondée sur les critères d'admissibilité

[52] Les tribunaux ont abordé la question de l'indépendance et de l'impartialité à divers stades de l'examen des critères d'admissibilité. Presque tous les volets du cadre établi par l'arrêt *Mohan* ont servi

way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797 (Ont. S.C.J.)); the necessity component (see, e.g., *Docherty*; *Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J.); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284. Some clarification of this point will therefore be useful.

[53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at §469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at 12:30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge

à l'examen des préoccupations relatives au parti pris : la qualification requise (voir, p. ex., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797 (C.S.J. Ont.)); la nécessité (voir, p. ex., *Docherty*; *Alfano*); et l'analyse coût-bénéfices, qui appelle l'exercice d'un pouvoir discrétionnaire (voir, p. ex., *United City Properties*; *Abbey* (ONCA)). À d'autres occasions, les tribunaux en ont fait un critère distinct (voir, p. ex., *Docherty*; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (C.S.J. Ont.); *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284). Des précisions s'imposent donc.

[53] À mon avis, c'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter (S. C. Hill, D. M. Tanovich et L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5e éd. (feuilles mobiles)), 12:30.20.50; voir également *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, par. 21; Lederman, Bryant et Fuerst, p. 826-827; *Halsbury's Laws of Canada : Evidence*, par. HEV-152 « Partiality »; *The Canadian Encyclopedic Digest* (Ont. 4e éd. (feuilles mobiles)), vol. 24, titre 62 — Evidence, §469). Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris (Hill, Tanovich et Strezos, 12:30.20.50; Paciocco, « Jukebox », p. 595).

(2) Le pouvoir discrétionnaire du juge en tant que « gardien »

[54] La constatation que le témoignage de l'expert satisfait aux critères ne met pas fin à l'analyse. Conformément au cadre établi dans la foulée de l'arrêt *Mohan* dont nous avons discuté précédemment,

must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

le juge doit encore tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

G. *Expert Evidence and Summary Judgment*

[55] I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

G. *Témoignage d'expert et jugement sommaire*

[55] Je me dois de glisser quelques mots sur le contexte procédural dans lequel s'inscrit le présent pourvoi, en l'occurrence celui d'une requête en jugement sommaire. (Mes commentaires concernent le régime des jugements sommaires établi par les règles de la Nouvelle-Écosse. Je reconnais que d'autres considérations sont susceptibles de jouer dans un autre régime.) Il est bien reconnu que le tribunal saisi de la requête ne peut examiner que la preuve admissible. Cependant, suivant la jurisprudence néo-écossaise, qui n'est pas remise en question dans le présent pourvoi, il n'appartient pas au juge saisi d'une requête en jugement sommaire, en Nouvelle-Écosse, de soupeser la preuve, de tirer des inférences raisonnables de celle-ci ou de trancher des questions de crédibilité (*Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, par. 42-44, 87 et 98; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, par. 6 et 12). Si l'on considère ces deux principes ensemble, le résultat est à mon avis le suivant. Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur — ou, à tout le moins, d'une valeur possible — à la preuve.

H. *Application*

[56] I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

[57] There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

[58] The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

[59] First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMillan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

H. *Application*

[56] J'aborde maintenant l'application de ces principes aux faits de l'espèce. À mon humble avis, le dossier appuie largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage de M^me^ MacMillan était admissible pour l'instruction de la requête en jugement sommaire. Bien sûr, ni le juge des requêtes ni la Cour d'appel ne disposaient du cadre que j'établis dans les présents motifs.

[57] Le juge des requêtes n'a pas conclu que M^me^ MacMillan avait un parti pris, qu'elle n'était pas impartiale ou qu'elle se faisait le défenseur des actionnaires (motifs de la C.A., par. 122). Au contraire, M^me^ MacMillan a reconnu expressément connaître les normes et exigences voulant que l'expert soit indépendant. Elle était également au fait des directives précises dans le milieu de la comptabilité applicables aux comptables cités comme témoins experts. Elle était consciente à titre de témoin expert de sa principale obligation envers le tribunal (d.a., vol. III, p. 75-76; motifs de la C.A., par. 134). Même si, selon le juge des requêtes, il faut une « apparence » d'impartialité, ce facteur ne constitue pas un critère d'admissibilité, comme je l'explique précédemment.

[58] La prétention des vérificateurs selon laquelle M^me^ MacMillan manquerait d'objectivité repose sur deux principaux points que j'aborde successivement.

[59] D'abord, les vérificateurs soutiennent que le travail fait antérieurement à l'intention des actionnaires par le bureau de Grant Thornton à Kentville [TRADUCTION] « a servi de catalyseur et de fondement à l'action pour négligence » intentée contre les vérificateurs et que cela « empêche [Grant Thornton] d'agir comme expert "indépendant" en l'espèce » (m.a., par. 17 et 19). Selon les vérificateurs, M^me^ MacMillan se trouvait dans « une situation de conflit d'intérêts irréductible qui la forçait inévitablement à commenter et approuver les mesures prises et la norme de diligence observée soit par ses propres partenaires chez Grant Thornton » soit par les vérificateurs (m.a., par. 21). Ce premier argument doit cependant être rejeté.

[60] The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

[61] The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

[62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be

[60] Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Dès lors que le travail initial est fait de façon indépendante et impartiale et que l'expert proposé comprend son obligation d'apporter au tribunal une aide juste, objective et impartiale et qu'il peut s'acquitter de cette obligation, il est satisfait au critère relatif à la qualification sur ce plan. Or, rien ne permet de penser ici que le cabinet Grant Thornton a été engagé pour exprimer un point de vue dicté par les actionnaires, ni qu'il y ait eu plus qu'une hypothétique possibilité que le cabinet soit tenu responsable envers ces derniers si, en fin de compte, le tribunal n'avait pas retenu son opinion. Le juge n'a pas conclu que M[me] MacMillan avait un parti pris, qu'elle a manqué d'impartialité ou qu'elle s'était faite le défenseur des actionnaires. De plus, l'argument des vérificateurs selon lequel M[me] MacMillan a en quelque sorte « admis » en contre-interrogatoire se trouver dans une situation de « conflit d'intérêts irréductible » n'est pas corroboré par une interprétation raisonnable de son témoignage dans son contexte (d.a., vol. III, p. 139-145). Au contraire, il ressort clairement de son témoignage qu'elle comprenait son rôle d'expert et son obligation envers le tribunal (*ibid.*, p. 75-76).

[61] Deuxièmement, M[me] MacMillan ne serait pas indépendante, puisqu'elle avait « incorporé » une partie du travail fait par son cabinet au bureau de Kentville. Cette prétention est également non fondée. D'abord, je n'accepte pas qu'un expert ne satisfasse pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. De plus, comme le juge Beveridge l'a conclu, ce qui a été « incorporé » consistait essentiellement en un exercice arithmétique qui n'avait rien à voir avec quelque opinion comptable qu'aurait exprimée le bureau de Kentville (motifs de la C.A., par. 146-149).

[62] Le présent dossier ne révèle aucun élément qui permette de conclure que le témoignage de

excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

[63] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Stikeman Elliott, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.

M[me] MacMillan devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. Je conviens avec la majorité de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en estimant que M[me] MacMillan était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial (par. 136-150).

IV. Dispositif

[63] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Stikeman Elliott, Toronto.

Procureurs des intimées : Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Henein Hutchison, Toronto.

CITATION: Wise v. Abbott Laboratories, Limited, 2016 ONSC 7275
COURT FILE NO.: CV-16-550747CP
DATE: 20161123

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
NORMAN DOUGLAS WISE and MONIKA ELISABETH WISE	)	*Michael Peerless, Sabrina Lombardi,* and *Eli Karp* for the Plaintiffs
Plaintiffs	)	
– and –	)	
ABBOTT LABORATORIES, LIMITED, ABBOTT PRODUCTS INC. (f/k/a SOLVAY PHARMA INC. and SOLVAY PHARMA CLINICAL INC.), ABBOTT PRODUCTS CANADA INC. (f/k/a SOLVAY PHARMA CANADA INC.), and ABBVIE PRODUCTS LLC (f/k/a ABBOTT PRODUCTS LLC, f/k/a ABBOTT PRODUCTS, INC., f/k/a SOLVAY PHARMACEUTICALS, INC.)	)	*Neil Finkelstein, Brandon Kain, Byron Shaw,* and *Breanna Needham* for the Defendants
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: September 21, 22, 23, 26, 27, and 28, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Norman Douglas Wise and his wife, Monika Elisabeth Wise, bring a proposed class action against Abbott Laboratories, Limited, Abbott Products Inc., Abbott Products Canada Inc., and Abbvie Products LLC (collectively, "Abbott").

[2] Abbott, which is a pharmaceutical company, manufactures a topical ointment known as AndroGel^{TM} as a treatment for hypogonadism, which is medical problem for males. Hypogonadism is indicated by low testosterone levels ("LowT") and the presence of a variety of symptoms.

[3] The Wises bring a products liability class action against Abbott. The Wises' principal allegation is that AndroGel™ causes serious cardiovascular events (sometimes referred to as serious CV events), such as heart attacks (myocardial infarction or "MI") and strokes.

[4] Another major allegation made by the Wises is that AndroGel™ was sold as a remedy for "LowT," which they allege is a fabricated disease made up by Abbott to sell more of its product. The Wises allege that Abbott marketed AndroGel™ to aging men as a cure for feeling sad or grumpy, deterioration in the ability to play sports, falling asleep after dinner, decreased libido and decreased sexual performance, but they say LowT is not a disease and that the aging men who purchase AndroGel™ to ameliorate the naturally occurring decline in testosterone, purchased a useless product and unnecessarily placed themselves at an increased risk of harm. The Wises allege that in selling AndroGel™ for LowT, Abbott was "disease mongering," the selling of a drug that offers no therapeutic benefits, and, therefore, the Wises submit that Abbott has been unjustly enriched and should compensate the Class Members for their pure economic losses. The Wises also assert a waiver of tort claim.

[5] Abbot denies all claims of negligence. Abbott submits that LowT is a type of hypogonadism; i.e., Abbott disputes that it is selling AndroGel™ to non-hypogonadal men, which is what, in effect, the Wises allege. Abbott argues that there is no basis for the Wises' tort claim for pure economic losses.

[6] Although the Wises' action has not yet been certified as a class action, Abbott brings a summary judgment motion to have the action dismissed.

[7] In its factum, Abbott submits that the Wises' negligence claims should be dismissed for four reasons: (1) because the Wises cannot prove general causation which is a constituent element in all of the claims; (2) because there is no evidence of negligence in design; (3) because the Wises cannot establish a breach of a duty to warn; and, (4) because there is no evidence to support the allegation that Abbott marketed AndroGel™ for off-label uses. Abbott makes other attacks against the Wises' claim, and it submits that the failure of the negligence claims entails the failure of the Wises' unjust enrichment and waiver of tort claims.

[8] In response to the summary judgment motion, the Wises, who do not bring a cross-motion for summary judgment, submit that the case is not appropriate for a summary judgment - for Abbott - but they submit that the case would be appropriate for a partial summary judgment - for them - with the result that three of the five certification criteria would be satisfied (cause of action, a common issue, and representative plaintiff criteria). In other words, the Wises submit that they should be granted a partial summary judgment and that their action should move on to certification and to a common issues trial of the remaining common issues followed by assessments of damages for individual Class Members.

[9] The parties filed more than 11,000 pages in materials for the summary judgment motion, including affidavits and exhibits and transcripts (approximately 7,200 pages), factums (292 pages) and case authorities (4,025 pages). There was six days of oral argument.

B. OVERVIEW

[10] For the reasons that follow, I grant Abbott a summary judgment dismissing the Wises' action. My ultimate conclusion is that there is no genuine issue requiring a trial about general causation, which was not proven.

[11] The Wises were successful in proving that there is an "association" between AndroGel™ and serious cardiovascular events, which is to say that AndroGel™ and serious cardiovascular events occur together more frequently than one would expect by chance. Proof of association, however, is not proof of causation because there might be explanations other than cause for why AndroGel™ and serious cardiovascular events occur together more frequently than one would expect by chance.

[12] Whether AndroGel™ can cause serious cardiovascular events was neither proven nor disproven and remains to be determined. The Wises had a difficult epidemiological problem to analyze because testosterone naturally decreases as men age and old men do have heart attacks regardless of their level of testosterone. It is debated whether restoring testosterone levels increases or decreases the likelihood of a serious cardiovascular event. It remains to be determined whether the association (a type of connection) between AndroGel™ and serious CV events is a matter of cause and effect (general causation) or is matter of chance (sometimes called random error), bias (errors in the design and implementation of the epidemiological studies), or confounding (explained below).

[13] As I shall explain below, the Wises proved that it is possible that AndroGel™ might be a possible cause of serious cardiovascular events. The simultaneous occurrence of AndroGel™ and cardiovascular events might be explained - but is not necessarily explained - by AndroGel™ causing serious cardiovascular events. However, the Wises' failed to prove general causation. The point is subtle, but all that the Wises proved was the possibility of a possibility. However, the possibility of a possibility that AndroGel™ could cause a serious cardiovascular event is not proof of general causation because, as a legal matter, it is not proof on the balance of probabilities.

[14] Based on the evidentiary record now before the court, it cannot be said that Mr. Wise, who was prescribed AndroGel™ and who subsequently had a heart attack, has proved "general causation"; which is to say that he failed on the balance of probabilities to prove that AndroGel™ could be a cause of his heart attack. Thus, there is no genuine issue requiring a trial that general causation was not proven. Mr. Wise's negligence action must be dismissed because he failed to prove causation, which is a constituent element of his negligence claims.

[15] I pause here to foreshadow that in arguing that Mr. Wise failed to prove general causation and that there was no breach of a manufacturer's duty to warn, Abbott relied on the legal-epidemiological methodology employed by Justice Lax in *Andersen v. St. Jude, Medical Inc*., 2012 ONSC 3660. However, while the *Andersen v. St. Jude, Medical Inc.* decision is ultimately not harmful to Abbott's argument, Abbott misunderstands Justice Lax's treatment of material risk and her use of statistics and epidemiology.

[16] The Wises' failure to prove general causation leads also to the dismissal of the failure to warn claim. Once again, the explanation for the dismissal of his claim is subtle. About the duty to warn, Abbott argued that there can be no duty to warn based on the proven association between AndroGel™ and serious cardiovascular events and that there was no evidence that it breached any duty to warn. I disagree with this argument.

[17] In my opinion, an association between a danger and a product may give rise to a duty to warn even if the association cannot be characterized as a causal association. Notwithstanding Abbott's arguments, I conclude that there was a duty to warn in the immediate case based on the association between AndroGel™ and serious cardiovascular events. However, whether that duty

to warn had been breached by Abbott, would involve an analysis of the standard of care and the adequacy of the warnings that Abbott included in its product monograph. On this summary judgment motion, the evidence and the analysis did not go that far, although the trend of the evidence, which showed compliance to regulatory standards, tended to favour Abbott. The primary reason that the Wises' failure to warn claim fails is assuming a breach of the standard of care, Mr. Wise's claim fails just because of his failure to prove general causation. A failure to warn that causes no harm is not culpable negligence; no causation of harm, no fault.

[18] As for the Wises' claims for unjust enrichment, pure economic losses, or waiver of tort, these claims also fail. These claims are based on the allegation that AndroGel^{TM} is a worthless, non-beneficial product, and a dangerous one not worth the risk of being consumed. Mr. Wise submits that he has proven that AndroGel^{TM}, which is a dangerous drug (the product monograph does point out several dangers), is misleadingly sold for uses for which it is ineffective and for which it provides no benefit, and, thus, he and the Class Members have a legally viable claim for pure economic loss in tort or for unjust enrichment or for waiver of tort in restitution. In the discussion below, I will explain that these submissions are mistaken for several factual and legal reasons.

[19] To arrive at the above conclusions, there is a great deal of complicated factual and legal material to cover, and there are some difficult ancillary legal and evidentiary problems.

[20] In the discussion below, in addition to addressing important issues about products liability claims, the use of epidemiological evidence, causation, and unjust enrichment, I shall also address several important evidentiary and procedural issues. The evidentiary issues were associated with the testimony of expert witnesses. There was a question about how to treat the evidence of most of the expert witnesses who were accused of partisanship (non-independence, conflicts of interest, bias and impartiality). There was a question about what to do with the circumstance that the number of Abbott's expert witnesses exceeded the number that, under s. 12 of the *Evidence Act*, R.S.O. 1990, c. E.23, may testify without the leave of the court. As a procedural matter, there was a question about whether the summary judgment motion was appropriate for a judgment and about whether it was in the interests of justice that there should be a trial to determine the general causation issue and the other constituent elements of the Wises' claims.

C. EVIDENTIARY BACKGROUND

1. The Witnesses

[21] Abbott Laboratories supported its summary judgment motion with affidavits from:

- Dr. Abraham Morgentaler, sworn September 28, 2015, April 19, 2016, May 9, 2016, and August 22, 2016. He delivered four reports. Dr. Morgentaler was cross-examined.
- Dr. William J. French, sworn September 22, 2015, May 10, 2016, and August 22, 2016. He delivered three reports. Dr. French was cross-examined.
- Dr. Gerald Brock, sworn September 28, 2015, May 9, 2016, and August 22, 2016. He delivered three reports. Dr. Brock was cross-examined.
- Dr. David Greenberg, sworn September 25, 2015, May 9, 2016, and August 22, 2016. He

delivered three reports. Dr. Greenberg was cross-examined.

- Dr. Laurentius Marais, sworn September 28, 2015, April 18, 2016, and August 22, 2016. He delivered three reports. Dr. Marais was not cross-examined.
- Dr. Joel Heidelbaugh, sworn August 22, 2016. He delivered one report. He was not cross-examined.
- Anne Tomalin, sworn September 26, 2015 and April 18, 2016. She delivered two reports. Ms. Tomalin was cross-examined.
- Sylvie Brillon, sworn, February 26, 2015. Ms. Brillon was cross-examined.
- Katherine Stubits, sworn September 19, 2016. Ms. Stubits was not cross-examined.

[22] Dr. Morgentaler, is an urologist. He is Associate Clinical Professor of Surgery (Urology) at Harvard Medical School, from which he received his B.A. (biology) and his M.D. He has been involved in testosterone research since 1976. In his 25 years of practice, he has treated several thousand men suffering from testosterone deficiency. He described himself as one of the earliest physicians in the modern era to treat substantial numbers of patients with testosterone for the condition of testosterone deficiency, also called hypogonadism. He is a member of the American Urological Association, the International Society for Sexual Medicine, the International Society for the Study of the Aging Male, and the International Consultation in Sexual Medicine. He served as chairman of the first international Expert Consensus Conference on Testosterone Deficiency. Over the last two years, he has focussed his research on the issue of whether testosterone replacement treatment causes cardiovascular (CV) events or increases CV risk. He represented the American Urological Association at the March 2016 annual meeting of the European Association of Urology where he lectured on testosterone therapy.

[23] Dr. French is a cardiologist with over 40 years of practice. He is Professor of Medicine at the David Geffen School of Medicine at the University of California, Los Angeles ("UCLA"). He is a graduate of the University of New Hampshire (B.Sc., chemistry) and of University of Vermont School of Medicine (M.D.) and he is a board certified physician in cardiovascular diseases and interventional cardiology. He has written extensively on serious cardiovascular events in peer reviewed publications. He is the Director of the Cardiac Catheterization Laboratory at the Harbor-UCLA Medical Center, which has a celebrated record of research studies in cardiology. He was co-author of a comprehensive review article entitled "Testosterone and the Cardiovascular System", which was published in the *American Heart Association Journal* in 2013. He was a member of the two-person Data Safety Monitoring Board for a randomized controlled trial studying the effects of testosterone on atherosclerosis in aging men, the results of which were recently published in the *Journal of the American Medical Association* ("*JAMA*").

[24] Dr. Brock is an urologist with over 25 years of practice. He is a graduate of McGill University (B.Sc., physiology and M.D.) and is a Professor in the Department of Surgery, Division of Urology at the University of Western Ontario and Program Director for the Urology Residency Training Program at the university. He was the Secretary of the Sexual Medicine Society of North America and the Vice President (now President) of the Canadian Urology Association. He is the Scientific Chair of the Society for the Study of the Aging Male and has served as Chair of the Canadian Male Sexual Health Council. In his clinical practice, he sees 25-50 new patients monthly for complaints of testosterone deficiency. He runs a clinical research

program, which focuses on various disease states leading to sexual dysfunction, including testosterone deficiency.

[25] Dr. Greenberg is a family physician with over 25 years of practice. He is a graduate of the University of Western Ontario (M.D.). He serves on the staff of St. Joseph's Health Centre in Toronto and is a lecturer in the Department of Family and Community Medicine at the University of Toronto. He is a member of the Board of the Canadian Society for the Study of the Aging Male, which, among other things, educates Canadian physicians on low testosterone medical conditions. He is a director of the Canadian Men's Health Foundation, a non-governmental organization ("NGO") dedicated to heightening awareness and providing education to Canadian men to improve their health. He is a founding member of the American Society for Men's Health. Dr. Greenberg also edits the Men's Health Guidelines for Family Medicine.

[26] Dr. Marais is a mathematician specializing in statistics. He is a graduate of Stellenbosch University (B.Sc., mathematics and computer science) and Stanford University (M.Sc., statistics, M.Sc., mathematics, PhD., business administration and mathematics). He is the Vice President and Principal Consultant at William E. Wecker Associates, Inc., and he specializes in analyzing biostatistical and epidemiological data concerning the rates of and risk factors for health effects, including the adverse events associated with pharmaceutical medicines. He is a fellow of the Royal Statistical Society and a member of the American Statistical Association and the Society for Industrial and Applied Mathematics.

[27] Dr. Heidelberg is a family physician and a professor at the University of Michigan Medical School. He received his M.D. from the Upstate Medical University in Syracuse, New York, in 1996. Since 1999, he has been on the faculty in the Department of Family Medicine at the University of Michigan and since 2000, he has practiced family medicine at the Ypsilanti Health Center in Ypsilanti, Michigan. Neither party referred to Dr. Heidelberg's report, and for the purposes of these Reasons for Decision, I have ignored his report and did not read it.

[28] Ms. Tomalin is a graduate of York University, and holds a B.A. in English (1970) and a B.Sc. in chemistry (1980). She received a Regulatory Affairs Certification from the Regulatory Affairs Professional Society for U.S. Regulatory Affairs (1997), European Regulatory Affairs (2001), and Canadian Regulatory Affairs (2005). She is the President and Founder of TPIreg, a consulting company that provides training services to pharmaceutical companies in regulatory affairs. She has worked in-house at pharmaceutical companies (not Abbott or any of its predecessors). She teaches Regulatory Affairs at Humber College in Toronto. She served on the executive of the Pharmaceutical Sciences Group (PSG) and the Canadian Association of Professional Regulatory Affairs (CAPRA), which are industry associations focusing on regulatory issues.

[29] Ms. Brillon was formerly the Senior Manager, Regulatory Affairs & Quality Assurance at Abbott, where she began her career in 1992 after receiving her M.B.A. from McGill University and a B.A. (chemical engineering) from the École Polytechnique in Montréal.

[30] Ms. Stubits is a law clerk at McCarthy Tétrault, counsel for Abbott. She filed an affidavit that contained copies of the reports and medical literature referred to by Drs. Morgentaler, French, Brock, Greenberg, and Marais and by Ms. Tomalin.

[31] The Wises resisted the summary judgment motion with affidavits or expert's reports

from:

- Norman Wise, affidavit sworn January 12, 2016. Mr. Wise was cross-examined.
- Dr. Barbara Mintzes, affidavits sworn January 12, 2016 and April 16, 2016. Dr. Mintzes delivered two reports. Dr. Mintzes was cross-examined.
- Dr. William Milne, affidavit sworn July 14, 2016. He delivered one report. Dr. Milne was cross-examined.

[32] Dr. Mintzes is a graduate of Simon Fraser University (B.A., geography, biology) and the University of British Columbia (M.Sc., healthcare and epidemiology, PhD, healthcare and epidemiology). She is an Affiliate-Associate Professor with that university's School of Population and Public Health, and she is also a senior lecturer at the Faculty of Pharmacy and Charles Perkins Centre at the University of Sydney, Australia. The Charles Perkins Centre is a multi-disciplinary research centre with a focus on obesity, diabetes, and cardiovascular disease and Dr. Mintzes works in a unit that focuses on research integrity. Her areas of specialization are drug safety and effectiveness and the influence of pharmaceutical promotion on medicine use. Previously, she was an Assistant Professor with the Department of Anesthesiology, Pharmacology and Therapeutics at the University of British Columbia. Since 1999, she has worked with the University of British Columbia-based research group, the Therapeutics Initiative, which group has the aim of providing physicians and pharmacists with information on prescription drug therapy. She has been lead researcher on approximately 30 systematic reviews of the clinical trial evidence on efficacy and safety of newly approved prescription medicines for the British Columbia Minister of Health and the Common Drug Review. Her areas of teaching interest include pharmaceutical policy, pharmaceutical regulation, systematic review, critical appraisal of clinical trials, risk assessment, ethics of interactions between professionals and the pharmaceutical industry, and public health. She has been a peer reviewer for over 65 periodicals including *British Medical Journal, Canadian Medical Association Journal, Journal of the American Medical Association, Lancet, McGill Journal of Law and Health, PLOS ONE,* and the *New England Journal of Medicine.*

[33] Dr. Milne is an emergency physician and is a strong proponent of the practice of what is known as evidence based medicine ("EBM"). He is a graduate of the University of Calgary (M.D.) and has a B.Sc. (physiology) and M.A. (physiology) from the University of Western Ontario. He is the Chief of Emergency Medicine and Chief of Medical Staff for the South Huron Hospital Group, a small hospital (19-bed) in Exeter, Ontario. He is an academic clinician with two adjunct appointments from the University of Western Ontario, one in the Department of Family Medicine and the other in the Department of Medicine/Division of Emergency Medicine. He has been involved in research for more than 31 years with a particular interest in the critical appraisal of medical literature as part of the EBM movement, which he practices and teaches. He has published extensively in peer-review publications with over 100 publications and abstracts. He is a faculty member of the Best Evidence in Emergency Medicine group, at McMaster University, where his responsibilities have included structured critical reviews of medical literature, covering a broad range of medical specialities.

2. The Alleged Partisanship of the Experts

(a) Introduction

[34] The *Rules of Civil Procedure* set out the duty of an expert. Rule 4.1 states:

> *Duty of Expert*
>
> 4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;
>
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
>
> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
>
> *Duty Prevails*
>
> (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

[35] Both parties made aggressive arguments to disqualify and discredit their opponent's expert witness for breaching the duties of an expert.

[36] As I shall explain in this section of my Reasons for Decision, although there is some factual traction to these arguments, ultimately, the respective arguments are misconceived and they fail. The evidence of both sides' experts is admissible and their evidence will be judged based on its persuasiveness and not discounted on account of the witness's alleged impartiality.

(b) The Allegations that the Experts were Partisan

[37] As a factual matter, there is some traction to the respective allegations that the litigants' experts were not fair, objective, and non-partisan. (There were also allegations of want of competence, which I did not think had any merit.)

[38] The Wises submit that all of Abbott's experts are biased and partisan and that their evidence should be given little weight. They submit that Abbott's experts are not objective, independent, and non-partisan and rather are connected with industry-affiliated groups. The Wises submit that the experts' support for AndroGel™ was self-interested.

[39] About the alleged partisanship or non-independence of Abbott's expert witnesses, it is true that various testosterone manufacturers, including Abbott, have paid Dr. Morgentaler for clinical trial research, consulting and feedback on scientific advisory boards. It is also true that pharmaceutical companies that sell testosterone products or that are developing testosterone products have sought Dr. Morgentaler's expertise, and as disclosed in his expert's report, he has served as a paid consultant for pharmaceutical companies and as a member of scientific advisory board committees. It is a fact that Dr. Morgentaler advocates the use of testosterone replacement for what the Wises submit is the prescribing of testosterone for non-hypogonadal men and disease mongering, but which Dr. Morgentaler describes as a treatment for hypogonadism. Dr. Morgentaler's advocacy for testosterone replacement was advanced at an open meeting of the

United States Food and Drug Administration's advisory panel looking into testosterone and cardiovascular harms. He wrote a book entitled: *Testosterone for Life: Recharge your Vitality, Sex Drive, Muscle Mass and Overall Health*. He founded the Androgen Group, which issued press releases and petitioned journals to retract articles about risks associated with testosterone treatment, which risks he regarded as unsubstantiated.

[40] It is also fair to say that Dr. Morgentaler, Dr. Greenberg, and Dr. Brock are promoters of the use of testosterone products for aging males. In his book, Dr. Morgentaler stated that if a man presents with symptoms of low testosterone, he deserves a trial of testosterone therapy.

[41] As noted above, Dr. Greenberg is the president of what was formerly known as the Canadian Andropause Society and, as will be noted below, "andropause" is a contentious issue in the medical science community and connotes the idea of male menopause, the existence of which is strenuously disputed. Dr. Greenberg is a founding member of the American Society for Men's Health and the president of the Canadian Society for the Study of the Aging Male ("CSSAM") formerly known as the Canadian Andropause Society, and he chaired a panel that developed guidelines for primary care issues pertaining to men's health, of which testosterone deficiency was one. Although Abbott had no role in the development of these guidelines, which were drafted and commented on by expert clinicians in active practice, it agreed to sponsor the distribution of the guidelines to Canadian physicians after funding was sought from various sources. It is also true that Dr. Greenberg was invited to and attended three AndroGel™ advisory board meetings (the last in 2012) for which he received honoraria between $1,500 and $2,500 per meeting for time away from his practice. Dr. Greenberg also presented two accredited continuing health education talks to pharmacists on testosterone deficiency and received reimbursement from Abbott for travel and lodging to attend three educational meetings. With the financial support of Abbott, Dr. Greenberg attended meetings of the American Urologic Association, the International Society for Pharmacoeconomics and Outcomes Research (in Milan, Italy), and the International Society for Men's Health (in Nice, France).

[42] Dr. Brock is the treasurer of the International Society for Sexual Medicine ("ISSM"), and it is true that in in campaigning for this position he stated that close ties to industry was essential. As an expert in hypogonadism, Dr. Brock was asked to attend or chair several AndroGel™ advisory board meetings (first in 2005 and the last in 2013), and one of the topics discussed at the meetings was how to increase the sales of the drug. Dr. Brock received honoraria of approximately $2,500 to $3,500 per meeting to compensate for his time away from clinical practice. The total honoraria Dr. Brock received was in the range $11,500 to $13,500 over an eight-year period. Various testosterone manufacturers, including Abbott's competitors (but not Abbott), and non-industry sources have funded the clinical trials conducted by Dr. Brock. The funding is paid to the Western University, Department of Surgery, and Dr. Brock receives no personal compensation for any grant money for clinical trials; all the money goes to cover clinical trial costs for Dr. Brock's experiments.

[43] It is true that Dr. French received industry grants for the costs of clinical trial research conducted through the laboratory arm of his practice at UCLA. In 2013 and 2014, he received in excess of half a million dollars in grants from pharmaceutical and medical device companies. However, Dr. French has never personally received compensation of any kind from testosterone manufacturers for any of his clinical or research work on testosterone deficiency and testosterone replacement treatment.

[44] It is true that Dr. Marais is a professional witness in the sense that he has been frequently retained to provide opinions for pharmaceutical and tobacco manufacturers.

[45] It is true that Ms. Tomalin's career is about providing regulatory advice to pharmaceutical and medical device manufacturers and she has frequently been retained as a professional witness for pharmaceutical companies including other retainers from Abbott.

[46] Dr. Milne, the Wises' expert, opined that the clinical judgment and opinions of Drs. Morgentaler, Brock, and Greenberg was questionable due to conflicts of interest. The Wises submit that the physicians testifying for Abbott have built their academic, clinical, and professional practices on promoting testosterone treatments and that they have substantial intellectual and financial conflicts of interests in opining in favour of AndroGel™. Further, the Wises submit that Dr. Brock's failure to reveal his ties to Abbott and in particular his involvement with the marketing of AndroGel™ was dishonest and his evidence should be disregarded. The Wises submit that Dr. Greenberg's failure to disclose his relationship with the pharmaceutical industry was misleading and dishonest and that his evidence ought to be given no weight.

[47] For its part, Abbott submits that Dr. Milne and Dr. Mintzes are not independent experts and rather are biased and partisan witnesses. Abbott's experts challenge both the competence and the objectivity of Dr. Mintzes and Dr. Milne. In attacking Dr. Milne's qualifications as an expert witness, Abbott's witnesses were very dismissive of his credentials to comment about the treatment of low testosterone and to review the scientific literature. In attacking Dr. Mintzes' qualifications as an expert witness, Abbott submits that she has an "obvious anti-pharmaceutical agenda" and it relied on the fact that her fee for providing her opinion for this litigation was 10% of her annual income. Abbott suggested that a large portion of Dr. Mintzes' career has been dedicated to criticizing the pharmaceutical industry and the industry's direct-to-consumer advertising, and they point out she has not published a single peer-reviewed article about cardiovascular risk and that her only peer-reviewed article about testosterone, "Disease mongering and low testosterone in men", concerns the perceived negative effects of advertising. Abbott criticizes Dr. Mintzes for disclosing in her report that she made a complaint to Health Canada about Abbott's advertising of AndroGel™, but failed to disclose that the complaint was rejected.

[48] Abbott suggests as an example of Dr. Mintzes' animosity toward the pharmaceutical industry is the fact that she was the lead author of a letter of complaint to the Pharmaceutical Advertising Advisory Board in June, 2011 that was copied to Health Canada. The authors of the letter, who included representatives of consumer organizations and professors of medicine, philosophy, health policy, bioethics and pharmacology from Canada, the U.S, England, and Australia, complained about an advertising campaign for AndroGel™. Dr. Mintzes objected to the advertising campaign with the headline "Lost that Loving Feeling?" that ran in the *Globe & Mail* in June and July of 2011. She contended that the ads were promoting unapproved uses of AndroGel™. Dr. Mintzes said that the advertisement was an example of disease mongering, the "widening of disease boundaries of treatable illness in order to sell a product" but Abbott pointed out that while Dr. Mintzes mentioned her letter in her opinion, she did not mention that Health Canada declined to take any action after it receiving the letter.

[49] The Wises, however, did not ask that Abbott's experts be disqualified for partisanship; rather, they just ask that no weight be given to their evidence because of partisanship. Similarly,

Abbott did not ask that the Wises' experts be disqualified for partisanship; rather, it just asks that no weight be given to their evidence because of partisanship.

[50] Thus, both parties make vigorous attacks against the impartiality of their opponent's expert witnesses and there is some factual basis for those attacks; however, both parties ask just that I simply weigh the partisanship as a factor when weighing the evidence of their opponent.

(c) Discussion and Analysis – The Alleged Partisanship of the Expert Witnesses

[51] There is no doubt that Abbott's witnesses have connections with the pharmaceutical industry and are proponents for the use of AndroGel™ as a treatment for hypogonadism, which, as I shall explain below, they expansively define. And, there is no doubt that Dr. Mintzes and Dr. Milne, who do not oppose the use of AndroGel™ for hypogonadism - narrowly defined - are advocates for protecting the interests of the consumers of pharmaceuticals and vigorously oppose the sale of AndroGel™ for LowT, which they do not accept is a form of hypogonadism and rather regard as disease mongering. There is no doubt that that the parties' respective experts vigorously oppose the views of the opposing experts, and the experts have little respect for the professional integrity and opinions of their opponents.

[52] What the court is to do about these circumstances is the question. To answer this question, it is necessary to review the law about the admission of the opinion evidence of experts including the law about the qualification to give expert evidence.

[53] As a general rule, opinion evidence is not admissible; witnesses testify as to the facts which they perceived, not as to the inferences -- that is, the opinions -- that they drew from their perceptions: *Graat v. The Queen*, [1982] 2 S.C.R. 819. There is, however, an exception for witnesses duly qualified to express an expert's opinion: *R. v. Abbey*, [1982] 2 S.C.R. 24. As confirmed by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, there is a two-stage test for the admission of opinion evidence.

[54] In the first stage, (the threshold stage), the litigant proffering expert evidence must satisfy the four factors from *R. v. Mohan*, [1994] 2 S.C.R. 9 which are: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of an exclusionary rule; and (4) qualification as an expert. There is a fifth factor from *Mohan* in cases in which the expert's opinion is based on novel or contested science or science used for a novel purpose, and in these cases, the reliability of the underlying science for that purpose must be established: *White Burgess Langille Inman v. Abbott and Haliburton Co., supra* at para. 23; *R. v. J.-L.J.*, 2000 SCC 51; *R. v. Trochym*, 2007 SCC 6.

[55] In the second stage, (the gatekeeper stage), the court makes a cost-benefit discretionary decision weighing the probative value of admitting the evidence against the potential adverse impacts of admitting the evidence including the consumption of time, prejudice, and the risk of confusing the trier of fact.

[56] In the immediate case, the problem of the respective attacks made on the opposing expert witnesses is associated with the fourth of the *Mohan* criteria in the threshold stage of the qualification of the witness as an expert. For the fourth criteria to be satisfied, two factors must be satisfied. First, the witness must be shown to have acquired special or peculiar knowledge through experience or study in respect of the matters on which he or she will testify: *R. v. Mohan, supra* at para. 27. Second (as codified by rule 4.1.01 in Ontario), the witness must be

independent, objective, and impartial, which non-partisanship will be assumed if the witness acknowledges his or her duties to the court. In the case at bar, the problem is about the non-partisan factor.

[57] In *White Burgess Langille Inman v. Abbott and Haliburton Co., supra,* Justice Cromwell explained that independence and impartiality of the proffered expert witness are to be considered at the threshold stage and not left as a matter going to the weight to be given to the expert's witness's testimony; i.e., it was not to be left to the assessment of the reliability of the expert's witness's testimony after the evidence is admitted. For present purposes, this is a very important point because before *White Burgess Langille Inman,* there were conflicting lines of authority about how the question of the independence and impartiality of the expert was to be treated.

[58] It seems that in the case at bar, both parties were relying on the line of authorities, which holds that except in egregious cases, the expert's independence and impartiality goes to weight rather than to admissibility. See: *Gallant v. Brake-Patten*, 2012 NLCA 23; *R. v. Klassen*, 2003 MBQB 253; *Andersen v. St. Jude Medical, Inc*., 2010 ONSC 5768; *Carmen Alfano Family Trust v. Piersanti,* 2012 ONCA 297 at para. 110; *Henderson v. Risi,* 2012 ONSC 3459. I emphasize, however, that the Supreme Court rejected this approach in *White Burgess Langille Inman*.

[59] In *White Burgess Langille Inman v. Abbott and Haliburton Co., supra,* the facts were that after the shareholders of Abbott and Haliburton Co. retained an accountant from the accounting firm of Grant Thornton LLP to audit the corporation's books, the accountant advised them that there were problems in the accounting previously done by the firm of White Burgess Langille Inman. The shareholders then sued White Burgess Langille Inman for professional negligence, and on a summary judgment motion, the shareholders proffered the expert evidence of Susan MacMillan, another accountant from Grant Thornton LLP. In a decision reversed by the Nova Scotia Court of Appeal, the motions judge ruled Ms. MacMillan was not qualified to provide independent and impartial expert evidence. Justice Cromwell, writing the judgment for the Supreme Court, affirmed the decision of the Nova Scotia Court of Appeal and held that Ms. MacMillan's opinion was admissible.

[60] Justice Cromwell's analysis was as follows. An expert witness has a special duty to the court to provide fair, objective and non-partisan assistance. This special duty is comprised of impartiality, independence, and the absence of bias. The expert must be impartial in the sense that he or she is expressing their own unbiased professional objective assessment. The expert must be independent in the sense that his or her opinion is the product of their own, independent judgment based on their own knowledge and judgment and uninfluenced by the litigant who retained them. The expert must be unbiased in the sense that he or she does not favour one litigant's position over another. The fact that an expert is paid by one of the litigants does not, standing alone, undermine the expert's impartiality, independence, or freedom from bias.

[61] Continuing his analysis, Justice Cromwell stated that a proposed expert witness who is unable or unwilling to comply with these duties of impartiality is not qualified to give expert opinion evidence and should not be permitted to do so. If a witness is unable or unwilling to fulfill their duties, he or she does not qualify to perform the role of an expert and should be excluded. Concerns about a witness's impartiality, independence, and bias should be addressed as a threshold requirement for admissibility. Absent a challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that the threshold test has been met. The burden is then on the litigant opposing the admission of the

evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable or unwilling to comply with his or her duty. If the opponent meets this burden of showing a realistic concern, then the litigant proffering the witness must demonstrate that the expert is impartial, independent and unbiased. If this is not done, the expert's evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded.

[62] In determining whether the threshold requirement is satisfied the judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. It is the nature and extent of the interest or connection with the litigation or a litigant that matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. Finding that expert evidence meets the basic threshold, however, does not end the inquiry and at the gatekeeping stage of the two-pronged test for the admissibility of expert evidence, the judge may take concerns about the expert's independence and impartiality into account in determining whether to admit the evidence. Ultimately, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

[63] Justice Cromwell summarized his approach at various stages of his judgment. He stated at paras. 10, 45, and 49:

> 10. In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. …
>
> ….
>
> 45. Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. …. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility".
>
> 49. This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In

> most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[64] Coming to the case at bar, one conclusion I take from Justice Cromwell's judgment in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, is that in the immediate case, the arguments of both parties are analytically misconceived. In making their respective arguments, having cocked their rifle with strident submissions that their opponent's experts are partial, dependent, and biased, the Wises and Abbott respectively do not pull the trigger to have the witnesses disqualified and excluded and rather they respectively just ask that no weight be given to their evidence because of the witnesses' partisanship.

[65] In my opinion, this approach advanced by both parties is misconceived, illogical, intellectually dishonest, and inconsistent with the trend of the modern case law, which is to tighten the admissibility requirements and not to leave evidentiary matters to the weight to be given the evidence. It strikes me as a *non-sequitur* to conclude that an expert is a partisan but then to admit his or her evidence and give it little or no weight. Having concluded that a witness is not independent, objective or neutral, it is hard to see how the court could give some weight to his or her evidence. It is a threshold requirement that the court be satisfied that a proposed expert witness be able and willing to comply with his or her duties to the court, and if a witness is unable or unwilling to fulfill their duties, he or she does not qualify to perform the role of an expert and his or her evidence should simply be excluded and it should not be put on the scales of justice.

[66] An expert's objectivity, independence, and non-partisanship are pre-conditions for admissibility: *Deemar v. College of Veterinarians Ontario,* 2008 ONCA 600; *R. v. Docherty,* 2010 ONSC 3628; *R. v. L.K.*, 2011 ONSC 2562. See, in particular, Justice Romilly's superb analysis of the issues in *United City Properties Ltd. v. Tong*, 2010 BCSC 111.

[67] To avoid misunderstanding, it is necessary to point out that if the expert passes the threshold and the gatekeeper tests and his or expert's testimony is admitted, it does not follow that the court must give it full weight and credit. There may be other reasons to give the expert witness's testimony little or no weight, including the straightforward reason that the witness was not persuasive and his or her opinion was just not helpful. And it is also necessary to point out that if the expert passes the threshold and is qualified to give evidence and does give evidence, he or she may later be revealed, possibility during cross-examination, to have become impartial and partisan and then the trial judge should give no weight to the discredited or disqualified expert's testimony.

[68] In the immediate case, given the vigorous attacks made on the qualifications of the various experts on the grounds of lack of independence, which as noted above, have some factual traction, I do not agree with the parties that I can admit the evidence and then give it diminished weight; my choices are to admit the evidence if I conclude that the expert is qualified or to exclude it in its entirety if I conclude that the expert is not qualified to give opinion evidence. This means in the case at bar that I must move beyond my conclusion that the allegations of partisanship have factual traction to determine whether the facts actually establish that the expert is not qualified to give opinion evidence.

[69] I begin that analysis by saying that none of the experts is so closely related to the litigants that there is an immediate apprehension of partisanship. In *Deemar v. College of Veterinarians of Ontario* (2008), 92 O.R. (3d) 97 (C.A.), Justice Juriansz stated at para. 21 that the court "may refuse to qualify a person of unquestioned expertise who is closely related to the tendering party". The case at bar is not a case like *R. v. Docherty*, *supra*, where defence counsel proposed to introduce a psychiatric report authored by his father, who was the psychiatrist called for the defendant. In that case, the expert's evidence could not be seen to be the independent product of the expert uninfluenced by the exigencies of litigation. See also: *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.); *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.), varied (2000), 138 O.A.C. 28 (C.A.).

[70] The case at bar is the type of case that requires a factual inquiry into whether impartiality does, in fact, exist. In *United City Properties Ltd. v. Tong*, *supra,* Justice Romilly described how a judge might go about screening for impartiality. He stated at paragraph 49:

> 49. Several options are suggested for logically situating the impartiality screening in the overall expert qualification analysis: it could be subsumed into the discussion of the necessity or reliability criteria; it could be treated in the context of the trial judge's residual discretion to exclude overly prejudicial evidence; or, preferably, it could be elevated to become a fifth criterion for qualification of the expert witness. While the authors [Casey Hill et al., *McWilliams' Canadian Criminal Evidence*, looseleaf (Aurora, Ontario: Canada Law Book, 2009)] do not suggest a particular test, they do list 14 factors which might warrant consideration when ascertaining bias and impartiality. ….:
>
> > (1) the nature of the stated expertise or special knowledge;
> >
> > (2) statements publicly or in publications regarding the prosecution itself or evidencing philosophical hostility toward particular subjects;
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> > (3) a history of retainer exclusively or nearly so by the prosecution or the defence;
> >
> > (4) long association with one lawyer or party;
> >
> > (5) personal involvement or association with a party;
> >
> > (6) whether a significant percentage of the expert's income is derived from court appearances;
> >
> > (7) the size of the fee for work performed or a fee contingent on the result in the case;
> >
> > (8) lack of a report, a grossly incomplete report, modification or

> withdrawal of a report without reasonable explanation, a report replete with advocacy and argument;
>
> (9) performance in other cases indicating lack of objectivity and impartiality;
>
> (10) a history of successful attacks on the witness's evidence;
>
> (11) unexplained differing opinions on near identical subject matter in various court appearances or reports;
>
> (12) departure from, as opposed to adherence to, any governing ethical guidelines, codes or protocols respecting the expert witness's field of expertise;
>
> (13) inaccessibility prior to trial to the opposing party, follow through on instructions designed to achieve a desired result, shoddy experimental work, persistent failure to recognize other explanations or a range of opinion, lack of disclosure respecting the basis for the opinion or procedures undertaken, operating beyond the field of stated expertise, unstated assumptions, work or searches not performed reasonably related to the issue at hand, unsubstantiated opinions, improperly unqualified statements, unclear or no demarcation between fact and opinion, unauthorized breach of the spirit of a witness exclusion order; and
>
> (14) expressed conclusions or opinions which do not remotely relate to the available factual foundation or prevailing special knowledge.

[71] Impartiality is a question of fact. Absent an obvious partisan relationship, what the court must do is undertake a factual inquiry as to whether or not there is an actual partisan relationship. In undertaking this inquiry, courts recognize and accept that experts are called by one party in an adversarial proceeding and are generally paid by that party to prepare a report and to testify. Thus, as noted by Justice Cromwell in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, *supra*, the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. The alignment of interest of an expert with the retaining party is not, in and of itself, a matter that will necessarily encroach upon the independence or objectivity of the expert's evidence: *Carmen Alfano Family Trust v. Piersanti*, *supra* at para. 106. That the proposed expert is paid or has an employment relationship or has a pre-existing relationship with a litigant is something to be examined, but it is does not necessarily entail that the witness cannot or will not comply with his duty to the court when giving expert evidence.

[72] Having reviewed the evidence in the immediate case, should I then disqualify and refuse to admit the evidence of any of the expert witnesses because I am satisfied that he or she is unable or unwilling to provide the court with fair, objective and non-partisan evidence? Having considered the above factors that are relevant to this determination, I conclude that the answer to this question is “no”.

[73] Apart from the fact, that both parties did not ask that any witnesses be treated as unqualified, I am satisfied that they all were able and willing to provide the court with fair, objective, and non-partisan evidence. Neither party met the burden of showing that there is a realistic concern that the expert's evidence should not be received because the expert was unable

or unwilling to comply with his or her sworn duty.

[74] While the opposing experts were sharply critical of their competitors' opinions, the competing opinions were not that far apart, at least in the sense that they were based on the same data and information and in the sense that there was agreement about the data that should be analyzed and general agreement about the methodology of analysis. In any event, etiology and epidemiology, which are explained below, are matters about which reasonable persons may differ.

[75] Further, in this last regard, etiology and epidemiology are ultimately matters about interpretation and reasoned argument, and in the case at bar both sides' methodologies of analysis and argument were conventional. Using the same data, there was consensus that there were limitations in all of the medical science studies of the data. Using the same data, there was a consensus that notwithstanding the limitations in the studies that an association between testosterone and serious cardiovascular events had been established, there was consensus that association is, however, not proof of general causation. Using the same data, neither side had data to work with that was overwhelmingly convincing to support their respective opinions.

[76] Moreover, there was a consensus that testosterone replacement treatments were appropriate for classical hypogonadism. There was no suggestion from any witness that AndroGel™ should be recalled or removed from the marketplace and not be available for the treatment of classical hypogonadism, and the controversy narrowed to whether AndroGel™ was negligently being sold for the treatment of a possibly age-related decline in testosterone. The essential dispute between the parties was about the adequacy and appropriateness of the information and warnings in AndroGel™'s product monograph beyond the product's use for classic hypogonadism.

[77] Using the same data, both parties emphasized the analysis of the regulators. In an extremely significant consensus, although the litigants differed somewhat in the significance to be given to the information, there was agreement that in providing an opinion that might be helpful to the court, the most reliable and valuable analysis was that of the regulators; i.e., Health Canada, the United States Food and Drug Administration ("FDA"), and the European Medicines Agency ("EMA"). Although both parties differed in their interpretations, they both relied heavily and borrowed extensively from what the regulators both said and did and also about what the regulators did not do about testosterone products. Given that the expertise, independence, and impartiality of the scientists working for the regulators was not doubted and given that unlike some products liability class actions, the regulator was not a party, the borrowing of the regulator's opinions diminished concerns of impartiality in the competing opinions.

[78] I was impressed with the qualifications, credentials, and experience of all of the witnesses and not impressed with Abbott's submissions that Dr. Mintzes and Dr. Milne were expressing opinions outside their areas of expertise.

[79] The scientific method is built on skepticism, and it is a good thing and not a bad thing that there are scientists like Dr. Mintzes that are sceptics about the claims made by pharmaceutical companies, who, for their part, do nothing wrong in having commercial motivations. But, if they are to be good corporate citizens, they should have the attitude of inviting and not avoiding the scrutiny of the sceptics like Dr. Mintzes.

[80] There is no necessary evil in pharmaceutical companies providing funding for research to

study the safety and efficacy of their products. For clinical researchers, there are often little to no other sources of funding, such as government grants, available for research trials, so it is understandable they would not refuse industry support in the research projects, but it is a good thing to civil society that there remain scientists like Dr. Mintzes and Dr. Milne prepared to be critics even if they are regarded as devil's advocates by the pharmaceutical industry. That said, the sceptics and critics cannot cross the line of losing their professional detachment and objectivity and must provide reasoned criticism of the industry sponsored research projects. In my assessment, Dr. Mintzes and Dr. Milne did not cross the line.

[81] Equally, provided they too do not cross the line, it is a good thing and not a bad thing that some doctors and scientists accept the funding from the pharmaceutical companies and conduct the research trials and that they serve on advisory boards for the pharmaceutical companies. In the development of drugs and medical devices, there is a push and pull relationship between the medical and scientific community, and it is not always clear who is pushing or pulling for the development of the product. The modern Hippocratic oath requires a physician to "respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow." Drs. Morgentaler, Greenberg, and Brock are promoters of the use of testosterone products for aging males. Their advocacy is not a purchased advocacy and rather appears to be a genuine belief based on clinical observation and their own study that it is in the interests of their patients to receive testosterone replacement treatments.

[82] An expert's alleged impartiality and want of independence must be scrutinized and is a matter of factual determination on a case by case basis. As already noted, in the immediate case, there is factual traction for an argument that several of the witnesses may have crossed the line and entered the forbidden territory of being advocates for the litigant who retained them, but in the end these arguments were misconceived and they did not succeed and none of the expert witnesses should be disqualified.

[83] I, therefore, shall admit the evidence of all of the experts.

3. The Multiplicity of Defendants' Experts

[84] Section 12 of the *Evidence Act* states:

> *Expert evidence*
>
> 12. Where it is intended by a party to examine as witnesses persons entitled according the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.

[85] Abbott delivered their first round of affidavits from each of their expert witnesses on September 30, 2015 in accordance with the scheduling order of Justice Leach, who was then case managing this action. Almost one year later, relying on s. 12 of the *Evidence Act*, R.S.O. 1990, c. E.23, the Wises objected that the number of defence experts exceeded the three permitted without first obtaining leave of the court.

[86] Candidly, I can say that had I been asked for leave before the argument of the summary judgment motions, I probably would have refused leave. With the Wises' complying with s. 12 of the *Evidence Act* with two experts and having been buried under the mound of 19 reports

delivered by Abbott's seven expert witnesses, with the benefit of hindsight that would have been the right decision. However, under s. 12, leave may be granted at any time, and, in my opinion, this is an appropriate case to grant leave notwithstanding that I would not have granted if it had been sought at the appropriate time.

[87] See *Reid v. Watkins*, [1964] 2 O.R. 249 (H.C.J.); *Burgess (Litigation guardian of) v. Wu*, [2005] O.J. No. 929 (S.C.J) for case law about s. 12. In *Burgess (Litigation guardian of) v. Wu*, Justice Ferguson described the factors to consider when a request for leave to call more than three expert witnesses is made; namely: (a) whether the opposing party objects to leave being granted; (b) the number of expert subjects in issue; (c) the number of experts each side proposes to have opine on each subject; (d) how many experts are customarily called in cases with similar issues; (e) whether the opposing party will be disadvantaged if leave is granted because the applying party will then have more experts than the opposing party; (f) whether it is necessary to call more than three experts in order to adduce evidence on the issues in dispute; (g) how much duplication there is in the proposed opinions of different experts; and (h) whether the time and cost involved in calling the additional experts is disproportionate to the amount at stake.

[88] Although in the immediate case, there was a great deal of redundant evidence and more experts than necessary from Abbott to adduce the evidence that was necessary to decide the issues on the summary judgment motion, nevertheless, I grant leave for more than three experts because, at the end of the day, I conclude that the Wises' would not be disadvantaged by granting leave and because, practically and metaphorically speaking, after a six-day hearing, it is too late and not fair to shut the evidentiary barn door and stable some of Abbott's experts or even possible to choose how many to stable. Until recently, the Wises were content to respond to Abbott's deluge of experts with just two of their own, and, therefore, I grant Abbott leave to call more than three witnesses.

D. FACTUAL BACKGROUND

1. Norman Wise

[89] On August 28, 2013, Mr. Wise, who was 67 years' old man at the time, was prescribed AndroGel™ as treatment for testosterone deficiency. Mr. Wise had cardiovascular risk factors including being overweight, high cholesterol, high blood pressure, and a past history of smoking. It was later discovered that he had severe atherosclerosis.

[90] Mr. Wise had seen a TV commercial about AndroGel™ and asked his family physician whether it might respond to his symptoms of fatigue and falling asleep early in the evening. His testosterone level was tested, and it was found to be on the low end (6.6 units) of the normal range of 6.0 units to 27 units. He was prescribed AndroGel™ and used it for one month. He did not renew his prescription because it was not making him feel better.

[91] On October 10, 2013, Mr. Wise suffered a myocardial infarction complicated by a ventricular septal defect. He underwent two operations and spent many weeks in the hospital.

[92] Mr. Wise testified that he would never have considered using AndroGel™ were it not for the misleading promises of Abbott. He said that he would not have used AndroGel™ had he been warned of its potential to cause or contribute to his having a heart attack.

[93] It was Dr. Milne's theory that the testosterone replacement therapy could have changed

Mr. Wise's coronary vascular tone and flow, destabilizing and rupturing the plaque from the atherosclerosis and contributing to Mr. Wise's heart attack.

2. The Proposed Class Action

[94] In January 2014, as described in more detail below, there was considerable media attention to the issue of whether testosterone medications increased the risk of serious adverse cardiovascular events.

[95] On June 26, 2014, the Wises commenced their proposed class action against Abbott. The action was brought on behalf of the following Class:

> (i) All persons in Canada who were prescribed and used AndroGel™ at any time, which was manufactured, marketed, sold and/or otherwise placed into the stream of commerce in Canada by the defendants; and
>
> (ii) All persons in Canada who by virtue of a personal relationship to one or more of such persons described above, have standing in this action pursuant derivative legislation in their jurisdiction (i.e., in Ontario, s. 61(1) of the *Family Law Act*).

[96] The Wises claim damages of $500,000 for each Class Member prescribed AndroGel™ plus punitive damages of $60 million. The Plaintiffs have not pleaded the existence of any contract with Abbott for the purchase of AndroGel™, and their position is that they are not asserting a negligent misrepresentation claim. Their causes of action are common law negligence and unjust enrichment. They claim waiver of tort as an alternative to damages.

[97] The Wises allege that Abbott represented that AndroGel™ is a safe and effective treatment of age-related hypogonadism and / or so-called "LowT", when in fact the drug causes serious medical problems, including life-threatening cardiac events, strokes, and thrombolytic events. The Wises allege that to increase sales, Abbott and other pharmaceutical companies manufacturing testosterone therapies have engaged in "disease-mongering," i.e., marketing campaigns to alert physicians and consumers about the under-diagnosis of "LowT" and associated grave health risks. The Wises allege that Abbott's marketing strategies misled consumers about the prevalence and symptoms of low testosterone and failed to protect users from serious dangers that Abbott knew or ought to have known would result from the use of AndroGel™. They allege that Abbott knew that AndroGel™ is not effective in relieving symptoms associated with aging that do not derive from genuine hypogonadism.

[98] In his Statement of Claim, Mr. Wise refers to four studies that suggest that testosterone replacement therapy in men increases the risk of cardiovascular and thrombolytic events; namely:

- (1) the Basaria Study (Shehzad Basaria, *et al*, "Adverse Events Associated with Testosterone Administration" , N. Engl. J. Med., 2010);
- (2) the Xu Study (Lin Xu, *et al*, "Testosterone Therapy and Cardiovascular Events among Men: A Systematic Review and Meta-Analysis of Placebo-Controlled Randomized Trials", BMC Medicine, 2013);
- (3) the Vigen Study (Rebecca Vigen, *et al*, "Association of Testosterone Therapy with Mortality, Myocardial Infarction, and Stroke in Men with Low Testosterone Levels",

Journal of the American Medical Association 2013); and,

- (4) the Finkle Study (William D. Finkle, *et al*, "Increased Risk of Non-Fatal Myocardial Infarction Following Testosterone Therapy Prescription in Men", PLOS One, 2014).

[99] For the summary judgment motion, the Wises' experts referred to numerous other epidemiological studies, as did Abbott's experts.

3. Hypogonadism and Testosterone Therapy

[100] Testosterone is an anabolic, androgenic, endogenous hormone. That testosterone is anabolic means that in the process known as metabolism, it brings together, i.e., synthesizes molecules to form human tissue. (In metabolism, anabolism is the chemical reaction that synthesizes molecules.) That testosterone is androgenic means it is classified as a so-called male hormone. The androgens include: testosterone, dihydrotestosterone (DHT), androstenedione, 11-ketotestosterone, and dehydroepiandrosterone (DHEA). Although it is thought of as a male hormone, testosterone is naturally produced in both men and women. Androgens are responsible for the growth spurt of adolescence and for the eventual termination of linear growth brought about by fusion of the epiphyseal growth centers. Testosterone is responsible for the development of male sexual characteristics. That testosterone is endogenous means that it is produced internally by a body organ. In males, that organ is the gonads (the testicles).

[101] "Hypogonadism" is a deficiency or absence of endogenous testosterone in males. Hypogonadism is characterized by a low serum testosterone level in combination with various symptoms, such as decreased libido, erectile dysfunction, reduced muscle mass and strength, and increased body fat, and weight gain.

[102] A major dispute between the parties is that they will not come to terms about the pathology of hypogonadism. The parties agree that naturally occurring testosterone is a factor in energy, strength, stamina, and mood and is responsible for male sexual characteristics and a factor in sexual desire and sexual functioning. They agree that hypogonadism is a medical condition marked by low testosterone levels and that the symptoms of hypogonadism include loss of energy, fatigue, weakness, sleep disorders, regression of secondary sexual characteristics, reduced muscle mass, increased body fat, loss of height, mood disorders, depression, irritability, decreased motivation, decreased sexual desire, erectile dysfunction, and delayed ejaculation. The parties agree that hypogonadism; i.e., low testosterone and its symptoms, can be caused by genetic disorders, Klinefelter's Syndrome, pituitary injury, or poorly functioning testicles from mumps, or damage to the testicles, which they both describe as "classic hypogonadism".

[103] For over 50 years, classic hypogonadism has been treated by testosterone replacement treatment ("TRT"), which is to say hypogonadism has been treated by administering non-endogenous (produced outside the body) testosterone to elevate the amount of testosterone to its naturally occurring level. The parties agree that this treatment is appropriate provided that adequate warnings are given about side effects and risks.

[104] Where the parties vehemently disagree is about whether low testosterone and its symptoms caused by natural aging is also a type of hypogonadism.

[105] Low testosterone and its associated symptoms caused by aging has sometimes been called secondary hypogonadism, testosterone deficiency syndrome, or "andropause," which is a

phrase coined to mean "male menopause," the existence of which is a matter of controversy. The Wises and their experts dispute that so-called andropause is pathological; rather they say andropause is a fabrication of a disease made up by pharmaceutical companies for commercial purposes. The Wises through their experts, particularly Dr. Mintzes, accuse Abbott of "disease mongering" in order to increase its sales of AndroGel™. The Wises submit that while AndroGel™ has been approved for and is effective in treating classical hypogonadism, which is an actual medical condition, AndroGel™ is neither indicated for, nor beneficial in respect of alleviating the symptoms of LowT caused by a man getting older.

[106] For its part, Abbott and the manufacturers of testosterone replacement treatments assert low testosterone along with the associated symptoms caused by aging, call it what you will, is an instance of hypogonadism. Thus, while the Wises submit that Abbott and other pharmaceutical manufacturers intentionally conflate hypogonadism with LowT or andropause, Abbott, and their expert witnesses, Drs. Morgentaler, French, Brock, and Greenberg deny any misclassification and define "hypogonadism" as synonymous with testosterone deficiency syndrome, andropause, and LowT.

[107] It is a source of all of confusion, controversy, and litigation that the parties, their experts, the regulators of the pharmaceutical industry, the scientific and medical community appear to differ on whether testosterone replacement treatment is indicated only for classical hypogonadism or whether testosterone replacement treatment is also indicated for low testosterone that occurs by natural aging. The fact that the parties disputed whether or not AndroGel™ was indicated not only for classical hypogonadism but also age-related hypogonadism, non-classical hypogonadism, testosterone deficiency syndrome, andropause, LowT, or whatever it might be called, led to disputes about whether AndroGel™ was being sold for off-label uses and about whether it had any efficacy for treating other than classical hypogonadism caused by accident or specific ailments.

[108] It is not for courts to decide what is or is not a disease or a medical syndrome, and to quote from Shakespeare, the submissions of both parties were "full of sound and fury" and there was much furious talk of no importance and little or no meaning about what is hypogonadism. I am glad to say that for the purposes of the summary judgment motion, I do not have to decide what is the pathology of hypogonadism and rather I find that doctors were not prescribing AndroGel™ for off-label indications. In other words, physicians are diagnosing their clients as having low testosterone and a set of symptoms and the physicians are prescribing AndroGel™ as the treatment for that diagnosis.

[109] For the purpose of this motion, the fundamental issue to be determined is not that of defining hypogonadism; rather the issue is whether the prescriptions of AndroGel™ can be the cause of serious cardiovascular events. For present purposes, I do need to describe the heated debate about the nature of hypogonadism because it is an actual part of the factual narrative, but I need to keep in mind that the underlying issue is not about what counts for hypogonadism but the ultimate issues are whether, as a matter of general causation, AndroGel™ can cause serious cardiovascular events and whether the sale of an allegedly useless but risky product, AndroGel™, can support a product's liability negligence claim for pure economic loss.

4. Serious Cardiovascular Events

[110] Abbott's summary judgment motion is essentially built on the argument that the Wises

have not proven on a balance of probabilities that testosterone replacement treatments, including AndroGel™, can cause serious cardiovascular events. It is, therefore, necessary to understand what is presently known about the causes of serious cardiovascular events, much of which is not controversial.

[111] Coronary artery disease is the number one cause of death. It is thought to begin with damage or injury to the inner layer of a coronary artery caused by various factors, including: sedentary lifestyle, obesity, smoking, high blood pressure, high cholesterol, diabetes, insulin resistance, and radiation therapy for cancer treatments. Once the inner wall of an artery is damaged, fatty deposits or plaque made of cholesterol and other cellular waste products tend to accumulate at the site of injury in a process called atherosclerosis. If the surface of these plaques breaks or ruptures, blood cells called platelets will clump at the site to try to repair the artery, but frequently these clumps of platelets mix with fibrin stands in the bloodstream and block the artery, leading to a heart attack.

[112] There are many known risk factors for coronary artery disease, including age, smoking, hypertension, diabetes, and obesity. Risk factors often occur in clusters and may build on one another, such as obesity leading to diabetes and high blood pressure. A family history of heart disease is associated with a higher risk of coronary artery disease especially if a close relative developed heart disease at an early age. A patient's risk is highest if their father or a brother was diagnosed with heart disease before age 55 or a mother or a sister developed coronary artery disease before age 65.

[113] In his report, Dr. French stated that low endogenous bioavailable testosterone levels have been shown to be associated with higher rates of all-cause mortality and cardiovascular-related mortality and that patients suffering from coronary artery disease, diabetes, and obesity have all been shown to have lower levels of endogenous testosterone compared with those in healthy controls. In addition, he said that the severity of coronary artery disease and heart failure correlates with the degree of testosterone deficiency.

[114] All the experts agree that testosterone replacement therapy is not an accepted treatment of cardiovascular disease. Although it is not a cure, some of Abbott's expert witnesses believe, however, that testosterone replacement therapy may help reduce the likelihood of serious cardiovascular events.

5. Epidemiology and Types of Epidemiological Studies

[115] To decide this summary judgment motion, it was necessary to have an understanding of epidemiology, most of which I gained from the evidence and arguments of the parties. I shall describe this background knowledge in this section of my reasons. In describing this necessary information, which I needed in order to understand the competing experts' opinions, I was also aided by Justice Lax's judgment in *Andersen v. St. Jude, Medical Inc*., *supra*, Justice Osler's seminal judgment in *Rothwell v. Raes*, [1990] O.J. No. 2298 (C.A.), leave to appeal refused, [1991] S.C.C.A. No. 58 and the *Reference Manual on Scientific Evidence* (3rd ed.) prepared by the United States Federal Judicial Center, in particular, by that manual's *Reference Guide on Epidemiology* and by its *Reference Guide on Statistics*.

[116] Etiology is the study of cause or causes, and epidemiology is the branch of medical science that studies the etiology of diseases and that identifies risk factors for disease or medical

conditions. Epidemiology focuses on "general causation;" i.e., whether or not an agent has the capacity to cause a disease or medical condition rather than on "specific causation;" i.e., whether or not an agent did cause a disease or medical condition to be suffered by a specific person.

[117] Using a variety of different methodologies derived from the branches of mathematics that develop techniques for organizing and analyzing information, an epidemiological study determines whether there is an "association" between an agent and a condition, state or event including a disease or syndrome. An association between an agent and a condition exists when the agent and condition occur together more frequently than one would expect by chance. If an association is established, then information in the study is examined to determine whether or not the association can be explained as causal; i.e. as a matter of general causation. To determine general causation, the researcher uses a variety of statistical methodologies, discussed in the next section, and analytical tools including professional judgment and his or her knowledge from other fields of science.

[118] There are a variety of different methodologies for epidemiological studies. Regarded as the most reliable, i.e., the gold standard, is the "randomized controlled trial" or RCT, which is also called a clinical trial or a true experiment. In a RCT, participants are randomly assigned to two groups. One group, the study or case group, will be exposed to the agent and the other group, the control group, will receive a placebo or not be exposed to the agent. The assignments can sometimes be "double blind," in which case the participants and those conducting the study are not told who is receiving the drug or a placebo. This will be revealed after the data is evaluated and the idea is that double-blinding protects the objectivity of the analysis and reduces bias, of which more will be said below.

[119] There are ethical and practical constraints that may impose limits on an epidemiological study; viz., it may be unethical to prescribe a known-to-be dangerous agent. It may be necessary to stop a study early if the experiment is causing harm to the participants. It may be necessary to substitute cadavers or animals (*in vivo* studies) or grown or fabricated human or animal tissue (*in vitro* studies) for human subjects.

[120] The selection of the participants into the study group and the control group is of fundamental importance to the design of an epidemiological study. Epidemiology borrows from mathematics the idea of random sampling from a population of participants to make probabilistic conclusions about the population in the study group and in the control group. Randomization acts to equalize the prevalence of causal factors between the groups so that observed differences between the two groups can more reasonably be attributed to the difference in the treatment of the groups, since that is the only remaining difference, other than the outcomes, between the groups.

[121] In addition to RCTs, other types of epidemiological studies are observational studies of which there are several types including: a cohort study; a case-control study; a cross-sectional study; and an ecological study. An observational study can show association, but it cannot prove causation because it does do not have the benefit of genuine randomization and, therefore, known and unknown potential causes of observed differences between groups cannot be ruled out.

[122] In a cohort study, a study population is defined without regard to the participants' disease status and then divided into two groups, a group (the exposed group) that was exposed to a particular agent and a group that was not exposed (the control group) to that agent. The cohort

may be constituted from a past group or from a present group. The disease or condition status of the cohorts is then examined prospectively over a period of time. If the agent causes the disease or condition, more of the exposed group would be expected to develop the disease. An association between the agent and the disease may be inferred if more of the exposed group have the disease than the unexposed group than would be expected by chance.

[123] In a case-control study, a study population is defined, and then the study population is divided into the group that has the disease (the study group) and the group that does not have the disease (the control group). This type of study is denoted retrospective because it commences with the fact that the injury or illness exists and it looks backwards into the history of the cases and compares them with the history of members of a control group. In a case-control study, the ratio of those with the disease who were exposed to the agent to those with the disease who were not exposed (odds that a case was exposed) to the ratio of those in the control group exposed or not exposed is calculated. The researcher then compares how the study group and the control group proportionately responded to being exposed or not exposed to the agent. If the agent causes the disease or condition, then it would be expected that the ratio of exposed to the agent would be higher in the study group than in the control group. Case-control studies, which are retrospective and, therefore, subject to significant potential biases, are regarded as providing weaker epidemiological evidence than do cohort studies.

[124] The major difference between observational cohort studies and observational case-control studies is that cohort studies examine persons exposed and not exposed to the agent for the experience of the condition and case-control studies examine persons with or without the condition for the experience of exposure to the agent.

[125] An ecological study does not gather data about individuals but rather uses population data about groups. Rates of disease for different groups are studied to identify some difference between the groups that might explain the difference in the incidence of the disease or condition. The population data may have to be adjusted for differences in the demographics of the population.

[126] The weakest kind of epidemiological study is the case report or anecdotal episodes. These examine the presence of exposure to the agent and the condition in individuals at a single point in time. This type of study provides no information about cause or effect but may indicate areas for research.

[127] Another type of epidemiological study is the meta-analysis or systemic review. The meta-review pools information from epidemiological studies and seeks to draw general conclusions. A meta-analysis is a statistical procedure for combining a set of individual results from prior studies. Systemic reviews combine evidence but are only as valid as the included studies and the quality assessment of the included trials is a critical element.

[128] An epidemiological study begins with a research methodology to determine whether there is an association between an agent and a disease or condition. If the study reveals an association between the agent and the disease or condition, then the strength and reliability of the mathematical outcome of the study is tested by the rules and theories of statistics and the study methodology is analyzed to determine whether limitations in the study could explain the association. Then, further analysis is undertaken to determine whether the association can be attributed to causation, which is the cause and effect connection.

[129] Once the data is gathered and analyzed for statistical significance, the research question becomes, relying on both an analysis of the limitations of the study and also other scientific knowledge, how plausible is the explanation for the association being that the agent can cause the condition. A popular guideline for the analysis is taken from a paper delivered in 1965 at the founding of the Industrial Medicine Section of the Royal Society of Medicine in England by Sir Austin Bradford Hill. He suggested nine factors relevant to the determination of causation, which are often referred to as the Hill factors; i.e.: (1) biological plausibility (coherence with existing health science); (2) consistency with other knowledge; (3) alternative explanations; (4) specificity of the association to a specific condition or disease; (5) temporality; (6) cessation of exposure; (7) strength of the association; (8) dose-response (ratio between extent of exposure and incidence of the condition); and (9) replication of results.

[130] Before any conclusion about association and any inference can be drawn about causation, the outcome of the study must be examined to determine whether it is a result of chance; i.e., random error; bias (errors in the design of the study that might impugn its findings including partisanship), and confounding, which is the phenomena that the agent is indeed associated with the condition, but it is another agent that explains that connection and that other agent is the true cause of the disease or condition.

[131] A positive or negative association must be interpreted by analysing the limits of the study in the light of scientific knowledge because the conclusion of the existence or non-existence of an association and any inference of causation may be a result of sampling error, confounding or bias.

[132] Bias is an effect or influence on the truth or falsity of the outcome of the epidemiological study. Bias is a source of error in the methodology. As noted above, bias includes conflicts of interest, which is to say that the objective judgment of the researcher is unduly influenced by personal interest including financial, academic, or reputational enhancement by disclosing a conclusion of causation.

[133] Bias may arise in the design of the study, in the implementation of the study, in the collection of data, and in the analysis of the data. Selection bias is an error in the selection of participants for the case group or for the control group. Information bias is an error in information about the disease status or exposure status of the participants in the study. (The validity of the findings will be influenced by the reliability of the before and after diagnosis of the members of the case group and of the control group.) Misclassification bias is the error of misclassifying the participants in the study as to their exposure and or as to their diagnosis. Recall bias is the factor that individuals with a disease tend to recall exposures more readily than individuals without the disease. Publication bias is the tendency for medical journals to prefer studies that find an effect; if negative studies are under-published, the medical literature will be biased.

[134] The presence of bias may exaggerate or understate the conclusion of the study. Sometimes the identification of bias will vitiate the outcome of the epidemiological study. In other instances, once the bias is identified, adjustments may be made to account for the bias and the study may still have probative value.

[135] The third major reason for error in epidemiological studies is confounding. Confounding occurs when another agent confuses the relationship between the agent of interest and the disease or condition of interest. If an association is established, it is critical to determine whether that

association is causal or the result of confounding. The researcher should identify other risk factors for the disease or condition under study and attempt to design the study appropriately. One technique is matching. For example, in a study to determine the association between smoking and cirrhosis of the liver, since smokers are frequently consumers of alcohol, it may be necessary to match the smokers (the study group) and the non-smokers (the control group) for alcohol consumption before determining whether there is an association that could be accounted for by smoking. Effective randomizing minimizes but does not eliminate confounding.

[136] There are analytic methodologies to account for the effect of confounding agents including stratification or multivariate analysis. Stratification evaluates the effect of a suspected confounder by subdividing the study groups based on a confounding factor. Multivariate analysis controls the confounding factor through mathematical modelling of the effect of the agent and the confounder on the increase in risk.

6. Epidemiology and Statistics

[137] The presence of an association between an agent and a condition and the strength or weakness of an association is expressed in terms of "relative risk," "attributable risk" or an odds ratio. From a positive number or ratio a conclusion of causation may be inferred. A negative association may imply that the agent prevents or cures condition. It, however, must be emphasized that association itself does not prove general causation.

[138] The incidence rate is the number of cases of the condition that develop during the study period divided by the size of the cohort being studied. Visualize, if 50 persons in a study group of 100 drug recipients developed a rash, the incidence rate would be 0.5. The relative risk is the ratio of the incidence rate of the condition in those exposed to the agent to the incidence rate to those not exposed to the agent. Visualize, if 25 persons in the control group of 100 persons who received a placebo developed a rash, the incidence rate for the control group would be 0.25 and using the above example for the study group, the relative risk would be 2.0 (0.5/0.25). It thus could be said that persons taking the drug are twice as likely to develop a rash than those not taking the drug.

[139] Attributable risk is a measure of the amount of the condition that can be attributed to the exposure to the agent. The attributable risk is equal to the incidence of the condition in the exposed group minus the incidence of the disease in the unexposed group divided by the incidence in the exposed group; i.e., using the above example, the attributable risk is 0.5 (50-25/50) "Attributable to" is used for the purposes of determining association and, once again, it does not mean causation.

[140] Statistical testing may be used to assess the extent to which an outcome may be due to chance. The researcher tries to determine whether the outcome represents a true association or is the result of chance. The two main techniques for assessing whether the outcome is a matter of chance are "statistical significance" and "confidence intervals." Data is statistically significant if it cannot be explained by chance alone. A confidence interval provides a range (interval) around the measure of risk within which the risk would, as a matter of probability, fall if the study were repeated many times.

[141] Statistical significance and confidence intervals are not about the strength or weakness of the association but about the reliability of the reported outcome not being a matter of chance

alone. Thus, for example, a study might report an association with a large value but given a small sample size the report may not be statistically significant.

[142] Procedures for testing statistical significance begin with the "null hypothesis" which posits that if the risk ratio for the agent and the condition is 1.0, then there is no association and the association has occurred by chance. The data of the study is analyzed by statistical testing to see whether it is plausible that the data disproves the null hypothesis. A statistically significant result justifies rejecting the null hypothesis. An erroneous conclusion that the null hypothesis has been disapproved is called a false-positive error (alpha error). An erroneous conclusion that the null hypothesis has been proved is a false-negative error (beta error).

[143] The size of the study is a factor in determining the reliability of its outcomes. It is a mathematical phenomenon known as the Law of Large Numbers that as the size of a sample being tested increases, the value of the average of the outcomes becomes more accurate and the role of chance diminishes. This phenomenon was explained with an example by Justice Osler in *Rothwell v. Raes*, *supra* at paras. 67-68, as follows:

> 67. The importance of chance in a particular study may vary with the size of the study and hence chance is a consideration in deciding on how large a study need be in order to be reliable.
>
> 68. A homely example given in the course of the evidence concerned the case of a barrel containing 10,000 marbles, 5,000 of which were, in fact, black and 5,000 of which were white. If one were to withdraw blindly, say 50 marbles, it could well be that something like 30 of these would be black and 20 white. If the composition of the contents of the barrel were to be reported on the basis of such a sample, it would, of course, be erroneous, given the known fact that 50% of the entire contents was composed of each colour of marble.

[144] Using Justice Osler's example, it can be appreciated that if say 100 marbles had been selected it could be that something like 55 of these would be black and 45 white. The composition of the barrel would still be reported incorrectly but the report would be more accurate as the size of the amount sampled increased. This makes common sense because as the size of the sample of marbles approaches the amount of the whole barrel, the reports become more and more accurate.

[145] Epidemiology uses a 5% level of statistical significance as the criterion by which to judge the possible effects of chance. In other words, if the probability that chance accounts for the result is less than 0.05 (5%), then the result of a study is said to have statistical significance, meaning that chance is considered to be an unlikely explanation of the result. One statistical method is the calculation of a "p-value," which is the probability that an observed positive association could result from chance even if, in truth, there was no association. The "chi-squared" and "Fisher's Exact" tests are statistical tests for detecting true associations. These tests calculate a p-value which is a number between 0 and 1. A p-value below 0.05 is labeled "statistically significant". The smaller the p-value the more likely the association is true and not a matter of chance.

[146] The size of the study can affect the calculation of the p-value, because, as noted above, the larger the size of the sample, the more reliable the report. Thus, a study comparing 100 cases and 100 controls might have a p-value of 0.07, which would not be a statistically significant

result, but if the study had been twice as large and reported the same outcomes, the p-value would be lower, say 0.01, which would indicate that the outcomes were statistically significant. (This example is taken from *Rothwell v. Raes, supra* at para. 70.)

[147] As an alternative to using a p-value of statistical significance, the level of accuracy of an epidemiological study can be expressed as a "confidence interval." A 95% confidence interval corresponds to statistical significance set at a 0.05 (5%) level. The confidence interval is a range of values of relative risk in which the true value of the relative risk, if any, would be found if the experiment were repeated many times. Where the confidence interval contains a relative risk of 1.0 or lower, the results of the study are not statistically significant. In other words, if the lower end of the interval is less than or equal to 1.0, then the likelihood that the results are simply a matter of chance cannot be ruled out.

7. The Evidence of Ms. Tomalin, Ms. Brillon, and Ms. Stubits

[148] Ms. Tomalin practiced exclusively in the area of Canadian regulatory affairs for 45 years and has considerable experience filing with Health Canada, New Drug Submissions (NDSs), Supplemental NDSs (SNDSs), and Notifiable Changes (NCs) relating to updates to product monographs for drug products.

[149] For this summary judgment motion, Ms. Tomalin provided a report that contained a description of the Canadian pharmaceutical regulatory regime and her comments on: the Canadian regulatory approval process for AndroGel™; the changes made to the AndroGel™ product monograph over time; and the advertising for AndroGel™.

[150] Ms. Brillon was a senior manager at Abbott, and from the perspective of Abbott, she provided evidence of the regulatory approval process in Canada for a new drug and she described the history of the introduction and marketing of AndroGel™ in Canada including post-approval regulatory submissions. She also described, from Abbott's perspective, recent Health Canada reviews and announcements about AndroGel™.

[151] As noted above, Ms. Stubits is a law clerk and she filed an affidavit that contained copies of the reports and medical literature referred to by Abbott's expert witnesses.

[152] I shall incorporate my findings about Ms. Tomalin's, Ms. Brillon's, and Ms. Stubits' evidence into the discussion below.

8. The Regulators

[153] AndroGel™ is marketed in Canada, where it was regulated by Health Canada. In the United States, it is regulated by the FDA, and in Europe, it is regulated by the EMA.

[154] Health Canada is responsible for approving drugs for sale in Canada. A drug is licensed for sale by Health Canada issuing a Notice of Compliance ("NOC") after an elaborate submission and review process. Pursuant to the *Food and Drugs Act*, R.S.C. 1985, F.27, and its regulations, the manufacturer must file a New Drug Submission ("NDS"). The NDS contains detailed information about: the chemistry of the drug; the manufacturing process; the results of pre-clinical and clinical testing; information about the proposed indications, dosage, and conditions of use; the drug's claimed therapeutic value; and warnings about potential side effects and risks.

[155] The NDS/NOC process includes an extensive review of the manufacturer's submission and a review of the proposed product monograph. The product monograph is subject to a review by Health Canada's Therapeutic Products Directorate ("TPD"). The Directorate is staffed by scientific experts with extensive clinical and or medical expertise. The product monograph provides pertinent information about the nature and uses of the drug including cautions and warnings. The product monograph summarizes the results of the studies submitted to Health Canada.

[156] The Health Canada reviewers are physicians, pharmacologists or other scientists with doctorate-level academic training and significant research experience. In determining whether to approve or reject a submission, the reviewers will scrutinize: whether the drug can be made consistently; whether the product quality can be assured; whether the efficacy of the drug is acceptable based on a randomized controlled trial(s) and whether the safety profile of the drug is acceptable based on the risk/benefit analysis.

[157] Since manufacturers of prescription drugs are not permitted to engage in direct marketing activities, such as advertising to consumers, any advertising or marketing must be specifically directed to physicians and may not make any claim that has not been approved as part of the product monograph.

[158] Health Canada is also responsible for the post-marketing surveillance of drugs once they have been marketed, including monitoring drug safety and ensuring that companies comply with the regulations, which include reporting and recordkeeping obligations about the effects of the drug on patients. For example, manufacturers are required to deliver expedited adverse drug reaction (ADR) reports of all serious adverse drug reactions that occur in Canada and all serious and unexpected ADRs that occur outside of Canada. ADRs may also be submitted by patients, health professionals or others.

[159] As new information about a drug becomes available, or as changes are made by the manufacturer, a follow-up submission to Health Canada may be required. If the manufacturer expands the indications for a drug, a SNDS must be filed. For a change to identify adverse events or to take risk management measures, the manufacturer must file a NC submission and the changes can be implemented only after Health Canada issues a No Objection Letter (NOL).

[160] Health Canada (as well as other regulators around the world) have drug safety programs in place to detect potential "safety signals" and to determine if changes to the product monograph should be made. In its *Guidance for Industry on Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment*, the FDA defines a "safety signal" as a concern about an excess of ADRs compared to what would be expected to be associated with a product's use.

[161] The FDA stated that signals indicate the need for further investigation to determine whether a product causes an event and to determine what actions should be taken.

[162] After a drug has been approved, Health Canada's Marketed Health Products Directorate (MHPD) monitors ADRs including the required reports from manufacturers and also spontaneous reports of ADRs from healthcare professionals across Canada. If Health Canada wishes to bring a specific issue concerning a drug to the attention of health professionals, it may direct the manufacturer to issue a specific communication on the issue to all relevant healthcare professionals. Health Canada will oversee amendments to the initial NOC approval, including changes to the product monograph such as changes in indications, dosages, patient populations,

and cautions and warnings.

[163] Health Canada's MHPD also reviews the scientific literature and media reports to identify issues. The data is added to a database and continually reviewed for "signals" of potential ADRs that may be associated with a drug. An Expert Advisory Committee on the Vigilance of Health Products also exists to provide Health Canada with on-going external expert broad strategic advice on the safety of marketed health products.

[164] The MHPD may conduct a "Signal Assessment" where "signal" means a preliminary indication of a product-related safety issue.

[165] As will be seen below, the MHPD of Health Canada conducted a Signal Assessment dated May 22, 2014 for testosterone products with respect to cardiovascular risk.

9. The Regulatory and the Marketing History of AndroGel™ and the Epidemiological Study of Testosterone Replacement Treatment

(a) 2000-2004: The Original Product Monograph

[166] AndroGel™ is a topical testosterone medication that was developed by Solvay Pharma Inc. In 2010, Solvay was acquired by Abbott Products, Inc., which, in turn, became Abbott Laboratories, Inc.

[167] Testosterone administered by injection has been approved for sale in Canada for decades. AndroGel™ administers testosterone transderminally (through the skin) and as such was considered a new drug that required regulatory approval.

[168] In 2000, the FDA approved AndroGel™ for sale in the United States.

[169] On February 6, 2002, AndroGel™ was approved for sale by Health Canada.

[170] Part I (Health Professional Information) of AndroGel™'s product monograph included: summary product information, indications and clinical use, contraindications, warnings and precautions, adverse reactions, drug interactions, dosage and administration, overdosage, action and clinical pharmacology, storage and stability, special handling instructions, and dosage forms, composition and packaging. Part II (Scientific Information) of the Product Monograph included pharmaceutical information, clinical trials, toxicology, and references. Part III was consumer information.

[171] The original product monograph of February 6, 2002 was modified on July 16, 2002, and the following excerpts from the July 2002 product monograph are relevant to determining to resolving this summary judgment motion:

PRODUCT MONOGRAPH

AndroGel™

(testosterone USP)

1% gel

THERAPEUTIC CLASSIFICATION

Androgenic Hormone

ACTIONAND CLINICAL PHARMACOLOGY

AndroGel™ (testosterone gel) contains 1% testosterone and provides continuous transdermal delivery of testosterone, the primary circulating endogenous androgen.

Testosterone and Hypogonadism:

Endogenous androgens, including testosterone and dihydrotestosterone (DHT), are responsible for the normal growth and development of the male sex organs and for maintenance of secondary sex characteristics. These effects include the growth and maturation of prostate, seminal vesicles, penis, and scrotum; the development of male hair distribution, such as facial, pubic, chest, and axillary hair; laryngeal enlargement, vocal chord thickening, alterations in body musculature, and fat distribution.

Male hypogonadism results from insufficient secretion of testosterone and is characterized by low serum testosterone concentrations. Symptoms associated with male hypogonadism include erectile dysfunction and decreased sexual desire, fatigue and loss of energy, mood disorder and depressive symptoms, regression of some secondary sexual characteristics, weakness, irritability and decreased motivation. Hypogonadism is a risk factor for depression and osteoporosis in men.

….

INDICATIONS AND CLINICAL USE

AndroGel™ (testosterone gel) is indicated for replacement therapy in males for conditions associated with a deficiency or absence of endogenous testosterone:

1. Primary hypogonadism (congenital or acquired) — testicular failure including cryptorchidism, bilateral torsion, orchitis, vanishing testis syndrome, orchiectomy, Klinefelter's syndrome, chemotherapy, or toxic damage from alcohol or heavy metals. These men usually have low serum testosterone levels but have high gonadotropins (FSH, LH) above the normal range.

2. Secondary hypogonadism (congenital or acquired)--idiopathic gonadotropin releasing hormone (GnRH) deficiency or pituitary-hypothalamic injury from tumors, trauma, or radiation. These men have low testosterone serum levels but may have basal gonadotropins in the normal or low range.

3. In sexual dysfunction or for andropause when the conditions are due to a measured or documented testosterone deficiency.

CONTRAINDICATIONS

Androgens are contraindicated in men with carcinoma of the breast or known or suspected carcinoma of the prostate.

AndroGel™ (testosterone gel) is not indicated for, nor has been evaluated for use

in women or children.

Women, especially pregnant women, should avoid skin contact with AndroGel™ application sites in men. Testosterone may cause fetal harm, especially during early pregnancy, ….

WARNINGS

….

Edema with or without congestive heart failure may be a serious complication in patients with pre-existing cardiac, renal, or hepatic disease. In addition to discontinuation of the drug, diuretic therapy may be required.

….

The treatment of hypogonadal men with testosterone esters may potentiate sleep apnea (interruption of breathing during sleep) or hypertension in some patients, especially those with risk factors such as obesity or chronic lung diseases.

….

INFORMATION FOR THE CONSUMER

….

What is ANDROGEL™?

Your body normally makes testosterone, primarily in the gonads (testicles). Your doctor has prescribed AndroGel™ therapy because your body is not making enough testosterone. The medical term for this condition is hypogonadism. Testosterone is important in the production of sperm and for the development of male sexual characteristics. Testosterone is also necessary for normal sexual function and sex drive. Low testosterone levels can result in decreased sexual desire, fatigue and loss of energy, a depressed mood, weakening of the bones, irritability, decreased motivation and strength.

AndroGel™ is a clear, colourless, fragrance free gel that delivers testosterone to your body through your skin. Once AndroGel™ is absorbed through your skin, it enters your bloodstream and helps you attain normal testosterone levels. The type of testosterone provided by AndroGel™ is the same as the testosterone produced by your testicles.

What can I expect from ANDROGEL™ therapy?

Depending on your symptoms, AndroGel™ may help improve your energy levels and mood, and increase your sexual desire. In addition, AndroGel™ may improve your body composition, which can help maintain your bone and muscle mass. To get the best results from AndroGel™, it is essential that you take it exactly as your doctor has prescribed. …

What are the possible side effects of AndroGel™?

….

- swelling due to extra fluid in the body. This can result in serious problems

for patients with heart, kidney or liver damage

- high blood pressure

….

[172] It should be noted in Canada, in the early years of its product monograph, AndroGel™ was indicated for the treatment of andropause, sexual dysfunction, and male climacteric symptoms. There was no similar indication in the product monograph in the United States.

(b) 2005-2007 – The Amendment to the Product Monograph

[173] Sometime in 2005, Health Canada's Bureau of Metabolism Oncology and Reproductive Sciences began a review of testosterone replacement therapy, and Health Canada questioned whether the science supported the therapy being indicated for andropause. Health Canada determined that there was very little data to support AndroGel™ and other testosterone replacement therapy having this indication and required that the product manual be amended to remove the indication for andropause.

[174] On June 26, 2006, Health Canada sent a letter to manufacturers of testosterone products advising them that an internal review had been conducted and had concluded that indications such as andropause and male climacteric symptoms were not supported by the available clinical data and requiring these indications to be removed from labelling of all testosterone products.

[175] In response to the notification from Health Canada, Abbott (actually Abbott's predecessor) made a 244-page submission to Health Canada prepared by its internal staff with the assistance of consultants. Before making its submission, Abbott considered whether it could justify the current indication for sexual dysfunction or andropause based on the current studies and decided that it could not. Abbott instead lobbied for language that while it removed the indication for andropause it broadened the definition of hypogonadism and preserved the therapeutic information provided by the product monograph.

[176] On August 30, 2007, the product monograph for AndroGel™ was amended.

[177] The Action and Clinical Pharmacology portion of the Product Monograph now stated:

> **ACTION AND CLINICAL PHARMACOLOGY**
>
> ANDROGEL™ (testosterone gel) contains 1% testosterone and provides continuous transdermal delivery of testosterone, the primary circulating endogenous androgen.
>
> **Pharmacodynamics**
>
> Testosterone and Hypogonadism:
>
> Testosterone and dihydrotestosterone (DHT), endogenous androgens, are responsible for the normal growth and development of the male sex organs and for maintenance of secondary sex characteristics. These effects include the growth and maturation of prostate, seminal vesicles, penis, and scrotum; the development of male hair distribution, such as facial, pubic, chest, and axillary hair; laryngeal enlargement; vocal chord thickening; alterations in body musculature; and fat distribution.

> Male hypogonadism results from insufficient secretion of testosterone and is characterized by low serum testosterone concentrations. Symptoms associated with male hypogonadism include decreased sexual desire with or without erectile dysfunction, fatigue and loss of energy, mood depression/ disorder and depressive symptoms, regression of some secondary sexual characteristics, osteoporosis, weakness, irritability and decreased motivation. Although causality has not been established, there are associations between hypogonadism and depression, osteoporosis, metabolic syndrome, type 2 diabetes, cardiovascular disease and increased mortality in men. Hypogonadism is a risk factor for osteoporosis in men.
>
> ….

[178] The Indications and Clinical Use portion of the product monograph now stated:

> **INDICATIONS AND CLINICAL USE**
>
> ANDROGEL™ is indicated for testosterone replacement therapy in adult males for conditions associated with a deficiency or absence of endogenous testosterone (hypogonadism).
>
> ANDROGEL™ should not be used to treat non-specific symptoms suggestive of hypogonadism if testosterone deficiency has not been demonstrated and if other etiologies responsible for the symptoms have not been excluded. Testosterone deficiency should be clearly demonstrated by clinical features and confirmed by biochemical assays (Endocrine Society Guidelines recommend two separate tests preferably in the morning) before initiating therapy with any testosterone replacement, including ANDROGEL™ treatment.
>
> Geriatrics (>65 years of age):
>
> There are limited controlled clinical study data supporting the use of ANDROGEL™ in the geriatric population (see WARNINGS AND PRECAUTIONS and CLINICAL TRIALS).
>
> ….

[179] The Warnings and Precautions and Clinical Trials portions of the product monograph now stated:

> **WARNINGS AND PRECAUTIONS**
>
> <u>General</u>
>
> There is very limited data from clinical trials with ANDROGEL™ in the geriatric male (>65 years of age) to support the efficacy and safety of prolonged use. Impacts to prostate and cardiovascular event rates and patient important outcomes are unknown.
>
> ANDROGEL™ should not be used to improve body composition, bone and muscle mass, increase lean body mass and decrease total fat mass. Efficacy and safety have not been established. Serious long term deleterious health issues may arise.

ANDROGEL™ has not been shown to be safe and effective for the enhancement of athletic performance. Because of the potential risk of serious adverse health effects, this drug should not be used for such purpose.

If testosterone deficiency has not been established, testosterone replacement therapy should not be used for the treatment of sexual dysfunction.

Testosterone replacement therapy is not a treatment for male infertility.

….

Special Populations

....

Geriatrics (> 65 years of age):

There are very limited controlled clinical study data supporting the use of testosterone in the geriatric population and virtually no controlled clinical studies on subjects 75 years and over.

Geriatric patients treated with androgens may be at an increased risk for the development of prostatic hyperplasia and prostatic carcinoma.

Geriatric patients and other patients with clinical or demographic characteristics that are recognized to be associated with an increased risk of prostate cancer should be evaluated for the presence of prostate cancer prior to initiation of testosterone replacement therapy.

Cardiovascular

Testosterone may increase blood pressure and should be used with caution in patients with hypertension.

Edema, with or without congestive heart failure, may be a serious complication in patients with pre-existing cardiac, renal, or hepatic disease. Diuretic therapy may be required, in addition to discontinuation of the drug.

….

Monitoring and Laboratory Tests

The patient should be monitored (including serum testosterone levels) on a regular basis to ensure adequate response to treatment.

Currently there is no consensus about age specific testosterone levels. The normal serum testosterone level for young eugonadal men is generally accepted to be approximately 10.4-34.6 nmol/L (300-1000 ng/dL). However, it should be taken into account that physiologically testosterone levels (mean and range) decrease with increasing age. Men with levels below their laboratory's reference range and who are experiencing symptoms are candidates for testosterone replacement therapy and should be evaluated as such.

[180] The Consumer Information portion of the product monograph now stated:

ABOUT THIS MEDICATION

Your doctor has prescribed ANDROGEL™ because your body is not making enough testosterone. The medical term for this condition is hypogonadism.

What it does:

ANDROGEL™ delivers medicine into your bloodstream through your skin. ANDROGEL™ helps raise your testosterone to normal levels.

….

WARNINGS AND PRECAUTIONS

….

There is very little information from clinical trials with testosterone in the older male (>65 years of age) to support safe use for a long period of time.

You should not use testosterone in an attempt to reduce weight and increase muscle, or improve athletic performance as it may cause serious health problems.

You should not use testosterone to treat sexual dysfunction or male infertility.

Before using ANDROGEL™, talk to your doctor if you:

- have difficulty urinating due to an enlarged prostate. Older patients may have a higher risk of developing an enlarged prostate or prostate cancer;
- have prostate cancer (confirmed or suspected);
- have liver, kidney or heart disease;
- have high blood pressure (hypertension);
- have diabetes;
- have breathing problems during sleep (sleep apnea).

…

(c) 2008-2013 – Increased Use of Testosterone Products

[181] Prescriptions for AndroGel™ increased substantially between 2008 and 2013. The gross sales in 2010 were $22.4 million and the sales were continuing to increase.

[182] Between 2008 and 2012, the prescriptions of AndroGel™ to Canadian men rose approximately 40 percent. In a study of testosterone sales in 41 countries between 2000 and 2011 a 12-fold increase was noted. Advertising text included: “Lack of Energy – Low Sex Drive: Has He Lost that Loving Feeling?”; “Not feeling like the man you used to be?”; and “Low T could potentially affect an estimated 1.7 million men in Canada.” Advertisement in various medical journals promoted AndroGel™ as treatment for sexual symptoms.

[183] The Wises’ experts submit that the increase in sales was prompted by the aggressive efforts by pharmaceutical companies in selling LowT as a treatable disease.

[184] In 2013, the American Endocrine Society and the American Association of Clinical Endocrinologists noted that testosterone therapy has the potential for serious side effects and

represents a significant expense. The Society warned against overprescribing of testosterone stating that many of the symptoms attributed to male hypogonadism are commonly seen in normal male aging or in the presence of comorbid conditions.

(d) <u>2010: Basaria Study</u>

[185] In 2010, the Basaria Study was published. The primary author of this study, Dr. Basaria, declared receiving grant support from Solvay Pharmaceuticals (now Abbott) along with many others drug manufacturers.

[186] The Basaria Study was a randomized controlled trial designed to investigate whether testosterone gel provided greater muscular strength and functional benefits over placebo in a population of 209 elderly men who were all over 65 (mean age 74) who had difficulty walking two blocks or climbing ten steps.

[187] The Basaria Study was not designed to investigate cardiovascular events and many of the participants had existing cardiovascular disease and co-morbidities including obesity.

[188] The Basaria Study was stopped early by the Data and Safety Monitoring Board due to more adverse CV events in the testosterone group than in the placebo group; i.e., 23 men in the testosterone group compared to 5 in the placebo group. The Study had a very expansive definition of a cardiac event that was broader than the criteria in the Medical Dictionary for Regulatory Activities.

[189] The Basaria Study concluded that testosterone replacement treatment is associated with cardiovascular harm. Although the study was not designed to investigate cardiovascular events, the researchers adjusted the results for the study group for co-morbidities and concluded that the adverse CV events were higher for the study group than for the control group.

[190] As is the case of all studies, there were limitations on the reliability of the Basaria Study. From the perspective of its utility for determining an association between testosterone treatment and serious adverse CV events, the limitations included the small size of the cohorts and the small number of adverse events, and the circumstances that elderly men are more likely to have cardiovascular disease. In the Basaria Study, the study and control groups were unbalanced in that more patients in the treatment group had co-morbidities than the placebo group. Another criticism of this study is that the men received higher than approved doses of testosterone.

[191] The researchers observed that chance may have played a role in the outcomes but nonetheless concluded that in the group of elderly men, the application of testosterone gel was associated with an increased risk of adverse CV events.

[192] Dr. Mintzes said that the Basaria Study was a strong signal of cardiovascular harm. However, in contrast, Dr. Marais opined that if the results of the Basaria Study were confined to serious CV events, it was reduced to a finding that did not reach the conventional threshold for statistical significance, and the study did not support the Wises' claims.

[193] Dr. Milne acknowledged that the Basaria Study was not designed to investigate CV events, and that it was not possible to draw any reliable conclusions from only four serious CV events.

[194] In 2010, Canada and the FDA reviewed the Basaria Study and concluded that there was insufficient evidence to proceed further and that the existing labelling for testosterone products

was sufficient.

[195] In 2012, in response to the 2010 Basaria Study, the European Association of Urology (EAU) revised its Guidelines on prescribing of testosterone replacement therapies to recommend individualized monitoring schemes involving pre-treatment assessment by a cardiologist and close monitoring during testosterone treatment.

(e) 2013: Xu Study

[196] In 2013, the Xu Study was published. The aim of the study was to evaluate the risk of CV adverse events associated with use of testosterone treatment.

[197] The Xu Study was a meta-analysis of 27 RCTs that incidentally reported serious CV events. The results were incidental because none of the studies were designed to assess the relationship between testosterone replacement treatments (TRT) and serious CV events. In aggregate, the 27 studies included 1,733 persons who had received TRT and a control group of 1,261 subjects. The TRT group experienced 115 CV events and the control group experienced 66 CV events. CV events were defined as determined by the authors of the 27 RCTs.

[198] The Xu Study researchers concluded that TRT increases the risk of CV events. They calculated an odds ratio of 1.54 with a 95% confidence interval of 1.09 to 2.18. The researchers noted that the risk ratios were higher in the studies not funded by the pharmaceutical industry.

[199] Dr. Marais opined that the Xu Study was driven by the 2010 Basaria Study, which when adjusted to serious CV events, did not support the Wises' claims. When the Xu Study was correspondingly adjusted, then its key statistical result disappeared. Dr. Marais' opinion was that the Xu Study did not support the Wises' claims.

(f) 2013: Vigen Study

[200] In November 2013, the Vigen Study was published.

[201] The Vigen Study was a retrospective observational study of a cohort of 8,709 veterans in the U.S. Veterans Administration electronic medical record system who had coronary angiography and also had low testosterone levels. The aim of the study was to assess mortality and hospitalizations for heart attack (myocardial infarction) and stroke comparing men who started a prescription for testosterone after the angiography with those who did not take testosterone after their angiogram procedures.

[202] The study focused on testosterone treatment in general with most patients receiving testosterone patches. Only 1.1% were prescribed a testosterone gel like AndroGel™. The testosterone group had less coronary artery disease and other co-morbidities than the control group and thus the results had to be adjusted for possible confounding. Without the adjustments, the results were not statistically significant.

[203] The Vigen Study reported increased rates of death, myocardial infarction, and stroke among men treated with testosterone. With an average follow-up of just over two years, the authors found an increase in a combined outcome of death, myocardial infarction or stroke, among testosterone users of 1.3% at one year, 3.1% at two years and 5.8% at three years. After making adjustments for the co-morbidities, the researchers found an increased risk of all-cause mortality, myocardial infarction, and ischemic stroke from testosterone use. The hazard ratio

(HR) was 1.29, with a 95% confidence interval (CI, 1.05 to 1.58) and a p-value of 0.02.

[204] The researchers concluded that the use of testosterone therapy in this cohort of veterans with significant medical comorbidities was associated with increased risk of mortality, myocardial infarction, or ischemic stroke and that future studies including randomized controlled trials were needed to properly characterize the potential risks of testosterone therapy in men with comorbidities.

[205] There were limitations to this observation study, and it drew a great deal of criticism in the medical community with dozens of medical societies asking that *JAMA*, the highly-regarded peer-reviewed journal, retract the Vigen Study. A March 24, 2014 letter to the editor from 26 medical societies and 157 doctors, researchers, and clinicians recommended the study be retracted because of data mismanagement. *JAMA* published some corrections to the article but did not retract the article. One major criticism of the study was that if one ignores follow-up time, the absolute percentage of patients who died, had a stroke or a myocardial infarction was higher in the untreated group (21.2%) than the testosterone group (10.1%).

[206] Dr. Mintzes defended the Vigen Study from its critics and stated that it would be wrong to ignore follow-up time. She concluded that the Vigen Study showed an increased risk of all-cause mortality, heart attack, and ischemic stroke for those administered testosterone. She said that the Study showed an increased risk of heart attacks for the group prescribed with testosterone.

[207] Dr. Morgentaler was one of the harsh critics of the Vigen Study. He and Dr. Marais opined that the Vigen Study depended on a novel statistical method (i.e., stabilized inverse probability weighting) without accreditation in peer-reviewed literature and they concluded that the Study provided no statistically reliable support for the Wises' claims.

(g) <u>2014: Finkle Study</u>

[208] In January 2014, *PLOS ONE*, a medical journal, published the Finkle Study. This Study reported increased rates of non-fatal myocardial infarction following testosterone prescriptions.

[209] The Finkle Study was a retrospective observational study of data in a health insurance database (Truven Health MarketScan) that reported rates of non-fatal myocardial infarction in the period up to 90 days following a testosterone prescription and compared these rates to myocardial infarction rates in the previous 12 months. There was no control group, but the researchers also compared men receiving a first prescription for testosterone with men who received a first prescription for the PDE5 inhibitor erection dysfunction drugs sildenafil (Viagra and alternatives) and tadalafil (Cialis and alternatives).

[210] The Finkle Study observed an increase in myocardial infarction for patients receiving a testosterone prescription. Two comparisons were carried out: comparing the testosterone users' experiences before their initial prescription and in the 90 days post-initial prescription. For testosterone users, the ratio for myocardial infarction was 1.36 (95% CI 1.03 to 1.81) comparing experience of this cohort pre-prescription and post-prescription and the rate in men older than 65 years was 2.19. In comparison, no increase in myocardial infarction rate was noted for men who received a prescription for a PDE5 inhibitor.

[211] The researchers noted numerous limitations in their own Study, but they called for more research to assess testosterone efficacy and safety and given the growing use of TRTs, they

encouraged physicians to discuss the potential cardiovascular risks with their patients especially those with cardiovascular disease.

[212] Dr. Morgentaler was again critical of this Study and again Dr. Mintzes defended the Finkle Study from Dr. Morgentaler's criticisms, and she said that it showed an increased risk of heart attacks for the group prescribed with testosterone.

[213] Dr. Marais opined that the Finkle Study provided no statistically reliable support for the Wises' claims because it had uncontrolled biases and lacked a control group to establish a baseline of myocardial infraction. He opined that the Finkle Study did not support the Wises' claims.

(h) 2014: Regulatory Response

[214] On January 31, 2014, after publication of the Finkle Study, the FDA announced it would investigate whether there were cardiovascular risks with the use of testosterone products. The FDA announcement stated:

> **FDA evaluating risk of stroke heart attack and death with FDA approved testosterone products**
>
> **Safety Announcement**
>
> The US Food and Drug Administration FDA is investigating the risk of stroke heart attack and death in men taking FDA approved testosterone products. We have been monitoring this risk and decided to reassess this safety issue based on the recent publication of two separate studies that each suggested an increased risk of cardiovascular events among groups of men prescribed testosterone therapy. We are providing this alert while we continue to evaluate the information from these studies and other available data and will communicate our final conclusions and recommendations when the evaluation is complete.
>
> At this time FDA has not concluded that FDA approved testosterone treatment increases the risk of stroke heart attack or death. Patients should not stop taking prescribed testosterone products without first discussing any questions or concerns with their health care professionals. Healthcare professionals should consider whether the benefits of FDA approved testosterone treatment is likely to exceed the potential risks of treatment. The prescribing information in the drug labels of FDA approved testosterone products should be followed.
>
> Testosterone is a hormone essential to the development of male growth and masculine characteristics Testosterone products are FDA approved only for use in men who lack or have low testosterone levels in conjunction with an associated medical condition. Examples of these conditions include failure of the testicles to produce testosterone because of reasons such as genetic problems or chemotherapy. Other examples include problems with brain structures called the hypothalamus and pituitary that control the production of testosterone by the testicles.
>
> None of the FDA approved testosterone products are approved for use in men with low testosterone levels who lack an associated medical condition. ….

> The first publication that prompted FDA to reassess the cardiovascular safety of testosterone therapy was an observational study of older men in the U.S. Veteran Affairs health system published in the Journal of the American Medical Association (*JAMA*) in November 2013. The men included in this study had low serum testosterone and were undergoing imaging of the blood vessels of the heart called coronary angiography to assess for coronary artery disease. Some of the men received testosterone treatment while others did not. On average, the men who entered the study were about 60 years old and many had underlying cardiovascular disease. This study suggested a 30 percent increased risk of stroke heart attack and death in the group that had been prescribed testosterone therapy.
>
> A second observational study reported an increased risk of heart attack in older men as well as in younger men with pre-existing heart disease who filled a prescription for testosterone therapy. The study reported a two fold increase in the risk of heart attack among men aged 65 years and older in the first 90 days following the first prescription. Among younger men less than 65 years old with a pre-existing history of heart disease the study reported a two to three fold increased risk of heart attack in the first 90 days following a first prescription. Younger men without a history of heart disease who filled a prescription for testosterone however did not have an increased risk of heart attack.
>
> ….

[215] In the weeks that followed the FDA announcement, law firms in the United States commenced an advertising campaign stating that testosterone was associated with heart attacks, strokes, and death, and the law firms encouraged men to contact the firms if they had suffered an adverse event after the use of testosterone.

[216] On February 25, 2014, the Public Citizen, an NGO, called on the FDA to immediately add a black box warning about the increased risks of heart attacks and other cardiovascular dangers to the product labels of all testosterone-containing drugs available in the US. Relying on the Basaria, Xu, Vigen, and Finkle Studies, the Public Citizen asserted that it was clear that testosterone treatment increases the risk of cardiovascular disease.

[217] Between March 3 and 6, 2014, the EMA Pharmacovigilance Risk Assessment Committee (PRAC) discussed cardiovascular risks for testosterone, and on April 11, 2014, it announced a review of testosterone-containing medicines for male hypogonadism over concerns about cardiovascular side effects of testosterone products raised by the studies noted by the FDA.

[218] On May 22, 2014, Health Canada conducted a Signal Assessment relating to Testosterone Containing Products and CV risk. The Signal Assessment stated:

> Marketed Health Products Directorate
>
> Health Products and Food Branch Health Canada
>
> Signal Assessment
>
> Testosterone Containing Products (ANDRODE®, ANDRIOL®, ANDROGEL™®, AXIROW, DELATESTRYL®, DEPO-TESTOSTERONE, Testim® and generics)

Cardiovascular Risk

….

1. Issue

Health Canada's Marketed Health Products Directorate (MHPD) regularly reviews published scientific literature, and in the course of that activity reviewed an article regarding the cardiovascular safety of testosterone hormone replacement therapy in 2010. Preliminary screening of the article found insufficient evidence to proceed any further with an assessment at that time and labelling for testosterone regarding cardiovascular risk was considered sufficient.

Since that time there has been a growing body of evidence calling into question the known cardiovascular safety of testosterone. A published scientific article regarding this issue from November 2013 prompted a detailed assessment.

2. Purpose

The purpose of this assessment is to retrieve and review available information regarding the cardiovascular safety of testosterone hormone replacement therapy to determine appropriate next steps, involving possible further risk mitigation measure(s).

3. Scope

Unless otherwise specified, the testosterone products referred to in this assessment are those used as testosterone hormone replacement therapy for hypogonadism (testosterone deficiency) in men in Canada ….

….

4.1.2. Testosterone

….

…. No large scale long-term clinical trials have been conducted to confirm the benefits of testosterone products. Treatment guidelines and recommendations for testosterone use in selected testosterone deficient men have been developed based on available evidence from smaller clinical trials and experience from experts in this field. The treatment guidelines developed by the International Endocrine Society based in the US in 2010 and by the European Association of Urology (EAU) in 2012 recommend testosterone therapy for men with symptomatic androgen deficiency to induce and maintain secondary sex characteristics and to improve their sexual function, sense of well-being, muscle mass and strength, and bone mineral density. …. While the Endocrine Society guideline recommend against testosterone therapy in men with uncontrolled or poorly controlled heart failure, the EAU guideline does not. The EAU guideline states that testosterone therapy is not associated with the development of any unsafe cardiovascular events, and special monitoring in this respect is not needed. The EAU guideline recommends men with cardiovascular co-morbidity be assessed by a cardiologist before starting testosterone therapy and close monitoring of the cardiovascular system while on testosterone therapy's, whereas, the Endocrine Society guideline

does not.

….

4.1.3. Previous and ongoing mitigation measures Actions Taken by Health Canada

Risk communications issued

As of March 10, 2014, no risk communication has been issued by Health Canada regarding the possible risk of cardiovascular events associated with testosterone.

Product labelling updates

The current labelling regarding cardiovascular risk for testosterone products marketed in Canada includes primarily warnings for hypertension, as well as edema with or without congestive heart failure (especially in patients with pre-existing cardiac disease). …. No recent change has been made to the labelling of testosterone products regarding cardiovascular events.

Other related pharmacovigilance activities

Health Canada has been, as it does with all marketed health products, routinely monitoring new and emerging safety issues with testosterone. In 2010, an article was reviewed on the issue of cardiovascular safety. Due to insufficient evidence and labelling in Canada was considered sufficient at that time, routine monitoring of this possible risk was recommended. The growing body of available evidence (including the studies mentioned by the US Food and Drug Administration regarding this issue prompted this signal assessment.

….

4.2.1. Biological plausibility

The biological plausibility for the possible association between testosterone use and cardiovascular risks exists and possible mechanism have been proposed for arterial and venous related events. [Health Canada identified six plausible biological theories as to how testosterone might be a factor in cardiovascular risk.]

….

4.2.3. Published scientific literature evidence

….

This assessment reviewed seven published studies in which cardiovascular events were specifically examined … and three case series or case reports in which cardiovascular events were reported with testosterone being the sole suspected agent. The seven studies include one small clinical trial, two larger size retrospective cohort studies, and four systematic reviews and/or meta-analyses of previously published clinical trials.

These studies have varying degrees of bias and limitations. The clinical trial, two retrospective cohort studies, and one systematic review and meta-analysis showed a greater risk of cardiovascular events in men treated with testosterone as

compared to those without; whereas, the remaining three systematic reviews or meta-analyses studies showed no statistically significant risk for cardiovascular events. Note that the four studies that showed a statistically significant cardiovascular risk have fewer limitations (e.g. better control, adjustment or assessment for the possible influence by differences in patient baseline characteristics; or larger patient population). The most recent systematic review and meta-analysis's pooled analysis of clinical trials funded by pharmaceutical companies showed no risk associated testosterone while pooled analysis of other trials not funded by the industry did. Of the four studies showing a risk of cardiovascular events associated with testosterone use, three included the intended patient population (i.e. patients with a deficiency of endogenous testosterone) in Canada and patients with underlying risk factors such as pre-existing cardiovascular diseases. Of these three, [Vigen Study], with a longer follow up period, showed that testosterone use was associated with a greater risk of all-cause mortality, MI, and ischemic stroke up to 2,000 days after coronary angiography (although the risk estimate at 2,000 days is less reliable due to smaller sample size). With a larger patient population, [Finkle Study] further stratified the patient population by age (men< 65 years and ≥ 65 years) and heart disease history. Men < 65 years showed a greater risk of cardiovascular events in those with a heart disease history; whereas men ≥ 65 years without a heart disease history showed a greater risk of cardiovascular events (the risk in those with a heart disease history did not reach statistical significance). Furthermore, this study showed a non-statistically significant risk for cardiovascular events in the comparator group (phosphodiesterase type 5 inhibitors). Note that phosphodiesterase type 5 inhibitors (such as VIAGRA®, REVATIO®, and .WCIRCA® are labelled for serious cardiovascular events such as MI, arrhythmia and stroke in Canada. Confirmation of patient testosterone deficiency was not possible in the [Finkle Study].

In addition to the above studies, 19 cases of cardiovascular events in men on testosterone therapy were reported in the published literature. ….

In summary, individually, each of the above ten articles presents varying degrees of limitations in their studies or reported case information; however, collectively, they provide evidence to support the possible association between testosterone use and the risk of serious cardiovascular events such as MI and ischemic stroke in adult men with or without pre-existing comorbidities such as heart disease.

….

6. Considerations

There have been no large scale long-term well-controlled clinical trials to confirm the benefits and adverse effects of testosterone products. However, treatment guidelines based on smaller efficacy driven clinical trials have been developed by the US based international Endocrine Society and the European Association of Urology (EAU). Health Canada's approved CPMs for testosterone products give physicians the ability to determine treatment suitability based on available guidelines and each individual patient's situation. Given these tools are available

to physicians, the appropriate diagnosis and treatment of hypogonadism using testosterone therapy relies on the attending physicians. Considering the growing body of evidence regarding the cardiovascular risk of testosterone, the current CPMs and treatment guidelines may need to be revisited to give up-to-date guidance to physicians.

7. Conclusion

The benefits and risks of testosterone therapy have not been confirmed by large (e.g. thousands of patients) randomized clinical trials. The current approved usage in Canada and worldwide treatment guidelines are based on results from small clinical trials in which data regarding usage in the elderly population was limited. With respect to cardiovascular safety, the current available evidence, including the growing number of Canadian and international cases, the emerging literature studies (e.g. clinical trial retrospective cohort studies, systematic review and meta-analysis, and case reports, albeit with some limitations), and possible biological mechanisms, supports the possibility that cardiovascular adverse events (e.g. myocardial infarction, stroke, pulmonary embolism, deep vein thrombosis, or cardiac arrhythmia related events such as tachycardia and atrial fibrillation) other than those currently labelled in the CPM may occur with testosterone therapy. Furthermore, testosterone therapy prescription usage in Canada (and worldwide) has been increasing, with the elderly population being the second most prescribed age group (after men aged 40-59 years). The majority of these prescriptions were written by family physicians or physicians without a specialty…. This raised additional concern that these products may not always be used within the approved patient population in Canada.

8. Recommendations

A. Initial Labelling Update

Given the evidence as it currently stands … indicating a possible increased cardiovascular risk beyond what is currently labelled in the CPMs of testosterone products, it is recommended that Health Canada's Therapeutic Products Directorate (TPD) consider updating the CPMs of testosterone products with the new statements described and underlined below. Further labelling may be considered as new evidence emerges and further discussion with international counterparts occurs.

….

B. Timely communication to healthcare professionals and the public

Given the number of products in question and the need to inform health care professionals and the public of the appropriate use of these products and the possible increased cardiovascular risk associated with testosterone therapy in a timely manner, it is recommended that Health Canada's Marketed Health Products Directorate (MHPD) issue a Health Canada Information Update regarding this safety issue following the issuance of advisement letters to the involved innovator market authorization holders by TPD.

….

[219] On June 11, 2014, Health Canada requested that Abbott and other testosterone manufacturers modify their product monographs.

[220] On July 7, 2014, Abbott submitted a revision to the product monograph in accordance with Health Canada's request. The updated product monograph for AndroGel™ added the following warning:

> Post-market studies suggest an increased risk of serious cardiovascular events such as myocardial infarction and stroke may be associated with testosterone therapy. Before starting testosterone therapy, patients should be assessed for any cardiovascular risk factors, (e.g., existing ischaemic heart disease) or prior history of cardiovascular events (e.g., myocardial infarction, stroke, or heart failure). Patients should also be closely monitored for possible serious cardiovascular events while on testosterone therapy.

[221] On July 15, 2014, Health Canada published a Summary Safety Review about testosterone replacement products and cardiovascular risk. The Summary Review stated:

> **Summary Safety Review – Testosterone Replacement Products - Cardiovascular Risk**
>
> **Issue**
>
> A safety review was initiated to evaluate the currently available information regarding the possible cardiovascular risk (heart and blood vessel problems) associated with the use of testosterone replacement products. In the course of its normal activities, Health Canada observed a growing body of evidence suggesting a possible association between the use of testosterone replacement products and cardiovascular risk. This evidence, and in particular a scientific article published in November 20131, prompted this detailed assessment.
>
> **Background**
>
> **Approved use of testosterone replacement products in Canada.**
>
> In Canada, there are 12 testosterone-containing products that are currently marketed for use as testosterone replacement therapy: ANDRIOL, ANDRODERM, ANDROGEL™, AXIRON, DELATESTRYL, DEPO-TESTOSTERONE, TESTIM and their equivalent generics. These products are approved for use in adult males who are experiencing medical conditions because their body cannot make enough testosterone. Testosterone replacement products should not be used in men for non-specific symptoms if laboratory tests have not been done to confirm a low testosterone level, and if other possible causes of symptoms have not been excluded.
>
> **Cardiovascular risk**
>
> Cardiovascular risk refers to the risk of a group of heart and blood vessel problems that can include, but is not limited to, heart attacks, strokes, blood clots in the lungs or legs, and an irregular heart rate. It is known that testosterone replacement therapy may cause an increase in blood pressure and fluid retention/swelling. In addition to these risks, testosterone replacement products may also cause blood vessel narrowing by promoting the build-up of fats and

other materials in the inner walls of blood vessels. This narrowing of blood vessels makes it harder for blood to flow through, and if a blood clot forms and blocks the flow of blood, it may cause a heart attack or stroke. Testosterone replacement products may also cause blood clots in the lungs or legs by affecting blood clotting processes.

At the time of this review, the Canadian product label for testosterone replacement products identified the risk of high blood pressure, as well as fluid retention/swelling (particularly in persons with underlying heart problems).

Objective

To assess the available evidence concerning the cardiovascular risk, beyond the known risks of high blood pressure and fluid retention/swelling, which may be linked to testosterone replacement products.

Key Findings

Use of testosterone replacement products in Canada

Similar to the trend in other countries, prescriptions for testosterone replacement products in Canada have been increasing. Testosterone was most commonly prescribed to men aged 40-59 years. The elderly population (65 years old and over) is the second most prescribed age group.

Canadian reports of cardiovascular problems in Canada associated with the use of testosterone replacement products.

As of Aug. 31, 2013, Health Canada received 35 reports of cardiovascular problems involving testosterone replacement products. Some of these reports described the problem as disappearing after the patient stopped using the product or as re-appearing when the patient re-started the product after having temporarily stopped it. This may support a possible link between cardiovascular risk and testosterone replacement products. Some of the reports also described patients with current, or a history of, conditions (e.g., diabetes and high blood pressure) that may also be associated with the reported cardiovascular problems. In 11 of the 35 reports, heart attack, blood clots in the lungs, or irregular heart rate were considered possibly related to testosterone therapy.

Scientific reports

Several studies conducted after marketing suggest an increased risk of serious cardiovascular problems (e.g., heart attack and stroke) that may be linked to testosterone replacement products. Although these studies have limitations, they provide evidence in support of this possible association when considered as a whole. Additional cases of cardiovascular problems, such as blood clots in the lungs and legs, have also been reported in the literature, as well as in other countries. Some of these cases also described the problem as disappearing after the patient stopped using the product or as re-appearing after the patient re-started the product after having temporarily stopped it.

> Conclusions and Actions
>
> The current available evidence suggests the possibility that cardiovascular problems, other than those already identified, may occur with the use of testosterone replacement products. The use of these products in Canada (and internationally) has been increasing and findings from a Canadian study raise additional concerns that these products may not always be used within the approved patient population.
>
> **Health Canada actions**:
>
> 1. Health Canada is working with manufacturers to update the Canadian product label for testosterone replacement products regarding possible cardiovascular risks including heart attack, stroke, blood clots in the lungs or legs, and irregular heart rate;
>
> ….
>
> Health Canada will keep Canadians informed and take action, as appropriate, if any new safety information is identified.
>
> ….

[222] Also on July 15, 2014, Health Canada published an Information Update entitled "Possible cardiovascular problems associated with testosterone products." The Information Update stated:

> OTTAWA - Health Canada is advising patients and healthcare professionals of new safety information regarding testosterone hormone replacement products and a risk of serious and possibly life threatening cardiovascular heart and blood vessel problems.
>
> ….
>
> Health Canada has recently completed a safety review on testosterone replacement products. This review found a growing body of evidence from published scientific literature and case reports received by Health Canada and foreign regulators for serious and possible life threatening heart and blood vessel problems such as heart attack stroke blood clot in the lungs or legs and increased or irregular heart rate with the use of testosterone replacement products.
>
> Health Canada is working with manufacturers to update the Canadian product labels regarding this risk. The Department continues to collaborate with foreign regulators including the United States Food and Drug Administration and the European Medicines Agency regarding this safety concern. Health Canada will keep Canadians informed and take action as appropriate if any new safety information is identified. Health Canada would like to remind the public of the following important information from the Canadian Product Monographs regarding the use of testosterone products.
>
> …

[223] Meanwhile, on July 16, 2014, the FDA denied the Public Citizen petition that requested a black box warning. The FDA concluded that none of the four identified studies reporting CV risk provided clear evidence of increased risk due to treatment with testosterone. After again

reviewing the Basaria, Xu, Vigen, and Finkle Studies, the FDA stated that there was insufficient evidence of a causal link between testosterone therapy and adverse cardiovascular outcomes to support the regulatory actions requested by Public Citizen.

[224] Following a September 17, 2014 Joint Meeting of the Bone, Reproductive and Urologic Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee, on March 3, 2015, the FDA released an announcement stating that it was requiring manufacturers to add information to labeling about a "possible increased risk of heart attacks and strokes in patients taking testosterone". The announcement stated that the FDA had concluded that there is a possible increased CV risk associated with testosterone use and that some studies reported an increased risk of heart attack, stroke, or death associated with testosterone treatment, while others did not.

[225] In the meantime, in Europe, the EMA, after requesting additional information from drug manufacturers, concluded there was no clear indication of increased CV risk and, therefore, determined there was no need to add a warning regarding CV risk. The EMA did, however, publish the following information in its product assessment report:

- In patients suffering from severe cardiac hepatic or renal insufficiency or ischaemic heart disease treatment with testosterone may cause severe complications characterized by oedema with or without congestive cardiac failure. In such case, treatment must be stopped immediately.
- Testosterone may cause a rise in blood pressure and … should be used with caution in men with hypertension.
- There is limited experience on the safety and efficacy of the use of [name of product] in patients over 65 years of age. Currently there is no consensus about age specific testosterone reference values. However it should be taken into account that physiologically testosterone serum levels are lower with increasing age.

(i) 2015: The Etmiman Study and the Morgentaler Article

[226] In 2015, M. Etmiman, *et al* published: "Testosterone Therapy and Risk of Myocardial Infarction: a Pharmacoepidemiologic Study": *Pharmacotherapy*, 2015; 35(1):72-8 (the "Etmiman Study"), which was a retrospective observational study using data from a health plan claims database. It was an observational study of a cohort of 934,283 men aged 45 to 80 years from a large U.S. insurance database (IMS Lifelink). The study observed a total of 515 CV events in men prescribed testosterone. The authors compared the myocardial infraction rate in various groups and calculated rate ratios (RR) for men whose last testosterone prescription (of any type) was within 90 days before the index date (current users) and past users (defined as all others).

[227] The authors of the Etmiman Study did not find an association between myocardial infraction and testosterone treatment save for a statistically significant association between first-time exposure to testosterone replacement treatment and myocardial infarction, although the absolute risk was low. More precisely, the authors found an increased risk of myocardial infarction among current first-time users: RR = 1.41 (95% CI 1.06 to 1.87), but they did not find an increased risk among prevalent users. The authors of the study concluded that an association

between myocardial infarction and past or current TRT had not been found but there was a very low but statistically significant association between first-time TRT exposure and myocardial infarction. Dr. Mintzes said that the Study added to the evidence of CV risks with testosterone use.

[228] In 2015, in an article in *Mayo Clinic Proceedings*, Dr. Morgentaler and others reviewed the Basaria, Xu, Vigen, and Finkle Studies and stated that none of the four studies supported any increased serious CV risk from the use of TRT.

(j) 2015 – Revision of the Product Monograph

[229] The AndroGel™ product monograph was revised. The product monograph approved on January 28, 2015 contains the following revision under Warnings and Precautions:

> Post-market studies suggest increased risk of serious cardiovascular events such as myocardial infarction stroke and venous thromboembolic events including deep vein thrombosis and pulmonary embolism associated with testosterone therapy. Before starting testosterone therapy, patients should be assessed for any cardiovascular risk factors (e.g., existing ischaemic heart disease) or prior history of cardiovascular events (e.g., myocardial infarction, stroke, or heart failure). Patients should also be closely monitored for possible serious cardiovascular events while on testosterone therapy. If any of these serious adverse events are suspected, treatment with ANDROGEL™ should be discontinued and appropriate assessment and management initiated.

[230] The Consumer Information portion of Abbott's product monograph for AndroGel™ was revised to state:

> Before using ANDROGEL™, talk to your doctor if you:
>
> …
>
> • have heart or blood vessel problems or a history of these problems such as heart attacks, stroke, or blood clot in the lungs or legs;
>
> ….
>
> SIDE EFFECTS AND WHAT TO DO ABOUT THEM
>
> …
>
> - Increased or irregular heart rate blood clot in the lungs or legs
>
> SERIOUS SIDE EFFECTS HOW OFTEN THEY HAPPEN AND WHAT TO DO ABOUT THEM

Symptoms/Effect		Talk with your doctor or pharmacist		Stop taking drug and call your doctor or pharmacist
		Only if severe	In all cases	
Uncommon	Heart attack and			√

	stroke			

(k) <u>2015 – The FDA's Product Safety Announcement</u>

[231] In the U.S., on March 3, 2015, the FDA published a product safety announcement that stated:

> The U.S. Food and Drug Administration FDA cautions that prescription testosterone products are approved only for men who have low testosterone levels caused by certain medical conditions. The benefit and safety of these medications have not been established for the treatment of low testosterone levels due to aging even if a man's symptoms seem related to low testosterone. We are requiring that the manufacturers of all approved prescription testosterone products change their labeling to clarify the approved uses of these medications. We are also requiring these manufacturers to add information to the labeling about a possible increased risk of heart attacks and strokes in patients taking testosterone. Health care professionals should prescribe testosterone therapy only for men with low testosterone levels caused by certain medical conditions and confirmed by laboratory tests.
>
> Testosterone is FDA approved as replacement therapy only for men who have low testosterone levels due to disorders of the testicles pituitary gland or brain that cause a condition called hypogonadism. Examples of these disorders include failure of the testicles to produce testosterone because of genetic problems or damage from chemotherapy or infection. However FDA has become aware that testosterone is being used extensively in attempts to relieve symptoms in men who have low testosterone for no apparent reason other than aging. The benefits and safety of this use have not been established.
>
> In addition, based on the available evidence from published studies and expert input from an Advisory Committee meeting FDA has concluded that there is a possible increased cardiovascular risk associated with testosterone use. These studies included aging men treated with testosterone. Some studies reported an increased risk of heart attack stroke or death associated with testosterone treatment while others did not.
>
> Based on our findings we are requiring labeling changes for all prescription testosterone products to reflect the possible increased risk of heart attacks and strokes associated with testosterone use. Health care professionals should make patients aware of this possible risk when deciding whether to start or continue a patient on testosterone therapy. We are also requiring manufacturers of approved testosterone products to conduct a well-designed clinical trial to more clearly address the question of whether an increased risk of heart attack or stroke exists among users of these products. We are encouraging these manufacturers to work together on a clinical trial but they are allowed to work separately if they so choose.

[232] In August 2015, the FDA published an article in the *New England Journal of Medicine*. The article stated:

> Testosterone products have been approved by the Food and Drug Administration FDA for replacement therapy in men with classic hypogonadism primary or secondary hypogonadism caused by specific well recognized medical conditions such as Klinefelter's Syndrome pituitary injury or toxic damage to the testicles. Treatment with testosterone to restore serum concentrations in men with classic hypogonadism has long been considered the standard of care. On the basis of this intended use the FDA has required only that testosterone products reliably bring low serum testosterone concentrations into the normal range defined as the concentrations seen in healthy young men. The FDA has not mandated that clinical trials show improvements in signs or symptoms of hypogonadism in order for testosterone product to be approved.
>
> In recent years however testosterone use has increased markedly among middle aged and elderly men for a controversial condition that the FDA calls age related hypogonadism. This condition also referred to as late onset hypogonadism is typically diagnosed in men who for no discernable reasons other than older age have serum testosterone concentrations below the normal range for healthy young men as well as signs and symptoms that may or may not be caused by low testosterone concentrations. Serum testosterone appears to decline as men age and although this decline is usually modest concentrations can fall below the normal range for healthy young men In these cases it is unclear whether coexisting nonspecific signs and symptoms such as decreases in energy and muscle mass are a consequence of the age related decline in endogenous testosterone or whether they are the result of other factors, such as coexisting conditions concomitant medications or perhaps aging itself.
>
> … prompted by the growing numbers of older men using testosterone to delay or treat a variety of signs and symptoms the Institute of Medicine formed a committee to assess the state of knowledge regarding testosterone therapy After reviewing the medical literature the committee concluded that the available evidence on the effects of testosterone therapy in older men was limited and inconclusive. To date there is no definite evidence that increasing serum testosterone concentrations in these men is beneficial and safe and the need to replace testosterone in older men who lack a distinct well recognized cause of hypogonadism remains debatable.

(l) <u>2016 – The Testosterone Trials</u>

[233] The "Testosterone Trials," was the largest RCT to date involving TRT. The report on this Study, the Snyder Study, was published in the *New England Journal of Medicine* in February 2016.

[234] The Snyder Study, "Effects of Testosterone Treatment in Older Men" reported on a randomized double-blind placebo controlled trial authored by the Testosterone Trial Investigators. The Study was designed to address benefits rather than safety. The targeted benefits were sexual function, physical function and vitality. In this Study, 790 men, over 65 years of age, received either testosterone gel or placebo for one year, with follow-up for an additional year to monitor for adverse events. In the first year of the Study, there were seven

major CV events in the testosterone group and seven events in the placebo group. In the second year, there were two major CV events in the testosterone group compared with nine in the placebo group. This Study does not evidence any increased risk for the testosterone group.

[235] The results of the Testosterone Trials showed no significant improvement from using TRT in regards to physical function. Vitality also showed no benefit. However, sexual function demonstrated a perceived benefit at three, six, and nine months but not at 12 months, compared to placebo.

10. The Evidence of Dr. Mintzes

[236] Dr. Mintzes reviewed: the Basaria, Xu, Vigen, and Finkle Studies; the safety assessments of Health Canada, the FDA and the EMA, and additional studies that had been mentioned by the regulators. Dr. Mintzes reviewed the seven epidemiological studies considered by Health Canada. She considered nine additional studies. Eight of the nine did not indicate an increased risk from testosterone replacement treatments ("TRT"). The ninth study, the Etmiman Study, indicated to her serious harm associated with testosterone use.

[237] Although she acknowledged that there were limitations in the studies, in Dr. Mintzes' opinion, there was a "strong signal" from the medical literature that testosterone products, including AndroGel™ are associated with an increased risk of serious adverse events. Relying on, in part, the Safety Review completed by Health Canada in July 2014 and the safety advisories of the FDA, Dr. Mintzes opined that "there is a strong signal from the medical literature that testosterone products, including AndroGel™ are associated with an increased risk of serious adverse events, including cardiovascular risks, blood clots (venous thromboembolic events), heart attack and stroke." She also noted that Health Canada's safety review discussed the biological plausibility for cardiovascular harm from testosterone use due to effects of testosterone on salt and water retention and she said that the signal of a potential for harm is sufficiently strong to warrant caution with use.

[238] Dr. Mintzes stated that a well-designed large-scale double-blind randomized controlled trial of several years' duration, comparing testosterone with placebo, would provide the most reliable evidence of whether testosterone use increases the risk of CV events. In the absence of such a trial, in her view, sufficient evidence existed to warrant caution with TRTs.

[239] Under cross-examination, Dr. Mintzes acknowledged that association is not causation and that she did not conclude in her report that there was a causal relationship between TRT and CV events. She conceded that there was not any strong evidence of causation.

[240] Dr. Mintzes opined that AndroGel™ ought not to have ever been indicated for andropause because andropause is not a medical condition but rather is a market-driven concept accepted by a handful of physicians as an antidote for aging.

[241] Dr. Mintzes said that the link between LowT and reduced libido, muscle strength, reduced energy, and depressed mood was weak and there was lack of evidence of LowT being a condition and rather reflected physiological changes that occur with age, obesity, or poorer health.

[242] She opined that the drug bulletins that are genuinely independent of the pharmaceutical industry that are prepared for physicians and pharmacists have judged testosterone to have very limited to no effectiveness for libido sexual function, depression, cognitive function, quality of

life, and for preventing CV events.

[243] In her second expert report dated April 16, 2016, Dr. Mintzes did not focus on the association between AndroGel™ and cardiovascular harm but rather examined whether Abbott could justify its advertised claims that AndroGel™ was a treatment for what she described as non-pathological hypogonadism; i.e. an age-related decline in testosterone and an associated experience of a decline in mood, vitality, energy, physical functioning, and sexual performance including erectile dysfunction.

[244] In her second report, she stated that AndroGel™ had been promoted by Abbott to improve mood, vitality, and sexual functioning in aging men but a review of the scientific evidence did not justify Abbott's claims. She said that there was a lack of evidence or no clear evidence of any clinically relevant benefits from treatment with testosterone. She said that such evidence as there was of modest benefits was likely affected by industry sponsorship and selective publication and that the very modest observed effects of testosterone on sexuality diminished or disappeared when these biases were taken into account.

[245] Dr. Mintzes concluded that Abbott's claimed effects on sexuality for AndroGel™ in Canadian advertising were not supported by solid research evidence and the very modest differences between testosterone and placebo on libido and sexual functioning were below a threshold that would be considered clinically significant. From a temporal viewpoint, she said that when Abbott made claims in Canadian medical journal advertisements for effects of AndroGel™ treatment on sexual function, physical function, mood or vitality, it did not have substantive research evidence to back its claims and the recent studies did justify the promotional claims and the efficacy claims did not outweigh the potential for harm.

11. The Evidence of Dr. Milne

[246] It was Dr. Milne's expert opinion that: (a) there is evidence in the literature that TRT is associated with, and can increase, the risk of major CV events; (b) the regulators were correct to add additional warnings to AndroGel™ based on the recent publications demonstrating increased risk of adverse events; and (c) use of AndroGel™ by Mr. Wise could have contributed to his heart attack.

[247] Further, it was Dr. Milne's opinion from his review of the scientific data, that the benefits of TRT are not clear. Dr. Milne made a detailed review of the studies and articles relied on by Dr. Morgentaler and stated that he did not find the evidence definitive. It was Dr. Milne's opinion that there had not been a properly designed research study and that AndroGel™ had not been proven to be safe. In his view, while most of the historic scientific literature suggested no increase in adverse events or harms with TRTs, this was not proof of the safety of the product and some of the industry sponsored or supported studies reflected an industry bias to under-report adverse events and harm.

[248] Dr. Milne stated that while there were limitations in the Basaria, Xu, Vigen, and Finkle Studies, as there is in all studies, these studies supported the claim that there was an increase in CV risk with TRTs. Further, the more recent Etminan Study observed a 41% relative increase in risk of myocardial infarction by first-time users and a 49% relative risk increase in first-time topical gel users and although the absolute increase in risk was small the actual amount of harm was considerable because millions of men were potentially exposed to this treatment. He said

that patients needed to be informed of the possible increased risk of myocardial infarction especially because the evidence of any actual benefits from the treatments was very weak.

[249] In this last regard, Dr. Milne stated that low testosterone may only be a marker of general health and the purported benefits of TRT came mostly from observational studies demonstrating an association not causation. In his view, there was no convincing evidence with patient oriented outcomes demonstrating that the risks, if any, of LowT can be mitigated with TRT.

[250] Dr. Milne said that all of the studies in the testosterone literature had limitations and flaws, including lack of blinding, lack of randomization, lack of control group, inappropriate comparison group, variety of biases, limited search strategies, failure to report harm/adverse events, lack of comprehensive follow-up, loss to follow-up, short duration, subgroup analyses, reliance on p-values, lack of precision, composite outcomes, high statistical heterogeneity, statistical rather than clinical significance, and surrogate markers not patient oriented outcomes.

[251] He said of his own analysis that one strength was his lack of a conflict of interest with the material being reviewed in contrast to Abbott's experts who had multiple conflicts of interest that diminished their objectivity and obscured the truth.

[252] In his cross-examination, Dr. Milne acknowledged that association is not proof of causation and that to date only an association and a weak signal of CV risk had been shown from TRT studies. He agreed that until a clinical trial was done, it could not be said whether TRT causes CV harm.

12. The Evidence of Dr. Morgentaler

[253] It was Dr. Morgentaler's opinion that there is no scientific basis for the claim that TRT causes or contributes to CV events or increases their risk. He said that the Basaria, Xu, Vigen, and Finkle Studies were weak studies that did not provide credible evidence of increased risk. He said that the Vigen and Finkle Studies arguably demonstrated a protective effect of TRT on CV risk. He said that the posited association between testosterone treatments and serious CV events was against the likelihood of increased risk and rather suggested that the treatments reduced the risk of cardiovascular misadventures.

[254] Dr. Morgentaler was sharply critical of each of the studies that had been relied on in the Wises' Statement of Claim. He said that in contrast to the four studies reporting increased CV risk with TRT, there was an extensive body of literature accumulated over several decades that suggested exactly the opposite; i.e., that testosterone deficiency was associated with adverse CV events and TRT was beneficial and reduced the risk of an adverse CV events. He said that after the Finkle Study, there had been at least 16 publications that reported no negative effects and several that reported cardiovascular benefits from TRT.

[255] Dr. Morgentaler strongly disagreed with the position taken by the FDA that testosterone is only indicated in men with classical hypogonadism. He said that the benefits of testosterone treatment had been clear for decades for classic hypogonadism and the treatment was beneficial for other causes of hypogonadism. He stated that the symptoms and signs of hypogonadism were due to a deficiency of the testosterone hormone, regardless of its cause. He said the symptoms and signs resolve once testosterone levels return to normal levels.

[256] Dr. Morgentaler said that most well-recognized medical societies do not share the recently announced view of the FDA that testosterone is only indicated in men with classical

hypogonadism and said that the symptoms and signs of hypogonadism are due to a deficiency of the testosterone hormone, regardless of its cause. He said that there is no justification to restrict treatment to a limited number of causes based on the knowledge from more than 20-30 years ago.

[257] In 2015, for *Mayo Clinic Proceedings*, Dr. Morgentaler and his colleagues published a review of approximately 100 studies conducted between 1940 to 2014 relating to testosterone and serious CV events: A. Morgentaler *et al*, "Testosterone Therapy and Cardiovascular Risk: Advances and Controversies", *Mayo Clin. Proc.*, 2015, 90(2). It was Dr. Morgentaler's opinion that none of the studies showed any association between TRT and increased CV risk. Rather, Dr. Morgentaler reported that TRT reduced CV event risk. He said that the studies showed that: mortality was reduced, the capacity to exercise was increased, carotid intima-media thickness and epicardial fat (a marker for CV risk) was reduced, muscle mass was increased and fat was reduced, metabolic syndrome (a risk factor for CV events), was resolved; and there was improvement in blood sugar control, representing a reduction in another CV risk factor. He said that administering testosterone resulted in greater exercise capacity and peak oxygen consumption compared with placebo among individuals with heart failure.

[258] Dr. Morgentaler said that the Testosterone Trials demonstrated that men who received testosterone gel achieved statistically significant benefits in the areas of sexual desire, sexual function, physical activity, and mood. In his third report, Dr. Morgentaler said that the Testosterone Trial's information did not show any increased risk of CV risk to those patients who had been prescribed testosterone products for hypogonadism by virtue of age alone. He said that it was worth noting that the study population consisted exclusively of men 65 years and older, a population already at increased risk of CV risk by virtue of age alone and that the Testosterone Trials excluded men with classical hypogonadism.

13. The Evidence of Dr. French

[259] Dr. French joined the parade of disparaging Dr. Mintzes for not having clinical experience and of having the impudence to express an epidemiological opinion without having this experience. Once again, I found the criticism unfair and paid far more attention to what Dr. French could objectively contribute to the debate.

[260] Dr. French stated that LowT had been shown to be associated with higher rates of all-cause mortality and of cardiovascular mortality. He stated that there was a correlation between the seriousness of heart failure and the degree of testosterone deficiency and that patients suffering from diabetes and obesity had been shown to have lower levels of testosterone compared with those healthy control groups.

[261] In addition to the Basaria, Xu, Vigen and Finkle Studies, Dr. French examined the medical literature and concluded that the data indicated that TRT did not increase the risk of adverse CV events. As for the Basaria, Xu, Vigen and Finkle Studies, in his opinion, all the studies were poorly designed, poorly executed, and replete with errors in data collection and analysis. In his opinion, none of the studies provided credible evidence of an increased risk of CV events from testosterone replacement treatments.

[262] Dr. French opined that there have been multiple benefits on the cardiovascular system from the use of testosterone. TRT in men who suffer from hypogonadism had proven effective in

decreasing cardiac problems by promoting better exercise tolerance, and by reducing of central obesity or increased weight in the waist, which has been shown to be a risk factor in heart disease. In addition, he said that favorable changes have been reported in platelet aggregation with reduced formation of blood clots and fibrinolytic activity with breakdown of blood clots and reduced exercise-induced heart ischemia.

[263] Dr. French served on the Data Safety Monitoring Board for the Testosterone's Effects on Atherosclerosis Progression in Aging Men (TEAAM) Trial, which was the largest randomized placebo-control trial to date to investigate the effects of testosterone on atherosclerosis progression in older men. In this study, the researchers evaluated cardiovascular endpoints using a placebo-control, double-blind, parallel-group randomized controlled trial involving 308 men aged 60 years or older with low or low-normal testosterone levels. 156 participants were randomized to receive 7.5 g of 1% testosterone and 152 were randomized to receive placebo gel packets daily for 3 years. On August 11, 2015, a report on the TEAAM Trial was published in *JAMA*. The authors found that there was no significant difference in common carotid artery intima-media thickness and coronary artery calcium (proxies for atherosclerosis) between the placebo and testosterone groups.

[264] Dr. French opined that the results of this trial confirm that there is no significant adverse effect of testosterone on important markers of CV risk. He said that the findings of the TEAAM Trial were consistent with other studies demonstrating the lack of any causal relationship between CV events and TRTs.

[265] Dr. French summarized the epidemiological literature on the relationship between TRT and CV events. He opined that the epidemiological studies indicated that TRT does not increase the risk of adverse CV events in men. He said that the Basaria, Xu, Vigen, and Finkle studies were flawed and did not provide credible evidence of the Wises' claims about the unsafety of testosterone replacement medications.

[266] In his second report, Dr. French reviewed the epidemiological studies identified by Dr. Mintzes and said that there was nothing there that would cause him to change his opinion. He said that there was no support for the claim that TRT causes increased CV risk and that the studies that showed an increased risk were not scientifically sound or reproducible.

[267] In his third report, Dr. French stated that while the results of large, long-term RTCs will be interesting and further advance the understanding of the benefits and risks of TRT, the evidence in the extensive testosterone literature to date was that there are clinically important benefits and no CV risks from TRT in testosterone deficient men.

[268] Dr. French said that Dr. Milne's theory that TRT could dilate the coronary arteries, increase blood flow, and make pre-existing coronary plaques unstable leading to a heart attack was not supported by any scientific evidence. It was Dr. French's opinion, as a cardiologist, that the theory was not plausible and was preposterous.

14. The Evidence of Dr. Brock

[269] In his report, Dr. Brock, who is an urologist, indicated that AndroGel™ was indicated for the treatment of hypogonadism, but it should not be used to treat symptoms suggestive of hypogonadism unless testosterone deficiency had been demonstrated and other etiologies responsible for the symptoms in the patient had been considered and excluded. He said that

based on his review of the scientific literature and through personal experience in clinical practice, he would continue to strongly recommend use of testosterone in patients who presented with symptoms of hypogonadism and who were found to have biochemical evidence of a LowT state.

[270] Dr. Brock opined that on balance, the scientific literature demonstrates that testosterone deficient men are at an elevated risk for CV events, including death. He said that the literature showed that and when men treated with testosterone are compared to untreated men, a measureable health benefit was demonstrated in many studies. He concluded from his review of the scientific literature that: (a) men with LowT are at an elevated risk of morbidity and mortality including from CV and metabolic events; (b) appropriate use of testosterone in these populations has been shown to mitigate the risks to some extent; and (c) the overwhelming existing evidence shows an overall health benefit of testosterone use in hypogonadal men.

[271] Dr. Brock was one of the researchers in a RCT examining the effects of TRT on the symptoms of hypogonadism. He was the lead author of a paper that was published in the *Journal of Urology* on May 17, 2015. The RCT was a double-blind study evaluating 715 hypogonadal men over 18 years of age for 12 weeks. The study found no significant differences in CV events between the testosterone and placebo groups. Dr. Brock deposed that the study demonstrated no change in blood pressure, heart rate, or any measureable difference in rates of stroke, myocardial infarction or serious adverse events. He said that there was no evidence found of CV risk from topical testosterone.

[272] Dr. Brock described the A. Aversa *et al*, RCT epidemiological study, "Effects of Testosterone Undecanoate on Cardiovascular Risk Factors and Atherosclerosis in Middle-Aged Men with Late-Onset Hypogonadism and Metabolic Syndrome: Results from a 24-month, Randomized, Double-Blind, Placebo-Controlled Study," which was published in *Sex Med*., 2010, 7(10). He said that the study was designed to to evaluate TRT on CV risk. While the numbers were small, the assessments were intensive and carried out over a two-year period. No CV adverse signal was noted in this intensive assessment trial; rather, there was a significant risk reduction among the men receiving testosterone observed.

[273] Dr. Brock testified that the TEAAM Trial affords "strong evidence" that TRT does not increase the risk of serious CV events.

[274] Dr. Brock reviewed 19 epidemiological studies and concluded that: men with LowT are at an elevated risk of morbidity and mortality including from CV and metabolic events; appropriate use of testosterone in these populations has been shown to mitigate these risks; and the overwhelming existing evidence shows an overall health benefit of testosterone use in hypogonadal men. He opined that TRT improves health-related quality of life of men diagnosed with late-onset hypogonadism.

[275] Dr. Brock stated that the Basaria, Xu, Vigen, and Finkle Studies were outliers going against the preponderance of the scientific literature. He said the four Studies were flawed and when the defects of these Studies were taken into account, they did not support the claim that TRT causes CV events or increased CV risk.

[276] He said that the decisions and announcements of Health Canada and the FDA did not support the claim that 1% testosterone gel causes CV events such as heart attack, stroke, thrombolytic events or death, or place LowT patients at an increased risk for these events. It was

his opinion that LowT patients who receive appropriate TRT in accordance with recognized standards of practice are not at an elevated risk of CV events; and rather treatment was likely to have a protective effect and guard against the risk of adverse CV outcomes and cardiovascular disease.

[277] Dr. Brock was dismissive of Dr. Mintzes' credentials to comment on the epidemiology of TRTs. In my view, Dr. Brock's criticism was unfair and started to move into the territory where people who live in glass houses ought not to be throwing stones. Epidemiology is not the reserve of clinicians. In my view, Dr. Mintzes was entitled to her view of the information and epidemiological studies as he was, and, as noted above, I have concluded that none of the expert witnesses should be disqualified for partisanship.

[278] Dr. Brock said that Dr. Mintzes' characterization of hypogonadism as being restricted only to certain diseases such as testicular failure, orchiectomy and Klinefelter's Syndrome was not supported by clinical practice, national and international guidelines, or the literature. Hypogonadism or testosterone deficiency syndrome was, in his view, a condition in which men with abnormally LowT exhibit symptoms that occur in patients with underlying conditions as well as in patients in many other circumstances. Dr. Brock's criticism of Dr. Mintzes manifested the problem that I alluded to earlier that while everybody agreed that testosterone was an appropriate treatment for hypogonadism, they would not come to terms on the pathology of hypogonadism.

[279] In any event, Dr. Brock disagreed with Dr. Mintzes that Health Canada's conclusion that current available evidence suggests the possibility that cardiovascular problems, other than those already identified, may occur with the use of testosterone replacement products was a strong signal. He said that regardless of how one characterizes the strength of the "signal", it is not evidence of causation. In my opinion, however, this is an example of unfair criticism because Dr. Mintzes' never claimed that causation of serious cardiovascular events had been proven.

[280] Dr. Brock was also dismissive of Dr. Milne's credentials to opinion on the risks and benefits of testosterone treatment for hypogonadism. He said that there were undoubted benefits revealed by the research literature and in decades of experience by treating physicians. He disagreed with Dr. Milne that the Basaria, Xu, Vigen, and Finkle Studies, and other studies, provide strong evidence of an association between the treatments and major CV events. He stated that none of the studies, which were seriously, flawed supported the Wises' allegations.

15. The Evidence of Dr. David Greenberg

[281] In his three reports, Dr. Greenberg discussed the nature, diagnosis, standard of care, and treatment of hypogonadism from the perspective of a primary care physician. He discussed the allegation that testosterone gel causes CV events with a focus on the perspective of the primary care physician. He reviewed the Product Monograph for AndroGel^{TM}, and commented on the appropriateness of the warnings in the Monograph over time. He commented on the allegations in the Statement of Claim regarding advertising for AndroGel^{TM}. He also responded to the reports of Dr. Mintzes and Dr. Milne.

[282] Dr. Greenberg, who as noted earlier in this decision, is a staunch proponent for testosterone replacement as a factor in men's health described how he and other treating physicians make a diagnosis of hypogonadism in older men. He said that he was guided by a

screening questionnaire known as the ADAM Questionnaire (Androgen Deficiency in the Aging Male) which was developed by John Morley, a geriatrician at St. Louis University. Dr. Greenberg acknowledged that pharmaceutical companies including Abbott used the ADAM Questionnaire to market their products.

[283] The ten questions in the ADAM Questionnaire are as follows: (1) Do you have a decrease in libido (sex drive)? (2) Do you have a lack of energy? (3) Do you have a decrease in strength and/or endurance? (4) Have you lost height? (5) Have you noticed a decreased "enjoyment of life"? (6) Are you sad and/or grumpy? (7) Are your erections less strong? (8) Have you noticed a recent deterioration in your ability to play sports? (9) Are you falling asleep after dinner? And, (10) Has there been a recent deterioration in your work performance? A positive result of the ADAM Questionnaire is defined as a "yes" to any three questions or as a "yes" to the question of diminished libido or weaker erections.

[284] In his report, Dr. Greenberg reported that he used the ADAM Questionnaire as a preliminary step in the diagnostic process and if the patient's history was consistent with what might be suspected to be hypogonadism, he would then order blood work. He said that if the testosterone level was between 12 to 35 units, he would not make a diagnosis of hypogonadism even in the presence of symptoms but below 12 units, particularly below 8 units, he would make a diagnosis of hypogonadism after considering and ruling out other causes for the patient's symptoms.

[285] Dr. Greenberg commented on the Basaria, Xu, Vigen, and Finkle Studies from his perspective as a clinician in active family practice. He found the Studies flawed and concluded that they did not demonstrate any causal relationship between TRT and cardiovascular disease. He emphasized that studies both before and after these Studies demonstrated an association between LowT, mortality, and morbidity and CV events, markers of coronary artery disease and diagnoses/disease states that are themselves risk factors for cardiovascular disease (such as obesity, glycemic control and diabetes). He agreed with Dr. Morgentaler's published review of these Studies.

[286] Dr. Greenberg reported that based on his clinical experience and after reviewing the scientific and regulatory literature, he could find no evidence that AndroGel^{TM} 1% testosterone gel, when properly prescribed, properly monitored and properly used by the appropriate patient, that is, someone with symptomatic and biochemically proven LowT, causes CV events or an increase in cardiovascular risk.

[287] In my opinion, like Dr. Brock, Dr. Greenberg was unfairly dismissive of Dr. Mintzes' qualifications to comment about the epidemiology of hypogonadism because, unlike him, she was not a physician with clinical experience. He said that while academic epidemiologists such as Dr. Mintzes are well trained on statistical methods and analysis of population data, it is important to note that the populations they observe often bear little, if any, relationship to the patient population treated in active practice. I doubt that this last comment is true, but if it was true it would go some distance in diminishing the value of Dr. Greenberg's clinical experience as making him better qualified to evaluate the epidemiological studies of persons with whom he had no clinical experience.

[288] I regard Dr. Greenberg's evidence much the same way as all of the experts' evidence should be valued. It contributed to a debate on a topic where both sides had the credentials to make a contribution to the debate.

16. The Evidence of Dr. Marais

[289] Dr. Marais analyzed the Basaria, Xu, Vigen, and Finkle Studies and opined that they did not support the Wises' claims.

[290] Additionally, Dr. Marais examined ten published meta-analyses studies of the potential association between TRT and serious CV events and reported that nine of the ten did not report a statistically significant elevation in CV risk. The sole exception was the Xu Study, which he had debunked. He examined 12 primary studies (including Basaria, Vigen, and Finkle) about the potential association between TRT and serious CV events and noted that only Basaria, Vigen, and Finkle reported a statistically significant increased risk but nine studies reported statistically significant decreases in serious CV risk. He notes that with the sole exception of the Basaria Study, all the risk ratios were less than 2.0.

[291] Dr. Marais observed that the authors of the Basaria, Xu, Vigen, and Finkle Studies did not avow causation and rather were of the view that the association between TRT and serious CV events warranted further research including a RCT.

E. DISCUSSION AND ANALYSIS

Introduction

[292] To resolve Abbott's summary judgment motion, there are four major issues; namely: (1) Is the case appropriate for a summary judgment? (2) Is there a genuine issue requiring a trial about general causation? (3) Is there a genuine issue requiring a trial about the duty to warn; and (4) Is there a genuine issue requiring a trial about the Wises' negligence or unjust enrichment claim for pure economic losses?

The Pursuit of Truth and Findings of Fact

[293] With one preliminary comment about the pursuit of truth, the legal analysis may begin with a partial summary of some of my findings of fact that will serve as the transition to and the contextualization of the legal analysis that follows. Additional findings of fact will be made in the legal analysis.

[294] By way of preliminary comment, one of the profound difficulties in the immediate case is that the court is being asked to make findings about the truth of scientific facts based on evidence from scientists who disagree about the truth of their respective findings and whose philosophy about certainty and truth is, in any event, conceptually different from the law's approach to certainty and truth.

[295] Scientists use the scientific method, which posits a tentative truth consisting in systematic observation, measurement, and experiment, and the formulation, testing, and modification of hypotheses. In contrast, judges in civil matters use a juristic pursuit of truth that posits a final and certain truth based on the balance of probabilities. To return to a theme mentioned earlier in these reasons for decision, one of the major difficulties in assessing the evidence and making findings of facts in this case was that it is not for courts to decide what is or is not a disease or a medical syndrome. Courts are not omniscient and as finders of fact, courts make descriptive largely retrospective findings about what counts for truth. A court's findings of fact are based on

the evidentiary record presented to the court, and subject to appeal, those findings become the certain truth of the matter. The court's findings are not tentative until the real truth comes along.

[296] In the immediate case, based on the above narrative of the factual background and based on the law's notion of the pursuit of truth, which is based on the balance of probabilities, I would summarize some of my findings of fact as follows.

[297] "Hypogonadism" is a deficiency or absence of endogenous testosterone in males. Hypogonadism is characterized by a low serum testosterone level in combination with various symptoms, such as decreased libido, erectile dysfunction, reduced muscle mass and strength, and increased body fat and weight gain. A deficiency in testosterone may be caused by disease or damage to a man's gonads but testosterone also naturally declines as a man ages. For decades and until today, when the deficiency in testosterone is caused by disease or damage to a patient's gonads and there are accompanying symptoms such as as decreased libido, erectile dysfunction, reduced muscle mass and strength, and increased body fat and weight gain, physicians will diagnose the patient as suffering from hypogonadism and physicians would prescribe artificially synthesized testosterone to elevate the patient's testosterone levels.

[298] In 2000, in the United States, and in 2002 in Canada, the regulators approved for sale AndroGel™, a drug manufactured by Abbott. AndroGel™ administers testosterone transderminally (through the skin). AndroGel™ was indicated for hypogonadism caused by disease or damage to the gonads, and in Canada but not the United States, it was also indicated for patients suffering from what was described in the product monograph "as sexual dysfunction or for andropause when the conditions are due to a measured or documented testosterone deficiency."

[299] I find that between 2002 and 2006, when Health Canada, the Canadian regulator, ordered that the indication for andropause be removed from the product monograph that Abbott thought that hypogonadism and andropause were different but closely related medical conditions for which AndroGel™ was an approved treatment. Today, Abbott's medical experts regard "classic hypogonadism" (i.e., low testosterone and associated symptoms caused by disease or damage to the gonads) and "testosterone deficiency", however it may be identified or labelled (i.e., low testosterone levels and associated symptoms caused by aging), as the same medical condition.

[300] The Canadian product monograph for AndroGel™ was amended in 2006 to remove the indication for andropause but, practically speaking, the change in the monograph did not change much. There was, and continues to be, a controversy in the medical and scientific community about whether andropause exists and whether it is a natural or pathological phenomenon, but physicians continued to prescribe AndroGel™ for patients presenting with measured LowT and symptoms of decreased libido, erectile dysfunction, reduced muscle mass and strength, and increased body fat and weight gain. I agree with Abbott that in prescribing AndroGel™ for testosterone deficient men, the treating physicians were making an on-label prescription.

[301] For the purposes of this summary judgment motion, it is not necessary to resolve the definition of hypogonadism because the underlying issue is not about what counts for hypogonadism, but whether, as a matter of general causation, AndroGel™ can cause serious CV events and whether the sale of an allegedly useless but risky product, AndroGel™, can support a product's liability negligence claim for pure economic loss.

[302] The ultimate issue is whether when Abbott sold AndroGel™ to Mr. Wise and others who

did not have hypogonadism of the clearly pathological sort, it breached a duty to warn that those taking AndroGel™ were exposed to a significant risk of a serious CV event like a heart attack, which is unfortunately what happened to Mr. Wise, who says that he never would have used the drug if properly warned.

[303] After Mr. Wise suffered his heart attack, there was a great deal of media attention and news reports that recent clinical studies had revealed an association between TRT, like AndroGel™, and serious CV events.

[304] Informed by this news and, in particular, the information available from the Basaria, Xu, Vigen, and Finkle Studies, which had prompted the media's attention, Mr. Wise commenced this class action.

[305] Abbott responded with this summary judgment motion and focused on what it perceived was the Achilles heel in Mr. Wise's products liability class action. It was Abbott's contention that a review and analysis of the regulator history of AndroGel™ marketing in Canada, the U.S., and Europe, and the myriad epidemiological studies of the positive or negative effects would demonstrate that there was no genuine issue for trial about a critical constituent element in the Wises' products liability action; namely, general causation.

[306] The summary judgment motion thus became a battle of experts about the epidemiology of hypogonadism and about the proven or not proven risks and benefits of AndroGel™.

[307] Notwithstanding a great deal of disparaging commentary, the opposing experts were in agreement about the fact that what epidemiologists regard as association is not proof of general causation; rather it is from an association that an inference of general causation can sometimes be drawn.

[308] The opposing experts and the parties were also in agreement that the best evidence to determine the issues for this summary judgment motion were the views of the regulators; namely: Health Canada, the FDA, and the EMA.

[309] The opposing experts and the parties, however, differed in what was to be learned from the regulators and the significance of the teachings. Each side cherry-picked what they thought was useful and dispositive in their favour from the regulators' statements.

[310] Thus, for example, the Wises relied on the statements in the FDA's January 31, 2014 announcement that: (a) it had been monitoring the risk of serious CV events in men taking testosterone products; and (b) it had decided to reassess the safety issue and investigate further because the Basaria and Xu Studies had each suggested an increased risk, while Abbott relied on the FDA's statements that: (a) it had not concluded that there was in fact an increased risk; (b) patients should not stop taking their prescriptions without discussing it with their doctors; and (c) their doctors should follow the prescribing information on the product monograph and should consider whether the benefits of FDA approved testosterone treatment is likely to exceed the potential risks of treatment.

[311] Thus, for another example, the Wises relied on the statements in Health Canada's May 22, 2014 Signal Assessment that: (a) since 2010, there was a growing body of evidence calling into question the cardiovascular safety of testosterone; and (b) Health Canada had reviewed seven published studies in which CV events were specifically examined and although the studies had varying degrees of bias and limitation, four of the seven showed a greater risk of CV events and three studies showed no statistically significant risk. And the Wises relied on Health

Canada's overall conclusion that the scientific literature provided evidence to support the possible association between testosterone use and the risk of serious CV events. For its part, Abbott relied on the fact that Health Canada's recommendation was to consider updating the Product Monograph to indicate a possible increased CV risk beyond what was currently described.

[312] Thus, for yet another example, the Wises relied on the statement in Health Canada's July 15, 2014 Summary Safety Review that although they had limitations, several studies suggested an increased risk of serious CV problems and provided evidence in support of a possible association between testosterone products and serious CV events. Conversely, Abbott relied on the fact that Health Canada indicated that in response to the studies, it would work with manufacturers to update the Canadian product labels and would keep Canadians informed and take action, as appropriate, if any new safety information was identified.

[313] Thus, for still more examples, Abbott relied on the fact that in the United States, the FDA denied the Public Citizen's position, but the Wises relied on the fact that notwithstanding the denial of the petition, the FDA on March 3, 2015, released an announcement stating that it was requiring manufacturers to add information to labeling about a possible increased risk of heart attacks and strokes in patients taking testosterone. The announcement stated that the FDA had concluded that there is a possible increased CV risk associated with testosterone use and that some studies reported an increased risk of heart attack, stroke, or death associated with TRT, while others did not.

1. Is the Case Appropriate for a Summary Judgment?

[314] Abbott submits that the case at bar is appropriate for a summary judgment. In response to the summary judgment motion, the Wises submit that the case is not appropriate for a summary judgment - for Abbott -, but they submit that the case would be appropriate for a partial summary judgment - for them - with the result that three of the five certification criteria would be satisfied (cause of action, a common issue, and representative plaintiff criteria). In other words, the Wises submit that they should be granted a partial summary judgment and that their action should move on to certification and to a common issues trial of the remaining common issues followed by assessments of damages for individual Class Members.

[315] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04(2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
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> 2. Evaluating the credibility of a deponent.
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> 3. Drawing any reasonable inference from the evidence.

[316] In *Hryniak v. Mauldin*, 2014 SCC 7 and *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[317] If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04(2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[318] At para. 22 of her judgment in the companion case of *Bruno Appliance and Furniture, Inc. v. Hryniak*, *supra*, Justice Karakatsanis summarized the approach to determining when a summary judgment may or may not be granted; she stated:

> Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

[319] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties will respectively present at trial: *Dawson v. Rexcraft Storage & Warehouse Inc*., [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc*. (1994), 18 O.R (3d) 481 (Ont. C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11. The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 255 (Gen. Div.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.).

[320] The jurisdictional test for granting a summary judgment is that there is no genuine issue requiring a trial, and at the heart of this test is a judicial gut check. Although she did not put it in quite that way, in *Hryniak v. Mauldin* at paras. 49 and 50, Justice Karakatsanis noted that in the context of an adversarial system, if a judge is going to decide a matter summarily, then he or she must have confidence that he or she can reach a fair and just determination without a trial. She

expressed this sentiment, as follows:

> 49. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process: (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
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> 50. These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[321] Part of this confidence or gut check that a summary judgment is fair and just is achieved if the judge is satisfied that he or she can justly and fairly decide the matter without the advantages of participating in the dynamic of a trial, where witnesses testify in their own words and can be observed through the rigours of both examination-in-chief and cross-examination, and where the judge has an extensive exposure to the evidence and sees the case unfold without having to piece it together in chambers working from affidavits, transcripts, and factums. In *Combined Air Mechanical Services Inc. v. Flesch* 2011 ONCA 764, which was the Court of Appeal's decision that became *Hryniak v. Mauldin* at paras. 51-55, the Court of Appeal described how a judge might determine whether he or she was satisfied that a trial was required rather than using the forensic resources of the summary judgment rule to decide the matter summarily; the Court of Appeal stated:

> 51. We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
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> 52. In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.
>
> 53. We wish to emphasize the very important distinction between "full appreciation" in the sense we intend here, and achieving familiarity with the total

> body of evidence in the motion record. Simply being knowledgeable about the entire content of the motion record is not the same as fully appreciating the evidence and issues in a way that permits a fair and just adjudication of the dispute. The full appreciation test requires motion judges to do more than simply assess if they are capable of reading and interpreting all of the evidence that has been put before them.
>
> 54. The point we are making is that a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.
>
> 55. Thus, in deciding whether to use the powers in rule 20.04(2.1), the motion judge must consider if this is a case where meeting the full appreciation test requires an opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand. Unless full appreciation of the evidence and issues that is required to make dispositive findings is attainable on the motion record - as may be supplemented by the presentation of oral evidence under rule 20.04(2.2)- the judge cannot be "satisfied" that the issues are appropriately resolved on a motion for summary judgment.

[322] Although in *Hryniak v. Mauldin* the Supreme Court of Canada rejected the "full appreciation test" and commanded a very robust summary judgment procedure, it did not foreclose lower courts from simply dismissing the summary judgment motion and ordering that the action be tried in the normal course: *Gubert v. 1536320 Ontario Limited*, 2015 ONSC 3294. Where there are genuine issues for trial and the court concludes that employing the enhanced forensic tools of the summary judgment procedure would not lead to a fair and just determination of the merits, the court should not decide the matter summarily: *Mitusev v. General Motors Corp*., 2014 ONSC 2342 at para. 79; *Gon (Litigation Guardian of) v. Bianco*, 2014 ONSC 65 at paras. 41-47; *Yusuf v. Cooley*, 2014 ONSC 6501; *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 at para. 44.

[323] In *Baywood Homes Partnership v. Haditaghi*, *supra*, the Court of Appeal held that where the motion is for a partial summary judgment, the motions judge is obliged to assess the advisability of a partial judgment in the context of the litigation as a whole. In this case, the Court of Appeal also stated that when conflicting evidence is presented on factual matters, a motions judge is required to articulate the specific findings that support a conclusion that a trial is not required. The Court noted that evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice and make the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context and that great care must be taken by the motions judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all. See also: *Trotter v. Trotter*, 2014 ONCA 841; *Gino L Arnone*

Professional Corp. v. Hacio, 2015 ONSC 5266.

[324] In *Mitusev v. General Motors Corp., supra*, Justice Edwards declined to allow a summary judgment motion proceed when the moving party defendant did not proffer sufficient evidence to ensure that the judge hearing the motion could be confident that he or she could fairly resolve the dispute. In that product's liability case, the plaintiff's personal injury claim arose from a single vehicle car accident allegedly caused by defects in the driver's seat in the vehicle. One of the defendants moved for summary judgment based on the submission that it was not the manufacturer of the part that was defective and that had caused the failure of the seat. Justice Edwards found, however, the defendant's evidence inadmissible and, accordingly, there was inadequate evidence to allow him to fairly and justly adjudicate the dispute.

[325] To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings: *Ghaeinizadeh (Litigation guardian of) v. Garfinkle Biderman LLP*, 2014 ONSC 4994, leave to appeal to Div. Ct. refused, 2015 ONSC 1953 (Div. Ct.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836 at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001.

[326] In considering whether to allow the summary judgment motion to go ahead or how it should go forward, the court should consider factors such as: (a) the nature and complexity of the issues; (b) the extent of the anticipated record; (c) the comparative prospects that the record will be sufficient to satisfy the test for a summary judgment with or without examinations for discovery; (d) whether the responding party have production and oral discovery similar to that available in the normal course; and (e) whether more efficient means could be developed to ensure the just, most expeditious and least expensive determination of the case on its merits: *George Weston Ltd. v. Domtar Inc., supra* at paras. 53-55.

[327] In *Ghaffari v. Asiyaban*, 2012 ONSC 2724, which was not a class action, Justice Ferguson stated that a summary judgment motion should only be stayed in the clearest of cases and only after the court had considered: (a) whether the party seeking a stay has put its best foot forward to show that there is a genuine issue requiring a trial or that the matter was too complicated for a judge to achieve a full appreciation of the case; and (b) whether the complexity of the matter, the nature of the issues, and the nature of the evidence indicated that the case was not amenable to a judgment without a full trial. See also *Stever v. Rainbow International Carpet Dyeing & Cleaning Co.*, 2013 ONSC 241, leave to appeal refused 2013 ONSC 1574 (Div. Ct.).

[328] The debate in the case at bar about whether the case is appropriate for a summary judgment is quite similar to the debate that took place in the British Columbia case *Player Estate v. Janssen-Ortho Inc.*, 2014 BCSC 1122, which was a proposed class action against five manufacturers of transdermal fentanyl patches, a prescription painkiller where the drug is delivered by a patch applied to the patient's skin.

[329] In *Player Estate*, the plaintiffs alleged that the defendants had designed their patches negligently. Before the certification of the action, two of the defendants, Teva Canada Limited and Sandoz Canada, whose patches were designed differently than the other three defendants, sought an order dismissing the action against them on a summary trial under British Columbia's Supreme Court Rules 9-7, 11-2. The parties filed more than 5,000 pages in materials for the

application, including affidavits, exhibits, submissions and case authorities. The proposed representative plaintiffs, whose deceased husbands had died after using the defendants' type of fentanyl patch, argued that the case was not suitable for a summary trial and ought to be tried by a full trial.

[330] Justice Bracken noted that there are a number of factors to consider in determining whether it would be appropriate and just to grant judgment at summary trial including: (a) the amount involved; (b) the urgency of the matter; (c) the complexity of the matter; (d) whether credibility was a critical factor in the determination of the dispute; (e) any prejudice likely to arise by reason of delay; (f) the costs of litigation; (g) the cost of taking the case forward to a conventional trial in relation to the amount involved, (h) the course of the proceedings; and (i) the undesirability of piecemeal litigation. See also: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [1989] B.C.J. No. 1003 (B.C.C.A.); *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369; *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31.

[331] Justice Bracken stated that while in some cases the fact that the summary trial was heard before certification and therefore would not bind the potential class members might be a reason to deny the application for a summary trial particularly if the issue was idiosyncratic to the proposed representative plaintiffs, this was not the general rule for cases where the application concerns the defendant's liability to the class as a whole. Justice Bracken noted that, practically speaking, it is very unlikely that where the defendant is successful on a dispositive issue at a summary trial pre-certification, that class counsel could enlist another class member to take on the enormous litigation risk of reprising the proposed class action.

[332] Justice Bracken listed a number of decisions where summary judgments were granted in pre-certification proceedings; see: *Azevedo v. Legal Services Society (British Columbia)* (1998), 49 B.C.L.R. (3d) 45 (C.A.) (breach of contract for payment of legal aid fees); *Pfeiffer v. Pacific Coast Savings Credit Union*, 2000 BCSC 1472, var'd on other grounds, 2003 BCCA 122 (interpretation of mortgage contract); *Royster v. 3584747 Canada Inc. dba Kmart Canada Ltd.*, 2001 BCSC 153 (mass wrongful termination of employees); *Dahl v. Royal Bank of Canada*, *supra* (failure by the banks to disclose credit card charges); *Consumers' Association v. Coca-Cola Bottling Company*, 2006 BCSC 863, aff'd 2007 BCCA 356 (claim for refunds on recyclable beverage containers); *Blackman v. Fedex Trade Networks Transport & Brokerage (Canada), Inc.*, 2009 BCSC 201 (breach of *Business Practices and Consumer Protection Act*).

[333] Justice Bracken concluded that notwithstanding the voluminous amount of material, the essential facts and issues were not as complex as the amount of material might suggest, and that although there were conflicts in the expert evidence, the evidence had been thoroughly canvassed and could be fairly assessed. He said that the evidence that had been presented was adequate to come to a full appreciation of the facts that were essential to the determination of the plaintiffs' action. He concluded that the case was suitable for a summary determination.

[334] With the enhancements to Ontario's summary judgment motion jurisdiction as interpreted by *Hryniak v. Mauldin*, it's regime is quite similar to British Columbia's summary trial regime, which is meant to expedite the early resolution of cases by allowing parties to put forward their evidence via affidavits and other written materials, rather than by *viva voce* testimony, and the Wises' Trumpian arguments in the immediate case to resist a summary determination - unless they were the winner - are similar to the arguments made by the plaintiffs in *Player Estate v. Janssen-Ortho Inc.* that were rejected by Justice Bracken.

[335] In my opinion, the case at bar is an appropriate case for a summary judgment. There is no doubt that I have sufficient evidence on all relevant points to allow me to make dispositive findings and both sides have put forward sufficient evidence to make their respective arguments about the dispositive issues. Although there was a voluminous amount of evidence, I am satisfied that I can justly and fairly decide the matter without the advantages of participating in the dynamic of a trial. The adjudicative process of reviewing and studying the evidence might have been less demanding for the adjudicator if stretched out over a trial, but a trial adjudicator would also have had also to address not only general causation but also some very difficult duty of care and standard of care issues and ultimately the trial judge would be left to explore and analyze the expert's material outside of the courtroom in the same way that I have.

[336] Having regard to the litigation as a whole, dealing with the matter of general causation is efficient and proportionate, and while the Wises wished to hedge with the argument that a summary judgment would be appropriate only for them, this hedging belies the notion that it would not be in the interests of justice to decide the issue of general causation immediately one way or the other. This is not a case like *Baywood Homes Partnership v. Haditaghi*, *supra,* where relying on affidavits and transcripts of cross-examinations are a medium for substantive fairness. I have decided above that the experts from both sides are qualified to give opinions and that their opinions are admissible. In the discussion below, I will determine how persuasive or helpful those opinions were, but I am confident that I can fairly and justly decide the issues to be determined by summary judgment. The case at bar is an appropriate case for a summary judgment.

2. Is There a Genuine Issue Requiring a Trial about General Causation?

(a) Products Liability Claims

[337] The issue of whether there is a genuine issue requiring a trial about general causation and also the issues about the duty to warn and about pure economic losses in negligence arise in the context of the branch of negligence law known as products liability. The discussion of whether there are genuine issues requiring a trial can therefore begin with the general nature of negligence claims and of products liability negligence claims, of which there are four established categories.

[338] The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law: *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at para. 3.

[339] There are four categories of products liability negligence claims. First, manufacturers have a duty of care to consumers to see that there are no defects in manufacture that are likely to give rise to injury in the ordinary course of use: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Second, manufacturers have a duty of care to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 20; *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569 at p. 574; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. Third, manufacturers have a duty of care in designing the product to avoid

safety risks and to make the product reasonably safe for its intended purposes: *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.); *Rentway Canada Ltd. v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 (H.C.J.), aff'd [1994] O.J. No. 50 (C.A.). The underlying argument in a design negligence action is that a manufacturer has a duty of care not to design a product negligently because the manufacturer should and can fairly be held responsible for the choices it makes that affect the safety of the product. The manufacturer has a duty to make reasonable efforts to reduce any risk to life and limb that may be inherent in its design: *Gallant v. Beitz* (1983), 42 O.R. (2d) 86 (H.C.J.) at p. 90; *Rentway Canada Ltd. v. Laidlaw Transport Ltd., supra*. Fourth, there is a pure economic loss claim in negligence because manufacturers have a duty of care to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger to the public: *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*, [1995] 1 S.C.R. 85.

[340] As explained by Justice Huddart of the British Columbia Court of Appeal in *Harrington v. Dow Corning Corp*., 2000 BCCA 605, affg. [1996] B.C.J. No. 734 (S.C.), leave to appeal to S.C.C. ref'd. [2001] S.C.C.A. No. 21, at paras. 42 to 46, typically, the four steps in a products liability class action are: (1) determining whether the product is defective or whether although non-defective, the product has a propensity to injure; (2) determining what the manufacturer knew about the dangerousness of its product; (3) determining the reasonableness of the warning whether direct or to a learned intermediary given the state of the art and the extent of the risks inherent in the product's use; and (4) determining individual causation and damages. The first step, known as the general causation step, determines whether the product is capable of causing harm. The second step is part of determining whether the manufacturer had a duty of care not to sell the product or to sell it only with an appropriate warning. The third step focuses on the adequacy of the warning. The fourth step will determine individual causation and the quantification of the compensation for the consequent harm.

(b) <u>General Causation</u>

[341] The fundamental issue in this summary judgment motion is the matter of general causation in the context of a medical device or pharmaceutical products liability claim. It is a constituent element of the tort of negligence that the defendant's negligence caused the plaintiff's injuries.

[342] There are two aspects to causation. The first aspect is "general causation," which concerns the aspect of whether the defendant's misconduct has the capacity to cause the alleged damage and the second aspect is "specific causation," which concerns the aspect of whether the capacity to harm was actualized in the particular case. In the immediate case, the issue is thus whether it has been proven that AndroGel™ can cause serious CV events. If this is proven, it would remain for Mr. Wise to prove that his use of AndroGel™ did cause his heart attack.

[343] As noted by Justice Myers in *Baghbanbashi v. Hassle Free Clinic*, 2014 ONSC 5934, in many cases, general causation is not an issue and the case will turn on specific causation because general causation will be obvious. However, in other cases, general causation cannot be assumed and must be proven. Justice Myers stated at para. 9 of his decision:

> 9. Court decisions in tort cases usually do not mention general causation because it is often obvious. Evidence is not needed, for example, to prove that being hit by a moving car can cause broken bones. The issue in most cases is simply whether,

> in that particular case, the car accident in issue broke the plaintiff's bones; i.e., whether there is specific causation. General causation is often assumed. In vaccination cases however, general causation cannot be assumed. Before a plaintiff shows that her particular injury was caused by the vaccination she received, she first must establish that the vaccine can cause that type of injury that she suffered. ….

[344] In *Clements v. Clements*, 2012 SCC 32 at para. 8, the Supreme Court of Canada set out the test for causation as follows:

> 8. The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[345] In the case at bar, Abbott submits that there is no genuine issue requiring a trial about general causation because having regard to all the evidence, the Wises cannot demonstrate on a balance of probabilities that AndroGel™ can cause serious CV events. Abbott submits that all of the scientific evidence only establishes association and that it is acknowledged by the Wises' experts that association is not proof of general causation, and so Abbott submits that there is no genuine issue requiring a trial about general causation and, therefore, the Wises' action should be dismissed.

[346] As a factual matter, I agree that as a matter of scientific proof, causation has not been proven. However, as a legal matter, although I agree with the conclusion of Abbott's argument that the Wises' action should be dismissed, I do not agree with its argument, and, in my opinion, its argument is not doctrinally sound.

[347] My different line of argument leading to the conclusion that the Wises' action should be dismissed is that in the immediate case, there is a genuine issue about causation. However, moving on to the second stage of the *Hryniak v. Mauldin* analysis to use the powers under rules 20.04(2.1) and (2.2), I conclude that that having regard to all the evidence, including the proof of an association between TRTs and serious CV events and also the proof that there is a biological plausibility for that association, nevertheless, the Wises cannot demonstrate on a balance of probabilities that AndroGel™ can cause serious cardiovascular events.

[348] On a balance of probabilities, the case at bar is not a case that permits the inference of general causation to be drawn from the evidence of association and biological plausibility.

[349] To begin the elucidation of this argument, I emphasize that the test for general causation used in legal cases differs from the rigorous standards of causation applied by science. A plaintiff's proving general causation to a scientific standard would be sufficient, but it is not necessary that a plaintiff prove general causation to the scientific standard. This very important point is demonstrated by the recent decision of the Supreme Court of Canada in *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25.

[350] In the *Fraser Health Authority* case, Katrina Hammer, Patricia Schmidt and Anne

MacFarlane were employees at a hospital laboratory in British Columbia. There were 63 employees at the facility and seven of them, including Mesdames Hammer, Schmidt and MacFarlane, were diagnosed with breast cancer. Pursuant to British Columbia's *Workers Compensation Act*, R.S.B.C. 1996, c. 492, which sets a lower standard of proof of causation than does civil tort law, they applied for compensation on the basis that their cancers were an "occupational disease," which, under the statute, was to say that their employment had "causative significance" in the development of their illnesses.

[351] Their claim for compensation was denied, but they appealed to the Workers' Compensation Board, which then had to decide the etiology of their breast cancers. There were three expert reports for the Board to consider. The experts reviewed the scientific literature on factors associated with the risk of breast cancer, did an epidemiological analysis of the cancer cluster among workers in the laboratory, and a field investigation into possible exposure among laboratory technicians to potentially carcinogenic substances. The three experts were in agreement that the incidence of cancer in the laboratory represented a statistically significant cluster, but they could not come to "scientific conclusions to support the association between work-related exposures and breast cancer in this cluster". The experts were unable to establish the basis for an etiological hypothesis based on scientific evidence of causal mechanisms for breast cancer and did not find any scientific evidence for the plausibility of a laboratory work-related etiological hypothesis regarding breast cancer. The scientists speculated that the increased incidence of breast cancer among laboratory employees may have been due to: (1) a cluster of reproductive and other known, non-occupational, risk factors; (2) past exposures to chemical carcinogens and less likely to ionizing radiation, and (3) a statistical anomaly. One of the experts went further and opined that that non-occupational factors were the cause of the breast cancer. Notwithstanding these expert opinions, the Board granted the claims for workers' compensation.

[352] Judicial review proceedings followed, and the proceedings worked their way to the Supreme Court of Canada, where Justice Brown (Chief Justice McLachlin and Justices Abella, Moldaver, Karakatsanis, and Wagner, concurring, Justice Côté dissenting) in addition to addressing the administrative law aspects of the appeal, upheld the decision of the Board and in doing so, he made several legal findings about proof of causation. At para. 33 of his judgment, Justice Brown said that: "the central problem in the handling of causation in the courts below arose not in their failure to have appropriate regard to the less stringent standard of proof required by [the legislation], but from their fundamental misapprehension of how causation -- irrespective of the standard of proof -- may be inferred from evidence." At para. 38 of his judgment, Justice Brown stated that a trier of fact is not confined to the evidence of the expert's in inferring causation; he stated:

> 38. The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation (e.g. *Snell*, at pp. 330 and 335). It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment. This goes to the chambers judge's reliance upon the Court of Appeal's decisions in *Sam and Moore* and to Goepel J.A.'s statement that there must be "positive evidence" linking their breast cancers to workplace conditions. Howsoever "positive evidence" was intended to be understood in those decisions, it should not obscure the fact that causation can be inferred -- even in the face of inconclusive or contrary expert

> evidence -- from other evidence, including merely circumstantial evidence. This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence.

[353] In *Miller v. Merck Frost Canada Ltd.*, 2015 BCCA 353, leave to appeal to the Supreme Court of Canada refused [2015] S.C.C.A. No. 431, where the issue at a certification motion was the extent to which the plaintiff had to show a methodology to prove causation in order to satisfy the criteria for certification, at para. 59 Justice Savage succinctly made the point that legal degrees of proof are not mathematical probabilities but legal or epistemic likelihoods and there are no hard and fast rules for inferring causation in any given case.

[354] In *Laferrière v. Lawson*, [1991] 1 S.C.R. 541, the Supreme Court of Canada considered causation in the context of physician's negligence case and Justice Gonthier for the majority of the Court (Lamer C.J. and L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ. concurring; La Forest, J., dissenting) in discussing causation wrote at para. 156:

> 156. Cases in which the evidence is scarce or seemingly inconclusive present the greatest difficulty. It is perhaps worthwhile to repeat that a judge will be influenced by expert scientific opinions which are expressed in terms of statistical probabilities or test samplings, but he or she is not bound by such evidence. Scientific findings are not identical to legal findings. Recently, in *Snell v. Farrell*, [1990] 2 S.C.R. 311, this Court made clear (at p. 328) that "[c]ausation need not be determined by scientific precision" and that "[i]t is not . . . essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation" (p. 330). Both this Court and the Quebec Court of Appeal have frequently stated that proof as to the causal link must be established on the balance of probabilities taking into account all the evidence which is before it, factual, statistical and that which the judge is entitled to presume. ….

[355] In *Rothwell v. Raes*, *supra*, Justice Osler heard a 74-day products liability negligence trial that was ultimately decided on the grounds that the plaintiff had failed to prove general causation. It was a very sad case. Within six months of his birth, Patrick Rothwell, who was an otherwise healthy infant, was immunized with DPTP vaccine, which included vaccination for pertussis or whooping cough, which is an extremely dangerous disease. Within days, he suffered brain damage that blinded him and left him seriously mentally and physically handicapped. The issue for the trial was whether there was a causal connection between the pertussis component of the vaccine and severe, permanent brain damage. Justice Osler noted that even the expert witnesses who opined that there was a causal relationship readily acknowledged that the relationship was a rare one, which did not bode well for the determination of specific causation, but the plaintiffs, Patrick's parents, failed in even establishing general causation in their action against the drug manufacturer.

[356] Justice Osler stated at paras. 237 and 245 of his judgment that the onus of proving general causation is on the plaintiff; he stated:

> 237. It is important to remember that the plaintiffs must prove their case and in

> medical and scientific matters it is not sufficient to show that a cause and effect sequence is theoretically possible. For the plaintiffs to discharge their onus they must show on the balance of probability that a cause and effect relationship does exist.
>
> ….
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> 245. While one dislikes in a case of such serious import to rely excessively upon the principle of onus, it cannot be forgotten that the onus does lie upon the plaintiffs to establish, if only by the slimmest balance of probability, that a named cause is likely. To demonstrate a possibility is not enough; probability must be established.

[357] Justice Osler's decision was affirmed by the Court of Appeal, which stated at para. 8:

> 8. We cannot agree that the judge failed to apply the proper standard in deciding the factual questions raised by the general causation issue or by the specific causation issue. Nor can we agree with the submission that he ought to have concluded that the onus was satisfied merely by the possibility that, in admittedly rare cases, pertussis vaccine might be a cause of brain damage. While the judge made clear that the onus could be satisfied by "the slimmest balance of probability" on the facts as he found them, he could not be satisfied that it is more likely than not that the vaccine caused or was a material factor in causing the harm. We agree with the trial judge that the onus is not met simply by demonstrating that there is a possibility of some causal connection. ….

[358] I now come to *Andersen v. St. Jude Medical Inc.*, *supra,* about which there was a great deal of, analysis, argument, and discussion in the immediate case about its teachings about general causation.

[359] In this case, the defendant St. Jude, the manufacturer of a mechanical prosthetic heart valve, introduced a new model that added a Silzone coating (a coating with silver metallurgy) designed to inhibit the growth of a lethal bacterial infection which was a very serious known complication of heart valve replacement surgery. Sometime after the introduction of the new model, St. Jude recalled the heart valves because a RCT revealed a statistically significant complication known as paravalvular leak ("PVL").

[360] The Representative Plaintiff Yvonne Andersen commenced a class action in 2000 that ended in 2012 after an 18-month trial. Justice Lax dismissed the action. Justice Lax held that the evidence established a material risk in increase of PVL but that Ms. Andersen had not proven any breach of duty regarding pre-market testing and post-market surveillance of products.

[361] In *Andersen v. St. Jude Medical Inc.*, common issue 3 was: "Does Silzone coating on heart valves, or annuloplasty rings, materially increase the risk of various medical complications including, but not limited to, PVL, thrombosis, thromboembolism, stroke, heart attacks, endocarditis or death?" This common issue was an issue of general causation but the issue was made enormously more complicated by the addition of the word "materially" by Justice Cullity when he certified the action as a class action; see: *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (S.C.J.). The inclusion of the notion of materially of risk led to über-complex debate between the parties largely made in mathematical terms about whether the ratio of increased risk should be set. Ms. Andersen argued that the risk ratio must be at least 1.33 and St.

Jude argued that it must be at least 2.0. As I regard this debate, which was repeated in the case at bar, it was a more a debate about the commonality and the utility of a finding of general causation to the subsequent determinations of specific causation than it was about a finding of general causation.

[362] The extreme complexity of the debate and Justice Lax's explanation for her decision to use a risk ratio of 2.0 is revealed by paras. 530 - 538 of her judgment, which are set out below. I have added emphasis to the statements that reveal that the problem that Justice Lax was addressing was more about the utility and commonality of an answer of a risk ratio of less than 2.0 than it was about what mathematical ratio may yield a finding of general causation. Justice Lax was addressing the interrelationship of a finding of general causation to the determination of specific causation.

> *The Defendants' Doubling of the Risk Standard for Materiality*
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> 530. The defendants argue that a risk ratio of 2.0 should be adopted as the standard for materiality under this common issue. As I will now explain, the defendants' argument in this regard flows from the nature of the "but for" test, and requires an understanding of some arithmetic ….
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> 531. The defendants note that at the individual stage of these proceedings each class member will have the onus of proving on a balance of probabilities that but for the presence of Silzone on his/her heart valve, the complication that was suffered would not have occurred. They further note that there exists a "background rate" for each complication at issue in this trial. That is, all of the complications at issue occur with conventional valves as well as with Silzone valves. The "background rate" for a complication is the risk of that complication associated with the conventional valve. **In order for class members to prove individual causation, they must prove that they would not have suffered the complication if they had been implanted with a conventional valve - that their complication was not an occurrence associated with the background rate**. This is simply a logical extension of the application of the "but for" test to the Silzone valve.
>
> 532. I will briefly explain the arithmetic behind the defendants' argument that I should adopt a risk ratio of 2.0 as the standard of materiality under this common issue. I will start with an example for illustrative purposes. A risk ratio of 1.6, for example, would indicate that the rate of occurrence of a complication for the Silzone valve is 1.6 times the rate for the conventional valve. Given two groups of patients of equal size - one with Silzone valves and one with conventional valves - if 100 patients in the conventional group suffered the complication then 160 in the Silzone group would suffer the complication. I**n this scenario, using the "but for" test, Silzone could be said to have caused the complication in 60 out of the 160 patients who experienced the complication in the Silzone group. The other 100 patients would have been expected to suffer the complication despite the Silzone valve, because we know that 100 patients in the conventional group suffered the complication.** In other words, the background rate would result in 100 patients suffering the complication, so for 100 of the 160 Silzone patients who suffered the complication, the complication would be

attributable to the background rate, and not to Silzone. As such, for those 100 patients in the Silzone group, one could not say that Silzone was a "but for" cause of their complications.

533. This scenario presents **a conundrum in determining causation in each individual case in the Silzone group**. If Silzone can be said to have caused only 60 of the 160 complications in the Silzone group, then, in the absence of any other evidence, for each of those 160 individuals it can only be said that there is a 37.5% probability that Silzone caused the complication in their particular case (60/160 = 37.5%). Since this is below 50%, it cannot be said that, on a balance of probabilities, Silzone caused the complication in *any* of the 160 instances. So while in this scenario i**t is apparent that Silzone increases the risk of the complication, it cannot be said on a balance of probabilities that it caused the complication in any given patient**.

534. The defendants note that this problem is solved when the risk ratio is greater than 2.0. For example, in the above scenario, if the Silzone group had experienced 201 complications (a risk ratio of 2.01), then 101 out of those 201 patients would not have suffered the complication "but for" the presence of Silzone on their valves. Thus, the likelihood that Silzone caused the complication in any one of those patients would be 101/201 = 50.2%. So on these facts, *all* of the 201 patients would be able to demonstrate that Silzone caused their complication on a balance of probabilities.

535. A peculiar outcome would result from the strict application of the concept described above. If no other evidence was considered other than the risk ratio, then in the former scenario none of the 60 patients who would not have suffered the complication but for the presence of Silzone on their heart valve would be able to demonstrate causation in their particular case. On the other hand, in the latter scenario, *all* of the 201 patients would be able to do so despite the fact that Silzone was a "but for" cause of the complication in only 101 of them. ….

536. Nevertheless, the defendants argue that a risk ratio of 2.0 should be adopted as the standard for materiality under Common Issue 3. The parties agreed that it was necessary to establish a materiality standard for the purposes of causation, but I was presented with only two alternatives. ….

537. As I stated above, by inserting the word "materially" Justice Cullity intended to ensure that findings with respect to whether Silzone increases the risk of complications would be sufficiently meaningful that they would be indicative of something more than a remote possibility of causation. The defendants' standard achieves this objective. As the discussion above demonstrates, whether a risk ratio for a complication is above or below 2.0, in the absence of any other evidence, is determinative of whether it is more likely than not that an occurrence of that complication **in an individual** can be attributed to the Silzone valve. **Thus, the defendants' standard satisfies Justice Cullity's intention that the word "materially" should increase the probability that a finding of an increased risk may actually translate into a finding of [individual] causation.**

538. **I therefore adopt the defendants' doubling of the risk standard as the**

standard for materiality under this common issue. However, as I will detail below, I disagree with the defendants' position in terms of how this standard ought to be applied.

[363] Justice Lax went on in paras. 539 to 544 of her judgment to explain how a 2.0 risk ratio could be used as a presumptive threshold to prove specific causation. This is possible because as a mathematical-epidemiological proposition, a risk ratio of 2.0 implies that 50% of the cases studied are associated with the condition. But two points must be emphasized. First, this use of a 2.0 risk ratio as a convenient presumptive threshold for specific causation has little to do with what is the risk ratio threshold for proof of general causation. Second, the proof of causation, be it general causation or specific causation, is not confined to the mathematics.

[364] For present purposes, I need not discuss any further this movement from a finding of general causation to the determination of specific causation. For present purposes, I rather note that Abbott cannot successfully rely on Justice Lax's judgment in *Andersen v. St. Jude Medical Inc.*, *supra* to advance the argument that there is no genuine issue requiring a trial about general causation because the associations that were identified so far between AndroGel™ and serious CV events did not raise to equal to or greater than a 2.0 risk ratio.

[365] As I understand, Abbott's argument it is that in order to meet the legal standard of proof based on the balance of probabilities no lesser risk ratio will do to prove general causation. I disagree with this argument because as demonstrated by: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, *supra*; *Miller v. Merck Frost Canada Ltd.*, *supra*; *Laferrière v. Lawson*, *supra*, and *Rothwell v. Raes*, *supra*, although a judge will be influenced by statistical probabilities he or she is not bound by such evidence.

[366] Such being the state of the law about general causation and applying that law to the circumstances of the immediate case where epidemiological evidence plays a prominent role, I conclude on a balance of probabilities that the use of AndroGel™ does not as a matter of general causation cause serious CV events.

[367] In its current state of development, at best, the scientific evidence does establish an association between AndroGel™ and serious CV events, but from the scientist's perspective, association is not proof of general causation unless the scientists are prepared to draw that inference based on a variety of factors such as those described by Sir Austin Bradford Hill and noted above.

[368] In the immediate case, neither Dr. Mintzes nor Dr. Milne were prepared to go beyond the fact of association to make the inference of general causation and not surprisingly Abbott's experts opined that given what they would describe as weak evidence of association there was no basis to proceed with inference drawing.

[369] Dr. Mintzes and Dr. Milne, quite fairly, acknowledged that proof of association is not proof of general causation. And, quite fairly, they did not draw the inference of causation, but rather they said that the scientific evidence was sufficient to justify stronger warnings about the use of AndroGel™ for patients who had LowT particularly those patients who were not suffering from classic hypogonadism and the current state of knowledge justified further and better RCTs to definitively determine whether the association was a cause and effect connection.

[370] I will return to the matter of whether the scientific evidence of association was sufficient to justify better warnings but foreshadow to say that using a drug's association with a serious

medical condition to justify stronger warnings is a very different matter than using a drug's association with a serious medical condition to draw an inference of causation. It appears that the regulators were alert to the distinction between an association and scientific evidence that would justify a finding of causation and an association that would justify amending the indications and warnings in a product monograph.

[371] In any event, from a legal perspective, in the immediate case, as revealed by the above cases, I am not bound to follow a scientist's conclusions about general causation. The law's approach is to apply a "but-for" test on a balance of probabilities and there is no guaranteed symmetry between a scientist's conclusions and a judge's conclusions about general causation. In any particular case, the evidence may satisfy a judge that a relationship is causal notwithstanding the skepticism of some or all of the scientists or conversely a judge may decide on a balance of probabilities that a relationship is not causal because he or she has not been persuaded by the evidence of the experts.

[372] In the immediate case no expert and no regulator was prepared to commit to the opinion that the association between AndroGel™ and serious CV events was causal. Notwithstanding the Wises' arguments that a partial summary judgment should be granted to them, I am not convinced on a balance of probabilities that AndroGel™ is a cause of heart attacks and other serious CV events. In the immediate case, there is no genuine issue requiring a trial about general causation.

3. Is there a Genuine Issue Requiring a Trial about the Duty to Warn?

[373] On this summary judgment motion, about the duty to warn, Abbott argued that there can be no duty to warn based on the proven association between AndroGel™ and major CV events because proof of association is not proof of causation of harm. I disagree with Abbott's duty to warn argument.

[374] In my opinion, an association between a product and a dangerous condition may give rise to a duty to warn even if the association has not been demonstrated to be causal. Notwithstanding Abbott's arguments, I conclude that there was a duty to warn in the immediate case. In *Hollis v. Dow Corning Corp.*, *supra*, at para. 21, Justice La Forest explained the rationale for a manufacturer's duty to warn. He stated:

> The rationale for the manufacturer's duty to warn can be traced to the "neighbour principle", which lies at the heart of the law of negligence, and was set down in its classic form by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.

[375] The manufacturer's duty to alert consumers about dangers associated with the use of a product is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered: *Hollis*

v. Dow Corning Corp., supra, at para. 20; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, at p. 1200. In the case of medical products, given their substantial risk of harm from improper use, the standard of care is correspondingly high and there will almost always be a heavy onus on the manufacturer to provide clear, complete and current information concerning the dangers inherent in the ordinary use of its product: *Hollis v. Dow Corning Corp., supra*, at para. 23.

[376] As the immediate case and a review of the case law demonstrates, the demonstration of an association between a drug and an adverse medical condition and even something less than an association such as adverse event reports is enough to energize a regulator to signal that the warnings and indications on an already approved product monograph may need to be changed including new warnings or more intensive alarms.

[377] As the factual background discussed above reveals, in the immediate case, the AndroGel™ Product Monograph was amended several times in response to the growth of scientific knowledge and the numerous epidemiological studies. Particularly, given the serious subject matters of some of the associations being studied, there is little doubt that Abbott had a duty to warn and for present purposes, I need say no more than that the Wises have reasonable arguments that Abbott breached its duty to warn and that Abbott has reasonable arguments that it met the standard of care and breached no duty to warn. In other words, in the immediate case, I find that Abbott had a duty to warn about any dangers associated with AndroGel™, but I make no finding about whether or not that duty to warn was breached.

[378] Whether the duty to warn had been breached by Abbott would involve more analysis of the standard of care and more analysis of the adequacy of the warnings that Abbott included in its product monographs as they changed from time to time. On this summary judgment motion, the evidence and the analysis did not go that far, although the trend of the evidence, which showed compliance to regulatory standards, tended to favour Abbott's position that its warnings were adequate having regard to the state of knowledge from time to time. However, I repeat that I make no finding one way or the other about whether the duty to warn was breached in the immediate case.

[379] The primary reason that the Wises' failure to warn claim must fail is, assuming a breach of the standard of care, they failed to prove general causation. A failure to warn that causes no harm is not culpable negligence.

[380] Given that I have found as a fact that there is an association between AndroGel™ and serious CV events and given that I do not agree with Abbott that proof of an association between AndroGel™ and serious CV events without proof of causation is insufficient to trigger action on its part to alert consumers about the association and given that both sides have reasonable arguments about the breach of the duty to warn, it would seem to follow that Abbott cannot succeed in its argument that the Wises' duty to warn claim should be summarily dismissed. However, that is not the case and their claim should be dismissed for the reasons expressed above about their failure to show that there is a genuine issue requiring a trial about general causation.

[381] This conclusion follows because assuming the Wises were successful at trial or on this summary judgment motion in establishing that Abbott breached its duty to warn, the breach would be legally inconsequential because the breach would not have caused any harm, or more precisely, the Wises cannot prove that any harm was caused by the breach of the duty to warn.

Visualize; assuming Mr. Wise proved that Abbott breached its duty to warn and that but for being encouraged by its advertising to use AndroGel™, he would not have purchased the product, his subsequent heart attack would be an unfortunate coincidence and he would not have proven that his injuries had been caused by the AndroGel™. (Incidentally, it may be noted that had he established general causation, there would still have to be a trial to determine whether specific causation had been proven.)

[382] No harm, no foul; causation is a constituent element of the Wises' negligence claim, be it a duty to warn claim or a negligent design claim, and there is no genuine issue requiring a trial about general causation. It follows that the negligence claims should be summarily dismissed.

4. Is there a Genuine Issue Requiring a Trial about the Wises' Negligence or Unjust Enrichment Claim for Pure Economic Losses?

[383] This brings me to the Wises' claim for unjust enrichment and its claim that Abbott should compensate the Class Members for their pure economic losses. This claim also fails.

[384] The Wises' claim for what are pure economic losses is based on the allegation that AndroGel™ is a worthless, non-beneficial product, and a dangerous one not worth the risk of being consumed. Mr. Wise submits that he has proven that AndroGel,™ which is a dangerous drug (the Product Monograph does point out several dangers), is misleadingly sold for uses for which it provides no benefit, and, thus, he and the Class Members have a legally viable claim for pure economic loss in tort or for unjust enrichment in restitution.

[385] In my opinion, however, the Wises' pure economic loss claim fails both factually and also legally.

[386] As a factual matter, putting aside for the moment, the matter of who bears the onus of proving that AndroGel™ is a beneficial product, on the evidentiary record produced for this summary judgment motion, I have already determined that general causation of harm from AndroGel™ has not been proven, but that conclusion begs the question of whether the harmless AndroGel™ is beneficial or productive of some good and thus worthy of a consumer purchasing the product or whether the harmless AndroGel™ serves no useful purpose and thus is a useless product that is not productive of any good, and thus unworthy of a consumer purchasing it.

[387] Without begging the question of whether AndroGel™ is worthy or unworthy for purchase, there is no dispute that it is worthy of purchase for classical hypogonadism, where it's utility has been recognized for decades. Thus, the question narrows to whether AndroGel™ is not worthy of purchase for what the Wises would describe as a treatment for LowT, which the Wises deny is a type of hypogonadism.

[388] The Wises' arguments are that selling AndroGel™ as a cure for a non-disease is to sell a worthless good and in any event selling AndroGel™ as a cure for LowT has no beneficial results. In my opinion, these arguments fail because, as I explained above, physicians were diagnosing their clients as having LowT on a set of symptoms and they were prescribed AndroGel™ as the treatment for that diagnosis, and thus almost by definition it cannot be said that a worthless good was being sold. But more to the point, the evidence established that while benefits of a prescription of AndroGel™ in ameliorating the symptoms were modest, there was some benefit at least for a short period of time and the evidence left open the truth of the opinions of some of the experts that AndroGel™ had some more substantial benefits including even the possibility

that there was a negative association between TRT and serious CV events; i.e., there was some evidence that AndroGel™ diminished the likelihood of serious CV events.

[389] The Wises are the plaintiffs in this products liability action, and as a factual matter, the onus of proving that AndroGel™ is a harmful product is on the Wises. If they had proven general causation of harm, then Mr. Wise's and the Class Members' claims would not be claims for pure economic losses. Putting aside for the moment, whether as a legal matter, Mr. Wise and the Class Members have a claim for pure economic losses, in my opinion, the onus of proving that Mr. Wise purchased a useless worthless product is also on the Wises. On the evidentiary record presented on this summary judgment motion, the Wises failed as a factual matter to meet this onus of proof.

[390] I appreciate that, practically speaking, putting the onus of the Wises to prove worthlessness is to burden them with proving a negative, but that is the burden they took on once they built their case on the notion that Abbott was disease mongering by selling AndroGel™ for LowT.

[391] The onus of proving their case on the balance of probabilities did not change for the Wises because Abbott brought a summary motion challenging whether there was a genuine issue requiring a trial. As noted above, on a summary judgment motion, both parties are taken to have stepped forward with their evidence to prove their claim or defence. In any event, if the onus was on Abbott to prove on the balance of probabilities that AndroGel™ was worth something, then it met that burden sufficiently to shift an evidentiary burden on the Wises to show that there was a genuine issue requiring a trial about Mr. Wise's pure economic losses.

[392] I conclude from an assessment of the evidence on this motion that as a factual matter, the Wises have not proven that Mr. Wise purchased a useless product. That conclusion disposes of the Wises' unjust enrichment, pure economic loss, and waiver of tort claims on a factual basis, but the claims are also not legally tenable even if it were established that AndroGel™ was a non-beneficial useless product sold for LowT.

[393] As a legal matter, it is necessary to emphasize that the Wises' do not advance a breach of contract claim nor do they advance a negligent misrepresentation claim. The predicate wrongdoing that underlies their proposed class action is a common law products liability negligence claim. If the Wises were to establish that negligence claim, then they could waive the tort, and advance a restitutionary claim or they would have the basis for an unjust enrichment claim. Mr. Wise's claim is essentially that he outlaid money for goods that had no value for him because they provided him with no benefit. The point to emphasize is assuming that the Wises do not have a negligence claim for damages for personal injuries, then for the unjust enrichment and waiver of tort claims, they must have a negligence claim for a pure economic loss.

[394] While there is a pure economic loss claim for negligently misrepresenting the qualities of a product, there is no pure economic loss negligence claim for selling worthless or shoddy goods that are not dangerous for the uses for which they are sold: *Arora v. Whirlpool Canada L.P.*, 2013 ONCA 657, aff'g 2012 ONSC 4642, leave to appeal to the S.C.C. refused, [2013] S.C.C.A. No. 498.

[395] The Wises' claim is for the financial loss from purchasing a product that caused neither their person or their property any physical harm. The law is that although the categories are not closed, there are only limited circumstances where damages for economic loss absent physical or

property harm may be recovered: *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860.

[396] Five descriptive categories of economic loss cases involving different policy considerations have been identified: (1) negligent misrepresentation; (2) negligent performance of a service; (3) relational economic loss; (4) the special liability of statutory public authorities; (5) negligent supply of shoddy goods or structures for the cost of repairing their dangerous defects.

[397] In *Arora v. Whirlpool Canada L.P., supra,* the Ontario Court of Appeal held that the Supreme Court of Canada in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 had left open the issue of whether there should be no recovery for pure economic loss where goods are shoddy, but not dangerous, but the Court of Appeal then went on to decide the issue by deciding that the plaintiff's claim had no reasonable prospect of success.

[398] In the immediate case, AndroGel™ is not a shoddy good and the dangers in use, as far as they are known to exist, have been disclosed and warnings provided. As was the case, in *Arora v. Whirlpool Canada L.P., supra* the sale of non-dangerous but useless goods is a circumstance where there is no public policy that would engage tort law and Mr. Wise should be left with his contractual, negligent misrepresentation, or statutory consumer law remedies, if any.

[399] As for the Wises' waiver of tort claim, I will repeat what I said in the lower court decision in *Arora v. Whirlpool Canada L.P., supra* at paras. 297-99, which was approved by the Court of Appeal in its decision in the *Arora* case; that is:

> 297. The last cause of action to consider is the claim of waiver of tort. One could write a lot about this topic, but for present purposes I can be brief. Historically, the doctrine of waiver of tort provided the victim of certain types of tortious wrongdoing with the option of foregoing (waiving) tort compensation measured by the damages suffered by the victim and claim instead disgorgement of the tortfeasor's ill-gotten gains. The traditional view was that waiver of tort was a remedy available for certain torts.
>
> 298. Without deciding the point, *Serhan v. Johnson & Johnson* [(2006), 85 O.R. (3d) 665, [2006] O.J. No. 2421 (Div. Ct.), leave to appeal to C.A. refused, Oct. 16, 2006, leave to appeal that denial of leave to S.C.C. refused, [2006] S.C.C.A. No. 494], initiated a debate about whether waiver of tort was not just a remedial choice but rather a cause of action available for more than the traditional short list of torts for which it had been available as a remedy or perhaps for wrongdoing generally. In other words, there has been a debate about the doctrinal nature of waiver of tort and the range of its availability. There, however, has been one point beyond debating. Whether a remedy or a cause of action, for waiver of tort to be available, the defendant must have done something wrong.
>
> 299. In *Aronowicz v. Emtwo Properties Inc.* [(2010), 98 O.R. (3d) 641, [2010] O.J. No. 475, 2010 ONCA 96], at para. 82, Justice Blair stated about the waiver of tort doctrine:
>
> > Whether the claim exists as an independent cause of action or whether it requires proof of all the elements of an underlying tort aside, at the very least, waiver of tort requires some form of wrongdoing. The motion judge found none here. No breach of contract. No breach of fiduciary duty, or

> duty of good faith or confidentiality. No oppression. No misrepresentation. No deceit. No conspiracy. As counsel for Mr. Grinshpan put it in their factum, "its eleventh hour insertion into the statement of claim does not provide the appellants' claim with a new lifeline given that the record discloses no wrongful conduct on the part of the respondents in respect of any of the causes of action pleaded."

[400] In the case at bar, for the reasons discussed earlier, because general causation has not been established, there is no predicate wrongdoing upon which to base a plea of waiver of tort. All of the proposed causes of action lack a constituent element, and thus there is no predicate wrongdoing to support a claim of waiver of tort be it a remedy or a cause of action.

[401] I conclude that there is no genuine issue requiring a trial about the Wises' negligence or unjust enrichment claim for pure economic losses.

F. CONCLUSION

[402] For the above reasons, I grant Abbott's summary judgment motion, and I dismiss the Wises' action.

[403] If the parties cannot agree about the matter of costs, then they may make submissions in writing beginning with Abbott's submissions within 20 days from the release of these Reasons for Decision followed by the Wises' submissions within a further 20 days.

[404] I alert Abbott that I am inclined to substantially reduce any costs award because of its failure to seek the leave of the court earlier to call more than three expert witnesses.

_____

Perell, J.

Released: November 23, 2016

CITATION: Wise v. Abbott Laboratories, Limited, 2016 ONSC 7275
COURT FILE NO.: CV-16-550747CP
DATE: 20161123

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

NORMAN DOUGLAS WISE and MONIKA ELISABETH WISE

Plaintiffs

– and –

ABBOTT LABORATORIES, LIMITED, ABBOTT PRODUCTS INC. (f/k/a SOLVAY PHARMA INC. and SOLVAY PHARMA CLINICAL INC.), ABBOTT PRODUCTS CANADA INC. (f/k/a SOLVAY PHARMA CANADA INC.), and ABBVIE PRODUCTS LLC (f/k/a ABBOTT PRODUCTS LLC, f/k/a ABBOTT PRODUCTS, INC., f/k/a SOLVAY PHARMACEUTICALS, INC.)

Defendants

REASONS FOR DECISION

PERELL J.

Released: November 23, 2016

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

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R.S.C., 1985, c. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

L.R.C., 1985, ch. C-34

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Titre abrégé

Titre abrégé

1 *Loi sur la concurrence*.

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2e suppl.), art. 19.

PARTIE I

Objet et définitions

Objet

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

L.R. (1985), ch. 19 (2e suppl.), art. 19.

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

Limitation

(2) Subsection (1) does not apply if the contravention of the laws of the foreign state has consequences that would be considered penal under Canadian law.

Mutual assistance

(3) In deciding whether to provide assistance under subsection (1), the Commissioner shall consider whether the government, organization or institution agrees to provide assistance for investigations or proceedings in respect of any of the sections mentioned in subsection (1).

2010, c. 23, s. 77.

Representation as to reasonable test and publication of testimonials

74.02 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest, makes a representation to the public that a test has been made as to the performance, efficacy or length of life of a product by any person, or publishes a testimonial with respect to a product, unless the person making the representation or publishing the testimonial can establish that

(a) such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or

(b) such a representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

1999, c. 2, s. 22.

Representations accompanying products

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale,

Restriction

(2) Le paragraphe (1) ne s'applique pas lorsque la sanction de la contravention de la loi de l'État étranger serait considérée comme pénale sous le régime du droit canadien.

Réciprocité

(3) Pour décider s'il doit accorder son aide en vertu du paragraphe (1), le commissaire vérifie si l'État étranger, l'organisation internationale ou l'organisme accepte d'aider les enquêtes, instances ou poursuites relatives aux articles visés à ce paragraphe.

2010, ch. 23, art. 77.

Indications relatives à l'épreuve acceptable et publication d'attestations

74.02 Est susceptible d'examen le comportement de quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, donne au public des indications selon lesquelles une épreuve de rendement, d'efficacité ou de durée utile d'un produit a été effectuée par une personne, ou publie une attestation relative à un produit, sauf si la personne qui donne ces indications peut établir :

a) d'une part :

(i) soit que ces indications ont été préalablement données ou que cette attestation a été préalablement publiée par la personne ayant effectué l'épreuve ou donné l'attestation,

(ii) soit que ces indications ou cette attestation ont été, avant d'être respectivement données ou publiée, approuvées et que la permission de les donner ou de la publier a été donnée par écrit par la personne qui a effectué l'épreuve ou donné l'attestation;

b) d'autre part, qu'il s'agit des indications approuvées ou données ou de l'attestation approuvée ou publiée préalablement.

1999, ch. 2, art. 22.

Indications accompagnant les produits

74.03 (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par communication orale faite par tout moyen de télécommunication, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

Representations from outside Canada

(2) Where a person referred to in subsection (1) is outside Canada, a representation described in paragraph (1)(a), (b), (c) or (e) is, for the purposes of sections 74.01 and 74.02, deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Indications provenant de l'étranger

(2) Dans le cas où la personne visée au paragraphe (1) est à l'étranger, les indications visées aux alinéas (1)a), b), c) ou e) sont réputées, pour l'application des articles 74.01 et 74.02, être données au public par la personne qui a importé au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Deemed representation to public

(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.

Présomption d'indications données au public

(3) Sous réserve du paragraphe (1), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné à l'article 74.01 est réputé donner ces indications au public.

Certain matters need not be established

(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that

(a) any person was deceived or misled;

(b) any member of the public to whom the representation was made was within Canada; or

(c) the representation was made in a place to which the public had access.

Preuve non nécessaire

(4) Il est entendu qu'il n'est pas nécessaire, dans toute poursuite intentée en vertu des articles 74.01 et 74.02, d'établir :

a) qu'une personne a été trompée ou induite en erreur;

b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;

c) que les indications ont été données à un endroit auquel le public avait accès.

General impression to be considered

(5) In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well

Prise en compte de l'impression générale

(5) Dans toute poursuite intentée en vertu des articles 74.01 et 74.02, pour déterminer si le comportement est susceptible d'examen, il est tenu compte de l'impression

(c) selection of participants or distribution of prizes is not made on the basis of skill or on a random basis in any area to which prizes have been allocated.

1999, c. 2, s. 22.

c) le choix des participants ou la distribution des prix ne sont pas faits en fonction de l'adresse des participants ou au hasard dans toute région à laquelle des prix ont été attribués.

1999, ch. 2, art. 22.

Saving

74.07 (1) Sections 74.01 to 74.06 do not apply to a person who prints or publishes or otherwise disseminates a representation, including an advertisement, on behalf of another person in Canada, where the person establishes that the person obtained and recorded the name and address of that other person and accepted the representation in good faith for printing, publishing or other dissemination in the ordinary course of that person's business.

Éditeurs et distributeurs

74.07 (1) Les articles 74.01 à 74.06 ne s'appliquent pas à la personne qui diffuse, notamment en les imprimant ou en les publiant, des indications, notamment de la publicité, pour le compte d'une autre personne se trouvant au Canada et qui établit qu'elle a obtenu et consigné le nom et l'adresse de cette autre personne et qu'elle a accepté de bonne foi d'imprimer, de publier ou de diffuser de quelque autre façon ces indications dans le cadre habituel de son entreprise.

Non-application

(2) Sections 74.01 to 74.06 do not apply in respect of conduct prohibited by sections 52.1, 53, 55 and 55.1.

1999, c. 2, s. 22; 2002, c. 16, s. 9.

Non-application

(2) Les articles 74.01 à 74.06 ne s'appliquent pas aux actes interdits par les articles 52.1, 53, 55 et 55.1.

1999, ch. 2, art. 22; 2002, ch. 16, art. 9.

Civil rights not affected

74.08 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action.

1999, c. 2, s. 22.

Droits civils non atteints

74.08 Sauf disposition contraire de la présente partie, celle-ci n'a pas pour effet de priver une personne d'un droit d'action au civil.

1999, ch. 2, art. 22.

Administrative Remedies

Definition of *court*

74.09 In sections 74.1 to 74.14 and 74.18, ***court*** means the Tribunal, the Federal Court or the superior court of a province.

1999, c. 2, s. 22; 2002, c. 8, s. 183.

Recours administratifs

Définition de *tribunal*

74.09 Dans les articles 74.1 à 74.14 et 74.18, ***tribunal*** s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183.

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

Décision et ordonnance

74.1 (1) Le tribunal qui conclut, à la suite d'une demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, the greater of

(A) $750,000 and, for each subsequent order, $1,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined, or

(ii) in the case of a corporation, the greater of

(A) $10,000,000 and, for each subsequent order, $15,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, correspondant au plus élevé des montants suivants :

(A) 750 000 $ pour la première ordonnance et 1 000 000 $ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur, si ce montant peut être déterminé raisonnablement,

(ii) dans le cas d'une personne morale, correspondant au plus élevé des montants suivants :

(A) 10 000 000 $ pour la première ordonnance et 15 000 000 $ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de la personne morale;

d) s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée.

Duration of order

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

Saving

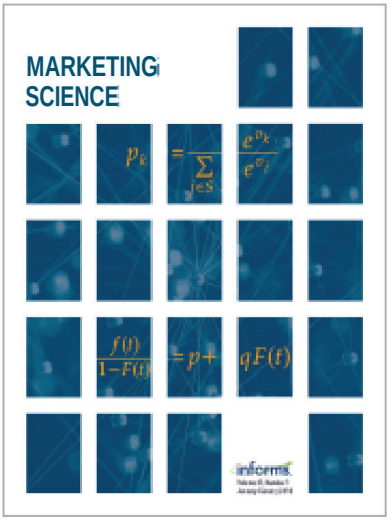
(3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

Durée d'application

(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

Disculpation

(3) L'ordonnance prévue aux alinéas (1)b), c) ou d) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher le comportement reproché.



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Price Salience and Product Choice

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Abstract. Online vendors often employ drip-pricing strategies, where mandatory fees are displayed at a later stage in the purchase process than base prices. We analyze a large-scale field experiment on StubHub.com and show that disclosing fees upfront reduces both the quantity and quality of purchases. The effect of salience on quality accounts for at least 28% of the overall revenue decline. Detailed click-stream data show that price shrouding makes price comparisons difficult and results in consumers spending more than they would otherwise. We also find that sellers respond to increased price obfuscation by listing higher-quality tickets.

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1. Introduction

The past two decades have witnessed a steady shift in purchasing from brick-and-mortar stores to online retailers and marketplaces. A common pricing strategy used by online vendors—most notably for event ticket sales—is "drip pricing," where mandatory fees are disclosed at a later stage in the consumer's purchasing process than the base price of a good. Textbook models of consumer choice assume that economic agents are rational and sophisticated in their ability to discern a product's true price, implying that purchase decisions fully account for any fees, taxes, or add-on features. However, a growing literature demonstrates that consumers often struggle to determine final prices. For example, Chetty et al. (2009) document that tax salience affects consumers' decisions to purchase personal care goods in grocery stores, implying that consumers have trouble inferring final prices when taxes are not displayed on the shelf. Morwitz et al. (1998) find that students in a laboratory react less to surcharges presented as percentages rather than dollars, suggesting a cognitive difficulty in calculating prices. Hossain and Morgan (2006) and Brown et al. (2010) present evidence that eBay buyers respond more to list price than to shipping cost.

Studies have therefore demonstrated that consumers are more likely to purchase goods when fees are obfuscated. Our paper contributes in two ways. First, we employ a large-scale field experiment involving millions of online consumers to confirm what small-scale studies have shown, and we use our detailed data to expose behaviors along the purchase funnel. Second, and more novel, we show that price salience affects not only whether a consumer chooses to purchase *any* product, but also affects their choice of *which* product to purchase. Our setting is a secondary marketplace for event tickets where more expensive tickets are associated with better (higher-quality) seats. We show that when fees are less salient, consumers are more likely to select and purchase more expensive tickets. Intuitively, reducing the salience of a percent-based purchasing fee makes all goods appear less expensive, enticing more consumers to select and then purchase a ticket. Because a percentage fee levies a larger fee level for more expensive goods, salience also changes the perceived marginal cost of quality. As a result, reducing salience encourages consumers to substitute to high-quality tickets. We therefore offer a more complete analysis of the effect of price salience on consumer choice, first, by demonstrating effects on the intensive margin, and second, by quantifying the relative importance of both the extensive and intensive margins in our setting.[1]

We begin our analysis by presenting two hypotheses that follow from the existing theoretical literature: first, that consumers are more likely to purchase goods if fees are obfuscated, and second, that consumers are more likely to purchase expensive, high-quality goods if fees are obfuscated. The former effect has been documented by many studies, but the latter

has not been explored because of data limitations in earlier work.

We take these predictions to data generated from a large-scale field experiment conducted by StubHub, a leading online secondary-ticket marketplace. Before the experiment was launched in August 2015, the platform used an upfront-fee (UF) strategy, where the site showed consumers the final price, including fees and taxes, from their very first viewing of ticket inventory. The platform then experimented with a back-end-fee (BF) strategy, where mandatory fees were shown only *after* consumers had selected a particular ticket and proceeded to the checkout page.

StubHub randomly selected 50% of U.S. users for the BF experience, whereas the remaining 50% were assigned to the UF experience. The experiment provides exogenous variation in fee salience in a setting with rich data on consumer choices, including choice sets, signals of purchase intent (e.g., product selection and clicks toward checkout), and final purchases. These rich data allow us to infer the effect of salience on both the extensive and intensive margins of product choice. Our empirical results support our hypotheses: price obfuscation distorts both quality and quantity decisions. A simple lower-bound estimate shows that the intensive margin—how expensive a ticket to buy—accounts for at least 28% of the increase in revenue raised from back-end fees.

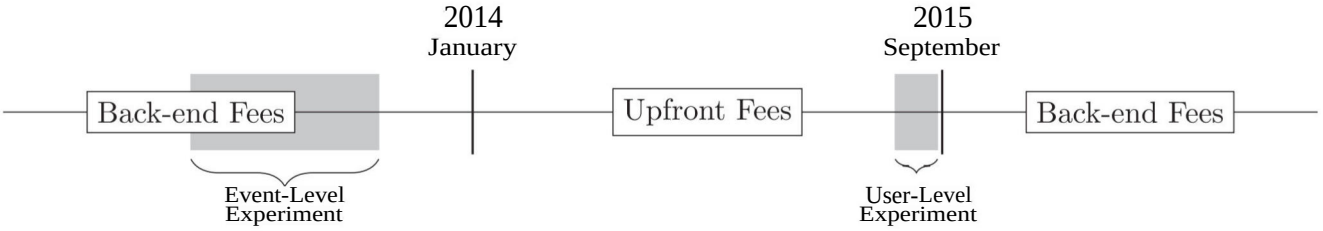
Further analysis of detailed individual-level clickstream data suggests that back-end fees play on consumer misinformation. UF users are more likely to exit before exploring any ticket, whereas BF users differentially exit at checkout, when they first see the fee. Furthermore, BF users go back to examine other listings more often than their UF counterparts. They are more likely to go back multiple times, which suggests that back-end fees make price comparisons difficult. Finally, back-end fees affect even experienced users, although on a smaller scale, which is consistent with consumers facing optimization costs even when they anticipate a fee, as in Morwitz et al. (1998).

We also investigate how sellers who list on StubHub respond to the change in fee salience on the platform following the experiment's conclusion, when StubHub shifted the whole site to back-end fees. Because back-end fees cause buyers to purchase more tickets, and, in particular, more expensive tickets, the two-sided nature of the platform should incentivize sellers to list relatively more expensive, high-quality tickets. Using row numbers as a proxy for quality, our analysis shows that sellers indeed choose to list higher-quality tickets after the transition to back-end fees. We also find that sellers respond in how they set prices; in particular, they are more likely to set list prices at round numbers. Hence, consistent with Ellison and Ellison (2009), we find that sellers respond to the change in buyer experience.

As a robustness check, we present evidence on price salience from an earlier experiment at StubHub performed in 2012. One advantage of this earlier experiment is that StubHub's default user experience during the experiment was BF, as shown in Figure 1. Thus, comparing the results from the 2012 and 2015 experiments can shed light on whether the effect of salience depends on the initial environment. Our findings indicate that the effect of salience is remarkably similar across the two experiments. A second feature of the 2012 experiment is that it randomized fee presentation across events, rather than across users. This experiment design circumvents interference from device-switching, when a user is randomized into different conditions on their mobile/laptop/desktop computers. Reassuringly, the results are broadly consistent with our findings from the 2015 experiment, indicating that this concern is not first-order in our setting.

Our paper also contributes to studies of alternative methods of obfuscation, such as add-on pricing and partitioned pricing. Ellison (2005) and Gabaix and Laibson (2006) explore models where some consumers ignore the price of complimentary goods (e.g., parking at a hotel) when making purchase decisions. Predictions from these models have been examined in recent empirical work, such as Ellison and Ellison (2009) and Seim et al. (2017) (see Heidhues and Kőszegi 2018 for an overview). In the language of Gabaix and Laibson (2006), StubHub fees constitute surcharges rather than add-ons because they are unavoidable. We might interpret the StubHub fee as a form of partitioned pricing because it is broken out from the base price of the ticket (see Greenleaf et al. 2016 for a review of the partitioned pricing literature).

Figure 1. Timeline of Fee Presentation at StubHub



One interpretation of our findings is that salience amplifies the effect of partitioned pricing. Salience may therefore help explain the persistence of markups and price dispersion in online markets, as documented by Brynjolfsson and Smith (2001), among others.

Closest to our paper is a recent study by Dertwinkel-Kalt et al. (2019), who examine the online purchase behavior of over 34,000 consumers of a large German cinema that obfuscated a surcharge for three-dimensional movies until checkout. They find that consumers initiate a purchase process more often when surcharges are obfuscated, but they also drop out more often when the overall price is revealed at checkout. In their setting, these two effects counteract each other, so that the demand distribution is independent of the price presentation. Hence, our findings differ from theirs in three important ways. First, as in previous studies, we find that obfuscation increases demand, meaning that the increased rate of purchase initiation outweighs the increased dropout rate caused by obfuscation. Second, our richer setting allows us to document how salience affects the intensive margin. Third, and most importantly, our findings contravene the argument in Dertwinkel-Kalt et al. (2019) that the salience effects documented in previous studies, such as Chetty et al. (2009), Taubinsky and Rees-Jones (2018), or Feldman and Ruffle (2015), do not generalize to online settings because e-commerce transactions often involve a single, focal product. Dertwinkel-Kalt et al. (2019) argue further that low cancellation costs, such as clicking back on a page, limit the effectiveness of practices like drip-pricing. Our results suggest otherwise, as we find a large effect of price salience in a large online marketplace with very low cancellation costs.

The next section presents a standard framework for consumer choice with price obfuscation and describes its empirical implications. Section 3 discusses the experiment run at StubHub, as well as the data used in the analysis. Section 4 describes robustness checks on the randomization, and Section 5 presents our main results. Section 6 contains evidence on mechanisms, and Section 7 explores two-sided market responses. Section 8 concludes.

2. Consumer Choice with Fee Obfuscation: Hypotheses

As a starting point, we build on the insights of Bordalo et al. (2013) and DellaVigna (2009), who each present simple models of consumer choice that explore the impact of price salience on purchase decisions. In Appendix A, we present a simple model based on these studies that formalizes our two main hypotheses: that obfuscating checkout fees causes more consumers to purchase goods, and that the goods they purchase will be more expensive and of higher quality compared with an environment with upfront fees.

In our setting, consumers visit the StubHub website—a platform for secondary-market ticket sales—in order to purchase tickets for events. As we describe in more detail in Section 3, final prices of tickets are made up of two components: a list price set by sellers and fees set by StubHub. We consider two salience conditions under which consumers make purchase decisions: the first is the "upfront-fee" (UF) condition, where the final purchase price including all fees is shown to consumers upfront, when they search for available tickets; and the second is the "back-end fee" (BF) condition, where consumers observe only list prices set by sellers when searching for tickets and the fees imposed by StubHub are revealed only after the consumer proceeds to the checkout stage with a particular ticket. Section 3 offers more details about the experiment's design and execution.

Consider the UF case. If all ticket prices exceed a consumer's willingness to pay, then she will not buy any ticket. If some are priced below her willingness to pay, then she will buy the ticket that maximizes her net surplus. Naturally, the higher her value for a given event, the more likely she is to purchase a ticket. Conditional on purchasing, the more she values the event, the more likely she is to buy an expensive, high-quality ticket. Finally, because fees are included upfront, the purchase price that the consumer faces at checkout is identical to the price that she saw on the listing page.

Now consider the BF case, where fees are revealed for the first time at checkout. Because fees amount to about 15% of the list price, if a consumer considers only the list price, then all tickets appear to be 15% cheaper during the consumer's search phase. The consumer therefore makes a choice from a seemingly cheaper set of tickets. This is akin to reducing the salience of prices relative to quality, as in Bordalo et al. (2013), and is also similar to the way salience is modeled in Finkelstein (2009). As a consequence, consumers who would not have chosen any ticket under UF may believe that they have found a cheap-enough ticket under BF to warrant purchase, and proceed to the checkout page with that ticket in hand. Upon reaching the checkout and purchase page, the ticket's *actual* price—including all fees—is revealed. Absent behavioral biases, the consumer ought to exit without buying the ticket, but we assume that some consumers will complete their purchase due to loss aversion or other behavioral biases.[2] This results in the following well-established and previously tested hypothesis:

1. Quantity Effect: *A consumer is more likely to purchase under BF than under UF.*

One of our main innovations compared with the previous literature is going beyond this quantity effect to explore how the *composition* of products purchased changes across the two conditions. To see this, consider a consumer who would have chosen a ticket listed at $100 under UF. Under BF, she instead selects a $100 ticket to which a $15 fee will be added at checkout, so that her purchase under BF is equivalent to a $115 ticket in the UF condition. With no behavioral biases and no search costs, this BF consumer would go back to the listing page and select a ticket that maximizes her utility (an $87 ticket, which will cost just about $100 after the fee is included at checkout). We again assume that some consumers will not reoptimize and instead will purchase their initial choice due to loss aversion or search costs, resulting in the following hypothesis that has not been analyzed previously in the literature:

2. Quality Upgrade Effect: *Consumers who buy tickets under both UF and BF conditions will purchase higher-quality and more expensive tickets under BF.*

The earlier salience literature overlooks this effect, perhaps because previously studied settings offered little to no vertical product differentiation (e.g., shipping fees as in Brown et al. 2010, electronic toll collection systems as in Finkelstein 2009, or supermarket beauty aids as in Chetty et al. 2009). Indeed, the log-log demand specification favored by earlier work leaves no scope for quality upgrades.

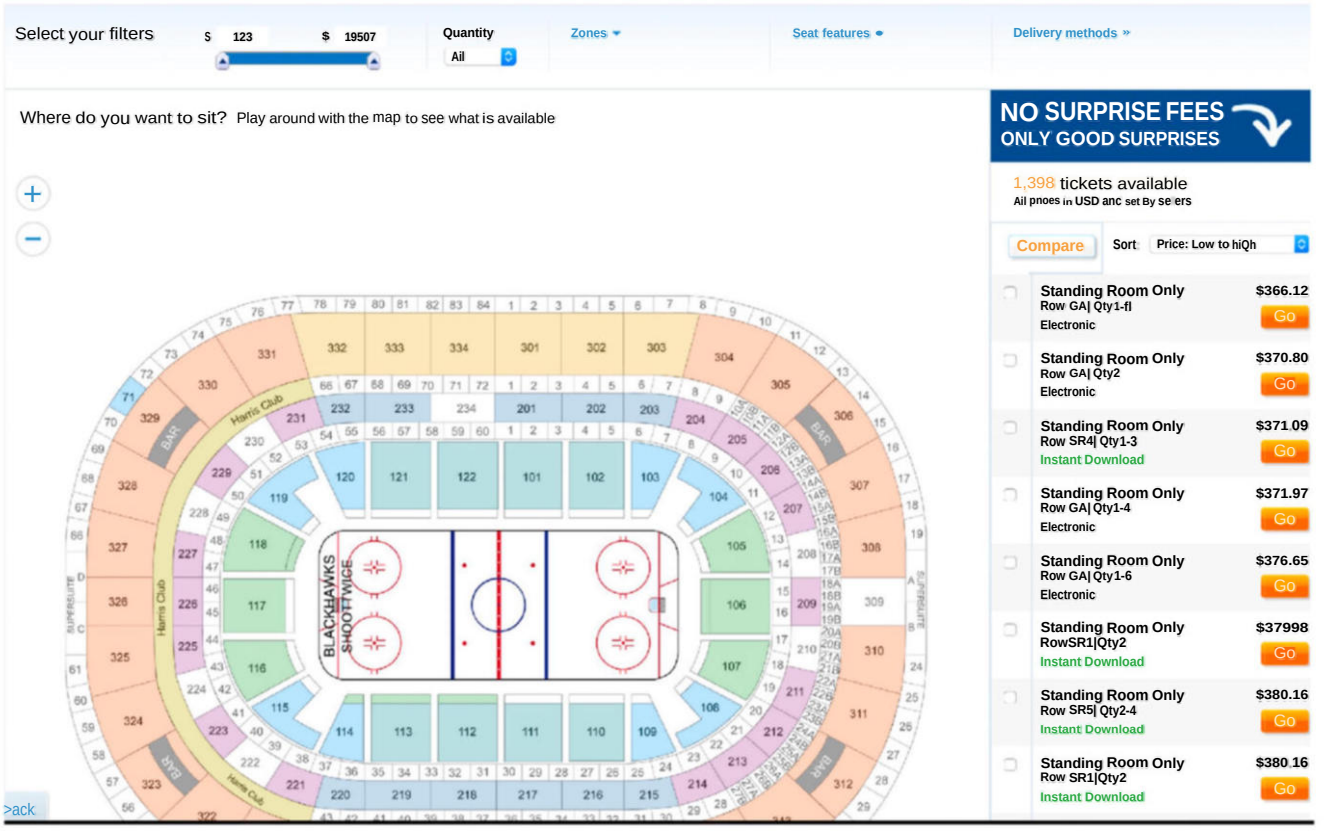
The Quality Upgrade Effect emphasizes how identification strategies must respect the impact of salience on quality choice. Consider the alcohol sales analysis of Chetty et al. (2009). They compare an excise (lump sum) tax to a sales (percentage) tax. The excise tax should arguably have no effect on the quality of beer chosen (conditional on purchase), since it makes each can of beer "in the choice set" more expensive by the same amount. The sales tax, however, may affect both the quantity and quality margins, since it is a percentage of the price. Simple comparisons of the revenue effects of excise and sales tax salience may therefore lead to inconclusive results.

The next section describes the experiment in detail and elaborates our empirical strategy for separately estimating the quantity effect, bounds on the Quality Upgrade Effect, revenue effects, and the change in the average purchase price.

3. Experimental Design

We exploit an experiment in price salience performed on StubHub, a platform for secondary-market ticket sales. Between January 2014 and August 2015, the

Figure 2. (Color online) Event Page (UF Users)



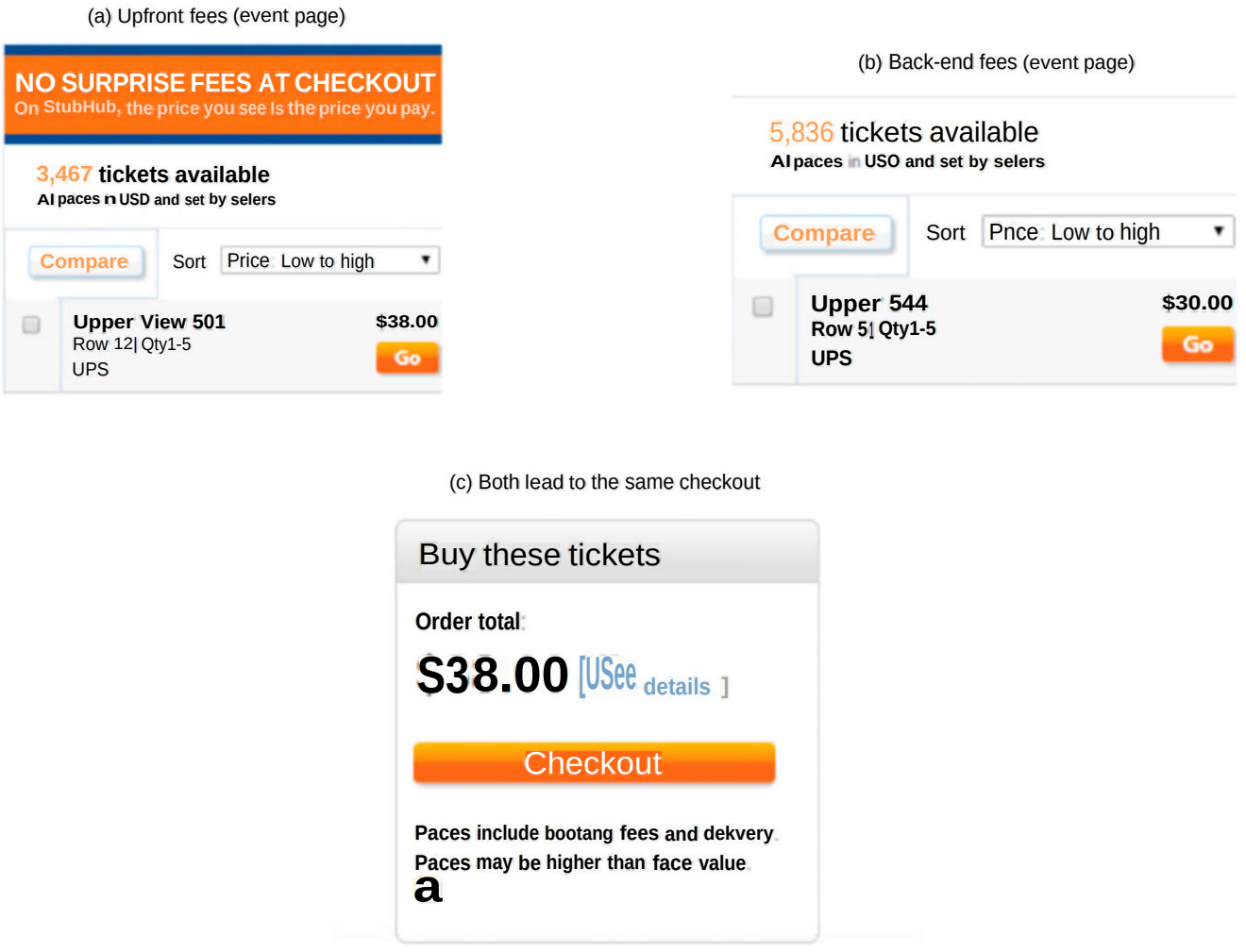
platform showed all fees upfront, so the initial prices that a consumer saw when browsing ticket inventory was the final checkout price. Figure 2 shows an event page, which is what consumers see when they select an event that they are interested in attending. Ticket inventory is listed on the right, and prices including all fees are presented for each ticket.

Between August 19 and August 31 of 2015, the firm ran an experiment where treated consumers were initially shown ticket prices without fees (Smith 2015). For treated customers, fees were added at the checkout page, much like sales taxes at the register of a store. We refer to this user experience as *back-end fees*.[3] StubHub's fee structure is nonlinear: the buyer fee is 15% of the ticket price plus shipping and handling, if applicable. StubHub also charges seller fees, which peak at 15%.

The experimental condition was assigned at the cookie-level, which identifies a browser on a computer. Half of U.S. site visitors were assigned to the treatment (BF) group at their first touch of an event page. On the event page, users are shown a list of tickets. Consumers assigned to the pre-experimental UF experience (the control group) were shown conspicuous onsite announcements confirming that the prices they saw upfront included all charges and fees. On the other hand, treated users in the BF group were shown only the base price when they perused available listings. Once a user in the BF group selected a ticket, they were taken to a ticket details page, where they could log in to purchase the ticket and then review the purchase. It is at this point that the BF group was shown the total price (ticket cost plus fees and shipping charges). Users could then checkout or abandon the purchase. Figure 3 shows the different prices on the event page that result in the same price on the checkout page for treatment and control.

First, we exploit the randomization to estimate the quantity effect described in Section 2 as the difference in purchase probabilities between UF and BF users.[4]

Figure 3. (Color online) Treatment vs. Control Experiences



Because sellers on StubHub cannot price-discriminate between BF and UF users, we need not worry that the two groups face different prices because of the treatment (nor do we include other control variables). In practice, we estimate the following equation via an ordinary least-squares regression, where Q_i is an indicator that consumer i purchases a ticket and T_i is a BF treatment indicator:

$$Q_i = \alpha + \beta T_i + \epsilon_i. \tag{1}$$

The parameter β represents the difference in the levels of purchasing (Q_i) for BF compared to UF users. To protect business-sensitive information, however, we report estimates of $\frac{\beta}{\alpha}$, which is the percent change in the likelihood of purchase for BF users.

Measuring the Quality Upgrade Effect is challenging because the random assignment of the BF experience changes the identity of the marginal consumer. Our intuition, developed more fully in Appendix A, suggests that the marginal consumer who purchases under BF has a lower valuation for the event and chooses lower-quality tickets.[5] Measuring the Quality Upgrade Effect requires adjusting for this selection. Namely, conditional on i making a purchase, let P_i be the purchase price of the ticket that i selects. Let Q_{i0} be an indicator for whether consumer i purchases a ticket when he observes fees upfront ($T_i = 0$) and Q_{i1} for when he observes fees at the back end ($T_i = 1$). We formulate the Quality Upgrade Effect (QUE) using the potential outcomes notation as

$$\text{QUE} = E[P_i|Q_{i0} = 1, T_i = 1] - E[P_i|Q_{i0} = 1, T_i = 0]. \tag{2}$$

The second term is observed by the econometrician and is the average price of tickets purchased by UF users. The challenge is that the econometrician cannot observe the first term, which is the average price of tickets that UF users would buy *if they were exposed* to the BF treatment. Instead, we observe the change in the average price, conditional on purchasing:

$$\begin{cases} \Delta P = E[P_i|Q_{i1} = 1, T_i = 1] - E[P_i|Q_{i0} = 1, T_i = 0] \\ = \text{QUE} + E[P_i|Q_{i1} = 1, T_i = 1] - E[P_i|Q_{i0} = 1, T_i = 1] \\ \leq \text{QUE}. \end{cases} \tag{3}$$

Equation (3) shows that the change in the average purchase price (ΔP) combines two separate effects: first, the Quality Upgrade Effect, where BF encourages consumers to purchase more expensive tickets than they would otherwise, and, second, a change in the marginal consumer, as BF induces more consumers to purchase tickets.[6] The former increases the average purchase price, whereas the latter depresses it (because marginal consumers buy cheaper tickets). We therefore use ΔP as a lower bound for the Quality Upgrade Effect; we estimate (3) using regression specification (1) with price as the left-hand-side variable.

We note that the change in average purchase price is inherently interesting in this setting, as it maps to a change in platform revenue. We decompose the change in revenue from treatment as[7]

$$\Delta E[R_i] = \underbrace{\Delta E[P_i|Q_i = 1]}_{\Delta P} \cdot E[Q_i] + \underbrace{\Delta E[Q_i]}_{\Delta Q} \cdot E[P_i|Q_i = 1]. \tag{4}$$

We also use conditional probability to derive an upper bound for the Quantity Upgrade Effect. The bound attributes the observed change in revenue entirely to the quality upgrade effect by setting the price paid by marginal consumers to zero. The formal derivation of the bound is presented in Appendix B.

4. Randomization Check

The experiment included several million users who visited the site over 10 days. To check randomization, we test whether we can reject a 50% treatment assignment probability. Results are shown in Table 1. Although the odds of assignment to the treatment group are 50.11% in the full sample, the large scale of the experiment allows us to reject the null hypothesis of a 50% assignment probability at the 5% level. Upon closer scrutiny, we discovered two glitches in the randomization: first, all users who logged in during the first 30 minutes of the experiment were assigned to the treatment group. Second, users on a particular browser–operating system combination were also skewed to the treatment group. After eliminating these two groups, we can no longer reject a 50%

Table 1. Treatment Assignment

Sample	% Unidentified	% Site in sample	% Back-end fees	*T*-statistic
Full	0.78	100	50.11	4.28
Time restriction	0.78	99.82	50.09	3.41
Time and browser restriction	0.82	66.12	50.06	1.99

Notes. This table reports the assignment of StubHub users (cookies) to different treatment cells. Each row corresponds to a different sample restriction. The T-statistics are from a two-sided test with a null of a 50% assignment probability.

Table 2. Covariate Balance

User characteristic	% Difference	*T*-statistic
Experience	0.01	0.02
Hour	−0.08	−1.6
Mac user	0.16	0.01

Note. This table presents summary statistics for differences between the BF (treatment) and UF (control) groups in our experiment from August 19 to August 31, 2015.

assignment at the 1% level.[8] We therefore exclude these users in our main analysis.[9] Although the probability of treatment remains slightly above 50%, the difference is economically insignificant.

As a robustness check on randomization, we test whether UF and BF users share similar observable characteristics. Unfortunately, as treatment was assigned before users are required to log in, the set of observables is limited. For example, we observe a user's purchase history only if they log onto the site during the experiment or if they have not cleared their cookies after a recent visit. However, we do see site visits since the last cookie reset, which we use to measure experience. We use this proxy as a left-hand-side variable in specification (1). Row 1 of Table 2 shows that the two groups have almost identical experience levels. BF and UF users also visit the site at similar hours of the day and are equally likely to use Mac computers (rows 2 and 3). These results give us confidence that the randomization was successful.

5. Results

Our framework indicates that obfuscation should encourage consumers with a low willingness to pay for quality to switch from the outside option to purchasing a ticket on StubHub, and also encourage consumers to switch from purchasing lower- to higher-quality tickets. Column 1 of Table 3 shows the net effect on revenue of the price-salience treatment. Consumers identified with cookies in the BF group, where fees are obfuscated, spend almost 21% more than those assigned to the UF group. We show revenue effects for the session (same day) and over the entire experiment (10 days), and point estimates are large and statistically significant at the 1% level for both.

Unfortunately, quantifying salience is difficult, so it is hard to benchmark our estimate to Chetty et al. (2009). (Although the change in user experience in the StubHub experiment is similar in spirit to their experiment of adding taxes to supermarket shelf prices, it is not clear how closely they align.) They find that obfuscating a 7.35% tax leads to an 8% revenue increase. On StubHub, obfuscating a 15% fee leads to a 21% revenue boost.[10] Our findings, detailed below, suggest that upgrades augment the salience effect in our setting.

5.1. Quantity Effect

We first examine the effect of salience on quantity. The third row of Table 3 shows that price obfuscation

Table 3. Effect of Salience on Purchasing

	Back-end vs. upfront fees: % difference	
	Baseline	Conditional on purchasing
Cookie 10-day Revenue	20.64 (1.38)	5.42 (1.37)
Average seat price	—	5.73 (1.5)
Propensity to purchase at least once	14.1 (0.09)	—
Number of transactions within 10 days	13.24 (0.88)	−0.9 (0.58)
Number of seats within 10 days	11.37 (1.17)	−2.32 (0.84)
12-month churn	—	−3.29 (0.66)
Cookie session Revenue	18.96 (1.27)	5.61 (1.27)
Cookie session Propensity to purchase	12.43 (0.6)	—

Notes. This table presents estimates of how fee salience affects purchasing. Effects are presented as percent differences between treatment (BF) and control (UF) users, as per Equation (1). Heteroskedasticity-robust standard errors are reported in parentheses. The sample in column 1 is all visitors to StubHub between August 19 and August 31, 2015. Column 2 restricts to users who made at least one purchase during the same period.

increased the transaction rate over the full course of the experiment by 14.1%. The second-from-last row shows that, within a cookie session, consumers in the BF group are 12.43% more likely to purchase a ticket during a visit (the estimate is significant at the 1% level). Fees average roughly 15% of ticket prices, suggesting a per-session salience elasticity of 0.1243/0.15 = 0.87, which is a similar order of magnitude to the elasticity of 1.1 found in Chetty et al. (2009). The 10-day elasticity is larger than the session elasticity (0.141/0.15 = 0.94), suggesting that the long-run effects of salience may be even greater.

Table 3 also provides estimates of how salience impacts the number of tickets purchased. Our framework ignores the consumer's decision of how many seats to buy and describes a world where consumers need a fixed number of seats and either buy that exact number or buy none at all. In reality, of course, consumers might enlarge their parties if they perceive prices to be lower. To the contrary, we find that BF users buy 2.4% fewer seats, conditional on making at least one purchase at StubHub. Admittedly, this effect is swamped by the increased probability of buying at least one ticket on StubHub, but hints at the nuance in salience responses. The lower number of seats suggests that the marginal consumers lured by the BF treatment buy slightly fewer tickets.[11]

5.2. Quality Upgrade Effect

The second column of Table 3 compares differences in the BF and UF groups' behavior conditional on a purchase. This comparison allows us to assess how salience affects average purchase prices: BF users spend 5.42% more than their UF counterparts. From the platform's perspective, the combination of the Quantity Effect and the Quality Upgrade Effect implies that the effect of salience on their bottom line is substantially larger than suggested in the earlier literature, which did not consider product quality upgrades.

Using Equation (4), we can calculate the increased revenues that are due separately to the Quantity Effect and the Quality Upgrade Effect. From Table 3, we observe that $\Delta P = 5.42P$ and $\Delta Q = 14.1Q$, and hence, rewriting Equation (4) without the expectations operator and subscripts for brevity,

$$\Delta R = \Delta P \cdot Q + \Delta Q \cdot P = 5.42 \cdot QP + 14.1 \cdot QP. \quad (5)$$

Dividing both the left- and right-hand sides of (5) by revenues, $R = QP$, we calculate the percent change in revenues ($\Delta R/R$) to be 19.52%, of which 5.42% (about 28% of increased revenues) are from the Quality Upgrade Effect. Note that the number of seats declines slightly, so that the change in the average purchase price per seat is even greater (5.73%).

We interpret the change in purchase price as evidence of an upgrade effect, where obfuscating fees leads consumers to buy more expensive, higher-quality tickets. This finding is consistent with Lynch and Ariely (2000), who find that subjects in a laboratory experiment bought higher-quality wine when prices were not displayed alongside product descriptions (and were only shown at checkout). Our framework indicates that the change in the average purchase price constitutes a lower bound for the upgrade effect—and although smaller than the quantity effect, even this lower bound is economically meaningful. Our upper bound calculation in (8) is 20.28%, suggesting that the Quality Upgrade Effect may even exceed the Quantity Effect.

We provide auxiliary evidence on the upgrade effect using data on seat locations. In particular, we examine whether BF users bought seats closer to the stage. Rows are often labeled using letters, where letters earlier in the alphabet correspond to a better view.[12] Conditional on purchasing a ticket, we separately calculate the probability that a BF and UF user purchases a seat in each row. Figure 4 graphs the relative probability (the ratio of the two probability mass functions), along with 95% confidence intervals, which are calculated pointwise. BF users are relatively more likely to purchase seats in rows A through D, which are the very first rows, and the likelihood declines for rows later in the alphabet. These patterns provide further evidence of the Quality Upgrade Effect.

Figure 4. (Color online) Difference in Likelihood of Purchase by Row (BF vs. UF Users)

Notes. This figure plots the relative purchase likelihood by ticket row letter for users in the treatment (BF) and control (UF) groups. Letters earlier in the alphabet generally correspond to seats that are nearer to the event stage.

5.3. A Second Experiment: Event-Level Randomization

The 2015 experiment randomized salience across users so that BF and UF users had the same StubHub experience except for fee presentation—fees were included in the search results only for UF users. In an earlier experiment performed in 2012 at StubHub, fee salience was randomized at the event level, which presents distinct challenges but offers a nice robustness check for the 2015 experiment.

First, StubHub's unique inventory threatens the independence assumption for the 2015 experiment, but not for its 2012 counterpart. Suppose that price obfuscation merely accelerates, but does not actually alter, the consumer's purchase decision. In this case, BF users will tend to buy early in the 2015 experiment, which may reduce inventory for UF users. Comparing purchase probabilities without taking this censorship into account would mistakenly indicate a positive treatment effect. In other words, treating user A affects user B (see Blake and Coey 2014 for a discussion of this challenge on eBay). Fortunately, the 2012 experiment does not suffer from the same contamination concern, because all tickets for a particular event share the same treatment status.

A second challenge that the 2012 experiment addresses is multidevice use. In the 2015 experiment, we sort users into BF or UF the first time that they touch an event page on StubHub during the experiment period. StubHub employs cookies to track users, so that the user remains in the appropriate group throughout the trial. However, cookies differ across devices, and a user would be rerandomized into the BF or UF group if she used a different device. Switching devices is particularly problematic if its incidence depends on initial treatment assignment. As an example, if UF users—upon seeing higher initial prices—delay their purchases and revisit StubHub on a second device, then the BF treatment would be positively correlated with purchasing. In the 2012 experiment, tickets to each event retain their treatment status, regardless of the device that consumers use. Finally, randomization at the event level provides insight into general equilibrium effects examined in Section 7. We have shown that when StubHub alters the consumer's experience, it alters sellers' behavior. Salience might also affect price levels, which is hard to gauge given the unique inventory on StubHub. For example, if price obfuscation attracts more elastic buyers, then sellers might lower their prices. If these effects are large, then the 2015 experiment does not provide the true counterfactual of interest: What happens when all users face BF? Instead, the econometrician only observes what happens on StubHub when fees are shrouded for 50% of users. The 2012 experiment answers this question, because a ticket seller for a particular match faces an entirely BF or UF audience, but not a mix of both.

In the 2012 experiment, 33 out of 99 Major League Soccer games were randomly selected for UF. Prices for tickets to these games included fees, even from the initial event page. The remaining 66 matches had the BF experience, which, at the time, was the site-wide user experience. The results from the 2012 experiment, displayed in Table 4, confirm our 2015 findings: fee salience reduces revenue substantially. Consumers are 13% less likely to buy tickets to an upfront-fee match.[13] The difference has a p-value of 0.076, with standard errors clustered at the event level.

We also examine whether users upgrade to more expensive tickets for BF games. Unfortunately, tests based on purchase prices are underpowered because of the high sampling variance across matches. To control for the unobserved popularity of matches, we test whether users purchase from the same quantile of price in BF versus UF matches. For each transaction, we calculate where the purchase ranks in a user's choice set (StubHub's entire inventory for the match at the time of purchase). On average, consumers buy from a 12% lower quantile for UF compared with BF games. Figure 5 shows the full distribution of purchase quantiles for BF and UF matches.

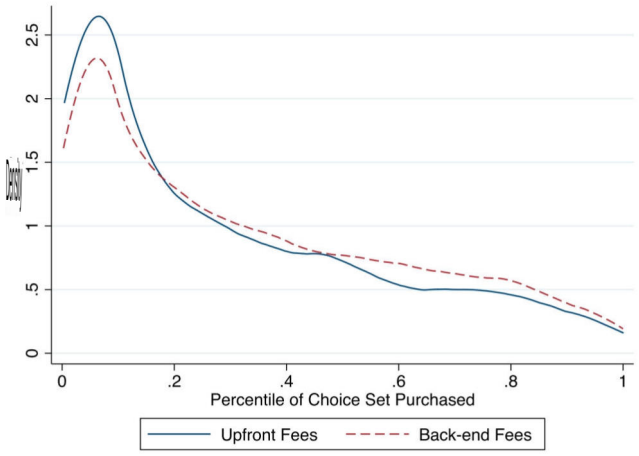
Although these results are heartening, we prefer the 2015 experiment for its larger sample size. Further, experimentation at the event level suffers from a different kind of contamination bias: consumers may substitute away from UF matches (which appear more expensive) to BF matches. The 2015 experiment is not vulnerable to this type of contamination. Another complementarity between the two experiments is that they differ in initial conditions: in early 2012, StubHub used a BF policy, whereas, in 2015, the site used a UF policy. Our results suggest that the effect of price salience at StubHub is similar despite the difference in the status quo. The ability to execute two experimental designs is one advantage of the StubHub setting.

Table 4. Experiment Results: Back-End vs. Upfront Fees, 2012

	% Difference
Purchase probability	−12.38 (6.63)
Percentile of choice set selected	−11.97 (5.62)

Notes. This table presents estimates of how fee salience affects customer purchasing based on data from the 2012 StubHub experiment, where salience is randomized at the event level. Effects are presented as percent differences between BF and UF users. Standard errors are clustered at the event level and reported in parentheses.

Figure 5. (Color online) Percentile of Choice Set Purchased in the 2012 Experiment



Notes. This figure plots the probability density function of purchases by price percentile separately for treatment (BF) and control (UF) users on StubHub.com. To calculate price percentiles, we reconstruct the set of available tickets on StubHub.com during each user's site visit.

6. Mechanisms

6.1. Misinformation

In this section, we leverage StubHub's detailed data to better understand why fee salience affects consumers so greatly. First, we examine consumer misinformation using web-browsing behavior. If consumers do not anticipate fees, then they will receive a negative surprise at checkout and should be more likely to exit when the fee first appears. For consumers who are nearly indifferent between purchasing at the base ticket price, the fee makes the outside option their utility-maximizing choice. Importantly, a misinformation theory offers implications about where (in the purchase funnel) BF and UF users will differentially exit.

To buy a ticket, a user follows StubHub's "purchase funnel" on the website as follows: (1) the consumer first sees the event page, which contains a seat map and a sidebar with top ticket results, sorted by price in ascending order; (2) once a consumer clicks on a ticket, the ticket details page appears; (3) the consumer proceeds to the checkout page, where a final purchase decision is made; (4) the purchase confirmation page completes the process.[14] BF users are shown lower prices than their UF peers until stage (3), when they are shown the final price, inclusive of fees. If consumers are ignorant of fees, then there should be a larger drop off between stages (1) and (2) for the UF group, since they see higher prices initially. But there should be a larger drop-off between stages (3) and (4) for the BF group. If the former is larger than the latter, then back-end fees increase the quantity sold.

The left panel of Table 5 shows the absolute and relative rate of UF and BF user arrivals between these key steps in the purchase process. Consistent with misinformation, BF users are almost 19% more likely to select tickets (transition from stage 1 to 2) than UF users. The difference is statistically significant at the 1% level and economically large. In contrast, the drop-off rate at the final stage (purchase) is much larger for BF users, as they are almost 45% less likely to purchase at checkout.

The right panel of Table 5 presents the average selected ticket price at each step in the purchase funnel for a subset of events. The average price of tickets under consideration declines at each step, suggesting that quality also drops. As the theory predicts, UF users always select cheaper tickets than BF users, but the difference narrows as users move closer to purchase. When fees are revealed, the gap is just under 7%, compared to an initial difference of almost 19%. In sum, BF users are more likely to contemplate buying expensive tickets, but when fees are revealed, more of the (potentially surprised) BF users exit than the UF users who see no change in their expected outcome.

One important question, from both the firm's and a policy maker's perspective, is whether consumers learn about the fees over time. As an example,

Table 5. Purchase Funnel Behavior by Fee Salience

	Percentage click through from prior page			Average ticket price		
	BF	UF	% Difference	BF	UF	% Difference
Event page	—	—	—	$1.00	$0.84	18.73
Ticket details	27.96	23.56	18.67	$0.86	$0.78	10.16
	(0.01)	(0.01)	(0.00)			
Review and submit	—	—	—	$0.56	$0.52	7.44
Purchase	18.52	33.41	−44.58	$0.42	$0.39	6.57
	(0.06)	(0.1)	(0.00)			

Notes. This table reports means and standard errors (in parentheses) of user behavior in the StubHub purchase funnel. Average ticket prices are normalized by the average price of tickets selected by BF users on the event page.

consumers could act as if they do not anticipate fees in their ticket selection each time they visit the site. In this case, websites stand to gain substantially by shrouding fees. This implication contrasts with a model where consumers anticipate a fee but do not know the exact level. In a model with learning, once a consumer makes a purchase, she updates her priors on future StubHub fees and does not make the same "mistake" twice.

To examine learning, we repeat our principal analysis (Table 3) separately by level of user experience. If consumers learn, then experience ought to lessen the response to obfuscation. Of course, experience is endogenous, so experienced users may react differently to salience for other reasons (as an example, they may have higher incomes). Nonetheless, examining responses across experience groups hints at how learning might work in this setting.

To measure experience, we calculate the number of visits that each cookie has made to StubHub prior to the experiment. A 2006 ComScore study found that 31% of users clear their cookies within 30 days, so we interpret this as a short-term measure of experience.[15] Unfortunately, we cannot exploit information about logged-in users (like number of past transactions) because logging in is a potential response to our treatment; users who see lower prices initially may be more likely to log into the website in order to purchase. Our measure does capture the most recent interactions with StubHub, which are likely to be the most relevant for a user's knowledge of the site.

We hypothesize that frequent StubHub users ought to be aware of fees and therefore less sensitive to salience. We split users into three groups: new users (no recorded visits), low experience (1–9 visits), and high experience (10 or more visits). Table 6 shows that the treatment effect is smaller for cookies with at least 10 site visits: the revenue effect is 15% compared with 21%. These results suggest that salience may be most important in markets where consumers purchase infrequently (for example, real estate or automobile markets). However, effects are still large for the most experienced group (the top 6% of users), which indicates only limited consumer learning. Because experience is not randomly assigned in the population, we interpret this evidence as suggestive, rather than causal.

We examine user churn to understand the long-run effects of salience. If obfuscation preys on misinformation, then marginal BF consumers, who would not purchase if shown fees upfront, may be more likely to abandon StubHub after seeing fees for the first time. Unfortunately, we cannot identify marginal consumers among the pool of BF consumers. We also cannot compare the return rates of all BF and UF users, as there is no way to track future purchases of users who do not log into the site. Instead, we compare the return rates of BF and UF users who purchase during the experiment. As Table 3 shows, BF users are 3.3% less likely to churn, which is inconsistent with the simple misinformation story. We emphasize caution in interpreting churn, however, as it potentially confounds multiple treatments: BF users may learn about the platform fees when they make a purchase, but they may also learn about StubHub's reliability, speed, quality, and so on. This additional learning may increase a consumer's likelihood of purchase, even if obfuscation effects are short-lived.

As a robustness check, we compare the likelihood of return for consumers who were logged into StubHub *before* the experiment. We can track these users' purchases after the experiment's conclusion, regardless of whether they made a purchase during the experiment window. The difference between BF and UF return rates drops to 0.65% and loses statistical significance. Although this sample contains consumers with high attachment to StubHub, this comparison also indicates that salience effects persist beyond initial misinformation.

Table 6. Salience by User Experience

	% Difference		
	New user	Low experience	High experience
User 10-day revenue	21.52	21.80	15.09
	(1.92)	(2.29)	(4.4)
Propensity to purchase at least once	15.33	13.68	10.19
	(0.653)	(1.15)	(2.42)
Number of transactions within 10 days	14.33	13.53	8.81
	(1.17)	(1.23)	(2.94)
% Sample	67	27	6

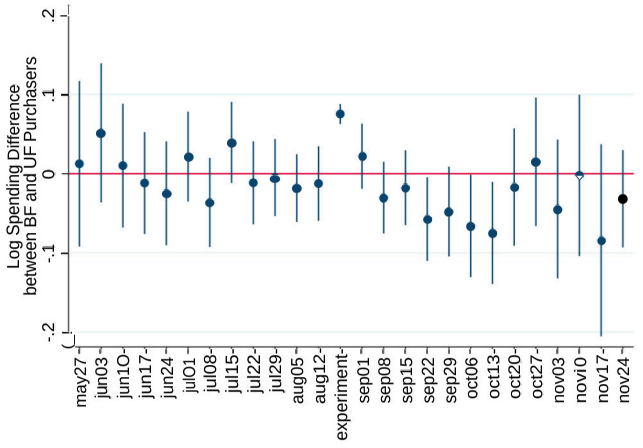
Notes. This table reports coefficient estimates of how fee salience affects purchasing (Equation (1)) for users of different experience levels. Estimates are presented as percent differences between treatment (BF) and control (UF) users. Heteroskedasticity-robust standard errors are in parentheses. See Table 3 for pooled estimates.

Finally, to shed light on the persistence of salience, we construct a panel data set that tracks the purchases of BF and UF users over a six-month period centered around the experiment window (May 18 through December 1, 2015). We have already established that BF users spend more, conditional on purchasing, during the experiment. On September 1, the entire site switched to BF, so that the only difference between users who *had been* assigned to BF versus UF is their experience with the back-end fees. If salience effects are short-lived, then we would expect UF users, who now experience back-end fees for the first time, to outspend their BF counterparts, who have 10 days of experience. On the other hand, if salience effects persist, then the UF-BF difference should dissipate after the experiment, as both groups spend more than they would have in an UF environment. If i denotes the user and t the purchase date, then we model purchase price using the following specification:

$$\ln p_{it} = \alpha_0 + \sum_{w=1}^{W} \alpha_w \cdot 1\{\text{week}_t = w\} + \sum_{w=1}^{W} \beta_w \cdot 1\{\text{week}_t = w\} \times T_i + \epsilon_{it}, \quad (6)$$

where $1\{\text{week}_t = w\}$ is an indicator that the purchase occurred during week t in our sample and T_i is a treatment indicator. For ease of interpretation, the week-14 indicator is labeled *experiment* and comprises 10 rather than 7 days. Purchases the first day of and after the experiment are omitted to account for any engineering lags in the user interface switch. We estimate Equation (6) using the sample of users who purchase during the experiment window, because these are the only users we can reliably track. During the purchase process, users log into the site, allowing us to identify their prior and subsequent purchases. Standard errors are clustered at the user level to account for serial correlation in individual purchasing decisions.

Figure 6. (Color online) Spending Before, During, and After the Platform Switch to Back-End Fees



Notes. This table includes data on purchases between May 18 and December 1, 2015, excluding August 9 (the first day of the experiment) and September 1 (the first day after the experiment). The data include only those customers who purchased *at least* once during the experiment window.

Figure 6 displays the estimates of the interactions between the BF treatment indicator and each time period. BF and UF users spend similar amounts before the experiment, when both groups experience UF. As in Table 3, we find that, during the experiment, BF users spend almost 6% more than UF users, conditional on purchasing at least one ticket. However, in the three-month period following the experiment, when all users experience BF, there is no difference in spending between the two groups. The results are robust to the inclusion of both buyer and day fixed effects.

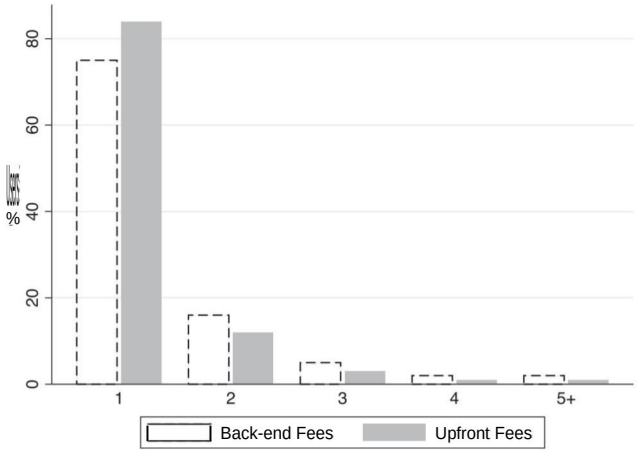
These event study findings, taken together with our results on experienced users and churn, indicate that salience effects are persistent. They suggest that users do not learn to anticipate the correct fee level after going through the purchase funnel with back-end fees at least once.

6.2. Consideration Sets and Search Frictions

In this section, we present evidence on forces beyond misinformation that might contribute to the importance of salience: consideration sets and search frictions. First, we consider whether fee obfuscation widens users' consideration sets. A growing body of literature (e.g., Goeree 2008) suggests that potential consumers often ignore a large fraction of inventory, and instead focus on choosing between a few products. StubHub presents inventory to consumers in ascending price order, so that expensive tickets are not visible to the consumer unless she actively scrolls down or filters the results (e.g., by section). It is possible that obfuscating fees might draw user attentions to a wider array of products, leading BF users to make different purchase decisions than their UF counterparts. We find that BF users scroll 10% more often, a difference that is statistically significant at the 1% level.

When fees are revealed, BF consumers are already at checkout with their tickets, but they may go back to the event page to reoptimize and purchase cheaper seats. We find that less than a quarter of BF users exercise this option, which is consistent with a search friction beyond misinformation. Figure 7 shows the average number of tickets viewed by BF and UF users. BF cookies are 56% more likely to view multiple ticket listing compared with their UF counterparts. Table 7 shows that BF users view cheaper tickets upon their return to the listings page from the checkout page (six percentage points cheaper). In contrast, UF users,

Figure 7. Number of Listings Viewed by Fee Salience



Notes. This histogram plots the number of listings viewed across users. The distribution is plotted separately for treatment (BF) and control (UF).

who are less likely to return overall, view more expensive tickets if they do.

Figure 7 shows that BF users are twice as likely to view three or more listings than their UF counterparts. Viewing more than two tickets suggests that the effects of price obfuscation extend beyond an initial confusion about fees. BF consumers who return to the event page have seen fees for their initial selection, but they must calculate the StubHub fee for each new ticket that they consider. If calculation costs are high, as hypothesized by Morwitz et al. (1998) or Ellison and Ellison (2009), then consumers might choose to go down the funnel multiple times rather than compute the fees themselves. Obfuscation as a search friction is consistent with our findings on experienced customers, who ought to anticipate fees but might still bear a higher search cost when fees are hidden. This evidence is in line with Ellison and Ellison (2009), who find that firms endogenously create such frictions to soften price competition.

7. Two-Sided Responses

In this section, we provide evidence on the effect of fee salience beyond changes in consumer behavior. Note first that, in two-sided markets like ticket resale, changes to the buyer experience may spill over onto sellers. As an example, if obfuscation lifts seller profits (by increasing buyer spending), then more sellers may enter the marketplace. In turn, increased seller participation may bolster competition and help buyers. These sorts of externalities complicate welfare analyses in two-sided markets.

7.1. Ticket Quality

As a first step, we examine whether inventory responds to the use of BF pricing, with a focus on ticket quality. Section 5.2 shows that buyers upgrade to higher-quality seats when fees are less salient, making StubHub a more attractive platform to sellers of high-quality tickets. Figure 8 shows the evolution of inventory on StubHub over time by row letter. Visual inspection suggests that the relative number of seats in front rows (A–E) compared with back rows (U–Z) increases after the switch to BF. Consistent with Ellison and Ellison (2009), we find that sellers respond to the change in the buyer experience.

To further investigate seller responses, we test for a break in listing quality during and after the experiment, when the whole site switched to BF. To measure quality, we construct a row-number variable, *Position*, which counts the number of rows between the seat and row A plus one (taking a value of one for seats in row A). We then construct an event study, where the log number of listings is the dependent variable. We are interested in the coefficient on the interaction between ln(*Position*) and an indicator for the post period as follows:

$$\ln \text{Listings}_{it} = \beta_0 + \beta_1 \cdot \ln(\text{Position}_{it}) + \beta_2 \cdot Post_t \ln(\text{Position}_{it}) + \Gamma_t + \epsilon_{it}. \quad (7)$$

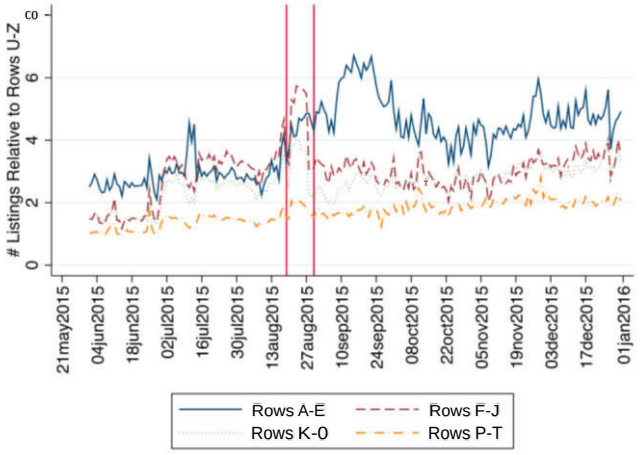
Our preferred specification includes date fixed effects, Γ_t, which control for any site-wide fluctuations that affect all types of tickets simultaneously. Columns 1 and 2 in Table 8 present the coefficient estimates on the interaction term, which is negative and statistically significant at conventional levels. The point estimates imply that a ticket listed on StubHub is 3.7% more likely to be in row A than row B following the experiment (under BF) compared to before (under UF). The increase in high-quality listings underscores the complexity of platform design, as

Table 7. Average Price of Tickets Viewed Relative to UF Initial Selections

Back-end fees		Upfront fees	
% Initial checkout	% Follow-up actions	% Initial checkout	Follow-up actions
8.3	0.8	0.0	1.8
(1.9)	(1.2)	(—)	(0.6)

Notes. This table reports means and standard errors for the relative price of tickets viewed across the treatment and control groups. Estimates are normalized by the price of tickets initially brought to checkout by UF users.

Figure 8. (Color online) Fraction of Listings by Row Letter



Notes. This figure plots the number of listings by row letter relative to base rows U–Z. The two vertical red lines denote the start and end of the 2015 fee salience experiment.

changes to one side of the market influence entry decisions on the other.

7.2. Ticket Prices

Second, we consider whether prices respond to back-end fees. Ideally, we could test whether back-end fees induce sellers to increase or decrease prices by comparing price levels before and after the site switches from UF to BF in September 2015. However, this time-series variation is confounded by changes in site inventory over time. The challenge is that the tickets listed and sold in August differ from those listed and sold in September because different events are held in the two months. As an example, the 2015 NFL season kicked off on September 10th. Instead of examining price levels, we focus on another aspect of pricing: the use of round numbers.

An extensive literature in marketing (e.g., Monroe 1973 or, more recently, Backus et al. 2019) documents the appeal of round-number pricing (amounts that end in zeros or nines). If sellers aim to employ round-number pricing, then they ought to adjust prices in response to the site's switch from UF to BF. That is, under UF, a seller should set its list (or "base") price so that the fee-inclusive price (list price + buyer fee) that is shown to the consumer is round. In contrast, under BF, the seller should set a round list price. Thus, we examine whether sellers are more likely to set base prices at round numbers after the switch to back-end fees.

Table 8. Changes in Listings Following Back-End Fees

	Log number of listings			
	(1)	(2)	(3)	(4)
Log Position × *Post*	−0.123	−0.123		
	(0.020)	(0.017)		
Round × *Post*			0.315	0.315
			(0.064)	(0.018)
Date fixed effect	No	Yes	No	Yes
Observations	4,680	4,680	360	360

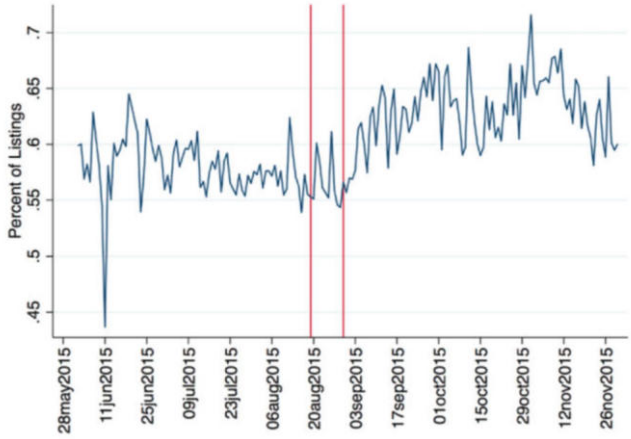
Notes. Heteroskedasticity-robust standard errors in parentheses. Data are from June 1, 2015, to December 1, 2015, at the daily level. Controls include log Position (the letter's position in the alphabet, where A occupies the first position) in columns 1 and 2 and an indicator for a round base price in columns 3 and 4. Columns 1 and 3 also include an indicator for the *Post* period.

As shown in Figure 9, the share of listed tickets with round base prices increases by approximately five percentage points following the switch to back-end fees. To be transparent, we examine only the prices of listings that were added or modified on each date, and we categorize prices that end in ".00" or ".99" as round. Columns 3 and 4 in Table 8 present results of the regression analogue of Figure 9, where we adopt specification 7 so that the independent variable of interest is an indicator for a round listing price. The results indicate an economically and statistically significant increase in the use of round listing prices following the switch to BF. This trend shows that sellers adjust their pricing policies in response the buyer's experience, which is consistent with Ellison and Ellison (2009).

8. Discussion

As the online share of transactions continues to grow, so too does the scope for regulations that guarantee the efficient functioning of markets. Chief among proposed regulations has been increasing the

Figure 9. (Color online) Percent of Listings with Round Prices



Notes. This figure plots the fraction of StubHub listings with round base prices for a six-month window around the 2015 fee-salience experiment. The two vertical red lines denote the start and end date of the experiment. The sample comprises listings that were created or modified each day.

transparency of mandatory fees. Using data from a randomized control trial on StubHub, we find that shrouding buyer fees increases total revenue by about 20%. In the experiment, the control group was shown fee-inclusive prices from the initial search page, whereas the treatment group was shown base prices until the checkout page. We decompose the impact of obfuscation into a quantity effect and a quality effect. The latter accounts for at least 28% of the revenue bump, because consumers upgrade to higher-quality products when they observe lower prices initially. We find that consumers who are shown fees upfront drop off early in the purchase funnel, whereas those shown fees later are more likely to exit after the site displays total prices, consistent with consumer misinformation.

We find that salience persists beyond initial misinformation. Experienced users, who arguably should anticipate the fee, spend 15% more on StubHub when the fee is shrouded. More strikingly, after the platform switched to back-end fees, the users exposed to the BF treatment during the experiment spend similar amounts to those newly exposed to back-end fees. This behavior suggests that short-term experience with back-end fees does not give users an advantage in anticipating true final prices. These patterns indicate that salience is not a one-off phenomenon, which becomes irrelevant as consumers learn about the sales environment. It is perhaps unsurprising, if not reassuring, that we find that sellers respond to changes in the salience of the buyer experience. Sellers are more likely to list high-quality tickets and to use round-number prices when fees are presented at the back end, highlighting the nuance of salience effects on a platform.

Our results also demonstrate that price salience looms large in markets where consumers purchase only intermittently. The existing literature focuses on contexts where consumers purchase frequently, such as grocery stores in Chetty et al. (2009). In these settings, consumers plausibly hold strong beliefs about both the amount and presentation of fees and taxes,[16] and so we might interpret their response to an abrupt change in salience as a reaction to off-equilibrium path play. In contrast, most users who visited StubHub during our experiment were new to the site. Their reactions to salience may more closely parallel reactions in markets like real estate, higher education, or automobiles, where policy makers may wish to mandate fee disclosure.[17]

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The authors are grateful to the executives and employees at StubHub for sharing the data for this study. They thank numerous seminar participants for helpful comments.

Appendix A. A Model of Consumer Choice with Limited Fee Salience

Consider a consumer who makes purchase decisions under two regimes. In the first, which we call upfront fees (UF), the final purchase price including all fees is shown to consumers when they browse the set of available tickets. In the second, which we call back-end Fees (BF), consumers observe only list prices when they browse available products, and fees are revealed only after a particular ticket is selected for purchase.

First, we consider a consumer's choice when she observes fees upfront. She is presented with a convex and compact set of available tickets J, where her utility v_j from ticket $j \in J$ depends on its price p_j and quality q_j (e.g., section and row, delivery method, etc.) as follows:

$$v_j = \theta q_j - p_j.$$

The consumer's willingness to trade off quality for money is captured by her type $\theta \in [0, \bar{\theta}]$. Let 0 denote the outside option, with $q_0 = p_0 = 0$. Figure A.1(a) illustrates her optimization problem: the set J of available tickets lies on and above the curved line, and the dashed line $v_0 = 0$ marks the consumer's indifference curve from not purchasing. The consumer chooses the ticket $j^* \in J$ on her highest indifference curve, yielding a utility of $v^* > 0$. A higher θ consumer will purchase a higher-quality ticket at a higher price. For consumers with low-enough values of θ [less steep indifference curves in Figure A.1(a)], their indifference curve $v_0 = 0$ lies fully below the set J, and they will not purchase any ticket. It therefore follows that, given a set of tickets J, there exists a threshold type $\underline{\theta} > 0$ such that a consumer of type θ will purchase a ticket if and only if $\theta > \underline{\theta}$.

We model consumer optimization with back-end fees as a shift in the boundary of J. Namely, her choice now depends on the *perceived* price $\tilde{p}_j$ of ticket j rather than its true final price. This is akin to reducing the salience of prices relative to quality as in Bordalo et al. (2013) and is also similar to the way salience is modeled in Finkelstein (2009). The consumer then selects $j \in J$ to solve her optimization problem:

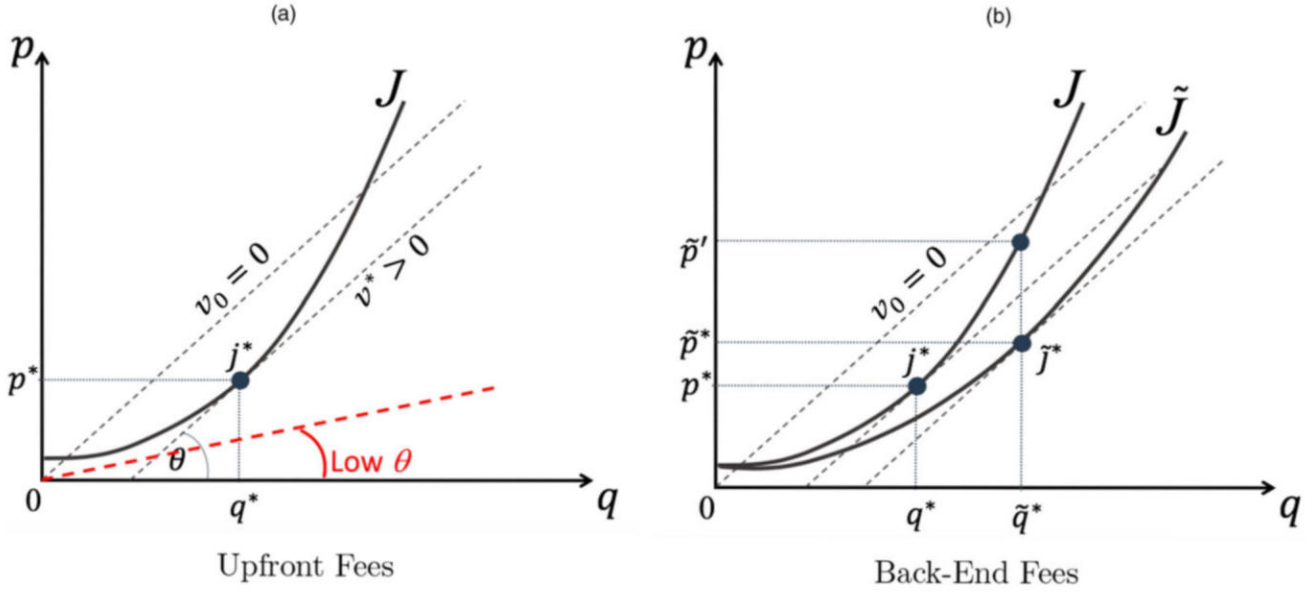
$$\max_{j \in J} \tilde{v}_j = \max_{j \in J} \ \theta q_j - \tilde{p}_j,$$

where the perceived price of not purchasing a ticket is also zero, $\tilde{p}_0 = p_0 = 0$. The established view on price salience is that $\tilde{p}_j < p_j$. That is, when fees are obfuscated, prices appear lower to consumers than they actually are, as illustrated in Figure A.1(a). The true price-quantity frontier is still J; however, when the consumer chooses a ticket for purchase, she perceives the frontier to be $\tilde{J}$, choosing the ticket $\tilde{j}^*$ which has quality $\tilde{q}^*$ and *perceived* price $\tilde{p}^*$.

Upon reaching the checkout and purchase phase, the ticket's *actual* price—including all fees—is revealed to be $\tilde{p}' > \tilde{p}^*$. We assume, however, that the consumer will continue with the purchase at this final stage of the purchase funnel rather than go back to the selection stage with a newfound understanding that the true choice set is J.[18]

Recall that the set of consumers with $\theta < \underline{\theta}$ will prefer not to purchase if they perceive the set of tickets to be J. Some of these consumers, however, will select a ticket for purchase

Figure A.1. (Color online) Optimal Ticket Choice



if they perceive the set of tickets to be $\tilde{J}$. It follows immediately that there exists a threshold type $\tilde{\theta} \in [0, \underline{\theta}]$ such that a consumer of type θ will purchase a ticket if and only if $\theta > \tilde{\theta}$. Hence, the analysis above implies that fee obfuscation has two effects on consumer choice:

1. Quantity Effect: *Under the BF treatment, a consumer is more likely to purchase.*

This prediction is consistent with the existing literature: more salient fees reduce the likelihood of purchase. However, it precludes at least two alternative effects of salience: first, if consumers anticipate fees (or hold unbiased beliefs), then perceived prices may not be lower than actual prices. Second, it is also possible that price obfuscation generates a "disgust" factor, wherein last-minute fees upset consumers. In that case, the quantity effect could be negative, contravening the standard price-salience model.

When true final prices are higher than perceived prices and the difference is *increasing* in the listing price, the model generates a second prediction: customers buy higher-quality items than they would under the UF regime. This condition would be satisfied, for example, if consumers simply ignored or underestimated a proportional fee or tax. More formally, for any ticket j, let $\tilde{p}_j$ be the perceived BF price excluding fees, and let p'_j be the true final price observed at checkout. We have the following:

2. Quality Upgrade Effect: *If $p'_j - \tilde{p}_j > 0$ and $p'_j - \tilde{p}_j$ is increasing in q_j, then consumers buy higher-quality tickets under BF.*

Conditional on purchasing, consumers upgrade to higher-quality tickets under back-end fees and therefore spend more on the site. The earlier salience literature overlooks this effect, perhaps because previously studied settings offered little vertical product differentiation (e.g. electronic toll collection systems as in Finkelstein 2009 or supermarket beauty aids as in Chetty et al. 2009). Indeed, the log-log demand specification favored by earlier work leaves no scope for quality upgrades.

The Quality Upgrade Effect emphasizes how identification strategies must respect the impact of salience on quality choice. Consider the alcohol sales analysis of Chetty et al. (2009). They compare an excise (lump sum) tax to a sales (percentage) tax. The excise tax should arguably not effect the quality of beer chosen (conditional on purchase), since it makes each can of beer "in the choice set" more expensive by the same amount. The sales tax, however, may affect both the quantity and quality margins, since it is a percentage of the price. Simple comparisons of the revenue effects of excise and sales tax salience may therefore lead to inconclusive results.

Appendix B. An Upper Bound for the Quality Upgrade Effect

We derive an upper bound for the Quality Upgrade Effect by setting the purchase price among marginal consumers to zero. That is, we assume that users who buy under BF but abstain under UF get tickets for free under the BF treatment. Formally, consider the following expression for the expected purchase price under back-end fees:

$$
\begin{aligned}
&E[P_i|Q_{i1}=1, T_i=1] \\
&\quad = E[P_i|Q_{i0}=1, Q_{i1}=1, T_i=1] \cdot \frac{P\{Q_{i0}=1\}}{P\{Q_{i1}=1\}} \\
&\quad + E[P_i|Q_{i0}=0, Q_{i1}=1, T_i=1] \cdot \left(1 - \frac{P\{Q_{i0}=1\}}{P\{Q_{i1}=1\}}\right) \\
&\quad = (\mathrm{QUE} + E[P_i|Q_{i0}=1, T_i=0]) \cdot \frac{P\{Q_{i0}=1\}}{P\{Q_{i1}=1\}} \\
&\quad + \underbrace{E[P_i|Q_{i0}=0, Q_{i1}=1, T_i=1] \cdot \left(1 - \frac{P\{Q_{i0}=1\}}{P\{Q_{i1}=1\}}\right)}_{>0}.
\end{aligned}
$$

The first equality follows from a conditional probability decomposition of $E[P_i|Q_{i1}=1, T_i=1]$. Note that it also

relies on choice monotonicity, which implies that $\Pr\{Q_{i0} = 1|Q_{i1} = 1\} = \frac{\Pr\{Q_{i0}=1\}}{\Pr\{Q_{i1}=1\}}$. In the second equality, we add and subtract an additional term to create a term including QUE. This last equality contains two expressions, the second of which includes the expected price of tickets bought by the marginal users who buy under BF but abstain under UF,[19] which we cannot observe but is greater than zero. If we assume that these consumers buy at a price of zero, thereby setting this last term to zero, then we obtain the following upper bound for QUE:

$$\text{QUE} \leq E[P|Q_{i1} = 1, T_i = 1] \cdot \frac{\Pr\{Q_{i1} = 1\}}{\Pr\{Q_{i0} = 1\}} - E[P_i|Q_{i0} = 1, T_i = 0]. \quad \text{(B.1)}$$

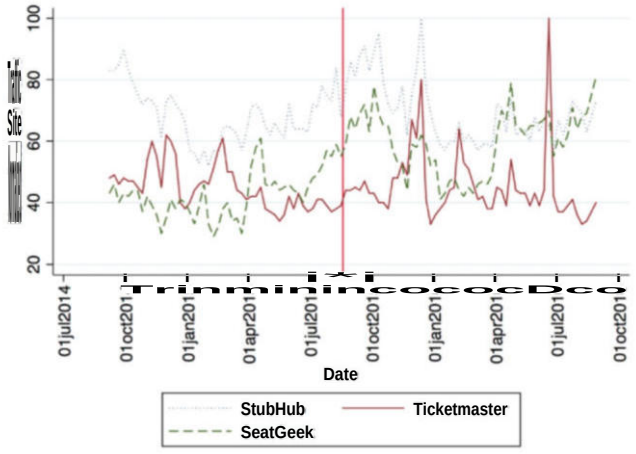
Importantly, all of the terms on the right-hand side in equation (B.1) can be estimated directly from the data.

Appendix C. Competition with Other Platforms

An additional consideration is how fee presentation at StubHub affects the broader competitive environment, including prices and inventory on rival sites. We focus on Ticketmaster and SeatGeek, two alternative secondary markets for tickets, with Ticketmaster serving as the primary market for certain sporting and music events. At the time of the 2015 experiment, both sites employed back-end fees. It is possible that, in comparison, StubHub appeared more expensive to consumers (because its listing prices included fees) and therefore less attractive to sellers. Thus, when StubHub itself switched to back-end fees in September 2015, it may have drawn sellers and buyers who would otherwise have frequented a rival platform. Unfortunately, we do not have access to listing or sales data from Ticketmaster or SeatGeek, so we investigate the effect of StubHub's switch to back-end fees using data from GoogleTrends on queries.

Figure C.1 shows the evolution of queries over three years from September 2014 to September 2016. (To be clear, Google normalizes weekly query volume separately for each platform by dividing by the site's peak from 2012 to 2017, so that the index ranges from 0 to 100 for each site. Queries for Ticketmaster are virtually flat, indicating that there is no effect of StubHub's switch to BF. During the entire period, SeatGeek seems to be gaining popularity, but, again, there is no evidence of a trend break in September 2015 when StubHub makes the change. We formally test for a change in Ticketmaster and SeatGeek queries by adapting specification 7 so that the right-hand side interactions are with indicators for Ticketmaster and SeatGeek (rather than Position) and the left-hand side variable is the Google query index. The omitted category is queries for StubHub itself. Table C.1 presents results that show an economically and statistically insignificant change in searches for Ticketmaster. In contrast, the coefficient on the interaction between SeatGeek and the post indicator is positive and statistically significant in columns 1 and 2, where the latter includes date fixed effects. To accommodate the gradual increase in SeatGeek queries during this period visible in Figure C.1, we add a site-specific time trend in column 3; the coefficient on the interaction term for SeatGeek and the post indicator reduces by half in magnitude and reverses sign. Our interpretation of these results is that they provide little evidence that other ticket resale platforms were affected by StubHub's switch to back-end fees. More work with data that speak to rivals' sales and not simply queries is needed, however, to give a definitive answer.

Figure C.1. (Color online) Google Queries for Competing Ticket Resale Platforms



Notes. This figure plots the Google trend index for StubHub, SeatGeek, and Ticketmaster for a two-year window around the fee-salience experiment. The index is normalized separately for each site based on its peak from 2012 to 2017.

Table C.1. Changes in Google Searches Following Back-End Fees

	Google queries index		
	(1)	(2)	(3)
Ticketmaster × *Post*	0.019	0.019	−1.092
	(2.691)	(2.408)	(4.877)
SeatGeek × *Post*	15.827	15.827	−8.765
	(2.691)	(2.155)	(3.643)
Date fixed effect	No	Yes	Yes
Site × time trend	No	No	Yes
Observations	312	312	312

Notes. Heteroskedasticity-robust standard errors in parentheses. Observations from September 1, 2014, to September 1, 2016, at the weekly level. All columns include main effects for Ticketmaster and SeatGeek. Column 1 includes an indicator for after the experiment, *Post*.

Endnotes

[1] In their working-paper version, Chetty et al. (2009) note that the revenue effect is bigger than the quantity effect, which is potentially due to consumers switching to lower-priced items. Their data are insufficient to investigate that possibility further.

[2] An alternative explanation is that by entering payment information en route to the checkout page, BF users face lower barriers to purchase than UF users. We find this explanation unlikely because hassle costs must be very large to explain the salience effects.

[3] Ticketmaster and other platforms also employ a similar back-end-fee pricing scheme.

[4] Using the potential outcomes notation, we can write the quantity effect as $\Delta Q = E[Q_i|T_i = 1] - E[Q_i|T_i = 0]$.

[5] In the language of the model that appears in the appendices, the marginal consumer has a lower θ.

[6] The derivation employs the standard monotonicity of choice for a given consumer (i.e., $\Pr\{Q_{i1} = 1|Q_{i0} = 1\} = 1$).

[7] Expected revenue using conditional probability is $E[R_i] = E[P_i|Q_i = 1] \cdot \Pr\{Q_i = 1\} = E[P_i|Q_i = 1] \cdot E[Q_i]$.

[8] And we cannot reject at the 5% level in a one-sided test against the null that the treatment assignment is greater than 50%.

[9] However, our main results are robust to their inclusion in the sample.

[10] Fee documented in Osborn (2015).

[11] A second possibility is that the revelation of fees at checkout induces BF users to reduce the number of seats that they intend to purchase once they observe the fee-inclusive price.

[12] As numbering schemes vary across venues, letter position only proxies for quality.

[13] Note that fees were approximately 10% in 2012.

[14] Before reaching the checkout page, a log-in page appears unless the consumer was already logged into their account. Many searches are nonlinear, where consumers examine multiple event pages (see Blake et al. 2016). BF users might even return to stage (1) once they see the additional fees leveed at stage (4).

[15] See https://www.comscore.com/Insights/Blog/When-the-Cookie-Crumbles.

[16] Chetty et al. (2009) provide survey evidence that the modal consumer in their setting identifies the correct tax level.

[17] For example, starting in 2012, the Department of Transportation required airlines to advertise fee-inclusive prices.

[18] Several frictions could prevent consumers who reach checkout from going back to purchase a different ticket, such as loss aversion or the anticipation of reoptimization costs (e.g., having to calculate the fee for each set of tickets). We remain agnostic as to which of these best explain why consumers do not reoptimize, which is what we find in the data.

[19] The types $\theta \in [\underline{\tilde{\theta}}, \underline{\theta}]$ in the model we present in Appendix A.

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The Price does not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing

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The Price does not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing

ABSTRACT

In the past two decades, pricing research has paid increasing attention to instances where a product's price is divided into a base price and one or more mandatory surcharges, a practice termed partitioned pricing. Recently, partitioned pricing strategies in the marketplace have become more pervasive and complex, raising concerns that consumers do not always fully attend to or process all price information, and underestimate total prices, which in turn influences their purchasing behavior. Thus, understanding how partitioned prices affect consumers is of increasing interest to consumer researchers, public policy makers, and marketing managers. This paper reviews and organizes the academic literature on partitioned pricing and proposes an agenda for future research. We focus on the psychological processes underlying partitioned pricing, to help these three constituencies understand how partitioned pricing works, the mechanisms by which it exerts its impact, and the appropriate areas where the practice may need regulation to protect consumers.

Keywords: Partitioned pricing, Behavioral Pricing, Surcharges, Fees, Price Obfuscation

Introduction

A considerable amount of research has studied how consumers react to prices that are divided into two or more mandatory parts and presented to consumers as a base price and one or more mandatory surcharges, a practice known as partitioned pricing (abbreviated here as PP). PP is distinct from all-inclusive pricing (abbreviated as AIP) which involves the use of single, all-inclusive price that covers all costs. Examples of PP surcharges include airline fuel surcharges, shipping and handling charges, hotel resort fees, and the buyer's premium paid by winning auction bidders. With PP the base price and mandatory surcharges are typically associated with the purchase of a single product or service. This differentiates PP from price bundling, where consumers purchase multiple products at the same time, for one price, and cannot split the bundle and buy only a subset of the products.

The Need for a Comprehensive Review of Partitioned Pricing Research.

The questions of how consumers react to PP, and how their reactions differ from those to AIP, are becoming of greater interest. In recent years the use of PP in the marketplace has increased, and firms' PP strategies have become more complex and sophisticated, often making it more difficult for consumers to accurately process PP. Indeed, it can be argued that for most online shopping, as well as many important purchases such as cellular phone services, cable television, and travel, PP is now the norm, rather than AIP. This trend of growth and increased complexity in PP places greater demands on three key constituencies. Consumer researchers need to understand reactions to PP to help obtain a comprehensive view of consumer reactions to price. Public policy makers have become more concerned about the potential for PP to mislead consumers and thwart competition, and have increased regulatory and legislative action

regarding PP to protect consumers, while lawyers and judges must understand PP to properly participate in the many legal cases involving the practice, brought by government entities and even by consumers. Lastly, marketing managers must have a thorough understanding of how PP affects consumers, and how to use it not only effectively, but also ethically.

Since the first academic investigation of consumer reactions to PP appeared in the late 1990s (Morwitz, Greenleaf, & Johnson, 1998), numerous articles examining PP have appeared in a wide range of disciplines - marketing, psychology, economics, finance, and law. Hamilton, Srivastava, and Abraham (2010) discuss and use some of this research in a "benefits based" managerial decision framework outlining how PP may increase the perceived value of an offering by partitioning the prices of product components with high-perceived benefits. However, there is still a need for a comprehensive review of the psychological processes that motivate consumer responses to PP. Such an inquiry can help the constituencies just mentioned to better understand why PP has the impact it does, to manage that impact, and to assess when that impact is in the public interest as opposed to when PP can mislead consumers. Furthermore, a review of the psychological processes underlying PP points to important unanswered questions and highlights avenues for future research.

Accordingly, this paper has four objectives: i) to discuss recent trends in PP in practice, to convey the increasing complexity that consumers – and thus consumer researchers, policy makers, and managers - must contend with when forming research, policy, and decisions for PP; ii) to introduce readers to the literature describing the wide impact that PP has in the marketplace, not only on price perceptions and demand, but also on key variables such as brand attitudes, fairness perceptions, and search intentions; as well as the key moderators of PP effects; (iii) to propose an organizing framework of the psychological processes responsible for PP's

impact on consumers; and (iv) to propose an agenda for future research in PP, focusing on key unanswered questions, and under-researched areas in the proposed framework just discussed.

PP is one of several related pricing strategies that tend to make the total cost to purchase a product less transparent and more difficult to process. In "drip pricing," some charges are revealed only after the purchase, so that consumers may underestimate the total cost at the time of purchase (Hamm 2013; Shelanski et al., 2012). Sometimes firms use "shrouded attributes" (Gabaix & Laibson, 2006) - whose prices, and even whose existence, is not readily evident to consumers. With "price obfuscation," (Ellison & Ellison, 2009) firms make prices difficult to process and to compare (Chioveanu & Zhou, 2013). "Price complexity" (Carlin, 2009) involves not only PP, but also introducing new terminology for price components that consumers may have difficulty understanding, as well as intentionally varying price presentations across firms, to make it difficult to compare prices. While the present paper focuses on PP, we will discuss its relationship to these other methods that reduce price transparency.

The Expanding, More Complex Role of Partitioned Pricing in Practice

Partitioned Pricing's Growing Popularity and Complexity in the Marketplace

Consumers are confronted with a proliferating use of PP in a wide range of markets, and many consumer transactions are more likely to involve a surcharge now than they were two decades ago. These surcharges have also become more sophisticated, complex, and potentially difficult for consumers to process and understand. Internet consumers, almost non-existent in 1998 when PP was first examined in the academic literature, face a bewildering set of PP strategies that vary considerably in what they include in the base price versus the surcharge (Xia and Monroe, 2004). Many service firms have added new surcharges, such as banks (Carrns,

2013), entertainment and arts ticketing (BBC News, 2007; McVeigh, 2008), and airlines (Rice, 2012; Tuttle, 2012a). Hotels have added surcharges for resort use, landscaping, housekeeping, and energy (Bennett, 2008, Marshall, 2004; Tuttle, 2012b), and total hotel revenue from surcharges has doubled in the last 10 years (Sharkey, 2013). Electrical, gas, and water utilities have added many surcharges, prompting the American Association of Retired Persons to investigate these practices and recommend consumer safeguards (Smith et al., 2012).

The use of buyer's premiums has expanded to include almost all auction houses, the largest of which have adopted complex sliding scales that make it more difficult for bidders to compute their total bid costs (Alberge, 2008; Thorncroft, 2007; Vogel, 2008). For example, as of September 30, 2013, the buyer's premium at Christies in the U.S. was 25% of the first $100,000, then 20% on any remaining amount up to $2,000,000, and then 12% of any amount exceeding $2,000,000. Online "penny auction" sites advertise very low winning prices, such as $18.88 for an iPod Touch, but require bidders to pay a surcharge, often between 50 cents and one dollar, to submit each bid (Grant, 2011; Kim, 2011; King, 2012). Surcharges, and not sales of items, are the primary revenue source for these sites – for example, an iPod touch that retails for approximately $250 earned an estimated $1132 in bid fees for its seller, QuiBids.com.

Surcharge amounts have also increased. British Air increased their fuel surcharge three times in four months (Clark, 2011). Buyer's premia at auction houses increased from 10% in the 1980s to as high as 25% today (Alberge, 2008; Reif, 1982; Vogel, 2008). In 2013 alone Christie's raised its buyer's premium twice (Appraiser Workshops, 2013). The Ponemon Institute estimated that an average adult pays $942 annually for surcharges they did not first notice (Pugh, 2008).

Firms are now incorporating PP not just as a part of their pricing strategy, but also as part

of their competitive positioning and segmentation strategies. For example, Southwest Airlines and Priceline (Business Wire, 2007) both differentiated themselves by advertising that they use all-inclusive pricing while their competitors add many surcharges. In early 2014, online ticket reseller StubHub switched to "all in" pricing that includes all fees. Initially this move seemed to reduce use of the site and sales, though sales later rebounded (Karp, 2014). Some retailers advertise that they will pay the sales tax on purchases, reduce or eliminate shipping and handling surcharges, or have introduced paid memberships, such as Amazon Prime, that allow consumers to receive free shipping. In December 2008, Bloomsbury Auctions temporarily reduced its buyer's premium from 20% to 15% in a "special holiday offer." Large auction houses have reportedly agreed to share a portion of the buyer's premium with major sellers, which previously they kept entirely (Bowley, 2014; Thorncroft, 2007). Firms has sometimes added or increased surcharges to "camouflage" price increases.

Some firms have also used a hybrid approach that has aspects of PP, AIP, and bundling, and falls between PP and AIP. For example, some airlines impose surcharges for seats with greater legroom, but include these seats in the base price for customers with a high frequent flyer status, or charge for food for less expensive service classes but not more expensive ones.

Public Policy and Partitioned Pricing

PP is also drawing increased attention from public policy makers, who are concerned that PP can reduce consumers' comprehension of their total costs, and can also affect search for information among competitors (Nussim, 2010; van Boom, 2011). The UK Office of Fair Trading's 2010 report on pricing practices in advertising concluded that PP and drip pricing had the greatest potential to mislead consumers, and "complex [price] offers" were ranked third. In

2012, the UK introduced new regulations prohibiting firms from invoking surcharges, exceeding their costs, for payment methods that consumers use. In December 2011, the U.S. Department of Transportation, in the face of airline opposition, changed its regulations to require airlines to include all mandatory taxes and fees in advertised fares, and to display prominently the total cost of a ticket online and in advertisements (Hunter, 2011). Airlines argued against the rule change, but the U.S. Supreme Court upheld it (Stohr, 2013). However, airlines continued to oppose the change, and in 2014 the U.S. House of Representatives passed the Transparent Airfares Act of 2014, which if enacted, would again allow airlines to quote airfares excluding taxes and fees (Davidson, 2014). In the European Union and in Canada, airlines must include all taxes and fees in their base prices (Dixon, 2012; Perkins, 2008). Surcharges for concert tickets in the U.K. (BBC News, 2007) and bid surcharges at penny auction websites in both the U.S. and abroad are also coming under increasing scrutiny (Kim, 2011; King, 2012). In the U.S., public policy makers are facing increasing demands to adopt European Union standards that require sellers to display prices that include taxes (Nussim, 2010). In May, 2012, the Federal Trade Commission held a conference focusing on drip pricing (Shelanski et al., 2012).

Governments have also prosecuted firms for civil and criminal violations involving PP practices. In November 2012 the U.S. Federal Trade Commission notified 22 hotels that their practices of adding resort fees to base prices could violate Federal law (Hamm, 2013). In New Zealand, Qantas Airlines and Air New Zealand were fined for failing to disclose surcharges in advertising and imposing extra charges to cover normal operating costs. Air New Zealand plead guilty in a similar legal case in Japan (Townsville Bulletin, 2006), and in 2012 an Australian court fined Air Asia for not including on its website a single price, inclusive of all surcharges (Saurine, 2012). Conspiracy to collude on buyer's premia featured prominently in the antitrust

and criminal prosecutions of auctioneers Sotheby's and Christie's in the early 2000s, resulting in convictions and a prison term (Ashenfelter & Graddy, 2005; Stewart, 2001).

Consumers have been increasingly willing to bring legal actions involving PP practices against firms. Sotheby's and Christie's paid $512 million to settle a class action suit stemming from the price fixing charges just mentioned, while audio/video club Columbia House and the music club BMG Direct both settled legal suits involving improprieties in shipping and handling fees (Del Franco, 2004; Hart, 2003). State attorneys general have investigated penny auctions and reached settlements with some to cease misrepresenting prices (Consumer Reports, 2014). Consumer advocacy organizations have also become involved with PP issues. Which?, a large UK consumer advocacy group, filed a legal "super-complaint" with the UK Office of Fair Trading regarding credit and debit payment surcharges (Which?, 2011), thereby helping prompt an OFT investigation of these practices at airlines, resulting in twelve airlines agreeing to include these fees in their stated prices (The Guardian, 2012).

Existing Empirical Research on the Downstream Impact of Partitioned Pricing

While the primary focus of this paper is on the psychological processes underlying PP, it is helpful at the outset to briefly summarize existing empirical research on PP's downstream impact. We discuss the papers below more extensively in the next section on the framework of psychological processes. A table summarizing these papers is in the Web Appendix.

PP's impact on consumers' perceptions of total cost. PP can cause consumers to perceive that their total costs are less than with an equivalent AIP. When products have surcharges, such as for shipping and handling, perceptions of total cost are often lower with PP than with AIP (Kim, 2006; Lee & Han, 2002; Morwitz et al., 1998).

Impact on willingness to pay, purchase likelihood, and demand. If consumers perceive their total costs are less with PP than with AIP, willingness to pay (WTP) and demand should increase. Auction bids, a useful measure of WTP, have been found to be higher in auctions with separate surcharges for buyers' premiums (Morwitz et al., 1998), and bids did not decrease as shipping and handling surcharges increased (Clark and Ward, 2008; Hossain & Morgan, 2006). Choice intentions for durable goods (Chakravarti et al., 2002; Xia & Monroe 2004) were higher with PP than with AIP. Consumers tended to be more sensitive to product prices than to their supplementary sales taxes (Xia & Monroe, 2004). Demand for consumer goods dropped when price tags included, rather than excluded, sales tax (Chetty, Looney, & Kroft, 2009). Demand for alcohol was more sensitive to variations in excise taxes, which are included in the base price, compared to sales taxes, which are not (Chetty, Looney, & Kroft, 2009). Online consumers tend to order more, and more frequently, if the price of shipping is separated but is then "free," as opposed to including a shipping charge (Lewis, Singh, & Fay 2006). Using PP can also increase a price's informational (price-quality) effect, which increases demand, but also increase a price's sacrifice effect, decreasing demand (Völckner, Rühle, & Spann, 2012).

Impact on other downstream variables. PP has additional downstream consequences, besides those related to price perceptions and demand. Brand attitudes decrease when consumers facing PP attribute price recall errors to the firm's actions rather than to themselves (Lee & Han, 2002). Higher surcharges can reduce perceptions of price fairness (Sheng, Bao, & Pan, 2007), as can using more components in a PP when a seller is not trusted (Carlson & Weathers, 2008). Xia and Monroe (2004) found some evidence suggesting that PP may decrease search intentions, but the results were not statistically significant. Analytical models incorporating empirical findings show that increasing "price complexity" allows firms to obtain more consumer surplus (Carlin,

2009), as does increasing "price frame dispersion," the variation in pricing methods across firms (Chioveanu & Zhou, 2013).

Factors that moderate PP's impact. The impact of PP depends on several moderators. Two key moderators are the surcharge magnitude and ease of processing. When surcharges are small consumers may not fully account for them, but when they are large the effect of PP diminishes and can even reverse (Sheng et al., 2007; Xia & Monroe, 2004; see Kim & Kachersky, 2006, for a conceptual model). When surcharge presentation is more complex, such as when using percentages of the base price, consumers tend to recall lower total costs, and are more likely to ignore surcharges (Kim 2006; Morwitz et al., 1998; Xia & Monroe, 2004). However, overly complex surcharge displays (e.g., with many components) can create unfavorable reactions to PP (Carlson & Weathers, 2008; Xia & Monroe, 2004). Kim (2006) found that PP lowered price perceptions relative to AIP, but only when the surcharge's font size was small, but Brown, Hossain and Morgan (2010) found that making shipping and handling charges more visible in auctions increased demand for low, but not for high, shipping costs.

The impact of PP can depend on the attribute for which a surcharge is levied. Choice intentions under PP increase more when the partitioned attribute is consumption- rather than performance-related (Chakravarti et al., 2002). Reactions are more favorable when the partitioned component is considered to be a good deal, as opposed to a bad deal (Bertini & Wathieu, 2008). Consumers are less price-sensitive to surcharges for product attributes that offer high, as opposed to low, benefits (Hamilton & Srivastava, 2008).

Consumers' trust in a firm can affect reactions to PP. Cheema (2008) found that in eBay auctions, bidders bid lower amounts when faced with higher shipping and handling surcharges from sellers with a low, but not moderate or high, reputation. Consumers' fairness perceptions

and purchase intentions are negatively affected by the use of many versus fewer surcharges, but only if the seller is not trusted (Carlson & Weathers, 2008).

Characteristics of consumers can also moderate the impact of PP. Schindler, Morrin, and Bechwati (2005) found that "shipping charge skeptics" pay more attention to surcharges because they believe firms attempt to profit from them, and Kachersky and Kim (2011) found considerable heterogeneity in consumers' perceptions of whether firms use PP and AIP with persuasive intent. Morwitz et al. (1998) found that participants with moderately favorable attitudes towards brands process surcharges more accurately than those with relatively low, or high, brand attitudes. More general consumer characteristics such as need for cognition and regulatory focus also moderate reactions to PP (Burman & Biswas, 2007; Cheema, 2008; Lee, Choi & Li, 2014). Online bidder experience has also been examined as a moderator, but results do not indicate a significant relationship (Cheema, 2008; Clark & Ward, 2008).

A Proposed Framework of the Psychological Processes underlying Partitioned Pricing

A central thesis of this paper is that to fully understand how PP affects consumers, and to create effective methods to manage these effects, consumer researchers, public policy makers, and marketing managers need to understand the psychological processes underlying consumer responses to PP, and the sequence of processes that take place when consumers encounter PP. For example, if public policy makers want to create regulations to improve consumers' comprehension of PPs, they first need to understand in what stage(s) of the process miscomprehension originates, and then create regulations focused on consumer behavior in those stages. If these efforts focus on stages that occur after miscomprehension has already occurred, such as only at the point of purchase as opposed to when consumers first observe price

information, they may not be successful. Consumer researchers who want to study a particular effect of PP will want to know in what stage of the process that effect is likely to occur, and what other effects may occur at the same stage. Similarly, marketing managers who want to (ethically) use PP to increase demand or reduce price sensitivity will need to understand which stages to focus on, since they will want to intervene before, rather than after, consumers have formed key perceptions that they seek to change. A broad, process-based view of consumer reactions to PP can also enhance the evaluation of such interventions, identifying relevant factors that should be monitored and measured at each stage. This, in turn, would help insure that research, regulatory, and managerial conclusions about these interventions are based on a thorough examination of their overall impact, and that unanticipated upstream or downstream effects are not ignored.

Our principal objective is to propose a framework for these psychological processes, and the relationships among them. A number of process explanations have been proposed, and some have been tested. However, to achieve the goals just discussed, there is still a need to organize these explanations, since different processes have sometimes been proposed to explain the impact of the same independent variable or moderator, or the same process for different variables. We propose that a sequence of psychological processes occurs when consumers encounter PP, and that the net impact depends on the cumulative impact of these processes. Furthermore, the importance of these different factors can vary across different contexts.

The overall framework we propose involves six inter-related stages (see Figure 1). We discuss these stages in the approximate chronological order in which they normally appear in consumers' decision-making processes. While we feel this order is likely to occur in many instances, we do not claim that this order will always hold.

First, we discuss processing for two stages that we feel simultaneously occur when

consumers first encounter PP. These are (1) the attention they give to the different PP components and (2) their attitudes towards the use of PP. These two stages may also influence each other. We then examine two more stages that may occur concurrently and that may influence each other. These are (3) how consumers combine the separate price components to arrive at a perception of their total cost for the product, and (4) how PP influences the attention paid to and the evaluation of product benefits. These two concurrent stages then lead into the last two stages (5) where consumers incorporate these perceptions into an overall evaluation of a product offer or offers for competing products, to decide which to purchase, and (6) the processes involved when PP affects postpurchase behavior.

Stage 1: Attention to PP Components

If consumers do not attend to some PP components, particularly the surcharge, they are more likely to underestimate, or under-perceive, their total cost for the product. Often this attention is related to the salience of the price components (Kim & Kachersky, 2006) but it can also be related to the importance consumers place on carefully attending to price, and to their perceptions of the relevance of a price component to their goals (Bertini & Wathieu, 2008).

Salience of surcharge. Surcharges are often less salient than base prices, due to the different nature of the two components. In some instances, surcharges have so little salience that they are ignored by some consumers. Morwitz et al. (1998) found that a substantial proportion of consumers (12.2% to 35.6%), ignored the surcharge completely when recalling a total price.

Chetty et al. (2009) conducted a three-week experiment in an actual supermarket, and varied whether shelf tags included only the base price and the 7.375% sales tax separately, or also reported at the bottom a tax-inclusive total price. Including the total reduced demand by an

average of 8%. In a second study, they found that the price elasticity of demand for U.S. alcoholic beverages was much lower for sales taxes, which are typically partitioned, compared to excise taxes, which are included in base prices. They further found that these taxes and their rate are well known to consumers, but are less salient to consumers during the decision and purchase stages than the prices of the items themselves.

Surcharges also capture less attention when they have a small magnitude. However, when the surcharge magnitude is substantial compared to the base price, it is more likely capture attention. Thus, when surcharges are small consumers do not fully account for them, but when they are large the effect of PP diminishes and can even reverse (Kim & Kachersky, 2006; Sheng et al.,2007; Xia & Monroe, 2004). However, Hossain and Morgan (2006) found that in auctions they conducted on eBay, both the number of bidders and total revenues increased as shipping charges were increased and minimum opening bids were decreased experimentally. They postulate that surcharges are salient to one segment of consumers but ignored by others.

Having too many surcharges can also increase their salience. Xia and Monroe (2004) found an inverse-U-shaped relationship between number of surcharges and purchase intentions. Similarly Carlson and Weathers (2008) found that participants perceived the total price of a car repair service to be higher with a larger versus smaller number of price components (when total prices were not provided), and suggested the high number of surcharges increases their salience.

Sometimes surcharges can be more salient than base prices. Lewis, Singh, and Fay (2006) found that offering free shipping increased purchasing to a greater extent than offering equivalent monetary discounts on the base price. They propose that consumers can be more sensitive to shipping and handling surcharges than base prices if the former are described as free.

Visual salience of surcharge vs. base price. How easy or difficult a surcharge is to see is

another aspect of salience. Kim (2006) found that PP lowered recalled total costs, relative to AIP, but only when the surcharge's font size was small. However, Brown et al. (2010) found that, in online auctions, demand increased when they increased the visual salience of low, but not high, shipping costs. Thus, the effect of visual salience was moderated by surcharge size.

Attitudes toward the product. Consumers' prior attitude towards a product also affects the attention consumers pay to PP. Morwitz et al. (1998) found that PP increased purchase intentions the most for consumers with favorable prior attitudes towards the target product. They propose that consumers with unfavorable brand attitudes do not feel it is worthwhile to carefully attend to price information, including surcharges, since they have a low interest in buying the brand, and therefore PP does not affect them. Consumers with moderately favorable brand attitudes, however, reduce their uncertainty over which brand to purchase by attending to and processing price information more carefully, including the surcharge, so that the surcharge does affect their purchase probability. Consumers with relatively favorable brand attitudes attend to surcharges less carefully, since they are already favorably inclined towards the brand and think it is likely they will purchase it, resulting in lower price perceptions and higher purchase intentions with PP.

Attitude toward the surcharge component. Hamilton and Srivastava (2008) propose that PP's impact depends on the relative benefit consumers perceive in different partitioned components. Although they don't claim that perceptions of the benefit of the surcharged component affect the attention paid toward its price, they do find that consumers are more price sensitive when a relatively low-benefit attribute is partitioned rather than a relatively high-benefit one. They conclude that, when firms partition prices, components with higher perceived benefits should have the separate surcharge.

Stage 2: Attitude Towards Surcharges and the Use of Partitioned Pricing

Research has examined consumers' attitudes towards the use of PP and surcharges, which we also believe has its impact at the start of the decision process. In some instances, consumers must first notice the surcharge before an attitude towards it becomes activated or is formed for that particular occasion. In other instances, the surcharge may be noticed subconsciously, but still activates an attitude. It is also possible that existing surcharge attitudes may affect the attention that consumers pay to surcharges.

Chronic attitudes towards surcharges. Schindler et al., (2005) find that some consumers have the chronic personality trait of being "shipping charge skeptics." They perceive shipping charges as less fair, and as designed to generate firm profits rather than just to recover actual firm costs. High-skepticism consumers pay attention to shipping charges and have no preference between PP and AIP. In contrast, low skepticism consumers prefer PP to AIP.

Kachersky and Kim (2011) also examined consumers' chronic attitudes towards pricing formats. Almost half of their participants believed PP had a greater persuasive intent than AIP, compared to 13% of participants who thought the opposite. The researchers suggest that consumers prefer price formats with less perceived persuasive intent, and that they will give more attention to PP components when they suspect it is being used with persuasive intent. Consistent with this, Brown et al. (2010) propose that there are three segments of online auction bidders - "attentive" bidders who are fully aware of shipping charges and know their exact amount, "naïve" bidders who believe the surcharge is low, even though they do not know its exact amount, and "suspicious" bidders who assume that these surcharges are high, even when they do not know the amount of the surcharge.

Perceptions of the seller. Cheema (2008) found that eBay auction bidders do not adjust

their bids downward to compensate for higher shipping and handling surcharges when sellers have a moderate to high reputation, but do adjust when sellers have a low reputation. He also finds that consumers use a more careful choice process, and pay more attention to the surcharge, when buying from low- than from medium- and high-reputation sellers. Carlson and Weathers (2008) find that trust for a seller affects not only reactions to PP, but moderates the impact of the number of price components used in a PP on perceptions of price fairness and purchase intention.

Perceptions of surcharge fairness. Judgments of price fairness affect many types of consumer behavior (Bolton, Warlop, & Alba, 2003; Campbell, 1999; Kahnemann, Knetsch, & Thaler, 1986; Xia, Monroe, & Cox, 2004), including reactions to PP. Sheng et al. (2007) found that high surcharges which exceed the base price, a surprisingly common practice, are perceived as less fair than surcharges smaller than the base price. Furthermore, fairness perceptions fully mediated the impact of surcharge magnitude on purchase intentions. As discussed earlier, Schindler et al. (2005) propose that the perceived fairness of surcharges helps distinguish between "shipping charge skeptics" and other consumers. Carlson and Weathers (2008) found that the magnitude and the number of surcharges can influence fairness perceptions.

Consumer and personality characteristics not specifically related to PP. Researchers have also examined the impact of more general consumer characteristics that may be related to the attention consumer pay to PP components or their attitudes toward them. Burman and Biswas (2007), found that high need for cognition participants (abbreviated NFC; Cacioppo, Petty, and Kao, 1984) had higher willingness to purchase when taxes and processing fees were partitioned rather than combined, but price format had no effect for low-NFC participants. A second study found that high NFC participants' reactions to PP depended on the perceived reasonableness of the surcharge magnitude. NFC can also moderate the impact of seller reputation and surcharge

magnitude on purchase likelihood. Cheema (2008) found that purchase likelihoods for low-NFC participants were affected by seller reputation, but not by surcharge size. For high-NFC participants, higher surcharges decreased purchase likelihood for low-reputation retailers, but not for high-reputation ones.

Regulatory focus also affects consumers' reactions to PP (Lee et al., 2014). PP is more attractive than AIP for promotion-focused consumers, who tend to use a global processing style that gives more importance to primary information, such as base prices. In contrast, the two pricing formats are equally attractive for prevention-focused consumers, who tend to use a local processing style that places more weight on secondary information, such as surcharges.

Stage 3: Combining Price Components to Determine a Perception of Total Price or Cost

In the next two steps in the proposed framework, consumers combine PP components to arrive at a perception of a product's total cost (Stage 3) and attend to and evaluate product benefits (Stage 4). For several reasons, in Stage 3, consumers sometimes do not do the math – sometimes simple, sometimes more complicated – needed to accurately total all price components. Consequently, they may not give any weight to surcharges, or may attend to and weight base prices and surcharges differently. Research has found that some consumers take the time and effort to calculate the sum of all of the price components, while others either never notice or ignore the surcharge and perceive that their total cost consists only of the base price, and still other consumers use a heuristic that partially incorporates the surcharge, arriving at a perception of total cost that usually is between the base price and the actual total cost.

For example, Morwitz et al. (1998) found that 23% of the PP participants simply ignored the surcharge when recalling total cost, 54.8% appeared to use a heuristic strategy, and only

21.9% used mathematical calculation, where estimated total cost was within 5% of the actual total. Chetty et al. (2009) found that when sales tax was not included on supermarket price tags, most participants included no tax at all when stating the total price they would pay at the cash register, thus ignoring sales tax. Only 18% reported a price within 25 cents of the actual, tax-inclusive price, increasing to 75% when the tag also stated a tax-inclusive price. Carlson and Weathers (2008) found that only 49% of participants estimated price within 5% of actual for two price components (vs. 23.3% for nine components). We next discus psychological reasons why consumers ignore surcharges, accurately calculate the total, or use heuristics to add base prices and surcharges. We then discuss more general factors that influence how consumers combine price components.

Ignoring the surcharge. There are several reasons why consumers might ignore surcharges, even when they are aware of them. First, consumers do not always fully process all information that is available to them. Consumers are often selective information processers, editing available information to a more limited set (Kahneman & Tversky, 1979), and focusing on the information most salient in that context (e.g., see, Hutchinson & Alba, 1991; Lynch & Srull, 1982). Second, consumers often process information in the same manner in which it was framed or presented to them, and do not integrate or transform information (Slovic, 1972; Thaler & Johnson, 1990). Thus, they may not combine price components mathematically, since they are presented separately, but instead ignore the surcharge.

Some consumers may have lay beliefs that a surcharge represents an extra, negligible cost for a peripheral product component, and is not a major profit source for the firm. Such consumers may conclude that a surcharge need not be integrated into the final cost, or that they can expect to encounter a similar surcharge from the firm's competitors, so that it is not

worthwhile to look for competing products with lower surcharges, and, as a result, ignore surcharges. Even if surcharges are not considered to be negligible, Sheng et al., (2007) propose that consumers may ignore surcharges to help them perceive that "they are getting a good deal."

Calculating total price. There are several reasons why some consumers use the most complex, but accurate, cognitive approach to PP and calculate the total price, arriving at a total very close to the actual total, aside from math errors or rounding. They may do so if the required cognitive effort is low, such as when all price components are round numbers that are easy to add, or if motivation to compute an accurate total price is high, such as for large surcharges.

Of course factors from the first two stages also influence the likelihood that consumers accurately calculate the total. First, consumers must attend to all price components to accurately compute a total. Second, their attitude toward PP might also affect their tendency to calculate a total cost. As mentioned earlier, shipping charge "skeptics" (Schindler et al., 2005) may be more motivated to process information carefully. Similarly, consumers who do not trust a retailer, such as an auction seller (Carlson & Weathers, 2008; Cheema, 2008) may be more motivated to calculate the total price, in order to avoid inadvertently paying a high price.

Estimating total costs with an heuristic. Even if consumers do attend to a surcharge, they may combine it with the base price using an heuristic to estimate their total cost. Such heuristics often give insufficient weight to the surcharge. Consumers may use anchoring and adjusting (Chapman & Johnson, 1996; Estelami, 2003; Tversky & Kahneman, 1974), anchor on the base price, and then insufficiently adjust upward in response to the additional surcharge information, resulting in an underestimated total price (Morwitz et al., 1998; Sheng et al., 2007; Clark & Ward, 2008). The temporal order of price presentation in PP, where base prices are typically presented first and surcharges later, may lead consumers to anchor on base prices, as proposed in

Morwitz et al. (1998). Such anchoring biases where consumers favor the first piece of information encountered, have been identified in other areas of decision making (Tversky & Kahneman, 1974). For example, consumers' perceptions for the overall cost of a grocery trip are disproportionately influenced by prices they see early in their shopping trip (Büyükkurt, 1986). Similar anchoring biases have been found in processing of single numbers and prices, where consumers give excessive weight to the first numbers in a sequence, such as in the first digit they read (Thomas & Morwitz, 2005). These same effects may apply to base prices and surcharges.

Furthermore, Morwitz et al. (1998) propose that consumers may anchor on the base price because they perceive that it is the most important piece of price information, while surcharges are perceived as less important, similar to what has been observed for product bundles (Yadav, 1994). Consumers tend to place excessive weight on a single component of a multidimensional price that they perceive as most important, such as the monthly payment in a car lease versus the number of payments (Estelami,2003), or the largest price versus other price components (Carlson and Weathers, 2008). Carlson and Weathers (2008) also propose that consumers may instead sometimes use a numerosity heuristic (Pelham, Sumarta, & Myaskovsky, 1994) in judging PPs, and comparing PPs with different numbers of components, where prices with more components are perceived to have higher total cost.

Cognitive demands of processing the surcharge. Consumers are also more likely to use an heuristic to estimate total costs or simply ignore surcharges when the cognitive demands of processing the surcharge are higher. Chetty, Looney, and Kroft (2007), in a more extensive version of their 2009 paper, propose a model where consumers have to "pay" cognitive costs to calculate the sum of product prices and taxes.

When the surcharge presentation is more complex (e.g., requiring more complex math, or

multiple surcharges) it is more difficult to process surcharges, making consumers more likely to rely on heuristics to combine the base price and surcharges. Morwitz et al. (1998) found that participants recalled a lower total price when the surcharge was presented as a percentage of the base price rather than in dollars. Further, a higher percentage of participants completely ignored the percentage surcharge than the dollar surcharge. Other studies have observed the same effect with percentage surcharges (Kim, 2006; Xia & Monroe, 2004). Carlson and Weathers (2008) propose that consumers are more likely to use an heuristic as the number of price components, and therefore the difficulty to calculate a total price, increases.

However, overly complex surcharge displays can sometimes prompt unfavorable consumer reactions. Xia and Monroe (2004) found that consumers had greater purchase likelihood for PP than for AIP, but that one surcharge yielded higher purchase intent than did two. They concluded that although partitioning with more than one small surcharges increased demand, consumers "do not like to be 'nickel and dimed' with multiple smaller surcharges…."

Using complex partitioned prices can also give firms advantages over consumers, or competitive advantages over each other. Carlin (2009), focusing on the financial services industry, uses an analytical game theory model to show that high-price firms will tend to use increased price complexity to make it more difficult for consumers to compare their prices to low-price firms, and as a result consumer surplus will decrease. He also finds that, as competition increases, more firms use more complex pricing policies, including PP.

Chioveanu and Zhou (2013) analytically find a symmetric equilibrium where prices are determined by whether consumers are more confused by "price frame dispersion," defined as variations in price presentation across firms, versus "frame complexity," defined as how difficult it is for consumers to compare prices using the same frame. Many of their frame examples

involve PP. They also find that prices and frames will both vary across firms, and that increasing the number of firms can, surprisingly, increase industry profits and lower consumer surplus, due to increased consumer confusion about comparing prices and total costs.

Presence or absence of total price. Even when consumers are presented with the total cost of PP, they may still react differently to PP and AIP (Carlson & Weathers, 2008). Xia and Monroe (2004) found that PP increased purchase intentions compared to AIP, even when a total price was provided. However, Chetty et al. (2009) found that presenting a total price, including sales tax, decreased demand. The differences in these results may be due to different reactions to surcharges for shipping and handling versus sales taxes, as both Xia and Monroe (2004) and Chetty et al. (2009) discuss.

Additional factors in combining PP components, which may not lead to a consistent bias in perceptions of total cost. Other psychological processes, that we discuss next, have been shown to also affect how consumers arrive at perceptions of total cost. These include mental accounting and processes related to reference price effects.

Chakravarti et al. (2002) propose that consumers can use different mental accounts for different attributes or benefits of a product. Since consumers are less price-sensitive for attributes they highly value, then increasing the salience of one of these attributes by charging a surcharge for it, can prompt that particular mental account. With AIP on the other hand, consumers use a single mental account, and do not weight differentially across benefits or attributes. Hossain and Morgan (2006) propose that online auction bidders may have separate mental accounts for different price components, such as product costs (i.e., their bids) versus shipping and handling fees. They caution, however, that if consumers are also loss-averse, raising shipping and handling fees excessively can end up decreasing demand.

Chakravarti et al. (2002) propose that with PP, consumers are more likely to compare the price of each component to reference prices for that component, as opposed to a reference price for the entire product. Thus, whether PP increases demand compared to AIP depends on how the price for the partitioned attribute compares to consumers' reference price for this component. Schindler et al. (2005) propose that when external reference prices for a product are available, shipping charge skeptics prefer AIP, since they infer that any separate shipping and handling charge is not justified, while non-skeptics prefer PP.

Stage 4: Attention to, and Evaluation of Product Benefits

When consumers evaluate a product, they often consider several product attributes besides price. To the extent that PP changes the relative importance of one or more of these attributes, the consumer's overall evaluation of a product can also change. Chakravarti et al. (2002) found that partitioning a consumption-related attribute, such as a refrigerator icemaker, increases the salience, and consequently the weight, of that attribute in the overall product evaluation. Since the consumption related attribute has positive utility, this increased weight increases choice intentions. By contrast, partitioning a performance-related attribute, such as the refrigerator's warranty, makes that attribute more focal, but this then increases concerns about the risk of product failure, which decreases choice intentions.

Bertini and Wathieu (2008) also examine how the nature of the attributes that are subject to surcharges can affect attribute weights, focusing on "secondary" attributes that normally receive less attention and weight. They find that the attractiveness of the secondary attribute that is highlighted through PP can determine whether PP increases, or decreases, product preference and perceived attractiveness. They found that PP increased preference for an airline flight

relative to AIP when the surcharged component - an entertainment and refreshment package - was perceived as a good deal, but decreased preferences when it was perceived as a bad deal.

Stage 5: Overall Evaluation of the Product Offer

Stages 3 and 4 involve the processes by which PP influences consumers' price and product related perceptions. In Stage 5, these perceptions in turn are combined to form an overall evaluation of the product offer. As discussed earlier, much research has shown that when PP lowers price perceptions it increases purchase likelihood and demand. However, since PP can affect product evaluations separately from its impact on total price perceptions, the ultimate effect of PP on demand depends on the weight consumers place on price versus other attributes. Importantly the impact of PP on consumers does not end with their purchase decision. Consumers' reactions to PP in one purchase situation, may also influence their later attitudes, perceptions, and future behavior with respect to PP, which we discuss next.

Stage 6: The Impact of PP on Postpurchase Perceptions and Behavior.

Attributions for errors and its impact on attitude towards the firm. Consumers' future behavior can depend on attitudes towards firms that are formed after purchase. Attitudes are affected by consumers' attributions (Weiner 1980) for outcomes related to the purchase. Lee and Han (2002) find that consumers who saw PP (vs. AIP) tended to underestimate actual total costs. However, a week later, when PP consumers realized they erroneously underestimated the total price, brand attitudes decreased from their initial level with PP, but did not change with AIP. Further, PP's negative effect on brand and retailer attitudes was larger when consumers attributed the blame for the price recall errors to the retailer rather than to themselves. Given this

result, consumers may be less likely to consider buying again from a firm who they believe contributed to the error, and if they do consider it, they would likely attend more carefully to price information to avoid repeating the price recall error.

Perceptions of price fairness. We earlier discussed how fairness perceptions can influence the attention paid to base prices and surcharges as well as the extent to which these are fully processed (Carlson & Weathers, 2008; Sheng et al., 2007). Collectively, these studies also suggest that PP affects consumers' price fairness perceptions, which in turn influence their purchase intentions. It is likely that these fairness perceptions would in turn affect how consumers react to PP on their next purchase occasion. The less fair consumers perceive PP to be, the more carefully they will attend to and process PP on their subsequent purchase occasions. Furthermore, consumers may be less likely to even shop, in the future, at a retailer whose pricing practices they perceive as unfair.

Impact of PP on future search. Xia and Monroe (2004) examined how PP affects consumers' intentions to search further for information. While search intentions were lower with PP than with combined pricing in the two studies where it was examined, the results were not statistically significant in each study, and a pooled analysis was not performed. While these results suggest that PP may reduce consumer search, more research is needed.

In sum, though most PP research has examined its effect on price perceptions and purchase likelihood, PP can also influence attitudes toward the firm, fairness perceptions, and search intentions. Since PP also can make the surcharged product component more salient, it also can potentially alter attribute importance. These factors all have the potential to affect not only current attitudes and behavior, but also future ones, and thus PP's future effectiveness.

An Agenda for Future Research on Partitioned Pricing

Although the research just reviewed makes many important discoveries about how consumers process PP, there still remain many under-researched areas and unanswered questions of interest to consumer researchers, public policy makers, and marketing managers. Some of these questions concern issues suggested by the framework of psychological process underlying reactions to PP. Other questions involve new directions and suggest ways to extend the conceptual framework. We next discuss these questions.

Future Research on Stage 1: Attention to PP Components

PP research can benefit from enhanced process measures, especially of attention and memory. Most existing research on the attention that consumers pay to PP and AIP has used indirect measures, such as calculation accuracy or impact on price perception. Future research can use more direct attention measures, such as eye tracking, and quantify the relative attention given to each price component under various conditions.

Future research should also examine factors that influence whether consumers attend to and whether they are later able to recall disclosures informing consumers about the presence of surcharges with PP and drip pricing. For example, one element of the price for checking accounts is an overdraft fee that is charged by a bank when a payment creates a negative balance in an account. A transaction as small as a $3 charge for a cup of coffee can result in the assessment of a $34 overdraft fee (CFPB, 2013; Liu, Montgomery, & Srinivasan, 2014). Interestingly, some research shows that many consumers do not remember having given permission for such fees to be charged, although they all must make a choice at when they open

an account (Pew Charitable Trusts, 2014). Such overdraft fees are estimated to generate $12.6 billion in revenue for banks (CFPB, 2013).

Future research on Stage 2: Attitude towards surcharges and the use of partitioned pricing

Relative preference for PP vs. AIP. More work is needed on the extent to which consumers prefer PP vs. AIP prices, and which types of PP they prefer, as well as factors that affect their preferences. These preferences could further moderate the link between PP and downstream variables such price perceptions and demand. For example, Hardesty, Bearden, and Carlson (2007), building on the concept of persuasion knowledge (Friestad & Wright, 1995), developed a 17-item index of "pricing tactic persuasion knowledge" (PTPK) that predicted consumer response to pricing, such as everyday low pricing, price bundling, and tensile price claims. While one of the items involved shipping and handling charges, they did not use the item, or the overall measure, to predict reactions to, or preferences for, PP. Given the many different PP strategies and surcharges used in the marketplace, it would be helpful to develop a persuasion knowledge measure specific to PP and variants of it, and determine its impact on consumer reactions. Such measures could complement approaches such as measuring shipping charge skepticism (Schindler et al., 2005), and open ended responses (Kachersky & Kim, 2011).

In examining relevant attitudes towards PP, it would be helpful to consider attitudinal forces that may operate in opposing directions, and the contexts in which each is stronger. For example, firms often claim that PP increases price transparency by conveying more information about components of the final price and the product itself. If consumers believe this claim, it may create positive attitudes towards PP, even if PP leads to inaccurate cost processing. On the other hand, consumers may perceive PP as an impediment to accurate cost processing, creating

negative attitudes. Thus, it would be helpful to examine the extent to which consumers hold these disparate beliefs, as well as their relative impact.

Consumers' attributions for different types of surcharges. With the growing diversity of surcharges, more research is needed on consumer attributions for these surcharges, and on how these attributions affect demand, price perceptions, price fairness, and firm and brand attitudes. In addition to examining internal vs. external attributions for PP's effect on price recall (Lee & Han, 2002) future research might examine who consumers believe is responsible for the surcharge. Examples include whether consumers faced with a booking surcharge for buying concert tickets online rather than at the box office perceive that they, or the ticket firm, are responsible for this fee. Other dimensions of attributions may also affect consumer reactions to PP. For example, stability perceptions might affect attitudes towards an airline fuel surcharge imposed to reflect higher oil prices. Controllability perceptions might affect attitudes for a car insurance surcharge imposed due to more accidents involving wild deer, which the insurance company cannot control, compared to a "construction work in progress" surcharge on electric bills, to pay for a utility's investment in a nuclear power plant that was never operational, which presumably the firm controls (Greenhouse, 1989). Controllability attributions may be particularly interesting for buyers' premia in auctions, since bidders do not control the premium in percentage terms, but the eventual monetary amount of the premium depends on their bid amount, which they do control. Consumers often have more positive reactions to price increases when they are perceived to be connected to increases in the firm's own costs, and future research might examine attributions regarding whether a surcharge is directly related to a firm's costs.

Attitudes towards prices that contain a "free" surcharge. Consumers' reactions to products offered for "free" often cannot be explained by price sensitivity alone (Chandran &

Morwitz, 2006, Shampanier, Mazar, & Ariely, 2007), and often involve additional utility from getting something useful for free. More research is needed on PP where one or more surcharges are framed as being free versus included in the base price (e.g., see Lewis et al., 2006), e.g. when warrantees, normally included in an AIP, are instead offered for free. Instances where firms offer to pay for taxes may be of particular interest, especially given that consumers often obtain more utility from avoiding taxes than from price reductions (Sussman & Olivola, 2011).

Changes in surcharge practices. Consumers' attitudes towards surcharges may depend on how that surcharge has changed. For example, research is needed on how consumers react when a formerly optional surcharge whose amount they could control, such as a restaurant tip, becomes a mandatory surcharge. Consumers may resent losing discretionary power in these transactions. A related question is the possibility of reactance when surcharges amounts are optional but specific amounts are suggested, such as credit card readers in taxicabs where tip amounts start at 20%, well above the 15% many consumers usually tip.

Relative preferences for PP versus AIP may also be affected by whether a change departs from existing practices that consumers are accustomed to. For example, surcharges are more prevalent in online purchases and catalogs (e.g., shipping and handling) and services (tips, buyer's premium), but are less prevalent in bricks and mortar settings. Consumers in the U.S. are used to paying extra for sales tax, but the European equivalent, VAT, is usually included in the price. Future research may examine if changes that depart from the status quo are more salient to consumers, and viewed more negatively, than changes consistent with the status quo.

Spontaneous and lay inferences about the price of the partitioned component. Future research may investigate how consumers' lay beliefs and inferences about the nature of surcharges affect attitudes and surcharge processing. For example, research might separate which

market conditions, including variations in price presentation and labeling, lead consumers to perceive surcharges as trivial, or inevitable, as opposed to large and unpredictable, to warrant paying attention to or comparing across competitors. More research is also needed on how these lay beliefs change as market practices change. Public policy makers will also be interested in consumer lay beliefs, to make sure that they are accurate and are not manipulated in an unethical manner. More work is needed on how lay inferences and prior attitudes towards PP vs. AIP can be changed to help consumers make informed decisions. For example, regulators will be interested in whether informing consumers about potential decision biases caused by PP can help counteract overly positive attitudes towards PP, that result in less accurate price processing.

Future Research on Stage 3: Combining Price Components to Determine a Perception of Total Price or Cost

Although PP researchers have investigated the cognitive processes consumers use to combine PP, as discussed earlier, more research is needed in this area. A better understanding of these processes can help public policy makers design regulatory protections to insure that the presentation of PP does not lead consumers to perceive total costs inaccurately.

Additional consequences of anchoring on the base price. More research is needed on other likely consequences of anchoring, suggested by existing decision and perception research, some of which extend beyond estimating total costs with PP. For example, people's tendency to anchor and adjust when they update beliefs as they obtain new information (Hogarth & Einhorn, 1992) can have several implications for PP. First, numeric anchors, such as low or high base prices, can make beliefs that are consistent with that anchor, such as that the offering is a good or bad deal, more accessible (Chapman & Johnson, 1999, Mussweiler & Strack, 2001). Second,

consumers may start to encode value once they see the base price but before they note the surcharge, which can affect how they encode the subsequent surcharge information, and can also affect future recall (Russo, Meloy, & Medvec, 1998). The affected initial beliefs could extend beyond price, such as that a brand is a wise purchase, cares about consumers' welfare, or is popular, because its base prices are low, and endure even after consumers later see surcharges, due to belief persistence (Ross & Lepper, 1980). Public policy makers will also be interested in research to see if accepted, or new, approaches to reducing anchoring biases such as these (Epley, 2006) can help create appropriate and effective regulations on the use of PP.

Impact of differences in numerical ability and processing style on combining price components. Future research may also examine how differences in consumers' math ability and their preferences toward and processes used for numerical calculations may affect how they compute total costs with PP, and thus their reactions to PP. Prior research has shown these traits influence processing of price promotions (Suri, Monroe, & Koc, 2013). These same factors or other measures of numerical ability may influence consumers' preference for PP and AIP and their tendency to calculate carefully versus to use heuristics (Welsh et al. 2013).

Reconciling results from PP with prospect theory and mental accounting. The prediction that PP can increase demand may seem to run counter to some findings from prospect theory (Kahneman & Tversky, 1979) and mental accounting (Thaler, 1985). These frameworks suggest that people prefer to integrate losses, which implies they should prefer AIP over PP. There are several directions future research might take to reconcile these possibly conflicting perspectives. First, these predictions need not be in conflict. Chakravarti et al. (2002) point out that the prior literature has proposed that consumers might treat product expenditures as exchanging money for value received, rather than as a loss. Thus, their associated mental accounting might take place

on the gains side of the value function, which is concave, an issue that has received empirical support (Novemsky & Kahneman, 2005). Second, consumers do not always integrate losses (Thaler & Johnson, 1990). Third, even when product expenditures are perceived as losses, those from surcharges might be less salient than losses from the base price.

Future Research on Stage 4: The Attention Paid to, and the Evaluation of, Product Benefits.

Firms sometimes use PP to signal to consumers that a product-related cost is not under their control, such as when airlines add a fuel surcharge (Hamilton et al. 2010) hoping it will lead to a positive reaction. However when firms use PP, they also may inadvertently increase the salience of such surcharges and negatively affect consumers attitudes. Hamilton et al. (2010) discuss how partitioning the price of a warranty for a durable good may raise concerns about the appliance's reliability. Since some research has shown that consumers overlook surcharges and other research has shown that PP increases attention to surcharged components, future research should examine when PP increases attention to non-price attributes, and continue to examine when this will lead to more positive versus negative evaluations compared to AIP.

Future research on Stages 5 and 6: Overall Evaluation of Product Offer and Post Purchase Perceptions and Behavior.

Simultaneous effects of PP on price perception and value. More research is needed on how PP affects perceptions of price and of value simultaneously. As we have discussed, PP can affect both the perceived benefits and perceived price of an offering, and the value received from particular components of an offering (Bertini & Wathieu, 2008; Chakravarti et al., 2002; Hamilton & Srivastava, 2008). However, more research is needed on how the price perception

effects and the perceived value effect might interact, to create an overall impact on purchase intentions and behavior. For example, research could look for the optimal tradeoff between highlighting a particular component by charging a relatively higher surcharge for it, to highlight its perceived benefits, versus charging a lower surcharge for it, which can draw less attention to the component's benefits but would lower total perceived costs.

Impact of PP on use of choice rules. There is a need for research to determine how the choice rules consumers sometimes use, which do not require an overall evaluation based on all product attributes, might be affected by PP. For example, in a conjunctive choice rule a brand is deemed acceptable only if its performance on an attribute exceeds a screening level. Consumers might set a cutoff level for the surcharge, as either an absolute amount or a percentage of the base price. In such cases, consumers may attend to the surcharge only in an earlier stage, when then attend to price components, but not later, when they calculate an overall total cost.

Cognitive vs. emotional reactions to PP vs. AIP. Our framework and discussion largely focused on cognitive evaluations and reactions to PP and AIP. However, consumers also have affective or emotional responses to price promotions. Honea and Dahl (2005) showed that consumer reactions to price promotions can result in different feelings toward the self, the product, the firm, and the selling context. Similarly, consumers may have different emotional reactions to PP than to AIP, and future research should examine the interplay of consumers' cognitive and affective reactions on their perceptions and behavior with PP versus AIP.

Postpurchase perceptions and behavior. Though most PP research has examined its effect prior to or during purchase, some research has examined its effects post purchase, e.g. on perceptions of attribute importance, attitudes toward the firm, and future search intentions. Future research should examine how these downstream effects influence consumers' reactions to

PP on subsequent purchase occasions. Relatedly, most PP research has focused on consumers' reactions to a single use of PP vs. AIP. Future research should examine consumers' reactions to PP over repeated occasions and the impact of experience on reactions to PP.

Future Research on the Impact of PP in Competitive Environments on Consumer Search

While some attention has been given to how PP affects consumer search behavior (Xia & Monroe, 2004), there is a need for more research. This impact can not only affect a firm's competitive strength, sales, and profits, but also has public policy implications, since any strategy that motivates consumers to search less or overlook more preferred or lower price products can reduce consumer welfare. For example, most research on PP has examined consumer reactions to a single PP offer or to two offers, one with PP and another with AIP. However, many purchase decisions, especially online, involve comparisons between multiple offers with multiple pricing methods (Grewal et al., 2003). More research is needed on how variations in pricing formats for PP across competitors affect consumer search, and particularly empirical research, to complement extant theoretical models (Carlin, 2009; Chioveanu & Zhou, 2013). For example, PP formats can vary across firms in different ways, in terms of surcharge amounts, what the surcharge is for, whether it is presented as an amount or a percentage, and spatial or temporal separation between presenting the base price and the surcharge. Future research could examine the extent to which these different kinds of variations reduce consumer search, and the consequences of that reduced search for consumers.

Research could examine consumer inferences and relative firm perceptions when one firm uses AIP and another uses PP, or when a firm changes from PP to AIP, or the reverse. For example, many moderate-priced furniture companies charge extra for delivery, while many

higher-priced ones use combined pricing, so AIP may imply a higher-luxury image.

Future research should also examine PP's impact on other characteristics of consumer search. First, more complex PP may make decision-making more difficult or tedious, leading consumers to delay and defer choice (Dhar, 1996). This effect might reduce demand when PP makes pricing more complex, counteracting price obfuscation effects. Second, complex PP might motivate consumers to shift their focus from price to other, more easily comparable attributes, reducing price sensitivity (Völckner, Rühle, & Spann, 2012). Third, consumers might intentionally, as opposed to inadvertently, focus on a smaller set of offers (Xia & Monroe, 2004).

PP's impact on consumers under competitive conditions may also depend on the assumptions that they make about the surcharges. For example, if consumers assume that surcharges do not vary across competitors, they may focus solely on base prices and not notice whether firms have higher surcharges, and furthermore prefer PP to AIP.

Consumers often form consideration sets early in their decision process, and limit information search to products in that set. Research is needed on how PP affects these consideration sets, such as which products are included versus excluded. Public policy makers may want to research the risks that, with PP, consumers might unduly exclude (or include) products with relatively low (or high) surcharges. Once consumers form a consideration set, they may "neglect" or discard the original screening information used to create the set, and judge the remaining products using different, "non-screening" information, even if the former information is judged to be more important (Chakravarti, Janiszewski, & Ülkümen, 2006). This neglect occurs because consumers perceive that attributes not used for screening will now best differentiate among the remaining options. In a PP context, if consumers initially screen on base price and give less or no attention to surcharges, they may not return to price information when

making their final choice, and thus never give sufficient attention to the surcharge, leading consumers to underestimate a product's cost. Future research could investigate this behavior, and its potential to make consumers leave out lower-priced products from sets.

Future Research on the Relationship between PP and Product Bundling

Despite their commonalities, PP and product bundling often yield disparate effects. For example, consumers react more favorably to a bundled price than to separate prices for each bundle element (Johnson, Herrmann, & Bauer, 1999; Stremersch & Tellis, 2002), which seemingly contradicts findings that PP can increase purchase intentions. Research is required to reconcile these results. One possible explanation is that, while with PP consumers must pay both the base price and surcharges associated with a single product (as, in pure bundling, where they must purchase the entire bundle of multiple products), with product bundling consumers can sometimes decline the bundle and purchase a single desired component. Research involving scenarios where consumers must purchase all bundled components has found results more similar to those in the PP literature (Chakravarti et al., 2002). Another explanation is that PP and bundling yield different effects due to the asymmetry in the values that consumers frequently assign to the surcharge compared to the base product. With product bundling such asymmetry is less common, so mechanisms that lead to surcharge neglect are less likely to become active.

Future Research on the Relationship between PP, Shrouded Attributes, and Price Obfuscation

Firms can still benefit even if only some consumers do not fully process surcharges. Gabaix and Laibson's (2006) model suggests that firms can benefit from "shrouding" the price of particular product attributes, and avoid competitive retaliation for doing so, if the market

contains both "sophisticated" consumers who consider fully the cost of these attributes and "myopic" consumers who only consider these costs if they are made explicit. Gabaix and Laibson focus on "avoidable shrouded attributes," which are "add-ons" that consumers have the option of purchasing, but do not propose a full model for "unavoidable shrouded attributes," which are essentially attributes with mandatory surcharges. However mandatory surcharges that are not transparently presented, or information that firms hide or obfuscate from customers, can also fit the description of a "shrouded attribute." Such models could be extended to address the impact of "unavoidable" shrouded attributes, on consumer search and firm profitability.

Ellison and Ellison (2009) define price obfuscation as practices firms use intentionally to make price comparisons more complicated, difficult, or confusing, and discuss how it increases consumers' search costs. They show that obfuscation can lead to increased firm profits by making consumers less informed about prices. Public policy makers may wish to determine when intentionally varying pricing formats creates obfuscation, making it more difficult for consumers to identify and evaluate options with lower total prices. Given the increasing complexity in surcharges in the marketplace, this topic has some urgency.

Conclusions

While past research has provided much knowledge about the impact of PP on consumers, many important questions remain to be answered for researchers, public policy makers, and firms using PP. Given the market trend towards new variations of PP and surcharges, these questions have become more important. We encourage more research on PP and hope it continues to use a variety of methods (e.g., auctions, field studies, and laboratory studies), subjects, products, and types of surcharges to answer these important questions.

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14

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TABLE 6.3 Understanding Consumer Behavior
Who buys our product or service?
Who makes the decision to buy the product?
Who influences the decision to buy the product?
How is the purchase decision made? Who assumes what role?
What does the customer buy? What needs must be satisfied?
Why do customers buy a particular brand?
Where do they go or look to buy the product or service?
When do they buy? Any seasonality factors?
How is our product perceived by customers?
What are customers' attitudes toward our product?
What social factors might influence the purchase decision?
Do customers' lifestyles influence their decisions?
How do personal or demographic factors influence the purchase decision?

Source: Based on figure 1.7 from George Belch and Michael Belch, *Advertising and Promotion: An Integrated Marketing Communications Perspective*, 8th ed. (Homewood, IL: Irwin, 2009).

2. The time between exposure to information and encoding has been shown generally to produce only gradual decay. Cognitive psychologists believe memory is extremely durable, so once information becomes stored in memory, its strength of association decays very slowly.[50]
3. Information may be *available* in memory but not be *accessible* for recall without the proper retrieval cues or reminders. The effectiveness of retrieval cues is one reason marketing *inside* a supermarket or any retail store is so critical—the actual product packaging, the use of in-store mini-billboard displays, and so on. The information they contain and the reminders they provide of advertising or other information already conveyed outside the store will be prime determinants of consumer decision making.

|Fig. 6.4|

Five-Stage Model of the Consumer Buying Process

The Buying Decision Process: The Five-Stage Model

The basic psychological processes we've reviewed play an important role in consumers' actual buying decisions.[51] Table 6.3 provides a list of some key consumer behavior questions marketers should ask in terms of who, what, when, where, how, and why.

Smart companies try to fully understand customers' buying decision process—all the experiences in learning, choosing, using, and even disposing of a product.[52] Marketing scholars have developed a "stage model" of the process (see Figure 6.4). The consumer typically passes through five stages: problem recognition, information search, evaluation of alternatives, purchase decision, and postpurchase behavior. Clearly, the buying process starts long before the actual purchase and has consequences long afterward.[53]

Consumers don't always pass through all five stages—they may skip or reverse some. When you buy your regular brand of toothpaste, you go directly from the need to the purchase decision, skipping information search and evaluation. The model in Figure 6.4 provides a good frame of reference, however, because it captures the full range of considerations that arise when a consumer faces a highly involving new purchase.[54] Later in the chapter, we will consider other ways consumers make decisions that are less calculated.

Problem Recognition

The buying process starts when the buyer recognizes a problem or need triggered by internal or external stimuli. With an internal stimulus, one of the person's normal needs—hunger, thirst, sex—rises to a threshold level and becomes a drive. A need can also be aroused by an external stimulus. A person may admire a friend's new car or see a television ad for a Hawaiian vacation, which inspires thoughts about the possibility of making a purchase.

Marketers need to identify the circumstances that trigger a particular need by gathering information from a number of consumers. They can then develop marketing strategies that spark consumer interest. Particularly for discretionary purchases such as luxury goods, vacation packages, and entertainment options, marketers may need to increase consumer motivation so a potential purchase gets serious consideration.

Information Search

Surprisingly, consumers often search for limited amounts of information. Surveys have shown that for durables, half of all consumers look at only one store, and only 30 percent look at more than one brand of appliances. We can distinguish between two levels of engagement in the search. The milder search state is called *heightened attention.* At this level a person simply becomes more receptive to information about a product. At the next level, the person may enter an *active information search:* looking for reading material, phoning friends, going online, and visiting stores to learn about the product.

INFORMATION SOURCES Major information sources to which consumers will turn fall into four groups:

- ***Personal.*** Family, friends, neighbors, acquaintances
- ***Commercial.*** Advertising, Web sites, salespersons, dealers, packaging, displays
- ***Public.*** Mass media, consumer-rating organizations
- ***Experiential.*** Handling, examining, using the product

The relative amount and influence of these sources vary with the product category and the buyer's characteristics. Generally speaking, although consumers receive the greatest amount of information about a product from commercial—that is, marketer-dominated—sources, the most effective information often comes from personal or experiential sources, or public sources that are independent authorities.

Each source performs a different function in influencing the buying decision. Commercial sources normally perform an information function, whereas personal sources perform a legitimizing or evaluation function. For example, physicians often learn of new drugs from commercial sources but turn to other doctors for evaluations.

SEARCH DYNAMICS By gathering information, the consumer learns about competing brands and their features. The first box in Figure 6.5 shows the *total set* of brands available. The individual consumer will come to know a subset of these, the *awareness set*. Only some, the *consideration set,* will meet initial buying criteria. As the consumer gathers more

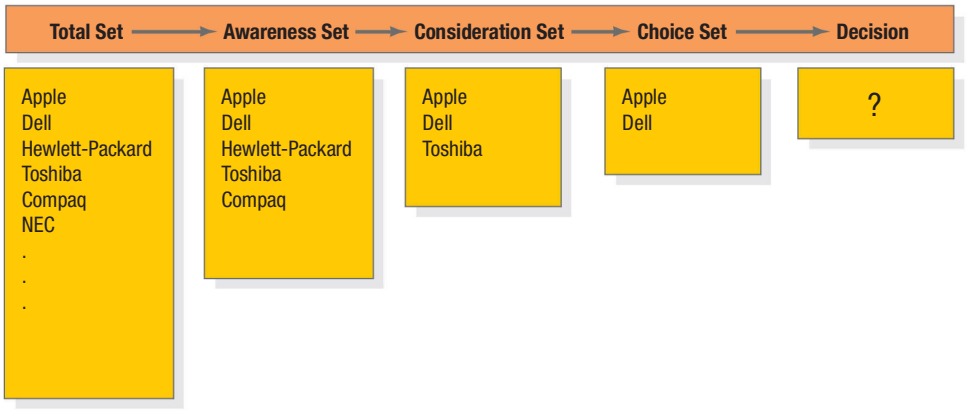


Fig. 6.5

Successive Sets Involved in Consumer Decision Making

information, just a few, the *choice set,* will remain strong contenders. The consumer makes a final choice from these.[55]

Marketers need to identify the hierarchy of attributes that guide consumer decision making in order to understand different competitive forces and how these various sets get formed. This process of identifying the hierarchy is called **market partitioning**. Years ago, most car buyers first decided on the manufacturer and then on one of its car divisions (*brand-dominant hierarchy*). A buyer might favor General Motors cars and, within this set, Chevrolet. Today, many buyers decide first on the nation from which they want to buy a car (*nation-dominant hierarchy*). Buyers may first decide they want to buy a German car, then Audi, and then the A4 model of Audi.

The hierarchy of attributes also can reveal customer segments. Buyers who first decide on price are price dominant; those who first decide on the type of car (sports, passenger, hybrid) are type dominant; those who choose the brand first are brand dominant. Type/price/brand-dominant consumers make up one segment; quality/service/type buyers make up another. Each may have distinct demographics, psychographics, and mediagraphics and different awareness, consideration, and choice sets.[56]

Figure 6.5 makes it clear that a company must strategize to get its brand into the prospect's awareness, consideration, and choice sets. If a food store owner arranges yogurt first by brand (such as Dannon and Yoplait) and then by flavor within each brand, consumers will tend to select their flavors from the same brand. However, if all the strawberry yogurts are together, then all the vanilla, and so forth, consumers will probably choose which flavors they want first, and then choose the brand name they want for that particular flavor. Australian supermarkets arrange meats by the way they might be cooked, and stores use more descriptive labels, such as "a 10-minute herbed beef roast." The result is that Australians buy a greater variety of meats than U.S. shoppers, who choose from meats laid out by animal type—beef, chicken, pork, and so on.[57]

The company must also identify the other brands in the consumer's choice set so that it can plan the appropriate competitive appeals. In addition, marketers should identify the consumer's information sources and evaluate their relative importance. Asking consumers how they first heard about the brand, what information came later, and the relative importance of the different sources will help the company prepare effective communications for the target market.

Evaluation of Alternatives

How does the consumer process competitive brand information and make a final value judgment? No single process is used by all consumers, or by one consumer in all buying situations. There are several processes, and the most current models see the consumer forming judgments largely on a conscious and rational basis.

Some basic concepts will help us understand consumer evaluation processes: First, the consumer is trying to satisfy a need. Second, the consumer is looking for certain benefits from the product solution. Third, the consumer sees each product as a bundle of attributes with varying abilities to deliver the benefits. The attributes of interest to buyers vary by product—for example:

1. ***Hotels***—Location, cleanliness, atmosphere, price
2. ***Mouthwash***—Color, effectiveness, germ-killing capacity, taste/flavor, price
3. ***Tires***—Safety, tread life, ride quality, price

Consumers will pay the most attention to attributes that deliver the sought-after benefits. We can often segment the market for a product according to attributes and benefits important to different consumer groups.

BELIEFS AND ATTITUDES

Through experience and learning, people acquire beliefs and attitudes. These in turn influence buying behavior. A **belief** is a descriptive thought that a person holds about something. Just as important are **attitudes**, a person's enduring favorable or unfavorable evaluations, emotional feelings, and action tendencies toward some object or idea.[58] People have attitudes toward almost everything: religion, politics, clothes, music, food.

Attitudes put us into a frame of mind: liking or disliking an object, moving toward or away from it. They lead us to behave in a fairly consistent way toward similar objects. Because attitudes economize on energy and thought, they can be very difficult to change. As a general rule, a company is well advised to fit its product into existing attitudes rather than try to change attitudes. If beliefs and attitudes become too negative, however, more serious steps may be necessary. With a controversial ad campaign for its pizza, Domino's took drastic measures to try to change consumer attitudes.

Domino's Known more for the speed of its delivery than for the taste of its pizza, Domino's decided to address negative perceptions head on. A major communication program featured documentary-style TV ads that opened with Domino's employees at corporate headquarters reviewing written and videotaped focus group feedback from customers. The feedback contained biting and vicious comments, such as, "Domino's pizza crust to me is like cardboard" and "The sauce tastes like ketchup." After President Patrick Doyle is shown on camera stating these results were unacceptable, the ads proceeded to show Domino's chefs and executives in their test kitchens proclaiming that its pizza was new and improved with a bolder, richer sauce; a more robust cheese combination; and an herb-and garlic-flavored crust. Many critics were stunned by the admission of the company that their number 2 ranked pizza, in effect, had been inferior for years. Others countered by noting that the new product formulation and unconventional ads were addressing a widely held, difficult-to-change negative belief that was dragging the brand down and required decisive action. Doyle summed up consumer reaction as "Most really like it, some don't. And that's OK."[59]

Recognizing consumers' solidly entrenched beliefs, Domino's launched a bold ad campaign to transform its image.

EXPECTANCY-VALUE MODEL The consumer arrives at attitudes toward various brands through an attribute evaluation procedure, developing a set of beliefs about where each brand stands on each attribute.[60] The **expectancy-value model** of attitude formation posits that consumers evaluate products and services by combining their brand beliefs—the positives and negatives—according to importance.

Suppose Linda has narrowed her choice set to four laptop computers (A, B, C, and D). Assume she's interested in four attributes: memory capacity, graphics capability, size and weight, and price. CD Table 6.4 shows her beliefs about how each brand rates on the four attributes. If one computer dominated the others on all the criteria, we could predict that Linda would choose it. But, as is often the case, her choice set consists of brands that vary in their appeal. If Linda wants the best memory capacity, she should buy C; if she wants the best graphics capability, she should buy A; and so on.

If we knew the weights Linda attaches to the four attributes, we could more reliably predict her laptop choice. Suppose she assigned 40 percent of the importance to the laptop's memory capacity, 30 percent to graphics capability, 20 percent to size and weight, and 10 percent to price. To find Linda's perceived value for each laptop according to the expectancy-value model, we multiply her weights by her beliefs about each computer's attributes. This computation leads to the following perceived values:

$$\text{Laptop A} = 0.4(8) + 0.3(9) + 0.2(6) + 0.1(9) = 8.0$$

$$\text{Laptop B} = 0.4(7) + 0.3(7) + 0.2(7) + 0.1(7) = 7.0$$

TABLE 6.4 A Consumer's Brand Beliefs about Laptop Computers

Laptop Computer	Attribute			
	Memory Capacity	Graphics Capability	Size and Weight	Price
A	8	9	6	9
B	7	7	7	7
C	10	4	3	2
D	5	3	8	5

Note: Each attribute is rated from 0 to 10, where 10 represents the highest level on that attribute. Price, however, is indexed in a reverse manner, with 10 representing the lowest price, because a consumer prefers a low price to a high price.

$$\text{Laptop C} = 0.4(10) + 0.3(4) + 0.2(3) + 0.1(2) = 6.0$$

$$\text{Laptop D} = 0.4(5) + 0.3(3) + 0.2(8) + 0.1(5) = 5.0$$

An expectancy-model formulation predicts that Linda will favor laptop A, which (at 8.0) has the highest perceived value.[61]

Suppose most laptop computer buyers form their preferences the same way. Knowing this, the marketer of laptop B, for example, could apply the following strategies to stimulate greater interest in brand B:

- ***Redesign the laptop computer.*** This technique is called *real repositioning*.
- ***Alter beliefs about the brand.*** Attempting to alter beliefs about the brand is called *psychological repositioning*.
- ***Alter beliefs about competitors' brands.*** This strategy, called *competitive depositioning*, makes sense when buyers mistakenly believe a competitor's brand has more quality than it actually has.
- ***Alter the importance weights.*** The marketer could try to persuade buyers to attach more importance to the attributes in which the brand excels.
- ***Call attention to neglected attributes.*** The marketer could draw buyers' attention to neglected attributes, such as styling or processing speed.
- ***Shift the buyer's ideals.*** The marketer could try to persuade buyers to change their ideal levels for one or more attributes.[62]

Purchase Decision

In the evaluation stage, the consumer forms preferences among the brands in the choice set and may also form an intention to buy the most preferred brand. In executing a purchase intention, the consumer may make up to five subdecisions: brand (brand A), dealer (dealer 2), quantity (one computer), timing (weekend), and payment method (credit card).

NONCOMPENSATORY MODELS OF CONSUMER CHOICE

The expectancy-value model is a compensatory model, in that perceived good things about a product can help to overcome perceived bad things. But consumers often take "mental shortcuts" called **heuristics** or rules of thumb in the decision process.

With **noncompensatory models** of consumer choice, positive and negative attribute considerations don't necessarily net out. Evaluating attributes in isolation makes decision making easier for a consumer, but it also increases the likelihood that she would have made a different choice if she had deliberated in greater detail. We highlight three choice heuristics here.

1. Using the **conjunctive heuristic**, the consumer sets a minimum acceptable cutoff level for each attribute and chooses the first alternative that meets the minimum standard for all attributes. For example, if Linda decided all attributes had to rate at least 5, she would choose laptop computer B.
2. With the **lexicographic heuristic**, the consumer chooses the best brand on the basis of its perceived most important attribute. With this decision rule, Linda would choose laptop computer C.
3. Using the **elimination-by-aspects heuristic**, the consumer compares brands on an attribute selected probabilistically—where the probability of choosing an attribute is positively related to its importance—and eliminates brands that do not meet minimum acceptable cutoffs.

Our brand or product knowledge, the number and similarity of brand choices and time pressures present, and the social context (such as the need for justification to a peer or boss) all may affect whether and how we use choice heuristics.[63]

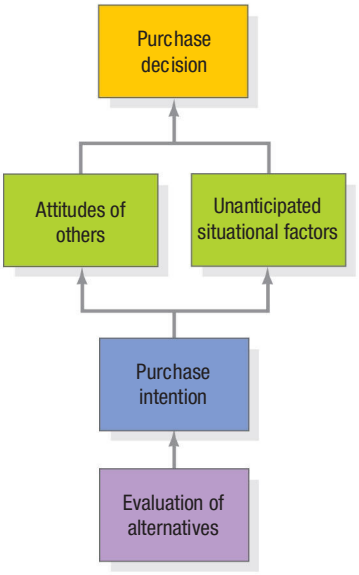
Consumers don't necessarily use only one type of choice rule. For example, they might use a noncompensatory decision rule such as the conjunctive heuristic to reduce the number of brand choices to a more manageable number, and then evaluate the remaining brands. One reason for the runaway success of the Intel Inside campaign in the 1990s was that it made the brand the first cutoff for many consumers—they would buy only a personal computer that had an Intel microprocessor. Leading personal computer makers at the time such as IBM, Dell, and Gateway had no choice but to support Intel's marketing efforts.

INTERVENING FACTORS

Even if consumers form brand evaluations, two general factors can intervene between the purchase intention and the purchase decision (see Figure 6.6).[64] The first factor is the *attitudes of others*. The influence of another person's attitude depends on two

|Fig. 6.6|

Steps between Evaluation of Alternatives and a Purchase Decision



things: (1) the intensity of the other person's negative attitude toward our preferred alternative and (2) our motivation to comply with the other person's wishes.[65] The more intense the other person's negativism and the closer he or she is to us, the more we will adjust our purchase intention. The converse is also true.

Related to the attitudes of others is the role played by infomediaries' evaluations: *Consumer Reports,* which provides unbiased expert reviews of all types of products and services; J.D. Power, which provides consumer-based ratings of cars, financial services, and travel products and services; professional movie, book, and music reviewers; customer reviews of books and music on such sites as Amazon.com; and the increasing number of chat rooms, bulletin boards, blogs, and so on where people discuss products, services, and companies.

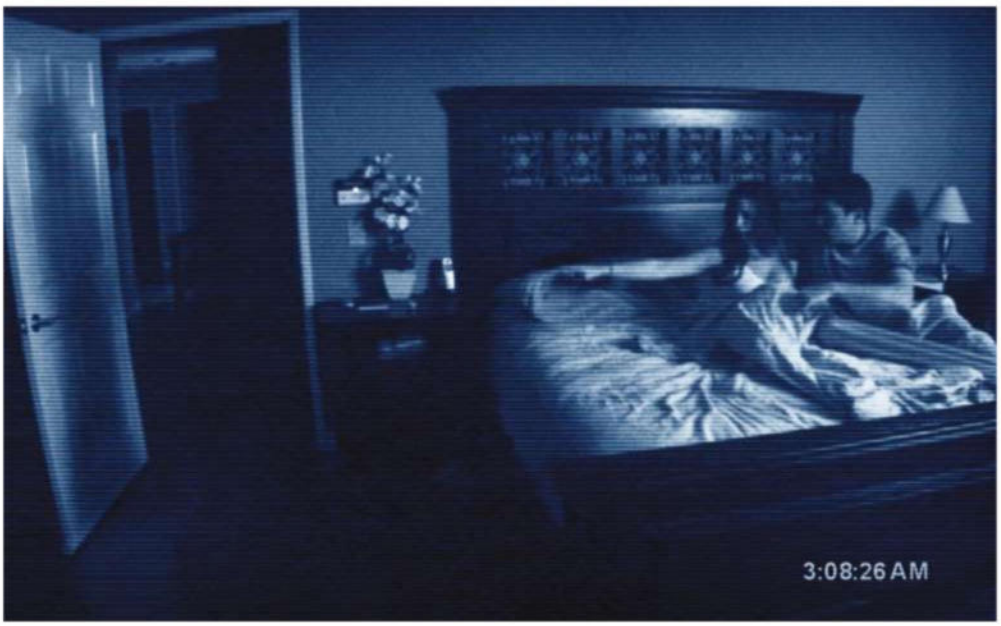
Consumers are undoubtedly influenced by these external evaluations, as evidenced by the success of a small-budget movie such as *Paranormal Activity,* which cost only $15,000 to make but grossed over $100 million at the box office in 2009 thanks to a slew of favorable reviews by moviegoers and online buzz at many Web sites.[66]

The second factor is *unanticipated situational factors* that may erupt to change the purchase intention. Linda might lose her job, some other purchase might become more urgent, or a store salesperson may turn her off. Preferences and even purchase intentions are not completely reliable predictors of purchase behavior.

A consumer's decision to modify, postpone, or avoid a purchase decision is heavily influenced by one or more types of *perceived risk:*[67]

1. ***Functional risk***—The product does not perform to expectations.
2. ***Physical risk***—The product poses a threat to the physical well-being or health of the user or others.
3. ***Financial risk***—The product is not worth the price paid.
4. ***Social risk***—The product results in embarrassment in front of others.
5. ***Psychological risk***—The product affects the mental well-being of the user.
6. ***Time risk***—The failure of the product results in an opportunity cost of finding another satisfactory product.

The degree of perceived risk varies with the amount of money at stake, the amount of attribute uncertainty, and the level of consumer self-confidence. Consumers develop routines for reducing the uncertainty and negative consequences of risk, such as avoiding decisions, gathering information from friends, and developing preferences for national brand names and warranties. Marketers must understand the factors that provoke a feeling of risk in consumers and provide information and support to reduce it.



Every year there are hit movies, such as *Paranormal Activity,* that ride a wave of buzz and favorable consumer word of mouth to box-office success.

Postpurchase Behavior

After the purchase, the consumer might experience dissonance from noticing certain disquieting features or hearing favorable things about other brands and will be alert to information that supports his or her decision. Marketing communications should supply beliefs and evaluations that reinforce the consumer's choice and help him or her feel good about the brand. The marketer's job therefore doesn't end with the purchase. Marketers must monitor postpurchase satisfaction, postpurchase actions, and postpurchase product uses and disposal.

POSTPURCHASE SATISFACTION Satisfaction is a function of the closeness between expectations and the product's perceived performance.[68] If performance falls short of expectations, the consumer is *disappointed;* if it meets expectations, the consumer is *satisfied;* if it exceeds expectations, the consumer is *delighted.* These feelings make a difference in whether the customer buys the product again and talks favorably or unfavorably about it to others.

The larger the gap between expectations and performance, the greater the dissatisfaction. Here the consumer's coping style comes into play. Some consumers magnify the gap when the product isn't perfect and are highly dissatisfied; others minimize it and are less dissatisfied.[69]

POSTPURCHASE ACTIONS A satisfied consumer is more likely to purchase the product again and will also tend to say good things about the brand to others. Dissatisfied consumers may abandon or return the product. They may seek information that confirms its high value. They may take public action by complaining to the company, going to a lawyer, or complaining to other groups (such as business, private, or government agencies). Private actions include deciding to stop buying the product (*exit option*) or warning friends (*voice option*).[70]

Chapter 5 described CRM programs designed to build long-term brand loyalty. Postpurchase communications to buyers have been shown to result in fewer product returns and order cancellations. Computer companies, for example, can send a letter to new owners congratulating them on having selected a fine computer. They can place ads showing satisfied brand owners. They can solicit customer suggestions for improvements and list the location of available services. They can write intelligible instruction booklets. They can send owners a magazine containing articles describing new computer applications. In addition, they can provide good channels for speedy redress of customer grievances.

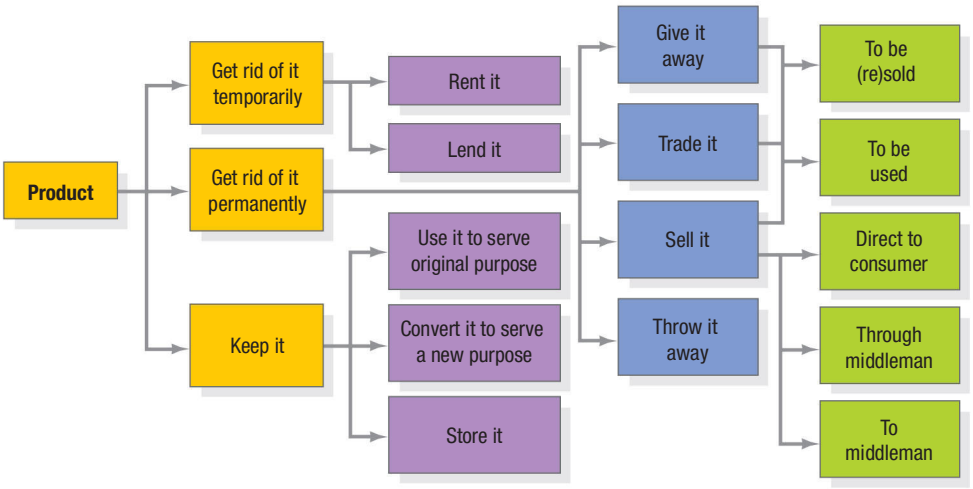
POSTPURCHASE USES AND DISPOSAL Marketers should also monitor how buyers use and dispose of the product (△ Figure 6.7). A key driver of sales frequency is product consumption rate—the more quickly buyers consume a product, the sooner they may be back in the market to repurchase it.

Consumers may fail to replace some products soon enough because they overestimate product life.[71] One strategy to speed replacement is to tie the act of replacing the product to a certain holiday, event, or time of year.

|Fig. 6.7| △

How Customers Use or Dispose of Products

Source: Jacob Jacoby, et al., "What about Disposition?" Journal of Marketing (July 1977), p. 23. Reprinted with permission from the *Journal of Marketing*, published by the American Marketing Association.



Misleading representations and deceptive marketing practices

It is against the law for businesses and individuals to advertise or market goods and services to Canadians in a way that is false or misleading. False or misleading marketing practices can:

- harm consumers
- harm businesses engaging in honest practices
- negatively impact the economy

One of the objectives of the *Competition Act* is to deter deceptive marketing practices and to ensure consumers receive truthful information to help them make informed buying decisions.

The Act applies to anyone inside or outside of Canada who is promoting the supply or use of a product, service or any business interest through:

- printed or electronic advertisements
- written or oral presentations
- illustrations
- audio-visual promotions

Examples of conduct covered by the *Competition Act*

- False or misleading representations
- Drip pricing
- Sale above advertised price
- Bait and switch
- Deceptive prize notices
- Promotional contests
- Deceptive telemarketing
- Double ticketing
- Representations in electronic messages and web addresses
- Use of tests and testimonials
- Ordinary selling price
- Performance claims not based on adequate tests
- Multi-level marketing
- Pyramid selling

- Warranties and guarantees

Table describing misleading representations and deceptive marketing practices covered by the *Competition Act*.

Type of practice	Section, subsection and paragraph of the Act	Description
False or misleading representations	section 52 and paragraph 74.01(1)(*a*)	It is against the law to make materially false or misleading representations to promote a product, service or business interest. A representation is "material" if the general impression it conveys leads someone to take a particular course of action, like buying or using a product or service. A "representation" refers to any marketing material, including online and in-store advertisements, direct mail, social media messages, promotional emails, and endorsements, among other things.
Drip pricing	Subsection 52(1.3) and subsection 74.01(1.1)	Drip pricing involves offering a product or service at a price that is unattainable because consumers must also pay additional charges or fees to buy the product or service. Subsections 52(1.3) and 74.01(1.1) confirm that offering a price that a customer cannot actually attain because there are mandatory fixed additional (non-governmental) charges or fees is a false or misleading representation.
Multi-level marketing	section 55	Multi-level marketing (MLM) is a legal business model for selling goods and services. Participants in an MLM plan earn compensation from supplying products to other participants or customers. However, it's illegal for operators or participants in an MLM plan to make any compensation claims, unless the claims include fair and reasonable disclosure of the amount of money likely to be earned by a typical participant.
Pyramid selling	section 55.1	Pyramid selling generates profits by recruiting others and not necessarily from the sale of products. It is a criminal offence to establish, operate, advertise, or promote a pyramid selling scheme.

Type of practice	Section, subsection and paragraph of the Act	Description
Warranties and guarantees	paragraph 74.01(1)(c)	It is against the law to make a representation about the warranty or guarantee of a product if it is misleading or there is no reasonable prospect that it will be carried out. This includes any promise to replace, maintain, or repair a product, or to continue a service until it has achieved a specified result.
Performance claims not based on an adequate and proper tests	paragraph 74.01(1)(b)	A business who makes a claim about a product's performance, effectiveness or length of life, must be able to prove the claim is based on an adequate and proper test.
Use of tests and testimonials	section 74.02	The law prohibits the unauthorized use or the distortion of test and testimonials.
Double ticketing	section 54	Double ticketing is supplying a product at a price that exceeds the lowest of two or more displayed prices.
Ordinary selling price	subsections 74.01(2) and (3)	A price cannot be referred to as the ordinary price when it is inflated to create the illusion of offering a better deal.
Bait and switch	section 74.04	Bait and switch selling is when a product is advertised at a "bargain price" but the product is not available for sale in reasonable quantities.
Sale above advertised price	section 74.05	Businesses cannot sell or rent a product at a price above its advertised price within a particular market.
Deceptive prize notices	section 53	It is a criminal offence to send prize notices that give recipients the general impression that they have won (or will win) a prize but requires them to pay a fee or incur a cost to collect their prize unless they have actually won the prize and the sender makes specific disclosures and satisfies certain other requirements.
Promotional contests	section 74.06	Contest organizers must: disclose the number and approximate value of prizes and information relating to the chances of winning. They cannot unduly delay the distribution of prizes, and must choose the participants and award the prizes either randomly or on the basis of skill.

Type of practice	Section, subsection and paragraph of the Act	Description
Deceptive telemarketing	section 52.1	In telemarketing, it is a criminal offence to fail to make certain disclosures at the beginning of each communication. It is also a criminal offence to make or allow the making of false or misleading claims to promote a product or a business interest when communicating orally over the phone or by using any form of telecommunications, including recorded messages and robocalls.
Representations in electronic messages and web addresses.	sections 52.01 and 74.011	It is against the law to make false or misleading representations in the sender, subject and content of electronic messages, as well as in locator information such as URLs.

Penalties and remedies for non-compliance

The consequences associated with engaging in deceptive marketing practices depend on which provisions of the *Competition Act* the conduct violates:

- Under the **criminal provisions** of the Act, violators can be tried in criminal court. This requires proof of each element of the offence "beyond a reasonable doubt."
- Under the **civil provisions**, practices are brought before the Competition Tribunal, the Federal Court, or the superior court of a province or territory. To be found in violation requires that each element of the conduct be proven "on a balance of probabilities."
    - Penalties and remedies for non-compliance

Compliance programs

- Learn how to create an effective compliance program

Commissioner's opinions

To find out more information on written opinions under section 124.1 of the *Competition Act*, contact the Bureau's Information Centre toll-free at 1-800-348-5358 or online. If a written opinion is provided by the Commissioner, a fee will apply based upon the section of the Act the proposed conduct or practice applies to. A written opinion is binding on the Commissioner as long as the facts submitted are accurate, and it remains binding if the facts on which the opinion is based remain substantially unchanged and your conduct or practice is carried out, as proposed. All fees and service standards for written opinions are set out in the Competition Bureau Fee and Service Standards Policy.

Further reading

- Written opinions
- Advertising dos and don’ts
- Enforcement guidelines:
  - Deceptive Notices of Winning a Prize
  - Ordinary Price Claims
  - “Product of Canada” and “Made in Canada” Claims
  - Multi-Level Marketing Plans and Schemes of Pyramid Selling
  - Guide for the Labelling and Advertising of Pet Foods (Chapter 6: Claims)
  - Promotional Contests
  - Consumer Rebate Promotions
- Compliance Bootcamp: Avoiding Deceptive Marketing
- *Deceptive Marketing Practices Digest*:
  Get technical guidance and the Bureau’s perspective on matters of ongoing interest in advertising and marketing:
  - Volume 1: Online advertising, disclaimers, online reviews
  - Volume 2: Performance claims, consent agreements, precious metals marking, Canadian Anti-Fraud Centre
  - Volume 3: International fora, mobile phone billing, unlimited claims in telecommunications services
  - Volume 4: Influencer marketing, “Made in Canada” claims, saving claims
  - Volume 5: Collection of consumer data in exchange for “free” online products and services, unsubstantiated weight loss claims, unattainable prices in the car rental market
  - Volume 6: Use of scarcity cues, drip pricing, and the *Competition Bureau*’s recent presidency of the *International Consumer Protection and Enforcement Network*
- Canada’s anti-spam law and deceptive marketing practices
- False or misleading representations: An in-depth review
- Scanner price accuracy
- Terms and conditions: Best practices for businesses
- Consumer Measures Committee *Canadian Consumer Handbook*
- Packaging and labelling requirements for non-food products
- Potential for immunity: Incentives for ending participation in illegal activity

- Protection for whistleblowers
- Misleading representations and deceptive marketing practices: Choice of criminal or civil track
- How we foster competition
- *Competition Act*:
  - Part VI - Offences in Relation to Competition (section 52 to section 55.1)
  - Part VII.1 - Deceptive Marketing Practices

List of deceptive practices Next ➜

Date modified:
2024-01-16

ontact the Competition Bureau

VICKI G. MORWITZ, ERIC A. GREENLEAF, and ERIC J. JOHNSON*

Many firms divide a product's price into two mandatory parts, such as the base price of a mail-order shirt and the surcharge for shipping and handling, rather than charging a combined, all-inclusive price. The authors call this strategy *partitioned pricing.* Although firms presumably use partitioned pricing to increase demand and profits, there is little clear empirical support that these prices increase demand or any theoretical explanation for why this should occur. The authors test hypotheses of how consumers process partitioned prices and how partitioned pricing affects consumers' processing and recall of total costs and their purchase intentions and certain types of demand. The results suggest that partitioned prices decrease consumers' recalled total costs and increase their demand. The manner in which the surcharge is presented and consumers' affect for the brand name also influence how they read to partitioned prices.

Divide and Prosper: Consumers' Reactions to Partitioned Prices

Many firms divide the prices they charge consumers into two mandatory parts, instead of charging one all-inclusive price. For example, a mail-order firm charges $32 for a shirt, plus $4.95 for shipping and handling. A restaurant's menu lists a price of $34 for a prix fixe dinner and mentions that "a gratuity of 18% will be added automatically for parties of six or more," but customers are expected to add a tip for smaller parties. A travel agency lists a price of $1,295 for a Caribbean cruise and charges an additional $140 for mandatory "port charges." In each case, the firm could charge a single, all-inclusive price that combines the components—$36.95 for the shirt, $40 for the dinner, and $1,435 for the cruise—but instead divides the price into two parts, a strategy we term *partitioned pricing.* Because we are interested in cases in which one partitioned price component is much larger than the other, we call the larger the *base* price (e.g., $32 for the shirt) and the smaller component the *surcharge* (e.g., $4.95 for shipping and handling).[1]

Firms presumably use partitioned pricing because they believe the strategy increases consumer demand for their products. If consumers attend to and process both base prices and surcharges with the same accuracy they use for equivalent combined prices, then partitioned prices should not increase demand. However, pricing research provides evidence that consumers do not always completely attend to, or accurately process, price information (Dickson and Sawyer 1990; Mazumdar and Monroe 1990, 1992; Stiving and Winer 1997). If consumers do not process base prices and surcharges completely and accurately, then partitioned pricing can potentially increase demand.

However, research in marketing has paid relatively little attention to how consumers react to partitioned prices, either cognitively or behaviorally, leaving unresolved for market-

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• The partitioned prices we examine are distinct from price discrimination strategies that also include two different kinds of prices. In "two-part" price discrimination strategies, consumers pay a set "entry" fee, and then a separate "per use" fee each time they use the product or service. In the partitioned pricing we examine here, paying the two prices gives the consumer ownership. Nor is partitioned pricing the same as "product bundling," in which two or more distinct products or services are priced together (Yadav and Monroe 1993). In the partitioned pricing strategies we examine, the price of a single product or service is divided into two mandatory components. Partitioned pricing is also distinct from efforts by firms to change the temporal frame consumers use to process prices, such as motivating consumers to break down the loss from a relatively large total cost into many smaller losses, each of which are only "pennies per day" (Gourville 1998).

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ing managers the important questions of how consumers process partitioned prices and whether these prices actually increase consumer demand compared with combined prices.2 If these strategies are effective, then managers must understand why they affect consumer behavior in order to create partitioned pricing strategies that maximize their profits in an ethical manner. Because partitioned prices can potentially mislead consumers when they are not made salient (McDowell 1996; *Travel and Leisure* 1996), public policymakers also must understand how consumers perceive and react to partitioned prices.

The purpose of this article is to investigate these issues. We develop hypotheses of how consumers react to partitioned prices on the basis of the literature on cost/benefit trade-offs. We then test these hypotheses in two experiments. We find that consumers exposed to partitioned prices have higher demand in an auction, as indicated by their bids, than consumers exposed to all-inclusive, combined prices. Our results in a second experiment, in which subjects choose between two telephones, suggest this occurs because a large proportion of consumers do not account fully for surcharges and, therefore, underestimate the total product cost. Wc also identify two factors that affect how consumers process and react to partitioned prices: (I) the effort required and (2) consumers' motivation to process partitioned prices fully and accurately.

In the next section, we develop hypotheses regarding how consumers react to partitioned prices. Wc then describe two experiments that test these hypotheses in two different contexts in which partitioned pricing is used in practice. Finally, wc discuss implications of our findings for firms using partitioned pricing strategies and for public policymakers, along with study limitations.

CONSUMER RESPONSE TO PARTITIONED PRICES

How Consumers Process Partitioned Prices: A Cost/Benefit Perspective.

When consumers process a partitioned price, they might combine price information from the base price and the surcharge to estimate the product's total cost. The manner in which they do this affects the "psychological price" stored in memory, which, tn turn, affects demand (Dickson and Sawyer 1990; Monroe 1973). Thus, how consumers process partitioned prices has important implications for marketing practice.

We believe that, in a given situation, consumers can use different approaches to process partitioned prices and that the approach chosen will vary across consumers. Although there are several ways to conceptualize variations in how consumers process partitioned prices, we believe it is useful to examine these variations from the perspective of a cost/benefit framework (Beach and Mitchell 1978; Johnson and Payne 1985; Shugan 1980), wherein consumers can choose from among several different strategies for solving problems. Consumers select a strategy for a particular task by making trade-offs between tire perceived benefits and the perceived costs of applying each strategy. In the partitioned pricing context, a strategy's perceived benefit is the increase in utility that the consumer expects to realize, a priori, if he or she processes the partitioned price with a particular level of expected accuracy. A strategy's perceived cost is the time and cognitive effort that the consumer expects, a priori, the processing strategy to require. The strategy a consumer selects in a given partitioned price context will depend on his or her perceptions of these costs versus benefits (i.e, effort versus accuracy).

Therefore, we believe that a useful point of focus in studying how consumers process partitioned prices is to examine how various processing strategies differ in the effort they require and in how accurately they estimate total product cost, based on the weight each strategy places on the base price compared with the surcharge. Although we allow for the possibility that some consumers will weight each dollar of the base price and surcharge equally, we also believe that others may weight these components differently. In the latter case, even though a product presented with a combined price has the same total cost to the consumer as one presented with a partitioned price, the consumer may recall different total costs for the two products.

From this perspective, we can divide these processing strategies into three genera) types, depending on how the base price and surcharge arc weighted and combined. Consistent with the cost/benefit framework discussed previously, these processing strategics differ in the amount of cognitive effort they require and the accuracy of the estimate of total product cost generated by the strategy. These processing strategics arc as follows:

Calculate the total cost as the mathematical sum of the base price and the surcharge. When this addition is performed correctly, consumers' recalled total costs for partitioned prices and equivalent combined prices should be identical. In this case, therefore, partitioned pricing should have no impact on consumers' recalled total costs or demand. This process is assumed by theories that presume descriptive invariance (Tversky, Sattath, and Slovic 1988), such as classical economics. Although this strategy leads to the most accurate recalled total costs, it requires the highest cognitive effort.

Use an heuristic to combine the base price and surcharge. Consumers may regard the base price and surcharge as separate pieces of information or as separate attributes of the product. When consumers must integrate two or more pieces of product information to form an overall judgement, they sometimes use simplifying heuristics rather than engaging in more accurate, but more difficult, mental arithmetic (Hitch 1978). Wc cannot specify the exact nature of the combination heuristic that all consumers will use, and there arc several possible heuristics that consumers could use to process partitioned prices. We also note that heuristic processing strategies can lead consumers to give the surcharge either greater or lesser weight than they would with a calculation strategy. For several reasons, however, we believe that, in the aggregate, consumers will tend to use heuristics that combine the base price and surcharge in a manner such that recalled total costs will be less than Ilie mathematical sum of the two prices. In these cases, partitioned pricing will tend to reduce recalled total costs and increase demand, compared with an equivalent combined price.

We note here that some Firms also might use partitioned prices for objectives other than increasing demand, such as to discourage consumer from returning catalog merchandise when shipping and handling charges are not refunded (Hess, Chu, and Gerstner 1996).

One specific heuristic that many consumers might use to process partitioned prices is anchoring and adjustment, which has been identified as a method consumers can use to simplify the task of processing multiple pieces of information (Chapman and Johnson 1996; Tversky and Kahneman 1974). Decision makers often overweight the anchor information and make insufficient adjustments for the remaining information (Jacowitz and Kahneman 1995; Lichtenstein and Slovic 1971; Tversky and Kahneman 1974; Wilson et al. 1996).

In partitioned pricing, we believe that consumers are likely to anchor on the base price and then tend to adjust insufficiently upward to incorporate the surcharge, for tlve following reasons: First, decision makers often anchor a perception on the first piece of information they encounter and then adjust for later information (Hogarth and Einhorn 1992; Tversky and Kahneman 1974). In the context of partitioned prices, consumers generally are exposed to base prices prior to surcharges. For example, this occurs if consumers read base prices before surcharges. Second, there is evidence that people tend to anchor on the piece of information they perceive is most important and then adjust this perception for less important information (Yadav 1994). If consumers believe that surcharges are less important than the base price (e.g., because surcharges tend to be much less than base prices), they again will tend to anchor on the base price and adjust insufficiently for the surcharge.

Therefore, we believe that, when consumers do use anchoring and adjusting heuristics to process partitioned prices, they will tend to recall that the total cost is less than the mathematical sum of the two prices and, thus, underestimate the total product cost. If this is true, price partitioning will tend to reduce recalled total costs and increase demand, compared with a single, combined price. Consumers may justify using this simplifying heuristic, despite the downward bias it gives to recalled total cost, because it requires less cognitive effort than calculating the total cost.[3]

Ignore the surcharge completely. Consumers also may ignore the surcharge information, either by not noticing it at all or by noticing but not incorporating it when recalling total product costs. Consumers might not use enough cognitive effort to notice the surcharge at all. This may be especially true when it is presented in a manner that is physically or temporally distant from the base price, as marketers sometimes do, but also may occur when it is presented near the base price. Kahneman and Tversky (1979) suggest that eliminating information, even when it is readily available, is one of the editing operations people might use when evaluating prospects. Furthermore, consumers often use incomplete information searches and might not process information on some attributes, especially unimportant ones. For example, Stiving and Winer (1997) find support for a model (hat assumes that consumers tend to process supermarket prices from the left-most digit to the right-most digit and that they often ignore the right-most (i.e., the pennies) digit when making brand choice decisions. They speculate that consumers weigh the cost of thinking about the pennies digit against the value inherent in the additional information it provides. Similarly, in the partitioned pricing context, consumers may believe that the extra thinking associated with processing the surcharge does not lead to significantly better decisions, and they therefore may decide to ignore the surcharge. When consumers completely ignore the surcharge, they recall the base price as the total cost. In such cases, partitioned pricing reduces recalled total costs, compared with using a single price, and does so by a greater amount than when consumers use heuristics that give any weight to the surcharge. The ignoring strategy requires less cognitive effort than cither the mathematical calculation or heuristic strategics but provides less accuracy.

In conclusion, consumers who completely ignore the surcharge will, by definition, recall lower total costs than consumers who use a calculation strategy. Although the recalled total costs of consumers who use an heuristic can be less titan the base price, between the base price and the sum of base plus surcharge, or greater than this sum, we expect that, in the aggregate, recalled total costs will be less than the sum but greater than the base alone. Overall, because we expect that some consumers will use heuristics to process partitioned prices, whereas others will ignore surcharges, even if some consumers use a calculation strategy, we expect that, on average, recalled total costs will be lower among consumers who see partitioned prices than among consumers who see combined prices with equivalent total cost.

Impact of Partitioned Price Strategies on Demand

Consumers' demand for most producLs increases as the total cost they recall for the product decreases, as long as this decrease occurs within consumers' latitude of price acceptance (Lichtenstein, Bloch, and Black 1988; Monroe 1971, 1973). In the context of partitioned pricing, this latitude implies that the combined price must be less than the high end of the latitude, which is the consumer's reservation price, whereas the base component of the partitioned price must be greater than the low end of this latitude, which represents the lowest price (or total cost) al which the consumer perceives the product still has adequate quality. In these situations (i.e., when the latitude of the price acceptance constraint is adhered to), the lower recalled total costs that are associated with partitioned pricing, as we discussed previously, also will lead to higher demand. Thus,

H(: In Ihe aggregate, consumers will have higher demand when a product has a partitioned price than when it has a single, combined price with Ihe same total cost.

As wc described previously, consumers will have higher demand when a product has a partitioned price, because some consumers will process partitioned prices in a manner that leads them to underweight the surcharge and, thus, underestimate the total product cost. Thus.

H2: In the aggregate, consumers will recall a lower total cost when they see a partitioned price than when they see a single. combined price that results in the same total cost.

[3]Other heuristics are also likely io lead to lower recalled prices in this context. For example. Lynch and Snill (1982) find that consumers often devote less processing effort to less important attnbutes. If they believe dial surcharges arc less important attributes than base prices, they may underestimate total product cost by undcrwctghting the surcharge. Furthermorc. consumers often give more weight to information about extreme attributes, on which one product is very different from other products, compared with attributes on which it is similar to other products (Anderson 1971; Lynch 1979). Because, in practice, the base prices of products tend lo vary more across Finns or catalogs than do surcharges such as shipping and handling, consumers may give less weight to a dollar of surcharge than to a dollar of base prix.

Next we discuss factors that we believe influence the impact of partitioned pricing on consumers' price processing, recalled total costs, and demand.

Impact of the Effort Required to Process Partitioned Prices on Processing Strategy. Recalled Total Costs, and Demand

The cost/bcncfit framework suggests that when the costs (i.e., the time and effort) associated with fully and accurately processing partitioned prices are high, consumers tend to use lower effort processing strategics. The effort required to process partitioned prices can he affected by how the firm presents the partitioned price information. In practice, firms present partitioned prices in several ways. Thus, an important question for marketers is whether the manner in which partitioned prices are presented, especially the surcharge, influences the strategy that consumers use to process them.

In practice, surcharges often are presented to consumers in dollar terms, such as $32 for a mail-order shirt and $4.95 for shipping and handling, but sometimes they arc presented as a percentage of the base price, such as 15.5% for shipping and handling. Consumers must expend more cognitive effort to calculate the total cost mathematically if the surcharge is presented as a percentage, because this requires a multiplication operation (multiplying $32 by 1.155) or both multiplication and addition (multiplying $32 by .155 and then adding this to $32). Both approaches demand more cognitive effort than adding $32 and $4.95, because multiplication operations typically require significantly more cognitive effort than addition operations (Bettman, Johnson, and Payne 1990; Chase 1978). Furthermore, variations in the cognitive difficulty of mathematical operations can lead consumers to use different processing strategics (Johnson, Payne, and Bettman 1988).

This suggests that consumers arc more likely to use the lower effort heuristic or ignoring strategics to process partitioned prices when the surcharge is presented as a percentage than when it is presented as a dollar amount. Thus,

Hj,: When the surcharge is presented as a percentage of the base price, consumers arc more likely to use an heuristic or ignoring strategy to process the partitioned price than when the surcharge is presented as a dollar amount.

When more consumers use an heuristic or ignoring strategy, wc expect that, in the aggregate, this will lead to lower recalled total costs and increased demand. Thus,

H ji,: When the surcharge is presented as a percentage of the base price, consumers will recall lower total costs than when the surcharge is presented as a dollar amount.

Hj^: When the surcharge is presented as a percentage of the base pnee, consumers will have higher demand than when the surcharge is presented as a dollar amount.

Impact of Consumers' Motivation to Process Partitioned Prices on Processing Strategy. Recalled Total Costs, and Demand

The cost/benefit framework that motivates these hypotheses has another important implication: The strategy consumers choose to process partitioned price information will depend on their a priori perceived likelihood of purchasing the brand (as has been shown in pricing contexts such as bundling; Suri and Monroe 1995). For example, in a choice context, if consumers believe they are unlikely to purchase one of the brands, they are unlikely to perceive much benefit from expending effort to process product information about this brand because the information is unlikely to make any difference; it is unlikely to change their predisposition not to buy this brand. Similarly, consumers who believe they are likely to buy one of the brands have little motivation to expend processing effort on information about it. because it is unlikely that the new information will change their decision to buy this brand. However, consumers who are relatively uncertain a priori whether they will choose a particular brand arc more motivated to expend effort to process price information more fully and accurately because there is a greater chance that this more complete and accurate information will influence their purchase decision.

Although several factors can influence consumers' a priori perceived likelihood of purchasing a product, we examine one such factor that often plays a role in choice situations. This is consumers' affect for a product's brand name, relative to other brand names in the choice set, which we refer to as *relative brand name affect.* This factor is relevant because consumers' affect for the brand name can transfer to the product. Thus, consumers whose affect for one brand name is high or low, relative to their affect for other brands in the choice set, should be less motivated to use the higher effort calculation strategy to process partitioned prices for that brand, compared with consumers whose affect for that brand name is similar to their affect for other brand names. Therefore, we expect an inverted U relationship between consumers' relative brand name affect for a given brand and the probability that they use a calculation strategy for partitioned prices for that brand. Thus,

H*,: In a choice siluation in which at least one brand uses partitioned pricing, consumers with high or low relative brand name affect for Ihat brand will be more likely to use an heuristic or ignoring strategy to process partitioned prices for the brand than consumers with moderate relative brand name affect.

As the proportion of consumers who use an ignoring or heuristic strategy to process partitioned prices increases, recalled total costs should decrease, as wc discuss in IG. Because, in H4a, we hypothesize that relative affect for a brand name influences processing strategy, wc expect this affect to influence the impact of partitioned pricing on recalled total costs also. Consequently, wc expect an inverted U relationship between relative brand name affect and recalled total costs when partitioned prices are used. Thus,

H_{4b}: In a choice situation in which al least one brand uses partitioned pricing, consumers with high or low relative brand name affect for that brand will have lower recalled total costs for the brand than consumers with moderate relative brand name affect. This effect will be greater than any analogous effect that might occur with combined prices.

The second sentence in H4tl (and H_{4c} following) is added to check for the possibility that the effects of relative brand name affect, as wc hypothesize in H4b and H4c, also might occur for combined prices, for reasons unrelated to the processing of partitioned prices. Thus, when testing H4b and H_{4c}, we ensure that the effects in them arc significantly greater for partitioned price subjects than for any analogous effect that might occur with combined price subjects.

Although H_{4b} predicts that partitioned pricing will be related to lower recalled total costs for consumers with low relative brand affect, compared with combined prices, we expect this change in recalled total costs to have little or no effect on these consumers' demand. Consumers are unlikely to purchase the brand, regardless of its recalled total cost, because they have low affect for this brand, relative to others in the choice set. By contrast, we expect that the lower recalled total costs, related to partitioned pricing for consumers with relatively high brand name affect, will significantly increase these consumers' demand because they already were more likely to purchase this brand than the other brands in the choice set, and partitioned pricing leads to even lower recalled total costs. Furthermore, we expect that the demand increase from partitioned prices will be greater for relatively high affect consumers than for moderate affect consumers, because H4a predicts that recalled total costs decrease least for the latter. Thus,

H_{4c}: In a choice situation in which at least one brand uses partitioned pricing, the increase in demand associated with partitioned pricing will increase as consumers' relative brand name affect increases. This effect will be greater than any analogous effect that might occur with combined prices.

DESCRIPTION OF PARTITIONED PRICING EXPERIMENTS

We test these hypotheses in two experiments that involve different products and types of surcharges. This method reflects that, in practice, partitioned pricing strategies are used for different products and services and presented in different ways. We also design the experiments to examine different types of consumer decisions, rather than focusing on only one partitioned price scenario. Specifically, the first experiment tests whether partitioned prices increase demand (H_1) for one type of demand, namely, auction bids in an actual auction with real financial consequences for the participants. This is a purchasing context in which partitioned prices often are used. The second experiment examines consumers' decisions regarding which brand to choose between two competing telephones. It is designed to test why partitioned pricing affects demand (H2) as well as factors that influence its effect (H3 and H4).

EXPERIMENT ONE: THE AUCTION EXPERIMENT

Design

Many auctioneers charge a buyer's premium, a percentage of the winning bid that the winning bidder must pay in addition to that bid. This premium is a partitioned pricing strategy. The auction experiment was designed to test H_1 by examining how the buyer's premium affects bids in an actual, sealed-bid auction for a jar full of pennies. Here, an appropriate measure of consumer demand is the ratio of the total cost of a consumer's bid compared with his or her perception of the monetary value of the pennies in the jar. This ratio should be less than one because consumers typically want to obtain the pennies for less than their perceived monetary value.[4] Although this ratio is an appropriate measure of demand in an auction, other demand measures are needed for other consumer purchase situations. We believe this experiment provides a strong test of H_1 because it examines the impact of partitioned pricing strategies on consumer demand when consumers make an actual purchase if their bid wins.

Subjects were 199 graduate business students who were told they would be participating in a sealed-bid auction for a jar of pennies. All subjects viewed the same quart jar full of pennies. Each subject received a sealed-bid form with written instructions, which they were told to read carefully, that informed them of the conditions of their bid and how to submit it. These instructions asked subjects to determine how much they would be willing to bid for the jar of pennies and to enter that bid on their form. Subjects were told that the winning bidder had the option of receiving the pennies or a check for their monetary value.

Subjects were assigned randomly to receive one of two paper forms for submitting their bids. One form mentioned that subjects must pay a buyer's premium of 15% in addition to their bid if they win. Specifically, these subjects were told, "If your bid is successful, the purchase price you must pay will be the sum of your bid plus a buyer's premium of 15% of that bid." Subjects receiving the other (control) form were told, "If your bid is successful, the purchase price you must pay will be the bid you indicate on the form." After writing down their bid, subjects in both conditions were asked how much they believed the pennies in the jar were worth.

Results

We test H_1 by first calculating the ratio of each subject's total cost (defined as the amount bid plus any buyer's premium) to his or her perception of the value of the jar of pennies. We then compare this ratio for subjects receiving the buyer's premium form versus the form with no buyer's premium. If partitioned pricing does not effect demand, we expect these ratios to be identical for the two groups. However, if partitioned pricing increases demand, then we expect consumers in the buyer's premium condition to be willing to pay a higher total cost (i.e., a higher percentage of their perceived value) for the jar of pennies.

The results support H_1; partitioned pricing increases demand. Subjects who received the buyer's premium form bid a total cost that was a significantly higher percentage of their perceived value (total cost/perceived value = .885, n = 108) than subjects in the control condition (total cosl/perceivcd value = .787, n = 91; r = .023 [where r is the effect size; sec Rosenthal 1991, pp. 14-20], $t^{\wedge}$ = 2.17, p = .014), based on a one-tailed test of two proportions.

These results demonstrate that partitioned pricing can increase aggregate demand for a product. The next experiment examines why partitioned pricing strategies increase demand (i.e., how partitioned prices affect recalled total costs and processing strategies) and investigates two factors that influence these effects.

EXPERIMENT TWO: THE TELEPHONE EXPERIMENT

Design

In the telephone experiment, we studied consumers' reactions to partitioned pricing for a product sold in a catalog when consumers could buy a similar product from a store instead. Many mail-order catalogs use a partitioned pricing

[4] Buyer's premiums are used both in open English auctions, in which bidders raise one another's bids, and in auctions in which each bidder submits a sealed bid. McAfee and McMillan (1987) discuss these auctions.

Thus, this context is appropriate for testing the impact of partitioned pricing on recalled total costs (H2). Furthermore, though many catalogs state this surcharge as a dollar amount, such as $6.95, others present it as a percentage of the base price, such as 12%. This provides an opportunity to test Hju.,.. In addition, many products sold in catalogs use well-known brand names for which consumers have existing affect, providing a good opportunity to test H.^.

Subjects were 233 undergraduate business students who were asked to choose between two brands of telephones: a control telephone sold at a store and a target telephone sold through a catalog. In studying the hypotheses related to brand name affect, we believed it was desirable to use products with real and well-known brand names and, so, chose two brand names with high levels of awareness among the subject population. The control telephone was a Sony, described as having ten-number memory dialing, repeat dialing. built-in speaker, and one-year warranty, and available at a local store for $64.95, including tax. The target telephone was an AT&T with these same features, except that the warranty lasted for three years, and it was available through mail order for $69.95, including tax, plus $12.95 for overnight shipping and handling.5

Subjects were assigned randomly to one of three experimental conditions. In all three, the store price of the control telephone (Sony) was presented as one all-inclusive price, whereas the target telephone's (AT&T) catalog price was presented in one of three different ways, all of which created the same total product cost: (1) combined price: "$82.90, including shipping and handling;" (2) base price and surcharge in dollars: "$69.95 plus $12.95 for shipping and handling;" and (3) base price and surcharge in percentage terms: "$69.95 plus 18.5% for shipping and handling."

Subjects first read descriptions and prices for the two telephones. To estimate the impact of partitioned pricing on demand, subjects indicated their choice intentions (i.e., their relative likelihood of choosing one telephone instead of another) using a ten-point bipolar scale with anchors labeled "I would definitely buy tire Sony phone" (1) and "I would definitely buy the AT&T phone" (10). Note that, whereas the auction experiment measured demand using bids in an actual auction, the telephone experiment measures demand by asking subjects to report relative purchase intent in response to the paired choice, and subjects do not actually purchase a telephone. Subjects then were asked to recall the total cost, including shipping and handling, for the AT&T (target) telephone and specifically instructed to do so without turning back to the descriptions. Next, to measure relative brand name affect, subjects rated their general preference for Sony and AT&T products on a ten-point bipolar scale anchored at "I strongly prefer Sony" and "1 strongly prefer AT&T."

Results

Testing the effect of partitioned pricing on recalled total costs (Hi). We test H2 by comparing the recalled total product costs of subjects exposed to combined versus partitioned prices. Subjects who did not write down a recalled total cost (i.e., did not answer the question or wrote down the base price and surcharge but did not provide a total cost, such as "$69.95 plus $12.95") were dropped from this analysis. The results support Hj. Subjects exposed to partitioned prices recalled significantly lower total product costs ($78.27, n = 106) than subjects exposed to combined prices ($83.90, n = 77; r = .18, tlgl = 6.39, $p < .0001$), based on a one-tailed t-test.

Classifying processing strategies for partitioned prices. We also used subjects' answers to the recalled total cost question to infer how frequently the consumers exposed to partitioned prices used each of the three processing strategies, as follows: Subjects reported their recalled total cost for the product without turning back to the page containing the prices. Although we cannot observe exactly how subjects process price and total costs, we can make inferences about their processing strategies on the basis of their answers to the recalled total cost question. We classified subjects as using a mathematical calculation strategy if they wrote down a single figure within 5% of the actual combined total cost, or if they wrote a calculation near their answer and solved it (e.g., "$69.95 plus $12.95 = $82.90"), regardless of whether the calculation was correct. A range of ±5% for "accurate" recall has been used in previous research on the accuracy of price recall (Dickson and Sawyer 1990). This range accommodates the possibility that some consumers convert prices and total costs into approximate magnitude estimates before storing them in semantic memory and then correctly recall these stored magnitudes. For example, $12.95 might be stored as $13.00. We classified subjects as using an ignoring strategy if they wrote down a single figure that was within 5% of the base price of the product. In all other cases, we classified subjects as using an heuristic strategy.

On the basis of our classification rules, it appears that all three processing strategies are well represented and that consumers often use a strategy that docs not produce the highest accuracy. We inferred that less than one-quarter of the subjects used mathematical calculations (21.9%), and a considerable proportion completely ignored the surcharge (23.2%). The most frequently used strategy appears to be the heuristic strategy (54.8%). These results suggest that strategics for processing partitioned prices do vary across consumers and that it is useful to examine factors that affect which strategy consumers use.

Testing the impact of dollar versus percentage surcharges (H_{3a-c}). We test Hja by comparing the percentage of subjects whom we classify as using a calculation strategy when the surcharge is presented in a dollar versus a percentage format. The results are reported in the top portion of Table I and support HJa. The proportion of subjects whom we classify as using a mathematical calculation strategy, as opposed to either an heuristic or ignoring strategy, is significantly lower when the surcharge is presented as a percentage (9.6%, n = 73) instead of in dollars (32.9%, n = 82; r = .28, $z = 3.52$, $p = .0002$), based on a one-tailed test of the two proportions.

The results in the middle portion of Table I report how presenting surcharges in dollar versus percentage terms affects recalled total costs. These results support HJb. Subjects recalled significantly higher total costs for the target AT&T telephone when the surcharge was presented in a dollar ($80.36, n = 61) rather than percentage format

5We used different warranty periods and prices for the Sony and AT&T telephones to differentiate the products so that subjects would not conclude that the study focused on brand preference for products with identical attributes.

Table 1

TELEPHONE EXPERIMENT: THE IMPACT OF PARTITIONED PRICE PRESENTATION (DOLLARS VERSUS PERCENTAGE) ON PROCESSING STRATEGY, RECALLED TOTAL COST. AND DEMAND

Type of Processing Strategy	Surcharge presented in $	Surcharge Presented in %	Effect Size	p-value
Inferred Processing Strategy—H_j.				
	tn = 82)	tn = 73)	r=28	z = 352. p = .0002
Calculation	32.9%	9.6%		
Heuristic	54.9%	54.8%		
Ignoring	12.2%	35.6%		
Recalled Total Cost for Target Telephone—$H_{,}h$				
—	(n = 61)	(n.45)	r = .II	tUM = 3.56, p = .0003
	$80.36	$75.43		
Choice Intentions—IK (soon: increases for higher intentions for target telephone)				
—	(n = 82)	(n = 73)	r=-.0098	<153® -\.2^P> .5
	4.21	3.62		

($75.43, n = 45; r = .33, t_{104} = 3.56, p = .0003), based on a one-tailed t-test.

The results in the bottom portion of Table 1 report how presenting surcharges in dollar versus percentage terms affecLs demand and do not support Hk. Although we hypothesized higher demand for subjects exposed to a percentage surcharge, we observed no significant difference in demand for subjects exposed to a dollar surcharge for the target AT&T telephone (mean purchase rating = 4.21, n = 82) versus a percentage surcharge (3.62, n = 73; r = -.0099, t_{153} = -1.23, p > .5, one-tailed).

Testing the impact of consumers' relative brand name affect (H_{4a-c}). We next test H.la, which states that consumers exposed to partitioned prices who have comparatively low and high relative brand name affect for a product are less likely to use a calculation strategy than those with moderate levels of this affect. We tested for the inverted U relationship in H_{4a} by first recoding the affect scale to range from —4.5 to +4.5 to lower multicollincarity between the affect measure and the square of that measure, which we also use. We then estimated a logistic regression model in which the binary dependent variable was coded as 1 for subjects whom we classified as using a calculate strategy and 0 otherwise, and the independent variables were the recoded affect scores and the square of those scores. Because this hypothesis is only relevant for subjects exposed to partitioned prices, and not for those exposed to combined prices, we only estimate the model using data from the former group. The inverse U-shaped relationship in H4il is supported if the coefficient for the square of recoded affect is negative and significant. However, the coefficient for this parameter is not significantly different from zero, and therefore, the results do not support H4a (p = -.025; r = -.080, χ^2 = -81. p = .18, one-tailed). In addition, the coefficient for the linear recoded affect term was not significantly different from zero (p = -.041, r = —.044, χ^2 = .30, p = .58, two-tailed).6

We next test H4b, which states that partitioned prices will be related to a greater decrease in recalled total costs for consumers with comparatively low and high levels of relative brand name affect than for those with moderate levels of this affect, using the following procedure: We use a regression model in which the dependent variable is recalled total cost and the independent variables are the recoded affect and squared, recoded affect terms used to test H4a. We estimate this model separately for subjects exposed to partitioned versus combined prices to test whether the relationship between relative brand name affect and recalled total costs is stronger for the latter. The inverted U relationship predicted in H4b is supported if the parameter estimate for squared affect in the partitioned case is negative and significant and the corresponding effect size is greater for the partitioned than the combined case.

The results support H4b. The squared, recoded affect parameter estimate had the hypothesized direction for partitioned price subjects (P = -.18; t_{103} = 1.86, p = .032, one-tailed). This parameter was not significant for combined price subjects (P = .005; t_{74} = .12, p = .91, two-tailed test because we have no hypothesis about this parameter's sign for these subjccLs). The linear affect terms were not significantly different from zero for partitioned price subjects (P = -.14; r = .055, $t_{)03}$ = .56, p = .57, two-tailed) or combined price subjects (P = —.16; r = .18, t_{74} = 1.54, p = .13, two-tailed). The parameter estimates for the combined price subjects were significantly different than those for the partitioned price subjects, according to a Chow test ($F2_{j79}$ = 21.55, p < .00001). Consistent with H4b, the effect size implied by the squared affect term for partitioned price subjects (r = .180) is also significantly greater than that for combined price subjects (r = -.014; z = 2.76, p = .0029, one-tailed).

Because we find support for H4b but not ll4a, the question of why relative brand name affect influences the impact of partitioned pricing on recalled total costs remains. Two possible post hoc explanations are as follows; First, moderate affect subjects could be less likely to use an ignoring strategy than low and high affect subjects, even though the former are not more likely to use a calculation strategy (because H4a is not supported). Second, some subjects who use heuristics may use more effortful and accurate heuristics than others. If moderate affect subjects who use heuristics employ strategics that are more effortful and accurate, they may recall higher total costs than low and high affect subjects using less accurate heuristics.

6In the preceding analysis, we used a (binary) logistic regression model to test whether the recoded affect and affect-squared terms were associated with a subject's use of a calculation strategy versus either an heuristic or ignoring strategy. We did this because our interest was in whether they used the higher effort calculation strategy or one of the lower effort strategies. An alternative approach is to use a multinomial logit model to examine the relationship between the affect terms and the subject's choice among the three strategies. We also estimated this model and did not find a significant relationship between the linear (p = .1743) or quadratic (p = .6820) recoded affect terms and choice of strategy.

We tested the first explanation by using the same logistic regression model used to test H4,. in which the binary dependent variable now indicates whether the subject is classified as using an ignoring strategy. The results do not support this explanation because the coefficient for the squared affect term was not significantly different from zero (0 = -.00088; r = .0024, χ2 = .0009, p = .98, two-tailed). The coefficient for the linear affect term was also not significantly different from zero (0 = -.12; r = .13, χ2 = 2.42, p = .12, two-tailed).

Although we cannot observe the specific type of heuristic each subject used, we can test the second explanation by examining how recalled total costs vary with affect among subjects who saw partitioned prices and were classified as using heuristics. We regressed recalled total costs on the recoded and the squared, recoded affect measure for all subjects exposed to partitioned prices and classified as using an heuristic strategy. The results, based on the coefficient for the recoded, squared affect term, provide greater support for this explanation (0 = -.26; r = .33, tjj = 2.00, p = .053 two-tailed). Although it is not part of this post hoc explanation, we note that the coefficient for the linear affect term in this model is also negative and significant (0 = -.86; r = .40, tjj = 2.50, p = .017, two-tailed). Together, these results suggest that relatively high affect subjects who use heuristics have lower recalled total costs than other subjects using heuristics.

We next test H^. which states that brand name affect moderates the influence of partitioned prices on demand, as measured by paired choice intent. This test compares two regression models for subjects who saw partitioned versus combined prices. Each model regressed subjects' choice intent for the target telephone on their brand affect. If the parameter estimate for affect from partitioned price subjects is significant, positive, and significantly greater than the correspond¬ing estimate from combined price subjects, then H.k is supported. Note that though we did not formally hypothesize a relationship between brand name affect and the demand measure, logically we expect them to be related positively and, therefore, use one-tailed tests for the affect parameters.

The results support H4c. The parameter estimate for affect from the partitioned price subjects (0 = .48; t|53 = 6.99, p < .0001, one-tailed) is significantly greater than the estimate from the combined price subjects (0 = .23; t76 = 2.19, p = .015, one-tailed) in a Chow test (F|,231 = 4.28, p = .040).' The effect size from partitioned price subjects (r = .49) is also significantly greater than that from combined price subjects (r = .24; z = 3.02, p = .0013, one-tailed).8

DISCUSSION AND IMPLICATIONS

The results of our experiments suggest that partitioned prices tend to increase consumers' product demand, as measured by bids in the auction experiment, compared with all-inclusive, combined prices. Our analysis of the telephone experiment also suggests that consumers use different approaches to process partitioned prices, so that the amount of weight the surcharge receives in determining recalled total costs and influencing demand varies across consumers. These results are also consistent with our theoretical framework, which proposes that one approach consumers use to select a method for processing partitioned prices is to make trade-offs between the benefits of higher accuracy and the costs of more time and cognitive effort, though we stress here that we have not tested formally for these trade-offs. Because consumers do not always process information about surcharges fully and accurately, partitioned prices tend to decrease consumers' recalled total costs in the aggregate.

We find that the strategy that we inferred consumers choose to process partitioned prices is influenced by whether the surcharge is presented in dollars or as a percentage of the base price. We also find that the increase in demand due to partitioned pricing in a paired choice situation increases with consumers' a priori likelihood of purchasing the brand, as is measured by their relative affect for one brand name compared with the other in the choice set. Although not part of an hypothesis, an ex post investigation suggests that this occurs because the recalled total costs of consumers who use an heuristic strategy has an inverted U-shaped relationship with relative brand name affect. Overall, the results suggest that partitioned pricing strategics can be effective in increasing demand for a product. Next, we describe some limitations of our research and then discuss the implications of our findings for consumer behavior theory, marketers, and public policymakers.

Limitations

The auction experiment examined how partitioned prices affect demand using a task that had real financial consequences for the subjects. However, the telephone experiment used hypothetical scenarios that did not require consumers to make an actual purchase in order to examine how consumers process partitioned prices and determine factors that moderate their effect on recalled total costs and demand. Because it is possible that subjects behave differently when making actual purchases instead of hypothetical choices, we recommend that further research in this area examine actual purchases and provide subjects with economic

Hhesc results for H_{4c} establish that there is a different relationship between relative brand name affect and demand when subjects are exposed to partitioned versus combined pnccs. Note that, had we simply compared the demand for the target telephone for partitioned versus combined pace subjects (as we did in H, in the auction experiment), we would have concluded that partitioned pricing does not affect demand. Specifically, if we aggregate across affect levels, we find that subjects exposed to partitioned pnccs have higher average demand (3.93. n = 155) than subjects exposed to combined prices (3.71. n = 78; r = .0362. t231 = ,55. p = .290). based on a one-tailed t-tcsl. However, this difference is not statistically significant. Thus, though we find that partitioned paces increase demand for relatively high affect consumers, we do not find a significant aggregate effect. Note too that the issue of relative brand name affect is not relevant to (he auction experiment, because it uses a single target product (i.e., money), which is not offered under different brand names.

8In Hk. we imply that demand for partitioned price subjects will be no lower than demand for combined price subjects at low levels of relative brand affect and that the demand increase due to partitioned pricing increases with this affect. Here, we note that, in the two regressions just described, the predicted values of affect are slightly lower for partitioned price subjects when this affect is low. However, these differences are not statistically significant, whereas the increase tn demand from partitioned pricing is statistically significant. We determined this by comparing the explanatory power of these two regressions, if modeled as a single regression, with that of a model in which demand for the two groups is constrained to be the same at the lowest affect score (using a nested F-tcst: Fuw = 1.6l;p = .206).

incentives for making g<x>d decisions. We note, however, that studies of other price processing biases have used hypothetical decisions (eg., Alba et al. 1994, on processing frequency versus magnitude information on price comparisons). Other biases of this type first were identified with hypothetical decisions, and these results later were verified with data from actual purchases. This includes latitude of price acceptance (Kalyanaram and Little 1994; Monroe 1971). Furthermore, we note that the number of units a person purchases can be an important component of purchase intentions and demand for products using partitioned pricing (such as articles of clothing or books purchased from catalogs). and our studies do not examine this.

We also note that the consumer task in the auction experiment. used to test the relationship between partitioned prices and demand, differs somewhat from the one in the telephone experiment, which was used to test relationships with processing, total cost recall, price presentation, and relative brand affect. In the partitioned price condition in the former, subjects first must decide how much they are willing to pay for the pennies in total and then decide whether and how much to modify their bid to compensate for the 15% buyer's premium. In the latter, subjects in this condition are given the price and surcharge for the target (AT&T) telephone and do not need to determine these themselves. These differences may lead subjects to frame prices, total costs, and responses to partitioned prices in a different manner.

The surcharges we used in our experiments, which varied from 15% to 18.5% of the base price, were chosen to be well within the typical range for these surcharges. This was desirable because the primary purpose of our hypotheses was to examine the impact of those partitioned price strategics that typically are found in actual practice. However, it also would be of considerable practical and theoretical interest for additional research to examine how consumers react to surcharges that are much smaller, or much larger, than this range. These reactions may differ from the results found here. They also may depend on the response measure used, such as actual purchase versus purchase intentions. Furthermore. consumers may not notice changes in surcharges until they exceed the threshold of a "just noticeable difference" (Monroe 1979. pp. 42–43).

In the telephone experiment, we measured recalled total costs by asking subjects to recall the total cost of the product in dollars. Although prior studies also have asked subjects to recall specific prices of products (Dickson and Sawyer 1990). there is evidence that consumers do not always encode prices (and presumably total costs) as specific dollar amounts and that, therefore, other types of recall measures also should be employed. For example. Mazumdar and Monroe (1990) find that consumers' processing goals (i.e., remembering the prices of brands versus choosing a brand) affected whether they could recall specific prices more accurately or instead could only rank order brands by price. In general, research has suggested that the probability that an item is recalled accurately from memory depends on the similarity between how the information was encoded originally in memory and the measure used to elicit recall (Tulving and Thompson 1973). Recall measures such as those employed in this study typically are used in situations in which the researcher assumes that people remember having been exposed to the information they are asked to recall. However, other measures may be more appropriate for situations in which people may be affected by. but cannot specifically remember being exposed to. the information (for a discussion of some alternative measures, sec Tulving 1983, 1993). In the partitioned pricing context, it is possible that consumers are influenced by partitioned prices without being able to recall any particular total dollar price, or cost, for the product. Therefore, future studies should consider using multiple measures to determine how partitioned price information is encoded and stored in memory.

The telephone experiment, used to study H^.. asked subjects to choose between two competing alternatives. The impact of brand name affect may be different in situations in which consumers evaluate a single alternative. In such situations. consumers may show more willingness to process information, even when brand affect is low, because no higher affect alternatives compete for their attention.

We have used samples consisting of fairly young, well-educated undergraduate and graduate students. Reactions to partitioned pricing may depend on factors such as age or education. Thus, the proportion of consumers using each of the three methods to process partitioned prices in our experiments is not necessarily representative of the population as a whole. Future studies ideally could involve a greater cross section of respondent types and additional purchase situations. For example, researchers could conduct split sample, direct-mail experiments in which some catalogs use combined prices and others use partitioned prices, or split cable television advertisements with the same manipulation.

Implications for Marketing Theory

Our finding that partitioned pricing can increase demand runs counter to classical economic theory, which predicts that partitioned pricing will have no impact on demand. This stems from the principle that consumers' preferences are independent of the external description used to represent choices, which has been termed "descriptive invariance."

Our findings also add to a body of evidence that suggests that consumers do not always process price information completely and accurately (Dickson and Sawyer 1990). Rather, we provide further support for the notion that consumers make cost/bcnefit trade-offs when processing price information. Stiving and Winer (1997) suggest that it might be rational for consumers not to process the pennies (rightmost) digit of prices if it is cognitively costly to do so and unlikely this method will lead to a mistake. Similarly, consumers might not be irrational when they underweight the surcharges in partitioned prices. They might be making a rational decision if they weigh the chances of making an incorrect decision against the cost of fully processing partitioned prices.

Finally, this research adds to growing literature on behavioral aspects of pricing. Whereas early pricing research focused on demonstrating that a particular consumer price response exists, this stream uses behavioral theories to understand why consumers respond in this manner. In this article, we both demonstrate how consumers react to partitioned prices and use a cost/benefit framework to identify factors that help explain why they react in these ways. Other theories might help identify additional factors that intluence how consumers react to partitioned prices. For example, research on familiarity and learning suggests that in a choice context.

consumers who are moderately familiar with the product may be better at learning product-related information than low- or high-familiarity consumers (Johnson and Russo 1984). This might suggest that moderately familiar consumers have more accurate total cost recall than other consumers. However, other research has found that moderately familiar consumers are less confident in using price and brand name than in using other functional product attributes, as compared with high- or low-familiarity consumers (Park and Lessig 1981). We hope that additional research further examines the cognitive processes consumers use to process partitioned prices and how these processes affect how consumers store and retrieve price, total cost, and product-related thoughts in memory.

Implications for Marketing Practice

The results of our experiments suggest that marketers can use partitioned pricing as a strategy to increase demand. This helps explain why partitioned pricing is so prevalent in today's marketplace. Although the effect sizes for increased demand observed in the experiments were relatively small, these small increases can create a meaningful increase in firm profits, because the cost to the firm of replacing combined pricing with partitioned pricing is usually low.

Marketers should realize, however, that partitioned pricing is related not only to higher demand, but also to lower recalled total costs. Thus, partitioned pricing might not be effective when marketers want consumers to recall high prices that reinforce a target market positioning of high quality in a category in which pricc/quality relationships operate. For example, many furniture stores charge separately for shipping, but more expensive stores often include shipping in their prices.

Our results raise interesting questions for how marketers can design optimal partitioned pricing strategies. For example, the impact of these strategies on recalled total costs and demand depends partly on the proportion of consumers who use an heuristic or ignoring strategy instead of a calculation strategy to process partitioned prices. These proportions may depend on the size of the surcharge relative to the base price, as well as on the absolute size of the surcharge, because consumers have more motivation to employ a higher accuracy strategy as the surcharge increases in relative and absolute terms. This presents marketers with an interesting trade-off in setting the size of the surcharge relative to the base price. A small surcharge might motivate many consumers to use an heuristic or ignoring strategy but, at most, might decrease total cost recall only slightly, because the surcharge is small. Alternatively, a large surcharge might motivate more consumers to use a calculation strategy, but it will have a bigger impact on the recalled total costs and demand of those moderatc-to-high affect consumers who still use an heuristic or ignoring strategy. This trade-off suggests that there may exist an optimal level of surcharge that maximizes firm profits. Identifying the factors that contribute to this trade-off and quantifying the optimal surcharge are areas for further research in partitioned prices. However, such research will need to investigate a larger range of surcharge sizes (as a percentage of the base price) than the range used in this article.

Consumer perceptions of a firm's fairness and honesty also may depend on the size of the surcharge. Small surcharges may be viewed as fair, but not large ones. Furthermore, perceived fairness may depend on the stated purpose of the surcharge. just as perceived fairness of price increases depends on the purpose of that increase (Kahneman, Knetsch, and Thaler 1986). For example, consumers may perceive transportation or state tax surcharges on a new automobile as more fair than a surcharge for "dealer preparation." Examining how different partitioned price strategics affect fairness perceptions is another area for further research.

Implications for Public Policymakers

Partitioned pricing also presents a challenge for consumers and public policymakers. We discussed previously that partitioned pricing can become unethical when firms attempt to hide the surcharge, such as by using small type size or stating surcharges in a place where consumers are unlikely to notice them. One important issue that needs more investigation is how accurately consumers process different kinds of partitioned price presentations. This can help identify cases in which a low proportion of consumers are aware of the partitioned price and that lead to policy guidelines for the ethical use of partitioned pricing. The guidelines that emerge might be similar to those in advertising, where advertisements that mislead a considerable proportion of consumers can be challenged legally by government agencies or competitors. Policymakers also may want to formulate methods to educate consumers to pay more attention to surcharges, much in the same way that unit pricing labels help educate consumers about actual product costs.

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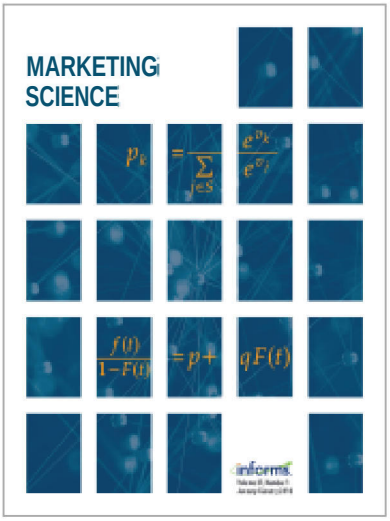

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Consumer Reactions to Drip Pricing

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Abstract. This research examines how drip pricing—a strategy whereby a firm advertises only part of a product's price up front and then reveals additional mandatory or optional fees/surcharges as the consumer proceeds through the buying process—affects consumer choice and satisfaction. Across six studies, we find that when optional surcharges are dripped (versus revealed up front) consumers are more likely to initially select a lower base priced option which, after surcharges are included, is often more expensive than the alternative. Moreover, consumers exposed to drip pricing tend to ultimately select this lower base price but higher total price option, even after being exposed to the total price and given the opportunity to change their selection and even though they are relatively dissatisfied with it. We explore why drip pricing has these effects and find that they are driven by consumers' perceptions regarding the costs and benefits of starting over and switching. Specifically, we find that high perceived search costs (study 2), self-justification (study 3), and mistaken perceptions regarding the potential gains of switching because of inaccurate beliefs that all firms charge similar additional fees/surcharges (study 4) all play roles. We discuss the implications of these findings for marketers, consumers, and policy makers.

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Keywords: drip pricing • pricing • consumer protection • hidden fees

> They set their fares lower on initial ticket price, then kill you on baggage fees. $55 to carry on, $50 to check in on my LA-Chicago flight. That's each way! They don't serve a complimentary drink (that's extra), you have to pay extra to pick seats, etc. End result is they are not that much cheaper, if at all in many cases, than other airlines and they are the least comfortable airline in the US—uncomfortable seats with little room. In other words, they are TERRIBLE! Choose another airline. Seriously.
>
> —Dominik, U.S. Spirit Airlines flyer (November 27, 2016). Overall rating: 1/10 stars
>
> EDITOR'S COMMENT: This is why it's important to do a final tally and check other airlines before actually paying. All the fees are stated throughout the booking process so it's important to add them all up first.[1]

1. Introduction

The above customer review (and editor response) is real and exemplifies a common situation that can occur with drip pricing. One firm may make prominent early in the buying process a price that appears lower than competitors' prices in an attempt to lure in customers. However, once one or more commonly accepted add-ons are selected and their associated prices added to the base price, the total price can often be more expensive than that of competitors. The U.S. Federal Trade Commission (FTC 2012a, p. 1) defines drip pricing as "a pricing technique in which firms advertise only part of a product's price and reveal other charges later as the customer goes through the buying process." The additional charges can be mandatory charges, such as hotel resort fees, or fees for optional upgrades and add-ons.

Drip pricing is frequently used by firms in domains as diverse as the airline, hotel, rental car, event ticketing, and financial services industries, and it has become a major cause for concern for regulators throughout the world who worry that the practice is harmful to consumers (Australian Competition and Consumer Commission (ACCC) 2010, Huck and Wallace 2010, Department of Transportation 2011a, Carrns 2019, FTC 2019). Indeed, various regulatory agencies have passed legislation and/or issued fines, penalties, and warnings to companies who engage in drip pricing. For example, the ACCC ordered the country's two largest airlines to pay penalties for misleading customers with drip pricing (Palmer 2017),

and the Canadian Competition Bureau (2014) took similar action against several retailers and rental car agencies (Evans 2016, The Canadian Press 2017). In the United States, the FTC (2012b) warned 22 hotel operators that their use of drip pricing for mandatory resort fees might be deceptive and urged them to review how they displayed prices to ensure that they were not violating any laws.

Regulators worry that drip pricing may impose two costs on consumers (Shelanski et al. 2012): (1) a monetary cost, which may result from making a product purchase that is more expensive than what would have been made if the prices of the surcharges had been known up front (indeed, if consumers had known about the surcharges, they may have forgone the purchase entirely), and (2) increased search costs for price comparisons (Sullivan 2017). However, despite the regulatory and consumer backlash to drip pricing, firms continue to use it, likely because it is highly profitable. Industry data show that, in 2017, U.S. airlines earned approximately $57 billion in "ancillary fee" revenue above the base ticket prices (Josephs 2017). Similarly, U.S. hotels earned approximately $2.7 billion from fees and surcharges in 2017 (Rosenbloom 2017). Consistent with this, some economic models of drip pricing show that the practice leads to increased profits for firms (Ellison 2005).

Given drip pricing's prevalence and its potential to harm consumers, research on how consumers respond to it is surprisingly limited. The little extant research often uses the terms partitioned pricing (Morwitz et al. 1998) and drip pricing interchangeably, although they differ in significant ways. In addition, prior research has primarily focused on the dripping of mandatory surcharges (Huck and Wallace 2010, Shelanski et al. 2012, Robbert and Roth 2014, Repetti et al. 2015, Robbert 2015, Sullivan 2017, Blake et al. 2018), though it is also common for firms to drip optional surcharges. Also, although economic scholars have explored the related topics of price obfuscation, transparency, and shrouding practices (Ellison 2005; Gabaix and Laibson 2006; Hossain and Morgan 2006; Chetty et al. 2009; Ellison and Ellison 2009; Brown et al. 2010; Zenger 2013; Chiles 2017; Seim et al. 2017a, b), this body of research has largely focused on the impact of these strategies on marketplace structure and firm profitability, rather than on consumer reactions.

Thus, our goal is to fill these gaps and to offer novel insights into how drip pricing of optional (versus mandatory) surcharges affects consumer judgments, choices, and satisfaction with their choices. Although current U.S. regulations concerning drip pricing cover only the disclosure of mandatory surcharges, the dripping of optional surcharges is an increasingly common practice, and policy makers have debated whether regulations should be expanded to cover such fees (Silk 2017). As a result, the current research has the potential to inform this important policy debate as well as other regulatory changes being contemplated regarding the dripping of mandatory surcharges in the hotel and ticketing industries (Carrns 2019, FTC 2019). Furthermore, our findings also have implications for the recent push to remove some regulations regarding the dripping of mandatory surcharges; in particular, regulations that currently require airlines to advertise base fares with mandatory fees, such as taxes, included (Silk 2017). Finally, we add to the literature by focusing on situations in which firms strategically set their base prices lower than those of a competitor, knowing that, with commonly accepted add-ons, their total prices exceed those of the competitor. These firms may anticipate that these initial decisions will be sticky even when information regarding add-on prices and total prices is revealed. For this reason, we examine whether, in these contexts, consumers exposed to drip pricing are disproportionately likely to initially select a lower base price option that, once all of the add-on fees are included, will ultimately be more expensive than the alternative. We then examine whether these consumers will change their initial decisions when given total price information and the opportunity to do so. We posit that consumers may stick with their initial selection (and reject the opportunity to change their selection) even if it is more expensive than the alternative and even if they are relatively dissatisfied with it, and we test several process explanations based on participants' self-reports, economic theory, and consumer psychology for why consumers may engage in such behavior.

The rest of the paper is organized as follows. First, we provide a short summary of the current regulations and debates concerning drip pricing in the United States. We then move on to a brief summary of related research before developing our predictions. We next describe the basic experimental design used in all of our studies, and we then present the findings from six experiments, four of which involve a consequential or incentive compatible decision. All of these studies examine situations in which one firm sets its prices such that its base price is lower than that of a competitor but, when commonly selected add-ons are added to the base price, the total price can be more expensive than that of the competitor. Across these studies, we show that consumers exposed to drip pricing (versus nondrip pricing, with the optional add-on fees presented up front) are significantly more likely to (1) initially select the option with the lower base price, (2) make a financial mistake by ultimately selecting the option that has a higher total price than the alternative option, given the add-ons

chosen, and (3) be relatively dissatisfied with their choice. Importantly, our results hold even though participants had the opportunity to start over and change their selection after they were exposed to the dripped surcharges and total prices. Indeed, we find that participants are resistant to changing their choice when given the opportunity to do so, and we find evidence that both economic and psychological reasons related to the perceived benefits and costs of switching drive this reticence, including a belief that the search costs of starting over outweigh the benefits, psychological costs associated with self-justification, and misperceptions of the potential benefits to be gained because of inaccurate beliefs that all firms charge similar surcharges. This is an important set of findings given that firms often claim that drip pricing is not harmful because add-on prices are disclosed during the search process, total prices are revealed before consumers have to confirm their purchase, and consumers can terminate the purchase at any stage during the process. However, this research highlights the critical role that an initial base price has on consumer choice, behavior, and satisfaction in subsequent stages of the purchase process. We conclude with a broader discussion of our findings, their implications and limitations, and areas for future research.

1.1. Background

1.1.1. U.S. Regulations. In 2011, the U.S. Department of Transportation (DOT) issued an "Enhancing Airline Passenger Protections Rule" covering the airline industry, which included, among other things, two requirements related to drip pricing: (1) the full fare advertising rule, which said that all government taxes and fees must be included in every advertised price, and (2) a provision that airlines must allow reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least 24 hours after the reservation is made (DOT 2011a). When the changes were announced, the Secretary of Transportation stated that "airline passengers have the right to be treated fairly," implying that drip pricing is unfair (DOT 2011b, p. 1). However, regulators and airlines seem to disagree on this point. Regulators consider it to be a deceptive pricing practice and harmful to consumers because it increases their financial costs and search costs. As such, the requirements around mandatory surcharges are presumably aimed at reducing deception and financial and search costs. On the other hand, the airlines argue that because the total price is provided to consumers before any final purchase is made—and consumers are not obligated to make a purchase—the practice is neither deceptive nor harmful (Bender 2014).

In 2014, Congress proposed the Transparent Airfares Act of 2014 (Elliott 2014a), which would no longer require airlines to include mandatory taxes and fees in their advertised prices. Instead, they would be allowed to initially quote a lower base price that excludes mandatory fees and then reveal the full price at the end of the booking process. In response, the U.S. Senate proposed the Real Transparency in Airfares Act, which would leave the current rules in place but increase the penalties for airlines that violate the pricing regulations (Elliott 2014b). To date, neither bill has been enacted, and the debate regarding regulations concerning drip pricing continues.

In January 2017, the DOT proposed legislation to require airlines to disclose up front any fees associated with carry-on and checked luggage (DOT 2017). This was a modification of legislation proposed earlier that would also require the upfront disclosure of the price associated with reserving a seat. Under current law, airlines are required only to inform consumers that there may be additional fees and where they can go to find those fees. If this proposed legislation had been enacted, airlines would have no longer been able to legally drip surcharges associated with luggage later in the purchase process. However, the Trump administration subsequently withdrew the proposal (Levin 2017).

In April 2018, Congress introduced the FAA Reauthorization Act of 2018, which, if the original proposed form had been approved, would again have allowed airlines to advertise fares that exclude mandatory and optional surcharges, including taxes. Consumer advocates were deeply concerned about this potential rollback of the 2011 full fare advertising rule (Elliott 2018). However, the final bill that passed in October 2018 maintained the full fare advertising rule, requiring that the advertised airfare include all government-imposed mandatory taxes and fees.

However, regulatory interest in drip pricing is not limited to the airline industry. In the ticketing industry, members of Congress recently reintroduced the Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2019, also known as the BOSS ACT. Among other requirements related to ticketing scarcity and resale, this bill would also require initial full disclosure of total ticket prices and the elimination of the dripping of additional fees later in the shopping process, in both the primary and secondary ticket markets (NCL Communications 2019). Additionally, in October 2019, two members of Congress introduced the Hotel Advertising Transparency Act of 2019, which would require advertised hotel prices to include any mandatory fees other than taxes (Sampson 2019).

1.1.2. Related Literature. Given the current debate and regulatory activity surrounding drip pricing, it is critical to understand its effects on consumers. Findings from the hidden fees (Grossman 1981, Milgrom 1981), after markets (Waldman 2012), obfuscation (Ellison and Ellison 2009), and shrouding (Gabaix and Laibson 2006) literatures are useful in understanding some effects of drip pricing. This research has developed economic models of a market in which one of these pricing strategies is used and then examined the subsequent effect on market structure, consumer demand, and competition. Models that assume that consumers have rational expectations about unadvertised prices conclude that, as long as there are no costs associated with disclosing information about add-on prices, consumers will not be harmed because they will assume high add-on prices, which will dampen demand (Grossman 1981, Milgrom 1981, Sullivan 2017). However, subsequent models showed that if some consumers do not have rational expectations (i.e., "myopes" or naïve consumers) and do not fully anticipate that there will later be add-on fees (Gabaix and Laibson 2006) or do not fully process add-on fees, they will underestimate total costs (Chetty et al. 2009, Farrell 2012) and can be harmed by paying higher prices than they otherwise would have (Sullivan 2017). However, little empirical work has examined whether these predictions actually manifest in the marketplace. One notable exception is Seim et al. (2017b), which provides empirical support for the notion that, when consumers are inattentive (which survey data suggest a sizeable segment of consumers are with respect to add-on fees) and the marketplace is competitive, firms have an incentive to set low base prices but high add-on prices.

Many of the presumed effects of drip pricing on consumers are informed by research on partitioned pricing (Morwitz et al. 1998), which is a pricing practice whereby firms separate mandatory—not optional—surcharges from base prices. In most partitioned pricing research, the base prices and surcharges are presented simultaneously (a key distinction from drip pricing). This body of research largely shows that when prices are partitioned (versus not), consumers do not pay full attention to the surcharges, they underestimate total prices, and on average, they are more likely to purchase (Morwitz et al. 1998, Chakravarti et al. 2002, Lee and Han 2002, Xia and Monroe 2004, Chetty et al. 2009, Greenleaf et al. 2016, Abraham and Hamilton 2018).

In contrast to partitioned pricing, drip pricing involves a sequential process, whereby the base price is revealed first, and then the add-ons prices are revealed later (e.g., on subsequent pages). Although drip pricing can involve mandatory or optional add-ons, the few experimental studies that have compared drip to partitioned pricing have used mandatory surcharges, and some have found that drip pricing results in lower purchase intentions (Robbert and Roth 2014, Robbert 2015). These studies also found that drip pricing leads to more accurate total price estimates (although total prices are still underestimated), higher perceptions of price unfairness, and stronger feelings of deception. However, in other experimental work, Huck and Wallace (2010) found that dripping mandatory surcharges (versus partitioned pricing) resulted in lower search, more purchasing, and suboptimal decisions, even with experience, and analysis of field data provides evidence that drip pricing leads to increased purchasing and the purchasing of more expensive products (Blake et al. 2018). Because the drip pricing findings are mixed, more research is clearly needed.

It is important to make clear that optional add-ons can be part of á la carte pricing or price customization strategies, which can be valid methods for capturing consumer heterogeneity in preferences for such add-ons (Shelanski et al. 2012). Our focus is not on how consumers react to the mere inclusion or exclusion of optional surcharges from the base price. Rather, we focus on the temporal aspect of the surcharge disclosure—whether information about surcharges for optional add-ons is provided up front or whether it is dripped during the purchase process—and the impact this has on consumers.

1.1.3. Predictions. When a firm uses drip pricing, consumers become aware of the surcharges for the optional add-ons only after they have initially made a selection and begun to proceed through the purchasing process. Even if disclosures are provided, such as "additional surcharges may apply," consumers may not fully attend to the disclosure or may underestimate the magnitude of those surcharges (Chetty et al. 2009, Farrell 2012, Seim et al. 2017b). Because consumers may not fully anticipate the optional surcharges, we make the straightforward assumption that, holding all else constant, consumers exposed to drip pricing will initially be more likely to select the option with the lowest *base* price, considering that that is the only information they have at that time (Greenleaf et al. 2016). In contrast, when drip pricing is not used, and consumers are presented with information about optional surcharges up front, at the beginning of the purchase process, they will use this information when making their initial selections. Therefore, when the surcharges are presented up front, we instead predict that, holding all else equal, consumers will initially be more likely to select the option with the lowest *total* price (base + optional

surcharges), based on their preferences for optional add-ons.

Firms that use drip pricing would likely argue that consumers' initial choices are inconsequential, considering that all surcharges and total prices are eventually revealed and consumers always have the opportunity to abandon their initial choice and start over. As such, consumers' *ultimate* (versus initial) choices are what matter. We make a new contribution to the drip pricing literature by focusing on this very question. That is, what happens when consumers are given the opportunity to abandon an initial decision and restart their search? We posit that, in general, consumers will be resistant to changing their initial selections and, as a result, these initial selections will tend to be sticky. We therefore predict that consumers exposed to drip pricing will also be more likely to *ultimately* select the lower base price option. Note that firms can strategically set prices so that their option has the lowest base price but will ultimately be more expensive than a higher base price option if add-ons are selected. We predict that, in these contexts, consumers exposed to drip pricing will be more likely to make a financial mistake, paying more than necessary given their selected add-ons. Finally, we also examine the impact of drip pricing on consumer satisfaction, considering that it may lead consumers to be more likely to select less satisfying options and because exposure to dripped surcharges may be unpleasant in and of itself (Lambrecht and Skiera 2006). We test and find support for our predictions in studies 1a, 1b, and 1c, which were designed to demonstrate these basic effects.

Our next block of studies (studies 2–4) explores why consumers exposed to drip pricing ultimately select an option with a lower base price even if, when all add-on fees are included, it ends up being more expensive and even if they are relatively dissatisfied with it. In our studies, and in the real world, consumers are given the information and opportunity to make a change before committing to a final choice with drip pricing. However, we predict that, in general, consumers will not take advantage of this opportunity to change their selection. Studies 2–4 draw on participants' self-reports, economics, and consumer psychology to explore the role that the perceived costs and benefits of switching play in consumers' ultimate purchase decisions.

Overall, we argue that consumers may hold the view that the costs (time, effort, or psychological) of switching outweigh its potential benefits. First, on the cost side of this trade-off, consumers may believe that the actual or the psychological costs of switching are substantial and not worth the potential benefits. In study 2, we test this by examining whether consumers are less likely to make financial mistakes in their decision process when we reduce search costs. In study 3, we examine the possible role of psychological costs to the self, namely, having to admit to oneself that he or she has made a mistake (i.e., self-justification; Festinger 1957, Aronson 1976).

We also consider whether consumers' tendencies to ultimately select the more expensive option with drip pricing are due to misperceptions regarding the benefits of restarting the search process. More specifically, consumers may hold the view that the potential benefits to be gained from restarting search are minimal. One reason this may occur is that consumers may hold strong prior beliefs that all firms charge for similar optional add-ons and/or that the magnitude of the surcharges for these optional add-ons are similar across firms. Thus, consumers may assume that there is no point in restarting their search and changing their selection—even if they are frustrated by the optional surcharges—because selecting another option is not likely to save them money (i.e., because the other option is also likely to charge for the optional add-ons) but will certainly increase their (search) costs (Fletcher 2012). We test this account in study 4 by manipulating these beliefs.

Because we believe that all of these processes are plausible and may jointly operate, we independently test their possible roles in explaining why consumers exposed to drip pricing ultimately select more expensive options. Before presenting the studies, we begin with an overview of our experimental paradigm, because our experimental design is similar across all of the studies.

2. Overview of the Experimental Paradigm

Each study had three parts. In part 1, participants read a purchase scenario and made a choice between two options (e.g., Airline A and Airline B). In part 2, they selected any optional add-ons they wanted to add to their purchase (e.g., baggage, reserved seat). Participants were next provided with the total price of their purchase and were given the opportunity either to complete the transaction or to start over. If they decided to start over, they returned to the initial choice page and went through the entire purchase process again. Once participants completed the transaction, their choice at that stage was considered to be their ultimate choice and their total price was determined (thus allowing us to determine whether a financial mistake had been made). They then moved on to part 3, in which their satisfaction with their choice was measured. This design allowed us to examine the effect of drip (versus nondrip) pricing on participants' initial choices, decisions regarding whether to start over,

their ultimate choices, financial mistakes, and satisfaction regarding their choices.

In addition, and importantly, in four of the six studies, participants' choices were consequential. Specifically, in studies 1a, 2, and 4, participants received bonuses that were contingent on their spending, with larger bonuses going to those who spent less. In study 1c, participants were entered into a lottery to actually receive their selection. Also, as our focus is on optional surcharges, in all studies but one (study 3, in which we hold the add-ons constant for comparability across conditions), participants could freely select any add-ons that they wanted.

2.1. Part 1: Initial Choice

In studies 1a, 1b, 2, and 3, the scenario involved booking a flight for a beach vacation with friends. To ensure that our results generalize to another context, for the last study in each block (i.e., study 1c in the demonstration study block and study 4 in the process study block) the context instead was that of selecting a hotel for a local staycation.

For both contexts, participants were presented with information about the base prices (which included mandatory taxes and fees) for two different offerings, with one base price greater than the other (e.g., in study 1a, the base prices were $239 for one airline and $194 for the other). Participants were informed that additional surcharges for optional add-ons may apply for the option with the lower base price. (These options were all included in the base price of the higher base price option.) Based on random assignment, these additional surcharges either were presented directly beneath the base prices (nondrip condition) or were dripped (drip condition) over several subsequent pages. Participants next selected one of these options. Thus, participants in the nondrip condition saw all of the surcharges prior to making their initial choice between the options. In contrast, in the drip condition, participants saw them only after making their initial selection.

2.2. Part 2: Optional Add-Ons, Opportunity to Start Over, and Ultimate Choice

Participants next decided whether to purchase any optional add-ons. The add-ons and their prices were presented one at a time, each on a different screen. For example, in studies 1a and 1b, participants were first asked whether they wanted to add a carry-on or checked bag for each leg of their journey ($28 for a carry-on and $30 for a checked bag each way for the lower base price option; both were included in the base price for the higher base price option) and, after, were asked if they wanted to reserve a seat for each leg of the journey ($18 each way for the lower base price option; included in the base price for the higher base price option). In three of the studies (studies 1a, 1b, and 2), participants were presented with running total prices that were updated after each add-on was selected. Table 1 shows the base prices and the prices for the optional add-ons for all studies.

After adding the optional add-ons, all participants were presented with the final total price for their selected option. Participants were then given the opportunity to complete the transaction or start over. Those who elected to start over returned to the initial choice page—where they could select either option—and went through the entire purchase process again. When participants elected to complete the transaction, we recorded their choice as their ultimate (versus initial) choice.

2.3. Part 3: Satisfaction with Choice

Last, participants indicated their satisfaction with their chosen option. Specifically, they were asked the following questions on seven-point scales with 1 = extremely unlikely and 7 = extremely likely (with modified wording for the hotel scenarios): "How likely are you to fly this airline again?"; "How likely are you to recommend this airline to your friends and family?"; "How likely are you to tell others about your purchase experience with this airline?"; and "If you were presented with the same choice of airlines again, how likely would you be to switch your choice?" (reverse coded). In addition, in the hotel studies (studies 1c and 4), participants were also asked their level of agreement (1 = strongly disagree, 7 = strongly agree) with the following statements: "I feel good about the hotel that I chose," "I regret choosing this hotel," and "The hotel's pricing is deceptive. These last two items were reverse coded." Participants then responded to demographic questions, such as gender and age.

Note that as we present the details for each study in the sections that follow, we focus the procedure sections on the aspects of that study that depart substantially from this basic paradigm. Detailed materials for each study, including the full scenarios, are available in the online appendix.

A few additional points are worth mentioning. First, consistent with how some firms behave, all of the studies reported in the paper were designed such that the lower base option would become more expensive than the higher base option if commonly accepted add-ons were included. Second, the surcharge information is only dripped but not otherwise shrouded (e.g., presented in small font or hidden with other information). Third, we examine only optional add-ons that are paid for at the same time as, and along with, the base price (though, in the real

Table 1. Pricing Structure for Lower Base Price Option and Higher Base Price Option Across Studies

Studies 1a and 2	Base fare	Carry-on bag (each way)	Checked bag (each way)	Reserved seat (each way)	Ship luggage with FedEx	Purchase new clothes	Carry-on bag/checked bag paid for prior to departure	Carry-on bag/checked bag paid for at gate
Lower base price option	$194	$28	$30	$18	$25	$80	$40	$60
Higher base price option	$239	$0	$0	$0	$25	$80	$0	$0

Study 1b	Base fare	Carry-on bag (each way)	Checked bag (each way)	Reserved seat (each way)
Lower base price option	$194	$28	$30	$18
Higher base price option	$239	$0	$0	$0

Study 1c	Base price	Wi-Fi	Breakfast buffet	Self-parking	Gym, pool, spa access
Lower room rate	$227	$13	$30	$38	$25
Higher room rate	$239	$0	$0	$0	$0

Study 3	Base fare	Carry-on bag (each way)*	Checked bag (each way)	Reserved seat (each way)*
Lower base price option	$194	$28	$30	$18
Higher base price option	$239	$0	$0	$0

Study 4	Base fare	Wi-Fi	Breakfast buffet	Self-parking	Gym, pool, spa access
Lower room rate	$240	$15	$20	$20	$25
Higher room rate	$255	$0	$0	$0	$0

*Participants in study 3 were instructed to select these options.

world, some add-ons become available only after purchase, such as buying minibar items in a hotel). In addition, our participants are relatively inexperienced consumers versus experts with significant relevant experience.

3. Study 1a

Study 1a uses a consequential choice to provide a first test of the impact of drip pricing on participants' initial and ultimate choices, likelihood of making a financial mistake, and choice satisfaction. We also explore why some participants elected not to start over when given that opportunity.

3.1. Methods

3.1.1. Participants and Design. Four hundred eight Amazon Mechanical Turk (mTurk) workers (57.7% female, M_{Age} = 38.70, SD_{Age} = 12.73) completed this study for $1.00 plus a potential bonus (explained next). Participants were randomly assigned to either the drip or the nondrip surcharge presentation condition in a two-cell between-subjects design.

3.1.2. Procedure. Participants were asked to imagine that they had decided to take a three-night beach vacation with friends and that they needed to book a round-trip airline ticket for themselves to the destination. To make participants' airline choices consequential, we informed them that they had a budget of $300 for their airfare and associated purchases (i.e., baggage and seat fees) and that they would receive a bonus on mTurk of $0.01 for every $1 of their $300 budget that they did not spend on their flight and associated purchases. For example, a participant who booked a flight for $280 would receive a

bonus of $0.20. Thus, participants had a financial incentive to book the airline option that resulted in the lowest total price.

Participants saw two airline options: a higher base fare ($239) and a lower base fare ($194) option and were asked to choose one. The lower base fare option had an asterisk next to it, which informed participants that additional baggage and seat surcharges may apply for it. Whereas in the nondrip condition these additional surcharges were presented directly below the base fares, in the drip condition, they were revealed only to those participants who selected the lower base fare airline after they made their initial choice.

After making their initial airline choice, participants were presented with the optional add-ons (i.e., a carry-on bag, a checked bag, and a reserved seat) for each leg of the journey and selected the ones that they wanted. Participants were presented with running total prices for their choice, which were updated each time an optional add-on was selected, throughout this process.

After selecting add-ons, participants were presented with the final total price of their chosen airline and were given the opportunity to either start over or complete their purchase. Those who decided to start over returned to the initial page with the two airline options and restarted the purchase process. For those who decided to complete their purchase, one of two things happened. Participants who had selected a baggage option (i.e., either a carry-on or a checked bag) for each flight leg were immediately directed to a "customer satisfaction survey" and responded to the first four questions listed in Section 2.3. However, to prevent mTurk participants from bypassing the baggage options simply to increase their bonuses, and given that very few travelers can feasibly embark on a three-day vacation without any luggage, participants who had not selected either a carry-on or a checked bag for one or both flight legs were notified about this and given a number of options for getting their belongings to and/or from the destination (with prices based on research of the typical market prices for these options). Specifically, participants could ship their belongings to and/or from their destination with FedEx for $25 (each way); they could add a carry-on or checked bag for either or both of their flights ($0 for higher base fare airline, $40 for lower base fare airline—consistent with the practice of increasing the prices of add-ons added after the initial booking process has been completed); or they could purchase new clothes at the destination for $80. Note that participants had the option to leave their clothing and/or luggage at their destination (for $0) and to not bring them on the return flight. After participants made these selections, they were asked whether they wanted to complete their airline purchase or start the entire purchase process over again from the beginning. Participants who elected to start over were returned to the start of the purchase process, whereas those who decided to complete their purchase were then presented with the customer satisfaction survey.

Finally, participants who did not elect to start over at any stage were asked their level of agreement with a series of statements in order to probe why they had made that decision. These statements included the following: "Most airlines charge extra fees for baggage and selecting a specific seat," "Starting over would take too much time," "I think I got a good deal on this airline ticket," and "The extra fees that airlines charge are pretty much the same for all airlines" (1 = strongly disagree and 7 = strongly agree). The complete set of questions is available in the online appendix. In addition, to assess these participants' perceptions of the costs and benefits of starting over, they were asked how long they thought it would have taken them to start over, as well as how much money they thought they could have saved by starting over (from $0 to $100).

3.2. Results and Discussion

For this first study, we present the full details for all of the analyses conducted. Because similar analyses were conducted for the subsequent studies and the results were largely consistent across studies, the results sections for the subsequent studies contain less detail to minimize redundancy. However, Table 2 and Online Appendix Tables W1 and W2 include additional details for all of the studies. Also, note that for all binary logistic regressions, 0 = nondrip condition and 1 = drip condition for the surcharge presentation factor, and 0 = higher base price option and 1 = lower base price option for the choice dependent variable.

3.2.1. Airline Choice. A binary logistic regression revealed a significant effect of surcharge presentation on initial choice (B = 2.21, SE = 0.26, Wald = 72.41, $p < 0.001$). Not surprisingly, as price was the only information provided about the two options, participants in the drip condition (54.5%) were significantly more likely to initially select the lower base fare airline than were those in the nondrip condition (11.7%).

More importantly, few participants (only 15.9%, $n = 65$) decided to start over when given that opportunity. The results of a binary logistic regression showed that a larger percent of participants decided to start over in the drip (25.2%) than in the nondrip condition (6.8%; B = 1.53, SE = 0.32, Wald = 22.85, $p < 0.001$). This effect was mediated by initial airline choice ($Z_{Mediation} = 4.52$, $p < 0.001$; Iacobucci 2012). Thus, whether the optional surcharges were dripped or not had an effect on participants' initial airline choice, which, in turn, affected whether they started over. Indeed, whereas only 6.2% of participants who selected

Table 2. Initial Choice, Start-Over Decision, Ultimate Choice, Price, Mistake, and Overall Satisfaction Results Across Studies

	Drip/nondrip condition		% Initially selecting lower base option	Test statistic (0 = non-drip, 1 = drip)	% Starting over	Test statistic (0 = non-drip, 1 = drip)	% Ultimately selecting lower base option	Test statistic (0 = non-drip, 1 = drip)	Mean price of selected option (SD)	Test statistic	% Making mistake	Test statistic (0 = non-drip, 1 = drip)	Mean overall satisfaction with selection (SD)	Test statistic
Study 1a	Drip		54.5	B = 2.21, SE = 0.26, Wald = 72.41, $p < 0.001$	25.2	B = 1.53, SE = 0.32, Wald = 22.85, $p < 0.001$	36.5	B = 1.62, SE = 0.27, Wald = 35.27, $p < 0.001$	$248.64 (19.84)	$t(404) = 4.55$, $p < 0.001$	24.5	B = 1.34, SE = 0.31, Wald = 19.04, $p < 0.001$	5.39 (1.15)	$t(403) = 4.30$, $p < 0.001$
	Nondrip		11.7		6.8		10.2		$241.60 (9.84)		7.8		5.83 (0.92)	
Study 1b	Drip		49.3	B = 1.68, SE = 0.24, Wald = 47.68, $p < 0.001$	9.0	B = 1.32, SE = 0.52, Wald = 6.58, $p = 0.010$	41.8	B = 1.38, SE = 0.25, Wald = 31.82, $p < 0.001$	$237.11 (25.75)	$t(395) = 1.39$, $p = 0.165$	17.9	B = 0.83, SE = 0.31, Wald = 7.04, $p = 0.008$	5.24 (1.18)	$t(395) = 3.02$, $p = 0.003$
	Nondrip		15.3		2.6		15.3		$240.37 (20.50)		8.7		5.57 (1.00)	
Study 1c	Drip		31.9	B = 1.88, SE = 0.68, Wald = 7.78, $p = 0.005$	0.0	N/A	31.9	B = 1.88, SE = 0.68, Wald = 7.78, $p = 0.005$	$245.40 (15.87)	$t(91) = 0.90$, $p = 0.370$	27.7	B = 1.70, SE = 0.68, Wald = 6.25, $p = 0.012$	5.73 (0.99)	$t(91) = 0.58$, $p = 0.563$
	Nondrip		6.5		0.0		6.5		$242.54 (14.75)		6.5		5.84 (0.92)	
Study 2	Drip	Alternative price absent	37.3		21.5		22.8		$243.39 (14.90)		15.2		5.41 (1.11)	
		Alternative price present	38.7	B = 1.89, SE = 0.29, Wald = 42.08, $p < 0.001$	30.9	B = 1.38, SE = 0.33, Wald = 17.39, $p < 0.001$	16.4	B = 1.46, SE = 0.33, Wald = 19.32, $p < 0.001$	$241.70 (15.64)	$F(1, 782) = 1.14$, $p = 0.287$	6.9	B = 1.21, SE = 0.38, Wald = 10.40, $p = 0.001$	5.54 (1.08)	$F(1, 783) = 23.92$, $p < 0.001$
	Nondrip	Alternative price absent	8.3		6.4		6.5		$241.26 (11.68)		5.1		5.85 (1.00)	
		Alternative price present	8.3		7.3		7.3		$241.77 (11.44)		6.2		5.84 (1.05)	
Study 4	Drip	Similar surcharges	19.6		8.4		19.6		$256.56 (11.64)		9.6		5.64 (1.04)	
		Different surcharges	23.7	B = 1.49, SE = 0.52, Wald = 8.23, $p = 0.004$	12.9	B = 0.51, SE = 0.58, Wald = 0.79, $p = 0.373$	22.8	B = 1.13, SE = 0.46, Wald = 6.02, $p = 0.014$	$256.96 (13.26)	$F(1, 391) = 0.04$, $p = 0.846$	13.0	B = 1.59, SE = 0.79, Wald = 4.06, $p = 0.044$	5.43 (1.15)	$F(1, 395) = 2.87$, $p = 0.091$
	Nondrip	Similar surcharges	5.2		5.2		7.3		$254.68 (4.36)		2.1		5.72 (1.00)	
		Different surcharges	9.6		6.8		9.8		$258.38 (13.75)		7.8		5.70 (1.08)	

Note. Study 3, which involved a different paradigm which would make meaningful comparisons difficult, is not included in this table.

the higher base fare airline decided to start over, 35.8% of those who selected the lower base fare airline started over.

After factoring in those who started over and changed their airline selection, a logistic regression on final airline choice revealed a significant effect of surcharge presentation (B = 1.62, SE = 0.27, Wald = 35.27, $p < 0.001$). Even after having the opportunity to switch their airline choice, participants in the drip condition (36.5%) were significantly more likely to ultimately select the lower base fare airline than were those in the nondrip condition (10.2%).

3.2.2. Percentage Making Financial Mistake. Whereas, in general, selecting a lower base fare airline is not inherently a financial mistake, given the prices we used, for many participants it did end up ultimately being more expensive than the higher base fare airline once the selected add-on surcharges were included. Although it was theoretically possible for participants to select the lower base fare airline and not make a financial mistake (i.e., if they selected to bring a carry-on or checked bag to the destination—or to ship their belongings to the destination—and then to leave their belongings behind at the destination), given the specific base and add-on prices, and the requirement that some money be spent to have clothing at the destination, most participants who selected the lower base price option did make a financial mistake. Overall, significantly more participants in the drip (24.5%) than in the nondrip (7.8%) condition made a financial mistake by selecting the option that, given the selected optional add-ons, was more expensive than the alternative (B = 1.34, SE = 0.31, Wald = 19.04, $p < 0.001$). Table 2 includes the average prices participants paid for their choices by condition for this and all studies.

3.2.3. Downstream Consequences—Overall Satisfaction. As an exploratory factor analysis (with varimax rotation) on the four satisfaction measures revealed that all four items loaded on a single factor (eigenvalue = 2.57, 64.2% of the variance explained), we averaged them to create a single measure of participants' choice satisfaction ($\alpha = 0.69$). An independent-samples t-test on this measure revealed a significant effect of surcharge presentation ($t(403) = 4.30$, $p < 0.001$). Participants in the nondrip condition (M = 5.83, SD = 0.92) were significantly more satisfied with their final choice than were those in the drip condition (M = 5.39, SD = 1.15).

Importantly, a mediation analysis (Iacobucci 2012) revealed that this result was mediated by ultimate airline choice, as there was a significant indirect effect of surcharge presentation on choice satisfaction through ultimate airline choice ($Z_{Mediation} = -5.25$, $p < 0.001$). The reason why satisfaction was lower in the drip condition was because whether the optional surcharges were dripped or not affected participants' ultimate choice which, in turn, affected their choice satisfaction. Indeed, participants who ultimately selected the lower base fare airline reported being significantly less satisfied (M = 4.60, SD = 1.09) than those who selected the higher base fare airline (M = 5.92, SD = 0.84; $t(403) = 12.36$, $p < 0.001$). Thus, drip pricing led participants to be more likely to select the lower base option, and that option led to lower satisfaction.

3.2.4. Reasons for Not Switching. Last, we examined why those participants exposed to drip pricing who initially selected the lower base fare airline decided to stick with their choice (rather than restart) even though for most (66.7%) their choice was more expensive than the other option, and they were relatively dissatisfied with it. Of the six potential reasons, participants expressed agreement with a statement suggesting that perceived costs played a role—specifically, that starting over would take too much time (M = 4.88, SD = 1.73). They also agreed with several statements suggesting that the benefits to be gained might be minimal: that most airlines charge extra fees for baggage and selecting a specific seat (M = 4.98, SD = 1.33), that the extra fees that airlines charge are similar across all airlines (M = 4.65, SD = 1.41), and that the price for their choice was satisfactory (M = 4.78, SD = 1.48). Note that they held these beliefs about the extra fees even though we provided a disclosure to participants when they made their initial choice that optional surcharges only applied to the lower base price option. Overall, these responses suggest that participants decided to not start over because they saw little value in doing so—as it would be costly in terms of time and would yield little financial gain (because all airlines charge similar extra fees).

However, these participants both overestimated the cost and underestimated the benefit of starting over. Indeed, after eliminating two extreme outliers (>1,799 seconds), these participants, on average, thought it would take significantly more time to start over (about 5.5 minutes; M = 341.26 seconds, SD = 243.56), than it actually took for the comparable participants who did start over (about 1.25 minutes; M = 74.70 seconds, SD = 91.60; $t(99) = 6.89$, $p < 0.001$). They also expected to save significantly less money (M = \$15.14, SD = 14.82) than was actually saved by those who did start over (M = \$26.31, SD = 36.55; $t(96) = 2.07$, $p = 0.041$).

3.2.5. Discussion. Study 1a provides initial support for our predictions. Participants in the drip surcharge condition were more likely to both initially and ultimately choose the lower base fare option and, given their add-on choices, were more likely to make a financial mistake than

those in the nondrip condition. In addition, participants in the drip condition were significantly less satisfied with their airline choice. Thus, it appears that dripping optional surcharges may not only harm consumers through increased financial and search costs, but it may also lead them to make decisions with which they are less satisfied.

It is important to note that although the stickiness of the initial decision is what leads participants exposed to drip pricing to be more likely to make a financial mistake, it is not drip pricing itself that leads to initial choice stickiness. Indeed, participants in both conditions were reluctant to restart search, consistent with a general status quo bias or a preference for the current state of affairs relative to any change in that state (Kahneman et al. 1991). In fact, those in the drip condition were more likely to start over after being exposed to the optional surcharges and the final total price than were those in the nondrip condition. Yet importantly, overall, relatively few participants elected to start over when they were given the opportunity to do so. As a result, given their initial choices, participants exposed to drip (versus nondrip) surcharges were significantly more likely to ultimately make a mistake by selecting the option that was more expensive given the optional add-ons that they selected.

The results from study 1a also provide some initial evidence for what drives the effect of drip pricing on choices. Specifically, participants exposed to drip pricing who initially selected the lower base fare airline and decided to complete the transaction rather than start over, reported that they did so primarily because they mistakenly believed that the costs of starting over outweighed the potential benefits. These misperceptions had real consequences. Indeed, these participants bypassed an opportunity to increase their bonus, in just over a minute, by more than $0.25, on average (an extremely good rate for Amazon mTurk workers). In studies 2–4, we manipulate the benefits and costs of starting over to experimentally test whether these perceptions help explain why drip pricing leads to financial mistakes.

One limitation of this study (and of all our studies) is that one could argue that, given our experimental design and initial base prices, the comparisons we make are not appropriate. Specifically, given the experimental design, participants could make financial mistakes for different reasons. In particular, participants in the nondrip condition had full price information at the time of their initial decision, so if they made a mistake by choosing a more expensive option, it is likely the result of inattention or mistakes in processing the price information. In contrast, in the drip condition, making an initial mistake was likely the result of actually paying full attention to the price information, as the lower base option appeared to be the cheaper option given the limited price information available at that stage.

Given this full price information asymmetry across conditions, we also compared the percent of participants who made a financial mistake, given their add-on preferences, across the conditions, based on when they had full information. In the nondrip condition, participants had full information prior to making their initial choice, and 9.3% made a financial mistake (based on their later-revealed add-on choices) with this choice. In contrast, in the drip condition, participants had full information only after their initial choice was made and they went through the add-on selection process; at this stage, 24.5% made a financial mistake with their ultimate choice. Thus, even when we focus on comparing participants based on when they had full price information, those in the drip pricing condition were more likely to make a financial mistake than those in the nondrip condition, consistent with our arguments. This is despite the fact that those in the drip condition who made a financial mistake were likely more attentive to price information than those in the nondrip condition who made a financial mistake.

Study 1a had several other limitations that are worth noting. First, because we required participants to pay for some means by which to get clothes to their destination, one could argue that, in this study, some of the add-ons were more mandatory than optional in nature. Second, some of the options that we provided for how participants could get clothes to their destinations were not very realistic and are likely infrequently used by real travelers. Third, although we accounted for the monetary costs of the options—such as shipping or shopping for clothes—we did not consider the nonmonetary time costs associated with these same options. Finally, although incentive-compatible experimental designs offer many advantages, in this instance, it may have encouraged participants to make decisions that would maximize their bonus, rather than to reflect the decisions that they actually would make in the real world.

To address these limitations, we ran study 1b in which we again manipulated whether surcharge information was dripped or not, but we no longer required participants to pay for some way to get their clothes to the destination (directly or indirectly). We also removed the incentive compatibility and simply asked participants to report what they normally do when they travel.

4. Study 1b

Study 1b is similar to study 1a, except that we allowed participants to freely choose all of their add-ons (versus directly or indirectly forcing them to choose to bring luggage or pay to ship or obtain clothes). One other difference from study 1a is that this study was not

incentive compatible, which removed any financial incentive for participants to select low-cost options that were not consistent with what they would normally select. Finally, we did not measure participants' reasons for not starting over when given that opportunity.

4.1. Methods

4.1.1. Participants and Design. Three hundred ninety-seven Amazon mTurk workers (42.6% female, M_{Age} = 34.85, SD_{Age} = 10.32) completed this study for $1.00. Participants were randomly assigned to one of two surcharge presentation conditions (drip versus nondrip).

4.1.2. Procedure. The procedure in this study was similar to that in study 1a except that this study was not incentive compatible and everyone was free to select, or reject, any add-ons that they wanted.

4.2. Results and Discussion

4.2.1. Airline Choice. A binary logistic regression revealed a significant effect of surcharge presentation on initial choice (B = 1.68, SE = 0.24, Wald = 47.68, $p < 0.001$). Replicating the findings of study 1a, participants in the drip condition were significantly more likely to initially select the lower base fare airline (49.3%) than were those in the nondrip condition (15.3%).

Also, as in study 1a, few participants (only 5.8%, $n = 23$) decided to start over when given that opportunity. The results of a binary logistic regression showed that significantly more participants decided to start over in the drip surcharges condition (9.0%) than in the nondrip condition (2.6%; B = 1.32, SE = 0.52, Wald = 6.58, $p = 0.010$). Initial airline choice again mediated the effect of surcharge presentation on whether participants started over ($Z_{Mediation} = 3.44$, $p < 0.001$; Iacobucci 2012). Thus, whether the optional surcharges were dripped or not again affected participants' initial airline choices which, in turn, affected whether they started over. Specifically, whereas only 1.1% of participants who selected the higher base fare airline decided to start over, 15.5% of those who selected the lower base fare airline started over.

After factoring in those who started over and changed their airline selection, a logistic regression on ultimate airline choice revealed a significant effect of surcharge presentation (B = 1.38, SE = 0.25, Wald = 31.82, $p < 0.001$). Even after having the opportunity to switch their airline choice, participants in the drip condition (41.8%) were significantly more likely to ultimately select the lower base fare airline than were those in the nondrip condition (15.3%).

4.2.2. Percentage Making Financial Mistake. Significantly more participants in the drip (17.9%) than in the nondrip condition (8.7%) made a financial mistake by selecting the option that, given the selected optional add-ons, was more expensive than the alternative (B = 0.83, SE = 0.31, Wald = 7.04, $p = 0.008$).

4.2.3. Downstream Consequences—Overall Satisfaction. An independent-samples t-test on the same satisfaction measure as in study 1a revealed a significant effect of surcharge presentation ($t(395) = 3.02$, $p = 0.003$). Participants in the nondrip condition (M = 5.57, SD = 1.00) were significantly more satisfied with their final choice than were those in the drip condition (M = 5.24, SD = 1.18).

The effect of surcharge presentation on satisfaction was mediated (Iacobucci 2012) by ultimate airline choice ($Z_{Mediation} = -4.56$, $p < 0.001$). Whether the optional surcharges were dripped or not affected participants' ultimate choice, which, in turn, affected their choice satisfaction. Indeed, participants who ultimately selected the lower base fare airline reported being significantly less satisfied (M = 4.72, SD = 1.01) than those who selected the higher base fare airline (M = 5.68, SD = 1.02; $t(395) = 8.49$, $p < 0.001$).

4.2.4. Results of Combined Analysis of Study 1a and Study 1b Data. We next conducted a combined analysis of the data from studies 1a and 1b to help determine whether the findings from study 1a were driven by the experimental design itself (i.e., the fact that the add-ons were not, strictly speaking, optional, and the use of some potentially unrealistic options for transporting clothing to the destination, which also may have included nonmonetary costs for which we did not account) or because of the incentive compatibility. To that end, we combined the data from these two studies and conducted all the same analyses as reported above (i.e., initial airline choice, likelihood to start over, ultimate airline choice, likelihood to make a financial mistake, and choice satisfaction) on the combined data. In addition to surcharge presentation, we included a dummy variable for study and an interaction term (i.e., study dummy by surcharge presentation) as independent variables. We examined the interaction of surcharge presentation and the study dummy to see if the results varied significantly across these two studies. If not, we can be more confident that the results are not an artifact of these concerns regarding the design of study 1a.

The results of the combined analysis replicated all the prior findings and, because none of the interactions terms were significant, suggest that the results of study 1a were not an artifact of its specific design. Specifically, surcharge presentation significantly affected initial choice, with participants in the drip condition being more likely to initially select the lower base fare airline (51.8%) than were those in the nondrip condition (13.6%; B = 2.21, SE = 0.26,

Wald = 72.41, $p < 0.001$). No other effects on initial choice were significant (p's > 0.119). Overall, few participants decided to start over (only 10.8%, $n = 88$). Participants were significantly more likely to start over in the drip surcharges condition (17.3%) than in the nondrip condition (4.9%; B = 1.53, SE = 0.32, Wald = 22.85, $p < 0.001$) and marginally more likely to start over in study 1a (15.9%) than in study 1b (5.8%; B = −0.86, SE = 0.50, Wald = 3.00, $p = 0.083$), but the interaction was not significant ($p = 0.576$).

After factoring in those who started over and changed their airline selection, participants in the drip condition (39.0%) were significantly more likely to ultimately select the lower base fare airline than were those in the nondrip condition (13.0%; B = 1.62, SE = 0.27, Wald = 35.27, $p < 0.001$). In addition, participants were marginally more likely to select the lower base fare airline in study 1b (28.7%) than in study 1a (23.2%; B = 0.51, SE = 0.30, Wald = 2.90, $p = 0.088$), but the interaction was not significant ($p = 0.399$).

Moreover, participants in the drip condition (21.7%) were significantly more likely than those in the nondrip condition (7.4%) to make a financial mistake by selecting the option that, given the selected optional add-ons, was more expensive than the alternative (B = 1.34, SE = 0.31, Wald = 19.04, $p < 0.001$). No other effects on financial mistake were significant (p's > 0.636).

Finally, participants in the nondrip condition (M = 5.72, SD = 0.96) were significantly more satisfied with their final choice than were those in the drip condition (M = 5.29, SD = 1.16; $F(1, 801) = 31.89$, $p < 0.001$). We also found that participants in study 1a (M = 5.61, SD = 1.06) were significantly more satisfied with their final choice than were those in study 1b (M = 5.40, SD = 1.10; $F(1, 801) = 7.83$, $p = 0.005$). But, as with all the prior analyses, the interaction was not significant ($F(1, 801) = 0.08$, $p = 0.779$).

4.2.5. Discussion. The results of study 1b replicate all of the findings from study 1a. This fact, along with the results of the analyses of the combined data set, increases our confidence that the observed effects of drip pricing manifest when consumers have free choice regarding which optional add-ons to include in their purchase. Although we did observe a few small differences between the studies in terms of the likelihood to restart search, to ultimately select the lower base fare option, and in satisfaction, none of the surcharge presentation by study dummy coefficients were significant, suggesting that, overall, the impact of drip pricing on consumers' reactions did not depend on specific design factors of these studies.

One limitation of both study 1a and study 1b was that, by design, and given the specific prices we used for the base fares and the add-ons, for most participants choosing the lower base option was inherently ultimately more expensive than the higher base option and, thus, a financial mistake. Although our primary interest is exactly these types of situations—specifically, ones in which a firm strategically sets its base prices to appear cheaper than a competitor—our design does not allow us to determine whether the other effects of drip pricing (i.e., the effects on market share for lower base price options and satisfaction) generalize to contexts in which choosing the lower base option is not necessarily a financial mistake. To provide some insight into this, we ran a follow up study that is reported in the online appendix. Specifically, in web study 1, we used the same incentive compatible procedure as we did in study 1a, but we varied the magnitude of the difference in base prices between the two flight options such that in some conditions choosing the lower base fare airline and selecting add-ons would no longer be a financial mistake for most participants. The detailed findings are reported in the online appendix, but overall, we found a similar pattern of results as in these first two studies such that exposure to drip pricing led participants to be more likely to initially and ultimately select a lower base fare option. Drip pricing also led participants to be more likely to make a financial mistake, except when the price difference between the lower and the higher base fare option was such that choosing the lower base fare option did not end up being a financial mistake even when add-ons were included. Finally, drip pricing led participants to be relatively dissatisfied with their selection, even when their choice ended up being less expensive. This suggests that consumers may react negatively to drip pricing even when it does not make them economically worse off. Overall, the findings from this follow-up study suggest that our initial findings generalize beyond the specific prices and price differences employed.

The next study attempts to replicate the findings from the first two studies using a choice in a different domain (hotels), a different participant population (university participant pool), a different incentive compatible design, and completely free choice regarding all possible add-ons.

5. Study 1c

5.1. Methods

5.1.1. Participants and Design. The study was completed by 93 subject pool members at a large business school in the Northeast (40.4% female, $M_{Age} = 34.24$, $SD_{Age} = 15.10$). Participants were paid $20 for completing this and several other unrelated studies in

an hour-long session. Participants were randomly assigned to either the drip or nondrip surcharge presentation condition in a two-cell between-subjects design.

5.1.2. Procedure. Participants were informed that they would make a choice and that one randomly selected participant would actually receive his or her choice. Participants read that they had decided to take a staycation in their local city, that they needed to book a hotel room for the staycation, that the budget for the staycation was $350, and that any money not spent on the hotel could be used for food and other activities. Participants were then presented with two hotel options (which were actually two different descriptions of the same hotel) and were told that the room rate (including all taxes and mandatory fees) was $239 for one hotel and $227 for the other hotel and that additional fees for optional add-ons may apply for the one with the lower room rate.

The prices of the optional add-ons were based on the actual prices for these amenities at the hotel and were designed such that, if at least one was selected, the lower room rate hotel would ultimately be more expensive than the higher room rate hotel, to again mirror real world contexts in which one firm strategically sets its base prices to be lower than that of a competitor. A pretest with a separate sample of 201 participants from the same population revealed that 99.0% selected at least one of these optional add-ons and that 94.7% of those who ultimately selected the lower room rate option selected at least one optional add-on (making it more expensive than the alternative).

Before making their hotel choice, participants were reminded that a randomly selected participant would receive a gift card for his or her hotel choice that could be used at his or her convenience. They were also told that the selected participant would receive a Visa gift card for any money remaining in his or her budget ($350) not spent on the hotel, which could be used for other expenses during the staycation. (Although not explicitly mentioned, it could actually be used at any time, not just during the staycation.) Thus, the selected participant would receive $350 in total value, regardless of his or her choice, with more or less being spent on the hotel, depending on his or her choices.

After making their hotel choice, participants selected any optional add-ons that they wanted. (There were no additional fees for these options for the hotel with the higher room rate.) Participants were then presented with the total price including all add-ons and were given the opportunity to either start over or complete their purchase. Finally, participants completed a customer satisfaction survey that measured their choice satisfaction. This survey contained the same questions as in studies 1a and 1b—as well as the other questions presented in Section 2.3.

5.2. Results and Discussion

5.2.1. Hotel Choice. As predicted, participants in the drip condition (31.9%) were significantly more likely to initially select the hotel with the lower room rate than were those in the nondrip condition (6.5%; B = 1.88, SE = 0.68, Wald = 7.78, $p = 0.005$). No participants decided to start over when given the opportunity to do so. Thus, surcharge presentation (nondrip versus drip) did not affect the decision to start over or not, and the ultimate hotel choices were identical to the initial choices.

5.2.2. Percentage Making Financial Mistake. Significantly more participants in the drip (27.7%) than in the nondrip condition (6.5%) selected the more expensive option given the chosen optional add-ons (B = 1.70, SE = 0.68, Wald = 6.25, $p = 0.012$).

5.2.3. Downstream Consequences—Overall Satisfaction. An exploratory factor analysis (with varimax rotation) found that the three new satisfaction items and the index used previously all loaded onto a single factor (eigenvalue = 2.38, 59.4% of the variance explained). We therefore averaged all seven items to create a measure of participants' overall choice satisfaction ($\alpha = 0.74$). Although there was no significant main effect of surcharge presentation on satisfaction ($M_{Drip} = 5.73$, SD = 0.99 versus $M_{Nondrip} = 5.84$, SD = 0.92; $t(91) = 0.58$, $p = 0.563$), as with studies 1a and 1b, a mediation analysis (Iacobucci 2012) revealed a significant indirect effect of surcharge presentation on satisfaction through ultimate hotel choice ($Z_{Mediation} = -2.21$, $p = 0.027$). Thus, surcharge presentation (drip versus nondrip) influenced hotel choice, which, in turn, influenced satisfaction. Indeed, participants who selected the lower base rate hotel were significantly less satisfied (M = 5.06, SD = 1.03) than were those who selected the higher base rate one (M = 5.96, SD = 0.86; $t(90) = 3.84$, $p < 0.001$).

5.2.4. Discussion. Using a different context, participant population, and incentive-compatible procedure, as well as with completely free choice regarding add-ons, we largely replicated the findings of studies 1a and 1b. It is notable that, in this study, none of the participants started over when given the opportunity to do so. Although this is consistent with our account that initial selections are sticky, it is possible that, because we used a lottery to ensure incentive compatibility in this study, participants did not feel enough incentive to restart search. For that reason, we use the incentive-compatible payment method employed

in study 1a going forward. Now that we have provided strong support for these core findings and their robustness, the next studies examine why drip pricing has these effects even though full price information is provided prior to final choice, and consumers can restart search in the face of this information.

6. Study 2

The results from study 1a suggest that many in the drip condition who initially selected the lower base price option did not start over because they believed that the search costs of starting over outweighed any potential financial savings. Therefore, the goal of this study is to directly examine whether reducing the search costs associated with restarting search to learn the price of the alternative option increases participants' likelihood of starting over. Although the prices for both options were presented at the start of the study, it is possible that, after selecting one, participants would not be able to remember the price of the other option. They would therefore have to engage in a new search to determine the price of the other option. If false beliefs about how long it would take to conduct a new search help to explain why restart rates are low, then an intervention that reduces these costs should increase the percentage of participants exposed to drip pricing who decide to start over after initially selecting the lower base fare airline. This, in turn, should reduce financial mistakes and increase choice satisfaction.

6.1. Methods

6.1.1. Participants and Design. Eight hundred five mTurk workers (57.5% female, $M_{Age} = 38.42$, $SD_{Age} = 11.94$) completed this study for $1.00 plus a potential bonus (the same as in study 1a). Participants were randomly assigned to one of four conditions in a 2 (optional surcharge presentation: drip, nondrip) × 2 (alternative airline's price: absent, present) between-subjects design.

6.1.2. Procedure. The procedure for this study was identical to that of study 1a except for one major difference. Specifically, when participants in the alternative airline's price present condition were asked whether they wanted to complete their transaction or start over, they were shown the alternative airline's base fare (along with the final total price for their chosen airline). Thus, participants who selected the higher base fare airline were reminded that the alternative option "had a base price of $194, but additional baggage and seat fees may apply," whereas those who selected the lower base fare airline were reminded that the alternative option "had a base price of $239, which included all baggage and seat fees." Participants in the alternative airline's price absent condition only saw the final total price for their selected airline.

6.2. Results and Discussion

6.2.1 Airline Choice. There was a significant effect of surcharge presentation on initial choice (B = 1.89, SE = 0.29, Wald = 42.08, $p < 0.001$). Participants in the drip condition (38.1%) were significantly more likely to initially select the lower base price airline than were those in the nondrip condition (8.3%). Note that participants made their initial airline choice prior to the search cost intervention.

Few participants (16.5%) decided to start over when given that opportunity. Surcharge presentation had a significant effect (B = 1.38, SE = 0.33, Wald = 17.39, $p < 0.001$), with a greater percent of participants in the drip condition (26.6%) starting over than in the nondrip condition (6.8%). This effect was mediated by initial airline choice ($Z_{Mediation} = 7.16$, $p < 0.001$; Iacobucci 2012). Whereas only 5.5% of participants who selected the higher base airline started over, 53.8% of those who selected the lower base airline started over. In addition, although there was no significant main effect of the intervention and no significant interaction (p's > 0.425), we examined whether the intervention had an effect among participants in the drip condition who initially selected the lower base fare airline. The intervention did have a significant effect (B = 0.66, SE = 0.34, Wald = 3.86, $p = 0.049$) such that participants shown the higher base fare airline's price were more likely to start over (63.1%) than were those who were not given this information (47.0%). In contrast, in the nondrip condition, for those who initially selected the lower base airline, there was no effect of the intervention on likelihood to start over (intervention absent: 44.4% started over versus intervention present: 43.8% started over; $p = 0.968$).

Next, we examined participants' ultimate airline choices. Only the effect of surcharge presentation was significant (B = 1.46, SE = 0.33, Wald = 19.32, $p < 0.001$; all other p's > 0.250). Even after having the opportunity to switch their airline choice, participants in the drip condition (19.3%) were significantly more likely to select the lower base fare airline than were participants in the nondrip condition (6.8%). Moreover, although the main effect of the intervention was not significant, a subsequent analysis revealed that, among participants in the drip condition who initially selected the lower base fare airline, those who were not exposed to the intervention (57.6%) were significantly more likely to ultimately choose that airline than were those who were exposed to the intervention (38.6%; B = −0.77, SE = 0.34, Wald = 5.27, $p = 0.022$). In contrast, in the nondrip condition, among those who initially selected the lower base fare airline, we found that the intervention had no effect on which airline was ultimately

selected (intervention absent: 58.8% selected lower base airline versus intervention present: 62.5% selected lower base airline; $p = 0.829$).

6.2.2. Percentage Making Financial Mistake. Significantly more participants in the drip (10.7%) than in the nondrip condition (5.6%) selected the airline option that, given the optional add-ons selected, was more expensive (B = 1.21, SE = 0.38, Wald = 10.40, $p = 0.001$). This significant effect of surcharge presentation was qualified by a significant interaction (B = −1.11, SE = 0.55, Wald = 3.99, $p = 0.046$). Specifically, when the intervention was absent, participants in the drip condition (15.2%) were significantly more likely to make a mistake than were those in the nondrip condition (5.1%; $p = 0.001$). However, when the intervention was present, participants in the drip condition (6.9%) were no more likely to make a mistake than were those in the nondrip condition (6.2%; $p = 0.795$). Finally, among participants in the drip condition who initially selected the lower base fare airline, those exposed to the intervention (16.0%) were significantly less likely to make a mistake than were those who were not exposed to the intervention (39.4%; $p = 0.002$). In contrast, for those in the nondrip condition who initially selected the lower base fare airline, exposure to the intervention had no effect on whether they ultimately made a financial mistake or not (intervention absent: 47.1% made financial mistake versus intervention present: 56.3% made financial mistake; $p = 0.598$).

6.2.3. Downstream Consequences—Overall Satisfaction. Only surcharge presentation had a significant effect on the satisfaction index ($\alpha = 0.71$; $F(1, 783) = 23.92$, $p < 0.001$; all other F's < 0.75, all other p's > 0.385). Participants in the nondrip condition (M = 5.84, SD = 1.02) were significantly more satisfied with their final airline choice than were those in the drip condition (M = 5.48, SD = 1.09). We again found a significant indirect effect of surcharge presentation on choice satisfaction through ultimate airline choice ($Z_{Mediation} = -4.65$, $p < 0.001$), indicating that whether the surcharges were dripped affected ultimate airline choice, which in turn affected satisfaction. Indeed, participants who ultimately selected the lower base fare airline reported being significantly less satisfied with their choice (M = 4.49, SD = 1.27) than were those who ultimately selected the higher base fare airline (M = 5.84, SD = 0.92; $t(785) = 13.06$, $p < 0.001$).

Although the effect of the intervention was not significant, we did find that, among participants in the drip condition who initially selected the lower base fare airline, those who were exposed to the intervention (M = 5.37, SD = 1.32) were marginally more satisfied than those who were not exposed to the intervention (M = 4.98, SD = 1.25; $t(147) = 1.83$, $p = 0.070$). This effect was also mediated by ultimate airline choice ($Z_{Mediation} = 2.15$, $p = 0.032$).

6.2.4. Discussion. The results of study 1a suggested that one reason why drip pricing affects consumers is because they believe the costs associated with switching are substantial. Therefore, in this study, we reduced the costs associated with resuming search to learn about the price of the alternative option by presenting the alternative airline option's price when the total price of the chosen airline was revealed and at the moment at which participants had the opportunity to start over. This intervention increased participants' likelihood to start over and select a different option, decreased their likelihood of making a financial mistake, and led to marginally higher satisfaction. These findings support our contention that consumers base their start-over decisions in part on the perceived search costs associated with starting over. Note that although we attribute the findings to a reduction in search costs, the results of this study may also reflect the benefits side of the equation. If participants inaccurately recalled the price of the alternative option that was initially not selected, they may falsely believe that there was not much to be gained in terms of financial benefits by resuming search. By providing information regarding the price of the nonselected option at the time of the start-over decision, we may have informed participants that there was more to be gained by restarting than they had thought. That said, this scenario is still consistent with our overall cost-benefit account for why consumers do not generally start over.

In addition to search costs, there may also be costs that are more psychological in nature that impact the decisions of those exposed to drip pricing. For example, self-justification processes may make consumers reluctant to start over, as they may convince themselves that they have made a good choice to avoid the costs associated with accepting that they made a mistake. We examine this possibility in the next study.

7. Study 3

Prior research has shown that people are more likely to persist with an initial suboptimal decision if they made that decision themselves, but not if others made the initial decision (Staw 1976, Staw and Fox 1977, Staw and Ross 1978). To test the possible role of self-justification in our drip pricing context, one group of participants completed the standard choice and add-on selection process used in our previous studies, whereas a second group merely observed another consumer going through that same process and making the same choices. We reasoned that if

self-justification was operating, participants exposed to drip pricing who selected the lower base fare option (which tends to ultimately be more expensive and relatively unsatisfactory) for themselves would rate this decision more positively than those who observed the same choice made by another individual, because participants simply observing the choice should feel little need to justify it.

7.1. Methods

7.1.1. Participants and Design. Four hundred two mTurk workers (49.5% female, $M_{Age} = 35.73$, $SD_{Age} = 11.53$) completed this study for $1.00. Participants were randomly assigned to one of four conditions in a 2 (optional surcharge presentation: nondrip, drip) × 2 (perspective: self, other) between-subjects design.

7.1.2. Procedure. We used the same airline scenario as in studies 1a and 2, except that participants were not given the option to start over. Those in the self-perspective condition completed the standard airline choice and add-on selection procedure. Participants in the other-perspective condition were presented with the same scenario, but instead observed the choices of another person named "Alex." On each screen in the study, they were presented with what Alex saw and decided. We designed Alex's choices to reflect the modal initial choices we observed in study 1a for that condition (i.e., in the drip condition, the lower base fare airline; in the nondrip condition, the higher base fare airline). In this study, to ensure equivalent comparisons across perspective conditions, we told all participants in the self-perspective condition to select the options to bring a carry-on bag and to select a seat, for both legs of the trip, which made the lower base fare option ultimately more expensive than the higher base fare option. For those in the other-perspective condition, they watched Alex select these same options.

Next, participants responded to a series of questions—similar to the satisfaction questions used in prior studies—designed to assess their level of satisfaction with their choice or Alex's choice ($\alpha = 0.97$). See the online appendix for the specific items.

7.2. Results and Discussion

7.2.1. Airline Choice. Among participants in the self-perspective condition, those in the drip condition were more likely to select the lower base fare airline (66.4%) than were those in the nondrip condition (16.8%; $p < 0.001$), which replicates our previous studies.

7.2.2. Overall Satisfaction Regarding Choice. Because in the other-perspective condition Alex only selected the higher base fare airline in the nondrip condition and the lower base airline in the drip condition, to make the responses to the satisfaction questions across the perspective conditions comparable, in the self-perspective condition, for this analysis, we excluded those participants in the nondrip condition who selected the lower base airline ($n = 17$) and those in the drip condition who selected the higher base airline ($n = 35$). However, the results are virtually identical (and actually stronger) when these responses are included. There were significant effects of surcharge presentation ($F(1, 346) = 305.48$, $p < 0.001$) and perspective ($F(1, 346) = 11.44$, $p = 0.001$) on satisfaction. These main effects were qualified by a significant interaction ($F(1, 346) = 5.76$, $p = 0.017$). In the nondrip condition, participants in the self-perspective ($M = 5.90$, $SD = 1.04$) and other-perspective ($M = 5.75$, $SD = 1.39$) conditions did not differ in their choice satisfaction ($F(1, 346) = 0.52$, $p = 0.473$). In contrast, in the drip condition, participants in the self-perspective condition felt significantly more satisfied with the choice ($M = 3.48$, $SD = 1.94$) than those in the other perspective condition ($M = 2.55$, $SD = 1.52$; $F(1, 346) = 15.72$, $p < 0.001$), consistent with a self-justification account.

7.2.3. Discussion. The results support the idea that psychological costs help explain how people respond to drip pricing. Those who made a bad decision in the face of drip pricing seem to justify their decisions to avoid the psychological costs associated with admitting one has made a bad decision, by convincing themselves that their price was satisfactory (consistent with participants' self-reports from study 1a). Taken together, the results from the last two studies provide support for the idea that perceived costs (i.e., search and psychological) help explain why consumers do not start over in the face of drip pricing.

In the next study, we turn to the other side of the cost-benefit equation, namely, perceived benefits. Recall that in study 1a participants in the drip condition who selected the lower base fare airline and did not start over stated that they believed that most airlines tend to charge extra for baggage and other add-ons and that the prices for these optional add-ons tend to be similar across airlines. As a result, they likely felt that starting over offered little benefit. Consequently, in the next study, we directly manipulate this belief (through providing information about whether surcharges tend to be similar or different for firms in an industry) and thereby the perceived benefit of starting over.

The next study also addresses a potential limitation of all of the earlier studies. Specifically, it is possible that our findings may be due, in part, to participants misunderstanding the surcharge disclosures we used in all of the studies. Specifically, in the drip pricing condition, there was always an asterisk only next to

the lower base price option to indicate that additional fees may apply for this option (but not the higher base option). It is possible that this disclosure was too subtle and either went unnoticed or was misinterpreted to mean that additional fees may apply for both options. It is also possible that some participants may have thought that the higher base option could still charge extra for add-ons even if it did not indicate that possibility through an upfront disclosure. Therefore, in this study, we provided information about what was and was not included in the base price up front. As in study 1c, we also again moved back to the hotel context to ensure that our findings generalize beyond airlines.

8. Study 4

8.1. Methods

8.1.1. Participants and Design. Four hundred mTurk workers (48.4% female, $M_{Age} = 36.23$, $SD_{Age} = 11.90$) completed this study for $1.00 plus a potential bonus (similar to that used in studies 1a and 2). Participants were randomly assigned to one of four conditions in a 2 (optional surcharge presentation: drip, nondrip) × 2 (information: similar surcharges, different surcharges) between-subjects design.

8.1.2. Procedure. Participants read an excerpt from a fictitious news article in which we made salient whether all firms within an industry tend to charge similar fees for optional add-ons. In the similar (different) information condition, the news article stated that if consumers encounter a fee from one airline service provider, they should (should not) assume that all airlines charge similar fees. After reading this excerpt, participants completed a neutral filler task (Srull and Wyer 1979).

Participants then completed the focal choice task in which they had to choose between two hotels—a lower and a higher base price option. The former charged extra for optional add-ons, whereas the latter did not. This was indicated by an asterisk next to the price of the lower base price option, which informed participants that additional fees may apply for that option. Notably, next to the base price of the higher base price option was a note that this base price included access to the pool, gym, and spa; a breakfast buffet; Wi-Fi; and self-parking.

After making their hotel choice, selecting add-ons (in this study, participants only saw the total hotel price—with the price of the selected add-ons included—after the add-on selection process had been completed), deciding whether to start over or not, and completing the customer satisfaction survey (α = 0.81), participants indicated their level of agreement with two statements that served as manipulation checks: "The extra fees that hotels charge are pretty much the same for all hotels" (1 = strongly disagree, 4 = neither agree nor disagree, 7 = strongly agree) and "The additional fees that companies charge are pretty much the same for all companies within an industry" (−3 = strongly disagree, +3 = strongly agree). Because participants' responses to these two items were highly correlated (r = 0.66), we averaged them to create a composite manipulation check variable (α = 0.93).

8.2. Results and Discussion

8.2.1. Hotel Choice. The effect of surcharge presentation was significant (B = 1.49, SE = 0.52, Wald = 8.23, p = 0.004). Participants in the drip condition (21.5%) were significantly more likely to initially select the lower base price hotel than were those in the nondrip condition (7.5%). Neither the main effect of information (p = 0.244) nor the interaction (p = 0.524) was significant.

Overall, across conditions, very few participants decided to start over (8.3%). A binary logistic regression of surcharge presentation, information, and their interaction on starting over revealed no significant effects on likelihood to start over (p's > 0.370).

Looking at final choices (i.e., including those who switched from their initial choice), we found that a larger percent of participants in the drip condition ultimately selected the lower base hotel (21.1%) than did those in the nondrip condition (8.6%; B = 1.13, SE = 0.46, Wald = 6.02, p = 0.014). No other effects were significant (p's > 0.525). Thus, explicitly informing participants that the optional surcharges that firms charge can vary across firms—as well as making this fairly clear when the base prices were presented—was not enough to reduce choice of the lower base rate hotel (which charged additional fees for optional add-ons) among those exposed to drip pricing.

8.2.2. Percentage Making Financial Mistake. Significantly more participants in the drip condition (11.2%) than in the nondrip condition (5.1%) selected a hotel option that, given the optional add-ons selected, was more expensive (B = 1.59, SE = 0.79, Wald = 4.06, p = 0.044). Participants in the different surcharges condition (10.3%) were marginally more likely to make a mistake than were participants in the similar surcharges condition (6.1%; B = 1.37, SE = 0.80, Wald = 2.88, p = 0.090). There was no significant interaction (p = 0.269).

8.2.3. Ultimate Hotel Choice Mediated by Beliefs About Hotel Surcharges. Although there was no effect of the information manipulation on consumers' choices, the manipulation itself was successful. A two-way ANOVA of surcharge presentation, information, and their interaction on the manipulation check

variable revealed a significant main effect of information ($F(1, 395) = 4.46$, $p = 0.035$). Participants in the similar surcharges condition (M = 3.80, SD = 1.55) were significantly more likely to agree that the surcharges that firms charge are similar across firms than were participants in the different surcharges condition (M = 3.44, SD = 1.63). Interestingly, though, there was also a significant main effect of surcharge presentation ($F(1, 395) = 4.14$, $p = 0.043$) and a significant interaction ($F(1, 395) = 4.28$, $p = 0.039$). The information manipulation had no effect on participants' beliefs in the nondrip condition ($M_{Similar} = 3.45$, $SD_{Similar} = 1.56$ versus $M_{Different} = 3.45$, $SD_{Different} = 1.70$; $p = 0.977$), perhaps because these participants had full information about the hotel add-on prices and relied on this information in forming their beliefs. However, it did have a significant effect in the drip condition (in which people lacked detailed surcharge information prior to going through the add-on selection process) such that participants in the similar surcharges condition (M = 4.10, SD = 1.49) were significantly more likely to agree that firms within an industry have similar surcharges than were those in the different surcharges condition (M = 3.44, SD = 1.56; $F(1, 395) = 8.74$, $p = 0.003$). Despite the fact that the manipulation worked as intended to affect these participants' beliefs, it did not affect their choices or likelihood to restart.

Interestingly, we also found that participants who ultimately selected the lower base hotel (M = 4.69, SD = 1.44) were significantly more likely to hold the belief that surcharges are similar across competitors than were those who ultimately selected the higher base hotel (M = 3.43, SD = 1.55; $t(395) = 5.78$, $p < 0.001$). We therefore examined whether this belief could help explain participants' hotel choices. Using the PROCESS Macro for SPSS (Model 4; Hayes 2013) and a bootstrap sample $n = 5{,}000$, we found that the indirect effect of surcharge presentation on ultimate hotel choice through consumers' beliefs about surcharges was significant (B = 0.20, SE = 0.10, CI (95%) = [0.04, 0.44]), as the 95% confidence interval excluded zero (Hayes and Preacher 2014). Thus, beliefs about surcharges do seem to help explain consumers' choices. It is not clear, though, why our manipulation was not sufficient to change choices as it changed beliefs.

8.2.4. Downstream Consequences—Overall Satisfaction.

Participants in the nondrip condition were marginally more satisfied with their choice (M = 5.71, SD = 1.04) than were those in the drip condition (M = 5.54, SD = 1.10; $F(1, 395) = 2.87$, $p = 0.091$). No other effects were significant (p's > 0.290). The effect of surcharge presentation on overall satisfaction was mediated by ultimate hotel choice ($Z_{Mediation} = -3.17$, $p = 0.002$). Indeed, we again found that participants who ultimately selected the lower base price hotel were significantly less satisfied with their choice (M = 4.58, SD = 1.07) than were those who ultimately selected the higher base price hotel (M = 5.82, SD = 0.95; $t(395) = 9.06$, $p < 0.001$).

8.2.5. Discussion.

Study 4 replicates and extends our previous findings. Once again, we find that drip pricing leads participants to be more likely to choose the lower base price option and to make mistakes by selecting more expensive, relatively unsatisfactory options. In addition, we again find that this choice can be difficult to change. Indeed, explicitly informing participants that the additional fees that firms charge vary within an industry had no effect on the hotel that participants ultimately selected. However, we did find that participants who ultimately selected the lower base price option were more likely to believe that all firms assess the same surcharges than were those who ultimately selected the higher base price option and that the effect of surcharge presentation on ultimate hotel choice was mediated by those beliefs, despite the disclosures provided. Thus, consistent with participants' self-reports in study 1a, one reason consumers exposed to drip pricing are more likely to ultimately select the lower base rate option—even when it is ultimately more expensive than originally anticipated and just as expensive as or more expensive than the higher base rate option—may be because they incorrectly believe that all firms charge similar surcharges, and therefore, there is little benefit to be gained by switching. It is worth noting that this belief appears to persist even though we explicitly indicated both that only the lower base rate option may have additional surcharges and, in this study, explicitly mentioned that the higher base rate option included the optional add-ons in its base price. Thus, this false belief may reflect a form of self-justification, similar to that demonstrated in study 3, whereby those who chose the lower base price option form and hold onto this belief to avoid having to admit that they may have made a mistake.

Overall, across the studies in this block that explored process, it appears that consumers' responses to drip pricing are multiply determined—driven by the perceived costs and benefits of starting over. These factors, in combination, cause drip pricing to harm consumers—leading to purchases that are more expensive than necessary and relatively unsatisfactory.

9. General Discussion

This research has two goals: (1) to demonstrate the effect of dripping optional surcharges on consumer choice and satisfaction and (2) to examine why drip pricing leads consumers to be more likely to ultimately choose a lower base price option, even when it

is more expensive in total than the alternative, they could save money by switching, and they are relatively dissatisfied with their choice. We examine these questions in situations in which firms strategically set base prices below those of their competitors but structure the prices of optional add-ons such that, once commonly selected add-ons are chosen, they ultimately end up costing more than the higher base price alternatives.

Across six studies, we find that drip pricing (versus nondrip pricing) increases the likelihood that consumers will both initially and ultimately select a lower base price option, even though the surcharges for optional add-ons cause this base price to balloon—making the lower base fare option more expensive than the alternative—and they are relatively dissatisfied with the choice. Moreover, we found evidence that consumers' reluctance to start over and change their initial decision can be attributed to their misperceptions regarding the relative costs and benefits of switching. We show that the effects are driven by the perceived time (study 2) and psychological (study 3) costs of starting over, as well as incorrect beliefs about the potential benefits to be gained by restarting due to beliefs about the similarity of surcharges across firms (study 4).

Given that drip pricing is of high interest to regulators, it is important to consider these results in the context of current and proposed law. Regulators argue that drip pricing is a deceptive pricing practice that increases consumers' financial and search costs. Our results provide support for these presumed financial and search costs, and they also show that there are psychological costs to consumers as well. Therefore, the current regulatory requirements, although limited to mandatory surcharges, are a step in the right direction. However, given the sizable revenue that firms derive from surcharges for optional add-ons and, as this research has demonstrated, the effects such surcharges have on consumers, expanded regulations may be needed. Indeed, our results showed that, when prices for optional add-ons were dripped, participants were consistently more likely to choose the lower *base* price option. However, given the optional add-ons involved and their prices, the lower *base* price option might *ultimately* be more expensive than the alternative, resulting in a financial mistake for consumers.

Firms have argued that drip pricing is not deceptive or harmful because consumers are always provided with total price information before they make their final purchase and are often provided with disclosures indicating that additional fees or surcharges may apply. However, as shown across our studies, simply providing the total price to consumers prior to when they complete their purchase does not eliminate the harm that drip pricing can cause consumers. Indeed, even though, in every study, we presented participants with the total price of their selection prior to them completing their transaction (and, in some cases, also presented running totals throughout the process), participants exposed to drip pricing were still significantly more likely to ultimately choose the lower base price option, make a financial mistake, and be relatively dissatisfied with their selection than were those in the nondrip condition. In every study we also provided disclosures that additional fees may apply—and even made them more explicit in study 4—but we still found that those disclosures were insufficient at eliminating the harmful effects of drip pricing.

Firms also have argued that consumers prefer drip pricing because it allows them to only select the add-ons of interest to them and to minimize their total payment. However, it is important to note that firms can still use add-on pricing but disclose the add-on pricing up front—indeed, that was the exact situation for the lower base price option in the nondrip condition of every study. Moreover, consumers may state that they prefer forms of price disclosure that lead them to make financial mistakes, because they may not realize the effects of these forms of disclosure. For example, White et al. (2019), in a different context not involving drip pricing, showed that consumers state a preference for more complex fee disclosures, believing that they provide more transparency. However, these more complex fee disclosures lead them to make financial mistakes by choosing more expensive options.

In addition, although not a focus of our inquiry, experience may not be sufficient to avoid the harmful effects of drip pricing (Blake et al. 2018). Indeed, an additional analysis of the study 1a data revealed that previous flying experience did not moderate the effects of drip pricing. (Results are available from the authors upon request.) In another study, we allowed participants to make two decisions separated by time (i.e., two one-way flight decisions), and we found that experience in the first decision did not fully eliminate the negative consequences of drip in the second decision. (Full details are available from the authors upon request.) Thus, this research highlights the need for regulators to protect consumers from the pernicious effects of drip pricing. Study 2 suggests that interventions that reduce the search costs involved with drip pricing and those that make it easier to compare prices may be particularly helpful in terms of protecting consumers.

It is also worth noting that, even in the nondrip condition, in which participants had complete pricing information (but the add-on prices for the lower base option were still partitioned from the base price),

some participants chose the lower base option even when it ended up ultimately being more expensive. Thus, a few participants in the nondrip condition made a financial mistake, selecting the more expensive option. This finding is consistent with the partitioned pricing literature (Morwitz et al. 1998, Greenleaf et al. 2016), which suggests that consumers may anchor on the base price and underestimate the total price. Thus, whereas disclosing fees up front is better than dripping them, it is not sufficient for eliminating mistakes, and regulations concerning partitioned pricing may also be needed, especially for add-on options that are considered important or necessary by most consumers.

Of course, the current research, like all research, has limitations. First, our studies provided highly stylized and limited information about the choice options, and the studies were confined to online and laboratory settings with paid participants who were relative novices. Although most of our studies were consequential, having data on search and payment from actual transactions in a field experiment would bolster our findings. Second, this research focused on the dripping of optional surcharges, given the recent debate around whether to expand current regulations to include such fees. However, there is also a debate concerning rolling back the existing regulations on mandatory surcharges, and this research does not explore the implications of such a change in policy. Although some prior research demonstrates the adverse effects of dripping mandatory fees (Sullivan 2017, Blake et al. 2018), research on this is limited, so more work is needed. Third, in all of our studies, participants were limited to two choice options, and consumer behavior may be different when there are more options to consider. Fourth, we did not provide product information about the options beyond price, and the effect of drip may depend on tradeoffs between price and other attributes, such as quality, or characteristics of the firm, such as reputation. Cheema (2008) demonstrated that firm reputation moderated the effect of surcharges on willingness to pay and purchase timing. Although we did not experimentally vary firm reputation in our studies, it may play a role in how consumers react to drip pricing. Fifth, we primarily focused on surcharges that are dripped before the total is paid, but in many real world situations, add-on options are offered and their prices dripped after the consumer has already paid for the base product (e.g., mini-bar charges at a hotel), and the effect of drip might differ in these cases. Sixth, in order to be conservative, in all of our studies, surcharge prices were fully revealed (either up front or during the drip process) versus being hidden in small print or embedded in unrelated information. The impact of drip might differ when surcharges are hidden. Finally, given that this research was focused on establishing a baseline understanding of how consumers react to drip pricing, we did not examine individual differences that may explain variations in reactions to drip pricing, such as knowledge, financial literacy, or comfort with numerical information. For example, economists refer to the differential effects of drip pricing on "sophisticates" and "naives" (Gabaix and Laibson 2006) or "rational" actors. Future research should address these limitations.

Given that the effects we observed seem to be multiply determined, future research should also explore other potential explanations. Beyond the explanations we identified, another possibility is that, after investing time in making an initial decision, participants may stick with their choice because of sunk cost effects or escalation of commitment (Staw 1976). We tested for possible escalation effects in another study not reported here, in which participants were given total cost information and the opportunity to start over after each add-on was added. A restart pattern consistent with an escalation of commitment explanation would likely show the incidence of starting over monotonically decreasing the further the participant got into the purchasing process. Our results did not follow this pattern, but did show a decrease at the end of the process, thus providing mixed evidence for escalation of commitment. (Full details are available from the authors upon request.) Thus, more work on this is needed.

Finally, it is also possible that consumer choices and satisfaction reflect an affective forecasting error. That is, when the purchase process begins, consumers may (erroneously) predict that they will not want the optional add-ons and would be happier with a low price. However, as they progress through the purchasing process, the attractiveness of the optional add-ons increases and consumers therefore end up purchasing them in contrast to their earlier predictions. This is an interesting possibility that should be explored in future research.

In closing, we hope that this research can be used to inform the current debates regarding the value of existing regulations around drip pricing as well as the proposed expansion of such rules (Silk 2017, NCL Communications 2019, Sampson 2019). Our results show that existing regulations are not sufficient for protecting consumers when firms that have higher total prices strategically set their base prices lower than competitors and then drip surcharge information. We believe that efforts to roll back the existing regulations regarding the dripping of government fees and taxes in the airline industry (Elliott 2014a, b) is concerning given our findings and prior research on dripping mandatory surcharges that shows that consumers pay more and search less when such pricing practices are used (Sullivan 2017).

In contrast, our results suggest that expanding current regulations by requiring airlines to disclose baggage and seat fees up front could benefit consumers and airlines alike. Indeed, participants in our studies were disproportionately more likely to select the higher base price option, be less likely to make a mistake, and be more satisfied with their selection when surcharges for optional add-ons were provided up front. As such, fee disclosures need not pit regulators and consumers against firms.

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Endnote

[1] See http://airlineratings.com/passenger-reviews/137/spirit-airlines (accessed June 1, 2017).

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World Leaders in Research-Based User Experience

Scrolling and Attention (Original Research Study)

Jakob Nielsen

March 21, 2010

Summary: Web users spend 80% of their time looking at information above the page fold. Although users do scroll, they allocate only 20% of their attention to below the fold.

In Web design, there's much confusion about the "**page fold**" concept and the importance of keeping the most **salient information within a page's initially viewable area**. (That is, in fact, the definition: "above the fold" simply means "viewable without further action.")

During the **Web's first years**, users often **didn't scroll** Web pages at all. They simply looked at the visible information and used it to determine whether to stay or leave. Thus, in usability studies during that period (1994–1996), sites often failed if they placed important information below the fold as most users didn't see it.

This reluctance to scroll made sense at the time, because people were used to having computers show all their choices. Dialog boxes, CD-ROM multimedia shows, and HyperCard stacks all worked that way, and didn't require scrolling. (Although users sometimes encountered scrolling text fields, they didn't need scrolling to see the commands and options, and could thus make all decisions from the visible info.)

In **1997**, however, I retracted the guideline to avoid scrolling pages because users had acclimated to scrolling on the Web. This was a rare case in which usability guidelines changed quickly. Typically, usability findings are stable across many years: 80% of Web usability guidelines from the 1990s are still in force.

Today, users will scroll. However, you shouldn't ignore the fold and create super long pages for two reasons:

- **Long pages** continue to be problematic because of users' limited attention span. People prefer sites that get to the point and let them get things done quickly. Besides the basic reluctance to read more words, scrolling is extra work.
- The **real estate above the fold is more valuable** than stuff below the fold for attracting and keeping users' attention.

So, yes, you can put information below the fold rather than limit yourself to bite-sized pages.

In fact, if you have a long article, it's better to present it as one scrolling canvas than to split it across multiple pageviews. **Scrolling beats paging** because it's easier for users to simply keep going down the page than it is to decide whether or not to click through for the next page of a fragmented article. (Saying that scrolling is easier obviously assumes a design that follows the guidelines for scrollbars and such.) Infinite scrolling is not always the answer either, however.

But no, the fact that users scroll doesn't free you from prioritizing and making sure that anything **truly important remains above the fold**.

Information foraging theory says that people decide whether to continue along a path (including scrolling path down a page) based on the current content's **information scent**. In other words, users will scroll below the fold only if the information above it makes them believe the rest of the page will be valuable.

> In This Article:
>
>

Eyetracking Data

In 2010, we conducted a broad eyetracking study of user behavior across a wide variety of sites. To investigate whether the "fold" continues to be relevant, I analyzed parts of the study with a total of **57,453 fixations** (instances when users look at something on a page, typically for less than half a second).

To avoid bias, I analyzed data from only 21 users accessing 541 different Web pages, even though our full study was much larger. To convince you that I didn't limit the data for nefarious reasons, let me explain **why I excluded some parts of the study** from the present analysis.

Because our research goal was to generate fresh insights for our annual conference seminars, we targeted large parts of the study to test:

- sites with novel **navigation** features for the IA courses;
- **corporate blogs**, interesting **FAQs**, etc., for the courses on Writing for the Web; and
- Web-based **apps** for the Application Design seminar.

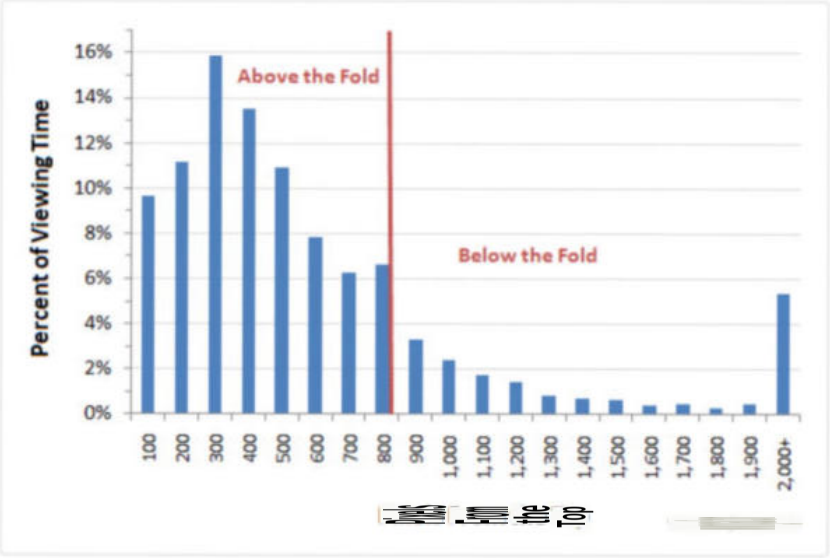
For each specialized topic, it's perfectly valid to target a study and test sites that have features that we want to investigate. For example, to gain insight into carousels for our navigation seminar, we *should* track users' eyes as they encounter carousels. To do this, we simply ask them to use a site that happens to include a carousel, but we don't draw their attention to that design element.

When we deliberately ask people to test sites that contain particular design elements, we can't conclude that their behavior is representative for average sites. Sticking with the carousel example, people might well scroll less often than normal if the carousel successfully keeps their attention on the upper part of the page.

Our study also featured a component that let users go to any site they wanted. These **non-constrained tasks** are the source of the data I'm analyzing here, because they tested the regular websites people use, as opposed to sites we picked for their design features.

Attention Focused at the Top

The following chart shows the distribution of user fixations along stripes that were 100 pixels tall. The bars represent total gaze time, as opposed to the number of fixations. (In other words, two fixations of 200 ms count the same as one fixation of 400 ms.)



Even though 5% of users' total time is spent past the 2,000-pixel mark, they tend to scan information that far from the top fairly superficially: some pages are very long (often 4,000+ pixels in my sample), and thus this 5% of user attention is spread very thinly.

In our study, user viewing time was distributed as follows:

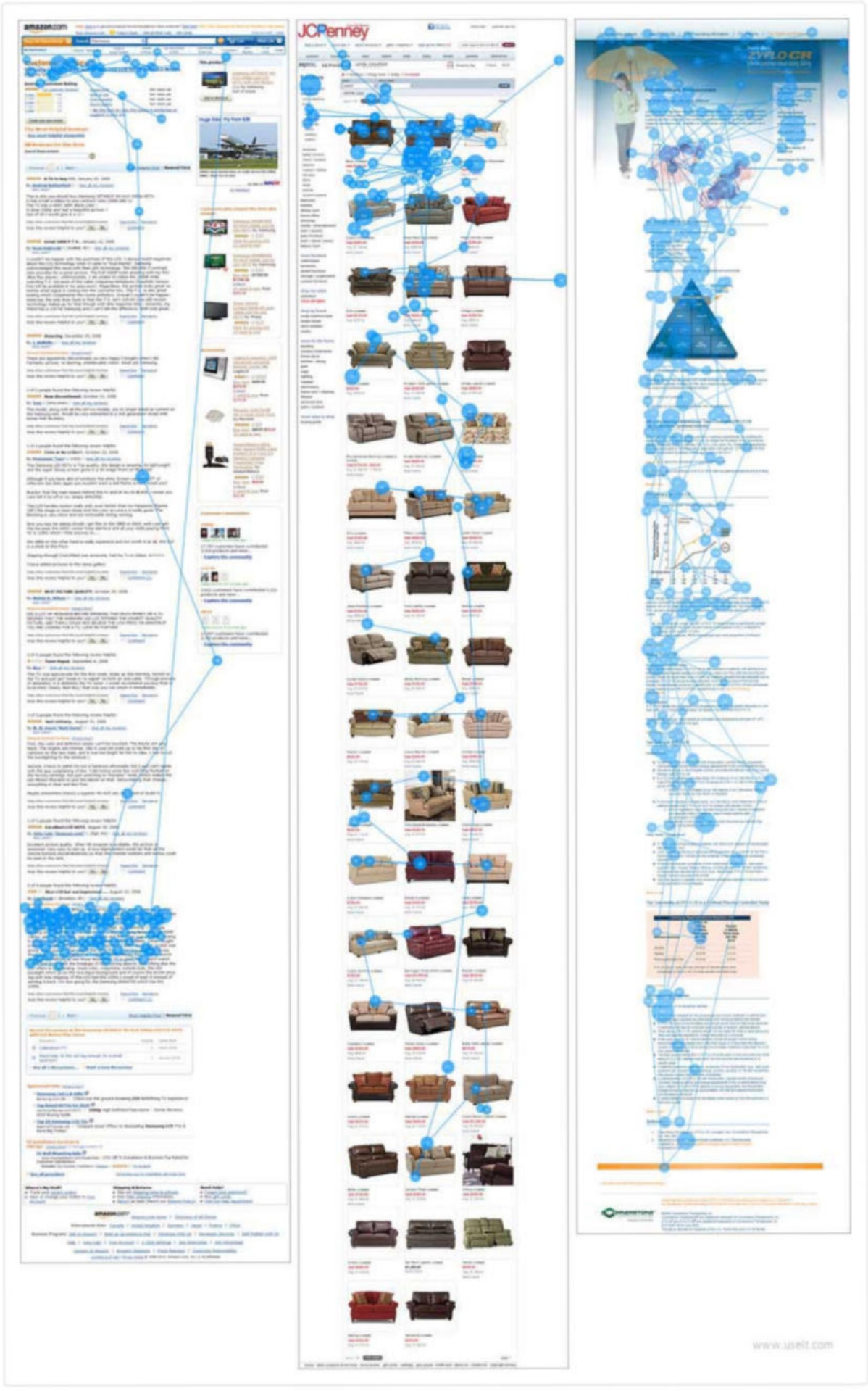
- **Above** the fold: **80.3%**
- **Below** the fold: **19.7%**

We used an eyetracker with a resolution of 1,024 × 768 pixels. These days, many users have somewhat bigger screens, and we've conducted many (non-ET) usability studies with larger resolutions. Although using a bigger monitor wouldn't change my conclusions, it would somewhat increase the percentage of user attention spent above the fold simply because more info would be available in the initially viewable space.

Scrolling Behaviors

Sometimes, users do read down an entire page. It does happen. Rarely.

More commonly, we see one of the two behaviors illustrated in the following gaze plots:


JCPenney
www.useit.com

Gaze plots showing where three users looked while visiting pages during three different tasks (one test participant per page). Each blue dot represents one fixation, with bigger dots indicating longer viewing time.

On the left, the user scrolled very far down the page and suddenly came across an interesting item. This viewing pattern gives us many fixations that are **deep below the fold**. We often see this pattern for well-designed FAQs, though the best FAQs present the *most* frequently asked questions at the top (so that many users won't need much scrolling).

The left gaze plot also illustrates another point: the **last element in a list** often attracts additional attention. The first few items are definitely the most important, but the final item gets more views than the one before it. (That's also why the bar chart shows more attention to the 701–800 pixel area than to the 601–700 pixel area: the bottom of our study monitor fell within the former area.) The end of a list's importance is further enhanced by the **recency effect**, which says that the last thing a person sees remains particularly salient in the mind. (We discuss the design implications of the recency and primacy effects in our seminar on The Human Mind and Usability.)

The two other gaze plots show more common scrolling behaviors: **intense** viewing of the top of the page, **moderate** viewing of the middle, and fairly **superficial** viewing of the bottom. (I picked examples where users scrolled more or less all the way down — often there's **no** viewing of the bottom because users don't scroll that far.)

It's as if users arrive at a page with a certain amount of fuel in their tanks. As they "drive" down the page, they use up gas, and sooner or later they run dry. The amount of gas in the tank will vary, depending on each user's inherent motivation and interest in each page's specific topic. Also, the "gasoline" might evaporate or be topped up if content down the page is less or more relevant than the user expected.

In any case, user **attention eventually peters out**, and the further down the page users go, the less time they generally spend on each additional information unit.

The middle gaze plot shows a category page with 50 sofas:

- The top 2 rows get about 5–10 fixations per sofa.
- The next 4 rows get around 2–4 fixations per sofa.
- The next 8 rows typically get 1 fixation per sofa.
- The bottom 3 rows get 2 fixations for one sofa and no fixations for the remaining 7 sofas.

This is only a rough pattern, and users will deviate depending on the content. For example, the Cameon Loveseat and the Custom Hugo Loveseat both get 4 fixations despite being 2,750 pixels down

the page. Presumably, the user found these two sofas particularly appealing.

Design Implications

The implications are clear: the material that's the **most important for the users' goals or your business goals should be above the fold**. Users do look below the fold, but not nearly as much as they look above the fold.

People will look very far down a page if (a) the **layout encourages scanning**, and (b) the initially viewable information makes them **believe that it will be worth their time** to scroll.

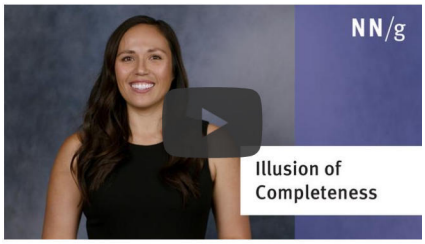
Finally, while placing the most important stuff on top, don't forget to put a **nice morsel at the very bottom**.

See also: **Update of this research** with newer data from eyetracking on bigger monitors.

Learn More:

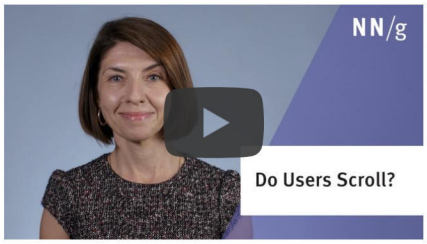
Infinite Scrolling: When to Use It, When to Avoid It

Tim Neusesser · 4 min



Why Didn't People Scroll? The Illusion of Completeness

Aurora Harley · 2 min



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Scrolling and Attention

Therese Fessenden

April 15, 2018

Summary: People scroll vertically more than they used to, but new eyetracking data shows that they will still look more above the page fold than below it.

People's behaviors are fairly stable and usability guidelines rarely change over time. But one user behavior that did change since the early days of the web is the tendency to scroll. In the beginning, users rarely scrolled vertically; but by 1997, as long pages became common, most people learned to scroll. However, the information above the fold still received most attention: even as recently as 2010, our eyetracking studies showed that 80% of users' viewing time was spent above the fold.

Since 2010, with the advent of responsive design and minimalism, many designers have turned towards long pages (covering several "screenfuls") with negative space. It's time to ask, again, whether user behavior has changed due to the popularity of these web-design trends.

In This Article:

Eyetracking Data

About the Study

To answer that question, we analyzed the x, y coordinates of over 130,000 eye fixations on a 1920×1080 screen. These fixations were from 120 participants, who were part of our recent eyetracking study that involved thousands of sites from a wide range of sectors and industries. For this study, we focused our analysis on a broad range of user tasks that spanned a variety of pages and industries, including news,

ecommerce, blogs, FAQs, and encyclopedic pages. Our goal was not to analyze individual websites, but rather to characterize the general range of user behaviors.

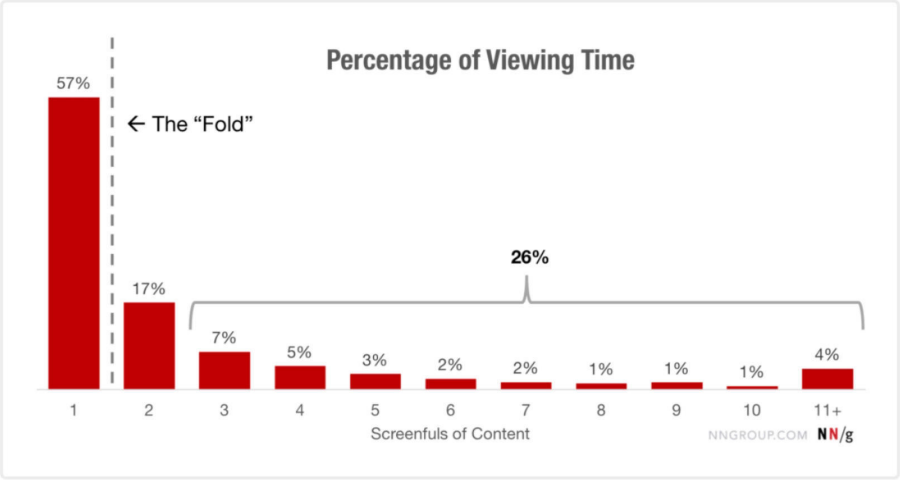
We compared these recent data with those obtained from our previous eyetracking study on 1024×768 monitors.

Study Results

Two changes happened between our studies: (a) bigger screens; and (b) new web-design trends, with possible adaptations on the side of the users. We can't tease apart the relative impact of these two changes, but it doesn't matter, since both are due to the passage of time, and we can't undo either one, even if we wanted.

In our most recent study, users spent about **57% of their page-viewing time above the fold. 74% of the viewing time was spent in the first two screenfuls**, up to 2160px. (This analysis disregards the maximum page length — the result can be due to short page lengths or to people giving up after the first two screenfuls of content.)

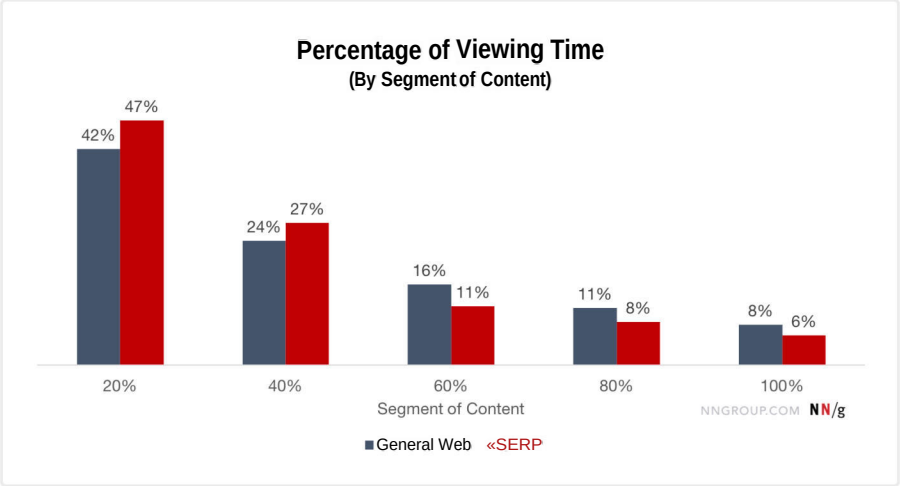
These findings are quite different from those reported in our 2010 article: there, 80% of the viewing time was made up of fixations above the fold. However, the pattern of a **sharp decrease in attention following the fold** remains the same in 2018 as in 2010.



Content above the fold receives by far the highest share of the viewing time. About 74% of the time was spent in the top two screenfuls of content (the information above the fold plus the screenful immediately below the fold). The remaining 26% was spent in small increments further down the length of the page.

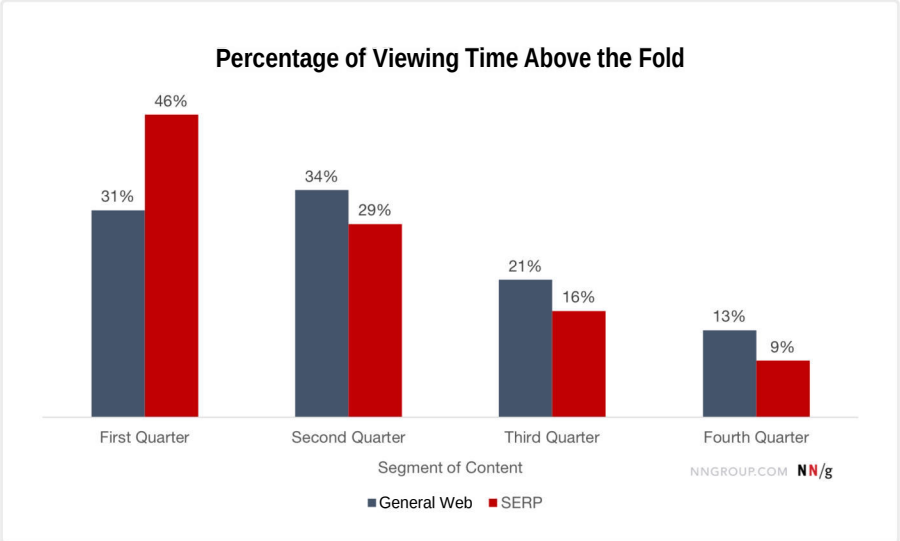
Understandably, not every page is the same length. To determine how people divide their fixations across the page (independent of how long the page is), we split the pages into 20% segments (i.e., one-fifth of each page). On general websites, more than 42% of the viewing time fell within the top 20% of the page, and more than 65% of the time was spent in the top 40% of the page. On search-results pages

(SERPs), which we did not isolate in the 2010 findings, 47% of the viewing time was spent on the top 20% of the page (and more than 75% in the top 40%) — likely a reflection of users' tendency to look only at the top results.



People spent disproportionately more time viewing the top 20% of a page.

If we look only at content above the fold — within the first screenful — the information towards the top of the screen received more attention than the information towards the bottom. More than 65% of the viewing time above the fold was concentrated in the top half of the viewport. On SERP, the top half of the first screenful received more than 75% of the viewing time above the fold. (It's an old truth, but bears repeating: be #1 or #2 on Google, or you hardly exist on the Internet. Google gullibility remains as strong as when we identified this user behavior, 10 years ago.)



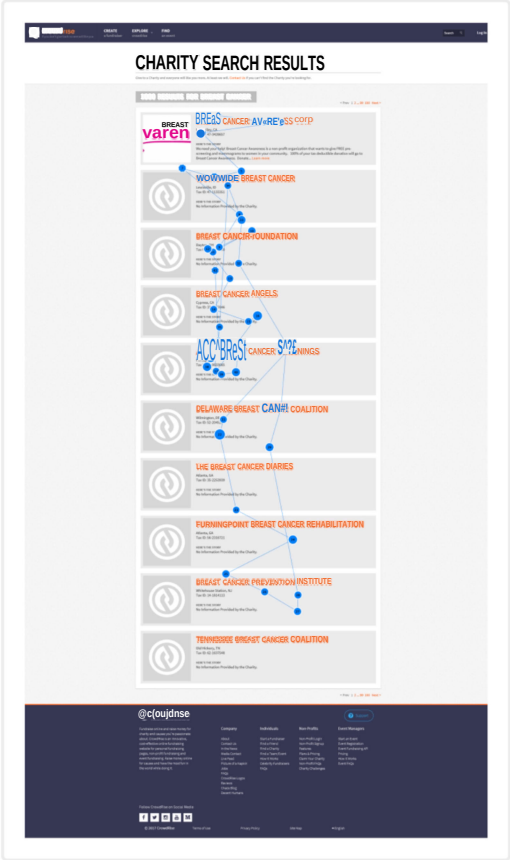
Even above the fold, attention was focused toward the top of the page — especially with SERPs.

Scanning & Reading Patterns

We've seen that the content above the fold received most attention (57% of viewing time); the second screenful of content received about a third of that (17% viewing time); the remaining 26% was spread in a long-tail distribution. In other words, the closer a piece of information is to the top of the page, the higher the chance that it will be read.

Individual reading patterns confirm this finding. Many users engage in an F-pattern when they scan a page whose content is not well-structured — they tend to look more thoroughly at the text placed close to the top of the page (the first few paragraphs of text), and then spend fewer and fewer fixations and time on information that appears low on the page.

Even with lists or information presented in a structured way, people use more eye gazes (and thus reading time) for the top of the page, as they need to understand how the page is organized. Once they do so, they tend to focus very efficiently only on the information relevant to the task at hand, thus spending a lot fewer eye gazes (and thus viewing time) on the content placed farther from the top.



This is a representative gaze plot showing that most of the user's eye fixations are concentrated in the top part of the page, though not always at the very top. The actual distribution of fixations will depend on the specific design and the user's goal in visiting the page. Occasionally a user may read a little bit if the information seems interesting, but overall, views peter out further down the page.

2010 vs. Present

In 2010, 80% of the viewing time was spent above the fold. Today, that number is only 57% — likely a consequence of the pervasiveness of long pages. What does that mean?

First, it could be that, overall, designers are doing a good job of creating signifiers to counteract the illusion of completeness and to invite people to scroll. In other words, they are aware of the disadvantages of the long page and mitigate them to some extent. Second, it could mean that users have become conditioned to scroll — the prevalence of pages requiring scrolling has ingrained that behavior in us.

At least to some extent. People still don't scroll a lot — they rarely go beyond the third screenful of info. Basically, the fold as a barrier has been pushed down to the third screenful — 8 years ago, 80% of the viewing time was spent in the first screenful of info (above the fold); today, 81% of the viewing time is spent in the first three screenfuls of information.

We've always said that people will scroll if they have a reason to do it. Attention still lingers towards the top of the page — that is the portion of the content that is most discoverable and likely to be viewed by your users. The interaction cost of scrolling reduces the likelihood that content will be viewed in lower parts of a longer page.

Interestingly, the increase in screen resolution did not lead to a decrease in scrolling, as one might have expected. The reason is probably that designers and developers did not leverage the larger screens, and instead, opted to spread content further apart. For better or worse, users are now encouraged to scroll more than in the past — but not much more. Information density was probably too high (leading to crowded and busy layouts) in the early days of the web, but page designs definitely tend to be too sparse now.

Implications

Given that users spend more viewing time in the top part of the page, especially above the fold, here are some things you want to keep in mind:

- **Reserve the top of the page for high-priority content: key business and user goals.** The lower parts of the page can accommodate secondary or related information. Keep major CTAs above the fold.
- **Use appropriate font styling to attract attention to important content:** Users rely on elements like headers and bolded text to identify when information is important, and to locate new segments of content. Make sure that these elements are visually distinct and styled consistently across the site so users can easily find them.

- **Beware of false floors**, which are increasingly common with modern minimalist designs. The illusion of completeness can interfere with scrolling. Include signifiers (such as cut-off text) to tell people that there is content below the fold.
- **Test your design with representative users** to determine the "ideal" page length and make sure that the information that users want can be easily seen.

Conclusion

While modern webpages tend to be long and include negative space, and users may be more inclined to scroll than in the past, people still spend most of their viewing time in the top part of a page. Content prioritization is a key step in your content-planning process. Strong visual signifiers can sometimes entice users to scroll and discover content below the fold. To determine the ideal page length, test with real users, and keep in mind that very long pages increase the risk of losing the attention of your customers.

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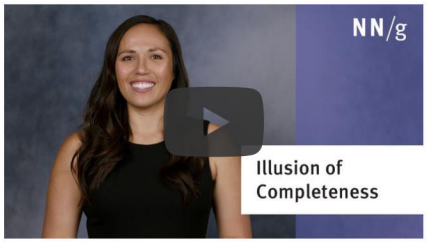

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The Illusion of Completeness: What It Is and How to Avoid It

Kim Salazar
January 17, 2016

Summary: Users can think they see the entire web page, although additional content exists off-screen. Designers must help users discover all relevant information.

Looking at a web page is much like looking at a landscape through a set of binoculars. A small part of that landscape is in your immediate view, but often you have to pan up and down, or side to side to see it all. Similarly, on a web page, to discover all the available content, users may need to scroll up and down, or even swipe or scroll side to side.

When viewing a landscape through binoculars, we know there are vast expanses of scenery in each direction — and that we may need to move our binoculars to spot the elusive bald eagle. But on the web, users have to rely on the design of the page to understand what possibilities for exploration exist. A golden nugget may be hidden below the fold, and users will never see it, unless they know (and feel motivated) to scroll. It is up to web designers to create designs that guide people toward valuable information by clearly signaling content down the page or even to the side.

In This Article:

Definition: Illusion of Completeness

The **illusion of completeness** happens when **the visible content on the screen appears to be complete, when in fact more information exists** outside of the viewable area. The term was coined

by Bruce Tognazzini in 1998. The illusion occurs when the visual design fails to guide users toward additional content that is present off-screen. Thinking a page is complete — when it isn't — is a serious usability failure: it can make users miss valuable information and prevent them from attaining their goals.

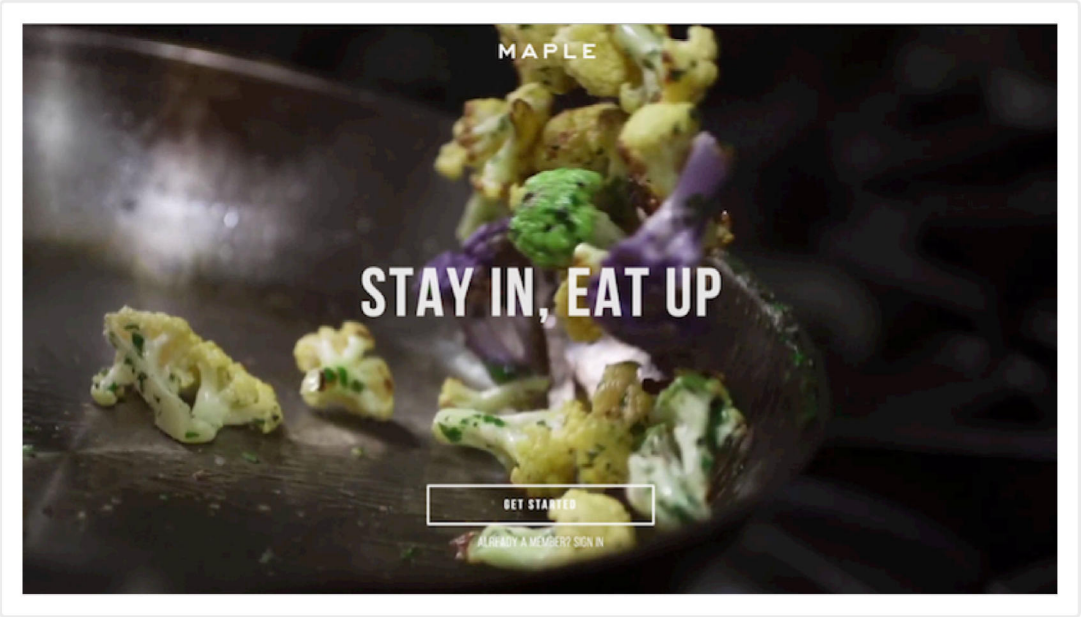
Since we've been warning designers of this usability problem for 18 years, why write about it again now? Because sites keep making the same mistake and because we keep seeing users trapped by the illusion of completeness in much of our ongoing user research. Let's put a last nail in this coffin and finally eradicate the illusion of completeness from the web so that we don't have to come back and tell you about it again in 2034.

Illusion of Completeness on the Vertical Dimension

In the early days of the web, users were less likely to scroll below the fold. Since then, users have grown accustomed to scrolling vertically. However, just because users have learned to scroll, we cannot expect them to know to scroll even in the absence of visual indicators inviting them to do so. If you don't think there's any more info, why on earth would you scroll?

Here is a list of design styles that often communicate the end of relevant content and create an illusion of completeness:

- **Large hero graphics or videos.** The recent trend toward image-based design has driven many websites to incorporate large eye-catching imagery or videos in the top area of the page. These approaches often push important content below the fold, out of immediate view and offer no additional cues to invite users to scroll.

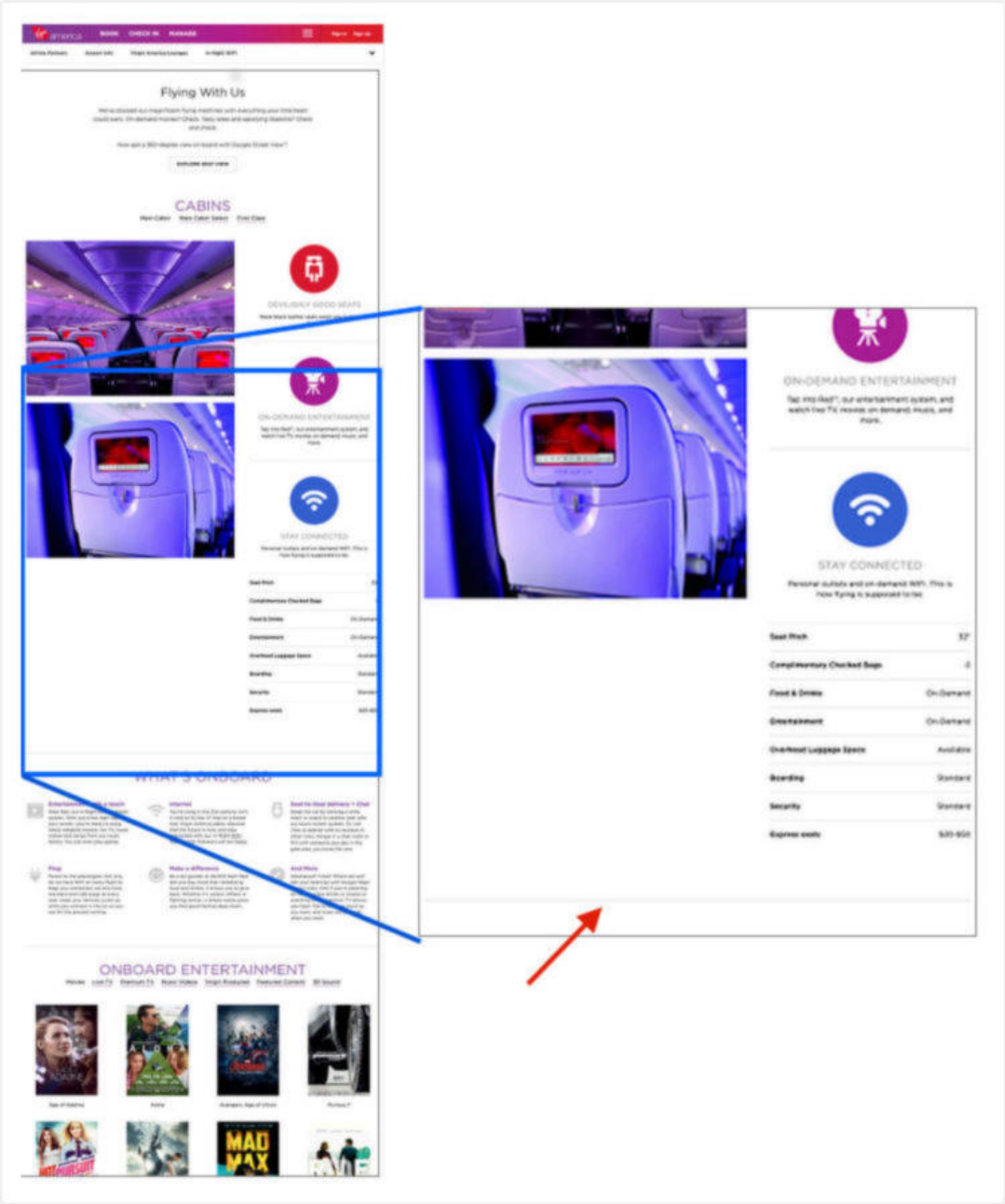


Maple.com, a food delivery service based in New York City, shows an autoplaying hero video that takes up the entire screen. The fold lands at the bottom of this image on all devices.

In the example above, the large video coupled with a strong call to action make the page appear complete, when in fact all details about this company are outlined further down the screen. This design creates a false floor, or an apparent end to the webpage. The absence of any navigational elements further contributes to the effect.

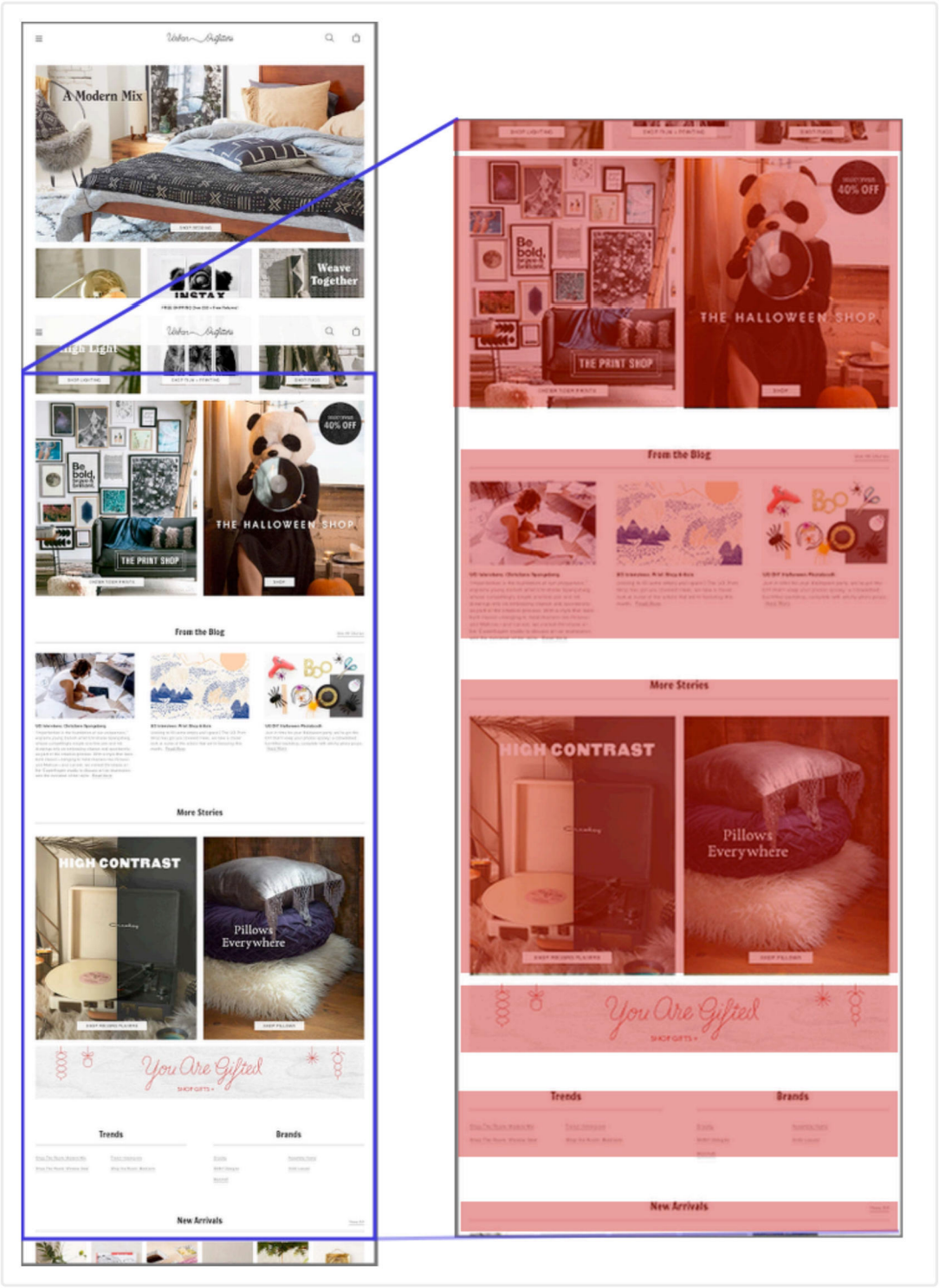
In a usability study we asked users to visit this site and find out what service this company offered. Six out of eight users did not realize they could scroll down this page. Because no other links or calls to action were visible, all our users selected the *Get Started* button and were met with a series of modals asking for personal information only to discover later on that the service was not available in their area. 75% of the test users were frustrated and not only had to spend time and effort entering their details on the site, but also were unable to find out what exactly this company did.

- **Distinct horizontal lines.** The illusion of completeness can occur anywhere on the page, not just at the top (as in the example above). A break in content marked by a horizontal line that spans the width of the page can create a visual barrier and discourage people to scroll further. If users encounter these strong horizontal breaks within the page content, they can assume it's not just the end of a section, but also the end of the page.



Virginamerica.com includes horizontal lines that span the width of the page between page sections. They can incorrectly suggest the end of content.

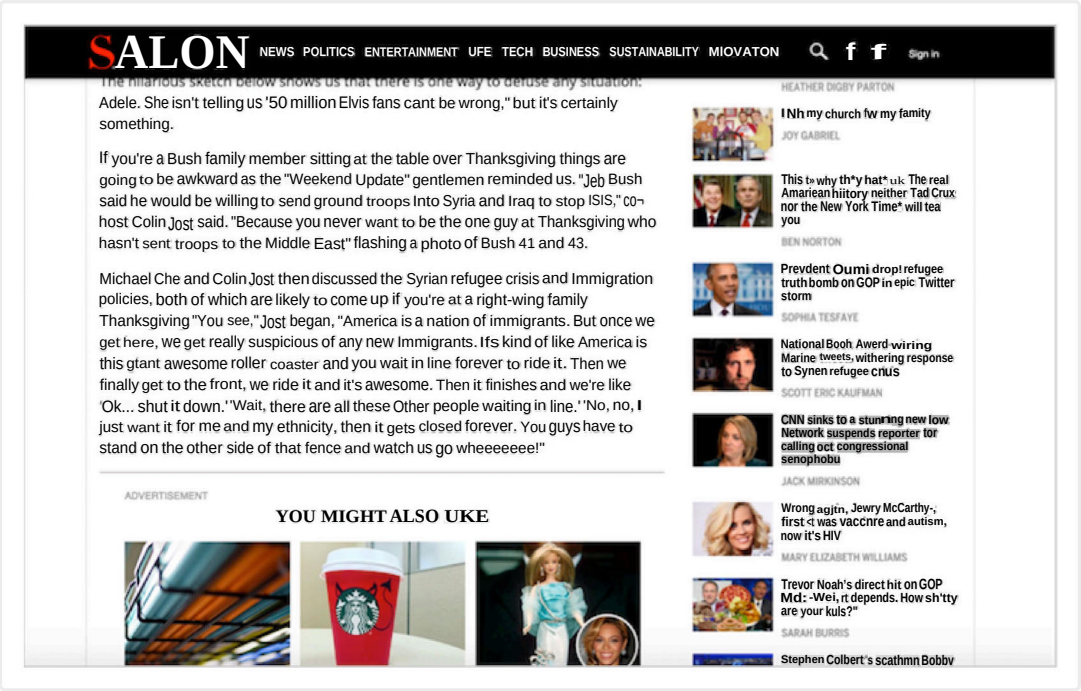
- **Expansive white space between content elements.** When horizontal gutters are too large or the content does not completely fill the container that it lives in, the large gap between content elements can signal the end of a page when users scroll down only to encounter one of those wide gaps. Why continue scrolling if it seems you won't get to see more information?



Urbanoutfitters.com Shading in red highlights content sections. Large horizontal gutters between sections make the page appear complete, although additional content exists further down the page.

- **Interruptions in the content flow.** Ads, internal promotions, or social-share buttons can indicate to users that they have reached the end of the page's relevant content. The issue is intensified if the ad is large enough that it becomes difficult to see what's below it —especially a danger on mobile devices with small screen sizes. Additionally, when the ad is placed at a natural end point in the content flow (e.g., at the end of an article), users can be justified in assuming there is no

more interesting information below (although, for instance, the page may still contain article comments or related content below the ad).



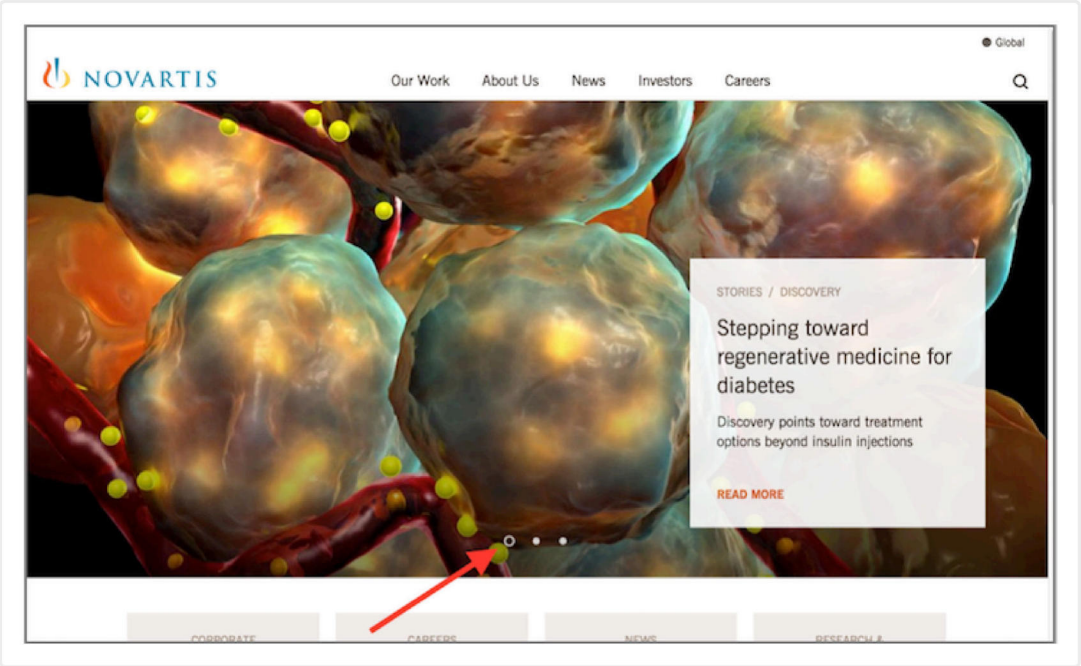
Salon.com displays large advertisements in the middle of the main body content. It is unclear that the remainder of the article continues following the advertisement.

The Illusion of Completeness on the Horizontal Dimension

Although users are accustomed to scrolling vertically on the web, scrolling (or swiping) horizontally is still not an expected way to interact with a desktop page. Even on mobile devices, where the horizontal-swipe gesture is fairly common, interfaces that rely on these gestures need strong signifiers to indicate the direction of interaction to users.

In order to browse news articles on the Yahoo Digest iOS app, users must swipe to reveal the next article. This gesture is much like removing the top card from a deck of cards to reveal the card below (and it's the reason why this interaction pattern is called a "deck of cards"). In this case, the screen lacks visual signifiers indicating the possibility to swipe horizontally.

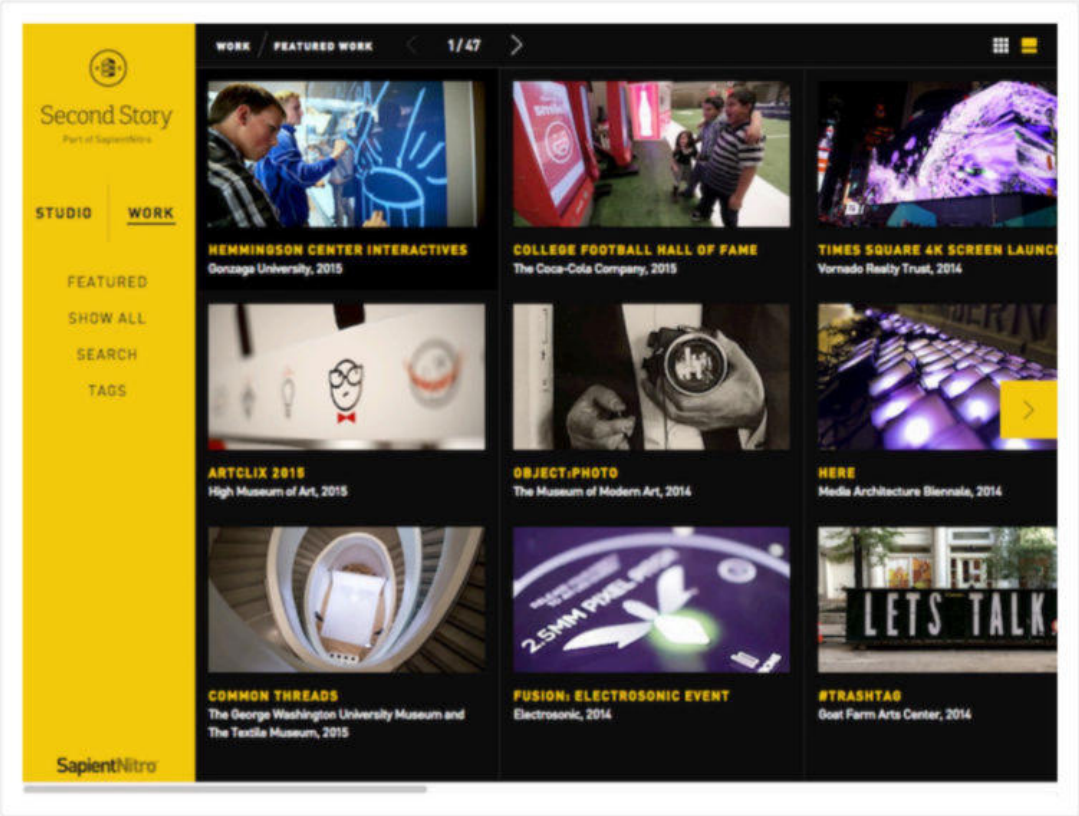
On desktops, horizontal navigation is most frequently associated to carousels. Cues that communicate how to interact with the carousel and expose the rest of the carousel frames are crucial.



Novartis.com. The dots at the bottom are weak carousel cues: they are not noticeable, and navigation arrows become visible only on hover. On the plus side, the site encourages vertical scrolling successfully by showing a sliver of the next sections (Corporate, Careers, News and Research) below the carousel.

It is less common that an entire website be laid out horizontally, requiring users to use a horizontal scroll bar to view all of the content. Occasionally designers and creative businesses take this direction

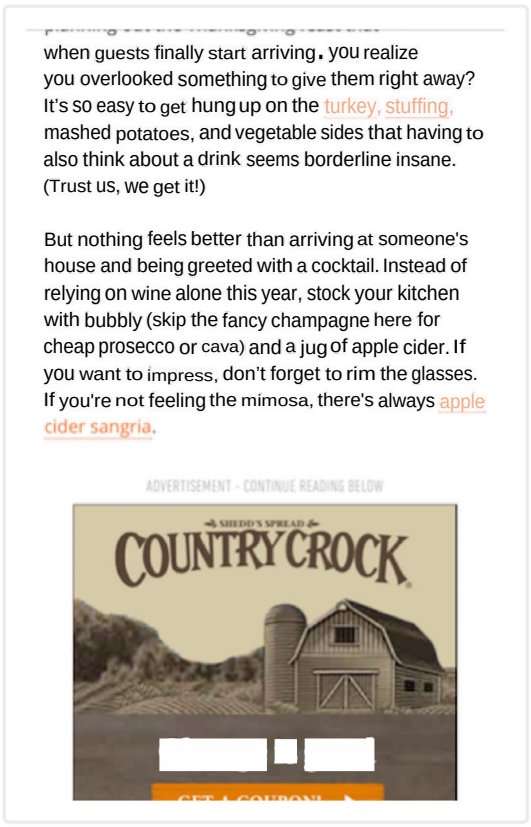
on their sites to showcase their creative design abilities. For mainstream sites, relying on horizontal scrolling is discouraged. The horizontal scrollbar is cumbersome because it requires constant attention and physical effort to steer the cursor within a narrow tunnel. And sites that are based on horizontal scrolling can easily make the same visual-design mistakes that create illusion of completeness on the vertical dimension.



Secondstory.com uses a horizontal layout. It is not immediately clear that additional content exists off-screen to the right. Users must identify the yellow arrow to the right, which is unexpected and hidden atop a bright graphic or expertly maneuver the bottom scrollbar sideways with their mouse.

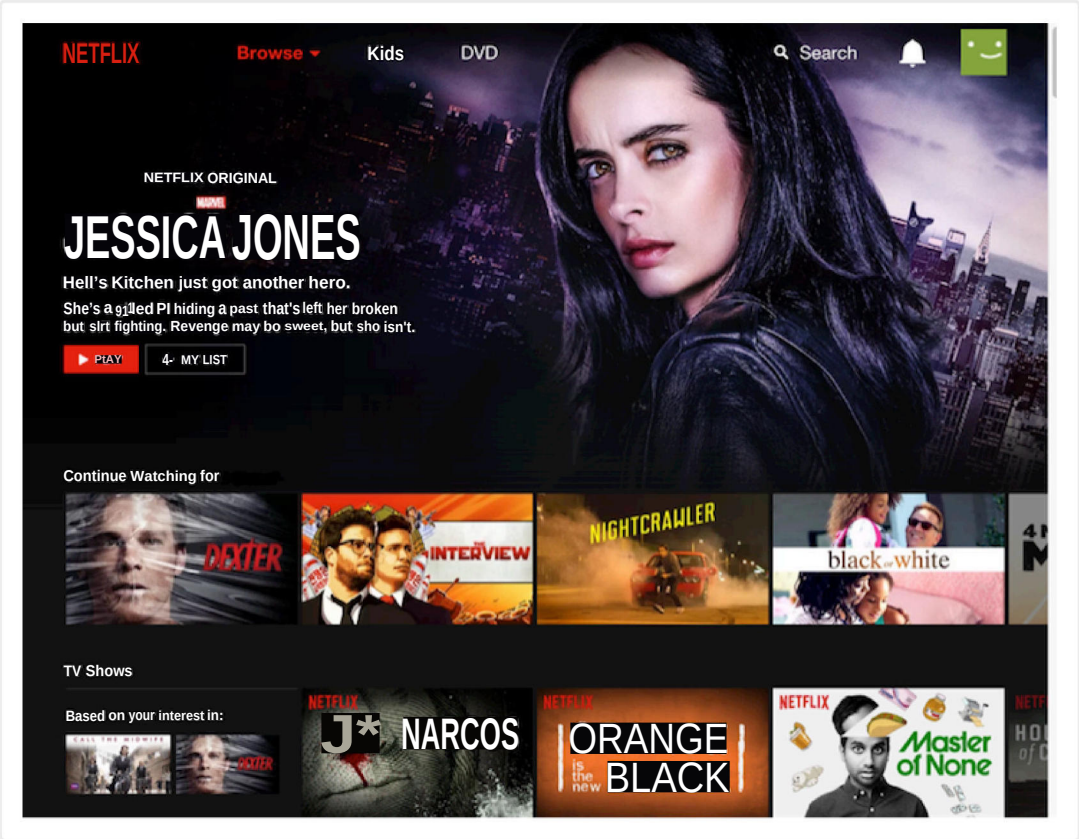
Ensure Your Pages Communicate Continuation Versus Completeness

- **Avoid full-screen hero content.** When using large banners, carousels, or videos in the hero space, ensure that additional content peeks above the fold to lead users to scroll further.
- **Be cognizant of contrasting lines or vast white spaces between content.** These visuals can be misconstrued as the end of relevant content.
- **Be cautious of interrupting content.** If you must interrupt content with an ad or with social-share icons, communicate to users that additional information can be found further down the page.



Delish.com: The ad within the article is preceded by the prompt to read past it. (Though in a rather low-contrast font.)

- **Create obvious cues for horizontal swiping.** Crucial information does not belong in a carousel or in any other horizontally scrolling container. Users often miss even obvious navigational cues, plus, the information scent provided by these cues is too weak and people are unsure what to expect from the additional content. When you do use a carousel, find ways to clearly communicate that additional information exists:
    - Show additional content bleeding off screen.
    - Include a list of headlines to indicate the content of the different carousel frames.
    - Provide salient and obvious arrow controls and slide counts.



Netflix.com uses a carousel to display programs in each category. The visual treatment of items on the right edge bleeding off the screen help to communicate the continuation of options.

- **Test on many devices** to ensure that design elements are working across different viewport sizes.

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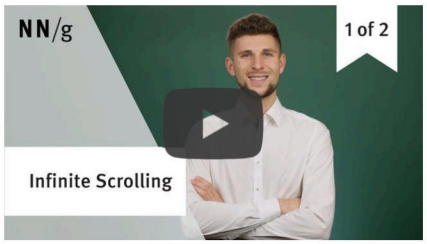

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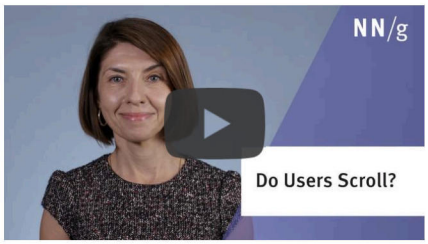

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The Cost of Thinking

Journal of Consumer Research; September 1980, Vol. 7, No. 2, p. 99-111

Abstract

Because consumer research often faces the finite or quantal choice problem, a recent study developed a theory of choice that explicitly considers the difficulty in comparing diverse alternatives. The theory's objective was to offer a methodology for explicitly dealing with 'thinking costs' that uses both the notions of preferences over characteristics and probabilistic predictions of choice. A second objective was to examine the precise cost of using various simplifying decision rules as compared to a utility maximizing procedure, allowing a theoretical comparison of various simplifying strategies on a cost basis. The resulting model does have some restrictive assumptions. However, it is able to quantify decision-making costs and the likelihood of mistakes. The model may be applied in the areas of: 1. Product characteristics in an advertisement, 2. Information presentation, and 3. New product sales forecasting. However, if used on an individual level, the adoption of simplifying choice strategies can leave a consumer vulnerable to manipulation. For example, due to a lack of proper feedback of information, a consumer is kept from learning of mistakes, and the best product may never be found.

The Cost Of Thinking

STEVEN M. SHUGAN*

A theory and methodology are developed for explicitly considering the cost of comparing diverse choice alternatives. The theory allows (1) explicit analytical measures of the cost of using various simplified decision strategies, and (2) predictions regarding the distribution of mistakes a consumer is likely to make when reducing decision-making effort.

To the vast majority of mankind nothing is more agreeable than to escape the need for mental exertion. . . . To most people nothing is more troublesome than the effort of thinking (James Bryce, The American Commonwealth 1888).

The finite or quantal choice problem[1] frequently occurs in consumer research (Bettman 1971; Blattberg and Sen 1976; Einhorn 1970; Fishbein and Ajzen 1972; Luce 1959; Marschak and Radner 1972; McFadden 1970; Tversky 1972; Tversky and Kahneman 1979). A consumer or decision maker faces a choice conflict in which the individual must select a choice from some set of alternatives (products, brands or generally choice objects). The consumer, after choosing one of the alternatives or products, derives satisfaction from the product represented by the product's utility (Farquhar 1977; Green and Wind 1973; Herstein and Milnor 1953) or affect (Fishbein and Ajzen 1972). Naturally, many theorists began by assuming individuals would choose their most preferred (optimal) product, thereby maximizing their utility. However, this approach ignored measurement errors and lacked insight for situations in which new alternatives are offered or old alternatives deleted.

Attempts to incorporate nonoptimal alternatives focused on probabilistic predictions of choice. For example, Luce's axiom (Luce 1959) or Clarke's rule (Clarke 1957) and its extensions (Morgan 1974) propose a mechanism where the probability of any product being chosen is a function not only of product preference, but also of the utilities of the nonoptimal products. Marketers began using information from the entire set of products to estimate choice probabilities. McFadden (1970) used statistical estimation implying Luce's assumption (for product addition and deletion) to determine underlying consumer preferences from choice data. Later, Hauser (1976) showed this probabilistic approach to be consistent with deterministic axioms of preference.

Unfortunately, the influence of nonoptimal alternatives is somewhat arbitrary. The actual consumer choice mechanism is not considered. Therefore, it is not difficult to construct choice situations that are inconsistent with Luce's axiom (Becker, DeGroot, and Marschak 1963; Debreu 1960; Tversky and Russo 1969).

One problem with Luce's axiom is its lack of consideration of product differences and similarities. In marketing terms, Luce's axiom implies that when a new brand is introduced, it derives its market share proportionally from all other brands regardless of substitutability. This deficiency was remedied by viewing preferences for characteristics as fundamental (Fishbein and Ajzen 1972; Keeney and Raiffa 1976; Lancaster 1966) rather than preferences for products. Tversky (1972) brilliantly combined the notion of characteristics (albeit binary) with a Luce-type mechanism.

The theory was now sufficiently rich to address problems of new products, deletion of products, and changing preferences for existing products. However, empirical examinations (Bass 1974; Bass, Pessemier, and Lehmann 1972; Hayes 1964; Payne 1976) showed that behavior was far more complex. When faced with a choice conflict, consumer perceptions were formed

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[1] The quantal choice, or "all-or-nothing response," refers to problems where responses can be expressed as "occurring" or "not occurring," e.g., whether an insect is dead or living. Problems such as "how much will he buy?" are not quantal choice problems. A large literature exists on statistical techniques for dealing with quantal response data.

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by acquiring information on each product and then processing that information to arrive at an expected utility. Preference only partially influences choice by determining benefits. However, the determination has costs—time information, numerous alternatives, time pressure, the consumer's limited information processing capabilities, and the general effort exerted to solve the problem. Generally, the net utility of finding the best product from one set of products may be different from the net utility of finding it as best from another set of products. That is, there may be a cost associated with the act of making a decision—the "cost of thinking."

The study of decision-making or thinking costs has been well accepted by many researchers (Coombs 1964; Dawes 1964; Simon 1957; Simon and Newell 1971) who have studied specific simplifying rules for processing information that purport to lower decision-making costs (Bettman 1977; Bettman and Kakkar 1977; Einhorn 1971; Slovic, Fischhoff, and Lichtenstein 1970; Wright and Barbour 1977) and their applications to marketing (Lehmann 1977; Russo 1977; Wright 1975). These rules often search for a "satisfactory" alternative rather than an optimal one, and, hence, the process is referred to as "satisficing" (Simon 1957). This experimental research has provided substantial understanding of consumer behavior. However, the costs associated with these rules have yet to be rigorously defined and measured. To adequately understand, model, predict, and possibly influence the consumer choice process, we must build a theoretical foundation for "thinking costs." We must quantify thinking costs, determine a unit of measurement, and explore how that measurement varies across choice conflicts.

This paper develops a theory of choice that explicitly considers the difficulty in comparing diverse alternatives. The objective is to provide a methodology and development for explicitly dealing with "thinking costs" that use both the notions of preferences over characteristics and probabilistic predictions of choice. Specifically, one objective is to define a measurable (i.e., well-defined and calculable) unit of thought, and then use it to quantify and estimate the cost of utility maximization. Another objective is to examine the precise cost of using various simplifying decision rules as compared to a utility maximizing procedure, allowing a theoretical comparison of various simplifying strategies on a cost basis.

Of course, simplifying decision rules may lead to less than optimal alternatives, which could be called mistakes. An important objective of this paper is to examine these mistakes and how a reduction in thinking costs often leads to a reduction in expected benefits. It will be shown that under certain specific conditions Luce's axiom describes these mistakes, and under more general conditions Tversky's mechanism describes them.

BRIEF REVIEW OF CHOICE THEORY

Strategies that intend to save decision-making costs by simplifying the choice process include conjunctive, disjunctive (or maximax), minimax, and lexicographic strategies, all generally referred to as noncompensatory. That is, one characteristic cannot compensate for a deficiency in another. The conjunctive rule states: any product not meeting a minimum cutoff level on any characteristic is eliminated. The Federal Drug Administration uses a conjunctive strategy in issuing standards (e.g., purity, weight, age) that all ethical drugs must meet. Wright (1975) cites a variation of this strategy, i.e., choosing the product that meets any of the cutoffs.

The disjunctive strategy or rule is a maximax strategy. Products are compared on their best characteristic. The product with the highest rating on its best characteristic is chosen. The minimax strategy suggests products should be judged on their weakest characteristic, and the one with the strongest weakest characteristic should be selected. For example, an electric circuit may be chosen on the basis of its weakest component because once that component fails, the circuit fails. Finally, the lexicographic strategy first ranks the characteristics in order of importance and then selects the product rated best on the most important characteristic. If two or more products rate equally, the next most important characteristic is used as a tie breaker. For example, the winner of a chess tournament is the person winning the most games. However, if two or more people tie on this criterion, a measure of the quality of the opponents may be used as a tie breaker. The lexicographic rule proper will not be dealt with in detail, because a generalization of the Tversky mechanism contains the essential lexicographic elements and represents a much richer model of the consumer decision process.

Note that each of the preceding examples of simplifying strategy usage was justified on the outcome it provided rather than the savings of decision-making costs. The strategies, in fact, determined the best product. It is much more difficult to compare the strategies on the ease of their use than on their potential to select the best alternatives. The first step involves experimentation on the relative ease of adopting various simplifying decision rules. However, a theoretical framework is needed to formally compare the potential savings in decision-making costs for the various strategies.

THE CONFUSION INDEX

Development of a "Thinking Cost"

Let us start by considering the cost of a utility-maximizing model. It will then be possible to determine how simplifying decision rules reduce that cost. Sup-

pose a consumer wishes to choose the best (most preferred) product from several products. For the moment, assume this decision is occurring for the first time. If there are M alternative products under consideration, the consumer must make $M-1$ comparisons to determine the most preferred, i.e., eliminate $M-1$ products. For example, to discover Lysol is the best of four household cleaners, the consumer could compare Lysol with the other three, making $M-1$ comparisons. If there were a fixed cost, f, per comparison, the total cost of the decision could be computed by multiplying that cost by $M-1$. Precisely,

$$\text{difficulty of choice} = (M-1)f, \quad (1)$$

where,

f = the cost of comparing two products, and
M = the number of alternative products considered.

Equation 1 can be written as,

$$\text{general difficulty of a choice} \equiv m\bar{f}, \quad (2)$$

where,

m = the number of product comparisons, and
$\bar{f}$ ≡ the average difficulty or cost of comparing two products.

Equation 2 provides a method for computing "thinking costs." However, some products may be harder to compare with each other than other pairs of products. Therefore, a method for computing the cost of comparing two products, f, is required.

The Difficulty of Comparing Two Products

Assume the consumer's preferences are determined (directly or as a cue) by the product's characteristics. Then, a consumer who wishes to choose between two products may proceed by comparing the two products on their characteristics. These comparisons may be viewed as aspect (Tversky 1972), or attribute, comparisons. For example, a consumer choosing between two household cleaning products may first compare them on ammonia content. Second, a comparison on drying speed may take place. Next, the products could be compared on the attractiveness of their respective colors. These comparisons could then proceed until all characteristics of the product are exhausted, uniquely defining each product. The two products may be compared on a multitude of characteristics before a choice is made.

Assume that associated with each characteristic comparison is a fixed cost, a unit of comparison effort. The products must be evaluated on the characteristic and their differences assessed. It is then reasonable to assume that the more comparisons necessary to make a choice, the more difficult the choice. If the choice can be made after comparing the products on one characteristic only, the choice is relatively easy. If, however, several hundred characteristic comparisons are required, the choice can be considered relatively difficult. This paper measures the thinking cost associated with a choice by positing that f is monotonically related to the number of characteristic comparisons made. That is, more difficult decisions require more characteristic comparisons.

This representation of the consumer choice process would be void of implications without a methodology to classify choice situations with respect to the number of comparisons necessary to resolve the conflict. Fortunately, this representation can be interpreted as a sampling problem. The consumer can be viewed as sampling product pair differences by characteristic. For example, consider the household cleaning product comparison. The consumer first compares the products on ammonia content. This comparison is basically sampling from the population of product differences. The sample chosen has one observation—difference in ammonia content. Again, the second comparison on drying speed can be viewed as an observation on drying speed difference. The sample now contains a third observation—color attractiveness difference. At each point in the sampling, the consumer can infer the true difference (i.e., the true preference) between the products. Given a positive inferred difference, the former product will be chosen. Given a negative inferred difference, the latter product will be chosen. Finally, given a difference close to zero, the consumer will remain uncertain and continue sampling, comparing the products on yet another characteristic.

The crucial question becomes: How many product difference comparisons need to be made so that the consumer will feel sufficiently confident to make a decision, i.e., choose the product judged superior on characteristics observed thus far? This number determines f, and, hence, the difficulty of the choice. Given some fairly unrestrictive assumptions (DeGroot 1970), sampling theory would dictate the following three factors as influencing the expected number of characteristic comparisons necessary to make the choice. If z_r is the difference in utility between the products on attribute r, the three factors are:

1. The true difference in mean utility (average relative preference) between the two products. This is the expected value of z_r, r probabilistically chosen, denoted $E(z)$.
2. The confidence level at which the decision must be made, denoted α. This value is the probability of not making a mistake.[2]
3. The variability in the characteristic difference between the two products. This is the variance of z_r, r probabilistically chosen, denoted $var(z)$.

[2] The α level has a strong relationship to the psychological theory of involvement.

The first factor is inversely related to the difficulty of the choice. If the true difference in utility between the two products is large, holding factors 2 and 3 constant, few characteristic comparisons will be required and the choice is easy. However, if the true difference in utility is small, many comparisons will be required to determine this small difference, hence the choice is more difficult. Hendrick, Mills, and Kiesler (1968) appear to have contradictory experimental results; however, other factors were not kept constant.

The second factor is directly related to the difficulty of the choice. The consumer may infer, at any time, which is the more preferred product and then choose that product. But the consumer would then be choosing a product before all possible characteristics have been compared. Hence, the consumer risks a mistake. Requiring more confidence implies a lower acceptable risk, which requires more comparisons and, hence, a more difficult decision. For example, in choosing sticks of gum, the consequence of a mistake is relatively unimportant. Here, the consumer may only consider one product characteristic for comparison, perhaps brand name. However, in choosing a house, the consequence of a mistake may be very costly and more comparisons are required.

Note that a is exogenous to the model. The confidence level, a, reflects how this choice interacts with other decisions and the expected difficulty of the decision at hand. The resources allocated, including thinking effort, to any choice will depend on opportunities made available by other choices. Here, a reflects and captures the effect of all outside choices on the choice at hand. Future research using Bayesian analysis may specify a loss function based on some global optimization.

The third and final factor is inversely related to the difficulty of the choice. As the variability in product characteristic differences increases (actually, the differences in utility), holding average relative preference constant, the number of comparisons necessary to make a choice at a given confidence level increases. This increase, in turn, heightens the difficulty of the decision. For example, in comparing the two household cleaning products, a consumer would find the comparison relatively easy if one product uniformly dominated the other product on all characteristics (color, amount of suds, abrasiveness, etc.), that is, zero characteristic difference variability. Conversely, the consumer would find the comparison relatively difficult if the two household cleaners were not only very different on all characteristics, but also superior on an equal number of characteristics.

The preceding discussion can be formalized for preciseness, as follows:

N ≡ number of characteristics (e.g., ammonia content or color attractiveness for household cleaners) that uniquely identify the choice alternatives.

X_{ij} ≡ the level of the *ith* characteristic for choice alternative j (e.g., the ammonia content for Windex).

$U_i(X_{ij})$ ≡ satisfaction or utility derived from the *ith* characteristic for alternative j, abbreviated U_{ij}.

U_j ≡ actual satisfaction or utility derived from the selection of alternative j.

Further, for simplicity, assume[3]

$$U_j = \sum_{i=1}^{N} u_{ij}.$$

Suppose a consumer must choose between product j and product k (for example, between Lysol and Windex). The consumer proceeds to compare the products on a series of characteristics. For each characteristic r, the utilities for both products, U_{rj} and U_{rk}, respectively, are observed and the difference, $z_r \equiv U_{rj} - U_{rk}$, is obtained. If n characteristics are examined, the consumer will choose product j if $\sum_{r=1}^{n} z_r > 0$ and product k if $\sum_{r=1}^{n} z_r < 0$. (The case where $\sum_{r=1}^{n} z_r = 0$ will be discussed later.)

The consumer must, then, choose the number of characteristics to observe (that is, n).[4] This n will depend on the willingness of the consumer to make a mistake, which is represented by a. The consumer requires n to be large enough so that the probability of not making a mistake is less than a. Precisely, the consumer requires both:

Condition A: $P(\bar{z}_n > 0 \mid U_j - U_k < 0) < 1 - a$,

and

Condition B: $P(\bar{z}_n < 0 \mid U_j - U_k > 0) < 1 - a$,

where P (-|-) is a conditional probability function, $\bar{z}_n$ is the sample mean with sample size n, i.e., $(1/n) \sum_{r=1}^{n} z_r$, and a is the confidence level ($0 < a < 1$).

To minimize thinking cost, the consumer will select the minimum number of characteristic comparisons, n^*, so that the confidence level is maintained. Precisely,

n^* = minimum n, so that Conditions A and B hold.

As stated earlier, n^* is a function of $E(z)$, $var(z)$, and a. Now, the variance of z can be interpreted as the perceptual difficulty in comparing the two products, which can be analyzed by breaking the $var(z)$ into its

[3] This assumption does not require a linear utility function, only additive separability over characteristics (see Farquhar 1977). Note that the assumption only concerns consumer preferences, and makes no direct assumption about information processing.

[4] Sequential sampling simply requires the use of standard and well-developed dynamic programming (for example, see Blackwell 1965 or Wetherill 1975) with special emphasis on optimal stopping (DeGroot 1970). However, the mathematics would soon become quite tedious and might obscure the insights of the subsequent development.

FIGURE A

POSITIVE COVARIANCE — A SIMPLE CHOICE

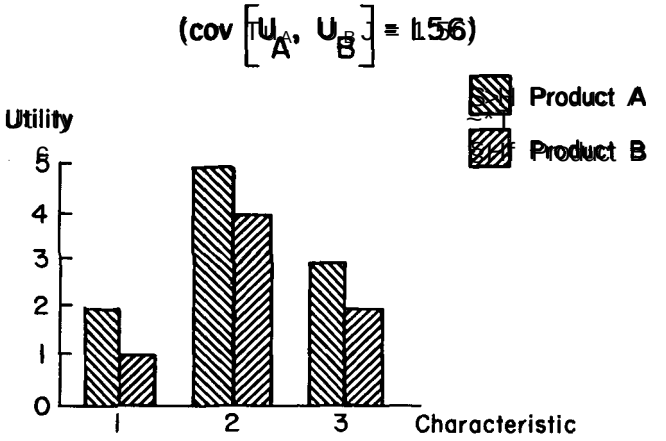
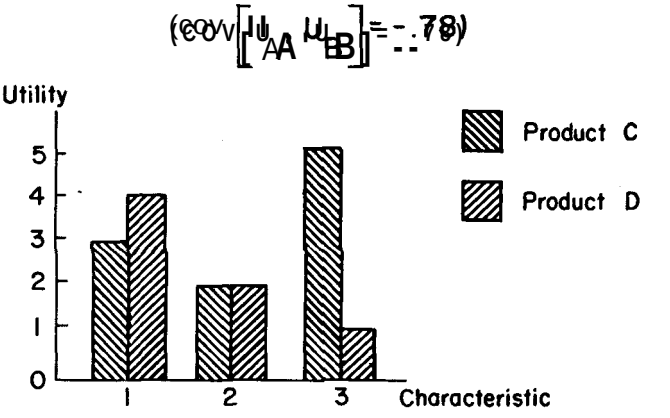


FIGURE B

NEGATIVE COVARIANCE — A DIFFICULT CHOICE



components. Hence,

$$var(z) = var(U_j - U_k),$$

$$= var(U_j) + var(U_k) - 2cov(U_j, U_k),$$

where $cov(U_j, U_k)$ is the covariance between U_j and U_k.

The first term, $var(U_j)$, can be interpreted as the lack of a halo effect (Beckwith and Lehmann 1975; Thorndike, 1920) for product j. For example, if product j has a strong halo effect, i.e., it is perceived similarly on all characteristics, this term will be small. Hence, other factors constant, the larger the halo effect on product j, the easier the choice becomes. The next term, $var(U_k)$, can be analogously interpreted as the lack of a halo effect surrounding product k. Again, the larger the halo, the easier the choice. The final term, $cov(U_j, U_k)$, represents the perceptual similarity of product j and product k.[5] It is inversely related to the cost of thinking. This term will tend to be large if the two products vary similarly, that is, if products j and k are both rated highly on the same attributes.

Consider Figure A. Here, product A and product B are compared on three characteristics. They vary similarly, i.e., A is high on the same characteristics as B. Product A is superior on all characteristics, the covariance is positive, and the thinking cost is small.

Now consider Figure B, which illustrates two products, C and D. The utility of Product C is the same as Product A, i.e., ten, and the utility of Product D is the same as Product B, i.e., seven. Again, the difference in preference is three units. The respective variances are also identical. However, the covariance is now negative. Product C is superior on only one characteristic. The consumer must trade off the third characteristic with the first and second characteristics. The result is a more complex and difficult decision. Hence, the covariance term represents the perceptual complexity inherent in the product differences.

Summarizing, the cost of thinking is directly proportional to the perceptual complexity in comparing the products (halo effect and difference effect), and is inversely related to both the difference in preference between the products and the confidence at which the choice must be made. These three factors influence the expected number of comparisons necessary to make a particular choice and, thus, the expected difficulty of comparing two products. These three factors also determine a bound for the number of necessary comparisons and, hence, the potential difficulty; the actual difficulty of comparing the two products will be probabilistic and depend on the characteristic selection. This potential difficulty is a bound on the number of characteristic comparisons necessary to achieve confidence level α. That bound follows for a binary choice and is the sample size sufficient to achieve the desired confidence level, i.e., meet Conditions A and B:

$$f_p = \frac{\text{var}[z]}{(1 - \alpha)E[z]^2}, \tag{3}$$

where f_p = the potential cost of comparing two products. This quantity is an upper bound on f as proven by Theorem 1:

> **Theorem 1:** If f_p comparisons are made then the probability of making a correct choice is at least α.[6]

Equation 3 is an upper bound on the minimum number of comparisons, n^*, and not the actual n. When the exact distribution of z is given, f can be computed directly. However, f_p may vary monotonically with f (i.e., still representing relative difficulty) and, there-

[5] However, it does not represent the difficulty in discerning differences as discussed by Thorndike (1920).

[6] Proofs of theorems are given in Appendices, which are available from the author.

force f_p, provides a method for approximating thinking costs with a closed form expression. The methodology for approaching thinking costs as proposed by this paper is not dependent on using this particular surrogate for f. Three comments in this connection are appropriate.

First, note that f_p defined by Equation 3 can be written in terms of the utilities of product j and product k as follows:

$$f_p = \frac{U_j^2 + \sigma_j^2 + \sigma_k^2 - 2\sigma_{jk}}{(1-\alpha)(\mu_j - \mu_k)^2},$$

where,

$\mu_j = (1/N)\sum_{r=1}^{N} U_{rj}$,

$\mu_k = (1/N)\sum_{r=1}^{N} U_{rk}$,

$\sigma_j^2 = (1/N)\sum_{r=1}^{N} (U_{rj} - \mu_j)^2$,

$\sigma_k^2 = (1/N)\sum_{r=1}^{N} (U_{rk} - \mu_k)^2$,

$\sigma_{jk} = (1/N)\sum_{r=1}^{N} (U_{rj} - \mu_j)(U_{rk} - \mu_k)$.

Second, f_p is scale invariant. The utilities can be subject to any linear transformation and f_p remains the same. Hence, this f_p is consistent with the use of utility functions unique to a linear transformation, as derived from most axiom systems (Herstein and Milnor 1953; Keeney and Raiffa 1976). Further, the utilities can be measured with standard techniques, such as conjoint analysis (Green and Rao 1971; Green and Srinivasan 1977; Luce and Tukey 1964) or its extensions (Hauser and Shugan 1980).

Third, f_p is either infinite or undefined as the difference in utilities approaches zero while the actual f will approach the total number of characteristics. This means that when two products have exactly the same utility, it is impossible to determine which product is superior.[7]

Comparing Multiple Products

If M products are considered, Equation 1 gives the cost of thinking. Letting f be the comparison cost for the *ith* comparison, Equation 1 can be rewritten as follows:

$$c = \sum_{i=1}^{M-1} f = (M-1)\bar{f}, \qquad (4)$$

where,

c = the cost or effort needed to make the choice,

$\bar{f}$ = the average binary comparison cost.

[7] Perhaps the cost of comparisons can no longer be viewed as fixed when many comparisons must occur. In that case, the cost must be marginally increasing or α must be decreased.

In general, the distribution of z, is unknown. In this case, the average comparison cost, $\bar{f}$, can be replaced by the average potential cost, $\bar{f}_p$. Note, the exact order in which the products are compared may affect both f and f_p. Many ordering criteria are possible.[8] In this paper, the criterion chosen will be the minimum f_p over all nonerrored[9] orders. Hence, assume that nonoptimal products are optimally eliminated. Finally, define c_p as the potential difficulty or "thinking cost" termed the confusion index, formulated as follows:

$$c_p = (M-1)\bar{f}_p^*, \qquad (5)$$

where,

$\bar{f}_p^*$ = the average cost per comparison given the optimal comparison order,

M = the number of alternatives ($M-1$ is the number of comparisons).

A Numerical Example

Consider a choice involving three household cleaners differing on four characteristics. Table 1 indicates a consumer's utility associated with each product by characteristic. These utility values can be obtained, for example, from part worths in conjoint analysis (Tversky 1967) or by multiplying importance by belief in a linear compensatory model. Theorem 1 can be used to determine the difficulty of each binary comparison (for example, let $\alpha = 0.5$).

The cost of deciding between Windex and Lysol can be computed as follows:

$\mu_{Windex} = 3.75$ $\sigma^2_{Windex} = 14.19$ $\sigma_{Windex,Lysol} = 10.44$

$\mu_{Lysol} = 4.75$ $\sigma^2_{Lysol} = 8.19$

and

$$c_p = \frac{[14.19 + 8.19 - 2(10.44)]}{(1-0.5)(3.75-4.75)^2} = 3.0.$$

It follows that the cost between Windex and Ajax is:

$$c_p = 54.0,$$

and the cost between Lysol and Ajax is:

$$c_p = 2.0.$$

[8] The expected cost rather than lowest cost is a usual and intuitively appealing measure. However, there are at least two reasons for using lowest cost. (1) Consider a lab psychologist who desires to measure the difficulty of a maze. That psychologist could use the number of necessary turns, for inches traveled, assuming the best possible path is taken, or the psychologist could use the number of necessary turns given a random path. The random path may be a poor measure because some sequences would obviously be eliminated by very simple learning. (2) The mean (expected value) may be a poor measure when f_p is used. This drawback comes from f_p being a potential rather than mean cost. Hence, some values of f_p will drastically overstate f.

[9] These orders assume binary choices are correctly resolved.

TABLE 1

UTILITIES BY CHARACTERISTIC BY HOUSEHOLD CLEANER

Product	Characteristic: Drying speed	Color attractiveness	Polishing	Scent	Total
Windex	0	2	10	3	15
Lysol	1	4	9	5	19
Ajax	1	3	5	4	13

Binary Comparisons. Previously, cp was argued to have the same monotonic properties as c. Thus, if the actual cost, c, were computed for each product comparison, the respective costs would be 1.7, 3.2, and 0.8, rather than 3.0, 54.0, and 2.0, yielding the same rank order.

The rank order depicts the relative difficulty of the respective binary choices. It becomes clear that choosing between Lysol and Ajax is relatively easy ($cp \equiv 2.0$). Lysol is, after all, superior on virtually every characteristic. However, choosing between Windex and Ajax is relatively difficult ($cp \equiv 54.0$). The inferior product for this consumer, Ajax, is superior on 3 of 4 attributes, requiring numerous tradeoffs to identify Windex as superior.

Windex versus Lysol versus Ajax. The lowest comparison cost would be achieved by first comparing Lysol and Ajax, eliminating Ajax and then comparing Lysol and Windex, eliminating Windex. The total comparison cost would then be 5.0. This sequential elimination can be pictured as a tournament, with the binary choices representing matches. The minimum fp can be thought of as the "lowest cost tournament," namely:

- choose between Lysol and Ajax,
- eliminate Ajax as inferior,
- choose between Lysol and Windex,
- select Lysol as superior.

FIGURE C

EXAMPLE OF LOWEST COST TOURNAMENT

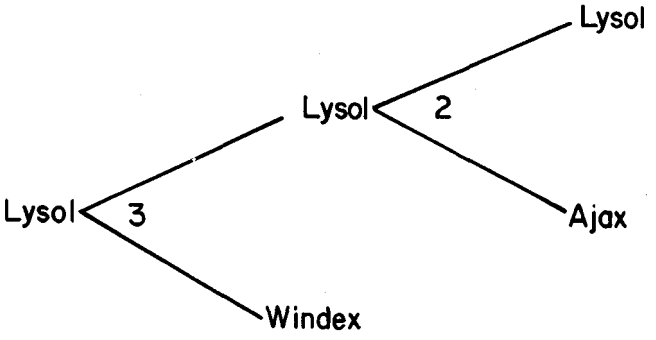


TABLE 2

UTILITIES BY CHARACTERISTIC

Product	Characteristic: 1	2	3	4	Total
A	1	11	2	5	19
B	5	6	3	7	21
C	8	9	3	3	23
D	4	2	5	4	15
E	1	2	7	6	16

The tournament is illustrated in Figure C. Lysol is first matched against Ajax and found superior, with an associated cost of 2.0. Lysol is then compared to Windex and is found superior with an associated cost of 3.0. The total "thinking cost" of choosing Lysol from these three household cleaners is $2.0 + 3.0 \equiv 5.0$.

There are many possible tournaments. The one actually used will depend on numerous factors, such as the expected cost of the tournament, as previously discussed. Again, note that the tournament represents only the expected or potential difficulty of the decision. The actual cost is random and will depend on the luck or skill with which the products are compared.

IMPLICATIONS FOR CHOICE BEHAVIOR

Optimality of Simplified Rules of Behavior

Tversky (1972), Coombs (1964), and Dawes (1964) have proposed simplifying decision rules that disregard information in an attempt to simplify the choice process. Wright (1975) offers a taxonomy of strategies and emphasizes the implication of these strategies to marketing research. Bettman (1971) and others (Payne 1976) have investigated the choice structure from an information processing viewpoint. Einhorn (1970) showed the mathematical relationship of several simplifying rules to linear compensatory models (as limiting cases). However, he emphasizes that "future research should concern the conditions, whether within the individual or in the task" under which these rules should apply. The confusion index previously developed provides a measure of the cost of these simplifying strategies.

A Conjunctive Rule. The conjunctive rule first assigns a minimal acceptable level to each characteristic. For example, if ammonia content is a characteristic of household cleaners', a minimal acceptable level may be 15 percent ammonia. Tversky (1972) extends this concept to define an aspect. Here, if the cleaner has 15 percent or more ammonia content, it is said to have ammonia. Essentially a step-function type of utility is assumed. However, each aspect could represent a level of the characteristic.

TABLE 3

UTILITIES FOR A CONJUNCTIVE STRATEGY

Product	Characteristics 1	2	3	4	Total
A	-M	11	-M	5	16-2M
B	5	6	3	7	21
C	8	9	3	3	23
D	4	-M	5	4	13-M
E	-M	-M	7	6	13-2M

[a] *M* approaches infinity.

TABLE 4

UTILITIES FOR A DISJUNCTIVE STRATEGY

Product	Characteristic 1	2	3	4	Total
A	0	11	0	0	11
B	0	0	0	7	7
C	0	9	0	0	9
D	0	0	5	0	5
E	0	0	7	0	7

To determine when a conjunctive strategy is less costly than a compensatory model, the confusion index must be computed. Consider the choice between five products (A through E), on four characteristics evaluated, as shown in Table 2. To measure the difficulty of this decision, compute c_p for the lowest cost tournament for which matches are correctly resolved. These matches, and associated costs, are as follows (the superior product labeled with an asterisk):

Comparison	c_p
B* vs. D	4.7
B vs. E*	13.7
A vs. C*	27
B vs. C*	66.

The total cost of using a compensatory model is, therefore, 111.4.

Next, the conjunctive strategy cost can be evaluated. To operationalize the conjunctive strategy, a minimal acceptable level of 3.0 will be assigned to each characteristic. If a characteristic does not meet the assigned level, the consumer utility for that characteristic will be given a very large negative value, called $-M$. Then, when a difference comparison occurs on that characteristic, the product not meeting the reasonable level is essentially eliminated.

Table 3 illustrates how Table 2 is transformed by a conjunctive strategy. Costs were computed by letting M approach infinity. The total cost of the conjunctive strategy is 76.0. Hence, the conjunctive strategy for this particular choice conflict not only involves less cost, but yields the same outcome (Product C) as the compensatory strategy. Also, the lowest cost tournament structure for the conjunctive strategy is, by coincidence, the same as the compensatory strategy.

An interesting feature of the conjunctive model is that its extreme case would be very costly. In this case, each and every characteristic must be observed to ensure each meets its predetermined minimum level. Therefore, the conjunctive rule was slightly redefined. When comparing two products' characteristics using a conjunctive strategy, the product meeting the fewest levels was eliminated. Then, in a sequential framework characteristic differences are observed-until either one product does not meet the reasonable level or until the consumer is confident both meet all levels, in which case the product with the larger inferred utility is chosen. Therefore, the conjunctive rule implies a product must meet the minimum level on a reasonable number of characteristics. Theorem 2 indicates the cost of using a conjunctive rule.

Theorem 2: The "thinking cost" of eliminating a product (compared to any satisfactory product) with a conjunctive rule is given by:

$$C_{\text{conjunctive}} = \frac{(1/k)(N-1)}{(1-a)},$$

where,

k = the number of characteristics on which the product misses the standard level for that characteristic,
N = the total number of characteristics, and
a = the confidence level for the decision.

When the number of characteristics, N, becomes large, the "cost of thinking" associated with the conjunctive rule increases. Wright (1975) has found this result supported experimentally. Now, as the number of characteristics not meeting the minimum level (i.e., k) increases, the "cost of thinking" decreases. For when the product has numerous characteristics at levels below the minimum, it takes few characteristics comparisons to reject the product as inferior. (Because the potential difficulty is being computed, all characteristics are used when computing C even though the consumer will not necessarily observe all characteristics.)

A Disjunctive Rule (Maximax). A disjunctive rule employs a comparison of each product on its best characteristic. For example, if Product A excels on Characteristic 2 and Product B excels on Characteristic 4, then only these two characteristics are used to dictate the choice.

Using a disjunctive strategy, Table 2 is transformed into Table 4. Only the product's best characteristic is used, and all other characteristics are set to zero. Evaluating the lowest cost tournament for the disjunctive strategy yields a total cost of 178.0. Thus, the adoption of a disjunctive rule not only leads to a larger

"thinking cost" than either a compensatory strategy or a conjunctive strategy,[10] but also leads, in this case, to the selection of a less than optimal product (i.e., Product A). Theorem 3 indicates the cost of using a disjunctive strategy.

Theorem 3: For the disjunctive strategy, the "thinking cost" involved in comparing a product with the null alternative is given by:

$$C_{\substack{Disjunctive \\ *\text{-}Disjunctive}} = \frac{(N - 1)}{(1 - \alpha)}, \quad (1 - a)$$

where,
where,
N ≡ total number of characteristics, and
a = the confidence level.

C is a function of N because the consumer must find the best characteristic. This expression reveals the conjunctive strategy always to have less or equal cost than the disjunctive strategy for comparing a product against the null alternative (product elimination).

It also can be shown, using the confusion index, that a decision is easier using disjunctive strategy for comparing two products with the same best characteristic, than when each is best on a different characteristic.

This analysis assumes the consumer knows the best characteristic when it is found. This assumption should be revised in future research to include only the maximum of the sample as the "best known characteristic."

The Maximin Rule. Maximin strategy compares the products on their weakest characteristic. The strategy dictates the selection of the product with the highest value on its weakest characteristic.

Table 5 reflects Table 2 transformed for a Maximin strategy. The total cost of a Maximin strategy for this set of products is 160.0. For this example, the strategy is, therefore, more costly to implement than either the conjunctive or compensatory strategies, and is less costly than the disjunctive strategy. However, the Maximin strategy does determine the optimal product for this example. Note again that the Maximin strategy is redefined along the same lines as the disjunctive strategy. Theorem 4 indicates the relative cost of the Maximin strategy.

Theorem 4: For the Maximin strategy, the "thinking cost" involved in comparing a product against the null alternative is given by:

$$C_{Maximin} = \frac{(N)(N-1)}{(1 - a)}.$$

[10] Table 4 is the "already processed data," whereas "c" reflects the "processing cost." The consumer may not even see all of Table 4 before making a decision. Consider Table 4 as an information board where a consumer sequentially uncovers a datum. Clearly, 75 percent of the time the consumer would have the frustrating experience of finding a "0." To the consumer, guessing which is the best product could be difficult.

TABLE 5

UTILITIES FOR MAXIMIN STRATEGY

	Characteristic				
Product	1	2	3	4	Total
A	1	0	0	0	1
B	0	0	3	0	3
C	0	0	0	3	3
D	0	2	0	0	2
E	1	0	0	0	2

Also, when using a Maximin strategy, the cost of comparing two products is smaller if they have the same worst characteristic rather than different worst characteristics.

Errors and Mistakes

Thus far only costs were considered. However, simplified decision rules reduce expected benefits by allowing mistakes. The previous section assumed that consumers made enough characteristic comparisons so that the chance of error was less than a for each product elimination. It is then possible to state the probability of an error, i.e., not choosing the best product. That probability is one minus the probability of choosing the best product computed by Equation 6.

$$P(\text{choosing best product}) = [1/(aM)][a(1 - a)^{M-1} + (1 - a) - (1 - a)^{M}], \quad (6)$$

where M = the number of products and a = the confidence level.

Note that for a = 0.5, P(choosing best product) is MM.

Until now, some confidence level was set and enough characteristic comparisons were made to achieve that confidence level, the number of necessary comparisons depending on the products. The more comparisons necessary to make the choice, the more costly was the choice. Assume the consumer sets the cost of thinking rather than the confidence level. Here the consumer is assumed to allocate the appropriate thought to the decision to be consistent with an expected utility maximization. For example, let the consumer set the cost of thinking at the lowest possible level, i.e., one. Then, given two products, A and B, Theorem 5 gives the probability the consumer will choose Product A over Product B, denoted $P(A \text{ over } B)$, and takes the form of Luce's axiom (with ordinary utility functions substituted for Luce's scale values) when (1) consumers minimize thinking costs, (2) the utility functions take just two values (e.g., 0 or 1), and (3) the products have no characteristics in common.

Theorem 5: If the individual seeks to minimize thinking costs, the utility functions are defined over aspects

(e.g., 0 or 1), and $U_{iA} \neq U_{iB}$, then:

$$P(A \text{ over } B) = \frac{\sum_{r \in R} U_{rA}}{\sum_{r \in R} U_{rA} + \sum_{r \in R} U_{rB}},$$

if and only if the products possess no common aspects, that is, $U_{rA} \neq 0$ if $U_{rB} = 0$.

The requirement that utility functions take just two values avoids the scaling problems inherent in the theorem, i.e., U_i must be more than ordinal. Hence, Theorem 5 reveals sufficient conditions for using Luce's axiom with ordinary utility functions. Unfortunately, if the products possess common characteristics and their utility functions are not identical, then Luce's axiom fails. Theorem 6 shows the form of $P(A$ over $B)$ given common characteristics.

Theorem 6: If the consumer minimizes thinking costs and characteristic utilities only take values 0 or 1, then:

$$P(A \text{ over } B) = \frac{\sum_{r \in R} U_{rA}}{\sum_{r \in R} U_{rA} + \sum_{r \in R} U_{rB}},$$

where,

$R \equiv \{r | U_{rA} + U_{rB} \equiv 1\}$.

The summation is over characteristics the products do not have in common. This equation is a special case of Tversky's elimination by aspects mechanism (Tversky 1972). Hence, Tversky's mechanism is much more powerful than Luce's axiom, and takes account of product similarities as well as their relative utilities.

Finally, Condition 2 is relaxed and characteristics will be allowed to have any positive finite utility. In addition, assume the probability of the consumer selecting a particular characteristic for comparing the products is proportional to the discriminatory power (the difference in utilities between the two products) of that characteristic. In this case, the probability of the consumer choosing A is described by a generalization of Tversky's mechanism to include characteristics. Precisely,

$$P[A \text{ over } B] = \frac{\sum_{r \in R'} |U_{rA} - U_{rB}|}{\sum_{r \in R''} |U_{rA} - U_{rB}|}, \quad (7)$$

where,

$R' = \{r | U_{rA} > U_{rB}\}$

$R'' = \{r | U_{rA} = U_{rB}\}$ for all i.

The upper summation is over all characteristics for which Product A dominates Product B. The lower summation is over all characteristics for which the products are not equally rated."

" Theorems 5 and 6 and Equation 7 naturally generalize to three or more products only when the process is conducted as a single stage. For example, when a third product, C, is introduced at utility U_C, then $P(A$ over B and $C)$ is $U_A/(U_A + U_B + U_C)$ in Theorem 5 only when processing occurs simultaneously rather than sequentially.

Choosing Among Unlimited Numbers of Products

Recalling Equation 2, the expected cost of making a decision was mf. However, in general, the number of product comparisons may be less than the total number of products. For example, even if there are 30 products, one product could be found superior to five others after four comparisons. The consumer may now stop and feel satisfied (confident) with the decision. In this case, not only is f a random variable, but so is m.

Now if m and f are independent, then we could use Equation 3 to obtain a potential difficulty measure when the number of product comparisons is variable. However, determining the optimal number of products has been well studied in the decision analysis literature (Blackwell 1965; Wald 1947) and in psychology (Pollay 1970), and used to formulate a theory of information and search (Nelson 1970; Stigler 1961; Wilde 1977). Therefore, the problem of determining m independent of f will not be addressed here. If the average or expected number of products m, denoted $\bar{m}$, could be determined, the expected decision difficulty would be $\bar{m}f$. Then, m would decrease the decision difficulty when the consumer felt future product comparisons would lead to no further improvements, which is consistent with experimental results (Hendrick, Mills, and Kiesler 1968; Kiesler 1966).

Often, m and f are not independent. Then, as the choice process proceeds, the average comparison cost changes. One would expect comparison costs to increase as set size decreases, because $E(z)$ decreases. Hence, the relative costs of different *simplifying rules* change as the choice proceeds, as has been found experimentally by Payne (1976) and Wright and Barbour (1977).

APPLICATIONS AND IMPLICATIONS

Being able to quantify decision-making costs and the likelihood of mistakes, given reduced decision-making effort, has numerous implications, as the following three examples indicate.

Product Characteristics in an Advertisement

The determination of how many product characteristics should be included in an ad has been more of an art than a science (Kotler 1978). The methodology previously discussed allows the potential for ascertaining how many product characteristics should be included in an ad. For example, suppose consumers sample ads rather than read them in their entirety. Equation 3 implies that when advertised brands are in product categories with high characteristic variability, the ad should mention as many of the brand's favorable characteristics as possible. When the characteristic variability is low, the company should stress only the

brand's best characteristics. Similarly, Equation 3 states that high-priced (relative to total income) products requiring large confidence levels should include more characteristics than products with smaller consumer confidence levels, keeping variability constant. Finally, if future research could measure the confidence level (a) at which consumers approach particular product category decisions, the best number of characteristics to advertise to maximize purchase probabilities could be determined.

Information Presentation

In some situations decisions should be made easier, in others more difficult (Russo 1977). For example, in arranging a data base, control panel, or a mail-order catalog, decisions should be made easy. Hence, items should be grouped to minimize average characteristic utility differences (other factors held constant). Also, in some situations changing the difficulty of the decision could change the respective choice probabilities. For example, school cafeterias may want to influence children's meal selections.

New Product Sales Forecasting

New products are generally thought to compete most with "similar" products. These "similar" products are thought to attract people desiring the same characteristics as the new product. However, this phenomenon may require some time. In the short-run when test marketing occurs and ultimate product success is predicted, the consumer may still be gathering information about the new product. Therefore, the purchase probabilities may reflect thinking costs leading to partial product evaluation. The new brand may, in the short-run, receive its market share from competitive products that are easy to compare to the new brand rather than from competitive products for which the effort of comparison is greater, even though long-run shares may be quite different.

Testable Hypotheses

Numerous studies show brand identification can cause a uniformity of perception across attributes (Allison and Uhl 1964). This effect manifests itself by creating strong halo effects about brands (Beckwith and Lehmann 1975). This empirical finding indicates that brand name identification will decrease $var(z)$. By Equation 3, f_p would be decreased, and by Equation 4 the "cost of thinking" is decreased. That is, less information need be sought to maintain the same confidence, a. This implication has had some experimental verification (Jacoby, Szybillo, and Busato-Schach 1977). However, Theorem 1 defines precise implications that could be empirically tested. For example, f_p could be computed and compared against "stated difficulty," "time spent," and other empirical measures.

The cost of thinking can be reduced by (1) memory, (2) summary statistics, and (3) probabilistic sampling. Thinking costs will be large when the confidence a is large (e.g., for large ticket items relative to total income) and when the characteristic utility variability is large (e.g., products that serve very different markets). In these cases, the consumer may try to reduce costs through memory.

The cost of future decision making can be reduced by remembering large characteristic differences. Just as attribute variability allows greater differentiation (van Raaij 1977), remembering some z_i can reduce c_p. Further, poor memory may encourage adoption of simplifying decision rules. The cost of decision making can also be reduced by gathering summary statistics. Hence, large thinking costs with common tastes, i.e., same $U(\cdot)$, will lead to awards given to best products, certifications, and branding. Finally, if key attributes, those with large variability, are known the consumer can selectively sample characteristics, engaging in probabilistic sampling. Thus, large thinking costs will lead to activities for finding key discriminatory attributes. For example, a consumer buying a boat for the first time may first seek a book about "what to look for in a boat," rather than information on particular boats. Experience may be defined by knowing which attributes have high variability.

LIMITATIONS

In attempting to model and abstract consumer behavior, some restrictive assumptions are often required. This paper provides no exception. Fortunately, quantification has made these assumptions less obscure. For example, the use of single stage sampling rather than sequential sampling was an obvious limitation of the current development. Another limitation is the assumption of a fixed cost per comparison. Although this is a handy assumption, it is clear that this cost should increase as comparisons are made. If "thought" is a limited resource, its use should meet with increasing marginal opportunity costs. This limitation is related to the necessity of requiring a to be determined outside the model.

A third limitation is the static nature of the model. Clearly, the real problem of interest would be the dynamic model. Current research in that area has led to some interesting theories (Lehmann 1977). Although current research on memory (Johnson and Russo 1978) is consistent with this paper, dynamic extensions would require the inclusion of memory and learning. In the dynamic case, it may no longer be appropriate to assume an arbitrary consumer randomly selects characteristics, but instead it may be more appropriate to assume an a priori vector of probabilities. In fact, the behavior of this probability vector over time might

hold the key to the most powerful applications of the development. Also, the evaluation costs of the characteristics may change in the dynamic case because of consumer memory.

SUMMARY AND CONCLUSION

A way was provided to explicitly model and measure the cost of thinking. A fundamental unit of thought was defined, which measures the potential difficulty of a decision by examining the characteristic utilities of the alternatives.

With this framework for exploring thinking, a confusion index was derived as a measurable bound on the expected number of necessary units of thinking required to make a choice. It was then possible to determine the relative costs of specific simplifying decision rules as a function of the alternatives. Formulas for computing costs of various decision rules were then derived.

On an individual level, adoption of simplifying choice strategies can leave a consumer vulnerable to manipulation. Choice conflicts can be changed (for example, by the inclusion of nonoptimal and therefore irrelevant products) to lead the consumer to select an inferior product. Hence, by manipulating the choice setting, some degree of control can be exercised over the consumer.

Einhorn and Hogarth (1978) note this effect may occur over an extended period of time. Lack of a proper feedback of information keeps the consumer from learning of the mistakes. Thus, mistakes recur and the best product is never found. Choice rules can, then, have implications for advertising copy decisions, in-store display design, strategies for launching new products, and pricing decisions.[12]

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[12] A relevant yet unanswered question is the effect of simplifying rules on an aggregate market. Perhaps, if consumers continually made mistakes, someone would have the incentive to inform them of their mistakes. Whether a firm could manipulate the behavior of one individual without interference from other individuals remains an unknown.

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No. CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

– and –

CINEPLEX INC.

Respondent

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CLOSING ARGUMENTS OF THE COMMISSIONER OF COMPETITION

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