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CT- 2024-006

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REGISTRAR / REGISTRAIRE

File No. CT-2024-006

OTTAWA, ONT.

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COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34 (the “Act”);

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 103.1 of the Act granting leave to bring an application under section 79 of the Act;

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 79 of the Act;

BETWEEN:

JAMP PHARMA CORPORATION

Applicant

– and –

JANSSEN INC.

Respondent

REPLY BOOK OF AUTHORITIES OF THE APPLICANT, JAMP PHARMA CORPORATION
(Pursuant to section 103.1 of the *Competition Act*)

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Federal Court



Cour fédérale

Date: 20110524
(Amended on May 30, 2011)

Docket: T-1668-10**Citation: 2011 FC 505****BETWEEN:**

ASTRAZENECA CANADA INC. AND
ASTRAZENECA AKTIEBOLAG

Plaintiffs
(Defendants by
Counterclaim)

and**APOTEX INC.**

Defendant
(Plaintiff by
Counterclaim)

PUBLIC FURTHER AMENDED REASONS FOR ORDER
(Confidential Reasons for Order issued April 29, 2011)

CRAMPTON, J.

[1] This motion was brought by the Plaintiffs for, among other things, an interlocutory injunction to restrain the Defendant and certain associated individuals from making, constructing, importing, exporting, using, offering to sell or selling to others to be used, Apo-Esomeprazole and/or esomeprazole magnesium pending the trial of this action, which is scheduled to begin in September, 2013.

[2] For the reasons that follow, I find that the Plaintiffs have not demonstrated, on a balance of probabilities, that they are likely to suffer irreparable harm if an interlocutory injunction is not issued. I also find that the Plaintiffs have not demonstrated that the balance of convenience lies in their favour. Accordingly, this motion will be dismissed.

I. Background

A. The Parties and the product at issue

[3] The within action concerns five patents that are owned by the Plaintiffs, AstraZeneca Aktiebolag (“AstraZeneca”) and AstraZeneca Canada Inc. (“AstraZeneca Canada”). Those patents contain claims that cover certain forms of the drug “esomeprazole”, which is sold by the Plaintiffs under the brand name NEXIUM, as well as certain processes used to produce that drug.

[4] Specifically, Canadian Patent No. 2, 139, 653 (the ‘653 Patent), which was issued to AstraZeneca on July 10, 2001 and expires on May 27, 2014, contains claims that cover optically pure esomeprazole magnesium.

[5] Canadian Patent No. 2, 290, 963 (the ‘963 Patent), which was issued to AstraZeneca on March 28, 2006 and expires on May 25, 2018, contains claims that cover esomeprazole magnesium trihydrate.

[6] Canadian Patent No. 2, 193, 994 (the ‘994 Patent), which was issued to AstraZeneca on May 3, 2005 and expires on July 3, 2015, contains claims directed to the process of making optically pure esomeprazole.

[7] Canadian Patent No. 2, 226, 184 (the ‘184 Patent), which was issued to AstraZeneca on August 5, 2008 and expires on June 26, 2016, contains claims related to a certain process used to make esomeprazole.

[8] Canadian Patent No. 2, 274, 076 (the ‘076 Patent), which was issued to AstraZeneca on September 30, 2008 and expires on December 16, 2017, also contains claims related to a process used to make esomeprazole.

[9] AstraZeneca and its affiliates (sometimes collectively referred to in these Reasons as “AstraZeneca”) develop and commercialize prescription medicines around the world. Through its subsidiary, AstraZeneca Canada Inc., it is the second largest innovative pharmaceutical company in Canada in terms of dollar sales. As of March 1, 2011, AstraZeneca employed about 987 people across Canada.

[10] AstraZeneca Canada has sold NEXIUM brand tablets containing esomeprazole magnesium trihydrate, in 20 milligram and 40 milligram strengths, since 2001. It purchases those tablets from AstraZeneca.

[11] Esomeprazole belongs to the class of medications known as “proton-pump inhibitors” (“PPIs”), which are used to treat gastric-acid related conditions. The Canadian PPI market is continuing to grow significantly from its current size of approximately 23 million prescriptions. That market also is highly competitive, with approximately seven alternative PPI drugs available, including a new entrant which entered the market in September 2010.

[12] Since its launch in September 2001, annual dollar sales of NEXIUM have risen from approximately \$6 million in 2001 to over \$281 million in 2010. According to AstraZeneca, NEXIUM was the best-selling PPI in Canada in 2010 and ranked among the top 5 prescription products in Canada by sales. In addition, NEXIUM is the number one “switched to PPI,” is recommended by 61% of physicians, is the highest ranking PPI in unaided awareness by patients, is the most self-reported prescribed PPI, and is the number one PPI doctors would select for themselves.

[13] There is currently no generic version of NEXIUM available in Canada.

[14] The Defendant, Apotex Inc., is a privately-owned Ontario company that carries on business as a manufacturer and distributor of a broad range of “generic” pharmaceutical products. Together with its affiliates (collectively, “Apotex”), it has over 5,000 employees in Canada.

B. Steps taken by Apotex to launch a generic version of esomeprazole

[15] The within action was launched by the Plaintiffs on October 15, 2010, following seven proceedings that the initiated in late 2007 under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, as amended by SOR/98-166 (the “PMNOC Regulations”), to prohibit the issuance of a Notice of Compliance (“NOC”) to Apotex for its proposed esomeprazole magnesium tablets. Those proceedings were initiated after Apotex filed seven Notices of Allegation (“NOAs”) under the PMNOC Regulations earlier that year.

[16] In addition, on June 8, 2007, Apotex filed a patent application in Canada entitled “Process for the Preparation of Esomeprazole and Salts Thereof.” That application refers to a United States Patent that AstraZeneca alleges corresponds to the ‘994 patent.

[17] After Apotex withdrew a number of its NOAs, AstraZeneca pursued only two of the aforementioned NOC proceedings.

[18] The first of those proceedings (Court File No. T-372-08) involved the ‘963 Patent. That proceeding was dismissed on consent on May 25, 2010, after AstraZeneca advised the Court that it was no longer asserting that Apotex’s allegation of non-infringement of the ‘963 Patent was not justified, as contemplated by subsection 6(2) of the PMNOC Regulations, and after Apotex agreed that the Court need not make any determinations in respect of its allegations of invalidity of the ‘963 Patent.

[19] The second NOC proceeding (Court File No. T-371-08) was dismissed by Justice Hughes on June 16, 2010, on the basis that Apotex’s allegation of invalidity of the ‘653 Patent was justified, within the meaning of section 6(2).

[20] The following day, June 17, 2010, Apotex received an NOC for its esomeprazole magnesium tablets. As of that date, Apotex was legally entitled to begin selling its generic esomeprazole tablets (“Apo-Esomeprazole”) in Canada.

[21] On July 13, 2010, at AstraZeneca’s request, Apotex provided an “on the record” confirmation of its intention to launch its Apo-Esomeprazole product. Then, on July 26, 2010,

Apotex again confirmed to AstraZeneca that it was proceeding with the production of launch quantities of Apo-Esomeprazole.

[22] On February 1, 2011, Apo-Esomeprazole was listed as esomeprazole magnesium trihydrate by the drug formulary in Quebec, where sales of NEXIUM are particularly strong, accounting for approximately 42% of AstraZeneca Canada's total Canadian NEXIUM sales. In addition, on November 25, 2010, Nova Scotia Pharmacare listed Apo-Esomeprazole as a non-insured interchangeable benefit. On February 9, 2011, the New Brunswick Drug Plan also posted a non-benefit interchangeable listing for Apo-Esomeprazole.

[23] On March 7, 2011, Apotex launched Apo-Esomeprazole and announced that it had commercial inventories of that product available in Quebec, New Brunswick and Nova Scotia, where it is listed at 89% of the price of NEXIUM.

II. Preliminary Motions

A. AstraZeneca's motion to strike

[24] On April 1, 2011 Apotex filed an affidavit sworn by Dr. Stephen Horne, the Vice President, Research and Development, at Apotex Pharmachem Inc. ("API"). According to Dr. Horne's affidavit (the "Horne Affidavit"), API currently makes esomeprazole magnesium for supply to Apotex Inc., using a process developed in-house (the "API Process").

[25] On April 13, 2011, AstraZeneca filed a motion for an Order to strike the Horne Affidavit in its entirety, or, in the alternative, to strike out paragraphs 17 to 29 of that affidavit. The grounds for that motion were stated to be that the Horne Affidavit: (i) contains evidence which is procedurally

prejudicial to AstraZeneca and/or is clearly irrelevant; and, in the alternative, (ii) does not meet the criteria for evidence adduced by an expert witness, as set forth in Rule 52.2 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”). AstraZeneca’s Notice of Motion also relied upon Rule 3, which provides that the Rules “shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.”

[26] In its written submissions, AstraZeneca stated that it would suffer prejudice if the Horne Affidavit were not completely or partially struck from the Court Record, because AstraZeneca did not have an opportunity to contemplate and respond to the information in that affidavit before the evidence on this motion was due. In addition, it stated that the information in the Horne Affidavit was clearly irrelevant because it could not assist the Court to properly construe the claims of the patent, as that is the subject matter for expert opinion. It also submitted that, to the extent that paragraphs 17 to 29 are alleged to be expert opinion, they should be struck for failing to comply with the Code of Conduct for Expert Witnesses, including the requirements that an expert witness: (i) be impartial, independent and objective; and (ii) sign the statutory declaration contemplated by the Code.

[27] I disagree with AstraZeneca’s submissions.

[28] With respect to the issue of prejudice, AstraZeneca’s Motion for an interlocutory injunction was brought without prior notice on March 11, 2011. The schedule that was subsequently established on consent for the hearing of that Motion required Apotex’s evidence to be served by April 1, 2011, the same date upon which the Horne Affidavit was filed. Cross-examinations did not need to be concluded until April 8, 2011, and AstraZeneca had the right to file, on or before April

12, 2011, a Supplemental Motion Record and a Supplemental Memorandum of Fact and Law to address Apotex's evidence and matters which may have arisen on cross-examination.

[29] However, on April 4, 2011, AstraZeneca advised Apotex of its decision not to cross-examine Dr. Horne on his affidavit. It then advised the Court, in a teleconference call on April 15, 2011, that it would not require a postponement of the hearing on its Motion for an interlocutory injunction, to permit it to have additional time to: (i) conduct cross-examinations on either the Horne Affidavit or the supplementary affidavit of Andrew Harrington, discussed below; or (ii) file any additional materials in respect of the Horne Affidavit. In contrast to Apotex, which sought leave to file a supplementary affidavit from one of its experts after receiving new information from AstraZeneca, AstraZeneca sought no such leave to file any response whatsoever to the Horne Affidavit.

[30] Given the foregoing, I am satisfied that it would not be appropriate to grant the Motion to strike on the ground of any prejudice that otherwise might result to AstraZeneca. This is not the type of exceptional situation contemplated by the jurisprudence applicable to motions to strike (see, for example, *Belgravia Investments Ltd. v. Canada*, [2000] F.C.J. No. 1246 (QL), at para. 10; *Temple Marble & Granite Ltd. v. "Mecklenburg I" (The)*, 2002 FCT 1190, at para. 2; and *GlaxoSmithKline Inc. v. Apotex Inc.*, 2003 FC 920, at para. 4). It could not have been a surprise to AstraZeneca that Apotex would adduce evidence regarding the API Process.

[31] As a practical matter, for the reasons explained below, no prejudice will flow to AstraZeneca because the Horne Affidavit has been adduced in support of Apotex's submission that

there is no serious issue to be tried, and I have determined in Part III.C of these Reasons below that there is such a serious issue to be tried.

[32] I am also unable to accept AstraZeneca's claims that the information in the Horne Affidavit is irrelevant and of no assistance to the Court. To the contrary, I found that information to be quite relevant and helpful in better understanding Apotex's position on the issue of whether there is a serious issue to be tried in the within action.

[33] This brings me to the assertion that the Horne Affidavit contains impermissible expert evidence. This assertion is largely based on Dr. Horne's statements, at paragraph 4 of his affidavit, that he was asked to address whether: (i) the API Process uses the same process as claimed in the '994 Patent; (ii) neutral esomeprazole in a solid, crystalline form, as claimed in the '076 Patent, is used or produced in API's Process; and (iii) the optical purity of esomeprazole is increased at any stage during API's process by selectively removing racemic omeprazole, as claimed in the '184 Patent. AstraZeneca attempted to support its position on this issue by noting that the Horne Affidavit states that Dr. Horne is "able to describe API's Processes and to respond to [the above-listed] questions because of [his] education and industrial experience as a medicinal and process chemist ... and by reason of [his] role at API and [his] involvement in the research and development of API's Process."

[34] I am satisfied that: (i) the Horne Affidavit does not attempt to provide an expert construction of any of the claims in the patents mentioned in the immediately preceding paragraph above; and (ii) Dr. Horne was not being put forth as an expert. In my view, Dr. Horne simply provided factual information in his affidavit, primarily based on his knowledge of API's processes. To provide that

factual information, he necessarily had to describe his understanding of the patents in question (*R. v. Graat*, [1982] S.C.J. No. 102 (QL), at para. 305, [1982] 2 S.C.R. 819, 144 D.L.R. (3d) 267; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at pp. 26-31; and Alan W. Bryant, Sydney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 3rd edition (Toronto: LexisNexis Canada Inc., 2009, at 774-777). In describing his understanding of those patents, he simply and very briefly: (i) quoted the plain language in those patents; and (ii) stated his understanding of what each of those patents claimed. He spent a total of four sentences describing his understanding of the '994 Patent, five sentences describing his understanding of the '076 Patent, and seven short sentences describing his understanding of the '184 Patent. By contrast, he spent nine full paragraphs describing API's Process, which was the clear focus of his affidavit.

[35] As the Vice President of Research and Development at API, Dr. Horne was as well placed as anyone to provide the factual information regarding the API Process that was set forth in his affidavit. The fact that he happened to be an organic chemist by education and to have more than 18 years of experience as a medicinal and process chemist in the pharmaceutical industry did not: (i) disqualify him from being a fact witness; (ii) transform his fact evidence into expert evidence; or (iii) require him to adduce his evidence pursuant to Rule 52.2 of the Rules.

[36] Accordingly, for the reasons set forth above, I dismissed AstraZeneca's Motion to strike the Horne Affidavit at the end of the hearing of that Motion.

B. Apotex's Motion to file a supplementary affidavit

[37] On April 15, 2011, Apotex filed a Notice of Motion to seek an Order granting leave to deliver a supplemental affidavit of Mr. Andrew Harrington. Mr. Harrington was one of three experts who swore an affidavit in support of Apotex's response to AstraZeneca's Motion for an interlocutory injunction.

[38] Mr. Harrington is a chartered accountant, a chartered financial analyst and a chartered business valuator. He is currently a Managing Director in the Toronto office of Duff & Phelps Canada Limited ("D&P") and is a member of that firm's Dispute and Legal Management Consulting Practice. D&P is the successor firm to Cole Valuation Partners Limited. According to his initial affidavit, Mr. Harrington has more than ten years of experience in business and intellectual property valuation and has served as an expert witness in the quantification of damages relating to intellectual property and various commercial litigation matters.

[39] The principal focus of Mr. Harrington's initial affidavit was upon claims made in an affidavit sworn on March 11, 2011 by AstraZeneca Canada's President and Chief Executive Officer, Marion McCourt. Ms. McCourt was cross-examined on that affidavit on April 5, 2011. During that cross-examination, she was asked about the business transformation plan that is discussed in her affidavit. Ms. McCourt revealed that a written presentation describing that plan had been prepared and she undertook to provide a copy of that document (the "Transformation Plan") to Apotex. That document ultimately was produced to Apotex on April 10, 2011, after the completion of cross-examinations on all of the affidavits on the Plaintiffs' Motion for an interlocutory injunction. However, it was not until April 12, 2011 that AstraZeneca agreed, after a case conference with my colleague Justice Campbell, to permit Apotex to share a copy of the document

with its experts. Two days later, on April 14, 2011, Mr. Harrington swore the supplemental affidavit that was the subject of Apotex's Motion to file.

[40] In his supplemental affidavit, Mr. Harrington stated, among other things, the following:

The Transformation Plan also provides previously unavailable information that allows me to calculate the level of profits generated on sales by AstraZeneca Canada even if it loses its Nexium exclusivity. With this new information, I am able to determine that, even without Nexium exclusivity, the profits generated on sales by AstraZeneca Canada will be almost \$[*] billion in the period 2011 to 2014.

[41] The reason that the Transformation Plan enabled Mr. Harrington to calculate AstraZeneca Canada's profits was that it provided previously unavailable information with respect to AstraZeneca Canada's costs. With that information, Mr. Harrington was able to provide more robust estimates for AstraZeneca Canada's revenues between 2011 and 2014, and to also provide estimates of AstraZeneca's profits for those years, which he was unable to do on the basis of previously available information.

[42] Based upon the information contained in the Transformation Plan, Mr. Harrington estimated that AstraZeneca Canada's revenues in the period 2011 to 2014 will be approximately \$[*] billion, and that, even if AstraZeneca were to lose 80% of its NEXIUM sales over the period May 1, 2011 to May 27, 2014, its total revenues would be approximately \$[*] billion.

[43] He further estimated that the contribution margin from AstraZeneca Canada's total sales over that period, assuming a loss of 80% of its NEXIUM sales, would be approximately \$[*] billion. After drawing on other information contained in the Transformation Plan to estimate

AstraZeneca Canada's fixed costs for that same period to be approximately \$[*] million, he then estimated that AstraZeneca Canada's profits for that period would be approximately \$[*] billion. Once again, that estimate was based on the assumption, which Mr. Harrington described as being conservative, that AstraZeneca Canada would permanently lose 80% of its sales of NEXIUM on May 1, 2011. As Mr. Harrington noted, his estimates of AstraZeneca Canada's revenues and profits would obviously be greater if it is able to hold onto more than 20% of the sales of NEXIUM.

[44] AstraZeneca opposed Apotex's Motion for leave to file Mr. Harrington's supplemental affidavit on five grounds.

[45] First, it claimed that the evidence provided in the affidavit was outside the area of Mr. Harrington's expertise. I disagree. A review of Mr. Harrington's *curriculum vitae* demonstrates that he "specializes in the quantification of loss and accounting of profits in intellectual property dispute matters and damages in commercial litigation matters," and that he "has been involved in over 500 valuation, damage quantification, consulting and other advisory engagements in numerous industries."

[46] Second, AstraZeneca claimed that Apotex did not previously consider information pertaining to AstraZeneca Canada's profits to be sufficiently important to request such information prior to, or during, the cross-examination of Ms. McCourt. Accordingly, AstraZeneca asserted that Apotex ought not to be permitted to split its case with evidence based on information that it already had or did not need.

[47] In my view, neither of these objections provides a basis for preventing Apotex from responding to information that previously had not been disclosed. On the particular facts of this case, it would make little sense to permit Apotex to request a document that it learned about during cross-examination, only to then prevent it from responding to relevant new information contained within that document. That information was relevant because it enabled Apotex to better respond to some of the claims made by Ms. McCourt, Dr. Gulati and Dr. Biloski, regarding irreparable harm that the Plaintiffs claim they will suffer if the interlocutory injunction that they have requested is not granted.

[48] Third, AstraZeneca submitted that the information in the supplemental affidavit was unnecessary, redundant or marginally relevant, and of no assistance to the Court. For the reason explained immediately above, I do not accept this submission. On the contrary, I found the information contained in Mr. Harrington's supplementary affidavit to be very relevant and material to my determination of AstraZeneca's motion for an interlocutory injunction.

[49] Fourth, AstraZeneca submitted that the information contained in the supplementary affidavit will cause material prejudice to AstraZeneca Canada.

[50] I agree that AstraZeneca would be prejudiced if leave were granted to Apotex to file the supplementary affidavit. However, that prejudice will be suffered primarily because the evidence in that affidavit, which is based on previously unavailable information contained in the Transformation Plan, undermines claims made by Ms. McCourt, Dr. Gulati and Dr. Biloski. Among other things, those claims include assertions that "the introduction of generic esomeprazole magnesium in Canada ... will have an immediate, catastrophic and irreversible impact on AstraZeneca Canada"

and will “imperil the [current] transformation [of AstraZeneca Canada and its] future performance”.

This context in which the Plaintiffs will suffer prejudice weighs against them in the consideration of their fifth submission, to which I will now turn.

[51] Finally AstraZeneca submitted that it would not be in the interests of justice to permit Apotex to file Mr. Harrington’s supplementary affidavit.

[52] Given my assessment of the first four submissions made by the Plaintiffs, I conclude that it would not be in the interests of justice to refuse Apotex leave to file Mr. Harrington’s supplementary affidavit, particularly given that: (i) Mr. Harrington was made available to be cross-examined on that affidavit; and (ii) Apotex was unable to cross-examine Ms. McCourt on the Transformation Plan document after its production, because she was allegedly out of the country or otherwise unavailable during the short period of time between the time when Apotex obtained the Transformation Plan and the date of the hearing on AstraZeneca’s Motion for an interlocutory injunction. AstraZeneca refused to avail itself of the opportunity to cross-examine Mr. Harrington on his supplementary affidavit and must now face the consequences.

[53] AstraZeneca submitted in the alternative that certain paragraphs in Mr. Harrington’s supplementary affidavit be struck. However, during the hearing of this preliminary motion, and after I agreed to strike the last sentence in paragraph 5 of that affidavit, counsel to AstraZeneca abandoned this submission.

III. Analysis

A. *The general legal principles applicable to this Motion*

[54] An applicant for an interlocutory injunction must satisfy the following well-known tripartite test:

- i. There is a serious issue to be tried;
- ii. The applicant is likely to suffer irreparable harm if the injunction is not granted;
and
- iii. The balance of convenience favours the granting of the injunction (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334 and 342, 111 D.L.R. (4th) 385 [*RJR-MacDonald*]).

[55] As to the first prong of the test, an applicant's burden is fairly low. The Court simply has to be satisfied that the applicant has raised at least one issue that is serious, in the sense of being "neither vexatious, nor frivolous" (*RJR-MacDonald*, above, at 335 and 337) nor "destined to fail" (*Laperrière v. D.&A. MacLeod Company Ltd.*, 2010 FCA 84, 66 C.B.R. (5th) 96, at para. 11).

[56] The second prong of the test, concerning irreparable harm "refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald*, above, at 341). At this stage of the analysis, the harm in question is harm that will be suffered by the applicant. Any harm that will be suffered by the respondent is considered in assessing the balance of convenience (*RJR-MacDonald*, above, at 341). In addition, the harm

claimed by the parties must be demonstrated to be clear and not speculative (*Bayer HealthCare AG v. Sandoz Canada Inc.*, 2007 FC 352, [2007] F.C.J. No. 585 (QL) [*Bayer Healthcare*], at para. 35; *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FC 815, 40 C.P.R. (4th) 210 [*Aventis Pharma*], at para. 59; *Abbott Laboratories Ltd. v. Apotex Inc.*, [1998] O.J. No. 2159 (QL) (Ont. Gen. Div.) [*Abbott Laboratories*], at para. 18).

[57] The third prong of the test is “which of the two parties will suffer the greater harm from the granting or refusal of ... [the] injunction” (*RJR-MacDonald*, above, at 342). In addition, other factors may be taken into consideration in determining where the balance lies (*RJR-MacDonald*, above, at 342). In this regard, “either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought” (*RJR-MacDonald*, above, at 344 and 348).

A. *General observations*

[58] In the case at bar, each of the parties made certain sweeping statements that I feel compelled to address, in the interest of discouraging similar statements and certain related hyperbole in the future.

[59] With respect to the first prong of the test, the serious issue to be tried, Apotex asserted that because this Court determined Apotex’s allegations of invalidity with respect to the ‘653 Patent to be justified in the NOC proceedings last year, “there is no reasonable basis to continue to presume that the patent is valid”. This position ignores the settled law that: (i) determinations in NOC proceedings “do not operate as *res judicata*” in a subsequent action in which infringement of the same patent that was the subject of the NOC proceedings is alleged; and (ii) “NOC proceedings are

quite different from subsequent infringement or impeachment actions” (*Apotex v. Pfizer Ireland Pharmaceuticals*, 2011 FCA 77, at paras. 23-24; *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49, at para. 42, 52 C.P.R. (4th) 145; *Novartis A.G. v. Apotex Inc.*, 2002 FCA 440, at para. 9; *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1234, at para. 116). In short, the presumption of the validity of a patent that is established by virtue of subsection 43(2) of the *Patent Act*, R.S.C. 1985, c. P-4 [the *Patent Act*] remains, notwithstanding any findings that may have been made in respect of the patent in proceedings under the NOC Regulations.

[60] With respect to the second prong of the tri-partite test, irreparable harm, Apotex suggested that AstraZeneca would not suffer irreparable harm because, “even if no interlocutory injunction is granted, and even if Apotex takes even more of the market for esomeprazole than is estimated by Astra’s CEO, Astra will still enjoy almost \$[*] billion of profits between now and the end of 2014.” To the extent that this statement may be interpreted as advancing the position that an applicant who is making profits, even significant profits, cannot ever be found to suffer irreparable harm, it must be rejected. As counsel to Apotex appropriately conceded during oral argument, the law does not require applicants for interlocutory relief to establish that they are likely to become unprofitable if the injunction they seek is not granted.

[61] Apotex also submitted that “[t]he relief sought by Astra is unprecedented and, if granted, would signal a fundamental change to the regime within which the generic pharmaceutical industry operates.” In this regard, it observed “[t]his Court has never granted an interlocutory injunction to restrain a party from selling its product after that party has already suffered under a statutory injunction imposed by the [PMNOC] Regulations.” AstraZeneca did not dispute this observation.

[62] To the extent that this submission stands for the proposition that the balance of convenience generally should be found to lie in favour of a respondent generic drug manufacturer in circumstances where it has been prevented from launching its product, for up to 24 months, as a result of a prohibition order preventing the Minister of Health from issuing an NOC to a generic, as contemplated by the PMNOC Regulations, it must be rejected.

[63] The same is true of Apotex's suggestion that the granting of an interlocutory injunction in cases such as the case at bar would somehow be inconsistent with the underlying spirit of the PMNOC Regulations, because such an injunction would prove devastating to "the very business model within which Apotex operates." In cross-examination on his affidavit dated April 1, 2011, Apotex's Chief Executive Officer, Mr. Bernard Sherman, extended this claim by stating, at p. 42 of the Transcript, that if an interlocutory injunction were granted to AstraZeneca in the case at bar, "it would destroy the business model for us in the whole generic industry and render useless the regulations, the whole regulatory regime." In oral argument, counsel to Apotex appropriately acknowledged that the fact that a generic drug manufacturer has acted in accordance with the PMNOC Regulations does not preclude the possibility that a patentee who may have been unsuccessful in proceedings under those Regulations may obtain an interlocutory injunction, if it can satisfy the applicable tri-partite test.

[64] It is settled law that the balance of convenience must be assessed on a case by case basis (*RJR-MacDonald*, above, at 342-343; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.); *Canadian Javelin Ltd. v. Sparling* (1978), 4 B.L.R. 153, 59 C.P.R. (2d) 146 (F.C.T.D.); affirmed on other grounds (1978), 22 N.R. 465 (F.C.A.)). In this regard, the weight that may be

attributed to any particular consideration also must be assessed on a case by case basis. (*RJR-MacDonald*, above). In case at bar, it is not necessary to devote time to discussing this consideration, as I have found, for the reasons discussed in Part III.E of these Reasons below, that AstraZeneca has not otherwise demonstrated that the balance of convenience lies in its favour. The issue as to whether it would be inconsistent with the underlying spirit of the PMNOC Regulations to enjoin a generic drug manufacturer from launching its product after that manufacturer has already been delayed from launching its products by a statutory injunction under those regulations is best left for another day, when the issue has been more fully argued. The same is true of the issue of how any such inconsistency that may be found to exist may factor into the balance of convenience of analysis.

[65] Finally, in oral argument, AstraZeneca suggested that my assessment of the balance of convenience should also take into account the public interest in patent rights and the promotion of innovation and drug discovery. I agree that this may well be a legitimate consideration to be considered in assessing the overall balance of convenience in appropriate cases. However, it is difficult for the Court to accord material weight to this consideration in the absence of evidentiary support. Where such support is not forthcoming, it cannot be expected that this consideration will be a determinative factor in the assessment of the balance of convenience. Therefore, counsel would be well advised to provide evidentiary support for this type of submission in future cases.

[66] This is particularly so where, as in the case at bar, there is uncontested evidence of a likely and substantial adverse impact on the public interest, in the form of delaying a significant reduction in drug prices, if the requested injunction is granted.

C. Serious issue to be tried

[67] Based on the record before me, I am satisfied that there is a serious issue to be tried.

[68] In the within action, AstraZeneca has alleged infringement of claims in five patents, namely, the '653 Patent, the '963 Patent, the '184 Patent, the '076 Patent and the '994 Patent. Until such time as the presumption of validity set forth in subsection 43(2) of the *Patent Act*, above, is displaced by "evidence to the contrary," that presumption stands.

[69] Apotex attempted to make much of the fact that the '653 Patent and the '963 Patent were the subject of prior NOC proceedings that were resolved in its favour. However, as discussed at paragraph 18 above, the proceeding resolving the latter patent was resolved on consent, after AstraZeneca advised that it was no longer asserting that the allegation of non-infringement of the '963 Patent was not justified in that application. It is noteworthy that AstraZeneca and Apotex agreed, as part of their resolution in that proceeding, that "the Court need not make any determination on the invalidity allegations" that had been made by Apotex in that proceeding.

[70] With respect to the NOC proceedings concerning the '653 Patent, Justice Hughes dismissed AstraZeneca's application for an order prohibiting the Minister of Health from issuing an NOC to Apotex for esomeprazole magnesium tablets, after he reviewed an extensive evidentiary record, totalling more than 9,000 pages of evidence and argument, much of which was not placed before the Court on this Motion. By the time that proceeding was heard by Justice Hughes, the "overriding issue [was] whether the allegations made by Apotex in its Notice of Allegation that Claim 8 of the '653 patent is invalid, are justified within the meaning of section 6(2) of the NOC Regulations"

(*AstraZeneca Canada Inc. v. Apotex Inc.*, 2010 FC 714 at para. 32, 88 C.P.R. (4th) 28 [*AstraZeneca* 2010]). Ultimately, Justice Hughes determined that Apotex's allegation that Claim 8 of the "'653 Patent is invalid for lack of sound prediction and to utility as for obviousness, is justified" (*AstraZeneca* 2010, above, at para. 138).

[71] Having regard to the foregoing, to the jurisprudence discussed at paragraph 59 above, and to the fact that three of AstraZeneca's patents were not the subject of any NOC proceedings, I am not prepared to accord much significance to the above-mentioned NOC proceedings for the purposes of this Motion.

[72] I am satisfied that the issues that have been raised in the within action are not frivolous, vexatious or destined to fail. In my view, those issues are complex and will require a substantial evidentiary record before they can be determined by this Court, particularly having regard to the fact that Apotex conceded in its written submissions that "the esomeprazole magnesium used in Apo-Esomeprazole is made by a process that was designed to avoid" infringing AstraZeneca's patents.

[73] I am also satisfied that Dr. Horne's explanations as to why, in his view, the claims made in the '994 Patent, the '076 Patent and the '184 Patent are not infringed by API's Process and the products produced in that process, are not sufficient to demonstrate that there is no serious issue to be tried in respect of those matters, particularly given that Apotex has not disputed in this Motion that its esomeprazole magnesium tablets are a generic form of NEXIUM, as referenced in its NOC submissions to Health Canada.

[74] As my colleague Justice Snider has observed: “It is clear from the jurisprudence that the hearing of an interlocutory injunction is not the time to finally determine the merits of a claim ... Only after a much deeper consideration of all of the evidence that will come forward in the context of a trial should such a determination be made” (*Laboratoires Servier v. Apotex Inc.*, 2006 FC 1493 [Servier], at para. 25; *Turbo Resources Ltd. v. Petro Canada Inc.* (1989), 24 C.P.R. (3d) 1 at 16, [1989] 2 F.C. 451 (C.A.)). Of course, prior to the fixing of the time and place for the trial in an action, a defendant such as Apotex is free to bring a motion for summary judgment pursuant to Rule 213 of the Rules. However, Apotex did not do so, perhaps because it was aware of the view that the “inherently complex, and technical” nature of patent infringement actions is a factor that would weigh against granting summary judgment (see, for example, *Wenzel Downhole Tools Ltd. and William Wenzell v. National-Oilwell Canada Ltd. et al.*, 2010 FC 966, at para. 38).

[75] The same logic applies to the consideration of the first prong of the tri-partite test in motions for interlocutory relief in drug patent infringement actions. It is this complex and technical nature of such actions that distinguishes them from the other types of actions that were at issue in many of the authorities relied on by Apotex in support of its position that there is no serious issue to be tried in the within action.

D. Irreparable harm

[76] AstraZeneca has claimed that “[t]he early introduction of generic esomeprazole magnesium in Canada – more than three years before the ‘653 Patent expiry [sic] and during a critical period for the business – will have an immediate, catastrophic and irreversible impact on AstraZeneca Canada”.

[77] To provide a sense of the importance of NEXIUM in its product portfolio, AstraZeneca adduced evidence of its forecasts that, in the absence of the entry and rapid expansion of a generic rival to NEXIUM, sales of NEXIUM will grow from approximately \$281 million in 2010 to \$[*] million in 2011, \$[*] million in 2012, \$[*] million in 2013 and \$[*] million to May 2014, when the '653 Patent will expire. AstraZeneca did not explain why it did not provide the Court with forecasts for the balance of 2014 and for the period 2015 to 2018, when the '184, '076, '994, '963 Patents will all expire. According to Apotex, and as conceded by counsel for AstraZeneca at the hearing, if AstraZeneca prevails with all of its claims in the within action, Apotex will be subject to a permanent injunction until 2018.

[78] AstraZeneca Canada has also forecasted that the importance of NEXIUM in its product portfolio will increase substantially, from accounting for approximately [*]% of its total sales in 2011 to [*]% in 2012 and [*]% [over 40%] in 2013. This significant increase in the importance of NEXIUM to AstraZeneca Canada is in part attributable to the fact that the patent protection for its leading drug product, CRESTOR (rosuvastatin calcium), will expire in 2012. CRESTOR has apparently accounted for approximately 30-40% of AstraZeneca Canada's total sales since 2008.

[79] In addition to the substantial monetary losses that it claimed it will suffer if the injunction is not granted, AstraZeneca submitted that it will suffer various intangible types of harms that cannot reasonably be quantified, namely, "the immediate loss of employee engagement, customer relationships, talent, innovation and creativity, and reputation." It further claimed that the harm that it will suffer will extend beyond its NEXIUM business, to include adverse impacts on "all of its products in both the current product portfolio (i.e., products existing in the marketplace) and future

product portfolio (i.e., products yet to enter the market), from the company's pipeline and from externalization."

[80] Virtually all of these types of claims have been consistently considered and rejected in other cases considered by this Court. AstraZeneca has not provided any persuasive evidence or submissions to persuade me to treat its claims any differently. In short, as discussed below, its claims are unsubstantiated and are little more than bald assertions. I therefore find that AstraZeneca has failed to establish that it is likely to suffer any cognizable type of irreparable harm.

(i) *Permanent loss of NEXIUM "market"*

[81] AstraZeneca claimed that if Apotex is not enjoined from continuing to roll-out its generic esomeprazole magnesium in Canada, it will suffer "permanent damage to the NEXIUM market." In this regard, AstraZeneca Canada estimated that it would lose "about [%] of its NEXIUM sales within three months of genericization and about [%] within ten months as a result of Apotex's esomeprazole market entry at this time."

[82] AstraZeneca also asserted that "AstraZeneca Canada will cease promotion of NEXIUM if the product is genericized". This is allegedly because "[i]t would be pointless to spend money, time, energy and efforts [*sic*], only to grow sales of generic esomeprazole (since the generic would be the principal beneficiary of such growth)." In response to Apotex's position that protecting the market position of NEXIUM would make sense because AstraZeneca would receive greater damages if it prevails in the within action, AstraZeneca responded that "litigation is inherently unpredictable" and that "[i]t is not reasonable for AstraZeneca Canada to assume that it will succeed in the infringement action and to operate its business on that basis."

[83] AstraZeneca added that an important consequence of ceasing to promote NEXIUM would be that the overall market for the drug will shrink, “resulting in a permanent decrease in the NEXIUM market” by the time the within action is decided, which it forecasted will be almost three years from now.

[84] In support of its claims, AstraZeneca submitted affidavit evidence from Ms. McCourt as well as from two experts, Dr. Ranjay Gulati and Dr. Alan Biloski.

[85] In her affidavit, Ms. McCourt repeated the claims made in AstraZeneca’s written submissions and stated that generic products typically are listed on provincial and private formularies at a fraction of the drug innovator’s prices. As a result, “once a generic enters the market it is expected that a substantial portion of the innovator’s market for that drug will be lost within months.” For this reason, “as soon as a generic version of an AstraZeneca product enters the market, AstraZeneca Canada considers that market lost, and the business is restructured accordingly.”

[86] Based on her experience with launches of other generic products, Ms. McCourt stated that she expects that “Apotex will quickly flood the market with lower priced generic esomeprazole.” She also asserted that “AstraZeneca Canada will cease promotion of NEXIUM if the product is genericized.” She added that “the loss of NEXIUM at this time will destabilize and imperil the transformation [of its organization that was recently implemented] and imperil its future performance.” This is based on her forecast that, in the absence of Apotex’s continued roll-out of

Apo-Esomeprazole, NEXIUM will generate approximately \$[*] billion in sales between now and May 2014. This represents “about [*] of the total [forecasted lifetime] sales of NEXIUM.”

[87] Dr. Biloski and Dr. Gulati supported Ms. McCourt’s position that it would not make economic sense to continue promoting NEXIUM once that product has become genericized. In short, they agreed that such action would simply serve to increase sales of the generic product more than to increase sales of NEXIUM. They added that such promotion would utilize resources that could be better spent on more fruitful endeavours. Indeed, Dr. Gulati asserted that “continued promotion of NEXIUM would require significant financial capital which would no longer be available due to the rapid erosion of the revenue stream following NEXIUM genericization.” Dr. Biloski and Dr. Gulati both opined that the harm to AstraZeneca that would likely flow from generic erosion of NEXIUM’s sales would not be reasonably quantifiable. Dr. Gulati explained that this was “because of the multiplicity of exogenous and endogenous factors which necessarily impact a business’ outcomes in its market and sphere of operation.” Likewise, Dr. Biloski supported his conclusion on the basis of “the wide variability in the future commercial outcomes of AstraZeneca Canada’s business if [NEXIUM] were to retain market exclusivity until May 27, 2014 ...”.

[88] I do not agree with either: (i) the position that it would not make sense to continue to promote NEXIUM once that product has become genericized; or (ii) the position that the various harms that AstraZeneca has asserted under this heading would not be reasonably quantifiable.

[89] With respect to the promotion of NEXIUM, I find the evidence of Apotex’s experts to be more analytically robust and persuasive.

[90] Dr. Bower appropriately noted that AstraZeneca has not provided any information with respect to the fixed costs involved in promoting NEXIUM. Therefore, he questioned the basis for Dr. Gulati's assertions that such promotion would require "significant financial capital" and that such capital "would no longer be available." In addition, given that AstraZeneca has not provided any information with respect to the profits earned by AstraZeneca Canada, he appropriately questioned how Dr. Gulati could conclude that AstraZeneca Canada would not be able to access the capital in question, whether from its parent company or otherwise. Dr. Bower also properly noted that there is no evidence in the Motion Record to support Dr. Gulati's conclusion that any growth from continued promotion would "taper off quickly."

[91] Dr. Hollis provided various calculations that served to confirm the common sense view that, "the firm that benefits from the promotional efforts will be the firm that is successful in the patent infringement action." Thus, even in the absence of an interlocutory injunction, AstraZeneca would be the only beneficiary of the promotional efforts, assuming that it prevails in the within action, and assuming that it can reasonably quantify and prove its damages. Given that AstraZeneca launched the within action fairly recently, and is continuing to pursue it, it is reasonable to assume that AstraZeneca believes that it will prevail.

[92] I agree with Dr. Hollis' observation that it is not reasonable for a firm that speculatively invests hundreds of millions of dollars in "finding and developing new drugs that may or may not be approved by regulatory authorities", to claim that it would not make good business sense to continue to promote NEXIUM, a proven blockbuster drug, until trial. Based on figures derived from AstraZeneca's own evidence, and assuming a 50% chance of prevailing in the within action, Dr.

Hollis estimated that AstraZeneca's expected revenues over the next three years would be approximately \$[*] million if the requested injunction is granted, and \$[*] million, which is only 5% less, if the requested injunction is not granted. If AstraZeneca believes that it has a greater chance of prevailing, the difference in the expected values of its revenues, with and without an injunction, would be even less. For example, Dr. Hollis calculated that this difference would be only approximately 1.6%, if the probability of AstraZeneca prevailing in the within action is 80%.

[93] Andrew Harrington agreed with Dr. Hollis' view that, if AstraZeneca Canada does in fact anticipate that it will succeed in the within litigation, "it would be prudent action to continue the full sales and marketing initiative and thereby preserve Nexium's share in the PPI market pending the outcome of the trial in this matter." In his view, this would be "sensible given that, if successful in the litigation, AstraZeneca Canada will have a damages award against Apotex equal to the amount of its lost sales to Apotex." Mr. Harrington acknowledged that there is no certainty that AstraZeneca Canada will in fact prevail in the within action. However, he estimated that, "depending upon which patent or patents AstraZeneca Canada succeeds upon, the benefit to AstraZeneca of maintaining the Nexium[®] market will be between \$[*] billion and over \$[*] billion." Although he did not refer to the marketing costs that would be required to continue to promote NEXIUM, his conclusion that "the prospective revenue opportunity benefit to AstraZeneca Canada of continuing to promote Nexium[®] is very substantial at a relatively low cost" strikes me as being much closer to the mark than the unsubstantiated assertions of Dr. Gulati and Dr. Biloski.

[94] Mr. Harrington also astutely questioned "why any reasonable business person would accept the risk" of Apotex successfully arguing, in the within action, that "the entirety of AstraZeneca Canada's losses were attributable to AstraZeneca Canada's irrational decision to allow the Nexium[®]

market to collapse.” This observation would apply with equal force even if Apotex only succeeded in ultimately establishing that a portion of AstraZeneca Canada’s damages were attributable to its decision to stop promoting NEXIUM.

[95] I do not accept AstraZeneca’s suggestion that the analyses provided by Dr. Hollis and Mr. Harrington were outside their respective areas of expertise. In my view, Dr. Hollis’ analysis was well within the domain of his extensive background and expertise in economics and competition between branded and generic drugs. Similarly, Mr. Harrington’s analysis was well within the field of his extensive background and expertise in dispute consulting, business and intellectual property valuation, and the quantification of loss and accounting of profits in intellectual property dispute matters and damages in commercial litigation matters.

[96] Considering the foregoing, and in the absence of additional financial and other evidentiary support from AstraZeneca or its experts, I do not accept that it would make good business sense for AstraZeneca Canada to discontinue promoting NEXIUM if this Motion for an interlocutory injunction is not granted. This is particularly so given that: (i) AstraZeneca’s patent protection is likely to last for approximately three more years, if not until 2018, when the last of the patents in the within action expires (*Servier*, above, at para. 71); and (ii) AstraZeneca Canada has not provided any evidence to indicate that the costs associated with continuing to promote NEXIUM would likely exceed the profits that could reasonably be expected to be derived from those promotional efforts.

[97] In my view, if AstraZeneca Canada does cease or reduce its promotional activities in respect of NEXIUM, any harm that it may suffer will flow from its own actions, not the continued roll-out

of Apotex's generic product. Moreover, such harm is likely to be quantifiable and, thus, not irreparable (*Servier*, above, at paras. 48 and 71; *Merck & Co. v. Nu-Pharm Inc.* (2000), 4 C.P.R. (4th) 464, [2000] F.C.J. No 116 (QL) (T.D.) [*Merck & Co*], at paras. 36 to 38; *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2001 FCT 1086, 15 C.P.R. (4th) 190 (F.C.T.D.) [*Bristol-Myers*], at para. 29; *Bayer Healthcare*, above, at para. 85; see also, *Aventis Pharma*, above, at paras. 43, 74-77 and 113).

[98] Turning to AstraZeneca's claim that the various other harms asserted under this heading would not be reasonably quantifiable, I acknowledge that, at this point in time, it may be difficult to accurately forecast the harm that AstraZeneca is likely to suffer, at least on a temporary basis, if this Motion is not granted. However, that difficulty is likely to be reduced by the time it is necessary to calculate damages in the within action (*Servier*, above, at para. 52).

[99] In any event, "[t]he jurisprudence is clear that difficulty in precisely calculating damages does not constitute irreparable harm, provided there is some reasonable methodology that could, at the time damages would be assessed, measure those damages" (*Servier*, above, at para. 51; *Aventis Pharma*, above, at para. 61; *Abbott Laboratories*, above, at para. 17).

[100] Moreover, I am satisfied that any such damages are likely to be quantifiable and recoverable (*Servier*, above, at para. 73; *Bayer Healthcare*, above, at para. 64; *Merck & Co*, above, at para. 41; *Abbott Laboratories*, above, at para. 24; *Fournier Pharma Inc. v. Apotex Inc.* (1999), 2 C.P.R. (4th) 351, [1999] F.C.J. No. 1689 (QL) (T.D.) [*Fournier Pharma 1*] at para. 66; *Bristol-Myers*, above, at paras. 21-22; *Pfizer Ireland Pharmaceuticals v. Lilly Icos LLC*, 2003 FC 1278, 29 C.P.R. (4th) 466 at paras. 27-29; *Pfizer Ireland Pharmaceuticals v. Lilly Icos LLC*, 2004 FC 223, 30 C.P.R. (4th) 317, at para. 39; *Aventis Pharma*, above, at paras. 79, 84 and 88).

(ii) *Negative impact on other existing products, customer relationships and employees*

[101] AstraZeneca claimed that, due to the fact that Apotex is launching Apo-Esomeprazole “at a time when major structural changes to the business have just been made, [this will lead to a] downward spiral of intangible harms which could negatively impact on sales of all of AstraZeneca Canada’s products in the immediate and longer term.” These structural changes were part of the recent implementation of a major business transformation which included the elimination, in December 2010, of [*]% of the total employees of AstraZeneca Canada. This business transformation was effected, at least in part, in anticipation of the loss of patent protection on CRESTOR, in 2012. However, that transformation allegedly did not take into account the possible genericization of NEXIUM. In addition, the employee reductions did not include any sales staff.

[102] AstraZeneca stated that “it is not aware of any major pharmaceutical company that has survived the loss of their top two selling products (which account for 50% or more of their revenue) in such a narrow time frame as faced in the present situation.”

[103] In this context, AstraZeneca claimed that “the loss of NEXIUM at this time will destabilize and imperil the transformation of AstraZeneca’s future performance.” In part, this is allegedly attributable to the fact that additional employee reductions will have to occur, and this will “necessarily have to include the sales force.” AstraZeneca claimed that this would “be particularly devastating” and of long duration, “because relationships with and knowledge of customers are built over years” and because most employees have responsibilities that cover more than one product or support the entire organization.

[104] AstraZeneca further claimed that “[t]here is undoubtedly little or no interest on the part of the global business to rescue a poorly performing arm, especially one in a small market such as Canada when there are potentially larger emerging markets that are competing for AstraZeneca’s investment.” In this regard, Ms. McCourt stated in her affidavit that [*].

[105] Ms. McCourt also stated in her affidavit that the continued roll-out of Apo-Esomeprazole will result, in the near and longer term, in “a real and substantial negative impact to the current portfolio of products in the market today as AstraZeneca Canada will have lost the resources, both financial and human, and competitiveness it presently enjoys.”

[106] Dr. Gulati added, in his affidavit, that “[r]esearch has also shown that as businesses downsize and reduce their key customer support personnel, their ability to deliver ancillary value-added service decline [*sic*], which in turn reduces customer satisfaction, loyalty, and repurchase intentions.”

[107] With respect to its employees, AstraZeneca claimed that its “recent layoffs and restructuring have likely shaken many employees”. However, it anticipates that, “absent further bad news, employees will be able to focus and gain renewed confidence in AstraZeneca’s future”. That said, the news that Apotex has been permitted to continue to roll-out Apo-Esomeprazole would “create stress perceived by job insecurity” as well as a “loss of employee morale, focus, commitment and energy.” If it is not able to “maintain a high level of employee engagement,” AstraZeneca claimed that “[k]ey priorities in 2011 and beyond, including product launches, will be derailed if employees are distracted and demoralized, and suffer stress and loss of pride and confidence in the company.” In turn, AstraZeneca asserted that “a number of high performing employees, who would not be part

of the downsizing, would leave, preferring not to work in a company that has suffered such a setback,” thereby compromising AstraZeneca Canada’s competitiveness in the immediate and longer term. AstraZeneca added that if it prevails in the within action, “all of this lost talent would not simply be available to be re-hired and it will not be possible to quickly replace and rebuild the employee base.”

[108] In her affidavit, Ms. McCourt reiterated the various claims set forth above and stated that the Transformation Plan that AstraZeneca Canada implemented in the first quarter of this year “assumes and depends on exclusivity for NEXIUM until patent expiry.” In other words, that plan did not take account of Apotex’s launch of Apo-Esomeprazole, which Apotex had previously confirmed was being pursued. In this latter regard, Ms. McCourt stated that it would be “illogical to conduct business assuming a possible blow at an unknown future time, including directing employees to prepare for such an eventuality. Certainty is needed.”

[109] Accordingly, Ms. McCourt claimed that “[t]he significant and rapid loss of NEXIUM revenue means that a significant further reduction of the size and structure of the business will be required over a short period of time. Further reductions will be in the range of [*]%. ” She added: “I believe that the company will not be able to absorb the further changes at this time without significant harm,” particularly given that the company has just implemented an approximately [*]% reduction of the employee base.

[110] Based on his understanding of Ms. McCourt’s affidavit, Dr. Gulati stated in his affidavit that “it is entirely reasonable and most likely necessary to expect a further significant downsizing of the company if there is early genericization of NEXIUM.” He added that this would be

compounded by additional voluntary departures, especially by persons within the company's sales force, "who will view AstraZeneca Canada – having lost its top two selling drugs in such a short period of time, as a defeated company with no opportunity for growth." In his view, these further employee reductions, over and above those recently implemented, "would be dramatic and catastrophic to AstraZeneca Canada." In short, he stated that these reductions:

... would likely create a destructive chain reaction within the organization, resulting in loss of employee engagement, commitment and motivation, physical and psychological strain on employees, loss of institutional memory, disruption of relationships between sales representatives and physicians, negative impacts on the climate for creativity, and negative impacts on reputation harming both the survivors and the organization itself, creating an environment of uncertainty for all persons within the company.

[111] After elaborating on the foregoing and drawing upon the findings in a number of recent articles that discuss research into corporate downsizing, Dr. Gulati opined that the alleged harms to AstraZeneca are not reasonably quantifiable in monetary terms, that is to say, quantifiable within a reasonable degree of accuracy.

[112] Dr. Biloski stated in his affidavit that, "further significant cuts will almost certainly be the inevitable result of a commercialization of generic NEXIUM in 2011 and the consequential loss of a significant NEXIUM revenue stream." In addition, he stated that he is "not aware of any major pharmaceutical companies that have been able to survive the loss of their top two selling products (which account for 50% or more of their revenue) in such a narrow time frame – and AstraZeneca Canada will likely be no different."

[113] Furthermore, he opined that, having regard to AstraZeneca's fiduciary obligation towards its shareholders and the likelihood of finding better returns from investments in countries such as China, it is "entirely reasonable that [AstraZeneca] would choose to forego providing a lifeline of financial and other support and allow AstraZeneca Canada to experience a sudden and pronounced decline."

[114] Consistent with Dr. Gulati's view, Dr. Biloski also opined that the impact of the above-described harms on AstraZeneca Canada "[are] not reasonably quantifiable given the wide variability in the future commercial outcomes of AstraZeneca Canada's business if [NEXIUM] were to retain market exclusivity until May 27, 2014 ...".

[115] I have great difficulty believing that AstraZeneca Canada did not account for the likelihood of a loss of significant sales of NEXIUM, when it recently implemented a reduction of approximately [%] of its workforce, particularly given the facts discussed in the paragraphs immediately below. In any event, I find that AstraZeneca's claimed harms are exaggerated, speculative and unsubstantiated. To the extent that any such harms do materialize between now and the time at which damages are calculated in the within action, I find that they are likely to be reasonably quantifiable and compensable.

[116] As with the claims discussed in Part III.D (i) above, I find the evidence of Apotex's experts to be more analytically robust and persuasive than the evidence of Ms. McCourt, Dr. Biloski and Dr. Gulati. In this context, where I must determine which conflicting evidence to accept for the purposes of assessing whether alleged irreparable harm has been clearly demonstrated, the Business

Judgment Rule, as summarized in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 40, has no application

[117] In his affidavit, Dr. Bower notes that AstraZeneca Canada: (i) has known since late 2007 that Apotex was seeking to obtain an NOC to market its generic esomeprazole product; (ii) is aware that Apotex obtained that NOC in June 2010; and (iii) thought that the risk of Apotex launching its product was so high that it commenced the within action. In these circumstances, he stated: “I find it hard to believe that Astra Canada would undertake a business transformation, commencing in late 2010, the success of which depended upon this launch not occurring.”

[118] Similarly, Dr. Hollis stated in his affidavit that he found it surprising that AstraZeneca would have to reduce its workforce by a further [*]% because, in anticipation of the genericization of CRESTOR, a drug which historically delivered over twice as much revenue as NEXIUM, the company recently cut approximately [*] employees. In this regard, Dr. Hollis pointed out that NEXIUM “is chiefly insured under private insurance plans, which have historically not been as aggressive in moving patients from brand name to lower priced generic drugs.” He also noted that the Province of Quebec “has a policy of allowing innovative medicines to be fully reimbursed for 15 years following their introduction,” such that “for the public plan in Quebec, Astra is likely to retain a healthy share of the market.” In addition, he suggested that Apotex’s proposed selling price of Apo-Esomeprazole, at 89% of NEXIUM’s price, will likely deter some people who might otherwise choose the generic product. In the absence of more specific information about AstraZeneca Canada’s financial situation, Dr. Hollis concluded: “It appears that Astra would not be financially constrained and thus would be able to maintain the staff required to continue to promote Nexium to physicians.”

[119] Dr. Hollis also responded to Dr. Gulati's suggestion that AstraZeneca Canada would not likely survive the genericization of its top two selling drugs by noting that Pfizer Canada lost its exclusivity on Norvasc and Lipitor in the space of one year. In this regard, Dr. Hollis noted that those two drugs accounted for approximately 63% of Pfizer Canada's revenues in 2008, and that, "despite these losses, [Pfizer Canada] continues to operate."

[120] Dr. Hollis also responded to Dr. Biloski's view that it would be entirely reasonable for AstraZeneca to withhold funding from AstraZeneca Canada if NEXIUM is genericized, as more attractive investment opportunities are available elsewhere in the world. In short, Dr. Hollis stated that this view "seems poorly founded," because if Canadian opportunities are not more attractive than opportunities elsewhere, "they should not be funded in any case, regardless of the potential cash flow from sales of Nexium."

[121] With respect to AstraZeneca Canada's financial resources, as discussed at paragraph 40 above, Mr. Harrington estimated that, even with the genericization of NEXIUM, AstraZeneca Canada's profits would be almost \$[*] billion in the period 2011 to 2014. Mr. Harrington also estimated the cost of maintaining [*]% of AstraZeneca Canada's existing workforce to be [*] [less than \$50] million, after tax.

[122] On a related point, Dr. Bower also noted, in his affidavit, that Ms. McCourt provided no explanation as to how AstraZeneca Canada concluded that the genericization of NEXIUM would necessitate a further [*]% reduction of its workforce. He also noted that Ms. McCourt did not

provide any information as to the annual cost savings that AstraZeneca Canada would expect to achieve by such a reduction.

[123] Given Ms. McCourt's statement, in her affidavit, that the recent implementation of the Transformation Plan has strengthened AstraZeneca Canada, and has resulted in a "new, more efficient and responsive operating model," Dr. Bower stated that he found "Ms. McCourt's statements as to how she intends to respond to Apotex's market entry foresomeprazole to be all the more perplexing." I endorse Dr. Bower's view.

[124] With respect to Ms. McCourt's statement that reducing AstraZeneca Canada's workforce by a further [*]% would have a devastating and long term impact on the company, and would prevent the company from successfully implementing the ongoing Transformation Plan, Dr. Bower opined that, "[i]t is illogical in the extreme to damage the very asset that would enable Astra Canada to survive and, indeed, thrive in the years to come." With this in mind, Dr. Bower opined that these statements, and the similar statements made in the affidavits of Dr. Biloski and Dr. Gulati, "vastly exaggerate the likely effects of the job cuts."

[125] After reviewing some of the relevant literature on corporate downsizing, Dr. Bower observed: "Thus, the literature states that whether or not the downsizing causes serious long-term harm to the company is largely within the control of its management." He also noted that some of the literature cited by Dr. Gulati reports that the adverse effects of corporate downsizing are "relatively short-lived." In addition, he referred to substantial and successful downsizings that have occurred at Xerox Corporation, Ford Motor Company and IBM.

[126] Dr. Bower then referred to an article, entitled “Death of a Salesman: AstraZeneca Replaced Entire Nexium Salesforce with Telemarketers,” which reported upon a recent corporate downsizing that was implemented by AstraZeneca Canada’s U.S. affiliate (“AstraZeneca U.S.”). That article reported that, in 2009, AstraZeneca U.S. “reduced its salesforce headcount by 430 full-timers, a 50 percent cut,” and replaced them with a 300 person call centre and an Internet site. As a result of this initiative, “essentially all detailing of Nexium was eliminated,” even though NEXIUM’s patent protection in the U.S. apparently will not expire until 2014. Notwithstanding this substantial reduction in its salesforce, the sales and market share of NEXIUM reportedly did not decline in 2009.

[127] Dr. Bower also referred to other articles reporting on other workforce cuts within AstraZeneca’s global enterprise. Based on those articles, he concluded that “it would appear that, since 2007, the AstraZeneca group of companies has announced cuts to its workforce totalling 23,550 jobs, which cuts are to be completed by 2013.” Based on another source that reported a total pre-downsizing workforce of 65,000, Dr. Bower estimated that the total reported cuts constituted approximately 36% of AstraZeneca’s [total worldwide] workforce.

[128] With respect to the recent cuts implemented by AstraZeneca Canada, Mr. Harrington noted that, on page 11 of the Transformation Plan, it is indicated that a key objective was to eliminate “unnecessary layers of management and small spans of control,” and to “streamline cross-functional processes.”

[129] Having regard to the foregoing, I find it implausible that AstraZeneca did not take Apotex's announced entry into the esomeprazole business into account when it planned and recently implemented a [*]% reduction of its workforce. This is particularly so given that: (i) on July 13, 2010, at AstraZeneca's request, Apotex provided an "on the record" confirmation of its intention to launch Apo-Esomeprazole; (ii) on July 26, 2010, it again confirmed to AstraZeneca that it was proceeding with the production of launch quantities of Apo-Esomeprazole; (iii) AstraZeneca filed the within action on the same day that Ms. McCourt presented the Transformation Plan to Mr. Fante for approval; and (iv) Ms. McCourt acknowledged during the cross-examination on her affidavit that "[a] competent CEO will most deliberately plan for events that are deemed likely to occur."

[130] In any event, given the evidence of Mr. Harrington and Dr. Hollis, I find it implausible that AstraZeneca will not have, or have access to, sufficient resources to maintain its workforce at a level which would avoid the devastating and catastrophic harms that it has claimed will result if Apotex is not enjoined from continuing to roll-out Apo-Esomeprazole.

[131] In addition, I find it implausible that AstraZeneca Canada's employees would react in the manner claimed by Ms. McCourt, particularly given that they have known for approximately 10 months now that Apotex obtained an NOC in respect of Apo-Esomeprazole, a fact that Ms. McCourt acknowledged when she admitted, during cross-examination on her affidavit, that she had sent a press release to AstraZeneca's employees regarding that NOC, soon after its issuance last June.

[132] Moreover, I find it implausible that any of the claimed harms will materialize if Apotex continues its roll-out of Apo-Esomeprazole. Having regard to Mr. Harrington's evidence that if any

of these claimed harms do materialize, they will be “measurable in a reliable and traditional manner,” I also find that such harms would be reasonably quantifiable and compensable if they do materialize. I note that these findings are consistent with the jurisprudence with respect to these types of claimed harms (*Fournier Pharma Inc. v. Apotex Inc.* (1999), 1 C.P.R. (4th) 344, [1999] F.C.J. No. 504 (QL) (T.D.) [*Fournier Pharma 2*], at para. 9; *Fournier Pharma 1*, above, at paras. 55 and 75; *Aventis Pharma*, above, at paras. 94-97; *Bayer HealthCare*, above, at paras. 58 and 70-73; *Servier*, above, at paras. 37, 45 and 48; *Wellcome Foundation Ltd. v. Interpharm Inc.* (1992), 41 C.P.R. (3d) 215, [1992] F.C.J. No. 123 (QL) (T.D.)).

(iii) *Negative impact on pipeline products*

[133] AstraZeneca submitted that it “expects [*] new products to be launched in 2011 and 2012, and several more beyond that.” As a result of the other harms that it has alleged, it claimed that it would “be going into these (and 2012) product launches wounded and severely disadvantaged.” As a result, the “uptake and success” of some of its future products “will therefore be critically diminished.” This is alleged to be an “unquantifiable impact which the business will never get back in the product’s life cycle.” In the case of at least one pipeline product, VIMOVO, which is a combination of NEXIUM and naproxen, the Plaintiffs claimed that the list price of the product “will likely be based on the price of the component drugs, if it is listed at all.” As a result, AstraZeneca asserted that “[i]t will be impossible for AstraZeneca Canada to obtain the price, and therefore the revenues, it would have ifesomeprazole was not genericized early.”

[134] In her affidavit, Ms. McCourt reiterated the foregoing claims and added that, as part of the ongoing business transformation plan, more resources are being shifted to effective launch strategies in relation to the company’s pipeline products.

[135] Dr. Biloski supported the above described claims by stating that: (i) losing key provider relationships will make it difficult to change prescribing behaviour of physicians; (ii) losing the most creative employees will deny a company the ability to optimize its promotional programs; and (iii) “the unexpected erosion of a flagship product such as NEXIUM can have a terminal impact on AstraZeneca Canada by foreclosing its ability to revitalize its product line.”

[136] As with the claims discussed Part III.D. (i) and (ii) above, I find the claims that have been made in respect of AstraZeneca’s pipeline products to be entirely speculative and unsubstantiated. Indeed, I agree with Dr. Bower’s view that these claims “vastly exaggerate the likely effects of the job cuts” that Ms. McCourt claimed will have to be made if the requested injunction is not granted. I also agree with Dr. Hollis’ opinion that “if pricing of Vimovo on any formulary is compromised by the generic esomeprazole, that would be a relatively easy harm to calculate.”

[137] In short, I find that AstraZeneca has not clearly established that it will suffer any irreparable harm in connection with its pipeline products.

(iv) Negative impact on reputation and future business development opportunities

[138] AstraZeneca claimed that the “early genericization of NEXIUM, and the consequential harms described above,” would result in “a negative reputational impact” in the eyes of “potential business development partners, who would consider AstraZeneca Canada, along with other innovators in Canada, for the development of their products.” An example of such a partnership is its marketing alliance with Bristol-Myers Squibb Canada in relation to the sale of ONGLYZA, a diabetes drug.

[139] AstraZeneca claimed that “roughly [*] %” of its future sales will “derive from outside AstraZeneca’s laboratories” and that AstraZeneca Canada develops and self funds some of those partnerships with third parties. It asserted that a “[l]oss in revenue will mean that acquisitions and in-licensing will no longer be possible or compromised” and that the likely perception of AstraZeneca Canada as a substantially weakened competitor would adversely impact upon its ability to partner with other companies, who would be “attracted to more financially robust companies.” Moreover, it claimed that [*].

[140] In her affidavit, Ms. McCourt essentially repeated these claims.

[141] Dr. Biloski supported these claims by, among other things, opining that “Canadian subsidiaries of multinational pharmaceutical companies such as AstraZeneca Canada have a critical need to supplement the parent company product pipeline with locally sourced license and partnership deals.”

[142] Dr. Gulati opined that it would not be possible to quantify the harm to AstraZeneca from this adverse impact on its reputation, because the extent of that impact “will not be known.”

[143] I find the claims that have been made by AstraZeneca in respect of the impact of the early genericization of NEXIUM on AstraZeneca Canada’s reputation and its future business development opportunities to be entirely speculative, unsubstantiated and exaggerated.

[144] Once again, I find the evidence of Apotex’s experts to be more analytically robust and persuasive than that of Ms. McCourt, Dr. Biloski and Dr. Gulati.

[145] I agree with Mr. Harrington that, as a company that will continue to have several hundred million dollars in sales, even assuming a 100% loss of NEXIUM sales, “there is no reason to believe that there would be any significant, if any, losses in business development opportunities.” This is particularly so given that, as Dr. Hollis noted: (i) “virtually every [branded drug] company has faced generic entry in spite of patents it believed were valid, and this is simply an expected part of the business;” and (ii) “[g]enerally, [prospective] partners would look to Astra for its expertise in marketing products. This is not put in doubt by the generic sales of esomeprazole.” I am also inclined to accept Dr. Hollis’ opinion that “it is the reputation of the parent companies that is far more important [to prospective partners] than that of the local subsidiaries.”

[146] In addition, as Dr. Bower noted, it is difficult to understand (i) “how the presence of a competing product for Nexium can have any effect on the perception that Astra Canada is a ‘high quality company’;” and (ii) “how the loss of market exclusivity three years before that loss was expected (and after the drug had already enjoyed exclusivity for ten years) could affect that ‘innovation’ image.”

[147] Dr. Biloski stated, in his affidavit: “In my direct experience, there is no faster way to change the perceptions of a research-based pharmaceutical company than via the unexpected generic erosion of a flagship product.” Dr. Hollis characterized this as being an “extraordinary claim.” He stated that in his “experience, the fastest way to change the perceptions of any pharmaceutical company is for it to be found that the drugs produced and marketed by the company are dangerous for the people...” He then noted that, “in late April 2010, the U.S. Department of Justice announced that an agreement had been reached with AstraZeneca whereby AstraZeneca had agreed

to pay \$520m to resolve allegations that it had marketed the antipsychotic drug Seroquel for off-label uses”. I agree with his opinion that the fact that AstraZeneca has “managed to survive, and indeed flourish, in the period after this public announcement, draws into serious question the hypothesis that Astra will not be able to address negative ‘perceptions’ brought on by Apotex’s market entry.”

[148] In addition, I find that Dr. Biloski’s evidence is undermined by the fact that he acknowledged, in cross-examination on his affidavit, that he did not know whether AstraZeneca Canada would remain “a top three [pharmaceutical] company” in Canada without NEXIUM. Indeed, he conceded that he not know where AstraZeneca Canada would place relative to other pharmaceutical companies in Canada.

[149] In summary, I find that AstraZeneca has not clearly established that it will suffer any irreparable harm in connection with its reputation and future business development opportunities. I note that this finding is consistent with determinations made by this Court in cases such as *Merck & Co.*, above, at para. 34; *Fournier 1*, above, at para. 74; *Bristol-Myers Squibb*, above, at para. 30; *Pfizer Ireland 1*, above, at para. 26; *Pfizer Ireland 2*, above, at para. 41; and *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, [1997] F.C.J. No. 953 (QL) (TD), at para. 12.

(v) *Innovation and creativity*

[150] In its written submissions, AstraZeneca claimed that “as a result of the negative impact on employees and climate just described, there would also be a loss of creativity and innovation.” The same bald assertion is made by Ms. McCourt, in her affidavit. A similarly unsubstantiated claim was made by Dr. Biloski, who stated, in his affidavit, that AstraZeneca Canada “is more likely to be

successful with the discovery and/or in-licensing and launch of new products if it continues to enjoy the cash flow from NEXIUM throughout its expected patent life to May 27, 2014.”

[151] In my view, Ms. McCourt’s claim is somewhat undermined by her inability to identify, during cross examination on her affidavit, the last drug product sold by AstraZeneca in Canada that was actually innovated by AstraZeneca Canada.

[152] In any event, in the absence of any substantiation whatsoever for the claims that have been made under this heading, they are purely speculative and have not been clearly demonstrated to constitute irreparable harm (*Servier*, above, at paras. 37 and 71; *Merck & Co.*, above, at paras. 35-36).

(vi) *General conclusion with respect to irreparable harm*

[153] Given the conclusions I have reached with respect to each of the categories of irreparable harm that AstraZeneca has claimed it is likely to suffer if the injunction that it has requested is not granted, I find that AstraZeneca has not clearly established that it is likely to suffer any such irreparable harm whatsoever.

E. *Balance of convenience*

[154] Given my conclusion immediately above, it is not necessary for me to address the third prong of the tri-partite test for the granting of an interlocutory injunction. Nevertheless, I will do so, in the event that I may have erred in my analysis of one or more of the irreparable harms that AstraZeneca has claimed.

[155] In its oral submissions, AstraZeneca suggested that my assessment of the balance of convenience should take into account the harm to the public interest in patent rights and the promotion of innovation and drug discovery, which would result from a decision not to grant the interlocutory injunction that AstraZeneca has requested in this Motion.

[156] As briefly discussed in Part III.B above, I agree that this may well be a legitimate consideration to be considered in assessing the overall balance of convenience, in appropriate cases. However, in this particular case, this claim is nothing more than a bald assertion. AstraZeneca has provided no evidence whatsoever of any adverse impact that would result from a decision not to grant the requested injunction.

[157] When pressed on this point during the hearing of this Motion, counsel to AstraZeneca was unable to provide any evidence to support the assertion that a refusal to grant this Motion might adversely impact upon innovative activity, whether in Canada or elsewhere. In the particular circumstances of this case, this is not surprising, particularly given that (i) much of the innovative activity in the drug industry is conducted outside Canada, and largely directed towards markets outside Canada; (ii) interlocutory injunctions are permitted in other jurisdictions that are as likely as Canada to be in the minds of drug innovators located abroad; and (iii) AstraZeneca has already had the benefit of approximately 10 years of full patent protection in respect of its production and sale of esomeprazole in Canada.

[158] In its written submissions regarding the balance of convenience prong of the tri-partite test for injunctions, AstraZeneca submitted that the potential loss of jobs is a significant matter of public

interest that should be dealt with in my analysis. In this regard, AstraZeneca baldly asserted that “[t]here will be an obvious negative impact on the approximately [*] workers who will lose their full time employment and benefits if Apotex is not restrained” from continuing to roll-out its Apo-Esomeprazole product. AstraZeneca also submitted that “there will be a significant impact on AstraZeneca’s ongoing and future performance,” as described in the section of its submissions dealing with the irreparable harm prong of the tri-partite test.

[159] Given my findings that AstraZeneca has not demonstrated that these unsubstantiated harms are likely to materialize, they do not merit material weight in the balancing of convenience assessment in this case.

[160] On the other side of the ledger, Apotex has identified certain harms that I am prepared, on the particular facts of this case, to accept are likely to result if the requested injunction is granted and if Apotex prevails in the within action.

[161] Specifically, if Apotex’s roll-out of Apo-Esomeprazole is suspended until a judgment is rendered in its favour, it claimed that it would either (a) lose the benefit of having launched the first generic competitor to NEXIUM (if its generic rivals, including three of whom are in the process of attempting to obtain their own NOCs, are able to launch their products before that time), or (b) merely be one of a number of generic entrants at that time, (if those rivals are enjoined from launching until that time). In either case, it would lose the ability to command the high price that it would have charged, but for the granting of the injunction.

[162] I am satisfied that it is likely to be particularly difficult to quantify the extent of such losses. In contrast to the situation that AstraZeneca faces, where any sale lost to Apotex will be known and quantifiable, it will be more difficult to ascertain what Apotex's total sales of Apo-Esomeprazole would have been, but for the injunction.

[163] In addition, AstraZeneca has known since Apotex received an NOC in respect of Apo-Esomeprazole, almost ten months ago, that Apotex was legally in a position to launch that product. A few weeks later, at AstraZeneca's request, Apotex provided an "on the record" confirmation of its intention to launch Apo-Esomeprazole. Two weeks after that, on July 26, 2010, Apotex again confirmed to AstraZeneca that it was proceeding with the production of launch quantities of Apo-Esomeprazole. On October 15, 2010, AstraZeneca considered the threat of Apotex's entry to be sufficiently serious that it launched the within action. However, it still did not file this Motion for an interlocutory injunction.

[164] It was not until after Apo-Esomeprazole was listed by Nova Scotia Pharmacare in November 2010, and then in Quebec and New Brunswick in February of this year, that AstraZeneca finally retained Dr. Gulati and Dr. Biloski and then filed this Motion.

[165] In my view, given the foregoing, the significant time, effort and monetary resources that Apotex expended between the time it received an NOC on June 17, 2010 and the time that this Motion was launched on March 11, 2011 are factors to be considered on Apotex's side of the ledger in the balancing of convenience analysis.

[166] Another factor to be considered on Apotex's side of the ledger is the fact that there is uncontested evidence of a likely and substantial adverse impact on the public interest that would result from enjoining Apotex from continuing its roll-out of Apo-Esomeprazole. This adverse impact is the delay of a significant reduction in the price of esomeprazole that would benefit the public. Unlike the harm that AstraZeneca would suffer from the loss of sales of NEXIUM (if the injunction is not granted and it prevails in the within action), and unlike the harm that Apotex would suffer from the deferral of its recoupment of the substantial investment it has made to date in preparing to launch Apo-Esomeprazole (if the injunction is granted and it prevails in the within action), the public will never be compensated for having suffered this harm.

[167] Considering all of the foregoing, I find that AstraZeneca has not demonstrated that the balance of convenience lies in its favour.

IV. Conclusion

[168] Based on my findings that AstraZeneca has not met its burden in respect of the second and third prongs of the tri-partite test applicable to interlocutory injunctions, this Motion will be dismissed.

[169] Given my finding with respect to the tri-partite test, it is not necessary to address the distinct issue that Apotex has raised with respect to delay and *Laches*.

V. Confidentiality

[170] AstraZeneca requested extensive redactions from the public version of these reasons. In addition to confidential financial information, it requested the redaction of (i) various assertions made by Ms. McCourt regarding claimed negative impacts of the early genericization of NEXIUM on AstraZeneca Canada's transformation and future; (ii) certain related information with respect to further downsizing and restructuring that it claimed would be necessary if the requested injunction were not granted, (iii) certain information pertaining to claimed adverse impacts on other products in its portfolio, its ability to retain key employees, its reputation, its ability to attract third parties to enter into potential business development opportunities, and its ability to launch new products; (iv) claims made regarding AstraZeneca Canada's future ability to access funds from its parent company; and (v) claims made regarding the possible list price of VIMOVO.

[171] This Court takes the protection of confidential information very seriously. However, parties cannot expect that requests to maintain the confidentiality of bald, unsubstantiated assertions or speculative will necessarily be granted. Such requests will be considered on a case-by-case basis.

[172] Pursuant to Rule 151 of the Rules, the Court must be satisfied that information in respect of which a request for confidentiality has been made should be kept confidential, notwithstanding the public interest in open and accessible court proceedings.

[173] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, the Supreme Court of Canada stated:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[174] With respect to the first branch of the aforementioned test, the Supreme Court identified, at paras. 54 to 57 of its decision, the following three elements:

- i. the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question;
- ii. in order to qualify as an “important commercial interest”, the interest in question cannot merely be specific to the party requesting the confidentiality order, the interest must be one which can be expressed in terms of a public interest in maintaining confidentiality; and
- iii. the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but must also restrict the order as much as is reasonably possible, while preserving the commercial interest in question.

[175] It follows from the foregoing that the less well grounded are the assertions in the evidence, the less likely it is that the Court will agree to maintain them in confidence. Moreover, even where the Court agrees that information contained in an assertion or claim ought to be maintained in confidence, it is required restrict the scope of redactions from its reasons as much as is reasonably possible, while preserving the commercial interest in question.

[176] With the foregoing principles in mind, I have rejected most of AstraZeneca's extensive requests for redactions, on the basis that they are not "well grounded in the evidence" (*Sierra Club*, above; *Abbott Laboratories Limited v. Canada (Minister of Health)*, 2005 FC 989, at paras. 100 and 102; *Pfizer Canada Inc. v. Novopharm Limited*, 2010 FC 668, at para. 37). This includes AstraZeneca's bald, largely unsubstantiated or speculative assertions with respect to the various adverse impacts that will be associated with the "early genericization" of NEXIUM, including:

- i. the "immediate, catastrophic and irreversible impact" that this will have on AstraZeneca Canada, including the other current and pipeline products in its portfolio;
- ii. the "destabilization and imperilling" of AstraZeneca Canada's ongoing transformation;
- iii. the fact that AstraZeneca's transformation did not take into account the possible genericization of NEXIUM;
- iv. additional employee reductions and voluntary departures;

- v. its reputation and ability to attract third parties to enter into potential business development opportunities;
- vi. the unlikelihood of AstraZeneca accessing funds or other assets from its parent company; and
- vii. the possibility that the list price of VIMOVO will be lower, because it "will likely be based on the price of the component drugs, if it is listed at all".

[177] The unsubstantiated and unpersuasive nature the claims in respect of which AstraZeneca has sought confidentiality protection is such that I am satisfied that any salutary effects that might be associated with maintaining the confidentiality of the claims and related evidence would not outweigh the deleterious effects that would be associated with such action. These deleterious effects include the significant difficulty that the public would have to discern the nature of those claims, why they were rejected and what might be required to establish similar claims in the future. If I were to accept the extensive confidentiality requests that AstraZeneca has made, important parts of these Reasons for Judgment would be difficult, if not impossible, for the public to follow. This includes persons who may consider making such claims in the future.

[178] Notwithstanding the foregoing, I am satisfied that the confidentiality of certain information set forth in the confidential version of these Reasons for Judgment ought to be maintained. This includes (i) specific financial and sales figures; (ii) specific figures with respect to the further reduction in its workforce that AstraZeneca's has asserted is likely to occur if the requested

injunction is not granted; (iii) advice that Ms. McCourt attested to having received from someone in AstraZeneca; (iii) the number of new products that AstraZeneca Canada expects to launch in 2011 and 2012; and (iv) a particular claim that was made regarding AstraZeneca Canada's ability to enter into potential business development opportunities.

“Paul S. Crampton”

Judge

Ottawa, Ontario
May 24, 2011
(Amended on May 30, 2011)

FEDERAL COURT**SOLICITORS OF RECORD**

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Toronto, Ontario

FOR THE DEFENDANT
(PLAINTIFF BY COUNTERCLAIM)

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110623

Docket: A-180-11

Citation: 2011 FCA 211

**CORAM: SHARLOW J.A.
TRUDEL J.A.
STRATAS J.A.**

BETWEEN:

**ASTRAZENECA CANADA INC. and
ASTRAZENECA AKTIEBOLAG**

Appellants

and

APOTEX INC.

Respondent

Heard at Toronto, Ontario, on June 23, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on June 23, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on June 23, 2011)

STRATAS J.A.

[1] This is an appeal from an order dated April 29, 2011 of the Federal Court (*per* Justice Crampton), dismissing the appellants' motion for an interlocutory injunction.

[2] The appellants sought to restrain the respondent and others from making, constructing, importing, exporting, using, selling to others to be used or offering to sell Apo-Esomeprazole and/or esomeprazole magnesium until the completion of a patent infringement trial.

[3] The Federal Court judge applied the well-known test in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R.199 to the facts established in the evidence adduced before him, and dismissed the motion. In careful, clear and comprehensive reasons for judgment, he reviewed, weighed and assessed that evidence, making credibility findings that were central to his decision. He preferred much of the respondent's evidence, calling it "more analytically robust and persuasive," and, at various times, termed the appellants' evidence as "implausible," "speculative," "unsubstantiated," and "exaggerated." Based on the evidence before him which he analyzed carefully, he did not accept that the appellants had established irreparable harm.

[4] In our view, the Federal Court judge's decision to dismiss the motion was heavily fact-based. Absent some fundamental legal error, it can be set aside only on the basis of palpable and overriding error.

[5] Before us, the appellants submit that the Federal Court judge committed fundamental legal error by requiring them to establish a standard of harm that was impossible to meet. For example, they say that the Federal Court judge set the bar too high by holding that AstraZeneca Canada Inc. should have known and planned for the eventuality that their medicine would have been subject to

generic competition at some point. They also allege that the Federal Court judge said (at paragraph 80) that certain types of harms are not “cognizable” in law.

[6] On an overall reading of the Federal Court judge’s reasons, we conclude that he did not set the bar too high on the issue of irreparable harm. He did not say that certain types of harm were not “cognizable in law.” Rather (at paragraphs 100, 132 and 149) he found that the case before him was similar to other reported cases, where the courts found that the harms were not irreparable. In our view, it was open to him, based on the evidence before him and the credibility findings he made, to reach the conclusion that the appellants had not established irreparable harm as it has been defined in the cases. He did not accept that the appellants would suffer any damage that could not be compensated.

[7] Even if we could impugn the Federal Court judge’s findings on irreparable harm, he also based his decision on other accepted legal bases, such as the appellants’ failure to persuade him that the balance of convenience was in favour of granting the injunctive relief. Here again, we also see no reviewable error.

[8] Many of the appellants’ submissions in essence invited us to reweigh the evidence and reach factual conclusions that the Federal Court judge did not make. Under the deferential standard of review that must apply to findings of fact in this case, we must decline the invitation.

[9] For the foregoing reasons, we conclude that the Federal Court judge committed no reviewable error.

[10] The respondent sought a special order for costs in the amount of \$20,000 plus reasonable disbursements based, among other things, on the filing of a memorandum that did not comply with the Rules and the numerous grounds asserted in it that had limited or no merit. The appellant disagreed with those bases, but accepted that costs should be awarded in a lump sum in the amount of \$10,000 plus reasonable disbursements.

[11] We shall dismiss the appeal with costs fixed in the amount of \$20,000, plus reasonable disbursements.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

DOCKET: A-180-11

(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE PAUL CRAMPTON, DATED APRIL 29, 2011, DOCKET NO. T-1668-10)

STYLE OF CAUSE: ASTRAZENECA CANADA INC.
AND ASTRAZENECA
AKTIEBOLA v APOTEX INC.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 23, 2011

**REASONS FOR JUDGMENT
OF THE COURT BY:** (SHARLOW, TRUDEL &
STRATAS J.J.A.)

DELIVERED FROM THE BENCH BY: STRATAS J.A.

APPEARANCES:

Gunars A. Gaikis FOR THE APPELLANTS
Yoon Kang
Vik Tenekjian

Andrew Brodtkin FOR THE RESPONDENT
Julie Rosenthal
Daniel Cappe

SOLICITORS OF RECORD:

Smart and Biggar FOR THE APPELLANTS
Barristers and Solicitors
Toronto, Ontario

Goodmans LLP FOR THE RESPONDENT
Barristers and Solicitors
Toronto, Ontario

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Competition Tribunal



Tribunal de la Concurrence

Reference: *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 31
File No. CT-2005-006
Registry Document No.: 0034

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

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY Guaranteed Payment and Npay Inc. for an order pursuant to section 103.1 for leave to make an application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY Guaranteed Payment and Npay Inc. for an interim order pursuant to section 104 of the *Competition Act*;

AND IN THE MATTER OF a motion for summary disposition filed by the Bank of Nova Scotia pursuant to subsection 9(4) of the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.) as amended.

B E T W E E N

**B-Filer Inc., B-Filer Inc. doing business as
GPAY Guaranteed Payment and Npay Inc.**
(applicants, respondents in the motion)

and

The Bank of Nova Scotia
(respondent, moving party)



Decided on the basis of the written record.
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: October 14, 2005
Reasons and Order signed by: Madam Justice Sandra J. Simpson

**REASONS AND ORDER DISMISSING
THE BANK OF NOVA SCOTIA'S MOTION FOR SUMMARY DISPOSITION**

I. BACKGROUND

A. INITIAL PROCEEDINGS BEFORE THE COMPETITION TRIBUNAL

[1] B-Filer Inc., B-Filer Inc. doing business as GPAY Guaranteed Payment and Npay Inc. (the "Applicants") have filed an application before the Competition Tribunal (the "Tribunal") pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for leave to apply under sections 75 and 77 of the Act, as well as an application for interim relief pursuant to section 104 of the Act (the "Tribunal Proceedings"). The Applicants allege that the Bank of Nova Scotia (the "Respondent") is refusing to deal with them, and that they are entitled to a remedy under section 75 of the Act. The Applicants also allege that the Respondent practices exclusive dealing, and that they are entitled to a remedy under section 77 of the Act.

[2] The Applicants provide an on-line, internet-based payment service to customers wishing to pay electronically using debit cards for goods and services purchased from merchants who accept payment through the Applicants' services. To offer those services, the Applicants need banking services to be able to move the money through a series of on-line transactions. Until recently, the applicants were dealing with two banks that allowed the Applicants to make the transactions through accounts held in those banks: Royal Bank of Canada and the Respondent. In a letter dated May 11, 2005, the Respondent advised the Applicants that it intended to terminate the services it had been providing to them. The Applicants had by then opened over 100 accounts with the Respondent. To terminate services, the Respondent relied on a clause in the *Scotiabank Financial Services Agreement*, which had been signed for each account by Mr. Grace, the principal of the Applicants. The relevant clause reads as follows:

12.2 We may cancel any service to you without reason by giving thirty days' written notice.

[3] A decision on the leave application pursuant to section 103.1 is scheduled to be issued on or before Thursday, November 10, 2005. If leave is granted, the Tribunal will shortly thereafter consider the application under section 104 for an interim order to supply banking services, pending the resolution of the application under sections 75 or 77.

B. PROCEEDINGS BEFORE THE ALBERTA COURT OF QUEEN'S BENCH

[4] At the time of their initial applications to the Tribunal, the Applicants had also commenced proceedings before the Alberta Court of Queen's Bench. In that action, the Applicants are seeking relief from the Respondent's decision to terminate banking services, and base their action on breach of contract and unlawful interference with economic interests. They also raise the issue of unfair competition.

[5] The Applicants brought an application for an interlocutory injunction to restrain the Respondent from closing the Applicant's bank accounts and terminating bank services pending trial. The application for injunctive relief was heard on September 16, 2005 and a decision was issued by Mr. Justice E.S. Lefsrud of the Alberta Court of Queen's Bench on September 22, 2005 (*B-FILER Inc. v. Bank of Nova Scotia*, 2005 ABQB 704, hereinafter the "Alberta Decision").

[6] Mr. Justice Lefsrud dismissed the application for injunctive relief. He concluded that the plaintiffs had failed to satisfy the three part test in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. This is especially so since the first part of the test, a serious issue to be tried, is more demanding in the case of a mandatory injunction, and requires a "strong prima facie case". Mr. Justice Lefsrud found no evidence of contractual breach on the part of the Respondent. In particular, he found that the terms of the agreement with the bank were clear, and that Mr. Grace, on behalf of the plaintiffs, had signed and had or should have understood their plain meaning. The evidence of unfair competition was not strong, and the plaintiffs had failed to establish a legal entitlement to the bank's services. Mr. Justice Lefsrud stated that this was sufficient to dispose of the application, but went on to say that the plaintiffs had not established irreparable harm, and that the balance of convenience favoured the bank.

II. THIS MOTION FOR SUMMARY DISPOSITION BEFORE THE TRIBUNAL

[7] Against this background, the Respondent now moves for a summary disposition of the Tribunal Proceedings under subsections 9(4) and 9(5) of the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.) as amended. These provisions were enacted with the 2002 amendments (S.C. 2002, c. 16, s. 18), and have never been interpreted or applied by the Tribunal. They read as follows:

<p>9 (4) On a motion from a party to an application made under Part VII.1 or VIII of the <i>Competition Act</i>, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.</p> <p>(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.</p>	<p>9 (4) Sur requête d'une partie à une demande présentée en vertu des parties VII.1 ou VIII de la <i>Loi sur la concurrence</i> et en conformité avec les règles sur la procédure sommaire, un juge peut entendre la demande et rendre une décision à son égard selon cette procédure.</p> <p>(5) Le juge saisi de la requête peut rejeter ou accueillir, en totalité ou en partie, la demande s'il est convaincu que, soit la demande, soit la réponse, n'est pas véritablement fondée.</p>
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[8] The Respondent submits that the Tribunal Proceedings have been decided by the Alberta Decision, and are now *res judicata*. The Respondent also argues that issue estoppel applies, and, in the alternative, says that to continue the proceedings before the Tribunal would be an abuse of process. The Tribunal should therefore, according to the Respondent, summarily dismiss the Tribunal Proceedings or, at a minimum, dismiss the application for the interim order, since there is no genuine basis for the Tribunal Proceedings or for injunctive relief, based on the decision of Mr. Justice Lefsrud. The Applicants have not responded directly to the motion, but by letter dated September 30, 2005, they have opposed its filing. The Applicants' position is that the Alberta proceedings and the Tribunal Proceedings are entirely different and that the Alberta Decision has no impact on the Tribunal Proceedings.

III. THE ISSUE

[9] Does the Alberta Decision foreclose the Tribunal Proceedings?

IV. DISCUSSION

[10] In his ruling, Mr. Justice Lefsrud does not determine whether the Act applies and draws a distinction between general contract law and competition law:

The Plaintiffs have made reference to various authorities, several of which would involve services like public utilities and are issued by either the Competition Tribunal or the Canadian Radio-television and Telecommunications Committee. Such cases relate to areas of law that are closely regulated by specialized tribunals and cannot translate into general contract law. (par. 35)

[11] For the purposes of the Alberta Decision, the Act is irrelevant since the Competition Tribunal has exclusive jurisdiction to adjudicate matters under part VIII of the Act. This includes situations in which a requirement to supply may be forced on an unwilling party.

[12] In *Manos Foods International Inc. v. Coca-Cola Ltd.*, [1999] O.J. No. 3623, 125 O.A.C. 66, the Ontario Court of Appeal had to decide whether the Ontario Court – General Division had jurisdiction to grant a mandatory injunction to supply. The Court of Appeal ruled that it did not, since there was no jurisdiction in common law for such an order. The Court went on to say that such a remedy, if available, was within the exclusive jurisdiction of the Competition Tribunal:

There is no common law obligation to contract with another party. Parties are free to contract as they see fit. The freedom to contract includes both the ability to enter into contracts and to refrain from entering into contracts. The effect of the remedy sought in paragraph 1(b) would be to compel the appellants to enter into contracts for sale of Coca-Cola products to the respondent on an ongoing basis. There is no jurisdiction in common law to make this order.

[...]

Although the remedy sought in paragraph 1(b) does not exist in common law, there are statutory remedies in the *Competition Act* available in certain circumstances which may require a supplier of a product to sell that product to persons whose businesses would be substantially affected if the supplier did not do so and also which may prevent a supplier from limiting the sale of a product by its customer (See s. 75 and s. 77 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended). These remedies are within the exclusive jurisdiction of the Competition Tribunal. (*Manos*, paras. 8 & 10)

[13] In my view, the Alberta Decision does not render the Tribunal Proceedings *res judicata*, because the issues before the Tribunal are not the same as the issues that were before the Alberta court. Mr. Justice Lefsrud found no contractual obligation to supply. This is not required under the Act. He did not rule on whether the Applicants had satisfied the requirements of section 103.1 of the Act, or on whether they could be entitled to an order under sections 75 or 77 of the Act. It is not an abuse of process for the Applicants to seek redress before the Tribunal, since the issues of refusal to deal and exclusive dealing must be decided under sections 75 and 77 of the Act, and since the Tribunal has exclusive jurisdiction to apply those provisions.

[14] Leave under section 103.1 of the Act may or may not be granted. If leave is granted, the application for interim relief under section 104 will be considered. Injunctive relief in the Alberta Decision was denied on the basis of contract law. It has not yet been decided in the context of competition law. It should be noted that the test for a mandatory injunction under the Act may not be as onerous as the common law test applied by Mr. Justice Lefsrud. In this regard, see *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28.

ORDER

[15] For these reasons, the motion for summary disposition is dismissed.

DATED at Ottawa, this 14th day of October, 2005.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

COUNSEL

For the Applicants (respondents in the motion):

Mr. Adam Atlas

For the Respondent (moving party):

Mr. F. Paul Morrison

Mr. Glen G. MacArthur

Ms. Lisa M. Constantine

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Federal Court of Appeal



Cour d'appel fédérale

Date: 20230705

Docket: A-115-21

Citation: 2023 FCA 157

**CORAM: NOËL C.J.
BOIVIN J.A.
GLEASON J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

**MICROBJO PROPERTIES INC.
DAMIS PROPERTIES INC.
SABEL INVESTMENTS II-A LIMITED
ZAGJO HOLDINGS LIMITED
DEVAMM INVESTMENTS II-A LIMITED**

Respondents

Heard at Toronto, Ontario, on February 9, 2023.

Judgment delivered at Ottawa, Ontario, on July 5, 2023.

REASONS FOR JUDGMENT BY:

NOËL C.J.

CONCURRED IN BY:

BOIVIN J.A.
GLEASON J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230705

Docket: A-115-21

Citation: 2023 FCA 157

**CORAM: NOËL C.J.
BOIVIN J.A.
GLEASON J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

**MICROBJO PROPERTIES INC.
DAMIS PROPERTIES INC.
SABEL INVESTMENTS II-A LIMITED
ZAGJO HOLDINGS LIMITED
DEVAMM INVESTMENTS II-A LIMITED**

Respondents

REASONS FOR JUDGMENT

NOËL C.J.

INTRODUCTION

[1] The Crown appeals from decisions rendered by the Tax Court of Canada *per* Owen J. (the Tax Court) (cited as 2021 TCC 24) vacating, on the basis of a single set of reasons, the

assessments issued by the Minister of National Revenue (the Minister) against each of the five respondents by virtue of subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The general anti-avoidance rule (GAAR) was also invoked by the Crown before the Tax Court as an alternative basis for confirming the validity of the assessments.

[2] Although a single notice of appeal was filed, five were required as five decisions are in issue (see subsections 27(1.1) and (2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7). As this is the result of a pure oversight and the respondents and the Crown have proceeded on the basis that the five appeals are properly before us, the Court, on its own motion, has treated the matter as involving five consolidated appeals. The reasons that follow dispose of all five.

[3] At issue is whether the participation by the respondents in transactions with a third party aimed at relieving them from a tax liability that ultimately went unpaid gave rise to a transfer for purposes of subsection 160(1) and, if so, whether or not they were dealing at arm's length with this other party at the time of the transfer. In the event that subsection 160(1) does not allow for the full recovery of the assessed amounts, the Court will have to determine whether the assessments can nevertheless be upheld as issued pursuant to section 245 of the Act.

[4] For the reasons that follow, I have come to the conclusion that a transfer did take place, and that the respondents and the third party were not dealing at arm's length when it took place, with the result that the respondents are liable for the outstanding tax debt pursuant to subsection 160(1), but only up to the monetary advantage that they derived from the transfer. I

am also of the view that, contrary to what the Crown asserts, the GAAR does not allow for the collection of the remainder. I therefore propose that the Crown's appeals be allowed in part.

[5] As was the case before the Tax Court, the appeals before us were heard on common evidence and the respondents agreed to be bound by the decision as it pertains to two of them, Microbjo Properties Inc. (Microbjo) and Damis Properties Inc. (Damis) (Reasons, para. 2). The series of transactions, more fully described in the partial agreed statements of fact appended to the Tax Court's reasons, highlight the two types of property that were the subject of the alleged transfer, i.e., property consisting of cash in one case and cash and an intercompany receivable in the other (Reasons, paras. 4-5). The Tax Court held that this was a difference without one as the intercompany receivable had a value equal to its face amount (Reasons, para. 116). The expression "cash" is therefore used throughout to refer to both descriptions of property. As well, like the Tax Court, we have used the amounts at issue for Microbjo to illustrate the mechanics and effect of the transactions as they pertain to all five respondents.

[6] For ease of reference, subsection 160(1) as it read at the relevant time is reproduced in the appendix to these reasons with emphasis on the relevant parts.

BACKGROUND

[7] The five respondents are holding corporations that indirectly owned—each through a 99.99% interest in five respective partnerships—a parcel of a farmland in Brampton, Ontario (Reasons, para. 1). In December 2005, the respondents each agreed to dispose of their undivided interest in the farmland to an arm's length purchaser, with the closure of the sale set for January

16, 2006 (Reasons, para. 20; partial agreed statement of facts pertaining to Microbjo, para. e)). The portion of the agreed upon proceeds of disposition was slated to generate total income approximating \$17 million for the respondents (Statement of Adjustments dated January 16, 2006 and appended to the Agreement of Purchase and Sale relating to the Farm Land, Appeal Book, vol. 2, at 397).

[8] Shortly after the agreement was executed, but before the date of the closure, Wilshire Technology Corporation (WTC), an independent third party, approached the respondents and proposed a package deal from which it and the respondents (the parties) could mutually benefit by sharing the amount that was otherwise destined to pay the respondents' income tax liability arising from the disposition of the farmland (Reasons, paras. 21, 22, 33 and 42). It was revealed during the course of the trial before the Tax Court that WTC implemented this type of package deal with as many as 50 other corporations (Reasons, para. 67; memorandum of the respondents, para. 41; letter from the Canadian Revenue Agency (CRA) to Mr. Craig Nerland dated December 8, 2014, Appeal Book, vol. 4, at 873-881; transcript of the examination of Mr. Craig Nerland, Appeal Book, vol. 6, at 1575 to 1580).

[9] The plan required that the respondents rearrange their affairs by moving their partnership interests to a newly formed single-purpose subsidiary and then having the partnerships dispose of the farmland, with the result that the cash received in exchange of the farmland be isolated in the subsidiaries, together with the tax liability (Reasons, para. 44). WTC would then purchase the shares of the subsidiaries for a price substantially in excess of their after-tax value (Reasons, para. 31). The respondents proceeded on the basis that the tax liability of the subsidiaries, once

assumed by WTC, would no longer be theirs, but their expectation was that WTC had the intent and the means to shelter this liability (Reasons, paras. 47 and 51; see also the transcript of the examination of Mr. Paul Bleiwas, Appeal Book, vol. 6, at 1477, lines 15-28 and at 1478, lines 1-3; and the transcript of the cross-examination of Mr. Paul Bleiwas, Appeal Book, vol. 6, at 1502, lines 9-28 and at 1503, lines 1-18).

[10] All the steps underlying the plan were dictated by WTC and presented to the respondents on a “take-it-or-leave-it basis” (Reasons, para. 50 and 135). The respondents did not ask questions (Reasons, paras. 22 and 34) and the only discussions that took place pertained to the time of implementation. The steps, which occurred between January 2006 and December 2006, were, in sequence, the incorporation of the subsidiaries, the tax-free rollover of the partnership interest, the sale of the farmland, the allocation of the partnership income to the subsidiaries, the increase of the stated capital of the shares, the execution a share put option agreement whereby the respondents could compel WTC to buy the shares of the subsidiaries for the agreed upon price, the resignation of the respondents’ designates as directors and officers of the subsidiaries and their replacement by a WTC designate and, finally, the sale of the shares, this last step occurring on December 31, 2006, following the exercise of the share put option by the respondents (Reasons, par. 9; see also the partial agreed statements of facts appended to the Tax Court’s reasons).

[11] WTC insisted on a period of two days between the time when it took control of the subsidiaries and the time at which the share sale would occur, and appointed its designate as their sole director and officer in the interim (Reasons, para. 46). The respondents had no knowledge of

what WTC would do with the subsidiaries during that period (Reasons, paras. 37 and 51). Based on the evidence adduced at trial, the actions taken by WTC in the interim period included the purported purchase of a class 12 computer software by way of an \$8.1 million promissory note and the signature of a marketing services agreement through which the software was purportedly to be exploited (see, in the case of Microbjo, the Software Purchase Agreement dated December 30, 2006 between Securitas Video Corp. and Microbjo (Chinguacousy) Inc. (the subsidiary of Microbjo), Appeal Book, vol. 4, at 882; and the Marketing Services Agreement dated December 30, 2006 between NG Global Marketing Corp. and Microbjo (Chinguacousy) Inc., Appeal Book, vol. 4, at 898).

[12] Based on the rounded numbers that pertain to Microbjo, when the shares of the subsidiaries were sold to WTC on December 31, 2006, the subsidiaries each held cash approximating \$4 million and carried a tax liability approximating \$1.3 million—both resulting from the disposition of the farmland (partial agreed statement of facts pertaining to Microbjo, paras. n), o) and v); Reasons, para. 28).

[13] Despite this tax liability, WTC and the respondents agreed on a purchase price that ignored it, i.e., \$3.3 million (partial agreed statement of facts pertaining to Microbjo, para. m); Reasons, para. 31), and to split on a 46/54 basis the amount that would otherwise have been available to discharge it, i.e., roughly \$600,000 (46%) going to the respondents and \$700,000 (54%) to WTC. The \$3.3 million price gave effect to this split (Reasons, para. 132, footnote 46 and para. 186; partial agreed statement of facts pertaining to Microbjo, para. i)). WTC's share of

the split ended up in a bank account in the Cayman Islands by way of a bank transfer made in the days following the share sale (partial agreed statement of facts pertaining to Microbjo, para. u)).

[14] In filing their tax returns for their 2006 taxation year, the subsidiaries claimed capital cost allowance (CCA) in an amount sufficient to offset the tax liability that they bore (partial agreed statement of facts pertaining to Microbjo, para. y)). Although the returns were due in June 2007, they were not filed until late 2009 (transcript of the cross-examination of Mr. Craig Nerland, Appeal Book, vol. 6, at 1619, lines 13-28 and at 1620, lines 1-3).

[15] Reassessments denying the CCA deductions were issued against each of the subsidiaries in November 2012 (partial agreed statement of facts pertaining to Microbjo, para. z)). Objections were filed (see the Crown undertakings #5 and #6 indicating that the subsidiaries' reassessments were confirmed by the Appeals Division between 2015 and 2018: Appeal Book, vol. 5, at 1181), but no challenge was subsequently brought before the Tax Court, with the result that the \$1.3 million tax liability ultimately became a tax debt that, to this day, has gone unpaid.

[16] In June 2016, the Minister, relying on subsection 160(1) of the Act, assessed the respondents for the totality of the subsidiaries' unpaid tax debt. These assessments were issued on the basis that a transfer took place when the cash belonging to the subsidiaries ended up in the hands of the respondents and that the consideration given by the respondents in return—i.e., the shares of the subsidiaries—had no value (amended reply to the notice of appeal filed by Microbjo, paras. 7.54 and 7.56, Appeal Book, vol. 1, at 176).

[17] Appeals were subsequently filed by each of the respondents. Although not invoked at the time of the assessments, the Crown raised the GAAR in its replies to the notices of appeal.

DECISIONS UNDER APPEAL

[18] The Tax Court first addressed the question whether subsection 160(1) applies independently of the GAAR. It considered whether each of the underlying requirements were met: specifically, if a transfer of property had taken place; if so, whether the parties were at arm's length at the time of the transfer; and whether the shares given in return constituted fair market value consideration. After answering each of these questions, the Tax Court went on to consider whether the subsidiaries' outstanding tax liability had been offset by the purported shelter implemented by WTC.

The transfer

[19] The Tax Court first asked whether property was transferred from the subsidiaries to the respondents "either directly or indirectly, by means of a trust or by any other means whatever", as these words appear in subsection 160(1) (Reasons, paras. 117-139). After reviewing the case law, it held that the cornerstone for this broad language is the existence of "a connection between the diminishment of the property of one person and the increase in the property of another person" (Reasons, para. 131). The Tax Court then identified the relevant property as the subsidiaries' cash and found that there was indeed a two-step transfer of the property so constituted, first between the subsidiaries and WTC, and second between WTC and the respondents (Reasons, paras. 132-133, 181 and 195 *in fine*). Specifically, this two-step transfer

began when the subsidiaries assigned or directed that the cash that they held be paid to WTC, and ended when WTC discharged the purchase price of the shares by turning over the cash to the respondents (less the \$700,000 that it retained), these two steps occurring one immediately after the other (Reasons, para. 138).

The arm's length relationship and the value of the consideration

[20] The Tax Court next addressed whether the respondents were dealing at arm's length with WTC and the subsidiaries at the time of the transfer, specifically when WTC discharged the purchase price (Reasons, paras. 148 and 154). The Tax Court first considered whether the respondents were, at that time, deemed not to be dealing at arm's length with their former subsidiaries, by virtue of being "related" pursuant to paragraph 251(1)(a) of the Act. The Tax Court answered the question in the negative after explaining that the transfer took place during the course of the day on December 31, 2006 and that the respondents were deemed by subsection 256(9) of the Act to have relinquished control of the subsidiaries at the commencement of that day (Reasons, paras. 155-157; see also paras. 181 and 184).

[21] After pointing out that there was "no evidence that after December 29, 2006, the [respondents] acted in concert with WTC to direct the actions of the subsidiaries" (Reasons, para. 185), the Tax Court went on to consider whether the respondents were in fact dealing at arm's length with WTC at the time of the transfer (Reasons, paras. 185-202). It conducted an extensive review of the case law, including *Swiss Bank Corp. et al. v. Minister of National Revenue*, [1971] C.T.C 427, 71 D.T.C. 5235 [*Swiss Bank* (Ex. Ct.)], aff'd in 1974 S.C.R. 1144,

72 D.T.C. 6470 [*Swiss Bank* (SCC)], and concluded that “the thread that holds the [factual] arm’s length test together is the concept of independent interests” (Reasons, para. 176).

[22] Equipped with this conclusion, the Tax Court went on to conduct a “risks and rewards” analysis (Reasons, para. 198) focussing on the “economic profit” that the respondents and WTC were each seeking (Reasons, paras. 186-187 and 191). WTC sought to make a profit by purchasing the shares of the subsidiaries for an amount equal to the cash that they held, less 54% of their tax liability (Reasons, para. 186). The Tax Court found that WTC assumed all the risks inherent in the implementation and operation of the proposed shelter and stood to gain 54% of the amounts destined to pay the tax liability, i.e., \$700,000 (Reasons, para. 186-187 and 201-202).

[23] The respondents for their part sought to profit by selling the shares that they held in the subsidiaries for an amount exceeding the after-tax value of the subsidiaries, specifically by an additional \$600,000 representing 46% of the subsidiaries’ outstanding tax liability (Reasons, paras. 31 and 191; see also para. 309). As such, the respondents, in addition from being relieved from the tax liability that was theirs, stood to gain \$600,000 in the process.

[24] Based on these findings, the Tax Court concluded that the respondents and WTC were in fact dealing at arm’s length since they each acted in the pursuit of their own separate and independent interests when the deal was struck (Reasons, para. 197; see also para. 188). The fact that the economic profit being sought was determined by reference to the subsidiaries’ tax liability did not alter this result (Reasons, para. 198 *in fine*; see also para. 192), nor did the

“questionable efficacy” of the shelter that WTC purported to implement (Reasons, para. 187). Specifically, this, in and of itself, was not indicative of a non-arms’ length relationship as “taxes” are an important consideration in many commercial transactions (Reasons, para. 192). As well, it was not important that the respondents knew that the amount that they were to receive would be paid using the funds of the subsidiaries, because it is reasonable to expect a vendor of property to be indifferent as to the source of the purchase price of property “provided that it is legal” (Reasons, para. 196).

[25] The Tax Court further found that the transactions were structured so as to protect the separate and independent interests of the parties (Reasons, para. 194 *in fine*; see also para. 185 *in fine*), pointing specifically to the share put option agreement which, in its view, “served the purpose of giving WTC the opportunity to take actions in the subsidiaries while protecting the interests of the [respondents]” (Reasons, para. 346; see also paras. 188 and 194). The fact that the plan involved pre-sale steps that seemed unusual and that these steps were without exception dictated by WTC did not alter this finding, because arm’s length parties do transact in similar circumstances (Reasons, paras. 188 and 196-197). The Tax Court supported this affirmation by using a car rental analogy (Reasons, para. 197).

[26] Finally, the Tax Court held that, just as the respondents were in fact dealing at arm’s length with WTC, they were in fact dealing at arms’ length with the subsidiaries at the time of the transfer (Reasons, para. 203), with the result that subsection 160(1) could find no application.

[27] Despite this conclusion, the Tax Court went on to assess the fair market value of the consideration (Reasons, para. 205). Given its finding that the parties were dealing at arm's length at the time of the transfer, the Tax Court held that the fair market value of the consideration given—the shares held by the respondents in the subsidiaries—was “by definition” equal to the cash that was transferred to the respondents (Reasons, para. 220; see also para. 221).

The purported tax shelter

[28] The Tax Court then turned to the purported tax shelter. Before addressing its validity, the Tax Court considered at length the question as to who bore the burden of proving that the underlying reassessments denying the CCA deductions claimed by the subsidiaries were right or wrong (Reasons, paras. 222-261). I note that nothing turns on this discussion in the matter before us because regardless of who bore the burden, the Tax Court had no difficulty in finding that no shelter was in place based on the evidence and this finding is not challenged on appeal.

[29] Indeed, the Tax Court found that the “purported” purchase of the software—using this expression or a variation as many as seven times (Reasons, paras. 263-268)—was not in the furtherance of a *bona fide* business venture undertaken by the subsidiaries to earn income, but was “solely to allow the subsidiaries to claim [CCA] in their T2 tax returns to reduce the tax liability of the subsidiaries” (Reasons, para. 266). As a result, the tax debts remained despite the purported shelter.

[30] In coming to this conclusion, the Tax Court noted that Mr. Nerland—the person designated by WTC to act as sole director of the subsidiaries during the three days leading to the

time of the transfer—had displayed a “striking lack of knowledge and/or memory” about the transactions undertaken by the subsidiaries following the sale of their shares to WTC (Reasons, para. 262). In fact, Mr. Nerland had no idea why the deal was structured the way it was. His simple understanding was that everybody involved would get some money and that the respondents would get the shelter they were looking for (Reasons, paras. 63-64). He signed the documents that had to be signed, without knowing what the software was or what it did (Reasons, paras. 60, 69 and 263-265). As to whether the software was actually purchased, Mr. Nerland testified that he “[did not] recall there ever being any payments made” on the promissory note, and that he “just [did not] think earnest money ever changed hands” (Reasons, paras. 70 and 263).

[31] The Tax Court also highlighted the fact that Mr. Nerland repeatedly confirmed that the subsidiaries had no employees so that no source deductions were to be withheld and made no sales that would attract goods and services tax (GST). Only this allowed him to sign the subsidiaries’ 2006 tax returns as he was satisfied that he could not be held personally liable in his capacity as director for any unpaid taxes (Reasons, paras. 74 and 265).

[32] In addition to Mr. Nerland’s testimony, the Tax Court pointed to independent evidence showing that the shelter was nothing but an idle rumination, including the absence of revenue over the six years following the incorporation of the subsidiaries, the absence of any marketing reports by the purported marketer of the software and the fact that the subsidiaries did not have a bank account nor any employees (Reasons, para. 268). None of the findings underlying the Tax Court’s denial of the claimed CCA are challenged in these appeals and, as noted (see para. 15

above), there is no indication that the reassessments denying these deductions were even challenged by the subsidiaries before the Tax Court.

The GAAR

[33] The Tax Court then considered whether, despite its initial conclusion, the application of section 245 of the Act could save the assessments. It asked whether the three conditions underlying the GAAR had been met, i.e., whether there was a tax benefit (Reasons, paras. 294-301); if so, whether the tax benefit resulted from an avoidance transaction (Reasons, paras. 303-311); and, if so, whether there had been an abuse of subsection 160(1)'s underlying rationale (Reasons, paras. 314-350). The Tax Court found that none of these conditions was met.

[34] The Tax Court began by explaining that although multiple tax benefits had been obtained as a result of the series of transactions, the analysis must be limited to the tax benefit identified by the Crown in support of its case, because “the taxpayer cannot defend against a GAAR assessment without knowing the tax benefit that is in issue” (Reasons, para. 310). It identified the tax benefit as the avoidance of the derivative liability under subsection 160(1) (Reasons, para. 294). According to the Crown, a reasonable alternative arrangement to the transactions undertaken would have been for the subsidiaries to distribute their cash by way of dividend to the respondents, in which case subsection 160(1) would have applied to the resulting transfer (Reasons, para. 295).

[35] The Tax Court noted that this alternative arrangement would have required the respondents to incorporate the subsidiaries and retain ownership of them (Reasons, para. 296 *in*

fine). It went on to discard the benefit so described after explaining that “[t]he subsidiaries were either created and sold to WTC, or they were not created. These two circumstances are not alternatives but are mutually exclusive” (Reasons, para. 299).

[36] The Tax Court also found that the Crown failed to demonstrate the existence of an avoidance transaction, holding that neither the series of transactions, nor any of the transactions within it, were undertaken to avoid subsection 160(1) (Reasons, paras. 307-308).

[37] The Tax Court went on to consider the object, spirit and purpose of subsection 160(1), which is to “vet transfers of property between non-arm’s length (and certain other) persons and to collect from transferees the lesser of the amount owed by the transferor under the ITA and the amount by which the transferee is enriched by the transfer” (Reasons, para. 337).

[38] In light of its previous conclusion that the transfer took place between arm’s length parties and that fair market value consideration was given in return, the Tax Court found that the object, spirit and purpose of subsection 160(1) were not frustrated (Reasons, paras. 343 and 350). It therefore concluded that the GAAR could find no application in this case (Reasons, para. 355).

[39] On a final note, the Tax Court suggested that the Minister would have been better off to invoke subsection 160(1) against WTC rather than the respondents. In its view, the recovery efforts made by the Minister failed not because of any shortcoming in subsection 160(1), but because she pursued the wrong person (Reasons, paras. 204, 219, 309, 350 and 352).

[40] The Tax Court therefore allowed the appeals and vacated the assessments in their entirety (Reasons, para. 356).

POSITION OF THE PARTIES

The Crown

[41] The Crown argues that the Tax Court erred in concluding that subsection 160(1), whether construed on its own or in light of the GAAR, did not apply in this case. In a non-GAAR context, the Crown first submits that the Tax Court committed an error of law in proceeding on the basis that it was required to determine whether the parties were dealing at arm's length only "[u]pon the conclusion of the final step" of the transfer (memorandum of the Crown, para. 47, citing Reasons, para. 148). This would have led the Tax Court to ignore "facts of crucial relevance to the analysis" (memorandum of the Crown, para. 47; see also paras. 57 and 61), including the fact that the transactions were solely carried out to avoid tax on a substantial economic gain and therefore had no underlying commercial purpose (memorandum of the Crown, paras. 1, 17, 61, 63, 71 and 121). At the hearing before us, counsel for the Crown went further, arguing that from WTC's perspective, "this was just a tax structure designed, marketed [and] promoted to remove the assets [of the subsidiaries] and walk away, and take a percentage of the cash" (transcript of the February 9, 2023 appeal hearing, at 03:15:41-03:15:54).

[42] The Crown submits that the Tax Court further erred when it held that the "notion of an 'ordinary commercial transaction' is not helpful" in addressing the arm's length issue,

commerciality not being “a necessary hallmark of a transaction carried out at arm’s length” (memorandum of the Crown, para. 48, citing Reasons, para. 178; see also paras. 62-64).

[43] The Crown submits that absent these errors, the Tax Court would have had to conclude that the respondents were not in fact dealing at arm’s length with WTC and the subsidiaries given that “the Respondents and WTC acted in concert, and in the same interest (i.e., splitting the benefit of the avoided tax), to direct the bargaining or dictate the conduct of the subsidiaries” (memorandum of the Crown, para. 61).

[44] Turning to the adequacy of the consideration given, the Crown submits that the Tax Court committed a palpable and overriding error in holding that the fair market value of the shares given as consideration was equal to the cash transferred in return (memorandum of the Crown, paras. 68-71). According to the Crown, there is no basis for the Tax Court’s rejection of the unchallenged expert opinion produced by the respondents establishing the fair market value of the shares of the subsidiaries at \$2.7 million, being the amount of cash that they held less their outstanding tax liability (memorandum of the Crown, para. 72). The Crown maintains that no arm’s length purchaser would agree to pay a price that ignores the tax liability being assumed (memorandum of the Crown, para. 73).

[45] The Crown therefore submits that subsection 160(1) finds application with the result that the respondents are liable for the tax debt up to the excess in value of the property transferred over the consideration given, i.e., \$600,000 (memorandum of the Crown, para. 75).

[46] In the weeks leading to the date of the hearing before us, the Crown sought leave to raise a novel argument in support of its view that the respondents are further liable for the remaining portion of the outstanding tax liability, i.e., \$700,000. Specifically, the Crown argues that the Tax Court erred in holding that the words “consideration given for the property” in subsection 160(1) mean “consideration given by the transferee regardless of who receives that consideration” (supplementary written submissions of the Crown, para. 1, citing Reasons, para. 209). In order to be validly given, consideration must “flow to, or for the benefit of, the transferor” (supplementary written submissions of the Crown, para. 1). Since the share consideration was given to WTC and no part flowed to or for the benefit of the subsidiaries, it follows that no valid consideration was given and that the respondents’ derivative liability under subsection 160(1) extends to \$1.3 million, being the totality of the subsidiaries’ unpaid tax debt (supplementary written submissions of the Crown, para. 16).

[47] Relying on the GAAR, the Crown adds that regardless of its new argument, subsection 160(1), when construed in light of its object, spirit and purpose, allows for the recovery of the \$700,000 difference in the hands of the respondents without regard to the limitation set out in subparagraph 160(1)(e)(i) (memorandum of the Crown, para. 76). Specifically, the Crown argues that the respondents undertook the series of transactions jointly with WTC in order to avoid or reduce their liability under subsection 160(1) (memorandum of the Crown, paras. 94 and 108). It further submits that this resulted in an abuse given that the object, spirit and purpose of subsection 160(1) is to protect the tax authorities from any vulnerability that may result from transfers taking place without adequate consideration between non-arm’s length parties (memorandum of the Crown, para. 112). Emphasizing the importance

of “preserv[ing] the CRA’s right to collect” (memorandum of the Crown, para. 116), the Crown submits that consideration given must be held to be inadequate “where it results in the intentional depletion of the assets of a tax debtor, at the expense of the tax authorities” (memorandum of the Crown, para. 117). It follows, according to the Crown, that subsection 160(1)’s underlying rationale would be frustrated if the respondents got credit for the consideration they gave to WTC, because the transactions were pre-ordained to deplete the assets of the subsidiaries and leave the tax collector dry (memorandum of the Crown, paras. 120-123).

The respondents

[48] The respondents stand by the reasons given by the Tax Court, both as they relate to subsection 160(1) construed on its own or in light of the GAAR. They add that in any event, the assessments should have been vacated on the basis that no transfer of property took place, be it direct or indirect. Indeed, the respondents submit that the Tax Court made a palpable and overriding error in failing to note that the cash held by the subsidiaries was replaced by a receivable of an equivalent amount payable by WTC. As such, there was no reduction or depletion of the assets of the subsidiaries (memorandum of the respondents, paras. 66-67 and 73) and since a loan does not give rise to a transfer, the first transfer identified by the Tax Court never took place (memorandum of the respondents, paras. 68-72 and 75).

[49] Turning to the nature of the relationship between the parties, the respondents maintain that the Crown’s attack on the Tax Court’s conclusion that the parties were dealing at arm’s length amounts to nothing more than an invitation to re-weigh the evidence and come to the opposite conclusion (memorandum of the respondents, paras. 35-45). In this respect, the

evidence is clear that the parties sought to realize their respective profit (memorandum of the respondents, paras. 39 and 60).

[50] WTC for its part relied on “its own ingenuity” to reduce or eliminate the tax liability in the subsidiaries (memorandum of the respondents, para. 40). Far from acting solely as an accommodating party, WTC carried out similar transactions with as many as 50 other corporations (memorandum of the respondents, paras. 40-41; see also para. 8 above). The respondents for their part had the assurance that they could realize their profit upon exercising their share put option (memorandum of the respondents, para. 44). A financial gain was realized and nothing was done by the respondents to “avoid the payment of taxes in the [s]ubsidiaries”; rather, it was WTC that took steps towards that end (memorandum of the respondents, para. 42, citing Reasons, para. 200).

[51] Turning to the value of the consideration given, the respondents submit that it was derived by the “premium” that WTC was willing to pay based on the risks and rewards of the transactions (memorandum of the respondents, para. 53 *in fine*). Since the bargain was struck between arm’s length parties, the respondents submit that the Tax Court correctly disregarded their expert evidence as to the fair market value of the shares at the time of the transfer (memorandum of the respondents, paras. 51-62). They insist that this expert evidence was only introduced as a precautionary measure in order to limit their liability in the event that they were found not to be dealing at arm’s length with WTC (memorandum of the respondents, para. 63).

[52] Turning to the new argument advanced by the Crown, the respondents maintain that it is baseless and ask—invoking *Canada v. Global Equity Fund Ltd.*, 2012 FCA 272, [2013] D.T.C. 5007 [*Global Equity*] at paragraph 40—that the costs incurred by reason of the Crown’s motion to advance this argument be awarded to them regardless of the outcome of these appeals (written submissions of the respondents on motion, paras. 15-19).

[53] Finally, the respondents adopt as their own the reasons of the Tax Court rejecting the Crown’s GAAR argument and submit that none of the requirements set out in section 245 of the Act are met. They add that even if they and WTC successfully avoided their subsection 160(1) liability as the Crown contends in advancing its GAAR argument, it has not been shown that this was the result of an avoidance transaction nor that this provision’s underlying rationale was frustrated (memorandum of the respondents, paras. 88-120). The respondents insist that this result does not point to any flaw in subsection 160(1) as such; rather, it shows that the Minister should instead have sought to recover the tax debt from WTC (memorandum of the respondents, paras. 102 and 120).

ANALYSIS

The standard of review

[54] Errors of law are to be reviewed on a standard of correctness whereas findings of fact or of mixed fact and law cannot be overturned in the absence of a palpable and overriding error, unless an extricable question of law is shown to exist (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 8, 10 and 36).

Was there a transfer?

[55] The Tax Court found that a transfer took place between the subsidiaries and the respondents, but held that its form was of “no consequence” (Reasons, para. 134), which led to some ambiguity. I agree with the respondents when they say that based on the Tax Court’s analysis, two distinct transfers took place—the first between the subsidiaries and WTC, and the second between WTC and the respondents (Reasons, paras. 132-133, 181, 183 and 195 *in fine*)—and that “the proper interpretation of [subs.] 160(1) requires giving effect to each individual transfer” (supplementary written submissions of the respondents, para. 14).

[56] Indeed, subsection 160(1) applies to successive transfers by treating a transferee as a transferor where it is itself a tax debtor either on its own account or as a joint and several debtor with the first transferor (see subparagraph 160(1)(e)(ii) of the Act as it read on December 31, 2006 which provides that the amount the transferee and the transferor are jointly and severally liable to pay under the Act include “an amount that the transferor is liable to pay under this Act”; see also *Jurak v. Canada*, 2003 FCA 58, 57 D.T.C. 5145, para. 1). In the present case, the Tax Court found that the property of the subsidiaries first moved from the subsidiaries to WTC, and then from WTC to the respondents by way of two successive transfers. It follows that the respondents can only be found to be jointly and severally liable for the tax liability of the subsidiaries if the conditions for the application of subsection 160(1) against WTC are also met.

[57] In this respect, the respondents take the position that subsection 160(1) cannot apply to the first transfer. Specifically, they maintain that the Tax Court, in holding otherwise, lost sight

of the fact that the cash that was initially paid out of the subsidiaries to WTC was replaced by a loan of an equivalent amount from WTC, as evidenced by the “accounts receivable” entry recorded in the books of the subsidiaries (memorandum of the respondents, para. 73, citing Reasons, para. 52). As it is well established that a loan does not give rise to a transfer, the respondents submit that the Tax Court made an error in failing to take into account this receivable and holding that the first transfer took place.

[58] The Tax Court made no such error. The question whether the book entry reflected a true receivable was at the forefront of the debate before the Tax Court, the Crown taking the position that if a debt had indeed been recorded, it was never to be paid (Reasons, paras. 95-96). The Tax Court, after pointing out that Mr. Nerland could not recall if the receivable existed and after noting that no mention was made of any consideration advanced by WTC in the assignment executed in its favour by the subsidiaries (Reasons, paras. 53 and 78), accepted the Crown’s proposition that no loan was in place (Reasons, paras. 133, 136 and 138-139; see also para. 352). The record fully supports this conclusion and there is no basis for the respondents’ contention that the Tax Court ignored the evidence in reaching it.

[59] As was found by the Tax Court, since the first transfer took place for no consideration and WTC was related to the subsidiaries within the meaning of paragraph 251(1)(a) of the Act at that time, WTC’s derivative liability for the subsidiaries’ outstanding tax liability is engaged (Reasons, paras. 349-350). Whether the respondents are also liable depends on whether they dealt at arm’s length with WTC at the time of the second transfer.

Were the respondents dealing at arm's length with WTC?

[60] The respondents and WTC were not “related” within the meaning of paragraph 251(1)(a) at the time of the second transfer. Where persons are otherwise unrelated, paragraph 251(1)(c) provides that “it is a question of fact whether persons ... are, at a particular time, dealing with each other at arm's length”. The issue to be decided is therefore whether the respondents and WTC were in fact dealing at arm's length at the time of the second transfer.

– *The relevant facts*

[61] I first observe that although the Tax Court correctly states that the issue to be determined is whether WTC and the respondents were dealing at arm's length “at a particular time” being the time of the transfer (Reasons, para. 182, citing paragraph 251(1)(c)), it remains that all the facts that bear on the relationship at that time, including those that relate to pre-sale transactions, must be taken into account. As was explained by the Supreme Court in *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79 [*McLarty*] (para. 61; see also *Swiss Bank* (Ex. Ct.), p. 438): “while the initial focus is on the transaction between the [parties], all the relevant circumstances must be considered to determine if the acquiring taxpayer was dealing with the vendor at arm's length”. There is therefore no basis for the suggestion that preserving the certainty and predictability of the “relationship rules” requires courts to turn a blind eye on facts that bear on the relationship as it exists at the time of the transfer only because they took place in the past, at a time when the subsidiaries were legally controlled by the respondents (Reasons, para. 182).

[62] The respondents did make the additional argument that Parliament, by resorting to a deeming rule in the recent amendment to section 160 (see new subs. 160(5) of the Act enacted by subs. 38(4) of the *Fall Economic Statement Implementation Act, 2022*, S.C. 2022, c. 19), signalled that absent this fiction, prior facts taking place when the parties were not at arm's length should be ignored in determining whether they were in fact dealing at arm's length at the time of the transfer. I disagree. New enactments cannot be presumed to alter the state of the law or involve a declaration as to the previous state of the law (see *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30, [2018] 6 C.T.C. 1, paras. 46 and 86, citing subsections 45(2) and (3) of the *Interpretation Act*, R.S.C. 1985, c. I-21; see also *Canada v. Remai*, 2009 FCA 340, [2009] D.T.C. 5188 [*Remai*], para. 24), and the binding authorities, including *McLarty* and *Swiss Bank* (Ex. Ct.), make it clear that no facts are to be ignored in applying subsection 160(1) as it read before this amendment if they can be shown to have an impact on the relationship at the time of the transfer. It follows that the amendment, as it relates to the precise issue with which we are concerned, can only be read as a measure that confirms the prior state of the law.

– *The transactions*

[63] Based on the plan and the parties' expectations, the totality of the amount paid out to the respondents and WTC was to be funded by the proceeds of \$4 million received from the sale of the farmland (Reasons, para. 195). Because the plan contemplated that the subsidiaries have no other assets (Reasons, para. 44) and that the distribution was to be funded by amounts that would otherwise have been used to discharge the subsidiaries' \$1.3 million outstanding tax liability, it follows that in the absence of a tax shelter this liability would go unpaid.

[64] The parties agreed that the respondents would receive 46%—\$600,000—of the amount that would otherwise have been available to pay the \$1.3 million tax liability and that WTC would keep the remaining 54%—\$700,000. These amounts and the corresponding tax liability of \$1.3 million are the only figures that need to be kept in mind in the analysis that follows since the value of the shares given as consideration was at least equal to \$2.7 million, that is cash of \$4 million less the \$1.3 million tax liability.

[65] In effect, the respondents got rid of a \$1.3 million tax liability for a payment of \$700,000 and pocketed the \$600,000 difference. Whether the respondents get to keep this difference depends on whether they are found to be vicariously liable under subsection 160(1), a conclusion that, in turn, hinges on whether they were dealing at arm's length at the time of the transfer. This is the issue that the Tax Court was called upon to decide.

– *The errors of the Tax Court*

[66] Strangely, the Tax Court found that the parties each obtained the economic return that they were seeking in the course of the analysis leading to its arm's length conclusion (Reasons, paras. 198 and 203). Although this may be the result of an unfortunate slip, the Tax Court could not logically hold that the respondents obtained their share of the payout without first deciding the arm's length issue as whether the respondents did obtain what they were looking for turns on how the arm's length issue is ultimately decided.

[67] Beyond this, the critical flaw in the Tax Court's arm's length analysis lies in the fact that it was conducted on the basis that the plan proposed by WTC was carried out by the parties with

the expectation that the plan could offset the tax liability generated by the sale of the farmland. Based on Mr. Nerland's evidence and the Tax Court's own factual findings, there was no such prospect.

[68] Indeed, the devastating findings made by the Tax Court about the purported shelter show unequivocally that from WTC's perspective, it was nothing more than a purported exercise designed to give its plan a semblance of legitimacy (Reasons, paras. 262-268; see also the account of Mr. Nerland's testimony at paras. 63-64, 69-72 and 74-79). Among other things, the Tax Court found that (Reasons, para. 266):

...the purported purchase of computer software by the subsidiaries was not in furtherance of a *bona fide* business venture undertaken by the subsidiaries but was solely to allow the subsidiaries to claim capital cost allowance in their T2 tax returns to reduce the tax liability of the subsidiaries resulting from the sale of the farmland. [my emphasis]

In so holding, the Tax Court recognized that those behind WTC were not concerned with setting up a *bona fide* business in which the purported software could be exploited (see para. 1102(1)(c) of the *Income Tax Regulations*, C.R.C., c. 945). Their sole purpose was to fulfill WTC's contractual undertaking pursuant to which the subsidiaries would file T2 tax returns showing the use of a shelter, and provide the respondents with copy of the relevant returns evidencing the CCA claims (see the Share Put Agreement dated December 29, 2006 between WTC and Microbjo, clause 6.7, Appeal Book, vol. 2, at 520). Significantly, this was the only element of the purported shelter that the respondents were contractually entitled to verify; as the Tax Court accurately noted, any further information about the implementation of the purported shelter was off limits (Reasons, para. 261).

[69] The Tax Court's findings as to the true nature of the shelter are unescapable when regard is had to Mr. Nerland's testimony who, "[w]hen asked why it was necessary to go beyond selling the software, ... stated that he did not know and could not recall" (Reasons, para. 64). He further indicated that he agreed to act as the sole director of the subsidiaries on the condition that they make no sales and hire no employees because he did not want to be exposed to any tax liability for unremitted source deductions or GST. These conditions were accepted when Mr. Nerland was made a director in December 2006 with the result that the subsidiaries could not possibly have envisaged exploiting the purported software on their own (transcript of the cross-examination of Mr. Craig Nerland, Appeal Book, vol. 6, at 1616, lines 23-28, at 1617, lines 1-8, at 1618, lines 13-28 and at 1619, lines 1-3; Reasons, paras. 74 and 265).

[70] Mr. Nerland was also unaware of the marketing services agreement pursuant to which the software was to be marketed by a third party (Reasons, paras. 71-72 and 264). He went so far as to say that while a promissory note of \$8.1 million was issued for the purchase of the software, he did not believe that money ever changed hands (Reasons, paras. 77 and 263).

[71] Mr. Nerland's testimony and the Tax Court's findings make it clear that despite the representations made to that effect, WTC contemplated no real tax shelter. Although WTC "took steps" (Reasons, para. 187; see also paras. 200-201), these were ephemeral at best and solely intended to allow the subsidiaries to take a tax return position reflecting the use of the purported shelter. From WTC's perspective, the so-called "tax strategy" (Reasons, para. 353) amounted to nothing more than emptying the subsidiaries of their cash, putting its hands on its share of the payout, allowing as many years as possible to pass before the revenue authorities could become

aware that the tax liability had turned into a tax debt (see paras. 14-15 above) and leaving the tax collector dry.

[72] Oddly enough, although a finding that the plan was validly undertaken would have been dispositive of the five appeals, the Tax Court did not address this issue until the tail end of its reasons, after having found that the parties were dealing at arm's length (Reasons, paras. 203 and 261 *in fine*-268). Indeed, the Tax Court conducted its arm's length analysis as though WTC was engaged in a *bona fide* attempt to eliminate the tax liability of the subsidiaries. Specifically, it found that WTC assumed the "tax risk" (Reasons, paras. 186, 201-202 and 204) and that as a result, preserving its part of the payout depended on its ability to implement a valid shelter (Reasons, para. 193). Based on the evidence, nothing of the sort was going on insofar as WTC is concerned.

[73] When asked why the Tax Court did not factor the findings that it made as to the true nature of WTC's plan into its arm's length analysis, counsel for the respondents was unable to provide an explanation (see the transcript of the February 9, 2023 appeal hearing, at 01:58:22-02:02:33). The reason why the Tax Court proceeded as it did is indeed difficult to explain, although it did make the point that the fundamental shortcomings of the plan were not relevant to the arm's length determination because these would only have become apparent with the passage of time, through hindsight, well after the time of the transfer (Reasons, para. 187; see also para. 353). I accept that this may be so for the respondents, but certainly not for WTC and those behind it.

[74] The Tax Court's failure to take into account the true nature of the plan amounts to an error of law. Indeed, as was explained by the Supreme Court in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 (paras. 39 and 41), a tribunal that fails to consider evidence that the law requires it to consider commits an error of law. In this respect, the task in conducting a factual arm's length analysis is to assess the precise nature of the relationship between the parties at the time of the transfer. As a result, there is no justification for addressing the issue without regard to both parties' perspectives. This is particularly so as WTC was the mastermind behind the plan and only it was aware of its true nature.

[75] I should point out at this stage of the analysis that although the parties' state of mind is essential to the arm's length component of the analysis, subsection 160(1) applies objectively so that liability accrues regardless of whether the parties were well intended or not when they embarked on the transactions underlying the plan (*Eyeball Networks Inc. v. Canada*, 2021 FCA 17 [*Eyeball Networks*], para. 39; *Wannan v. Canada*, 2003 FCA 423, 57 D.T.C. 5715, para. 3).

[76] When regard is had to the true nature of the plan, the Tax Court's suggestion that the Minister would have been better off to invoke subsection 160(1) against WTC rather than the respondents seems, with great respect, somewhat naïve (Reasons, para. 204; see also Reasons, paras. 219, 309, 350 and 352). Although it is true that the Minister was free to pursue either party, there is no basis for believing for a moment that WTC and those behind it would have left assets in Canada within the reach of the tax collector (see, for example, the partial agreed statement of fact pertaining to Microbjo, para. u), which indicates that WTC's share of the

payout ended up offshore in a bank account in the Cayman Islands in January 2007, a few days following the transactions; see also Crown undertaking #7 indicating that WTC was not assessed under s. 160 because it acted solely as a conduit: Appeal Book, vol. 5, at 1181). Significantly, the Minister could not have been aware that the tax liability of the subsidiaries became an acknowledged tax debt until 2014 or 2015 when the subsidiaries, after filing two years late and objecting to the reassessments issued against them, abandoned their right of appeal to the Tax Court (see para. 15 above). It is telling that to this day, some 17 years after the fact, we still do not know based on the record as constituted before us who was actually behind WTC (see the transcript of the February 9, 2023 appeal hearing, at 01:49:44-01:50:45, where counsel for the respondents informed the Court that the person who they presented as the person behind WTC—Robert J. MacRae (see memorandum of the respondents, para. 8; Reasons, paras. 40 and 59)—was not a principal of WTC but an external advisor).

[77] When the scheme is viewed from WTC’s perspective as it must be given that it conceived and implemented it without the respondents being even allowed to ask questions as to its nature, it becomes clear that the “economic profit” that both parties were looking for was to be funded by money that was not theirs. This, as shown in the paragraphs that follow, has a decisive impact on the factual arm’s length analysis.

– *The factual arm’s length analysis*

[78] The purpose of the arm’s length test is to verify whether the relationship between transacting parties is such that courts can have the assurance that the terms of the deal “will reflect ordinary commercial dealing[s] between parties acting in their separate interests” (*Swiss*

Bank (SCC), p. 1152; *McLarty*, para. 43; *Remai*, para. 34). Such assurances cannot be found unless parties not only seek a profit, but also transact with their own property or money with the result that what is at stake is their own patrimony or property. Human behaviour being what it is, this combination allows for the presence of the tension that drives each party to “seek[] to get the best possible terms for himself” (*Minister of National Revenue v. Kirby Maurice Company Limited.*, 58 D.T.C. 1033, [1958] C.T.C. 41 (Ex. Ct.), p. 1037). It is the existence of this tension that provides the assurance that the terms of the deal reflect ordinary commercial dealings.

[79] A cogent demonstration can be found in the Supreme Court’s decision in *Swiss Bank* (SCC), where the issue was whether non-resident lenders were dealing at arm’s length with a Canadian borrower, pursuant to then clause 106(1)(b)(iii)(A) of the *Income Tax Act*, R.S.C. 1952, c. 148 (now clause 212(1)(b)(i)(A) of the Act). The Supreme Court asked whether the lender-borrower relationship presented “the assurance that the interest rate will reflect ordinary commercial dealing between parties acting in their separate interests” (*Swiss Bank* (SCC), p. 1152) and found that it did not because the borrower was “captive to the interests” of the lenders and, therefore, no tension was in play (*Swiss Bank* (SCC), p. 1151). Subsequent rulings have reiterated the need for this tension to exist by insisting on the presence of “ordinary market forces” (*Canada v. GlaxoSmithKline Inc.*, 2012 SCC 52, [2012] 3 S.C.R. 3, para. 1) or “commercial safeguard[s]” (*Petro-Canada v. Canada*, 2004 FCA 158, 58 D.T.C. 6329 [*Petro-Canada*], para. 59) before a factual arm’s length relationship can be found to exist.

[80] Whether and the extent to which this tension exists in any given case is an issue that must be addressed in light of the relevant facts (*McLarty*, para. 62) and the particular provision of the

Act pursuant to which the issue arises (*Keybrand Foods Inc. v. Canada*, 2020 FCA 201 [*Keybrand Foods*], paras. 35; see also para. 46). Just as the applicable provision in *Swiss Bank* (SCC) was concerned with interest rate manipulations, subsection 160(1) is concerned with price manipulations in the context of non-arm's length property transfers. As affirmed by this Court, subsection 160(1) was enacted to "protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than the fair market value of the transferred property" (*Eyeball Networks*, para. 44, citing *Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241, [2013] D.T.C. 5170, para. 60; see also *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166, [2019] 5 C.T.C. 1, para. 3).

[81] Turning to the facts of this case, it is true that WTC and the respondents each sought to enrich themselves and that they were, in theory at least, at odds as to how to split the payout. However, because they were splitting amounts earmarked to pay a tax liability that was bound to become a tax debt rather than their own money, the resulting split does not provide the assurance that it reflects an ordinary commercial dealing between parties acting in their separate interests. Specifically, the tension that provides that assurance did not exist to the extent that it would had the parties been dealing with their own money.

[82] Perhaps the best illustration of this significantly abated tension is provided by the Tax Court's own "risks and rewards" analysis. The Tax Court correctly posited that, by assuming ownership of the subsidiaries, WTC assumed the totality of the tax risk that they bore (Reasons, paras. 186, 201-202 and 204) and yet, WTC determined that the rewards would be shared on a close to 50/50 basis. As a matter of first impression, no arm's length party assuming all the risks

and acting in the belief that its own money is at stake would have agreed to such a split, let alone impose it (compare *Keybrand Foods* at para. 66, citing *Petro-Canada*, para. 55).

[83] The Tax Court did not confront this price anomaly. It recognized that WTC, “[f]or its own reasons”, undervalued the tax liability of the subsidiaries (Reasons, para. 201) but did not ask why; it simply held, based on its prior conclusion that the parties were at arm’s length, that the price at which they transacted was “by definition” reflective of fair market value (Reasons, para. 220; see also para. 221). In the face of the Tax Court’s own analysis, this price was out of whack.

[84] A transaction that takes place at a price far removed from the price that one would expect based on the risks assumed and the rewards sought can provide a strong indication that the parties are not dealing at arm’s length (*Keybrand Foods*, para. 68; *Remai*, para. 34). To be clear, the fact that the adequacy of the price is addressed in the “second part” of subsection 160(1) rather than in the “first part”, as the Tax Court points out (Reasons, paras. 104 and 106), is not a reason for ignoring significant price anomalies in conducting a factual arm’s length analysis. After all, price manipulation is the very concern that the arm’s length test seeks to curtail under that provision.

[85] Although there are circumstances that can explain price anomalies, for instance when one party plainly outsmarts the other contracting party, nothing of the sort can explain the lopsided price in the present case. Quite clearly, the fact that the parties were splitting money that was not

theirs and believed that they could profit without putting at risk their own patrimony or property took away one of the fundamental safeguards that is inherent in an arm's length relationship.

[86] Further, once the respondents were swayed to buy into WTC's plan by the thought of turning an unexpected profit out of their crystallized tax liability through what they viewed as a risk-free exercise, they became the instruments through which WTC, acting as the sole mastermind, would lay its hands on the \$1.3 million, isolate it with the remaining cash in the subsidiaries and share it with the respondents in the proportion that it imposed. Contrary to what the Tax Court asserts, no part of the contractual arrangement lessened the respondents' state of subservience.

[87] In this respect, the Tax Court held that the share put agreement shows that the respondents acted in their own independent interests throughout (Reasons, paras. 185 *in fine*, 188 and 194), but it evidences the exact opposite. Like all the other terms of the deal, this agreement was imposed by WTC—it was “always” inserted as part of WTC's scheme (Reasons, para. 62)—because no one, including the respondents, would have agreed to transfer control of the subsidiaries to WTC while remaining the controlling shareholders without such an agreement being in place (Reasons, paras. 32, 47 and 188). Indeed, proceeding without it would be no different than leaving the keys to one's home to a total stranger with no way of ensuring that the furniture would remain. With respect, the share put agreement was incorporated into the plan by WTC simply because its scheme could not have been sold without it. If anything, it is a further manifestation of the respondents' total state of subservience.

[88] The Tax Court also relied on a car rental analogy to assert that take-it-or-leave-it arrangements with no questions asked are not unusual (Reasons, para. 197). The fundamental difference, however, is, first, that the car rental payments are made by the clients with their own money, and second, that however asymmetrical the bargaining relationship between car rental companies and their clients might be, one never becomes the other's instrument as occurred here.

[89] Finally, although I agree with the Tax Court that "[t]he fact that the economic return [is] determined with reference to a tax liability" is not necessarily indicative of a non-arm's length relationship (Reasons, para. 198 *in fine*; see also para. 192), questions necessarily arise about the arm's length nature of the bargain when the added value contemplated by the proponents of the deal is derived from the non-payment of a tax debt and the transaction price is clearly off the mark when assessed in the light of normal financial considerations.

[90] In the end, the absence of the arm's length tension caused by the fact that the parties were splitting money that did not belong to them and revealed by the respondents' disproportionate share of the payout and their absolute willingness to blindly abide by WTC's every term in order to obtain it lead me to conclude that the respondents were not in fact dealing at arm's length with WTC at the time of the transfer.

The fair market value of the consideration given

[91] The task of determining the fair market value of the consideration given by the respondents pursuant to paragraph 160(1)(e) is not controversial as the respondents have conceded that if they were not dealing at arm's length with WTC, the fair market value of the

shares that they gave as consideration must be discounted by \$600,000, from \$3.3 million to \$2.7 million (oral submissions of the respondents, Appeal Book, vol. 6, at 1716, lines 7-28 and at 1717, lines 1-7). This is in line with the respondents' own expert opinion (Reasons, para. 81) and consistent with the case law which unequivocally holds that an arm's length purchaser of shares would discount any existing tax liability of the underlying corporation in determining their value (*626468 New Brunswick Inc. v. Canada*, 2019 FCA 306, para. 39, referring to *Deuce Holdings Ltd. v. Canada*, 51 D.T.C. 921, [1998] 1 C.T.C. 2550 (TCC), paras. 30 and 32).

[92] Giving effect to the limit set out in paragraph 160(1)(e), the respondents are therefore liable for the outstanding tax debt of the subsidiaries up to the amount of \$600,000, being the lesser of the monetary advantage that they derived from the transfer and the outstanding \$1.3 million tax debt (subparas. 160(1)(e)(i) and 160(1)(e)(ii) respectively).

Can the remaining \$700,000 be recovered from the respondents?

– *The Crown's new argument*

[93] Relying on its new argument, the Crown maintains that the Tax Court erred in holding that the words "consideration given for the property" in subsection 160(1) mean "consideration given by the transferee regardless of who receives that consideration" (supplementary written submissions of the Crown, para. 1, citing Reasons, para. 209). According to the Crown, the consideration must "flow to, or for the benefit of, the transferor" (supplementary written submissions of the Crown, para. 1) and since no part of the consideration given by the respondents flowed to or for the benefit of the subsidiaries, it follows that consideration was not

validly given for purposes of subsection 160(1). The result is that the respondents' derivative liability would extend to the full amount assessed, \$1.3 million.

[94] In advancing this argument, the Crown ignores the fact that we are dealing with two successive transfers (see paras. 55-59 above) and that the one with which we are concerned involved consideration in the form of the shares of the subsidiaries moving from the respondents as transferees to WTC as transferor.

[95] In addition, there is no basis for the proposition that consideration must be ignored unless it flows to or for the benefit of the transferor. Subparagraph 160(1)(e)(i) refers to “consideration given” rather than “consideration received”. The words “consideration given” were added in 1983 when the scope of subsection 160(1) was expanded to apply beyond transfers made between family members (*An Act to amend the statute law relating to income tax (No. 2)*, S.C. 1980-81-82-83, c. 140, s. 107 (Bill C-139)). Prior to this amendment, the derivative liability imposed by subsection 160(1) extended to the lesser of the transferor's tax liability and the monetary value of the property transferred, without credit being given for any consideration given in return. Bill C-139 changed that by limiting the liability of a transferee “to the amount by which the fair market value of the property at the time of transfer exceeds the fair market value of any consideration given in return” (*Explanatory Notes to Bill C-139*, 32nd Parliament, 1st Session, December 1982, clause 107). In this context, the use of the words “consideration given” rather than “consideration received”—as they appeared in the former version of the Act—can only be viewed as a deliberate choice reflecting Parliament's intention to limit the derivative

liability of transferees to the monetary advantage that they derive from the transfer (compare *Eyeball Networks*, paras. 67-68).

[96] The Crown's attempt to recover the remaining \$700,000 from the respondents pursuant to this new argument must therefore be rejected.

– *The GAAR*

[97] The Crown pursues its quest to recover the remaining \$700,000 from the respondents by invoking the GAAR. Specifically, the Crown submits that the respondents embarked on the plan with the primary purpose of avoiding their own derivative liability under subsection 160(1) as well as allowing for the same result with respect to WTC's share of the payout. According to the Crown, the respondents' success in depleting the assets of the subsidiaries for their benefit and that of WTC defeats subsection 160(1)'s underlying rationale. Hence, the Crown argues that the Minister should be entitled to recover the whole of the outstanding tax debt from the respondents without regard to the limit set out in paragraph 160(1)(e).

[98] The difficulty with the Crown's GAAR argument is that the factual premise on which it rests runs directly against the Tax Court's finding that the respondents did not undertake the transactions in order to avoid the application of subsection 160(1) (Reasons, paras. 307-308). In so holding, the Tax Court accepted Mr. Bleiwas' testimony to the effect that legitimate tax shelters capable of erasing the tax liability of the subsidiaries were prevalent at the time when the plan was presented to the respondents, and that they embarked on the plan in the unverified but genuine belief that WTC was contemplating the implementation of such a shelter (transcript of

the cross-examination of Mr. Paul Bleiwas, Appeal Book, vol. 6, at 1502, lines 9-28 and at 1503, lines 1-18; Reasons, para. 51). The Crown has not even attempted to show that a palpable and overriding error was committed in this regard, and I can detect none.

[99] The Crown's attempt to recover the remaining \$700,000 from the respondents by invoking the GAAR must therefore also be rejected.

DISPOSITION

[100] For the above reasons, I would allow the five appeals in part and giving the judgments that the Tax Court ought to have given, I would refer the assessments back to the Minister for reconsideration and reassessment on the basis that the respondents are liable for the tax debt of the subsidiaries up to the amount by which the cash or the cash and the intercompany receivable transferred to them exceeds the fair market value of the consideration that they gave in return, the resulting liability being \$605,290 for Microbjo; \$644,217 for Damis; \$385,350 for Zagjo Holdings Limited; \$598,714 for Sabel Investments II-A Limited; and \$377,835 for Devamm Investments II-A Limited.

[101] Because success is otherwise almost evenly divided, the Crown and the respondents should assume their respective costs before both courts.

[102] I note before closing that the respondents did ask, relying on *Global Equity*, for a special award with respect to costs incurred in responding to the Crown's motion to raise its new argument. I am not inclined to grant this request because the Crown's new argument, in contrast

with the new arguments raised in *Global Equity* (paras. 33 and 36-40), was fully advanced before the Tax Court (see the oral submissions of the Crown, Appeal Book, vol. 6, at 1800, lines 3-28 and at 1801, lines 1-3; and the oral submissions of the respondents (then the appellants), Appeal Book, vol. 6, at 1740, lines 27-28 and at 1741, lines 1-9) and, as a result, could be addressed on the basis of the existing evidentiary record without the need to argue anything more than what was argued before the Tax Court.

“Marc Noël”

Chief Justice

“I agree.

Richard Boivin J.A.”

“I agree.

Mary J.L. Gleason J.A.”

APPENDIX

160 (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

(b) a person who was under 18 years of age, or

(c) a person with whom the person was not dealing at arm's length,

the following rules apply:

(d) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor [*sic*], and

(e) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of

160 (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

b) une personne qui était âgée de moins de 18 ans;

c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts révisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[Emphasis added.]

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;

aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.

[Non soulignés dans l'original.]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-115-21

**APPEAL FROM FIVE AMENDED JUDGMENTS OF JUSTICE JOHN R. OWEN
DATED MARCH 26, 2021, DOCKET NOS. 2016-4783(IT)G, 2016-4785(IT)G,
2016-4787(IT)G, 2016-4788(IT)G AND 2016-4789(IT)G.**

DOCKET: A-115-21

STYLE OF CAUSE: HIS MAJESTY THE KING v.
MICROBJO PROPERTIES INC.,
DAMIS PROPERTIES INC.,
SABEL INVESTMENTS II-A
LIMITED, ZAGJO HOLDINGS
LIMITED, DEVAMM
INVESTMENTS II-A LIMITED

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 9, 2023

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

DATED: JULY 5, 2023

APPEARANCES:

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4

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180201

Docket: A-399-16

Citation: 2018 FCA 30

**CORAM: NOËL C.J.
DAWSON J.A.
RENNIE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

OXFORD PROPERTIES GROUP INC.

Respondent

Heard at Toronto, Ontario, on December 11, 2017.

Judgment delivered at Ottawa, Ontario, on February 1, 2018.

REASONS FOR JUDGMENT BY:

NOËL C.J.

CONCURRED IN BY:

DAWSON J.A.
RENNIE J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180201

Docket: A-399-16

Citation: 2018 FCA 30

**CORAM: NOËL C.J.
DAWSON J.A.
RENNIE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

OXFORD PROPERTIES GROUP INC.

Respondent

REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal by Her Majesty the Queen (the Crown or the appellant) from a decision of the Tax Court of Canada in which D'Arcy J. (the Tax Court judge) allowed Oxford Properties Group Inc.'s (Oxford or the respondent) appeal from a reassessment issued by the Minister of National Revenue (the Minister) with respect to its 2006 taxation year. The reassessment was

issued pursuant to the General Anti-Avoidance Rule (GAAR) found in section 245 of the *Income Tax Act*, R.S.C., 1985, c.1 (5th Supp.) (the Act).

[2] The Tax Court judge held that the series of transactions undertaken by Oxford, which involved rolling three real estate properties through a tiered partnership structure, increasing the adjusted cost base of the partnership interests and selling these interests to tax-exempt entities without tax being paid on the latent recapture and accrued gains in the property held by the partnerships, not to amount to abusive tax avoidance.

[3] In support of the appeal, the Crown contends that the Tax Court judge in coming to this conclusion misconstrued the provisions of the Act which were relied upon to obtain this beneficial tax treatment. The Crown invites us to construe these provisions with a focus on their object, spirit and purpose as the GAAR commands, and to come to the opposite conclusion.

[4] For the following reasons, I am of the view that a proper construction of the provisions in issue supports the Crown's contention and that the Tax Court judge's conclusion of non-abuse cannot stand. However, I also agree with the respondent's alternative argument that the consequential adjustments made by the Minister pursuant to subsection 245(5) are not reasonable as they overshoot the abuse that was made of the provisions in issue. I therefore propose to allow the appeal in part only and refer the reassessment back to the Minister for reconsideration and reassessment in accordance with these reasons.

[5] The provisions of the Act that are relevant to the analysis which follows are set out in the annex to the reasons.

FACTS

[6] The series of transactions unfolded over some five years and are complex. The details are fully set out in the Statement of Agreed Facts which is reproduced at Appendix A of the judgment under appeal (*Oxford Properties Group Inc. v. The Queen*, 2016 TCC 204). The following is an outline of the transactions as they unfolded with a focus on the statutory provisions that were used to achieve the tax benefit.

[7] The respondent's predecessor, Old Oxford, was a publicly traded Canadian corporation and one of the largest real estate firms in North America. In 2001, BPC Properties Inc. made a proposal to takeover a substantial portion of the common shares of Old Oxford. The parties agreed that, prior to the takeover, Old Oxford would undertake a pre-closing arrangement and divest itself of certain real estate properties. The properties in question, the Atria Complex, the Richmond Adelaide Center (RAC) and the Calgary Eaton Center (CEC) (collectively the real estate properties), had high fair market values and low adjusted cost bases (ACB) and undepreciated capital costs (UCC).

[8] In pursuance of this agreement, a first set of limited partnerships was created, namely OPGI Office LP and MRC Office LP (OPGI Office LP and MRC office LP are collectively referred to as the first tier partnerships). Using the rollover provided for under subsection 97(2), the RAC and CEC were transferred to OPGI Office LP whereas the Atria Complex was

transferred to MRC Office LP. The elected amounts corresponded to the ACB and UCC of the properties. As such, the partnerships had high fair market values but the interests held by the partners in the partnerships had a low ACB. Pursuant to section 97, the properties held by the partnerships maintained their tax attributes, that is their low ACB and UCC.

[9] Further restructuring resulted in the amalgamation of OPGI Amalco and MRC Amalco, the limited partners in each of the first tier partnerships. This newly formed entity was subsequently amalgamated with its sole shareholder. The result of the latter amalgamation was the formation of the respondent, Oxford. Following the amalgamations, the partnership interests in the first tier partnerships formerly held by OPGI Amalco and MRC Amalco were held by Oxford.

[10] Because Oxford was formed by way of a vertical amalgamation, it became eligible for a bump pursuant to subsection 88(1), which allows a parent corporation to increase the tax cost of the non-depreciable capital property held by its subsidiary at the time of the amalgamation. Oxford was therefore able to increase, or bump, the ACB of the partnership interests it held in the first tier partnerships formerly held by OPGI Amalco and MRC Amalco. As a result, the first tier partnerships now had high fair market values and the partnership interests held by the partners had a high ACB while the properties held by the partnerships retained their low ACB and UCC.

[11] The following step in the series was the formation of a second tier of partnerships in which the first tier partnerships became partners: MRC Office LP became a partner in Atria

limited partnership (Atria LP) while OPGI Office LP became a partner in RAC limited partnership (RAC LP) as well as Calgary Eaton Center partnership (CEC LP). Oxford was therefore a partner in the first tier partnerships, which in turn held partnership interests in three newly formed partnerships (Atria LP, RAC LP and CEC LP are collectively referred to as the second tier partnerships).

[12] On February 1, 2004, the first tier partnerships transferred the real estate properties to the second tier partnerships by way of rollovers pursuant to subsection 97(2). In exchange for debt and further partnership interests, MRC Office LP transferred the Atria Complex to Atria LP and OPGI Office LP transferred the RAC to RAC LP and its interest in the CEC to CEC LP. The elected amounts again corresponded to the tax cost of the property transferred, that is their ACB and UCC subject to a slight variation with respect to the land portion of the CEC and the Atria Complex. As a result, the second tier partnerships had high fair market values and their partnership interests had low ACB. As was the case following the first rollovers, the real estate properties retained their low ACB and UCC.

[13] The first tier partnerships were then dissolved. The property of the first tier partnerships, including the partnership interests which they held in the second tier partnerships, were distributed to their partners. This resulted in Oxford acquiring partnership interests in the second tier partnerships. As well, an election was made pursuant to subsection 98(3). This allowed Oxford to avail itself of a second bump and increase the ACB of the partnership interests it held in the second tier partnerships. As a result, the partnership interests held by Oxford in the second tier partnerships had high fair market values and ACB while the real estate properties retained

their low ACB and UCC. This was the situation when, between September 2005 and July 2006, Oxford disposed of its partnership interests in the second tier partnerships to the tax-exempt entities.

[14] Given the high ACB of the partnership interests sold by Oxford, little or no taxable capital gain was generated by the sale and, in one case, a capital loss resulted. The outcome is that even though the sale was made to tax-exempt entities, subsection 100(1) had no application. As a result, tax on the latent recapture and accrued gains inherent in the underlying real estate properties which had been deferred by reason of the rollovers was avoided altogether.

- *The reassessment*

[15] The Minister canvassed several assessing positions before ultimately deciding to rely on the GAAR (Appeal Book, Vol. 3, p. 342). The Minister came to the view that, although the series of transactions complied with the letter of the law, the overall result was abusive. Specifically, the rollovers and bumps were used to increase the ACB of the partnership interests in the first and second tier partnerships in a manner which allowed Oxford to circumvent the application of subsection 100(1).

[16] The reassessment denies the bumps in their entirety and applies subsection 100(1) on the resulting capital gain. This gives rise to a taxable capital gain of \$148,187,562.00. It is common ground that this taxable capital gain reflects recapture in the amount of \$116,591,744.00 and a taxable capital gain in the amount of \$32,203,408.00; \$21,285,500.00 being attributable to the depreciable property and \$10,917,908.00 being attributable to the non-depreciable property

(Summary of relevant income inclusions under alternative methods; GAAR consequences; Appeal Book, Vol. 2, pp. 206, 422, 426, 430).

DECISION OF THE TAX COURT OF CANADA

[17] After dismissing Oxford's contention that the tax benefit which it achieved did not result from a series of avoidance transactions (Reasons, para. 76), the Tax Court judge devoted the remainder of his analysis to the issue of abuse. He did so by focussing on each of the steps undertaken by Oxford in order to circumvent the application of subsection 100(1).

[18] With respect to the rollovers, the Tax Court judge concluded that subsection 97(2) permits tax to be "fully or partially avoided" upon the transfer of property to a partnership and that subsection 97(4) preserves recapture when the property so transferred is depreciable property (Reasons, paras. 107, 111). The Tax Court judge also found that when a partnership interest is purchased by a tax-exempt entity, subsection 97(2) must be considered in light of paragraph 69(11)(b) (Reasons, para. 121). Because the three year holding period set out in subsection 69(11) had been met in this case, the Tax Court judge concluded that subsection 97(2) had not been abused. He also found that, although the purpose of subsection 97(2) was to preserve the cost base and potential recapture in the real estate properties, the fact that little or no tax was paid on the sale of the partnership interests did not offend subsection 97(2) as its purpose is not to tax the partners when they dispose of their partnership interests on the accrued gain and latent recapture relating to property held by the partnership (Reasons, paras. 181, 186, 188).

[19] As to the object, spirit and purpose of the bump provisions, the Tax Court judge held that subsection 88(1) prevents double taxation by allowing the disappearing ACB of a parent's shares in its subsidiary to be pushed down to other non-depreciable capital property while simultaneously preserving the tax attributes of depreciable property (Reasons, paras. 143-145). Subsection 98(3) functions in a similar manner and with a similar purpose, but with the view of preserving ACB in the disappearing partnership interests (Reasons, paras. 160-167).

[20] The Tax Court judge also found that amendments made to section 88 in 2012 were relevant in construing the object, spirit and purpose of the bump provisions (Reasons, para. 153). He then proceeded to conclude that the purpose of sections 88 and 98, as they read before the amendments, was not to prohibit an "indirect" bump, preserve recapture or deny a bump based on the nature of the assets held by the partnerships (Reasons, para. 205). The Tax Court judge also held that the addition of subparagraph 88(1)(d)(ii.1), which would have prevented the result achieved by Oxford, reflects a change in the law rather than a clarification (Reasons, para. 211). As a result, Oxford's use of the bumps did not frustrate the object, spirit or purpose of the provisions which were relied upon.

[21] The Tax Court judge then turned to subsection 100(1). He observed that the purpose of that provision was straightforward: to tax at a rate of 50% the portion of the capital gain realized on the sale of a partnership interest attributable to an increase in the value of non-depreciable property and to tax at a rate of 100% any portion of the gain that is attributable to depreciable property (Reasons, paras. 172-173). Taxing the portion of the gain attributable to an increase in the value of depreciable property at the rate of 100% ensures that "recaptured depreciation" is

taxed at the same rate as it would have been, had the property been sold to a tax-exempt entity directly (Reasons, para. 174).

[22] However, the operation of subsection 100(1) is based on the gain otherwise determined under the Act (Reasons, para. 217). Given that the ACB of the partnership interests and the resulting gain were properly computed when regard is had to the bumps, subsection 100(1) was not abused. Moreover, had Parliament intended subsection 100(1) to operate as a “look through”, it would have drafted subsection 100(1) in a manner similar to subparagraph 88(1)(d)(ii.1) (Reasons, para. 216).

[23] Having found that no abuse had been demonstrated, the Tax Court judge allowed the respondent’s appeal insisting that it had engaged in a proper exercise of tax minimization (Reasons, para. 219).

POSITION OF THE PARTIES

- *The Crown*

[24] The appellant argues that Oxford used subsection 97(2), paragraph 88(1)(d) and subsection 98(3) in order to avoid recapture that would normally arise pursuant to subsection 100(1) (Memorandum of the appellant, para. 43). In concluding that this did not give rise to an abuse, the Tax Court judge erred in his analysis of these provisions and failed to consider the overall result achieved by Oxford (Memorandum of the appellant, para. 36).

[25] The Crown argues that the Tax Court judge's analysis of subsection 100(1) was confined to the words or the text (Memorandum of the appellant, para. 51). The Tax Court judge further ignored that subsection 100(1) is located in Subdivision j, which deals with partnerships, and contemplates the tax consequences of the sale of a partnership interest (*ibidem*). Equally ignored was the reason why subsection 100(1) modifies the computation of the capital gain in the way that it does (Memorandum of the appellant, para. 52). According to the Crown, subsection 100(1) ensures that recapture is realized and taxed on the sale of a partnership interest to a tax-exempt entity as otherwise it will escape taxation altogether (Memorandum of the appellant, para. 56).

[26] The Crown further argues that the Tax Court judge committed two errors in his analysis of subsection 97(2). First, he conflated the deferral and avoidance of tax. While subsection 97(2) allows for the deferral of capital gains which would otherwise arise because there has been no change in the transferor's economic position, it was not designed to avoid the taxation of the deferred gain (Memorandum of the appellant, para. 63). Second, the Tax Court judge's understanding of this provision was clouded by his misunderstanding of subsection 69(11). The reason why subsection 69(11) did not apply was not because the three year holding period was respected, but because there was no subsequent sale of the real estate properties. Even if the partnership interests qualified as "substituted property", no exemption was available because Oxford, the vendor, was a taxable corporation (Memorandum of the appellant, para. 71). The Crown also submits that subsection 69(11) deals with a different factual situation and has its own rationale; the Tax Court judge ought to have focused his analysis on subsection 100(1) (Memorandum of the appellant, para. 72).

[27] The Crown further argues that the purpose of the bump under section 88 is to preserve a tax basis embedded in non-depreciable capital property which would otherwise disappear. The bump allows this tax basis to be transferred to other non-depreciable capital property with similar tax attributes. Depreciable property is ineligible for the bump as it is taxed differently. Subsection 98(3) also excludes depreciable property again because it is “an asset of a different nature” (Memorandum of the appellant, paras.73-80).

[28] Nothing under the legislative scheme as it stood at the time suggests that the bump in the value of depreciable property through the interposition of a partnership was permissible. The 2012 amendments therefore merely confirm that one cannot do indirectly what is not permitted to be done directly. Indeed, the Budgetary Supplementary Information released at the time of its enactment indicates that this amendment was intended to “clarify” the law rather than modify it (Memorandum of the appellant, para. 85).

[29] The Crown also argues that the Tax Court judge erred in considering the Minister’s treatment of the Dufferin Mall and the René Lévesque transactions in order to determine whether paragraphs 88(1)(c) and (d) and subsection 98(3) were abused. A GAAR analysis is not a comparative analysis and the Minister’s treatment of these properties is irrelevant. In any event, the reason why the Minister did not invoke the GAAR on the Dufferin Mall transaction is because the partnership interests were sold to a taxable entity so that the deferred taxes will eventually be paid whereas the transfer of the property to the partnerships in the René Lévesque transaction was not part of the series of transactions (Memorandum of the appellant, paras. 99-103).

[30] The overall result of the series was the circumvention of subsection 100(1). A reasonable consequence would therefore be the denial of the bumps in order for subsection 100(1) to have its intended effect. Subsection 100(1) “exact a price” to the extent that capital gains realized on depreciable property are taxed at a rate of 100%. However, this is the price that Parliament has imposed for trying to avoid recapture (Memorandum of the appellant, para. 106).

- *Oxford*

[31] The respondent supports the conclusion reached by the Tax Court judge and essentially adopts the reasons that he gave. It adds that he purposively construed the provisions in issue and considered the overall result of the series of transactions (Memorandum of the respondent, para. 70). In the event that the GAAR applies, Oxford argues that the tax adjustments brought about by the reassessment overshoot the abuse which they seek to correct and are as such unreasonable (Memorandum of the respondent, para. 122).

[32] The Tax Court judge correctly understood that subsection 97(2) must be construed in light of subsection 69(11). This latter provision indicates that Parliament made the conscious decision that latent recapture and accrued capital gains could go unpaid in the context of transactions involving a tax-exempt purchaser, where the three year holding period is met (Memorandum of the respondent, para. 96). Oxford argues that paragraph 69(11)(b) deals “exclusively with tax-deferred transfers to partnerships under 97(2)” and prescribes the limited circumstances in which the benefit of a rollover can be denied (Memorandum of the respondent, para. 56).

[33] The Tax Court judge also correctly concluded that any rule against “indirect bumping” would have to be based on a broad policy that is not grounded in the Act (Memorandum of the respondent, para. 107). He also correctly discerned that the 2012 amendments implement a change in this policy (Memorandum of the respondent, para. 119). Oxford argues that section 88 sets out explicitly and exhaustively the circumstances in which a bump can be denied. Nowhere do these rules deny the bump where property is pre-packaged and sold to a tax-exempt entity (Memorandum of the respondent, para. 51).

[34] Oxford further argues that, as the Tax Court judge correctly concluded, the purpose of subsection 100(1) is not to tax accrued gains on the property held by a partnership. The starting point is the actual gain calculated under the usual rules (Memorandum of the respondent, paras. 115-116).

[35] In the event that the GAAR applies, Oxford argues that the Crown’s assessment is punitive because the disallowance of the bumps affects the computation of the entire capital gain, not just recapture (Memorandum of the respondent, para. 124). The adjustment should be limited to the latent recapture which, based on the Crown’s own theory, reflects the only income which was avoided. It adds that in any event the adjustment should be corrected so as not to tax 100 percent of the capital gain portion of the adjustment pertaining to the depreciable property (Memorandum of the respondent, paras. 121-126).

ANALYSIS AND DISPOSITION

[36] In a GAAR analysis, three questions must be addressed: was there a tax benefit? If so, were the transactions which gave rise to this benefit avoidance transactions? If so, were the avoidance transactions abusive? (*Copthorne Holdings Ltd. v. Canada*, [2011] 3 S.C.R. 721 [Copthorne] at para. 33, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paras. 18, 21, 36).

[37] In the present case, the respondent conceded that: the deferred tax on the accrued gains and recapture pursuant to subsection 97(2); the bumps in the ACB of the partnership interests in the first and second tier partnerships by virtue of subsections 88(1) and 98(3); and the reduction of tax payable on the sale of the partnership interests to the exempt entities, all give rise to a tax benefit (Reasons, para. 58). As to the second question, the Tax Court judge found that the sale of the partnership interests to the exempt entities was part of a series of transactions that contained one or more avoidance transactions (Reasons, para. 76). The respondent does not challenge this finding in this appeal.

[38] The only question which arises in this appeal turns on the abuse analysis. Specifically, does the elimination of the capital gain on the sale of the partnership interests to the exempt entities by the use of the bumps and the consequential avoidance of recapture under subsection 100(1) frustrate this provision and the other provisions relied upon in order to achieve this result?

- *Standard of review*

[39] The inquiry as to whether there has been an abuse gives rise to a question of mixed fact and law and is therefore subject to the standard of palpable and overriding error (*Trustco* at para. 44; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 37 [*Housen*]). However, the abuse analysis proceeds in two stages. The first stage requires the determination of the object, spirit and purpose of the provisions giving rise to the tax benefit while the second turns on whether the provisions, so construed, were frustrated by the tax benefit achieved (*Trustco* at para. 44). The object, spirit and purpose of a provision is discerned by way of statutory interpretation (*Cophorne* at para. 70). This gives rise to a question of law and is an extricable part of the analysis. It is therefore subject to the standard of correctness (*Trustco* at para. 44; *Housen* at paras. 8, 37).

- *Construction under the GAAR*

[40] In order to situate the discussion which follows, it is useful to first consider the approach to statutory construction called for under the GAAR at the abuse stage of the analysis.

[41] The distinction between a word-based construction and an object, spirit and purpose interpretation in a GAAR context was carefully delineated by the Supreme Court in *Cophorne*:

[66] The GAAR is a legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer. While the taxpayer's transactions will be in strict compliance with the text of the relevant provisions relied upon, they may not necessarily be in accord with their object, spirit or purpose. [...]

[42] The Court went on to explain:

[70] The object, spirit or purpose can be identified by applying the same interpretive approach employed by this court in all questions of statutory interpretation — a “unified textual, contextual and purposive approach” (*Trustco*, at para. 47; *Lipson v. Canada*, 2009 SCC 1 (CanLII), [2009] 1 S.C.R. 3, at para. 26). While the approach is the same as in all statutory interpretation, the analysis seeks to determine a different aspect of the statute than in other cases. In a traditional statutory interpretation approach the court applies the textual, contextual and purposive analysis to determine what the words of the statute mean. In a GAAR analysis the textual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision. Here the meaning of the words of the statute may be clear enough. The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.

(My emphasis)

A GAAR analysis can therefore lead to a result that is different from that obtained by a traditional, textual, contextual and purposive interpretation focused on the meaning of the words of the relevant provisions.

[43] The Supreme Court further explained that by invoking the GAAR, the Minister necessarily concedes that based on a traditional approach, the tax benefit is properly attained:

[109] [...] When the Minister invokes the GAAR, he is conceding that the words of the statute do not cover the series of transactions at issue. Rather, he argues that although he cannot rely on the text of the statute, he may rely on the underlying rationale or object, spirit and purpose of the legislation to support his position.

[44] Although the GAAR is based on the premise that the construction which it commands will lead to a different result than that obtained on the basis of a word-based analysis, the Court was quick to point out that this will not always be the case:

[110] I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.

[111] However, the implied exclusion argument is misplaced where it relies exclusively on the text of the PUC provisions without regard to their underlying rationale. If such an approach were accepted, it would be a full response in all GAAR cases, because the actions of a taxpayer will always be permitted by the text of the Act. As noted in OSFC, if the Court is confined to a consideration of the language of the provisions in question, without regard to their underlying rationale, it would seem inevitable that the GAAR would be rendered meaningless (para. 63).

(My emphasis)

[45] It is clear from the above that in all cases, the GAAR requires the Court to look into the underlying rationale of the provisions relied upon in order to obtain the tax benefit. This goes to the heart of the Crown's contention that rather than giving the relevant provisions a meaning which accords with their object, spirit and purpose, the Tax Court judge confined the effect of these provisions to their wording. According to the Crown, this narrow construction of the relevant provisions cannot stand as it is based on an erroneous assessment of the impact of subsequent amendments brought to the Act in 2012, many years after the series of transactions unfolded.

[46] I will come back to this later but I note for now that subsequent amendments cannot be assumed to alter or confirm the prior state of the law (see subsections 45(2) and (3) of the *Interpretation Act*, R.S.C., 1985, c. I-21 (the *Interpretation Act*)). The recent decision of this Court in *Univar Holdco Canada ULCC v. Canada*, 2017 FCA 207 at paragraphs 23 to 27 illustrates the point that in a GAAR context, the provisions used to obtain the tax benefit must first be construed on their own. Only then can one say whether a subsequent amendment that touches upon the same subject matter confirms or alters the prior state of the law.

- *Statutory context*

[47] Before turning to the analysis, it is useful to say a few words about the tax treatment of partnerships, the distinction between capital property and depreciable capital property and the context in which subsection 100(1) was enacted in 1972.

[48] Partnerships have a hybrid status under the Act. Although partnership income is allocated to the partners, it is computed “as if the partnership were a separate person” (paragraph 96(1)(a)). Because partnerships are distinct from the partners at the income computation stage – Division B – computation of income – they, much like corporations, can hold assets, in which case the interest of the partners in those assets is reflected by their partnership interests. Partnership interests are distinct from the underlying property held by the partnership and can be subject to a different treatment under the Act.

[49] Depreciable property is by definition capital property (subsection 54(a)) and the disposition of capital property for proceeds which exceed its ACB – essentially the capital cost in

the case of depreciable capital property (see paragraph 54(a)(i)) – gives rise to a capital gain, 50% of which is taxable. To this extent, the tax treatment of depreciable and non-depreciable capital property is identical.

[50] However, only capital property that comes within the definition of “depreciable property” in subsection 13(21) – essentially capital property that is used in the income making process and with respect to which capital cost allowance (CCA) may be claimed – can give rise to recapture. In simplified terms, CCA allows for a 100% deduction of the annual rate of depreciation authorized by regulation and recapture essentially brings back into income the excess CCA claimed, as revealed by the difference between the selling price of a depreciable property and its UCC as it stood when sold. In contrast with a capital gain derived from the disposition of depreciable property, recapture gives rise to a 100% inclusion given that it recuperates a 100% deduction (For a more detailed explanation of the workings of the capital cost allowance system see *Water’s Edge Village Estates (Phase II) Ltd. v. Canada*, 2002 FCA 291, [2003] 2 F.C.R. 25 [*Water’s Edge*] at paragraphs 37 to 41).

[51] Subsection 100(1) was enacted at the time when the capital gains system was introduced in 1972. The concern which it addresses is the sale of partnership interests to tax-exempt entities in circumstances where the underlying assets comprise property, the disposition of which can give rise to a 100% rate of inclusion – *i.e.*: depreciable capital property, resource property and other types of property that are subject to a 100% rate of inclusion. A partnership interest, being capital property, will be subject to capital gain treatment when sold – unless held on a trading

account – and the purchaser will eventually be subject to tax on any latent recapture in the underlying depreciable property when it is disposed of.

[52] However, where the purchaser of the partnership interest is a non-taxable entity, the recapture of excessive depreciation will never take place. Subsection 100(1) prevents this potential revenue loss by making the disposing partners liable for tax on 100% of any portion of the gain resulting from the sale of their partnership interests which can be attributed to depreciable capital property held by the partnership based on its pro-rated value.

[53] I now turn to the object, spirit and purpose analysis of the provisions that were used in order to avoid the application of subsection 100(1).

- *Subsection 97(2)*

[54] In implementing the first step of the series, Old Oxford used the subsection 97(2) rollover on the transfer of the real estate properties to the first tier partnerships. Subsection 97(2) was also used when these properties were later transferred to the second tier partnerships.

[55] Subsection 97(2) allows for the transfer of property – including non-depreciable capital property, depreciable capital property and inventory – to a partnership on a tax deferred basis subject to a joint election being filed by the partners. In this case, where the ACB was elected with respect to the land portion of the property – *i.e.*: the non-depreciable capital property – and the UCC was elected with respect to the buildings erected thereon – *i.e.*: the depreciable capital property – the accrued capital gain and the recapture which would otherwise have resulted from

the transfer by virtue of subsection 97(1) were deferred. This last provision provides that the partners, upon contributing property to a partnership, are deemed to receive proceeds equal to the fair market value of the transferred property.

[56] Rollovers, including the one provided for in subsection 97(2), defer the tax consequences of transfers which take place amongst selected groups such as shareholders and their corporations (subsection 85(1)) and partners and their partnerships (subsection 97(2)), the premise being that no tax consequences should be recognized given that there is no fundamental change in ownership – *i.e.*: rather than holding the transferred property, the transferor holds a partnership interest or shares having the same value (Vern Krishna, *The Fundamentals of Canadian Income Tax*, 9th ed. (Toronto: Thomson/Carswell, 2006) at p. 1112).

[57] The logic behind rollovers as revealed by the mechanism used to give effect to them – *i.e.*: the fact that a transferor's deemed proceeds become the transferee's deemed cost – ACB or UCC as the case may be – makes it clear that any tax thereby deferred will be paid on a subsequent disposition giving rise to a change in the transferor's economic position. As was said in direct reference to subsection 97(2): “tax is not avoided; it is deferred [...]” (*Continental Bank of Canada et al. v. the Queen*, 94 D.T.C. 1858 at 1872 (T.C.C.), *aff'd* 96 D.T.C. 6355 (F.C.A.)). This flows from both the wording and the object, spirit and purpose of subsection 97(2).

[58] Indeed, subsection 97(4) ensures this result in express terms with respect to recapture by providing that where depreciable property is transferred to a partnership for proceeds which

exceed the transferor's capital cost, this cost becomes the partnership capital cost and the difference is deemed to have been taken as CCA by the partnership.

[59] Against this background, it must be acknowledged that the object, spirit and purpose of subsections 97(2) and 97(4) is to track the tax attributes of depreciable property in order to ensure that deferred recapture and gains are subsequently taxed.

[60] The respondent argues that this treatment does not apply to all situations where a tax-exempt entity is involved. It points to the fact that a tax-exempt entity is permitted to be a member of a partnership. As such, a partnership could sell property that was rolled into it at its tax cost pursuant to subsection 97(2) with the result that any excess recapture shown to have been claimed on the subsequent sale of the property would go untaxed to the extent that it is allocated to the tax-exempt partner.

[61] That is so. Parliament has not provided for every situation where the interposition of a tax-exempt entity can give rise to revenue losses but it can be seen, when regard is had to subsection 100(1), that when partnership interests are sold to exempt entities, latent recapture was not intended to go untaxed. This treatment is consistent with the object, spirit and purpose of subsection 97(2).

[62] The Tax Court judge did not construe subsection 97(2) this way. He focussed his attention on the three year holding period set out in subsection 69(11) of the Act, and concluded

that subsection 97(2) is not frustrated when deferred recapture goes untaxed, so long as this holding period is met.

[63] All are agreed that subsection 69(11) can have no application in this case because even if it were otherwise applicable, the three year holding period was respected. This provision, specifically paragraph 69(11)(b), envisages an initial disposition of property for an amount below its fair market value in circumstances where planning steps have been taken in order to allow the taxpayer to “benefit” (“profiter” in the French text) from a tax exemption available to any person on “any income arising on a subsequent disposition” of the property. Where this can be shown, the provision deems the initial disposition to have taken place at fair market value. However, subsection 69(11) ceases to apply if the property originally transferred is kept by the transferee for a minimum period of three years and no arrangements can be shown to have been made for a subsequent distribution within this period.

[64] The Tax Court judge’s reasoning for holding that this three year limitation is part of the object, spirit and purpose of subsection 97(2) is as follows (Reasons, para. 193):

I agree with counsel for the [respondent] that Parliament is presumed to know the law and to take the law into account when making amendments.[Footnote omitted] Parliament was aware of the three-year limitation at the time it extended the application of subsection 69(11) to tax-exempt entities. Thus, when it amended subsection 69(11) it made the positive decision to limit the application of subsection 69(11) to transfers to tax-exempt entities that occur within the three-year period. In my view, it is reasonable to conclude that Parliament was of the view that transfers after this three-year period did not abuse subsection 97(2). Such a conclusion must be drawn in order to, in the words of the Supreme Court of Canada, preserve some “certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly.”[55] [*Canada Trustco*, para. 61]

[65] I first note that subsection 69(11) is found in subdivision f, “Rules Relating to Computation of Income” whereas 97(2) is found in subdivision j which deals with “Partnerships and Their Members”. This shows that the application of subsection 69(11) is not restricted to partnerships. It therefore cannot be said that subsection 69(11) was introduced in order to target subsection 97(2) rollovers (Reasons, para. 189). It has a much broader application. Although it could apply to a series of transactions initiated by a subsection 97(2) rollover, subsection 69(11) applies to any series where the initial disposition takes place below fair market value, whether a rollover under subsection 97(2) or any other provision is involved or not. As such, there is no “plausible and coherent plan” which could justify reading the three year time limitation set out in subsection 69(11) into subsection 97(2) (*Copthorne* at para. 91).

[66] I note as well that it is not unusual for Parliament to place a time limit on anti-avoidance provisions whose application depends on a transaction which may take place sometime in the future (Compare paragraph 6204(1)(b) of the *Income Tax Regulations*, C.R.C., c. 945 as construed by this Court in *Montminy v. the Queen*, 2017 FCA 156 at para. 59; see also the holding period set out in section 54 relating to superficial losses). The obvious intent is to put a cap on the paralysing effect brought about by this type of provision which would otherwise be perpetual. This provides certainty and finality. No such concern arises with respect to subsection 97(2) or any of the other provisions in issue in this appeal as none are subject to a condition subsequent for their application.

[67] Beyond this, I could follow the connection which the Tax Court judge saw between the present situation and the one contemplated by paragraph 69(11)(b) if the tax benefit in issue here

had been obtained by reason of the tax-exempt status of the purchasers. However, there is no evidence to this effect. The reason why Oxford achieved the tax benefit that it did is because it rolled over the three real estate properties into partnerships, made a clever use of the bumps and successfully avoided the application of subsection 100(1). If anything, the tax benefit was obtained despite the exempt status of the purchaser, not because of it.

[68] There is therefore no basis for the Tax Court judge's conclusion that "certainty, predictability and fairness in tax law" require that the three year limitation found in subsection 69(11) be applied to subsection 97(2).

[69] The following passage could be read as advancing further and independent grounds for holding that subsection 97(2) was not frustrated by the result achieved in this case (Reasons, paras. 186, 187, 188):

I agree with the [Crown] that another purpose of subsection 97(2) is to preserve in the partnership the tax attributes of the Three Real Estate Properties, including their adjusted cost base and potential recapture. This is why the rollover is commonly referred to as a deferral of tax. However, the object of the provision is to only determine the amount of tax payable on the accrued gains when the First Level LP and Second Level LP subsequently sell the transferred asset. The amount of such tax is based upon the attributes, including the adjusted cost base, of the property at the time of such sale.

In my view, on a textual, contextual and purposive analysis of subsection 97(2) it is not the purpose of subsection 97(2) to tax the partners, when they dispose of their partnership interest, on the potential recapture or capital gain relating to the property of the partnerships, including the Three Real Estate Properties. The Act treats the sale of the partnership interest as a sale of non-depreciable property. The partnership's assets are taxed at the partnership level on the basis of their attributes at the time of the sale.

In short, it is not one of the purposes of subsection 97(2) to tax the subsequent sale of an interest in a partnership on the basis of the nature of the property held by the partnership.

[70] The question being discussed in this passage is whether subsection 97(2)'s reason for being or underlying rationale was frustrated. As the Tax Court judge recognizes in the initial paragraph, the rollovers placed the real estate properties into the first and then the second tier partnerships on a tax deferred basis in circumstances where the tax attributes of these properties had been preserved. The question which he had to answer is whether the fact that these deferred gains and recapture will never be taxed frustrates subsection 97(2).

[71] Rather than confronting this question, the Tax Court judge asked another one – *i.e.*: whether “it is [...] one of the purposes of subsection 97(2) to tax the subsequent sale of an interest in a partnership on the basis of the nature of the property held by the partnership” (Reasons, para. 188).

[72] I first note that subsection 97(2) defers tax; it does not purport to tax anyone. Furthermore, the question whether deferred gains and recapture should be taxed in the hands of the partners when they sell their partnership interests to the exempt entities turns on the object, spirit and purpose of subsection 100(1), not subsection 97(2).

[73] The question which the Tax Court judge had to address at this stage of the analysis is whether the fact that deferred gains and recapture will never be taxed frustrates the object, spirit and purpose of subsection 97(2). Given that the only reason why Parliament would preserve the

tax attributes of property that is rolled into a partnership is to allow for the eventual taxation of the deferred gains and latent recapture, the answer must be in the affirmative.

- *Paragraphs 88(1)(c), 88(1)(d) and 98(3)(b)*

[74] The two bumps were essential in allowing the respondent to circumvent the application of subsection 100(1). Beyond deferring the accrued gains and latent recapture, Oxford also had to bring up the ACB of its partnership interests up to an amount approximating their fair market value in order to achieve this goal.

[75] The transactions which allowed for the bumps are complex, but for present purposes it is sufficient to remember that after the properties were rolled into the first tier partnerships, the rules pertaining to vertical amalgamations were brought into play thereby allowing the amalgamated entity to bump the ACB of its interests in the first tier partnerships pursuant to paragraph 88(1)(d).

[76] In a vertical amalgamation, paragraph 88(1)(a) deems the parent corporation to have acquired the property of its subsidiary at the subsidiary's tax cost. Prior to the windup, however, it is possible that the parent's tax cost of the shares in its subsidiary (the ACB of the shares) will exceed the tax cost of the subsidiary's underlying property. Upon a vertical amalgamation, these shares will disappear. Without further adjustment, the tax cost in those shares would also disappear, thereby giving rise to potential double taxation in the event that the underlying property is subsequently sold. This is because the deemed cost of the underlying property in the

hands of the parent, being equal to the subsidiary's tax cost, would not reflect any appreciation in value up to the time of the wind-up.

[77] The bump provided for in paragraphs 88(1)(c) and (d) rectifies this situation by first calculating the difference between the ACB of the parent's shares and the tax cost of the subsidiary's property. This amount is then allowed to be added to the tax cost of the non-depreciable capital property which the parent inherited from its subsidiary. In other words, the tax cost of this property is bumped. The bump essentially allows any ACB that would otherwise be lost on a vertical amalgamation to be preserved and transferred to different property that is taxed the same way.

[78] Subparagraph 88(1)(c)(iii) prohibits the parent from bumping the cost of "ineligible property" which includes depreciable property. The issue the bump seeks to address is the disappearance of the shares and the tax cost (the share's ACB) embedded therein. Preserving and transferring ACB that would otherwise be lost to an asset that is taxed with the same rate of inclusion is the way in which this is accommodated. Allowing property that is taxed on the basis of a 50% rate of inclusion to augment the value of property that is taxed on the basis of a 100% rate of inclusion would result in an obvious revenue loss. That explains why depreciable property or other types of property that give rise to a 100% rate of inclusion cannot be bumped.

[79] Subsection 98(3) operates essentially the same way. It applies in the context of the dissolution of partnerships and seeks to preserve the tax basis in partnership interests rather than shares. The rationale is the same as that under paragraph 88(1)(d). Subparagraph 98(3)(b)(ii) and

paragraph 98(3)(c) also exclude “ineligible property”, including depreciable property for the same reasons as those already explained. As well, both subparagraph 88(1)(a)(iii) and paragraph 98(3)(e) deem the parent corporations or the partners to have acquired the inherited property at the subsidiary’s or the dissolving partnership’s UCC, which evidences an intent to maintain continuity in the application of the CCA scheme.

[80] Given the rationale of the bump provisions, one can see why depreciable property is excluded. A bump pertaining to depreciable property on which CCA has been claimed will increase the UCC and decrease the latent recapture which is subject to a 100% rate of inclusion. However, the same logic does not extend to a gain realized from the disposition of depreciable property, which, like any other capital gain, is subject to a 50% rate of inclusion. When regard is had to the underlying rationale for the bump provisions, a bump which can be shown to increase the capital cost rather than the UCC of depreciable property would not be objectionable. I will come back to this in assessing the overall result of the series of transactions.

[81] The Tax Court judge understood the distinct treatment of depreciable and non-depreciable property and the reasons for it. It can be seen from his reasoning (Reasons, paras. 143-146, 167, 168) that the bumps are available to increase the ACB of non-depreciable capital property in order to compensate for the loss of the tax basis in non-depreciable property – *i.e.*: the shares – in the context of a vertical amalgamation and the partnership interests in the context of a partnership dissolution. He explained that this eliminates the potential double taxation which would arise upon a subsequent sale of the assets. He also noted that another purpose of

subsection 88(1) is to preserve the tax attributes of depreciable property and the “potential recapture” (Reasons, para. 146).

[82] Had the Tax Court judge stopped here and moved to the abuse analysis, he would have had to conclude that the object, spirit and purpose of the relevant provisions was frustrated because the bumps were used to effectively increase the UCC of depreciable property. As well, he would have had to conclude the tax attributes of the underlying depreciable property were “preserved” to no avail.

[83] However, this played no role in the conclusion which the Tax Court judge reached. After noting that paragraph 88(1)(d) was amended in 2012 by the addition of subparagraph 88(1)(d)(ii.1) (Reasons, para. 147) and that this amendment is relevant when determining the object, spirit and purpose of the relevant provisions (Reasons, para. 153), the Tax Court judge went on to hold (Reasons, para. 205):

I cannot find, on a textual, contextual and purposive analysis, that one of the objects or purposes of paragraphs 88(1)(c) and (d), subsection 98(3) [...] is to establish an “indirect” bumping rule or, for that matter, a latent recapture rule that, as envisaged by the Respondent, applied when the partnership interests in the First Level LPs and Second Level LPs were bumped. Nor do I accept that one of the objects or purposes of paragraph 88(1)(c) and subsection 98(3), as they read during the relevant periods, was to reduce or deny the bump on the basis of the nature of the assets held by the partnerships.

(My emphasis)

[84] He added after pointing to the complexity of the bump rules and emphasizing Parliament's extreme care in the choice of words to give effect to them (Reasons, para. 206):

[...] Section 88, as drafted at the time, did not require the Appellant to look at the nature of the assets of the First Level LPs to determine the amount by which it could bump its interest in the limited partnerships.

(My emphasis)

[85] The Tax Court judge's insistence on the relevant provisions "as they read" is explained by the contrast which he draws between the law as it stood when the series of transactions unfolded and the law as it stood after the addition of subparagraph 88(1)(d)(ii.1) and related amendments in 2012 (Reasons, paras. 210-212). He explained earlier on how this change operates and what it achieves (Reasons, paras. 147-153). In his view, new subparagraph 88(1)(d)(ii.1) addresses the very issue which arises here but on a prospective basis only. This led the Tax Court judge to conclude that (Reasons, para. 210):

The legislative scheme that the [Crown] is looking for exists in the current version of section 88, in particular as a consequence of the addition of subparagraph 88(1)(d)(ii.1) in 2012. However, in my view, the amendment reflects the adoption of a new policy by Parliament.

To be clear, he added that "[...] it is not a clarification of the old provisions" (Reasons, para. 212).

[86] Whether an amendment clarifies the prior law or alters it turns on the construction of the prior law and the amendment itself. As explained, the *Interpretation Act* prevents any conclusion from being drawn as to the legal effect of a new enactment on the prior law on the sole basis that

Parliament adopted it. Keeping this limitation in mind, the only way to assess the impact of a subsequent amendment on the prior law is to first determine the legal effect of the law as it stood beforehand and then determine whether the subsequent amendment alters it or clarifies it.

[87] The Tax Court judge concluded that new subparagraph 88(1)(d)(ii.1) operates as new law by comparing it to subsection 88(1), as it read before the amendment. He explained that whereas subsection 88(1) provided that the bump is based “on the fair market value of each qualifying non-depreciable asset of the subsidiary, including the fair market value of a partnership interest held by the partner”, this ceased to be the case after the amendment, “which restricted the amount by which a partnership interest may be bumped to the amount of the fair market value of the partnership that is not attributable to depreciable property” (Reasons, para. 211). In short, the amendment is novel because the limit now imposed with respect to depreciable property was not there before.

[88] The difficulty with this reasoning is that it is based on the wording of the former provisions rather than on their object, spirit and purpose. As was stated in *Copthorne*, the GAAR contemplates that the meaning and legal effect of the provisions of the Act can vary depending on whether they are construed according to a traditional, textual, contextual and purposive construction focused on the meaning of the words of the Act, or on the basis of an analysis focused on discerning their underlying rationale or reason for being (*Copthorne* at para. 70). While one cannot rule out the possibility that the underlying rationale for a provision will be fully captured by the words, this must still be demonstrated by inquiring into the provision’s reason for being (*Copthorne* at paras. 110-111).

[89] There is no doubt that new subparagraph 88(1)(d)(ii.1) operates as new law if one construes the prior provisions with a focus on the words or the text as the Tax Court judge did. By invoking the GAAR, the Minister conceded, and all are agreed that paragraphs 88(1)(c) and (d) and subsection 98(3) do not impose a limit that would prevent the bumps achieved here (Compare *Copthorne* at para. 109). As new subparagraph 88(1)(d)(ii.1) imposes such a limit prospectively, it will operate as new law whenever the Act requires that the former provisions be given a traditional construction focused on the meaning of the words – *i.e.*: in cases where the GAAR is not in play.

[90] However, the question whether new subparagraph 88(1)(d)(ii.1) operates as new law in a GAAR context must be assessed having regard to the meaning of the prior provisions, when construed with a focus on their underlying rationale or reason for being. In this respect, it can be seen from the Tax Court judge's own analysis of the provisions as they stood before the amendment (Reasons, paras. 142-146 and 164-168), that new subparagraph 88(1)(d)(ii.1) conveys in express terms a rationale which was already present in these provisions. Notably, these provisions already drew the distinction between depreciable and non-depreciable property and the only reason for making this distinction is to take into account the distinctive tax treatment afforded to each type of property under the Act in determining which is eligible for a bump and which is not. The use of tiered partnerships to bypass this distinctive treatment frustrates the reason for the distinction which these provisions already drew.

[91] When the prior law is construed with a focus on its object, spirit and purpose as it must be, the amendment does not operate as new law. Its practical effect is simply that the GAAR will

no longer have to be resorted to in order to prevent the result achieved in this case (Compare *Water's Edge* at para. 47).

[92] I want to make clear that I reach this conclusion without placing any reliance on the Budget Supplementary Information document that was issued by the Department of Finance in conjunction with the enactment of subparagraph 88(1)(d)(ii.1) and related amendments in 2012. The Crown relies on the distinction drawn in this publication between remedial amendments and clarifying amendments and emphasizes the assertion that in this case the amendments “clarify” the prior law (Memorandum of the appellant, paras. 84, 85; Economic Action Plan 2012, pp. 414-415; Joint Book of Authorities, Vol. 2, Tab 49).

[93] While publications of this type, including Explanatory Notes, are considered as permissible extrinsic aids (*Copthorne* at para. 69, citing *Trustco* at para. 55), I do not believe that this particular publication, which the Crown urges upon us, should be given any weight in this case. This is because, as acknowledged at p. 415 of this publication, it was issued at a time when officials of the Department of Finance were aware that structures like the one here in issue were being challenged by the Minister. This raises the obvious concern that the publication may be self-serving, particularly in a GAAR context, where the object, spirit and purpose of the pre-amendment law is the matter in issue. As such, the opinion expressed in this publication must be disregarded.

[94] Before closing the analysis on the bumps, I must address the Tax Court judge's further conclusion that the Minister's position should be rejected because it is based on a broad policy

that is not anchored in the Act itself (Reasons, para. 204). He came to this conclusion by reason of the distinct treatment which was given to the Dufferin Mall and the René Lévesque property (Reasons, paras. 201-203).

[95] I cannot share that view. First, that the Minister did not see fit to apply the GAAR to limit the bumps achieved with respect to these other properties does not detract from the fact that the Minister's position in this case is firmly grounded in the object, spirit and purpose of paragraphs 88(1)(c) and (d) as well as subsection 98(3). As such, the treatment which the Minister gave to these other properties is irrelevant.

[96] Nevertheless, in order to diffuse any suggestion of ambivalence on the part of the Minister, the decision not to apply the GAAR in respect to these properties is fully explained by the fact that the ultimate sale, insofar as the Dufferin Mall is concerned, was to a taxable entity with the result that tax on the latent recapture and accrued gains will eventually be paid. As to the René Lévesque property, the GAAR was not applied because the property was not contributed to the partnership as part of the series of transactions.

[97] I therefore conclude that the bumps insofar as they allowed the respondent to avoid latent recapture on the depreciable property held by the partnerships frustrate the object, spirit and purpose of paragraphs 88(1)(c) and (d) and subsection 98(3).

- *Subsection 100(1)*

[98] The special computation provided for under subsection 100(1) applies to the capital gain realized when a partnership interest is sold to a tax-exempt entity. Paragraph 100(1)(a) calls for the application of the normal rate of inclusion of 50% to the portion of the gain that is attributable to the value of non-depreciable capital property held by the partnership. To the extent that the gain realized on the sale of the partnership interest is attributable to the value of the depreciable property, paragraph 100(1)(b) provides for a 100% rate of inclusion.

[99] The conclusion reached by the Tax Court judge with respect to the object, spirit and purpose of this provision is also based on new subparagraph 88(1)(d)(ii.1). In rejecting the Crown's contention that the purpose of subsection 100(1) was to look through the partnership and tax latent recapture which would otherwise go unpaid by reason of the exempt status of the purchaser, he wrote (Reasons, para. 216):

A textual, contextual and purposive analysis of subsection 100(1) does not support such a purpose. If Parliament had intended such a result it would have drafted subsection 100(1) in a manner that required such a look-through, in other words, in a manner similar to new subparagraph 88(1)(d)(ii.1) of the bump rules.

[100] Given this conclusion, the Tax Court judge gave subsection 100(1) a meaning that tracks its wording. In his words, as “the object of subsection 100(1) is to start with the capital gain computed under the Act and then determine what portion of this gain is a taxable capital gain”, and as no gain arose when regard is had to the relevant provisions, particularly the bump rules, subsection 100(1) was not frustrated (Reasons, para. 217).

[101] It was incumbent upon the Tax Court judge to conduct an object, spirit and purpose analysis of subsection 100(1). Although he purports to have done so, his analysis simply tracks the wording of subsection 100(1). As explained, subsection 100(1) brings into income 100% of the gain resulting from the sale of a partnership interest to an exempt entity insofar as it is attributable to depreciable property. The question which the Tax Court judge had to ask is why does this provision provide for such an inclusion? The answer is that Parliament wanted tax to be paid on the latent recapture which would otherwise go unpaid on a subsequent sale of the depreciable property by the tax-exempt purchaser. There is no other answer.

[102] Given this, the inevitable conclusion is that the object, spirit and purpose of subsection 100(1) was frustrated by the result achieved in this case as the latent recapture in the depreciable property held by the second tier partnerships at the time of the sale of the partnership interests to the tax-exempt entities will forever go unpaid.

[103] Before closing the analysis with respect to subsection 100(1), I note that the reassessment issued by the Minister applies a 100% rate of inclusion to both the recapture and the capital gain portion of the increase in value attributable to the depreciable property. This is at odds with the normal rate applicable to capital gains, but the Crown maintains that the Minister was required to apply a 100% rate of inclusion when regard is had to the object, spirit and purpose of subsection 100(1). Specifically, the Crown argues that the 100% rate of inclusion provided for in paragraph 100(1)(b) is explained by the fact that Parliament wanted to “exact a price” in order to “discourage the attempted avoidance of recapture” (Memorandum of the Crown, para. 106).

[104] I do not believe that this can explain why paragraph 100(1)(b) applies a 100% rate of inclusion to all increases in value attributable to depreciable property. First, doubling the tax on capital gains attributable to depreciable property does not deter attempts to avoid recapture. Indeed, where the attempted avoidance is limited to recapture, the 100% rate of inclusion provided for in paragraph 100(1)(b) merely matches the normal rate of inclusion applicable to recapture. If the intent was to “exact a price” on attempts to avoid recapture, subsection 100(1) would be framed differently. Second, there is no logic or reason why Parliament would “exact a price” on attempts to avoid recapture but not on attempts to avoid tax on the other types of property targeted by subsection 100(1).

[105] Rather, it appears that subsection 100(1), like the bump provisions, was drafted with a focus on the 100% rate of inclusion applicable to the targeted properties generally. The capital gain aspect of depreciable property which calls for a 50% rate of inclusion does not seem to have warranted special attention, perhaps because this type of property is typically consumed in the income making process and rarely gives rise to capital gains. Whatever the reason, deterring the avoidance of recapture is not part of the explanation.

[106] That said, no definitive conclusion needs be drawn because regardless of the explanation, taxing 100% of the capital gain portion of the increase in value attributable to depreciable property, as the Minister did, is not justified when regard is had to the overall result that was achieved. This is the issue to which I now turn.

- *The overall result*

[107] Having concluded that none of the steps which form part of the series of transactions gave rise to an abuse, the Tax Court judge did not believe it necessary to consider the overall result. There are therefore no reasons to which deference could be given on this part of the analysis.

[108] The overall result was the circumvention of subsection 100(1) by eliminating the capital gain which would otherwise have resulted from the sale of the partnership interests to the exempt entities. This was achieved by bumping the tax cost of the partnership interests so as to approximate their fair market value, as established by the price paid by the arms' length exempt entities, thereby eliminating any gain on which subsection 100(1) could apply and making the deferral of accrued gains and latent recapture permanent.

[109] Specifically, no gain "could reasonably be regarded as attributable to increases [...] in the value" of non-depreciable property held by the second tier partnerships pursuant to paragraph 100(1)(a) when the transaction took place, even though the selling price of the partnership interests, as allocated by agreement, revealed that its value stood at \$21,835,816.00 above its ACB. Similarly, no gain could be regarded as attributable to increases in the value of depreciable property held by the second tier partnerships pursuant to paragraph 100(1)(b), even though the selling price, as allocated by agreement, showed that it had been over depreciated by \$116,591,744.00 and had a value that stood at \$42,570,999.00 above its capital cost.

[110] When considering the overall result as it relates to the underlying depreciable property, a distinction must be drawn between the tax treatment of excess depreciation claimed with respect to depreciable property as revealed by the difference between its capital cost and its UCC, and capital gains as revealed by the difference between its capital cost and its value at the time when it is sold. As noted earlier, when depreciable property is disposed of for a price which exceeds its capital cost, the difference between the UCC and the capital cost will give rise to recapture, subject to a 100% rate of inclusion, while the excess of the selling price over the capital cost will give rise to a capital gain, subject to an inclusion rate of 50%.

[111] Keeping this distinct treatment in mind, the result achieved insofar as it allowed Oxford to avoid paying tax on latent recapture in the amount of \$116,591,744.00 frustrates paragraph 100(1)(b). Selling partnership interests to an exempt entity when the underlying property includes depreciable property on which excess CCA has been claimed without triggering the recapture which would have been subject to tax had the property been sold directly is precisely what this provision is intended to prevent. As explained, paragraph 100(1)(b) pre-empts the potential revenue loss which arises by reason of the tax-exempt status of the purchaser by allowing for a look through the partnership, to the partnership property, and making the partners liable for the tax on the latent recapture that would otherwise go unpaid.

[112] However, this provision cannot apply unless the sale of the partnership interests yields a capital gain commensurate with the increase in value of the underlying partnership property. In the present case, Oxford succeeded in rendering paragraph 100(1)(b) inoperative by offsetting this gain by the use of the bumps and creating a dichotomy between the tax cost of the

partnership interests and the underlying property. In the process, the rationale for excluding depreciable property from the bumps pursuant to subparagraphs 88(1)(c)(iii) and paragraph 98(3)(e) was defeated as the tax cost of the depreciable property was bumped all the way up from its UCC to its capital cost thereby allowing costs originating in property that is subject to a 50% rate of inclusion to be used to offset recapture which is subject to a 100% rate of inclusion. As well, Oxford abused subsections 97(2) and 97(4) because the UCC elected and deemed to continue in the hands of the first and second tier partnerships had no subsequent application thereby making the deferred recapture permanent.

[113] In my view, the Crown has successfully discharged her burden of identifying the object, spirit and purpose of the provisions used by Oxford to achieve this result, and showing that all were frustrated in the process (*Trustco* at para. 65).

[114] Conversely, it has not been shown that an abuse of paragraph 100(1)(b) or any of the relevant provisions results from the fact that the increased value of the depreciable property, from its capital cost to its fair market value, was not reflected in the capital gain generated by the sale of the partnership interests. This is because this portion of the increase in value of the depreciable property was properly offset by their increased tax cost resulting from the bumps when regard is had to the object, spirit and purpose of paragraphs 88(1)(c), 88(1)(d) and 98(3)(b).

[115] As alluded to earlier, no abuse of these provisions arises when disappearing costs are used to increase the cost of property that is taxed the same way as the property from which the

transferred costs originate. This is what has been shown with respect to the part of the disappearing costs that were used to offset the \$42,570,999.00 increase in the value of the depreciable property from its capital cost up to its fair market value. This result is not abusive because this portion of the capital gain which would otherwise have arisen pursuant to paragraph 100(1)(b) was nullified in a manner consistent with the object, spirit and purpose of the bump provisions.

[116] For the same reason, subsection 97(2), insofar as it was used to defer tax on this part of the increase in the value of the depreciable property, was not abused. In contrast with the deferred recapture, the deferred capital gain did not simply vanish. Rather, it was offset by adding real costs to the capital cost of the depreciable property. The failure to recognize a cost that has been actually incurred but which would disappear on a vertical amalgamation or a partnership dissolution goes against the integrity of the capital gains system because it allows for the subsequent realization of a capital gain in circumstances where there has been no economic gain. Preventing this outcome is the reason why the bump provisions were enacted.

[117] In the end, the only basis on which the Minister could refuse to give the bumps this limited application is by insisting on a construction of the bump provisions which focuses on the meaning of the words, specifically on the unqualified and express disqualification of depreciable property. However, the Crown cannot have it both ways. In a GAAR context, the same interpretative approach must be applied to both the determination of the abuse and the consequential adjustments required in order to counter it.

[118] I therefore conclude that the Minister could not reassess Oxford on the basis that the overall result achieved by this circumscribed use of the bump provisions was abusive.

[119] The overall result as it applies to the non-depreciable property – *i.e.*: the land – was achieved essentially the same way – *i.e.*: by bumping its value from its ACB to its fair market value, thereby offsetting the deemed capital gain in the amount of \$10,917,900.00 which would otherwise have been attributable to the increase in the value of the land pursuant to paragraph 100(1)(a).

[120] The above reasoning explains why this result does not frustrate subsection 100(1) or any of the provisions relied upon in order to achieve it. The only meaningful difference is that the land, being non-depreciable property, qualifies for the bumps whether the bump provisions are construed with a focus on the meaning of the words or on their object, spirit and purpose.

- *The reasonable GAAR consequences*

[121] The reassessment issued by the Minister nullifies the bumps and applies subsection 100(1) to the resulting gain. The disallowance of the bumps decreased the ACB of the partnership interests, and increased the capital gain realized by the respondent on their sale to the tax-exempt entities by the amount of \$148,187,560.00.

[122] It can be seen from the above analysis that the amounts included under paragraphs 100(1)(a) and 100(1)(b) do not reflect consequences that are reasonable in the circumstances as no abuse results from the avoidance of the taxable capital gain in the amount of \$10,917,900.00

under the former and the only abuse which was made of the latter pertains to the avoidance of tax on recapture, which the parties agree is in the amount of \$116,591,744.00.

- *Disposition*

[123] For these reasons, I would allow the appeal in part, set aside the decision of the Tax Court judge and giving the judgment which the Tax Court judge ought to have given, I would refer the reassessment back to the Minister for reconsideration and reassessment on the basis that subsection 100(1) gives rise to a taxable capital gain in the amount of \$116,591,744.00 rather than \$148,187,562.00. The Crown should have her costs here and below. The award in both cases should be apportioned based on a rounded 80/20 ratio to reflect the respondent's partial success.

"Marc Noël"

Chief Justice

"I agree

Eleanor R. Dawson J.A."

"I agree

Donald J. Rennie J.A."

ANNEX***Income Tax Act, R.S.C., 1985 c. 1
(5th Supp.)*****Contribution of property to partnership**

97(1) Where at any time after 1971 a partnership has acquired property from a taxpayer who was, immediately after that time, a member of the partnership, the partnership shall be deemed to have acquired the property at an amount equal to its fair market value at that time and the taxpayer shall be deemed to have disposed of the property for proceeds equal to that fair market value.

(2) Notwithstanding any other provision of this Act other than subsection 13(21.2), where a taxpayer at any time disposes of any property that is a capital property, Canadian resource property, foreign resource property, eligible capital property or inventory of the taxpayer to a partnership that immediately after that time is a Canadian partnership of which the taxpayer is a member, if the taxpayer and all the other members of the partnership jointly so elect in prescribed form within the time referred to in subsection 96(4),

(a) the provisions of paragraphs 85(1)(a) to 85(1)(f) apply to the disposition as if

(i) the reference therein to “corporation’s cost” were read as a reference to “partnership’s cost”,

(ii) the references therein to “other than any shares of the capital stock of the corporation or a right to receive

***Loi de l’impôt sur le revenu, L.R.C.
1985, ch. 1 (5^e suppl.)*****Apport de biens dans une société de personnes**

97(1) Lorsque, après 1971, une société de personnes a acquis des biens auprès d’un contribuable qui, immédiatement après le moment de l’acquisition, faisait partie de la société de personnes, cette dernière est réputée les avoir acquis à un prix égal à leur juste valeur marchande à ce moment et le contribuable est réputé en avoir disposé et en avoir tiré un produit égal à cette juste valeur marchande.

(2) Malgré les autres dispositions de la présente loi, sauf le paragraphe 13(21.2), dans le cas où un contribuable dispose de son bien — immobilisation, avoir minier canadien, avoir minier étranger, immobilisation admissible ou bien à porter à l’inventaire — en faveur d’une société de personnes qui est, immédiatement après la disposition, une société de personnes canadienne dont il est un associé, les règles suivantes s’appliquent si le contribuable et les autres associés de la société de personnes en font conjointement le choix sur formulaire prescrit dans le délai mentionné au paragraphe 96(4):

a) les alinéas 85(1)a) à f) s’appliquent à la disposition comme si la mention :

(i) « pour la société » était remplacée par la mention « pour la société de personnes »,

(ii) « autre que toutes actions du capital-actions de la société ou un droit d’en recevoir » était remplacée

any such shares” and to “other than shares of the capital stock of the corporation or a right to receive any such shares” were read as references to “other than an interest in the partnership”,

(iii) the references therein to “shareholder of the corporation” were read as references to “member of the partnership”,

(iv) the references therein to “the corporation” were read as references to “all the other members of the partnership”, and

(v) the references therein to “to the corporation” were read as references to “to the partnership”;

(b) in computing, at any time after the disposition, the adjusted cost base to the taxpayer of the taxpayer’s interest in the partnership immediately after the disposition,

(i) there shall be added the amount, if any, by which the taxpayer’s proceeds of disposition of the property exceed the fair market value, at the time of the disposition, of the consideration (other than an interest in the partnership) received by the taxpayer for the property, and

(ii) there shall be deducted the amount, if any, by which the fair market value, at the time of the disposition, of the consideration (other than an interest in the partnership) received by the taxpayer for the property so disposed of by the taxpayer exceeds the fair market value of the property at the time of the disposition; and

par la mention « autre qu’une participation dans la société de personnes »,

(iii) « actionnaire de la société » était remplacée par la mention « associé de la société de personnes »,

(iv) « la société » était remplacée par la mention « tous les autres associés de la société de personnes »,

(v) « à la société » était remplacée par la mention « à la société de personnes »;

(b) dans le calcul, à un moment donné après la disposition, du prix de base rajusté, pour le contribuable, de sa participation dans la société de personnes, immédiatement après la disposition :

(i) il doit être ajouté l’excédent éventuel du produit que le contribuable a tiré de la disposition des biens sur la juste valeur marchande, au moment de la disposition, de la contrepartie (autre qu’une participation dans la société de personnes) reçue par le contribuable pour les biens,

(ii) il doit être déduit l’excédent éventuel de la juste valeur marchande, au moment de la disposition, de la contrepartie (autre qu’une participation dans la société de personnes) reçue par le contribuable pour les biens dont il a ainsi disposé sur leur juste valeur marchande au moment de la disposition;

(c) where the property so disposed of by the taxpayer to the partnership is taxable Canadian property of the taxpayer, the interest in the partnership received by the taxpayer as consideration therefor shall be deemed to be taxable Canadian property of the taxpayer.

(4) Where subsection 97(2) has been applicable in respect of the acquisition of any depreciable property by a partnership from a taxpayer who was, immediately after the taxpayer disposed of the property, a member of the partnership and the capital cost to the taxpayer of the property exceeds the taxpayer's proceeds of the disposition, for the purposes of sections 13 and 20 and any regulations made under paragraph 20(1)(a)

(a) the capital cost to the partnership of the property shall be deemed to be the amount that was the capital cost thereof to the taxpayer; and

(b) the excess shall be deemed to have been allowed to the partnership in respect of the property under regulations made under paragraph 20(1)(a) in computing income for taxation years before the acquisition by the partnership of the property.

Deemed proceeds of disposition

69(11) Where, at any particular time as part of a series of transactions or events, a taxpayer disposes of property for proceeds of disposition that are less than its fair market value and it can reasonably be considered that one of the main purposes of the series is

(c) lorsque les biens dont le contribuable a ainsi disposé en faveur de la société de personnes sont des biens canadiens imposables du contribuable, la participation dans la société de personnes qu'il a reçue en contrepartie est réputée être un bien canadien imposable du contribuable.

(4) Lorsque le paragraphe (2) s'appliquait à l'égard de biens amortissables acquis par une société de personnes auprès d'un contribuable qui, immédiatement après avoir disposé de ces biens, était un associé de la société de personnes et que le coût en capital supporté par le contribuable pour les biens dépasse le produit qu'il a tiré de leur disposition, pour l'application des articles 13 et 20 ainsi que des dispositions réglementaires prises en vertu de l'alinéa 20(1)a):

(a) le coût en capital supporté par la société de personnes pour les biens est réputé être celui qui a été supporté par le contribuable pour ces mêmes biens;

(b) l'excédent est réputé avoir été admis en déduction en faveur de la société de personnes au titre des biens, en vertu des dispositions réglementaires prises en application de l'alinéa 20(1)a), dans le calcul de son revenu pour des années d'imposition antérieures à l'acquisition de ces biens par la société de personnes.

Produit de disposition réputé

69(11) Malgré les autres dispositions de la présente loi, le contribuable qui, à un moment donné, dispose d'un bien dans le cadre d'une série d'opérations ou d'événements pour un produit de disposition inférieur à la juste valeur marchande du bien est réputé avoir disposé du bien à ce moment pour un

- produit de disposition égal à sa juste valeur marchande à ce moment s'il est raisonnable de considérer que l'un des principaux objets de la série consiste
- (a)** to obtain the benefit of
- (a)** à profiter de l'un des éléments ci-après offert à une personne (sauf une personne qui serait affiliée au contribuable immédiatement avant le début de la série, compte non tenu de la définition de *contrôlé* au paragraphe 251.1(3)) relativement à une disposition ultérieure du bien ou d'un bien de remplacement, à condition que cette disposition soit effectuée, ou des arrangements en vue de cette disposition pris, avant le jour qui suit de trois ans le moment donné :
- (i)** any deduction (other than a deduction under subsection 110.6(2.1) in respect of a capital gain from a disposition of a share acquired by the taxpayer in an acquisition to which subsection 85(3) or 98(3) applied) in computing income, taxable income, taxable income earned in Canada or tax payable under this Act, or
- (i)** une déduction (sauf celle visée au paragraphe 110.6(2.1) au titre d'un gain en capital provenant de la disposition d'une action acquise par le contribuable dans le cadre d'une acquisition à laquelle se sont appliqués les paragraphes 85(3) ou 98(3)) dans le calcul du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable en vertu de la présente loi,
- (ii)** any balance of undeducted outlays, expenses or other amounts
- (ii)** un solde de dépenses ou autres montants non déduits;
- available to a person (other than a person that would be affiliated with the taxpayer immediately before the series began, if section 251.1 were read without reference to the definition *controlled* in subsection 251.1(3)) in respect of a subsequent disposition of the property or property substituted for the property, or
- (b)** to obtain the benefit of an exemption available to any person from tax payable under this Act on any income arising on a subsequent disposition of the property or property
- (b)** à profiter d'une exemption offerte à une personne de l'impôt payable en vertu de la présente loi sur un revenu découlant d'une disposition ultérieure du bien ou d'un bien de

substituted for the property,

remplacement, à condition que cette disposition soit effectuée, ou des arrangements en vue de cette disposition pris, avant le jour qui suit de trois ans le moment donné.

notwithstanding any other provision of this Act, where the subsequent disposition occurs, or arrangements for the subsequent disposition are made, before the day that is 3 years after the particular time, the taxpayer is deemed to have disposed of the property at the particular time for proceeds of disposition equal to its fair market value at the particular time.

Winding-up

88(1) Where a taxable Canadian corporation (in this subsection referred to as the “subsidiary”) has been wound up after May 6, 1974 and not less than 90% of the issued shares of each class of the capital stock of the subsidiary were, immediately before the winding-up, owned by another taxable Canadian corporation (in this subsection referred to as the “parent”) and all of the shares of the subsidiary that were not owned by the parent immediately before the winding-up were owned at that time by persons with whom the parent was dealing at arm’s length, notwithstanding any other provision of this Act other than subsection 69(11), the following rules apply:

(a) subject to paragraphs 88(1)(a.1) and 88(1)(a.3), each property (other than an interest in a partnership) of the subsidiary that was distributed to the parent on the winding-up shall be deemed to have been disposed of by the subsidiary for proceeds equal to

Liquidation

88(1) Lorsqu’une société canadienne imposable (appelée « filiale » au présent paragraphe) a été liquidée après le 6 mai 1974, qu’au moins 90 % des actions émises de chaque catégorie de son capital-actions appartenaient, immédiatement avant la liquidation, à une autre société canadienne imposable (appelée « société mère » au présent paragraphe) et que toutes les actions de la filiale qui n’appartenaient pas à la société mère immédiatement avant la liquidation appartenaient alors à des personnes avec lesquelles la société mère n’avait pas de lien de dépendance, les règles suivantes s’appliquent malgré les autres dispositions de la présente loi, exception faite du paragraphe 69(11):

a) sous réserve des alinéas a.1) et a.3), tout bien de la filiale, à l’exception d’une participation dans une société de personnes, attribué à la société mère lors de la liquidation est réputé avoir fait l’objet d’une disposition par la filiale pour un produit égal :

(i) in the case of a Canadian resource property, a foreign resource property or a right to receive production (as defined in subsection 18.1(1)) to which a matchable expenditure (as defined in subsection 18.1(1)) relates, nil, and

(iii) in the case of any other property, the cost amount to the subsidiary of the property immediately before the winding-up;

(c) subject to paragraph 87(2)(e.3) (as modified by paragraph 88(1)(e.2)), and notwithstanding paragraph 87(2)(e.1) (as modified by paragraph 88(1)(e.2)), the cost to the parent of each property of the subsidiary distributed to the parent on the winding-up shall be deemed to be

(i) in the case of a property that is an interest in a partnership, the amount that but for this paragraph would be the cost to the parent of the property, and

(ii) in any other case, the amount, if any, by which

(A) the amount that would, but for subsection 69(11), be deemed by paragraph 88(1)(a) to be the proceeds of disposition of the property

exceeds

(B) any reduction of the cost amount to the subsidiary of the property made because of section 80 on the winding-up,

plus where the property was a capital property (other than an ineligible property) of the subsidiary at the time that the parent last acquired control of the subsidiary and was owned by the subsidiary thereafter without interruption until such time as it was

(i) à zéro, dans le cas d'un avoir minier canadien, d'un avoir minier étranger ou d'un droit aux produits, au sens du paragraphe 18.1(1), auquel se rapporte une dépense à rattacher, au sens de ce paragraphe,

(iii) au coût indiqué du bien, pour la filiale, immédiatement avant la liquidation, dans le cas de tout autre bien;

(c) sous réserve de l'alinéa 87(2)e.3), modifié par l'alinéa e.2), et malgré l'alinéa 87(2)e.1), modifié par l'alinéa e.2), le coût, pour la société mère, de chaque bien de la filiale attribué à la société mère lors de la liquidation est réputé être :

(i) le coût du bien pour la société mère, compte non tenu de présent alinéa, si le bien est une participation dans une société de personnes,

(ii) sinon, l'excédent éventuel du montant visé à la division (A) sur le montant visé à la division (B):

(A) le montant qui, sans le paragraphe 69(11), serait réputé en application de l'alinéa a) être le produit de disposition du bien,

(B) le montant qui, par l'effet de l'article 80, est appliqué en réduction du coût indiqué du bien pour la filiale lors de la liquidation,

plus le montant déterminé selon l'alinéa d) relativement à ce bien, s'il était une immobilisation, autre qu'un bien non admissible, de la filiale au moment où la société mère a acquis pour la dernière fois le contrôle de la filiale et si, par la suite sans

distributed to the parent on the winding-up, the amount determined under paragraph 88(1)(d) in respect of the property and, for the purposes of this paragraph, ineligible property means

(iii) depreciable property,

Rules applicable where partnership ceases to exist

98(3) Where at any particular time after 1971 a Canadian partnership has ceased to exist and all the partnership property has been distributed to persons who were members of the partnership immediately before that time so that immediately after that time each such person has, in each such property, an undivided interest that, when expressed as a percentage (in this subsection referred to as that person's "percentage") of all undivided interests in the property, is equal to the person's undivided interest, when so expressed, in each other such property, if each such person has jointly so elected in respect of the property in prescribed form and within the time referred to in subsection 96(4), the following rules apply:

(a) each such person's proceeds of the disposition of the person's interest in the partnership shall be deemed to be an amount equal to the greater of

(i) the adjusted cost base to the person, immediately before the particular time, of the person's interest in the partnership, and

(ii) the amount of any money received by the person on the cessation of the

interruption jusqu'au moment où il a été attribué à la société mère lors de la liquidation, il appartenait à la filiale; pour l'application du présent alinéa, les biens suivants sont des biens non admissibles :

(iii) les biens amortissables,

Règles applicables lorsqu'une société de personnes cesse d'exister

98(3) Lorsque, à un moment donné après 1971, une société de personnes canadienne a cessé d'exister et que tous ses biens ont été attribués à des personnes qui étaient des associés de la société de personnes immédiatement avant ce moment de sorte que, immédiatement après ce moment, chacune de ces personnes possède, sur chacun de ces biens, un droit indivis qui, lorsqu'il est exprimé en pourcentage (appelé le « pourcentage » de cette personne au présent paragraphe) de tous les droits indivis sur ces biens, est égal à son droit indivis, lorsqu'il est ainsi exprimé, sur chacun de ces autres biens, les règles suivantes s'appliquent toutes ces personnes ont fait le choix ensemble relativement à ces biens, selon le formulaire prescrit et dans le délai mentionné au paragraphe 96(4):

a) le produit que reçoit chacune de ces personnes lors de la disposition de sa participation dans la société de personnes est réputé être un montant égal à la plus élevée des sommes suivantes :

(i) le prix de base rajusté, pour elle, immédiatement avant le moment donné, de sa participation dans la société de personnes,

(ii) le montant qu'elle a reçu en argent lorsque la société de personnes a cessé

partnership's existence, plus the person's percentage of the total of amounts each of which is the cost amount to the partnership of each such property immediately before its distribution;

(b) the cost to each such person of that person's undivided interest in each such property shall be deemed to be an amount equal to the total of

(i) that person's percentage of the cost amount to the partnership of the property immediately before its distribution,

(i.1) where the property is eligible capital property, that person's percentage of 4/3 of the amount, if any, determined for F in the definition cumulative eligible capital in subsection 14(5) in respect of the partnership's business immediately before the particular time, and

(ii) where the amount determined under subparagraph 98(3)(a)(i) exceeds the amount determined under subparagraph 98(3)(a)(ii), the amount determined under paragraph 98(3)(c) in respect of the person's undivided interest in the property;

(c) the amount determined under this paragraph in respect of each such person's undivided interest in each such property that was a capital property (other than depreciable property) of the partnership is such portion of the excess, if any, described in subparagraph 98(3)(b)(ii) as is designated by the person in respect of the property, except that

d'exister, augmenté de son pourcentage du total des montants qui constituent chacun le coût indiqué, pour la société de personnes, de chacun de ces biens, immédiatement avant leur attribution;

b) le coût que chacune de ces personnes supporte pour son droit indivis sur chacun de ces biens est réputé égal au total des montants suivants :

(i) le pourcentage, pour cette personne, du coût indiqué du bien pour la société de personnes immédiatement avant son attribution,

(i.1) lorsque le bien est une immobilisation admissible, le pourcentage, pour cette personne, des 4/3 du montant représenté par l'élément F de la formule applicable figurant à la définition de montant cumulatif des immobilisations admissibles au paragraphe 14(5) titre de l'entreprise de la société de personnes immédiatement avant le moment donné,

(ii) lorsque le montant déterminé en vertu du sous-alinéa a) (i) dépasse le montant déterminé en vertu du sous-alinéa a)(ii), le montant déterminé en vertu de l'alinéa c) relativement à son droit indivis sur ces biens;

c) la somme déterminée en vertu du présent alinéa, relativement au droit indivis de chacune de ces personnes sur chacun de ces biens qui étaient des immobilisations (autres que des biens amortissables) de la société de personnes, est la fraction de l'excédent visé au sous-alinéa b)(ii) qui est désignée par elle, relativement aux biens, sauf que :

- (i)** in no case shall the amount so designated in respect of the person's undivided interest in any such property exceed the amount, if any, by which the person's percentage of the fair market value of the property immediately after its distribution exceeds the person's percentage of the cost amount to the partnership of the property immediately before its distribution, and
- (ii)** in no case shall the total of amounts so designated in respect of the person's undivided interests in all such capital properties (other than depreciable property) exceed the excess, if any, described in subparagraph 98(3)(b)(ii);
- (e)** where the property so distributed by the partnership was depreciable property of the partnership of a prescribed class and any such person's percentage of the amount that was the capital cost to the partnership of that property exceeds the amount determined under paragraph 98(3)(b) to be the cost to the person of the person's undivided interest in the property, for the purposes of sections 13 and 20 and any regulations made under paragraph 20(1)(a)
- (i)** the capital cost to the person of the person's undivided interest in the property shall be deemed to be the person's percentage of the amount that was the capital cost to the partnership of the property, and
- (ii)** the excess shall be deemed to have been allowed to the person in respect of the property under regulations made under paragraph 20(1)(a) in computing income for taxation years
- (i)** en aucun cas la somme ainsi désignée relativement à son droit indivis sur un de ces biens ne peut dépasser l'excédent éventuel de son pourcentage de la juste valeur marchande de ce bien, immédiatement après son attribution, sur son pourcentage du coût indiqué de ce bien, supporté par la société de personnes, immédiatement avant son attribution,
- (ii)** en aucun cas le total des sommes ainsi désignées relativement à ses droits indivis sur toutes ces immobilisations (autres que les biens amortissables) ne peut être supérieur à l'excédent visé au sous-alinéa b) (ii);
- (e)** lorsque le bien ainsi attribué par la société de personnes était un bien amortissable d'une catégorie prescrite de la société de personnes et que le montant que représente le pourcentage, afférent à l'une de ces personnes, de la somme représentant le coût en capital de ce bien supporté par la société de personnes dépasse le montant déterminé en vertu de l'alinéa b) comme étant le coût, supporté par cette personne, de son droit indivis sur le bien, pour l'application des articles 13 et 20 et des dispositions réglementaires prises en vertu de l'alinéa 20(1)a):
- (i)** le coût en capital, supporté par elle, de son droit indivis sur le bien est réputé être son pourcentage de la somme représentant le coût en capital du bien supporté par la société de personnes,
- (ii)** l'excédent est réputé lui avoir été alloué au titre du bien selon les dispositions réglementaires prises en application de l'alinéa 20(1)a), dans le calcul du revenu pour les années

before the acquisition by the person of the undivided interest;

d'imposition antérieures à l'acquisition, par elle, de son droit indivis;

Disposition of an interest in a partnership

Disposition d'une participation dans une société de personnes

100(1) Notwithstanding paragraph 38(a), a taxpayer's taxable capital gain for a taxation year from the disposition of an interest in a partnership to any person exempt from tax under section 149 shall be deemed to be

100(1) Malgré l'alinéa 38a), un gain en capital imposable d'un contribuable, pour une année d'imposition, tiré de la disposition d'une participation dans une société de personnes en faveur d'une personne exonérée d'impôt en vertu de l'article 149 est réputé être formé du total des sommes suivantes :

(a) 1/2 of such portion of the taxpayer's capital gain for the year therefrom as may reasonably be regarded as attributable to increases in the value of any partnership property of the partnership that is capital property other than depreciable property,

a) la moitié de la partie de son gain en capital tiré de cette source, pour l'année, qu'il est raisonnable de considérer comme attribuable à l'augmentation de valeur de tout bien de la société de personnes qui est une immobilisation, sauf un bien amortissable;

plus

(b) the whole of the remaining portion of that capital gain.

b) la totalité de la partie restante de ce gain en capital.

Determination of tax consequences

Attributs fiscaux à déterminer

245(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

245(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d'une personne de façon raisonnable dans les circonstances de façon à supprimer l'avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d'une opération d'évitement :

(a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable peut être en totalité ou en partie admise ou refusée

(b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(c) the nature of any payment or other amount may be recharacterized, and

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d'un revenu, d'une perte ou d'un autre montant peuvent être

c) la nature d'un paiement ou d'un autre montant peut être qualifiée autrement;

d) les effets fiscaux qui découleraient par ailleurs de l'application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

DOCKET: A-399-16

STYLE OF CAUSE: HER MAJESTY THE QUEEN V.
OXFORD PROPERTIES GROUP
INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 11, 2017

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY DAWSON J.A.
RENNIE J.A.

DATED: FEBRUARY 1, 2018

APPEARANCES:

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Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Secure Energy Services Inc.*, 2022 Comp Trib 3
File No.: CT-2021-002
Registry Document No.: 100

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Secure Energy Services Inc.
(respondent)



Date of hearing by video-conference: January 28, 2022
Before Judicial Member: Phelan, J.
Date of order: February 15, 2022

**REASONS FOR ORDER AND ORDER REGARDING THE RESPONDENT'S MOTION
TO COMPEL THE COMMISSIONER TO PROVIDE PROPER AND COMPLETE
ANSWERS TO REFUSALS ON DISCOVERY**

I. NATURE OF MATTER

[1] This is Secure Energy Services Inc.'s [Secure/Respondent] motion [Secure's Motion] following the discovery of the Commissioner's representative. It was heard along with the Commissioner's motion to compel Secure to answer certain questions. The Tribunal has ruled on the Commissioner's motion. Ultimately Secure's Motion comes down to whether some or all of the questions identified in Schedule A to Secure's Motion should be answered. This Order will address the specific questions to be answered as well as the applicable principles regarding the types of questions. Many of the disputed questions related to information arising from the Commissioner's investigation of the Tervita/Newalta merger previously described in the Tribunal's decision related to the Commissioner's discovery motion.

[2] The Commissioner has taken the position that it is only required to answer questions about facts learned related to the Tervita-Newalta merger whereas Secure takes the position that the Commissioner has a broader obligation to answer questions based on the Commissioner's "information, knowledge and belief" – the usual discovery standard.

[3] Secure recognizes, properly I add, that certain types of questions are improper to ask of the Commissioner including those seeking expert opinion and analysis – sometimes a difficult distinction. Secure does not ask for new analyses to be performed but says that the Commissioner's refusals relate to the Commissioner's existing knowledge, information and belief about a completed transaction involving one of the merging parties in (arguably) the same product and geographic market.

[4] The Tervita/Newalta merger's relevance or potential relevance to the Secure/Tervita Merger [Merger] is obvious from the facts in issue and from the pleadings in the litigation. The Commissioner does not seriously dispute the relevance of the Tervita/Newalta merger to the issues in this case. It just seeks to shield itself from disclosing some of what it learned from its review of that merger.

II. CONSIDERATIONS

[5] Generally Secure's position better reflects the discovery obligations of a party in a Tribunal matter – including the Commissioner's. The Tribunal has taken a broad approach to the discovery obligation and has provided guidance, which I adopt, in *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2019 Comp Trib 3 [*Live Nation*], and *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 [VAA].

[6] The following quotes from *Live Nation* reflect the Tribunal's approach to the discovery obligation:

[6] ... It is now well-recognized that a liberal approach to the scope of questioning on discovery should prevail (*Lehigh* at para 30). What the parties and the Tribunal are both trying to achieve with examinations for discovery is a level of disclosure sufficient to allow each side to proceed fairly, efficiently, effectively and expeditiously towards a hearing, with sufficient knowledge of the case each

party has to meet (*The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16 (“VAA”) at para 46). If a party does not disclose relevant facts or information known to it until trial, the other side will be unfairly disadvantaged.

[7] ... FC Rule 240 provides that a person being examined for discovery must answer, to the best of the person’s knowledge, information and belief, any question that is relevant to the unadmitted facts in the pleadings.

[8] ... At the discovery stage, relevance is a generous and flexible standard (*Apotex Inc v Sanofi-Aventis*, 2011 FC 52 at para 19). Doubts on the issue of relevance are to be resolved in favour of disclosure, and questions will typically need to be answered unless they are clearly improper.

...

[10] That being said, even when questions do meet the standard of relevance, courts have nonetheless delineated some boundaries to the type of questions that may be asked on examinations for discovery. A party can properly ask for the factual basis of the allegations made by the opposing party and for the facts known by such party, but it cannot ask for the facts or evidence relied on by the party to support an allegation (VAA at paras 20, 27; *Montana Band v Canada*, 1999 CanLII 9366 (FC), [2000] 1 FC 267 (FCTD) (“*Montana Band*”) at para 27; *Can-Air Services Ltd v British Aviation Insurance Company Limited*, 1988 ABCA 341 at para 19). In *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff’d 2005 FCA 144 (“*Apotex*”), the Federal Court further established that witnesses are not to testify on pure questions of law: a fundamental rule is that an examination for discovery may seek only facts, not law. Accordingly, the following types of questions have generally been found not to be proper subject matters for discovery: (i) questions seeking expert opinion, (ii) questions seeking the witness to testify as to questions of law, (iii) questions seeking law or argument, as opposed to facts, and (iv) questions where the witness is being asked “upon what facts do you rely for paragraph x of your pleading” (*Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 2015 FC 1176 at para 19).

[11] ... The scope of permissible discovery will ultimately depend “upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles” (*Lehigh* at paras 24-25; see also VAA at paras 41-46).

[7] In outlining the broad scope of discovery applicable to parties, it is important to recognize the somewhat unique status of the Commissioner. This was touched upon at VAA, paras 43-44:

[43] Other factors colour the examination for discovery process in Tribunal matters. First, the Commissioner is a unique litigant in proceedings before the Tribunal. The Commissioner is a non-market participant and his representatives have no independent knowledge of facts regarding the market

and behaviour at issue. Rather, all of the facts or information in the Commissioner's possession, power or control arise from what he has gathered from market participants in the course of his investigation of the matter at stake. The Commissioner and his representatives do not have the direct and primary knowledge of the facts supporting the Application. This means that it may typically be more difficult and challenging for a representative of the Commissioner to exhaustively describe "all facts known" to the Commissioner.

[44] **Second, expeditiousness and considerations of fairness are two fundamental elements of the Tribunal's approach and proceedings.** Subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) directs the Tribunal to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit". Ensuring both expeditious litigation and adequate protection of procedural fairness is thus a statutory exigency central to the Tribunal's functions. The Tribunal endeavours to make its processes quick and efficient and, at the same time, never takes lightly concerns raised with respect to the procedural fairness of its proceedings. Furthermore, as I have indicated in the *VAA Privilege Decision*, since proceedings before the Tribunal are highly "judicialized", they attract a high level of procedural fairness (*VAA Privilege Decision* at para 159). It is well-established that the nature and extent of the duty of procedural fairness will vary with the specific context and the different factual situations dealt with by the Tribunal, as well as the nature of the disputes it must resolve (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 25-26; *VAA Privilege Decision* at paras 165-170).

[Tribunal's emphasis]

[8] The guiding principles for this discovery obligation are relevance and fairness as reflected in para 46 of *VAA*.

[9] While the Tribunal has recognized the limits on the source of the Commissioner's knowledge, information and belief, the Commissioner has the obligation to meet the discovery disclosure standard subject to usual issues of relevance, privilege and proportionality to name a few.

[10] In respect of relevance, discovery cannot be used as a tool to review the Commissioner's conduct of another merger investigation. The issue before the Tribunal is not the "reasonableness" of the Commissioner's decision to challenge this merger – it is not judicial review nor is it a review of the Commissioner's decision not to challenge the other related merger or any other merger. It is not about how the Commissioner conducted its investigations or the techniques used in those investigations. Whether they were proper and well conducted or botched is of no relevance to the Tribunal's consideration of the alleged substantial lessening of competition of this Merger.

[11] That being said, recognition that the Commissioner is not a typical litigant does not support the proposition that the Commissioner can be insulated from the basic tenets of discovery or of the

examination for discovery process (See *Canada (Director of Investigation and Research) v NutraSweet*, [1989] CCTD No 54 at para 35 [*NutraSweet*]).

[12] An important aspect of oral discovery is that of obtaining admissions from the opposing party. This process can involve probing inquiry of matters and issues (VAA, para 41).

[13] As explained in *NutraSweet* and in *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp Trib 17, Secure is entitled to be provided with the relevant factual information underlying the Commissioner's application and the allegations therein, to know the case it has to meet, to obtain sufficient information respecting specific facts in issue.

[14] As with all motions regarding refusals, one must examine the questions at issue, the context, and their true nature. The Tribunal must determine the true nature of the question posed and ensure that questions are not a disguised manner of trying to obtain that which is not permitted. As acknowledged at para 63 of VAA, requiring the Commissioner to outline the facts and sources cannot be a disguised way to requiring disclosure of the "fact relied upon" by the Commissioner.

[15] There is no magic formula for determining whether a question should be answered. It requires a review of the question as posed, the subject matter and the context.

[16] In keeping with the underlying principles of discovery including that ultimate relevance and weight will be determined by the hearing tribunal, this stage of the litigation favours disclosure.

[17] It is not a realistic premise that if there is true surprise by matters which should have been disclosed, an adjournment can be granted to allow the surprised party time to consider their position. While such remedy does exist, in these scheduled and time managed proceedings, the process of stopping the hearing and restarting is inefficient, disruptive and difficult for the parties and the Tribunal itself. Adjournment is a last resort, not a "going in" proposition.

III. QUESTIONS IN ISSUE

A. Customer based approach

[18] Q 156 asks whether the Commissioner used "the customer based" approach and more directly phrased, Secure is seeking an admission as to the Commissioner's knowledge which is a proper line of questions.

[19] Q 157, on the other hand, seeks to question the Commissioner's decisions during the inquiry process which is not pertinent and need not be answered.

B. Product/Geographic Markets

[20] Q 332 seeks an admission that the Tervita/Newalta merger involves the same products and market as the Secure/Tervita Merger. The question could have been approached in stages of

identifying the products of each and then comparing the answers. The question posed is a more efficient way to secure an admission on a relevant issue.

[21] Q 332 includes a follow-up question seeking any differences. Both aspects should be answered within the context of the Commissioner's knowledge, information and belief.

[22] Q 332 asks questions directed at how the Commissioner dealt with product markets internally. As such, it seeks information about how the Commissioner conducted the Tervita/Newalta merger review. The Commissioner's manner of conduct is not the issue in this litigation and the question need not be answered.

[23] Q 333: for the same reasons as Q 332, it need not be answered.

[24] Q 334: as this relates to geographic markets in the same way Q 332 related to product markets, it must be answered.

[25] Q 335 is directed at the internal workings of the Commissioner's office and is irrelevant.

C. Tervita/Newalta Merger

[26] Q 339 asks about the Commissioner's post Tervita/Newalta closing conduct and is irrelevant.

[27] Q 350 to 354 asks about how the Commissioner conducted his analysis of aspects of the Tervita/Newalta merger. It is not relevant. The current litigation is not a process of comparing investigative activities as between merger reviews.

D. Dead Weight Loss

[28] Q 355-358: the series of questions focuses on dead weight loss analysis. Dead weight loss is a key defence in this litigation. Apparently the Commissioner has knowledge, information or belief of aspects of dead weight loss in what is arguably the same product and geographic markets. To the extent that the questions do not require the production of expert opinion or engage privileged communication, the information is producible.

E. Other

[29] Q 359 – 361 raises similar questions in respect to demand elasticity and for the same reasons and subject to the same caveats as above, they are to be answered.

[30] Q 362 inquires into how the Commissioner conducted the Tervita/Newalta merger review and is irrelevant.

[31] Q 363 inquires into efficiencies considered in the Tervita/Newalta merger and to the extent that the Commissioner has knowledge, information and belief on this subject and Secure is seeking

an admission, the Commissioner is to answer. The fact that there may be expert opinion on a topic does not, in and of itself, form a valid grounds of refusal.

ORDER

FOR THE REASONS GIVEN, the Tribunal orders the following questions to be answered:

Q 156, 332, 334, 355 to 358, 359 to 361 and 363

DATED at Ottawa, this 15th day of February, 2022

SIGNED on behalf of the Tribunal by the presiding judicial member
Michael Phelan.

(s) Michael Phelan

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6

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 Tribunal¹ 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. Trethewey’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

<p>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).</p>	<p>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).</p>
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[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.

- VAA’s Statement of Purposes

[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 in 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 airside 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 something more than 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 some credible, objectively ascertainable basis in fact 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).

[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).

[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).

[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).

[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*

- The evidence

[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 dndata 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.

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.

Administrative monetary penalty

(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.

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.

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.

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.

Purpose of order

(3.3) The purpose of an order made against a person under

(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 \$.

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.

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.

Superior competitive performance

(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.

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.

Limitation period

(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

encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Efficienc e économique supérieure

(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

(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.

Prescription

(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)

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Competition Tribunal



Tribunal de la Concurrence

CT - 1989 / 003 – Doc # 463

IN THE MATTER OF an application by the Director of Investigation
and Research under sections 92 and 105 of the
Competition Act, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Imperial Oil Limited of
the shares of Texaco Canada Inc.

B E T W E E N:

The Director of Investigation and Research
Applicant

and

Imperial Oil Limited
Respondent

and

Attorney General of Quebec
Beacon Hill Service (2000) Ltd.
Atlantic Refining and Marketing Employees Association
and Atlantic Oilworkers Union, Local 1
Consumers' Association of Canada
Pioneer Petroleums
Claude Harnois Inc.
Barron Hunter Hargrave Strategic Resources Inc.
Attorney General of Newfoundland and Labrador
Pétroles Ronoco Inc.
The City of Victoria
Lyn-Den Distributors
Banff Bulk Fuels Ltd.
Texaco Retail Council, Halifax-Dartmouth Metropolitan Area
Cook's Oil Company Limited

Intervenors



REASONS FOR DECISION REGARDING JURISDICTION OVER UNDERTAKINGS

Date of Hearing:

November 4, 1994

Presiding Member:

The Honourable Mr. Justice Marshall E. Rothstein

Counsel for the Applicant:

The Director of Investigation and Research

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Atlantic Oilworkers Union, Local 1

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COMPETITION TRIBUNAL

REASONS FOR DECISION REGARDING JURISDICTION OVER UNDERTAKINGS

The Director of Investigation and Research

v.

Imperial Oil Limited

This motion is brought by the Atlantic Oilworkers Union, Local 1 ("Union"). In essence, the motion requests that the Tribunal act to prevent the closure of, or to require the sale of, the Eastern Passage refinery in Dartmouth, Nova Scotia. At present the refinery is owned by Ultramar Canada Inc. ("Ultramar"), which is currently in the process of closing it down.

As part of a 1990 consent order made by the Tribunal in respect of the acquisition of Texaco Canada Inc. ("Texaco") by Imperial Oil Limited ("Imperial"), the Director of Investigation and Research ("Director") and Imperial agreed, and the Tribunal ordered, that certain Texaco assets in the Atlantic region, including the Eastern Passage refinery¹, be divested by Imperial. The consent order provided that the Director have the authority to approve a purchaser of the refinery in accordance with certain considerations set out in the order. In approving the purchase of the refinery by Ultramar, the Director obtained undertakings from Ultramar which, among other things, provided that Ultramar would operate the refinery for a minimum of seven years, barring a "material adverse change". Now, after only four years, Ultramar proposes to close the refinery. The Union says that closure at this time is inconsistent with the undertakings given by Ultramar and asks the Tribunal to either ensure that Ultramar continues to operate the refinery for the full seven-year period or that Ultramar sells the refinery to another purchaser who will keep it operating.

¹ Defined in the consent order as "the Texaco refinery in Dartmouth and the Dartmouth marine terminal": *infra*, note 2 at 6.

The Union and the Director agreed that a preliminary question was the Tribunal's jurisdiction to deal with this matter. Among the other relief requested, the Union asks the Tribunal to assume jurisdiction over "the issues raised by the closure of the Eastern Passage Refinery and the enforcement of the [Ultramar] undertakings made to the Director of Investigation and Research". It was only this jurisdictional question which was argued before me on November 4, 1994, and at the conclusion of argument by counsel for the Union, I ruled from the bench that the Tribunal did not have jurisdiction to hear and decide the merits of the motion. The following are the reasons for my decision.

Background

To place the matter in context, some further background details are necessary. On February 6, 1990, the Tribunal issued the consent order in the matter of the acquisition of Texaco by Imperial². The purpose of the order is, as stated in paragraph 1, to ensure that the purchase of Texaco by Imperial "will not prevent or lessen, or be likely to prevent or lessen, competition substantially in the downstream sector of the Canadian petroleum industry."

The Director approved the purchase by Ultramar of the former Texaco assets in the Atlantic region in the fall of 1990. By letter dated September 24, 1990, Ultramar undertook to the Director that, with reference to the Eastern Passage refinery:

Ultramar intends to continue to operate the Dartmouth Eastern Passage refinery. Specifically:

- A. The refinery shall be kept operating for a minimum of seven years from the date of the closing of the purchase of the Texaco Canada Assets barring a material adverse change.

If a material adverse change occurs in this seven year period, Ultramar shall provide the director with a minimum 90 days' notice prior to taking any actions adversely affecting the continued operations of the refinery.

- B. Attached as Schedule "C" to these undertakings is a proposed investment programme for the Dartmouth refinery, which Ultramar will carry out in accordance therewith.

²*Director of Investigation and Research v. Imperial Oil Ltd.* (6 February 1990), CT8903/397, Consent Order, [1990] C.C.T.D. No. 3 (QL).

In the same document Ultramar agreed that its undertakings could, on application by the Director, be made part of a consent order of the Tribunal under section 105 of the *Competition Act*³.

By letter dated October 25, 1993, Ultramar provided further undertakings to the Director in respect of its acquisition of the Texaco Atlantic assets. These later undertakings stated that:

in the event that Ultramar Canada Inc., as required by the undertakings of September 24, 1990, provides notice to the Director respecting any action which will adversely affect the operation of the refinery, more particularly notifying the Director of its intention to cease operation of the refinery prior to the expiry of the seven year term provided for in the undertakings of September 24, 1990, Ultramar will, after having reviewed this matter with the Director, provide to the Director evidence establishing whether there is any reasonable, legitimate continuing interest on the part of a viable party in maintaining the refinery as an operating business in Canada. It will be sufficient to satisfy this undertaking if Ultramar establishes, to the Director's satisfaction, that it has publicly marketed the refinery, without unreasonable restriction on the price, and there is no legitimate expression of interest to purchase the refinery and continue its operation.

On May 10, 1994, Ultramar gave notice to the Director that it intended to take "adverse" action as set out in the 1993 undertakings. On May 16, 1994, Ultramar announced that, if a buyer was not found within 90 days, the refinery would be closed and converted into a marine terminal in the fall. At the same time, Ultramar put the refinery up for sale, but without the tankage and dock facilities, which it proposed to retain. To date the refinery has not been sold and the Union has been advised that most of the workforce will be laid off by November 18, 1994.

Reasons for Decision Regarding Jurisdiction

Counsel for the Union argues that the Tribunal has the jurisdiction to require the Director to enforce or to itself enforce the Ultramar undertakings in the manner in which those undertakings are interpreted by the Union. He submits that Ultramar has closed the refinery without complying with the undertakings because there has been no "material adverse change"; the investments in the refinery have not been made; and the refinery has

³R.S.C. 1985, c. C-34.

not been properly offered for sale. He further submits that the Director is unwilling to ensure compliance with the undertakings and that therefore the Tribunal must ensure compliance or order the Director to ensure compliance.

Counsel submits that the Tribunal has jurisdiction over this matter in two ways, pursuant to subsections 8(1) and 8(2) of the *Competition Tribunal Act*⁴, and pursuant to paragraph 37 of the consent order. Section 8 reads:

- (1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto.
- (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
- (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

Paragraph 37 of the consent order reads:

The Tribunal shall retain jurisdiction in this matter for purposes of addressing any matters in this Order where specific reference is made to the Tribunal, for purposes of variation and for any other purposes provided for in the Act.

Counsel emphasizes that portion of paragraph 37 which states that the Tribunal retains jurisdiction "for any other purposes provided in the Act." He argues that one of the purposes of the Act is the maintenance of competition and therefore the Tribunal has continuing jurisdiction over the matters which arise from the consent order and which relate to that purpose.

I agree with counsel for the Union that the Tribunal has a continuing jurisdiction to enforce its orders pursuant to section 8 of the *Competition Tribunal Act*. This has been clearly set out in the decision of the Supreme Court of Canada in *Competition Tribunal v.*

⁴R.S.C. 1985 (2d Supp.), c. 19.

Chrysler Canada Ltd., which dealt in particular with the power to enforce orders by way of contempt⁵. In this regard, I should observe that it is not evident to me that the position taken by counsel for the Director in his filed memorandum of argument, to the effect that only the Director is authorized to bring an application for enforcement of an order, is the correct one. While I have concluded that the Tribunal does not have jurisdiction to do what is requested in this particular motion, this decision does not rely on the fact that the person bringing the motion for enforcement is someone other than the Director.

Although the Union's argument relating to paragraph 37 is stated somewhat more broadly, it is my view that both the argument respecting paragraph 37 and the argument relating to section 8 of the *Competition Tribunal Act* rest on the same foundation. The Tribunal's jurisdiction to do what is requested by the Union must stem from the terms of the consent order of February 6, 1990. The fundamental question is, therefore, what the consent order provides, since it is the provisions of the consent order which are subject to enforcement by the Tribunal.

The particular paragraph of the order that deals with the Eastern Passage refinery is paragraph 14. As mentioned above, all the divestitures set out in the consent order were subject to the prior approval of the Director. In addition to that general regime, paragraph 14 provides additional constraints on the divestiture by Imperial of its Atlantic assets:

The divestiture of the assets in the Atlantic Region shall, to the extent reasonable and possible, be to a single purchaser who, in the Director's opinion, has the intention and the ability to become a vigorous and effective competitor in the

Atlantic Region. In exercising his rights of approval under this Order and in accordance with the provisions of the Act, the Director, in addition to the considerations with respect to acquisitions provided for in the Act, will have regard for:

- (i) the financial soundness of the proposed purchaser of the assets and their continued operation;
- (ii) the business plans of the proposed purchaser for continued maintenance and operation of the assets; and
- (iii) the availability to the proposed purchaser of technical and marketing expertise to continue operation of the assets on an integrated basis.

⁵ [1992] 2 S.C.R. 394.

Clearly there is no reference in paragraph 14 to undertakings as such. The Director did, however, require the September 24, 1990 undertakings as part of the process of granting his approval of the divestiture of the refinery to Ultramar. In a letter dated October 3, 1990, from counsel for the Director to the Tribunal, it was stated that "on the basis of the 1990 undertakings, the Director is satisfied that the terms of the Consent Order and of the *Competition Act* have been met."

Counsel for the Union acknowledges that the Director complied with the obligations explicitly placed upon him by paragraph 14 when he approved the Ultramar purchase with the September 24, 1990 undertakings. Nonetheless, counsel for the Union seeks to go further. He argues that the Director's actions in requiring the undertakings flowed directly from the consent order and that once the undertakings came into existence they were, in a sense, "incorporated by reference" into the consent order. A matter relating to compliance or non-compliance with those undertakings is therefore, he submits, within the jurisdiction of the Tribunal.

I agree that the undertakings obtained by the Director from Ultramar were the method by which he complied with the duties placed upon him by the Tribunal, as set out in paragraph 14. I cannot, however, agree that because the Director chose to carry out his obligations in this manner that the undertakings are themselves of the same nature and status as the actual words of paragraph 14 such that they should be treated as being incorporated by reference into paragraph 14. One of the problems with the Union's incorporation by reference argument is that had the Director chosen to fulfil his obligations under paragraph 14 of the consent order in a manner other than through the obtaining of undertakings, the words of paragraph 14 would not confer on the Tribunal the power to require him to obtain the undertakings that the Union is relying on here. Nothing in paragraph 14 suggests that undertakings are contemplated by the paragraph or that they automatically flow from the Director's obligations under the paragraph.

It is true that the Director did obtain the seven-year undertaking, among others. I recognize that the Director may have, by obtaining the undertakings, adopted certain continuing obligations and duties related to those undertakings. I do not, however, see

how it can be successfully argued that disputes arising from the interpretation of, or the compliance with, the undertakings are within the jurisdiction of the Tribunal to resolve or enforce. The Tribunal's jurisdiction must arise from paragraph 14 of the consent order. If the question before me was whether the Director, in granting his approval to Ultramar, did "have regard to" the conditions set forth in paragraph 14, then the Tribunal might well have jurisdiction. But counsel for the Union does not suggest that the Director has not complied with the express terms of paragraph 14. In my view, it requires an unwarranted stretch of the imagination to suggest that the wording of paragraph 14 extends the Tribunal's jurisdiction to the enforcement of undertakings that were given to the Director. Nothing in paragraph 14 expressly requires that the Director obtain undertakings, nor does it indicate that the Tribunal has a role to play in determining how the Director administers any undertakings that he obtains. If there is some complaint about how the Director is performing his duty as a public official in administering the undertakings, then recourse must lie elsewhere.

The structure of paragraph 14, as consented to by the parties and approved by the Tribunal, supports this view. Paragraph 14 sets out certain limits on the Director in approving a purchaser but within those limits he was given the discretion to approve the purchaser. It was open to the Tribunal to refuse to approve the consent order unless it contained a condition that any prospective purchaser of the refinery undertake to the Tribunal to operate the refinery for a specified length of time. Likewise, all matters pertaining to dealings with the refinery, such as closure, could have been made subject to prior Tribunal approval. Or the consent order could have stated that all such dealings would be subject to the approval of the Director *on condition that* he obtain specific undertakings regarding continued operation, which would have been reviewable by the Tribunal for noncompliance. None of these courses was followed.

Counsel for the Union argues that the Tribunal must intervene, in essence, to require the Director to enforce the undertakings. To not do so, he says, permits the Director to frustrate paragraph 14 of the consent order. The intent of paragraph 14, he argues, was that the Atlantic assets and, particularly the refinery, should continue to be operated in the interests of competition. He submits that the closing of the refinery and

the failure of Ultramar to offer the whole refinery for sale are inconsistent with the intent of the order.

I agree that, based on the history of the proceedings leading up to the issuance of the consent order, the Tribunal was concerned with the continued operation of the Atlantic assets in the interests of competition. This concern, however, does not convert the Ultramar undertakings to the Director into undertakings to the Tribunal or render the Director subject to the approval of the Tribunal in his handling of the undertakings. The Director is, after all, a public official with important responsibilities under the *Competition Act* for protecting competition in Canada. I must assume that the Tribunal dealt with its concerns about the operation of the Atlantic assets and competition in the Atlantic region to its satisfaction in paragraph 14 of the order. The Tribunal was apparently satisfied that the Director has the authority and the responsibility to decide, in the interests of competition, who could purchase the Atlantic assets and the conditions of that purchase, subject to the considerations specified in paragraph 14. As indicated above, it has not been suggested that there was non-compliance by the Director with the specified considerations. Outside of those considerations, the Director is not responsible to the Tribunal.

Further, it is necessary to keep in mind that I am here dealing with a consent order. The original application was brought before the Tribunal under section 105 of the *Competition Act*. The words of paragraph 14 were agreed upon between the parties. To suggest that the undertakings are incorporated by reference into paragraph 14 extends that provision beyond what was agreed upon. It is also relevant, in my view, that the undertakings are themselves consensual in nature. They represent an agreement between the Director and Ultramar. The only reference to the Tribunal occurs in the September 24, 1990 undertakings when Ultramar agrees that:

the terms of these Undertakings may, on application by the Director, be made part of a consent order of the Competition Tribunal under Section 105 of the Competition Act. These Undertakings constitute Ultramar's irrevocable consent to the issuance of such an order.

The decision to bring an application to make the undertakings part of a consent order is that of the Director.

I am of the opinion that my conclusion is supported by an examination of what the Tribunal would be asked to do, should it assume jurisdiction as requested by the Union. Counsel for the Union indicated that were he successful on both the jurisdictional question and on the merits, he would ask the Tribunal to order the Director to enforce the undertakings or to order Ultramar to either continue operating the refinery or to offer the entire refinery for sale. In either case, the end result is a Tribunal order which would compel Ultramar to do certain things. Ultramar, however, is not and has never been a party to the proceedings before the Tribunal. I think that it would be quite extraordinary if the Tribunal could unilaterally assume jurisdiction to enforce, or to require the enforcement of, undertakings against a person who is not a party to proceedings before the Tribunal.

In the course of argument, counsel for the Union suggested that if the Tribunal refused to assume jurisdiction as he requested, it would be abdicating its responsibility for the maintenance of competition in Canada. I do not agree. The *Competition Act* does not confer open-ended jurisdiction on the Tribunal to deal with any and all competition issues. It is given specific powers which are set out in the *Competition Act* and in the *Competition Tribunal Act*. It may only act where it has been given the power to do so. The scheme of the *Competition Act*, as it pertains to civil reviewable matters, provides that both the Director and the Tribunal have a role to play in achieving its purposes. The most clear indication of this is that the Director has virtually complete discretion over whether to make an application to the Tribunal. There is nothing contradictory between the objectives of the *Competition Act* and an order of the Tribunal which leaves to the Director the responsibility and opportunity to exercise his discretion to achieve those objectives.

For these reasons, I am of the opinion that the Tribunal does not have jurisdiction to enforce or to require the Director to enforce the Ultramar undertakings. The motion of the Union was therefore dismissed on November 4, 1994.

DATED at Toronto, this 10th day of November, 1994.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Marshall Rothstein
Marshall Rothstein

8

Competition Tribunal



Tribunal de la Concurrence

CT - 1991 / 002 – Doc # 72

IN THE MATTER OF an application by the Director of Investigation
and Research under section 79 of the *Competition Act*,
R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF certain practices by
Laidlaw Waste Systems Ltd.
in the communities of Cowichan Valley Regional District,
Nanaimo Regional District and the District of Campbell River,
British Columbia.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Laidlaw Waste Systems Ltd.

Respondent

**REASONS FOR ORDER**

Dates of Hearing:

October 28 - November 19, and December 16, 1991

Presiding Member:

The Honourable Madame Justice Barbara J. Reed

Lay Members:

Dr. Frank Roseman
Madame Marie-Hélène Sarrazin

Counsel for the Applicant:

Director of Investigation and Research

William J. Miller
Josée Touchette

Counsel for the Respondent:

Laidlaw Waste Systems Ltd.

A. G. Henderson
Kerry D. Sheppard
Patrick Selinger

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COMPETITION TRIBUNAL

REASONS FOR ORDER

The Director of Investigation and Research

v.

Laidlaw Waste Systems Ltd.

I. INTRODUCTION

An application is brought by the Director of Investigation and Research ("Director") pursuant to section 79 of the *Competition Act* ("the Act"),¹ for orders prohibiting Laidlaw Waste Systems Ltd. ("Laidlaw") from engaging in certain anti-competitive acts and for orders to redress the anti-competitive situation created by those acts. Subsection 1 of section 79 provides:

79. (1) Where, on application by the Director, 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,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

¹ R.S.C., 1985, c. C-34, as amended.

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Subsection 2 of section 79 authorizes the Tribunal to make orders to restore competition to the market. This is the second case brought under section 79 since its enactment in 1986. The first was *Director of Investigation and Research v. The NutraSweet Company*.²

II. CLASS OR SPECIES OF BUSINESS - PRODUCT MARKET

There is no dispute in this case as to the relevant product market. It is a specific category of waste collection and disposal service.

Solid waste collection and disposal services can be classified into three categories: the collection and disposal of garbage which has been placed in bags or cans, usually at curbside; the collection and disposal of garbage which has been placed in bins which remain on the customer's premises at all times; the collection and disposal of garbage which has been placed in very large containers which are transported to the dump site to be emptied.

The first type of service is usually required by residences, small apartments and those establishments which generate relatively small quantities of garbage. The vehicles used for this service are often of a rear- or side-load

² (1990), 32 C.P.R. (3d) 1 (Competition Trib.).

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configuration, usually containing a compactor, into which the bags of garbage are loaded manually.

The third type of service (roll-off or giant-haul service) is required by customers who generate large amounts of waste, some of it non-compactible. These customers are often industrial undertakings such as large factories or construction sites. The large containers (up to forty cubic yards in size) are loaded onto a flat-bed roll-off truck and, as has been noted, taken to the dump site for emptying. The empty container is then returned to the customer's premises unless it has been rented for one occasion only.

It is the second type of service which is the product in issue in this case. While it is sometimes referred to in the evidence as commercial service or front-end service, it is common ground that a more accurate description is lift-on-board service. This service is required by customers who generate a significant quantity of solid waste. These customers are often commercial enterprises such as restaurants, office buildings and campgrounds. The bins may be as small as two cubic yards or as large as twelve cubic yards. The vehicles used for collection are often front-load vehicles which lift the bin over the front of the truck by a hydraulic hoist. The waste material is thus emptied into the vehicle where it is compacted. These trucks while usually of a front-load configuration may also be of either a side-load or rear-load variety.

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Lift-on-board customers can be subdivided with respect to their size and method of purchasing. Some, who most likely sign the standard form contracts which are in issue in this case, are small enterprises often requiring no more than one bin for service. Others, who either because of the volume of service they require or because as public entities they are bound by certain purchasing standards, seek service only through a process of public tender. No argument has been made that a distinction should be made for product market definition purposes between these two and the Tribunal does not make any.

III. LAIDLAW'S CONDUCT

A. Acquisitions and Related Activity

Laidlaw's conduct which is the subject of this application can be described by reference to a number of geographic areas³ on the eastern side of Vancouver Island: the Cowichan Valley (Duncan) area; the Nanaimo area; the Courtenay-Comox-Cumberland area; and the Campbell River area.

(1) Cowichan Valley (Duncan) Area

In 1986 there were three lift-on-board disposal service companies in the Cowichan Valley (Duncan) area: C.W. Disposals Ltd. ("C.W."), Fox's Disposal

³ More fully described *infra* at 46-48.

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Service (1977) Ltd. ("Fox"), and PAN Garbage Disposal ("PAN"). C.W. was by far the largest player in the market. It held a municipal contract with the Corporation of the District of North Cowichan. Fox held a five-year contract with the Village of Lake Cowichan which it served together with some outlying areas. PAN was and is a very small family-run business operating to the south of Duncan.

(a) Acquisition of C.W. Disposals Ltd. - Restrictive Covenant

In May 1986, Laidlaw acquired the assets of C.W. The acquisition agreement included a restrictive covenant obligating the shareholders and chief operating officers of the company not to engage directly or indirectly in any waste disposal business, for a period of five years after the acquisition, anywhere within the province of British Columbia. The covenant provides alternatively for non-competition within a 300-mile radius of Duncan and in the further alternatives within a 200-mile radius, a 100-mile radius or a 50-mile radius of Duncan. An internal memorandum, dated May 21, 1986 and prepared by Laidlaw's in-house counsel, indicated that it was a 300-mile radius which had been agreed to despite the fact that the signed contract provides for a covenant extending over the whole province of British Columbia.

(b) Municipal Contract of C.W. Disposals Ltd. - Pre-emption by Laidlaw Waste Systems Ltd.

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The acquisition agreement also provided for the assumption by Laidlaw of the contract which C.W. held with the Corporation of the District of North Cowichan. That contract had been signed first in 1975. It had a one-year term which renewed automatically each year in the absence of notice by either party terminating the contract. The municipal council annually approved the prices to be charged to those who used the lift-on-board garbage disposal service. In December 1985 the council approved the rates which were to be charged for 1986.

While initially the municipality had billed the customers for the lift-on-board service, there is some evidence that in early 1986 it was expecting C.W. to take over this administrative task. This does not mean that the municipality was withdrawing from the contract but merely that it expected C.W. to assume certain administrative tasks related thereto. The council accepted Laidlaw as the successor to C.W. under this contract. It was known by June 1986 that the council planned, in the fall, to call for public tenders with respect to the contract. Before this could occur, however, Laidlaw managed to have many of C.W.'s ex-customers sign individual contracts with Laidlaw even though Laidlaw was at the time serving these customers pursuant to its contract with the Corporation. The council had asked Laidlaw to cease the practice but Laidlaw did not comply.

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When the tender for the municipal contract was called, Laidlaw suggested to the council that this process was futile since most of the individuals to whom the service was being provided were by this time directly under contract with Laidlaw. The council proceeded with the tendering process. Laidlaw took part in that process. Laidlaw was the high bidder. Fox was the low bidder. Laidlaw then questioned the authority of the council to award the contract since Laidlaw had individual contracts with many of the users of the service. Laidlaw threatened the council with a lawsuit. The council cancelled the tendering process and did not award a contract. The council took this course of action because it did not want the expense and political embarrassment of being involved in a lawsuit with Laidlaw.

(c) Fox's Disposal Service (1977) Ltd. Leaves the Market

In April 1987 the contract which Fox held with the Village of Lake Cowichan came up for retender. The Village decided to provide its own lift-on-board collection and disposal service for its inhabitants. This left only the outlying areas to be covered by the tender. Fox was the low bidder for the lift-on-board service but Laidlaw was the low bidder with respect to the residential portion of the collection service covered by the contract. Fox lost the contract to Laidlaw. Fox was thereafter out of business.

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(d) Advance Waste Systems Inc. - A New Entrant

Advance Waste Systems Inc. ("Advance") entered the lift-on-board business in the Cowichan Valley (Duncan) area in April 1987. Advance was financed by Daniel Jack McLeod. He had been operating a roll-off waste disposal service in the Duncan area for many years. The lift-on-board service of Advance was run on a day-to-day basis by Michael Wallace. After commencement of the business, Mr. Wallace was approached on several occasions by a representative of Laidlaw, Dean Woods, seeking to purchase the Advance lift-on-board business. Mr. Wallace was also harassed by Mr. Woods with verbal taunts regarding the future of Advance.

Part of Advance's marketing strategy was to emphasize the fact that it was a local company. In a communication to Laidlaw's customers, Mr. Wallace mistakenly referred to Laidlaw as "of Chicago, Illinois".⁴ He had seen Laidlaw referred to in that way in a newspaper article even though he thought Laidlaw originated in Hamilton, Ontario. In fact, Laidlaw Waste Systems Ltd. did go through several metamorphoses and, at one point in the early 1980s, it was listed as Laidlaw Industries Inc. on the NASDAQ Exchange in Chicago. Laidlaw responded to the Advance letter in a wildly overly aggressive manner by launching an action against Advance seeking damages for libel, injurious

⁴ Joint Book of Documents, vol. VII, tab F-2 at 9 (Exhibit VII).

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falsehood and interference with contractual relations. Mr. Woods again approached Mr. Wallace and sought to buy the Advance lift-on-board business. Mr. Wallace was told that if this business was not sold to Laidlaw, Laidlaw would ensure that Advance was put out of business. Mr. Wallace understood that part of the strategy for doing so involved the pursuit of legal action against Advance for the support of which Laidlaw was willing to spend \$100,000.

Eventually, on February 28, 1990, Mr. McLeod sold the Advance lift-on-board business to Laidlaw; it had been suggested to him that Laidlaw might begin operating in the roll-off business in the Duncan area.

(e) Acquisition of Advance Waste Systems Inc. - Restrictive Covenants

The acquisition agreement pursuant to which Laidlaw purchased the Advance lift-on-board assets in February 1990 requires Advance and its principal officers not to engage either directly or indirectly in the lift-on-board business, for a period of five years after the acquisition, within a geographic area commencing 15 miles north of Victoria and ending at the northern city limits of Nanaimo and extending 30 miles westward from the coastline of Vancouver Island between those limits.⁵ Laidlaw agreed not to operate any roll-off business within this same

⁵ The actual text of the covenant, although different in wording, is not different in substance:

Commencing at Goldstream Provincial Park, then following northward up the coastline of Vancouver Island to Parksville, then inland a distance of thirty miles, then returning down the Island staying a distance thirty miles from the coast until at the same parallel as Goldstream

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area for the same period of time. In fact, undoubtedly unknown to Mr. McLeod, Laidlaw was already under a restrictive covenant not to engage in the roll-off business in this area as a result of an agreement signed with Jones Disposal Services Ltd. in May 1986.⁶ Under the agreement with Advance, Laidlaw also obtained a right of first refusal to purchase Advance's roll-off business, should it decide to sell.

With the withdrawal of Advance from the lift-on-board business in the Cowichan Valley (Duncan) area, Advance ceased a small amount of business which it had been doing in Nanaimo for ex-customers of another company which had been purchased by Laidlaw, SCS Waste Systems Inc.⁷ After the acquisition of Advance the only competitor to Laidlaw in the Cowichan Valley (Duncan) area was and is PAN.

(f) Attempted Acquisition of PAN Garbage Disposal

Laidlaw tried on several occasions to acquire PAN. On one occasion Mr. McLeod was asked by Laidlaw to purchase PAN and turn it over to Laidlaw.

Provincial Park and then across to the Park. (Joint Book of Documents, vol. II, tab A-5-8 at 93 (Exhibit II)).

⁶ *Infra* at 19.

⁷ *Infra* at 20-21.

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PAN had refused to deal with Laidlaw. Mr. McLeod refused. Mr. McLeod was left with the impression that Laidlaw intended to move into the residential garbage collection business in the area in which PAN operates in order to bring prices down so low that Niko Pfaffe, who together with his wife owns and operates PAN, would be driven out of business. Mr. Pfaffe who has met Laidlaw as a competitor in the residential collection business has also been left with that message.

(2) Nanaimo Area

In 1986 there were three businesses providing lift-on-board service in the Nanaimo area: Nanaimo Disposal Service (1980) Ltd. ("Nanaimo Disposal"); Jones Disposal Services Ltd. ("Jones"); and United Disposal Ltd. ("United"). Laidlaw purchased Nanaimo Disposal in March 1986. It purchased the lift-on-board businesses of Jones and United in May and August respectively of the same year.

(a) Acquisition of Nanaimo Disposal Service (1980) Ltd.
- Restrictive Covenant

The acquisition agreement respecting Nanaimo Disposal contains a non-competition clause whereby the vendors (the company and its two principals) are obligated not to carry on either directly or indirectly any waste disposal business, for a period of five years after the acquisition, within a 300-mile radius of the City

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of Nanaimo or within a 300-mile radius of the City of Vancouver. An exception to this restriction allowed one of the principals, Calvin Fox, to continue to carry on a garbage disposal business in the District of Port Hardy. Port Hardy is 391 kilometres (250 miles) north of the City of Nanaimo.

(b) Acquisition of Jones Disposal Services Ltd. - Restrictive Covenants

The May 1986 acquisition agreement with Jones contained a non-competition clause obligating both the company and Norman Jones not to carry on directly or indirectly any commercial lift-on-board service or any residential side- or rear-load collection and disposal service, for a period of ten years after the acquisition, anywhere within the province of British Columbia. Laidlaw's in-house counsel's reporting letter indicates that a ten-year 300-mile radius had been agreed upon.⁸ At the same time, Laidlaw signed a companion agreement not to compete with Jones in the roll-off waste disposal business for ten years within a 50-mile radius of Nanaimo.⁹ Laidlaw sold the roll-off equipment it had acquired when it purchased Nanaimo Disposal to Jones and obtained a right of first refusal,

⁸ The restrictive covenants are again set out in a step arrangement, both in terms of time and in terms of area (within a 500-mile radius, a 400-mile radius, a 300-mile radius of the City of Nanaimo or anywhere on Vancouver Island; the alternative time periods descend in one year decrements to one year). There is some uncertainty from the materials in evidence as to exactly what covenants were in fact signed. Both executed and unexecuted versions exist and these differ. Also, the executed version does not seem to contain a time dimension but it is clear from the asset purchase agreement (Joint Book of Documents, vol. XIII, tab L-2 at 276 (Exhibit XIII (confidential)) and vol. II, tab A-5-4 at 56 (Exhibit II)) that a covenant for ten years was agreed upon.

⁹ This covenant was also of a "step" variety going from a 50-mile radius downward in decrements of ten to a ten-mile radius and in time from ten years to one year.

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for a ten-year period, to purchase Jones' roll-off business or assets should that company decide to sell.

(c) Acquisition of United Disposal Ltd. - Restrictive Covenant

The August 1986 acquisition agreement with United obligated that company and its two principals, Peter Kupiak and Ivan Paquette, not to compete either directly or indirectly in the waste disposal business, for a period of five years after the acquisition, within a 300-mile radius of Parksville (Parksville is 36 kilometres northwest of Nanaimo).¹⁰ After that acquisition there were no competitors to Laidlaw in the lift-on-board service in the Nanaimo area.

(d) SCS Waste Systems Inc. - A New Entrant - Acquisition
- Restrictive Covenant

In April 1987, SCS Waste Systems Inc. ("SCS Waste Systems") commenced business in the Nanaimo area. This business was started by Charles Saunders in conjunction with a steel container manufacturing business he operated under the name of SCS Steel Container Systems Inc. ("SCS"). That company manufactured a variety of steel containers used for waste disposal services including the bins used for lift-on-board service. Mr. Saunders

¹⁰ This covenant was also a "step" variety going from a 300-mile radius downward to a 50-mile radius.

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approached Laidlaw when he first started his container manufacturing business to see if that company would purchase containers from him. He was told that Laidlaw was not buying anything at the time and in any event it had its own source of supply for containers.

After SCS Waste Systems had been in the business for four months, a Laidlaw representative approached Mr. Saunders and he understood from that meeting that Laidlaw had \$265,000 for the purchase of new containers. He understood that Laidlaw would be willing to deal with SCS, but not while SCS Waste Systems was a competitor to Laidlaw.

SCS Waste Systems was sold to Laidlaw in August 1987. The acquisition agreement contains a non-competition clause obligating SCS Waste Systems, SCS and Mr. Saunders not to engage either directly or indirectly in the solid waste collection and disposal business, for a period of five years after the acquisition, within a 400-mile radius of the City of Nanaimo.¹¹ Since that time Laidlaw has purchased steel containers for its business from SCS. After SCS Waste Systems went out of business, as noted above, some of its customers approached Advance to see if that company would provide lift-on-board collection and disposal services in the Nanaimo area.

¹¹ This covenant was also of a "step" variety going from a radius of 400 miles downward to a 50-mile radius.

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(e) West Coast Waste Systems Inc. - A New Entrant - Invoking a Restrictive Covenant

In April 1989, Peter KUPIAK's brother, Jerry KUPIAK, started West Coast Waste Systems Inc. ("West Coast"). Jerry KUPIAK tendered on a recycling contract with the Regional District of Nanaimo. The details are not important; it is sufficient to note that on a retender, which included both lift-on-board service and the recycling service, West Coast was the low bidder.

It was assumed by the KUPIAK brothers that Peter KUPIAK could be involved in the business as recycling manager. They were aware of the restrictive covenant which Peter KUPIAK had signed with Laidlaw in connection with its acquisition of United but did not believe that the covenant prevented Peter KUPIAK's involvement in recycling as opposed to the traditional type of garbage collection in which United had been engaged. Laidlaw commenced an action against both Peter and Jerry KUPIAK as well as against West Coast, seeking an interim injunction to prevent any of them from engaging in the waste disposal business.

After obtaining legal advice the KUPIAK brothers realized that Peter KUPIAK's involvement in recycling was covered by the covenant. A letter, dated October 31, 1989, was written to the Regional District recognizing this obligation and giving a commitment that Peter KUPIAK would not be involved in the

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business. Jerry Kupiak also signed an affidavit, dated November 29, 1989, in response to Laidlaw's application for an interim injunction, stating that he and his brother now understood the scope of the covenant and that Peter Kupiak would not be involved in the business. Despite this commitment, Laidlaw pursued the action and had a consent judgment issued against Peter Kupiak on February 20, 1990. There is no evidence that Laidlaw communicated with the Kupiak brothers regarding its concerns about the covenant prior to starting its action for an injunction.

A Laidlaw manager also wrote to the Regional District on September 11, 1989:

I am writing in follow up to the opening of Tender 89-102.

I am quite concerned, as in the past I have seen a similar situation where a low bidder was chosen when there was reason to believe they would be unable to perform.

The situation took place in Delta where Laidlaw had been serving for a number of years. ...

We attempted to explain to the decision makers that it was below cost for the service they were anticipating but they went with the low bid.

Since then, the poor performance and lack of funds has been headline news in that community.

...

The Council has had a political problem on its hands and is now contemplating retendering in lieu of the requested increase.

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The stress on the system and inconvenience on the taxpayer has left those involved with a desire to roll back the clock.

Here in Nanaimo there is a chance to avoid the same problem. ...

...

I would suggest that the Regional District of Nanaimo does not want the problems attendant with an underbid contract that is so significant.¹²

Employees of the Regional District received a subsequent communication from Laidlaw, dated October 31, 1989, suggesting that it would be reasonable if the District decided to retender, particularly given the fact that Peter Kupiak was now not going to be involved in West Coast. The contract was not retendered. West Coast was awarded the contract. West Coast is still in business in the Nanaimo area. The uncertainties created by Laidlaw's legal action against the Kupiak brothers and West Coast, however, delayed the signing of the contract with the Regional District for over a year. The contract was not finally signed until September 24, 1990 and service thereunder was not begun until January 8, 1991.¹³

In addition to West Coast, Browning-Ferris Industries ("B.F.I.") is also presently attempting to establish itself as a competitor in the Nanaimo area. In the spring and summer of 1990 it obtained two tendered contracts: one is a

¹² Joint Book of Documents, vol. VII, tab F-1 at 150-51 (Exhibit VII).

¹³ Transcript at 116-17 (28 October 1991).

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Department of National Defence contract and the other a Regional and City School Board contract. There is evidence that these were bid not with the primary objective of making a profit but in order to get a foothold in the market in that area.¹⁴

(3) Courtenay-Comox-Cumberland Area

(a) Attempted Acquisition of Lacey Garbage Disposal Limited

There are two disposal services in the Courtenay-Comox-Cumberland area: Lacey Garbage Disposal Limited ("Lacey") and Valley Disposal Limited. Lacey is by far the larger company, holding contracts with the City of Courtenay, the Town of Comox and Canadian Forces Base Comox. Laidlaw approached Lacey on several occasions to see if that company was interested in selling. This initiative was temporarily dropped. Lacey was given to understand that its asking price was too high. Laidlaw had learned that in the event of a purchase it was unlikely that the City of Courtenay would assign the Lacey garbage collection contract to Laidlaw. Laidlaw has on subsequent occasions sought to purchase Lacey, often just before one or other of the contracts that Lacey holds came up for retender.

¹⁴ Transcript at 360ff (29 October 1991).

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(4) Campbell River Area

(a) Acquisition of Borgfjord Trucking (1986) Ltd. and Campbell River Sanitation Service Ltd. - Restrictive Covenants

In the spring of 1986 there were two competitors in the Campbell River area: Borgfjord Trucking (1986) Ltd. ("Borgfjord") and Campbell River Sanitation Service Ltd. ("Campbell River Sanitation"). Laidlaw purchased Borgfjord and Campbell River Sanitation on the same day, May 1, 1986. The agreement with Borgfjord contained a non-competition clause under which that company and its two principals agreed not to directly or indirectly engage in any solid waste disposal business, for a period of five years after the acquisition, within a 500-mile radius of Campbell River. The agreement with Campbell River Sanitation contained a clause which required the company and its three principals not to carry on directly or indirectly any waste disposal business in competition to Laidlaw, for a period of five years after the acquisition, anywhere within the province of British Columbia. Laidlaw's in-house counsel's reporting letter indicates that only a 300-mile radius had been agreed to in the case of Campbell River Sanitation even though the signed contract provides for the broader term.¹⁵

(b) B & D Disposal Ltd. - A New Entrant

¹⁵ Both covenants are of a "step" variety descending in 100-mile decrements with a 50-mile radius being the smallest.

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In March 1988 a new company commenced offering lift-on-board service in the Campbell River area: B & D Disposal Ltd. ("B & D"). This company was run by Dwight Bakken and Brian Preston. Mr. Bakken was motivated to get into the business by an experience he had had with Laidlaw. He had spoken to a Laidlaw representative to obtain garbage pick-up for his residence. He was asked to pay for service twelve months in advance. He did not consider this request appropriate and was further outraged by remarks which he remembers as indicating that there was no competition to Laidlaw in the market and therefore he had no choice.

(c) Acquisition of B & D Disposal Ltd. - Restrictive Covenant

In any event, Mr. Bakken and Mr. Preston commenced business and the business grew, initially at least. In June 1989, Mr. Bakken was forced to leave the business as a result of personal financial difficulties. Mr. Preston decided he could not carry on alone. His new partner was not as experienced as Mr. Bakken. Mr. Preston had other businesses and could not afford the time and effort to make B & D a viable operation. He attempted to find a purchaser other than Laidlaw and was unable to do so. He sold B & D to Laidlaw on September 1, 1989. The agreement contained a non-competition clause obligating B & D and its two principals (at the time Brian Preston and Kenneth Pople) not to engage either directly or indirectly in the solid waste disposal business, for a period of five

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years after the acquisition, within a 100-mile radius of the municipal boundaries of Campbell River.

In May 1990, Bernard Bakken, brother of Dwight Bakken, and his partner Claude Vermette started a lift-on-board disposal business in Campbell River under the name Camvest Disposals ("Camvest"). They are presently trying to establish this business in that area.

B. Laidlaw's Contracting Practices

(1) Signing the Contracts

Immediately after acquiring the lift-on-board collection and disposal assets of the above companies, Laidlaw approached the customers of those firms to have them sign service contracts (customer service agreements) with Laidlaw. This was done, when possible, by using the locally known owner/operator of the acquired company.¹⁶ That individual was asked to approach his "ex-customers" to explain that he had sold his business to Laidlaw and that Laidlaw's corporate practice was to obtain a signed container service agreement from its customers. In addition, Laidlaw would at times organize "sales blitzes" and bring in sales personnel from

¹⁶ Transcript at 319-23 (29 October 1991) and at 505-11 (30 October 1991).

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outside the local area to assist in signing customers to contracts or to assist in obtaining renewals of existing contracts. Laidlaw would seek the renewal of contracts, at times, long before their expiry date. A disturbingly recurring theme through much of the evidence before the Tribunal was that signatures on many of these contracts had been obtained by representing to the customers that the documents they were being asked to sign were "a mere formality", or because it was "the national corporate practice which Laidlaw followed", or because Laidlaw simply wanted "to up-date its information", or because the acquisition entailed switching information to Laidlaw's computer system and it was necessary "to verify where the various containers were located". The issue in this case does not require a determination as to how many of these contracts were obtained through misrepresentation. The above details are set out merely for the purpose of setting the context within which many signatures were obtained.¹⁷

(2) Terms of the Contracts

The contracts thus signed were for a three-year term. After three years the contract would automatically renew ("evergreen clause") unless notice had been given by registered mail 60 days before the expiration of the three-year period. There is no provision limiting the number of times the contracts are to roll over in this way. If the customer wished to terminate because he or she was going out of

¹⁷ Transcript at 268-75 (29 October 1991).

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business or was relocating to an area in which Laidlaw did not provide lift-on-board service, then the contract could be terminated on 30 days notice.¹⁸ If Laidlaw wished to terminate because a customer refused to accept a proposed price increase, then this could be done by giving the customer 30 days written notice under some contract forms, or ten days written notice in more recent versions. The most recent version has no notice provisions.

Laidlaw's standard form contract changed from time to time and all versions presently exist in the market as a result of the evergreen clause and because, even after the issuance of new contract forms, the older forms were often used until the supply was exhausted.

The contracts used in 1986 contained a clause which obligated the customer, even if the contract had been terminated, to take service from Laidlaw if Laidlaw was willing to meet a competitor's terms and conditions of service (right of first refusal clause):

If, during the term of this Agreement or of any renewal period (and regardless whether the Customer has given notice of termination under this Agreement) or during a period of 90 days after the termination of this Agreement, the Customer receives a bona fide offer from another supplier for the provision of solid waste disposal services or if the Customer wishes itself to make a bona fide offer to another supplier, then the Customer shall not accept or make such offer unless the Customer first offers to enter into an agreement with the Company [Laidlaw] on the same or

¹⁸ Early versions of the standard form contract do not contain an express provision in this regard.

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equivalent terms and conditions with respect to monthly charges, number and size of bins, frequency of service, date of service, and term (including renewal periods) as are contained or are to be contained in such bona fide offer. The Customer's offer to the Company shall be in writing, delivered by hand or by registered mail, and shall be open for acceptance for 14 days following actual receipt by the Company. If the Company accepts the Customer's offer, the Customer shall execute the Company's then standard Container Service Agreement containing the terms and conditions agreed to....¹⁹ (underlining added)

This was subsequently changed to a right to compete clause:

Customer grants the Company the right to compete with any bona fide offer which Customer receives or intends to make during the term of this Agreement or of any renewal period relating to the provision of non-hazardous solid waste disposal services after the termination of this Agreement. Customer shall notify Company forthwith in writing if Customer receives or intends to make any such bona fide offer, disclosing to the Company all of the terms and conditions thereof. Customer shall not accept or make such offer for the period of fourteen (14) days after such notification and, if the Company within fourteen (14) days of such notification submits an offer of its own Customer shall consider the Company's offer, but is not bound to accept it. Nothing stated in this clause shall be interpreted as relieving the Customer of its obligation to comply strictly with the provisions of this Agreement until such time as this Agreement has been terminated in accordance with its terms.²⁰ (underlining added)

This clause was eventually dropped from Laidlaw's standard form contract in 1991 insofar as the Vancouver Island markets are concerned. Laidlaw took the position before the Tribunal that it did not intend to try to enforce the clauses in existing contracts. However, no notice of this had been given to Laidlaw's

¹⁹ Joint Book of Documents, vol. V, tab D-1 at 1 (Exhibit V).

²⁰ *Ibid.* at 3.

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customers in the markets under consideration prior to the hearing of this application.

Certainly, there is no disagreement that these clauses are anti-competitive. Requiring a customer to provide information about bids from other companies allowed Laidlaw to know who was competing with it and on what terms before the competitor could succeed in obtaining a single customer from Laidlaw. Laidlaw therefore did not have to respond to competition by lowering prices generally. It could target price reductions only on the customer that a competitor was seeking to acquire, thereby reducing the costs of using predatory or disciplinary pricing to discourage price competition. In addition, these kinds of clauses prevent secret price-cutting which is widely recognized to be an important means of maintaining competitive markets. Since it has been agreed that these clauses will be dropped, they will not be referred to again for the purposes of these reasons except when the remedies which are requested are discussed.

Although the contracts with customers specifically mention the number of bins, the size thereof and the frequency per week with which they were to be emptied, the contracts also purport to bind the customer to employ Laidlaw for *all* its garbage disposal purposes:

Customer agrees that the Company shall have the sole and exclusive right to pick up and dispose of all

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garbage and other refuse during the currency of this agreement.²¹ (underlining added)

Other versions read:

This agreement shall include collection and disposal of all solid waste generated by Customer excluding radioactive, volatile²²(underlining added)

and

During the term of the Agreement, Customer shall solely and exclusively use Company's Equipment and Service for the collection, removal and disposal of all of its non-hazardous solid waste.²³

This was used, for example, to prevent one customer (Bayside Inn Resort) from participating in a pilot recycling project with respect to part of its garbage at a time when Laidlaw did not provide such service.²⁴ It was used to attempt to prevent another customer (Island Hall Beach Resort) from using a competitor to service two bins located close to the hotel kitchen when that customer's contract with Laidlaw, on its face, only referred to service for one bin located close to the Crossroads Pub²⁵ which was also part of the resort complex.

²¹ *Ibid.* at 1.

²² *Ibid.* at 2.

²³ *Ibid.* at 3.

²⁴ Transcript at 434-35 (30 October 1991).

²⁵ Transcript at 736ff (31 October 1991).

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The price to be charged under the contracts can be increased automatically if landfill site dumping fees charged to Laidlaw are increased. Price increases for reasons not covered by the automatic price increase clause can be charged if the customer consents. Customers are assumed to consent unless on receipt of notice they specifically notify Laidlaw that they object to the price rise (a negative option clause). The early contract forms required Laidlaw to give the customer a 30-day notice of a proposed price rise. The 30-day notice requirement was changed in later contract forms to a 15-day notice. On some occasions at least the notice given to customers was nothing more than a statement in the bottom corner of one month's invoice that a price rise was going to be added to the following month's bill. If the customer did nothing to object and the invoice containing the price rise was paid, the customer was deemed under the contract to have agreed to the price rise.

The most recent of the contract forms is structured differently. The automatic price increase clause covers not only increases in landfill site dumping fees but also increases in taxes, duties, levies, fuel costs, certain administrative fees and "other costs of doing business". No notice of proposed increases is required to be given with respect to price rises for other reasons. The forms simply state that price increases which the company proposes and which are agreed to by the customer will be incorporated into the contract. Consent to increases is said to be "evidenced by the action and practices of the parties." If

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Laidlaw interprets the customer's paying of a bill to which a price increase has been added as an action implying agreement, then this contract also contains a negative option clause. A negative option clause under this most recent standard form contract will of course be less important because of the increased number of items and their open-ended nature for which automatic cost increases may now be charged.

There is evidence to indicate that Laidlaw used the occasion of landfill dumping fee increases to raise its price to customers in an amount which considerably exceeded a straight flow-through of the increased dumping fees charged to Laidlaw.²⁶

If a customer, despite the three-year term, insists that the contract be terminated, some versions of the contract provide for the payment of liquidated damages in an amount six times the customer's average monthly charge.²⁷ This clause was changed in more recent contracts to provide for an amount equal to 30% of the customer's charge for the month preceding default multiplied by the number of months remaining under the contract.

²⁶ Based on Mr. Woods' evidence regarding measured weight and the comparison of Laidlaw's additional costs and those required to be paid by the customer.

²⁷ Again, the early standard form contracts do not contain this provision.

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Although the details differ, Laidlaw's contracts contain many elements which are also found in the standard form contracts used by the two other major international garbage collection firms, Browning-Ferris Industries ("B.F.I.") and Waste Management Inc. ("W.M.I."). Indeed, some forms of contracts were adopted by Laidlaw in response to B.F.I.'s contracting practices.

(3) Enforcement of the Contracts

As has been noted, often customers did not know they had signed a contract with Laidlaw. One such form contains almost no indication on its face that it is a contract. There is an indication in very minute printing that general conditions concerning the agreement are found on the reverse side of the paper. It is on this reverse side that one finds the terms of the contract described above. Since customers were not always aware that they had a written contract with Laidlaw, when they were approached by a Laidlaw competitor seeking their business or if disgruntled by Laidlaw's service or price and seeking an alternate supplier, they would purport to cancel what they thought to be their verbal contract with Laidlaw and hire the competitor. It would then be brought to their attention that a written three-year contract existed.

In the meantime it is possible that the competitor had placed a bin on the customer's premises and started to provide service to that customer. Both the

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customer and the competitor would then be told by Laidlaw that a contract with Laidlaw existed and the potential competitor would have to remove its bin and cease serving the customer. The chilling effect this had on competition is amply illustrated by the evidence of Peter Kupiak concerning the experience of West Coast,²⁸ Jack McLeod concerning the experience of Advance,²⁹ and Brian Preston concerning the experience of B & D.³⁰ The difficulties encountered as a result of the Laidlaw contracts led them to discontinue actively seeking new customers. Instead they waited to be approached by potential customers.

When a customer attempted to obtain service from another hauler, the customer was likely to receive a letter from Laidlaw as follows:

We are forwarding a copy of your existing contract to your attention, on the off chance that you were not aware of the service contract.

We would ask you to review terms and conditions governing the contract which is in force.

We are continuing and will continue to provide service as per our contractual obligation and respectfully request that you, our customer do the same.

...

Thank you in advance for your continued business.³¹

²⁸ Transcript at 121-23, 142-44 (28 October 1991).

²⁹ Transcript at 611, 620 (30 October 1991).

³⁰ Transcript at 1220ff (4 November 1991).

³¹ Joint Book of Documents, vol. V, tab D-5 at 13 (Exhibit V).

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Alternatively or additionally, if the customer persisted, a letter would be sent by

Laidlaw's local legal counsel to the customer's lawyer:

I act for Laidlaw Waste Systems Ltd. and have been provided with a copy of your letter to my client's Nanaimo division, dated November 1, 1988.

...

It is apparent that your client has contrived an excuse to cancel its Container Service Agreement and that it has done so because of a competitive price quote from Advance Waste Systems Inc. This occasionally happens and has consistently prompted Laidlaw to sue for damages for breach of its Container Service Agreement. I have personally handled several such actions and can tell you that none has been dismissed to date. If Mr. Andrinopolos winds up paying Laidlaw damages for breach of contract, he will inevitably find that the expected short-term price reduction will disappear.

I am writing in the hope that your client can be persuaded to abide by his Container Service Agreement with Laidlaw to the end of its current term on February 16, 1990. The alternative is an action by Laidlaw for damages for breach of contract, in the context of which we do not believe your client's complaints of poor service will stand up to scrutiny.³² (underlining added)

In fact, Laidlaw's practice in the Vancouver Island markets seems to have been one of not pursuing litigation against customers. No evidence was adduced of any action against a *customer* having been commenced to enforce the contracts. Only the threat of litigation was used.

³² *Ibid.* at 16-17.

³³ Transcript at 1477 (6 November 1991).

^{33.1} The Tribunal thinks it is important to point out that the counsel who wrote these letters was not in any way connected to or associated with the counsel who appeared for Laidlaw in these proceedings.

In addition to writing to the customer or the customer's lawyer, Laidlaw's local legal counsel^{33.1} would also write to the competitor. An example of this type of letter follows:

I have been asked to bring to your attention two recent incidents of unlawful competition by Advance. First, Advance has initiated service to Katerina's Place at 15 Front Street, in Nanaimo, notwithstanding that the customer has a valid and subsisting Container Service Agreement with Laidlaw. The customer has purported to cancel the Laidlaw Container Service Agreement on the ground of poor service, but this excuse is entirely contrived. ...

I enclose for your reference copies of the two Container Service Agreements in question. You will see that both contracts are for terms of three years and can be cancelled only at the end of a contract period and only by 60 days' prior written notice by registered mail. Both contracts remain in force, and Laidlaw intends to see that they are enforced, if necessary by litigation against both the customers and your client. Laidlaw has pursued many such actions against its customers over the last few years and has not been unsuccessful to date. ...

Unless Advance's containers are removed from these two sites immediately, Laidlaw will have no alternative but to take action against the two customers in question for breach of contract and against Advance for inducing breach of contract. In addition, Laidlaw will seek an injunction against

Advance, if a pattern of unlawful interference becomes apparent.³⁴ (underlining added)

Another such letter reads as follows:

Almost all of Laidlaw's customers have entered into written Container Service Agreements, virtually all of which have a minimum term of three years. This is standard in the industry. This means that, any time your client calls on a prospective customer and finds that the customer is at present being serviced by Laidlaw, there is a very high probability that the customer has an existing contract with Laidlaw. It would therefore be unlawful for your client to invite such a customer to enter into a service contract with your client, unless of course the term of your client's contract was not to commence until the expiration of the existing Laidlaw contract. Such unlawful competition has been the subject of litigation between major waste disposal suppliers in the Lower

³⁴ Joint Book of Documents, vol. IX, tab H-4 at 137-38 (Exhibit IX).

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Mainland, and I am aware of at least two injunctions that have been pronounced to restrain unlawful interference in a competitor's contractual relations.

Laidlaw does not want to have to sue to protect its patronage, but it is certainly prepared to do so. Would you kindly raise this matter with your client and urge your client not to interfere with any of Laidlaw's existing contracts. Your client can safely assume that there is an existing contract in all cases where a Laidlaw container is on site. If either your client or the customer in question is uncertain whether a Laidlaw contract exists, the customer or your client need only contact Mr. Dean Woods at Laidlaw's office in Nanaimo to be provided with an answer.³⁵ (underlining added)

As has already been noted, in May 1990, Claude Vermette and Bernard Bakken started a lift-on-board service in Campbell River under the name Camvest Disposals. Vermette and Bakken began to solicit customers for this business before its May 3, 1990 opening by placing advertisements in the local newspaper and by calling on potential customers. They received a number of favourable responses and on commencement of their business placed bins on the premises of those individuals who had decided to become their customers. Many of these individuals had contracts with Laidlaw and did not realize it. Camvest began to get letters from Laidlaw with copies of contracts attached and, in general, removed its bin unless the customer indicated otherwise. On May 16, 1990, Camvest received a letter from Laidlaw's local legal counsel indicating that he had been advised by Laidlaw that Camvest was inducing Laidlaw's customers to breach their contracts:

³⁵ *Ibid.*, tab H-1 at 25.

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We demand that you remove your waste containers from the customers' premises immediately. If the waste containers are not removed immediately, we will seek our client's instructions to bring an injunction application against you. We will seek an Order that you be prevented from placing any of your waste containers on premises where Laidlaw already has waste containers in place. We will also be seeking an Order that the containers already placed on the premises of Laidlaw customers be removed forthwith. Of course, we will also seek damages and costs of the action against you.³⁶

On June 7, 1990, Laidlaw commenced an action against Camvest seeking both an interlocutory and a permanent injunction to prevent Camvest from placing containers on premises where a Laidlaw container existed and to require Camvest to remove the bins it had already placed. Damages for inducing breach of contract were also sought. This was supported by an affidavit listing eleven customers who had allegedly been induced to breach their contracts with Laidlaw. Attached were the relevant copies of the Laidlaw contracts. The eleven customers responded by filing affidavits stating that Camvest had not induced any of them to break their contract with Laidlaw. One such affidavit reads, in part, as follows:

4. THAT in about March, 1990, I advised Laidlaw Waste Systems Ltd. (hereinafter referred to as "Laidlaw") that I would no longer be requiring their services. I advised Laidlaw that I would be using the services of Camvest Disposals it started (*sic*).

5. THAT at the time I cancelled, Laidlaw claimed that I had a contract with them but I do not believe that I had any contract with Laidlaw. If I had one, I was unaware of it.

³⁶ Joint Book of Documents, vol. X, tab H-7 at 14-15 (Exhibit X).

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6. THAT approximately one month after I had advised Laidlaw I would not need their services any longer, a representative of Laidlaw attended at our office and had my wife sign a three year contract, a copy of which is marked as Exhibit "P" to the Affidavit of William Alexander Muise. My wife attends the office only about once per week. She was unaware of what she was signing. Laidlaw obtained a contract signed by my wife knowing full well that Greenstone Creek Logging Ltd. was no longer going to be using their services.³⁷

Another affidavit reads in part:

1. THAT I am the owner/operator of M & H Kitchens.
2. THAT I deny advising William Alexander Muise that I was under any pressure to enter into a contract with Camvest Disposals.
3. THAT I terminated my contract with Laidlaw Waste Systems Ltd. (hereinafter referred to as "Laidlaw") after obtaining legal advice by reason of Laidlaw's breach of that contract by raising monthly charges without authorization. A copy of my lawyer's letter dated May 29, 1990 is attached hereto and marked Exhibit "A".
4. THAT neither Camvest Disposals nor any of its agents or representatives in any manner induced, persuaded, encouraged, pressured or suggested that I breach my contract with Laidlaw. There was no interference by Camvest Disposals with any contractual relations between Laidlaw and M & H Kitchens.
5. THAT I asked Laidlaw to remove their waste container from my premises but Laidlaw has failed or refused to do so. I wish their waste container removed.³⁸

Laidlaw's application for an interlocutory injunction was refused but the judge who heard that application indicated that there was a serious issue to be tried with respect to the dispute. This would be dealt with on the hearing of the claim for a permanent injunction and damages. Laidlaw filed an appeal of the decision

³⁷ *Ibid.* at 128-29.

³⁸ *Ibid.* at 138.

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refusing an interlocutory injunction. In reporting to Messrs. Vermette and Bakken on these developments, their counsel indicated that he was making an attempt to negotiate a settlement with Laidlaw and to come to "some agreeable manner of doing business". The attempt to reach a negotiated settlement was prompted by the fact that a considerable amount of money had already been spent by Camvest in defending the application for an interlocutory injunction and Camvest could not support extended legal fees. Camvest's costs to that point were in excess of \$8,000 and are now in excess of \$14,000. Camvest's counsel reported that the response he received to his attempt to obtain a settlement was: "Laidlaw's lawyer feels they have to proceed with the appeal and injunction application". Negotiations for settlement did continue, however, but before either a settlement could be agreed upon or the appeal could be heard, Camvest became aware of the Bureau of Competition Policy's investigation into Laidlaw's activities. Neither the appeal nor the application for a permanent injunction has been pursued.

IV. AN AREA OF CANADA - GEOGRAPHIC MARKET

Subsection 79(1) of the Act only applies if the respondent "substantially or completely controls" the relevant class or species of business "throughout Canada or any area thereof." In order to determine whether complete or substantial control exists it is necessary to define the market, both its product and geographic dimensions, within which the control is alleged to operate. As has been noted

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above, the product market dimensions are not in dispute. The product is the provision of lift-on-board garbage collection and disposal service. There is considerable dispute, however, about the geographic dimensions of the market.

A. Description of the Area

The geographic area relevant for the purposes of this case is a longitudinal portion of the eastern side of Vancouver Island. It stretches, in general, along Highway No. 1 (north from the City of Victoria to the City of Nanaimo) and Highway No. 19 (from the City of Nanaimo to the District of Campbell River and then to the Village of Sayward). Population is clustered at intervals along the spine created by these highways. The first significant population centre north of Victoria is the City of Duncan (population approximately 4,100). It is 60 kilometres from Victoria. A dump site is located south of Duncan (TRP No. 2).³⁹ North of Duncan are a number of small communities which fall into the District of North Cowichan (population approximately 20,000) and immediately north of that is the Town of Ladysmith (population approximately 5,000). Ladysmith is 28 kilometres from Duncan. A landfill site exists just south of Ladysmith (TRP No. 3).⁴⁰ Directly to the west of Duncan and not on Highway No. 1 is the Village of Lake Cowichan. It is 30 kilometres from Duncan. A dump site is located

³⁹ Thermal Reduction Plant ("TRP") No. 2, Koksilah Road.

⁴⁰ Peerless Road.

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approximately a further 20 kilometres northwest of that village (TRP No. 1).⁴¹ The communities of Duncan, the District of North Cowichan, the Village of Lake Cowichan and the Town of Ladysmith are all located in the Cowichan Valley Regional District.

The next significant population centre north of Ladysmith along the longitudinal route defined by Highway No. 1 is the City of Nanaimo (population approximately 56,000). Nanaimo is 23 kilometres northwest of Ladysmith. It is 51 kilometres from Duncan. A dump site is located south of Nanaimo, the Cedar Road landfill site. The City of Parksville (population approximately 6,800) and the Town of Qualicum Beach (population approximately 4,100) are 36 and 47 kilometres, respectively, northwest of Nanaimo along Highway No. 19. Until recently a landfill site existed at Qualicum Beach. It was closed at the beginning of September 1991 and a transfer station was opened just west of Parksville, the Church Road transfer station. Garbage which is collected in the Parksville/Qualicum Beach area is taken to this transfer station and dumped into rail cars. The Nanaimo Regional District then transports this garbage south to the Cedar Road dump outside Nanaimo. The communities of Nanaimo, Parksville and Qualicum Beach are all located in the Nanaimo Regional District.

⁴¹ Meads Creek.

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The next major population cluster along the spine created by Highway No. 19 is formed by the Town of Comox (population approximately 7,800), the City of Courtenay (population approximately 11,000) and the Village of Cumberland (population approximately 2,000). Courtenay is 73 kilometres from Parksville and 108 kilometres from Nanaimo. A landfill site exists south of the Courtenay-Comox-Cumberland area, the Pigeon Lake disposal site. The District of Campbell River (population approximately 20,000) is 45 kilometres northwest of the Courtenay-Comox-Cumberland area along Highway No. 19. Quadra Island is located to the east of Campbell River and is reached by ferry. The Village of Sayward (population approximately 400) is located 79 kilometres northwest of Campbell River. A dump site is located in the vicinity of this community. A dump site exists to the southwest of Campbell River. The communities of Courtenay, Comox, Cumberland, Campbell River, Quadra Island and Sayward are located in the Comox-Strathcona Regional District.

B. Positions of the Parties

While the Director has alleged in his application that anti-competitive acts lessened competition substantially in the Cowichan Valley Regional District, the Nanaimo Regional District and the District of Campbell River, the dimensions of the geographic markets are more specifically delineated by his expert as being within a radius of 50 kilometres or less from each of Laidlaw's hubs in the

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Cowichan Valley (Duncan) area, the City of Nanaimo and the District of Campbell River.

The respondent argues that the relevant geographic markets are two in number. It is its position that the Cowichan Valley Regional District and the Nanaimo Regional District together form one geographic market and that the eastern portion of the Comox-Strathcona Regional District forms the other. This eastern portion of the Comox-Strathcona Regional District includes not only the District of Campbell River and the Courtenay-Comox-Cumberland area but also the community of Sayward and the whole of Quadra Island. There is no dispute that the geographic markets, however they may be defined, do not include the City of Duncan and the Village of Lake Cowichan. These two communities employ their own crews and trucks to provide lift-on-board garbage collection and disposal service.

C. Market Definition and Determination

The general test for determining the geographic dimensions of a market is the same as that used to determine the product dimensions: identification of the universe of effective competition. That is, insofar as the relevant geographic dimensions are concerned, for the purposes of this case one asks what are the boundaries of the geographic area within which competitors must be based if they

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are to provide effective competition to Laidlaw. Effective competition means that the competitor provides a significant restraint on Laidlaw's ability to raise prices above the competitive level.

The Director's position is that the determination of the geographic boundaries of the market should be based on a review of how the market in the relevant areas operated in the past as well as on observation of the existing market: the past and present conduct of the customers and providers of lift-on-board service. The respondent's position is that the conceptual test, found in the Director's *Merger Enforcement Guidelines*,⁴² should be used: could a provider of the service (as a hypothetical monopolist) impose a significant non-transitory price increase without causing the buyers of the service to purchase the service from suppliers located in other regions. A significant price rise is sometimes considered to be 5%; non-transitoriness is sometimes said to exist if the rise can be sustained for a two-year period.⁴³

(1) Essential Issue - Dimensions of Market in which Campbell River is Located

It must first of all be noted that whether the Cowichan Valley (Duncan) area and the Nanaimo area are classified as one market or as two is not of great

⁴² Director of Investigation and Research, Information Bulletin No. 5, March 1991 (Supply and Services Canada, 1991).

⁴³ [U.S.] Justice Department Merger Guidelines 49 Fed.Reg. 26,823 (1984); J. Whalley, "Department of Justice Merger Enforcement" (1988) 57 Antitrust L.J. 109.

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import in this case. It was agreed at the opening of the hearing that however that market(s) is(are) defined, Laidlaw's market share is extensive. It is so high under either classification that it will give rise to a *prima facie* conclusion that Laidlaw is dominant in that(those) market(s). The main dispute respecting geographic dimensions is whether the communities of Courtenay-Comox-Cumberland are in the same geographic market as the District of Campbell River. If they are, then Laidlaw's share of that market is probably below 50% and no *prima facie* finding of dominance would arise. If they are not, then Laidlaw's market share is considerably higher.

(2) Hypothetical Monopolist

The expert opinion, filed on behalf of the respondent, that a hypothetical monopolist would be restrained by a competitor based more than 50 kilometres away, relies upon evidence respecting the incremental cost of operating a garbage disposal service at a distance equal to 50 kilometres from the base. This analysis is based on information obtained from Laidlaw as to its cost of providing service into the Cowichan Valley (Duncan) area from Nanaimo, which it does once a week, and the revenue received therefrom. The analysis assumes a route density for the one-day service in the remote region equal to the route density in what might be called the home area.

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With respect to the use of Laidlaw cost and revenue information in the Cowichan Valley (Duncan) - Nanaimo areas, if the Director's position is correct and Laidlaw is without effective competition in those areas, then there is no reason to assume that the revenue figures which have been provided are ones which would exist if Laidlaw were constrained by a competitive market ("the cellophane fallacy").⁴⁴ Accordingly, an analysis of the incremental costs, which a provider of the service could sustain and still compete effectively in the remote market, based on such figures is not persuasive.

Counsel for Laidlaw argues that the criticism of commentators on the holding in *United States v. E. I. du Pont de Nemours & Co.* (the cellophane case) does not apply because that case was concerned with the product boundaries of a market, not its geographic boundaries. It is noted that different sets of evaluative criteria are used for defining the geographic boundaries and the product boundaries of a market (e.g., transportation costs and shipment patterns are particularly relevant to the former). He also argues that the revenue figures (\$20 per pick-up) on which Laidlaw's experts founded their analysis is a competitive price. He maintains that this is so because Laidlaw's competitors did not attempt to compete with Laidlaw on that price.⁴⁵

⁴⁴ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); D.F. Turner, "Antitrust Policy and the Cellophane Case" (1956-7) 70 Harv. L.R. 281.

⁴⁵ Transcript at 1147-48, 1283 (4 November 1991).

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The alleged non-competition on price does not demonstrate that the price is a competitive one. Such behaviour can be explained in two ways: (1) the competitors did not wish to engage in price competition with Laidlaw because they were afraid that Laidlaw's market power would enable it to undercut them selectively with respect to price and thus force them out of the market; (2) they were exhibiting normal pricing behaviour in a concentrated market and sheltering under the price being charged by the dominant firm.

With respect to the arguments concerning the applicability of the "cellophane fallacy", different evaluative criteria may be relevant for determining the product and geographic market dimensions. This does not lead to the conclusion, however, that the logic of the criticism (using prices or revenue as they exist in a non-competitive market as a surrogate for competitive prices) is invalid.

Counsel for Laidlaw argues that it is not open to the Director to argue that the model used by Laidlaw's experts is flawed on the basis of the "cellophane fallacy" when he did not adduce any expert evidence to this effect. The Director's objection to the evidence relates to the weight to be given to it in the absence of evidence by Laidlaw that the cost and revenue information contained therein relates to the competitive level. This criticism can be made without support by expert evidence. It is Laidlaw which is relying on the opinion in question and

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therefore Laidlaw has the responsibility of providing the factual basis to support it.

In addition, to analyze the Campbell River market area with respect to Courtenay-Comox-Cumberland, one should be using prices and costs from those areas. And, in any event, it is not at all clear that all relevant costs have been included in the analysis. For example, no allocation is made for the extra costs involved in the initial delivery of the container to the customer and related sales representative or service calls to the extent that these might require physical attendance at the customer's premises. No allocation is made for contingencies such as the breakdown of a truck in the remote area. With respect to the assumption that the route density (for the one-day a week service) in the remote area is the same as in the home area, this does not mirror the initial competitive situation which exists when a new supplier attempts to provide service in the remote market. It assumes that the new supplier has obtained customers in a tight geographic area, comparable to that which exists where the supplier is well established. It is likely that customers would be scattered and far more dispersed for a new competitor than they are for Laidlaw in the Cowichan Valley (Duncan) area. The model, therefore, does not demonstrate that the remote supplier of the service could be an *effective* competitor.

Also missing from the analysis is a consideration of further costs and strategic factors that a Courtenay based firm would have to contend with in trying

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to operate in Campbell River. The 5% hypothetical increase is imposed on a volume base derived from the pick-up of 74 bins in a single day. The assumption is that the distant firm is able to attract that volume of business for a *particular* day. The evidence is that customers often have a preference with regard to the day that their bins are picked up. This factor would add to the difficulties facing the Courtenay seller in attracting a sufficient number of customers who were not tied by Laidlaw contracts. Based on the experience of entrants in Campbell River, there is no reason to believe that the Courtenay firm would quickly attract the required volume of business. During the period that fewer than 74 bins were being picked up the firm would be experiencing losses compared to operating in Courtenay. For these losses to be recovered the price differential would have to be more than the 5% difference assumed by the respondent's experts. Additionally, it is clear from the evidence that prices for garbage disposal are not uniform. Selective price-cutting by Laidlaw would be another factor that could confront the would-be entrant.

Indeed, as counsel for the Director argues, it is not obvious that a significant non-transitory price increase test for determining market boundaries is useful in an abuse of dominant position case. In an abuse of dominant position case it is not the *potential* dominant position or the increase in dominance of a firm which is at issue. The respondent firm is alleged already *to have* a dominant

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position in the relevant market. The market definition issue relates to an existing situation rather than a prospective one.

The Tribunal wishes to emphasize that the above discussion of the respondent's expert evidence should not be taken as an acceptance that the 5% price rise criterion is necessarily a useful one even in a merger case. While the test of a non-transitory significant price increase may be conceptually useful, what percentage will be significant and what period of time will satisfy the test of non-transitoriness can only be determined by reference to the facts of a particular case.

(3) Regulatory Constraints on Dump Sites

All three regional districts have by-laws or rules which require that only solid waste from certain areas is to be dumped in the various landfill sites. The Cowichan Valley Regional District requires that only waste from that district may be deposited in its dump sites (TRP No. 1, TRP No. 2 and TRP No. 3). In addition, conditions attached to the permits authorizing the operation of the sites require that only refuse collected from its vicinity be deposited in the particular site.

The Nanaimo Regional District requires with one exception that only refuse generated within its boundaries is to be disposed of at its dump sites. That

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district prescribes dump site usage by reference to school district boundaries. Refuse collected from residents of School District No. 68 (located in the southern portion of the district) must be disposed of in the Cedar Road landfill site located south of the City of Nanaimo. School district boundaries in British Columbia are not necessarily coincident with regional district boundaries. School District No. 68 takes in part of the northern area of the Cowichan Valley Regional District and thus refuse collected in that area may also be disposed of at the Cedar Road dump. Refuse collected from residents of School District No. 69 (the northern part of the Nanaimo Regional District) was required to be dumped at the Qualicum Beach landfill site until it was closed at the beginning of September 1991. It now may be deposited at either the Church Road transfer station or taken to the Cedar Road site south of Nanaimo.

In the Comox-Strathcona Regional District the use of dump sites is also restricted to residents of the district. With respect to the Pigeon Lake disposal site located in the Courtenay-Comox-Cumberland area, only refuse collected from those municipalities is to be disposed of at that site. Insofar as the Campbell River dump is concerned, the District of Campbell River (By-Law No. 1261) allows only residents of that district and the surrounding electoral areas D, E and F as well as a defined portion of J to dispose of garbage at that dump site. Electoral areas E and F are small areas adjacent to the District of Campbell River. Electoral area D is larger in size but apart from the area close to the District of Campbell

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River is sparsely populated; indeed, much is completely uninhabited. The "defined portion of J" refers to a small part of Quadra Island closest to Campbell River. The dump site at Sayward is limited to refuse collected from the vicinity of that village.

While the regulations respecting the use of dump sites are factors which constrain the geographic market, these regulations do not prevent a hauler operating in one area on one day and dumping at the appropriate site, and operating in another area on another day and dumping at the site appropriate to that area. Also, it is clear that arrangements can be made with dump site operators to allow for the dumping of small volumes which have been collected outside their area.⁴⁶

(4) Past and Present Behaviour of Market Participants

The Director relies heavily on evidence respecting the past and present behaviour of the providers of lift-on-board service in the areas in question. He uses that evidence to support a conclusion that the outer boundaries of the geographic market are generally within 50 kilometres or less from a hauler's hub of operation. Such hubs are usually located in close proximity to a substantial population centre and a disposal site.

⁴⁶ Transcript at 366 (29 October 1991).

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The evidence discloses, for example, that Fox⁴⁷ operated around the Village of Lake Cowichan and sought business no further afield than the District of North Cowichan. Advance⁴⁸ operated in the Duncan and North Cowichan area. On the sale of SCS Waste Systems⁴⁹ to Laidlaw, Advance attempted to service some customers in the City of Nanaimo but this was found to be uneconomical.⁵⁰ The market in that area was more difficult to penetrate because of Laidlaw's contracts than was the case in the Cowichan area.

Nanaimo Disposal⁵¹ operated in the Town of Ladysmith and the City of Nanaimo.⁵² (It faced some competition in Ladysmith from C.W. which at the time operated out of Duncan). United⁵³ and its predecessors, Mid-Island Disposal Co. Ltd. and B & B Garbage Disposal Ltd., operated in the Parksville-Qualicum Beach area (from Nanoose Bay to Qualicum Beach). SCS Waste Systems served customers located in the Ladysmith-Nanaimo area and West Coast similarly limits its scope of operation⁵⁴.

⁴⁷ *Supra* at 11, 14.

⁴⁸ *Supra* at 14-17.

⁴⁹ *Supra* at 20-21.

⁵⁰ Transcript at 890, 892 (1 November 1991).

⁵¹ *Supra* at 18.

⁵² "We tried to stay within a reasonable amount of travelling time. If you get out too far, it costs you too much to get back to the garbage dump, and time-wise". (Transcript at 316 (29 October 1991)).

⁵³ *Supra* at 18, 20.

⁵⁴ Except for some customers in Chemainus and Crofton who are part of a "package deal". *Supra* at 20-24.

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B & D⁵⁵ operated in the Campbell River District area,⁵⁶ never going south of the Oyster River. The Oyster River crosses Highway No. 19 approximately halfway between Courtenay and Campbell River. Camvest operates within a 15-mile radius of Campbell River. Insofar as the Campbell River area is concerned, it is most significant that Lacey, which operates in the Courtenay-Comox-Cumberland area, does not consider it economical to operate north of the Oyster River. It is significant that Laidlaw does not operate south of it.

Evidence respecting past and present players in the market must of course be considered carefully. The conduct may result from characteristics particular to those players (e.g., a decision to run a family business and remain small) rather than being evidence of the actual geographic scope of possible effective competition. In this case, however, the evidence of the historical and present conduct of what might be called the small collection and disposal participants in the market is buttressed by other evidence.

In a written submission to the Bureau of Competition Policy with respect to another transaction, Laidlaw itself described the geographic markets in the solid waste services industry as being:

⁵⁵ *Supra* at 27-28.

⁵⁶ "... we wanted to concentrate as close to the dump as possible." (Transcript at 1152 (4 November 1991)).

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... generally local in nature essentially defined by political jurisdictions and transportation economics. They tend to cluster around metropolitan areas.⁵⁷

Laidlaw also continued to operate hubs in both Nanaimo and Duncan despite its claim that these two areas fall into one market. Laidlaw's evidence that in the future it might conduct itself differently is not persuasive. Laidlaw does service the Cowichan Valley (Duncan) area once a week with a truck sent from Nanaimo. However, this does not demonstrate that the two areas are one market. The conduct is more properly characterized as cost minimization behaviour by a participant who operates in two adjacent markets and has excess capacity in one of them. The evidence that Laidlaw serves Sayward from Campbell River is unconvincing as evidence that the communities of Courtenay-Comox-Cumberland and Campbell River are in the same geographic market. Sayward is a small (population 400) and remote area. It is considerably farther from Campbell River than is Courtenay-Comox-Cumberland. As far as is known Laidlaw is the closest supplier of garbage disposal services to Sayward. It would be out of the question to station equipment in Sayward; the volumes could not support it. The fact that Laidlaw now apparently finds it profitable to service Sayward provides no information about the economies of Laidlaw competing in Courtenay-Comox-Cumberland or Lacey competing in Campbell River. There is simply insufficient information regarding this new service to allow the Tribunal to give that

⁵⁷ Exhibit A-55: Appendix X, Waste Services Industry, at 1.

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development much weight. There is no information, for example, concerning the price that is being charged to the residents of Sayward.

It is significant that when the Nanaimo Regional District closed the Qualicum Beach landfill site, the Church Road transfer station was opened. The Regional District did not require haulers in the Parksville-Qualicum Beach area to transport the refuse they collected to the Cedar Road site. The Regional District had received advice that it was uneconomical to expect a hauler to serve customers located more than 30 kilometres from a landfill site.

The Tribunal accepts the proposition that when assessing the boundaries of the geographic market, the place at which the trucks are parked is relevant as a hub. In the case of the small local businesses this is likely to be the place at which the administrative functions are also carried out. In the case of a firm such as Laidlaw the administrative functions (e.g., billing, accounting, etc.) may take place many miles away, in Victoria, Edmonton or Hamilton, but such functions are not relevant to the geographic dimensions of the lift-on-board service market. These dimensions must be assessed by reference to factors relevant to the geographic scope of the market, primarily transportation costs, and not by reference to factors which are independent of such costs.

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(5) Conclusion

One does not expect to be able to define the geographic dimensions of a market with precision. The boundaries will necessarily overlap with adjacent markets and be indistinct from those adjacent markets at many points.

The Tribunal's conclusion is that the Courtenay-Comox-Cumberland area is not in the same market as Campbell River. This conclusion is based in part on the evidence respecting the conduct of the past and present market participants in all three areas under consideration: the fact that the providers of lift-on-board service generally did not, and do not, on a regular and on-going basis attempt to provide service to customers located more than 50 kilometres from the base of operation at which their trucks are parked, is a response to the higher cost of operating at further distances. Laidlaw's retention of the two hubs, one in the Cowichan Valley (Duncan) area and the other in the Nanaimo area, is significant, as is the evidence of Lacey. If one found that Laidlaw operated at greater distances in the Cowichan Valley (Duncan) and Nanaimo areas, then one might be prepared to accept the argument that Lacey's view of the boundaries of its market, operating from Royston (between Comox and Cumberland) was based on considerations particular to it and was too limited but that is not the case.

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In addition, there is virtually no credible evidence that prices charged in the Campbell River area are or would be disciplined by the prices which pertain in the Courtenay-Comox-Cumberland area or that customers in the Campbell River area look outside that area for providers of the service.

One of the most significant factors in the determination of the geographic boundaries of the market is that the area between Courtenay-Comox-Cumberland and Campbell River is sparsely populated. This creates a significant barrier to effective overlapping competitive areas by firms operating in the two different localities. The geographic boundaries of a market cannot be glibly defined by reference to a certain kilometre or mileage distance. A more careful analysis is required. In this case the extensive, sparsely populated area between the communities of Courtenay-Comox-Cumberland and Campbell River together with the locations of the dump-sites which serve those areas are significant to the conclusion that the two population centres are not in the same geographic market with respect to the provision of the lift-on-board garbage collection and disposal service.

V. SUBSTANTIAL OR COMPLETE CONTROL

In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power

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in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the *ability* to earn supra-normal profits by reducing output and charging more than the competitive price for a product. As was said in the *NutraSweet* decision:

Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period.⁵⁸ (underlining added).

As was also stated in the *NutraSweet* decision:

While this [the ability to set prices above the competitive level] is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.⁵⁹

A *prima facie* determination as to whether a firm is likely to have market power can be made by considering the share of the relevant market held by that firm. If that share is very large the firm will very likely have market power.⁶⁰ But other considerations must also be taken into account including: how many competitors there are in the market and their respective market shares; how much

⁵⁸ *Supra*, note 2 at 28.

⁵⁹ *Ibid.*

⁶⁰ See, for example, H. Hovenkamp, *Economics and Federal Antitrust Law* (St.Paul, Minn.: West, 1985) at 58 for a discussion of this assumption.

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excess capacity the firms in the market have; how easily a new firm can establish itself as a competitor.

A. Market Share

There is no dispute that the most appropriate method of measuring market share is by comparing the revenues earned by each of the providers of lift-on-board service in the relevant geographic markets. Such information was not available to the expert witnesses of either party when their affidavits of expert evidence were filed.

Two alternative methods of measuring market share were used by the experts: a comparison of the respective weights of refuse dumped at the various dump sites and a physical count of the number of containers of each provider which could be seen within the relevant geographic markets. Both these measures were recognized to be flawed. A customer is charged for lift-on-board service by reference to the size of the bin and the frequency with which it must be emptied. Since the weight of the refuse emptied from one bin may vary considerably from that emptied from another, weight is not necessarily an accurate surrogate for revenue. The weight of the garbage dumped by one hauler vis-à-vis others may not precisely reflect market share. More important, however, is the fact that this kind of data is not available for all dump sites. No weight data is available from

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the Campbell River dump site nor from the Lake Cowichan (TRP No. 1) site. Tipping fees are not charged at those locations and weight information was not collected. Also, with respect to the Lake Cowichan dump, Laidlaw's experts did not include in their calculations Laidlaw's estimate of the amount of material dumped by Laidlaw at that site. Information obtained by the experts from the dump site operator indicated that no commercial lift-on-board waste was deposited at that location. The operator of the dump did not realize that Laidlaw was using side-load (or rear-load) vehicles to service the lift-on-board customers in that area.

Insofar as assessing market share by container count is concerned, there is no guarantee that all bins will be located and counted. Some may not be easily visible (i.e., they may be located inside buildings). In addition, the bins were only counted in a sample area and there is no reason to believe that the sample area is truly representative. Another flaw in this technique arises because counting containers does not provide information as to how often they are emptied. Assumptions in this regard must be made.

During the course of the hearing, information concerning the gross revenue of the various suppliers of lift-on-board service was sought. Some of this data may lack precision to the extent that the information given relates to the gross revenue of a hauler's total operation (if that operation includes both lift-on-

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board service and residential collection service or other services).⁶¹ Nevertheless, any inaccuracies that might arise from the inclusion of mixed revenues by the smaller firms can only operate to Laidlaw's benefit.

The data collected indicates that in the District of Campbell River area Laidlaw's market share exceeds 87%. The only other provider of lift-on-board service in that area is Camvest, a company, as previously noted, that commenced business on May 3, 1990. There is also a small hauler on Quadra Island but little information about that firm was placed before the Tribunal and its scope of operation is not of great import.

In the combined markets of Cowichan Valley (Duncan) and Nanaimo, Laidlaw's market share, according to the gross revenue figures, also exceeds 87%. Three firms hold the remaining share. PAN, the small family business operating in the Cowichan Valley (Duncan) area has 1.3%. West Coast and B.F.I. operate in the Nanaimo area and hold 6.4% and 4.7% respectively.

B. Excess Capacity

Share of sales may overstate a firm's market power when there is excess capacity since other firms are able to increase their market shares by increasing

⁶¹ Exhibit A-57-C: Market Share Calculation by Gross Revenue for Commercial (Lift-on-Board) Solid Waste Collection in Relevant Geographic Markets (confidential); Exhibit A-91-C: Market Share Calculation by Gross Revenue for Commercial (Lift-on-Board) Solid Waste Collection in Relevant Geographic Markets (confidential).

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output and sales. With respect to waste removal, capacity is probably best measured in terms of the capacity of trucks. However, capacity cannot be measured simply by counting the number of trucks; age, type of equipment and state of repair have to be taken into account. Bins too must be considered when measuring capacity, but this input does not have the "lumpiness" of trucks (i.e., a truck has to be bought regardless of the number of bins to be serviced) and therefore the operator can avoid expanding the number of bins too far ahead of actual need.

In any event, the evidence is clear that Camvest in the District of Campbell River area, West Coast in the Nanaimo area and B.F.I. in the Cowichan Valley (Duncan) area are servicing far fewer bins than their truck capacity allows. The pressure on them to expand to more fully utilize their truck capacity is not in doubt. Their share of truck capacity is probably greater than their share of current sales and, if they survive, can be taken as an indicator of their future share of sales. However, the importance of excess capacity is tempered by the extent to which customers are bound by long-term contracts and by the apparent unwillingness of Laidlaw's competitors to use price as an inducement to attract customers.

C. Pricing Practices

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Counsel for Laidlaw argues that there is no convincing evidence that Laidlaw is dominant in the markets in question because there is no evidence that it has been charging prices above the competitive level.

Insofar as tendered contracts are concerned, in 1987 Laidlaw held the Campbell River School Board contract. The Board paid \$22,440 to Laidlaw under that contract. When B & D entered the market, it bid for this contract. It bid \$18,780 for the 1988 year and was awarded the contract. This was a profitable price for B & D. The following year, 1989, B & D tendered the same bid. Laidlaw won the contract with a tender of \$14,580. Laidlaw claims that its ability to reduce its price so dramatically was the result of its adoption of a computerized grid routing system. This is not convincing. The computer program would appear to be a fairly standard and simple routing program which replaced what had previously been a manual task. It is not believable that the adoption of this system or the installation of a computer system for Laidlaw's administrative functions generally result in cost savings leading to the price reductions which occurred. Also, there was no lowering of prices generally to all customers in this regard.

In 1987, Laidlaw held the North Cowichan School District contract. When the contract came up for tender in 1987, Advance bid \$2,600 per month. It was lower than Laidlaw's bid. When the contract again came up for tender in 1989, Advance lowered its bid to \$1,750 per month because it had heard of what had

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happened in Campbell River. Laidlaw's tender on the contract was \$1,760 per month. Mr. Paquette, who worked for Laidlaw at the time, was told to write up another contract and take it to the individual in charge (the Maintenance Superintendent) to try to resubmit a bid at a lower price: "I was just told to lower the contract rate under the pretence that the original bid was charging them for extra pick-ups which they would normally have got for free"⁶². This initiative was not successful; Advance was retained on the contract.

With regard to pricing pursuant to the standard form contracts, it must first be noted that there was no evidence from Laidlaw as to its pricing policies during most of the years in question. Its representatives and ex-employees could give no guidance as to how prices were set or what costs Laidlaw took into account when deciding how to price its services. More recently (since January 1990 in Nanaimo, January 1991 for Campbell River) price lists have been available but still no analysis of costs has been provided. The price lists contain A, B and C levels of pricing for the use of sales representatives. Laidlaw's representative, Dean Woods, indicated that in general Laidlaw was successful in getting customers to agree to the highest level, the A level.

It is argued that Laidlaw's financial statements demonstrate that Laidlaw was not exercising market power. For the fiscal year ending August 31, 1991, the

⁶² Transcript at 528 (30 October 1991).

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Campbell River Divisional Income Statement shows a net income of \$27,481 as against a total revenue of \$1,027,720 (50% of which is for commercial accounts). Net income on that basis is 2.7% of total revenue. The Nanaimo Divisional Income Statement (which includes the Cowichan Valley area) shows a net income of \$23,021 on total revenue of \$2,889,468 (82% of which is for commercial accounts). The net income shown by these figures then is only 0.8% of total revenue.

There is a general concern that accounting profits or net income is not a reliable indicator of economic profit.⁶³ In the case of Laidlaw there is a more specific problem. It relates to the numerous acquisitions made by Laidlaw and the amortization of the goodwill as an expense in its statements. Since most of the cost of the acquisitions appears to have been a payment for goodwill rather than for tangible assets, it is reasonable to conclude that the amortizations represent significant amounts. These are not part of the normal cost of waste disposal and including them totally clouds even accounting net income.

Customers gave evidence as to the rises in price which Laidlaw kept imposing pursuant to the terms of the standard form contracts and the negative option price clauses contained therein. Mr. Thomson of Muffy's Muffins Ltd. gave evidence that he tried to terminate his contract with Laidlaw because "we

⁶³ See F.M. Fisher & J.J. McGowen, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits" (1983) 73 Am. Econ. Rev. 82.

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were getting a little tired of the rates going up constantly".⁶⁴ Mr. Thomson sought a quotation from Advance for provision of the same service that he was getting from Laidlaw and discovered that Advance's prices were 20-25% below Laidlaw's.

Mr. Clarke, property manager for School District No. 69 in the Regional District of Nanaimo, also experienced repeated efforts to raise prices. In October 1990 he received a notice that Laidlaw's price was going to rise as a result of a "temporary fuel surcharge". After obtaining legal advice, he wrote back to Laidlaw noting that the contract between them did not provide for an automatic price rise on that basis. Laidlaw responded that a mistake had been made and the price increase was rolled back.⁶⁵ Shortly thereafter a notice was received stating that a price rise was to occur as a result of increased landfill site dumping fees being charged to Laidlaw. Mr. Clarke wrote back asking for supporting documentation. At the time, refuse collected from School District No. 69 was deposited at the Qualicum Beach disposal site where no dumping fees were charged. Laidlaw responded saying a mistake had been made and the price increase was rolled back. More recently, Laidlaw has moved to a flat rate⁶⁶ format with respect to customer charges in conjunction with increases imposed as a result

⁶⁴ Transcript at 764 (31 October 1991).

⁶⁵ Transcript at 807-9 (31 October 1991).

⁶⁶ Transcript at 2903 (18 November 1991): a charge based on a customer's lift rate times the number of lifts per year, divided by 12, to which the appropriate portion of the yearly rental for the bin is added to obtain the amount billed monthly.

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of the dumping fees now being charged at the Church Road transfer station.⁶⁷ Mr. Clarke has not paid the most recent invoices but has asked for a breakdown of the flat rate fees in comparison to the previous method of charging. He notes that there appears to be at minimum a 100% increase as a result of these changes.

Donald Bruce, who was Maintenance Supervisor for Pat Carson Bulldozing, noted that Laidlaw would often "slip ... a price increase through without notifying me ahead of time". He would then phone Laidlaw to get the increase rolled back. He gave evidence:

If I spent my energy chasing them I could keep it [the price] where I felt it was reasonable. The minute you turned your back and a raise got through, it was too late to fight it. This is what happened in the last, I can't remember the increase, but it was quite a jump⁶⁸

Mr. Paquette who worked for Laidlaw between 1986 and 1989 gave evidence that Laidlaw asked its various divisions to aim for a 20-25% profit margin. He noted, however:

In Parksville we had no competition at all. I believe we hit ... 42 per cent in one month.⁶⁹

While, as counsel for Laidlaw argues, there is no firm evidence that Laidlaw was charging monopoly prices in the markets in question, the anecdotal evidence is more consistent with a firm exercising market power than the reverse.

⁶⁷ Transcript at 812 (31 October 1991).

⁶⁸ Transcript at 1060 (1 November 1991).

⁶⁹ Transcript at 536 (30 October 1991).

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D. Barriers to Entry

Market share is only a *prima facie* indication of market power. As has been noted, other considerations must also be taken into account. One of these is barriers to entry: how easily can a firm commence business in the relevant market and establish itself there as a viable competitor? The term "entry" for an economist when used in the phrase "barriers to entry" is a term of art which carries with it the connotation of sustainability. The term "entry" will be used in that sense in these reasons. Related words such as "to enter" or "entrant" are used in their non-technical sense as meaning "to begin" or "to commence".

In general, in this industry barriers to entry are very low.⁷⁰ The amount of equipment required is limited: a truck and some containers. The capital to purchase these can easily be obtained: the equipment will itself serve as security for a loan. There is no requirement for extensive technical training or expertise although experience as a mechanic is useful. There are limited administrative and overhead expenses. Many of the providers of the service have operated and still operate out of their homes.⁷¹ The most significant barrier to entry is acquiring a sufficient customer base within a reasonable period of time to allow the business to become profitable.

⁷⁰ See also *infra* at 108-9.

⁷¹ Transcript at 833-34 (31 October 1991), 1186 (4 November 1991), 1369 (5 November 1991).

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While barriers to entry in the industry are low, much higher barriers exist in the markets under discussion as a result of the contracting practices of Laidlaw. It is these contracting practices, along with other allegedly anti-competitive acts, which it is argued lead to both Laidlaw's dominant position and a substantial lessening of competition in the markets in question.

VI. ANTI-COMPETITIVE ACTS RESULTING IN A SUBSTANTIAL LESSENING OF COMPETITION

A. Anti-Competitive Acts

There is no *general* definition in the Act as to what characterizes an anti-competitive act. Section 78 contains a list of examples of behaviour which are included in that definition.⁷² There is no dispute that this list is not exhaustive. The various acts of Laidlaw which are alleged to be anti-competitive, that is, a

⁷² Section 78 reads:

78. For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

- (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;
- (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;
- (c) freight equalization on the part of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (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;
- (f) buying up of products to prevent the erosion of existing price levels;
- (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;
- (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
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

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pattern of acquisitions designed to create and maintain a monopoly position together with contracting practices designed to preserve that position, are not among those enumerated in section 78.

The principle underlying section 79 is that the public interest is best served when markets are competitive. The refusal of the common law courts to enforce contracts which contain unreasonable restraints of trade is one manifestation of that principle. Such contracts are deemed to be contrary to public policy. In *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd.*, Lord Macnaghten said:

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable -- reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.⁷³

Useful descriptions of the antecedents of competition law can be found in: *Competition Law* by R. Whish;⁷⁴ and *Canadian Competition Policy* by B. Dunlop et al.⁷⁵ Part of that history includes the Sherman Act⁷⁶ in the United States; it was

⁷³ [1894] A.C. 535 (H.L.) at 565.

⁷⁴ (London: Butterworths, 1985) c. 2.

⁷⁵ (Toronto: Canada Law Book Inc., 1987) c. 1-3.

⁷⁶ 15 U.S.C. § 1-7.

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enacted in 1890. Read literally it condemns every contract in restraint of trade (although subject to statutory and judicially developed exceptions). Another manifestation in more recent times is article 85 of the Treaty of Rome.⁷⁷ It prohibits acts:

which may affect trade between the member states [of the European Economic Community] and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...

A review of the literature indicates that attempting to establish some general criteria as to when an act or practice is anti-competitive and should be restrained, as opposed to when it is a sign of healthy or at least normal commercial competition, is not easy. As has often been said, every contract is a contract in restraint of trade: the commercial freedom of the contracting parties is limited by their obligations to perform the contract. To the extent that any general criteria exist they seem to require an assessment of the nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market. An analysis is required which takes into account the commercial interests of both parties served by the conduct in question and the degree of restraint or distortion of competition which results.

(1) Acquisitions

⁷⁷ 298 U.N.T.S. 11 (25 March 1957).

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It is agreed, as counsel for Laidlaw argues, that acquisitions by themselves are not anti-competitive acts. That does not mean, however, that they might not be used as such and thereby become so. An acquisition can be a legitimate method of entering a market; it can be a legitimate method of growing in a market. The pattern of acquisitions and attempted acquisitions in this case together with the evidence respecting their surrounding circumstances make it clear that Laidlaw's practice of acquiring firms in the lift-on-board business was for the purpose of initially acquiring a monopolistic position in the markets in question and then eliminating competitors from those markets. This characterization results from a number of factors.

(a) Frequency, Timing and Result of Acquisitions

One important factor is the time frame within which the acquisitions occurred. In the Campbell River area the only two competitors were acquired on the same day. In the Nanaimo area the only three competitors were acquired within five months of each other. Not only were all the existing firms acquired in those two areas, but there was a clear pattern of attempting to acquire any new entrant which appeared on the scene both in those areas and in the Cowichan Valley (Duncan) area. The attempted acquisition of Lacey in the Courtenay-Comox-Cumberland area and of PAN in the Cowichan Valley (Duncan) area also supports the conclusion that the acquisitions and attempted acquisitions were

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entered into for the purpose of monopolizing the markets. The effect of the acquisitions was to give Laidlaw at times 100% of the market.

(b) Expressions of Subjective Intent

While subjective intent may not be a required element in order to find that a given practice (series of acts) is of an anti-competitive nature in this case such exists. It can therefore be taken into consideration as part of the relevant evidence. Charles Saunders was encouraged to sell SCS Waste Systems to Laidlaw on the promise that Laidlaw would thereafter purchase bins from him. Michael Wallace was given to understand that if Advance was not sold to Laidlaw, Laidlaw would see it put out of business by causing Advance extensive and expensive litigation costs. PAN, which has not been acquired, was left with the impression that if it refused to sell, Laidlaw would use its market power to ensure that it was put out of the market by way of price competition. Lacey was left with the message that if it would not sell to Laidlaw, Laidlaw had other methods of achieving what it wanted. Laidlaw argues that the activity of some of its employees in these markets, for example, in leaving the above-described messages with SCS Waste Systems, Advance, PAN and Lacey, should not be taken as evidence of intent on Laidlaw's part. It may be that there will be occasions when an employee is off on a "frolic of his own" and his conduct will not be taken as evidence of the intent of his corporate employer but that will rarely be the case and it is not the case here.

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Indeed, one acquisition was undertaken at the specific direction of a senior corporate officer after he saw a non-Laidlaw bin in the market when visiting the Nanaimo area.

(c) Laidlaw's Business Purpose Explanation - Not Convincing

It is argued that the acquisitions were not anti-competitive acts but were merely a manifestation of Laidlaw's general corporate policy to enter markets and achieve growth through acquisitions. In support of this position it was stated that the acquisitions in question were subjected to the same *pro forma* financial analysis as other acquisitions and were completed after it was determined that they made good business sense. Yet, the only acquisition for which any analysis was provided was that of B & D on September 1, 1989 and some relating to the possible acquisition of Lacey. No *pro forma* analysis was available with respect to the acquisition of Advance which occurred in February 1990 after the standardized *pro forma* spread sheets were allegedly in use by Laidlaw. The *pro forma* analyses for the acquisitions supposedly determine whether an acceptable rate of return would be garnered from the acquisitions. One assumption which enters into these *pro forma* analyses is that there will be no competition in the market place over the length of the pay-back period.⁷⁸ In addition, the length of that period (eight years) is itself an indication of the fact that the acquisitions were

⁷⁸ Transcript at 2626-30 (15 November 1991).

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proceeding on the assumption that Laidlaw would face no or at least little competition in the future in the markets in question. The fact that so much of the purchase price for these acquisitions is related to goodwill could very well be an indication that a premium might have been paid by Laidlaw for the firm being acquired.

(d) Restrictive Covenants

Finally, the overly restrictive covenants in the acquisition agreements also demonstrate an intent to monopolize the markets. It is trite law that in order to be enforceable restrictive covenants must be reasonable. The leading case on this subject is the *Nordenfelt* decision.⁷⁹ Restrictive covenants must be reasonable with reference to both the interests of the parties themselves and the interests of the public. As stated by Blair J.A. in *Tank Lining Corp. v. Dunlop Industrial Ltd.*, *Nordenfelt* essentially established a four stage inquiry:

Firstly, is the covenant under review in restraint of trade? ... Secondly, is the restraint one which is against public policy and, therefore, void? ... Thirdly, can the restraint be justified as reasonable in the interests of the parties? Fourthly, can it also be justified as reasonable with reference to the interests of the public?⁸⁰

⁷⁹ *Supra*, note 73.

⁸⁰ (1982), 40 O.R. (2d) 219 (C.A.) at 223.

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With respect to the geographic scope of such covenants, reasonable boundaries are usually determined by the location of the customers of the business which is sold⁸¹. Covenants preventing a vendor from operating within a 300-mile radius with respect to the purchase of a business which operated generally within an area having less than a 30-mile radius, are clearly unreasonable.

Counsel for Laidlaw argues that restrictive covenants are a normal and usual part of acquisition agreements and that it is not unusual to find these drafted in a series of step-type decrements. He argues that the covenants used in these acquisitions were a standard type used by Laidlaw with respect to a variety of acquisitions and that the overbreadth of the covenants was simply an oversight. While some of the covenants, at least, are of a "standard form" format, it is clear that a representative of Laidlaw did address his or her mind to their application in the relevant markets. Reporting letters by Laidlaw's in-house counsel specifically note the scope of the covenants which were agreed to. These, in general, were of a 300-mile radius. It is also significant that when Laidlaw was the party giving covenants these were always very carefully limited in scope.

⁸¹ M.J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) at 240:

... the covenantee [the purchaser] must typically show that the business sold previously operated throughout the area subject to restraint, although not necessarily in every community within that area.

... in cases where the customers of the business sold are concentrated in one part of the geographic area subject to restraint, the courts will commonly strike a covenant down, if it cannot be severed.

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The reciprocal agreements with Jones and Advance by which Laidlaw agreed to stay out of the roll-off market in return for the vendor's agreement to stay out of the lift-on-board market are the type of acts (market sharing arrangements) that fall under section 45 of the Act. Whether or not these result in a substantial lessening of competition in the roll-off market for the purposes of section 79 is not clear from the evidence adduced in this case. Whether they results in an "undue lessening" of competitive in the roll-off market for the purposes of section 45 is also not clear. While intuitively one would expect this to be so, given the small size of the markets in question, there is simply insufficient evidence with respect to the roll-off markets for the purposes of section 79 to enable the Tribunal to come to any conclusion in that regard.

Regardless of the conclusion with respect to the effects of any or all of the restrictive covenants they provide some evidence of intent. It is clear from the evidence as a whole that the acquisitions were part of a pattern of anti-competitive acts.

(2) Mergers or Acquisitions and Section 79 - Legal Considerations

With respect to acquisitions one further matter must be addressed: whether they properly can be considered under section 79 at all. In the *NutraSweet* decision the Tribunal refused to classify a voluntary agreement between

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competitors as an anti-competitive act. The agreement in question was a worldwide market sharing agreement by The NutraSweet Company with its suppliers. Reference was made in this regard to the fact that a feature of the enumerated acts listed in section 78 (except for that in paragraph (f)) is that the competitor of the dominant firm is a target, not a fellow actor.⁸² At the same time, the Tribunal left open the question as to whether or not such horizontal arrangements might be classified as anti-competitive acts. It commented that it was reluctant to conclude that all horizontal arrangements were excluded from sections 78 and 79 and that, in any event, it was sufficient for the purposes of the *NutraSweet* decision to state that the Tribunal had not been provided with adequate justification (insofar as effects in Canada were concerned) to allow the Tribunal to categorize the market sharing agreement as an anti-competitive act.

The Tribunal in this case, insofar as the acquisition agreements are concerned, is dealing with horizontal arrangements between willing competitors. Extensive and detailed evidence and argument has been heard respecting the anti-competitive effects of the conduct in question. It is not seriously in dispute, as the Tribunal noted in the *NutraSweet* decision, that the enumeration in section 78 is not controlling with respect to the scope of section 79. The Tribunal in this case has no difficulty classifying the acquisitions as acts constituting an anti-competitive practice.

⁸² *Supra*, note 2 at 37.

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Counsel for Laidlaw argues that acquisitions and mergers do not fall under section 79 at all because they are dealt with elsewhere in the Act. A detailed set of provisions concerning the prevention or dissolution of anti-competitive mergers and acquisitions is found in sections 91 to 107 inclusive. Laidlaw argues that, based on the maxim *expressio unius* (explicit mention of one case involves implicit exclusion of the others), Parliament could not have intended that mergers be dealt with under the abuse of dominance provisions. Laidlaw's argument is based on two sections of the Act: (a) paragraph 78(b) includes as anti-competitive acts the acquisition by a supplier of a customer and the acquisition by a customer of a supplier, but not the acquisition of a competitor; and (b) section 91 defines merger, in part, as "the acquisition ... of control over or significant interest in the whole or a part of a business of a competitor ...". Laidlaw says that because the acquisition of a competitor is explicitly mentioned in section 91 but not in paragraph 78(b) Parliament intended such acquisitions to be dealt with under the merger provisions and not under the abuse of dominance provisions. Had Parliament intended otherwise, Laidlaw contends that it would have listed the acquisition of a competitor as an anti-competitive act under paragraph 78(b).⁸³

Laidlaw's *expressio unius* argument is not convincing. Firstly, paragraph 78(b) is explicitly non-exhaustive. The fact that an act is not listed in paragraph 78(b), even if it is listed elsewhere in the statute, is no reason to

⁸³ Written Argument of the Respondent at 44-45.

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conclude that it is excluded as an anti-competitive act. Secondly, while section 91 does state that the acquisition of a competitor is a merger, it does not necessarily follow that such an acquisition *exclusively* falls under the merger provisions.

Moreover, there would not appear to be any other indication in the Act that merger and abuse of dominance are to be mutually exclusive, such that a merger case could never be brought under section 79. Nor would there seem to be anything inconsistent or repugnant in the finding that a merger case could be brought as an abuse of dominance case. As such, the following words of E.A. Driedger, are applicable:

If the overlapping provisions, whether in the same statute or not, are not in conflict, then the question is whether they both operate with respect to a particular situation or whether only one operates. It would seem that *prima facie* both operate, unless there is something to indicate that the legislature intended one provision to be exhaustive or exclusive ...

Acts should be so construed as to avoid or remove inconsistent overlapping. But there is no principle that they should be construed so as to avoid or remove overlapping not inconsistent.⁸⁴ (underlining added)

If there were any doubt at all about this question, subsection 79(7) makes it clear that Parliament contemplated the possibility of mergers being the subject

⁸⁴ *Construction of Statutes*, 2d. ed. (Toronto: Butterworths, 1983) at 235-36.

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of either a section 92 application or a section 79 application.⁸⁵ Subsection 79(7) and companion sections 45.1 and 98 are relevant. Subsection 79(7) provides that where proceedings are commenced under the conspiracy or merger provisions of the Act, no application may be made under the abuse provision based on the same or substantially the same facts.⁸⁶ These provisions prohibit concurrent proceedings and require that a choice initially be made between the abuse, merger, and conspiracy provisions. The mere inclusion of these sections clearly contemplates that an application on the same facts could be made under either the merger or the abuse of dominance provisions. Otherwise, there would be no need for these sections at all as merger and abuse of dominance would be mutually exclusive and there would be no possibility of concurrent proceedings.

Counsel for the Director referred to the interpretation of section 79 suggested by Anderson and Khosla:

⁸⁵ Subsection 79(7) reads:

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or
(b) against whom an order is sought under section 92.

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

⁸⁶ Sections 45.1 and 98 are similar. Section 45.1 provides that where proceedings are commenced under the merger or abuse of dominance provisions, no application may be made under the conspiracy provision based on the same or substantially the same facts. Section 98 provides that where proceedings are commenced under the conspiracy or abuse of dominance provisions, no application may be made under the merger provision based on the same or substantially the same facts.

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The choice between the merger and abuse of dominance provisions could arise, for example, in situations involving a series of acquisitions in an industry by a dominant firm. In such situations it may be the cumulative effect of such actions (i.e., the practice of anti-competitive acts) rather than any single purchase which lessens competition substantially. In these circumstances, the abuse provisions may be more readily applicable than the merger provision.⁸⁷

This accords with the Tribunal's interpretation of the provisions in question.

(3) Contracting Practices

Professor Noll, in his affidavit of expert evidence,⁸⁸ (counsel for Laidlaw chose not to cross-examine him) notes that in most cases long-term, exclusive contracts do not raise significant anti-competitive issues. They can contribute to economic efficiency and thereby benefit consumers. They serve to allocate future business risks; investment decisions, for example, which must be made today can be made with some degree of assurance that they will not be subject to the vagaries of future price increases and other factors. Such timing may be particularly important when a supplier provides a product or service to a customer which is specifically tailored to that customer's needs and which entails a "relation

⁸⁷ R.D. Anderson and S.D. Khosla, "Reflections on McDonald on Abuse of Dominant Position" (1987) 8:3 Can. Comp. Pol. Rec. 51 at 56. See also R.D. Anderson and S.D. Khosla, "Recent Developments in Canadian and U.S. Merger Policy" (1986) 7:3 Can. Comp. Pol. Rec. 46 at 58.

⁸⁸ Expert Affidavit of Professor R.G. Noll (Exhibit A-52).

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- specific investment", that is, one made solely for the purpose of serving a particular customer.⁸⁹

Roll-over provisions can be beneficial in some circumstances because they can lower transaction costs. Liquidated damages clauses can often avoid litigation costs. Automatic price rise clauses (often called negative option price clauses) can eliminate unnecessary negotiation or litigation and apportion the risk related to future events between the vendor and the purchaser. In a negotiated contract when there is more or less equal bargaining power one can assume that benefits to both sides will arise.

While certain of the contract terms may in many circumstances be entirely unobjectionable, it is necessary to look at the particular combination of clauses in the contracts in question as they relate to the vendor and purchaser of lift-on-board service in the relevant markets and to balance this against the effect the contracts are having on competition in those markets.

(a) Contract Terms - From the Supplier's Point of View

With respect to the long-term nature of the contracts in issue, Professor Noll notes that the relation-specific investments that we would normally expect to

⁸⁹ *Ibid.* at 9-10. Professor Noll offers the example of a railway spur built specifically to serve a coal mine. The long-term exclusive contract with liquidated damages clauses protects the parties against future opportunistic behaviour on either side that seeks to take advantage of the lock-in nature of the investments.

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find when there is exclusivity, long terms and liquidated damages clauses, do not exist in the lift-on-board service business.⁹⁰ He notes that the customer-specific investment made by Laidlaw consists "primarily of the costs of negotiating the agreement". This is borne out by the evidence. The Tribunal notes that this investment will not be independent of the contract terms since the amount that Laidlaw is willing to spend in obtaining a customer's signature to a contract will depend upon how long and profitably the customer is bound by that contract. Professor Noll expresses the opinion that the other terms of the contract⁹¹ (other than exclusivity, long term and liquidated damages) also do not have any identifiable efficiency rationale. The Tribunal agrees with that opinion.

The terms of the Laidlaw contracts are not justified as necessary to protect Laidlaw against any cost exposure on termination by a customer. In the first place, no such cost exposure exists because the costs associated with commencing service to a customer are minimal. Secondly, if such terms were necessary to protect Laidlaw, one would not expect to find that customers who go out of business or move to locations where Laidlaw does not provide service, would be able to terminate on a 30-day notice, while in all other circumstances they are bound for three years. It is also significant that Laidlaw does not offer customers a

⁹⁰ *Ibid.* at 14. While the text of the affidavit refers to the "waste disposal business", it is clear from the context that it is the lift-on-board segment of the industry which is under discussion.

⁹¹ *Supra* at 30ff.

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lower price for signing a long-term contract; nor does it refuse to provide service if a customer refuses to sign any contract.

The automatic price increase clause protects Laidlaw from any exposure to increases in dump fees, which are a significant portion of its costs, and, under the most recent standard form contract, against increases in taxes, levies, duties, fuel costs, administrative and other costs of doing business. The negative option price clause in the earlier contract gives Laidlaw the power to adjust prices to monopoly level as long as there are no other suitable competitors in the market. The customer is then locked in by the long-term provisions of the contract so that even if a competitor eventually enters the market there is no opportunity to take advantage of that event and thereby obtain the benefit of a price which is closer to that which pertains in a competitive market.

There is no credible explanation for many of the provisions of these contracts other than to create barriers to entry for would-be competitors by making customer purchase decisions inflexible. The tying of the customers to Laidlaw operates to exclude other competitors from the market.

(b) Contract Terms - From the Purchasers' Point of View

The three-year term, the automatic roll-over provisions, the inability to cancel the contract after 60 days before the end of each three years, the liquidated

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damages clauses and the exclusivity provision bind the customer tightly to Laidlaw for a long period of time. These terms prevent a customer from accepting an offer of service from a Laidlaw competitor unless the customer is careful to arrange for such at some time prior to the 60 days before the expiration of the three-year term.

The negative option price clauses can lead to monopoly pricing even when competitors are present in the market⁹². Since lift-on-board service is usually a minor cost item for a business, there is a tendency for those in charge to overlook the increases which are being levied simply because contesting them takes more time than it is worth.⁹³ If a customer responds negatively to a price increase he or she is immediately faced with having to arrange for alternate service and within a very short period of time: ten days under some contracts.

The fact that the contracts in question are contracts of adhesion is also significant. Laidlaw notes that some terms in some cases were negotiated. This was clearly an infrequent occurrence and does not detract from the characterization of the contracts as contracts of adhesion. The dominant position

⁹² *Supra*, note 88 at 19.

⁹³ Transcript at 1060 (1 November 1991).

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of the respondent is both secured by and reflected in these contracts.⁹⁴ The evidence makes it clear that the customer derives virtually no benefit from them.

(c) Intent Required

One last consideration with respect to the contracting practices must be addressed: the nature of the intent which must be proven in order to find that a respondent has engaged in anti-competitive practices. Counsel for Laidlaw argues that it is necessary to find a clear subjective intention. He argues that in this case the contract forms were general forms used by Laidlaw everywhere in the North American market. He argues that they are designed to meet competition from Laidlaw's two main competitors on that broader stage: Browning-Ferris Industries ("B.F.I.") and Waste Management Inc. ("W.M.I.") All three firms operate continent-wide. W.M.I., with gross revenues of approximately \$5 billion annually, is six to eight times the size of Laidlaw. B.F.I. is three to four times the

⁹⁴ F. Kessler, "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Columbia L.R. 629 at 632:

In so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts. And there can be no doubt that this has been the case to a considerable extent. The use of standard contracts has, however, another aspect which has become increasingly important. Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

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size of Laidlaw. In the context of Canadian markets, however, Laidlaw is the largest of the three.

Counsel for Laidlaw argues that the contracts in the North American context are standard in the industry, that they were not designed with the particular markets here in question in mind. Therefore, Laidlaw could have had no specific intention to restrict competition in the Vancouver Island markets.

Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a "smoking-gun".⁹⁵ Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.

In addition, the claim that the contracts are designed to compete with B.F.I. and W.M.I. on the national and indeed North American stage seems to be saying no more than "we are doing it because they are doing it." The three firms may be international in size but many markets in which they operate are local. The contracts in question exclude not only the small, local competitors but also

⁹⁵ A document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market.

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B.F.I. or W.M.I. as the case might be. There is nothing before the Tribunal with respect to how these contracts operate in larger markets. Nevertheless, insofar as the markets in issue are concerned, there is no doubt that they have anti-competitive effects. It is no answer to say that they were designed for a different market and therefore not intended to have anti-competitive effects in the smaller market. As has been noted, actions will be presumed to have been intended to have the effects which actually occur in the absence of convincing evidence to the contrary. The argument that Laidlaw lacked the requisite intention because the contracts were designed to counter B.F.I. and W.M.I. contracting practices is not convincing.

(d) Jurisprudence Considered

In general, the jurisprudence which has been cited to the Tribunal with respect to anti-competitive acts, as it relates to various contracting practices, is not *directly* relevant. It relates to the statute law of other jurisdictions. At the same time, that jurisprudence does provide illustrations as to how the law in those other jurisdictions has developed. This is useful background information for the Tribunal. Of particular interest in this regard were: *Hoffmann-La Roche & Company AG v. Commission of the European Communities*;⁹⁶ *International Salt*

⁹⁶ [1979] E.C.R. 461.

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*Co., Inc. v. U.S.*⁹⁷; Use of Negative Option Plans by Sellers in Commerce;⁹⁸
Washington v. TCI Cablevision; Soda Ash-Solvay;¹⁰⁰ *European Gas*;¹⁰¹ and
"Monopolization and the Definition of "Abuse" of a Dominant Position under
Article 86 E.E.C. Treaty" by J.T. Lang.¹⁰²

(4) Aided by Questionable Litigation Practices

No one can read the evidence concerning the use Laidlaw made of litigation and the threat of litigation in this case without a sense of outrage. The respondent used its vastly larger size and economic resources together with the threat of litigation to prevent customers from switching to competitors. It commenced spurious litigation and threatened litigation against its competitors to drive or attempt to drive them out of business by raising their costs of doing business. This is certainly predatory behaviour.

It is useful to quote from R.H. Bork:

⁹⁷ 332 U.S. 392 (1947).

⁹⁸ 16 C.F.R. § 425 (1973).

⁹⁹ No. 91-2-11299-1 (Wash. Super. Ct. 4 June 1991).

¹⁰⁰ Commission of the European Communities decision 91/299, [1991] 2 CEC 2029.

¹⁰¹ (1989) 10 E.C.L.R. 299.

¹⁰² (1979) 16 C.M.L. Rev. 345 at 363.

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As a technique for predation, sham litigation is theoretically one of the most promising. Litigation, whether before an agency or a court, can often be framed so that the expenses to each party will be about the same. Indeed, if, as is usual, the party seeking to enter the market bears the burden of going forward with evidence, litigation expenses may be much heavier for him. Expenses in complex business litigation can be enormous, not merely in direct legal fees and costs but in the diversion of executive time and effort and in the disruption of the organization's regular activities. Thus, the firm resisting market entry through sham litigation can impose equal or greater costs upon the entrant and, if it has greater or even equal reserves, may be able to outlast the potential rival. This tactic is likely to find unqualified success only against smaller firms, since the costs of litigation must loom large relative to reserves if the firm is to be driven out. The tactic may be successful against larger firms if the costs are large relative to expected profits in a small market.

The predator need not expect to defeat entry altogether. He may hope only to delay it. Sham litigation then becomes a useful tactic against any size firm, regardless of relative reserves, for it may be worth the price of litigation to purchase a delay of a year or several years in a rival's entry into a lucrative market. In such cases, successful predation does not require that the predator be able to impose larger costs on the victim, that the predator have greater reserves than the victim, or that the predator have better access to capital than the victim. No other technique of predation is able to escape all of these requirements, and that fact indicates both the danger and the probability of predation by misuse of governmental processes.

This mode of predation is particularly insidious because of its relatively low antitrust visibility.¹⁰³

It would be hoped that when courts become aware of this kind of oppressive use of the legal system they would at the very least be prepared to award costs to the defendant on a full indemnity basis.

¹⁰³ R.H. Bork, *The Anti-Trust Paradox* (New York: Basic Books, Inc., 1978) at 347-48.

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B. Substantial Lessening of Competition

Pursuant to paragraph 79(1)(c) of the Act, the Tribunal must determine if the practice of anti-competitive acts has had, is having or is likely to lessen competition substantially.

(1) Market Concentration

Laidlaw argues that the Director has not demonstrated that there has been any substantial lessening of competition in the relevant markets. It is argued that no analysis has been done of the state of competition in the markets before Laidlaw entered compared to what exists now. While it is true that the Director has provided no statistical information concerning the state of competition in the markets before Laidlaw's entry, it is known that in the Cowichan Valley (Duncan) area there were two businesses that *could* compete in that area: Fox and C.W. Whether PAN should be included as a vigorous competitor is unclear given its size. In the Nanaimo area there were three companies: Nanaimo Disposal, Jones and United. In the Campbell River area there were two: Borgfjord and Campbell River Sanitation. The markets are clearly small and would not likely support more than two competitors in the Cowichan Valley (Duncan) area, two in the Campbell River area and three in the Nanaimo area. This does not mean, however, that there has not been a substantial lessening of competition in those markets.

In addition, it is argued that the Nanaimo-Cowichan market is becoming increasingly competitive. The changing market shares calculated by the Ross-Levelton study¹⁰⁴ are as follows:

<u>Date</u>	<u>Laidlaw</u>	<u>PAN</u>	<u>B.F.I.</u>	<u>West Coast</u>
January 1991	90.89%	3.40%	5.45%	0.26%
June 1991	83.43%	3.69%	11.11%	1.77%
October 1991	77.96%	3.97%	8.72%	9.36%

The evidence disclosed that the West Coast percentages for January 1991 and June 1991 were significantly understated. It is likely that the market share for West Coast in the months in question is much larger than indicated. Laidlaw's market share and that of the other market participants would be correspondingly reduced. This means that the evidence of a trend is not very convincing. Indeed, one could not conclude that a trend existed by reference to such a short time frame and particularly when all the data relate to the period after the Director's investigation commenced.

The acquisition practices increased concentration in the market, at times to monopoly levels. Laidlaw bought all the firms in the market so that at times it held a 100% market share. This by itself constitutes at least a *prima facie*

¹⁰⁴ Exhibit A-69: Market Trend Analysis at 2.

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lessening of competition which is substantial. The Tribunal does not purport to determine whether those practices alone, in the absence of the Laidlaw contracts, could have resulted in a substantial lessening of competition. It is sufficient to say that the acquisitions form part of the anti-competitive practices in that regard.

(2) Creation of Artificial Barriers to Entry

It is not just the number of competitors and comparative market shares which are relevant in considering whether a substantial lessening of competition has occurred. In this case the linchpin of Laidlaw's maintenance of its dominant position is the standard form contracts of adhesion which it uses to lock in a customer base. In this regard, the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.

Counsel for Laidlaw argued that the evidence discloses that competitors can still enter the market easily and grow. Reference was made to the fact that SCS Waste Systems placed about 80 containers with customers in a four-month period. Advance acquired about 350 container rentals in a three-year period. West Coast placed 150 containers in the market between its commencement of business

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in January 1990 and October 1991. B & D acquired about 180 container placements in a fourteen-month period. Camvest had approximately 135 containers after a seventeen-month period.

In evaluating the number of containers placed by Laidlaw's past and present competitors it is important to bear certain things in mind. To the extent that Laidlaw did not succeed in having all customers sign contracts there was a small pool of customers available to competitors when they entered. It is clear from the evidence that the firms which tried and are trying (since they are not yet viable at their current scales) to establish themselves in the market experienced an initial surge of growth and then ran into the barrier created by Laidlaw's contracts. Extrapolation from the number of containers placed in the early months of operation is therefore not justified. The evidence further discloses that the local firms benefited from the preference of many customers to deal with a local firm. Thus, the firms had an advantage that should have translated into easy success if they were willing, at least, to meet Laidlaw's price. The evidence also discloses that the number of bins placed by Advance and West Coast overstates their success. Messrs. McLeod and Wallace, the owner and manager of Advance, stated that they succeeded in placing many bins with rural customers who otherwise took care of their own garbage disposal. The prices received from these customers were low and the cost of servicing them high. Advance was forced into these arrangements by the need to utilize its trucks and personnel. Similarly,

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Mr. Kupiak of West Coast described having to go much farther afield than he would choose to go if he had access to customers closer to his base of operation.

It is argued that without evidence as to how long it normally takes to become established as a viable business in these markets, one cannot conclude that the time horizons have been too long. It is argued that Fox's entry into the Nanaimo market in 1980 was no more rapid than is the case for some of the companies now trying to establish themselves in the relevant markets. It is difficult to put much reliance on Fox's experience of so many years ago as a benchmark for a reasonable period of entry today.

Professor Noll's description, which is fully supported by the evidence, notes that the costs of getting into the business are not great. It requires an investment in a truck, some containers, a minimum commitment in work hours to waste collection employees and a similar commitment in advertising. The most significant factor facing an entrant is to obtain a minimum number of customers to keep the truck and collection workers fully occupied and to cover the other initial commitments necessary for entry. But once a minimum number of customers is obtained, the future scale economies in the provision of lift-on-board service are very small and diminish quite rapidly. (These additional economies arise from being able to design more efficient pick-up routes as more customers are added). The implication is that for a very small company, attaining quickly a

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minimum number of customers is very important, but for a large company with several trucks and pick-up routes, scale economies are not important. Delay in achieving the minimum scale necessary to operate means that the new firm must experience higher costs than incumbent firms, and probably losses. Losses experienced during early periods increase the risk and reduce the incentive to enter. In the event that the firm does not succeed, the losses absorbed are not recoverable. But in any event these losses must be taken into account when estimating future profits. Professor Noll notes that, in addition, the contracts enable one geographic area to be monopolized regardless of competitive conditions in an adjacent area: they segment the market so that each can be separately monopolized.

There is no reason to doubt that based solely on the economics of lift-on-board service these should be highly competitive markets. The evidence shows, however, that the effect of the contracts is to make entry sufficiently difficult so that it no longer effectively polices the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a customer base with sufficient rapidity to make entry attractive. In the markets in question there is no doubt that acquisition practices of Laidlaw buttressed by the creation of artificial barriers to entry through the contracts have resulted in a substantial lessening of competition.

VII. EVIDENCE CONSIDERATIONS

Counsel for Laidlaw correctly points out that few of the witnesses in this case were truly neutral. Some of the past competitors and customers of Laidlaw certainly do not view Laidlaw in a positive light. The Tribunal has been conscious of that fact when weighing the evidence. It has equally been aware that many of Laidlaw's witnesses are also not disinterested in the outcome of these proceedings.

Part of the evidence of Michael Wallace was heard by the Tribunal subject to its admissibility being determined at a later time. The evidence relates to a conversation which Mr. Wallace taped. The conversation was with Dean Woods, District Manager of Laidlaw, and took place over lunch. The tape was not submitted in evidence. It was used by Mr. Wallace to refresh his memory before giving evidence. A copy of the tape was provided to counsel for Laidlaw sometime before the hearing and the original was made available to him during the hearing. The tape appears to be undecipherable, because of background noise, to everyone except Mr. Wallace.

Counsel for Laidlaw argued that evidence of the luncheon conversation should not be accepted in evidence because it had been taped by Mr. Wallace

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without Mr. Woods' consent. This argument was based on the recent decision of the Supreme Court of Canada in *R. v. Duarte*.¹⁰⁵

While subsection 184(1) of the *Criminal Code*¹⁰⁶ makes it a criminal offence to electronically "intercept" a private conversation, it is not illegal for one of the participants to a conversation to record that conversation without the knowledge of the other participants. The tape recording by Mr. Wallace of a conversation in which he participated is not illegal. In the *Duarte* case, the Supreme Court decided that when this kind of "participant" or "consent" taping is carried out by "an instrumentality of the state" (e.g., a police officer) it amounts to a search or seizure. As such it would be unreasonable unless it had been authorized by judicial warrant. The Court held that it was unacceptable in a free society that agents of the state be free to use the technology of electronic surveillance at their sole discretion. The unauthorized audio-visual recording in issue in the *Duarte* case was therefore said to offend section 8 of the *Canadian Charter of Rights and Freedoms*. At the same time, the Court held that the admission of the evidence, even though it had been obtained without authorization by judicial warrant, would not bring the administration of justice into disrepute. The evidence had been obtained on the understanding of the law as it existed pre-

¹⁰⁵ [1990] 1 S.C.R. 30.

¹⁰⁶ R.S.C., 1985, c. C-46, as amended.

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Duarte and not through a deliberate or wilful breach of *Charter* rights. The evidence was therefore held to be admissible.

In the present case, it is sufficient to note that Mr. Wallace was not acting as an instrumentality of the state when he recorded his conversation with Mr. Woods. He was acting as a private individual. The *Duarte* decision does not apply. There is no impediment to the admissibility of Mr. Wallace's evidence on the basis of the *Duarte* decision.

Laidlaw also questioned the credibility of the evidence given by Darlene Gunter. Laidlaw suggests that she forged signatures on some container service agreements. Laidlaw has made no attempt to pursue its allegations in this regard through the criminal courts and the handwriting expert called by Laidlaw did not do a blind analysis.¹⁰⁷ The Tribunal does not doubt the credibility of Ms. Gunter's evidence.

VIII. REMEDIES

The Director seeks the following remedies:

¹⁰⁷ An analysis in which the expert is not aware of the identity and handwriting of the person suspected of writing the documents.

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... an Order or Orders prohibiting the Respondent from entering into or continuing to use any agreement for the provision of the Product in the Markets which contain terms:

1. (i)
 - a) creating an automatic renewal thereof;
 - b) requiring notice of termination beyond one payment period;
 - c) creating or containing a term of more than one year;
 - d) creating a right of first refusal on the part of the Respondent for the continuation or acquisition of the business of a customer or potential customer;
 - e) obliging a customer to reveal competitive bids or information regarding discussions, negotiations or quotes provided to the customer from competitors of the Respondent;
 - f) requiring the customer, if it requires the Product at multiple locations or in differing quantities, or levels of service to obtain it exclusively from the Respondent;
 - g) requiring a customer to pay any stipulated sum upon early termination.
- (ii) declaring null and void any such provisions in contracts in place in the Markets.

2. [An order] prohibiting the acquisition of any competitor in the Markets for a period of three years from the date of the Order of this Tribunal.

3. An Order prohibiting the Respondent from exiting the Markets for a period of three years from the date of the Order of this Tribunal.

4. An Order prohibiting the Respondent for a period of three years from charging a price for the Product in any of the Markets, for the purpose of meeting or undercutting the price of a competitor in such market unless the price so charged by the Respondent is applied or made available uniformly by it to customers similarly situated.

5. An Order directing that the Respondent may only supply the Product in the Markets, if, by written contract, which contract shall prominently and unambiguously state thereon that the document is a contract for waste disposal for a fixed term; and that all such contracts in place therein at the time that the orders sought herein are granted and entered into thereafter for a period of three years be provided to the Applicant at the Applicant's request;

6. An order declaring any clause in any contract of purchase and sale or appurtenant or ancillary thereto of a competitor or any other provider of the product in the Markets or its business which restricts that vendor or any of its principals or any other

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person a party thereto from competing in the Markets or each of them, in any business or activity competitive with that of the Respondent's, null and void until such time that the Respondent demonstrates that it is no longer dominant in the Markets;

7. An order declaring any existing agreements between the Respondent and any other person which allocates customers, fixes territorial limits on the extent of the involvement of the parties in the market for the supply of the Product in the Markets, or which stipulates conditions or prohibitions as to entry into the Markets, are null and void; and prohibiting the Respondent from entering into any such agreement;

8. An order requiring the Respondent to develop a system to determine the cost of service of each of its customers based upon an approved Canadian Institute of Chartered Accountants Generally Accepted Accounting Principles formulation thereof derived from the weight of waste generated by each customer as weighed at the time of pick up;

9. An order requiring the Respondent, for a period of five years from the date of the Order to create and circulate to its customers in the Markets and each of them a price list regarding its scale of charges for the supply of the Product;

10. An order requiring the Respondent to provide timely notice to each of its customers of any change in its standard form of container service agreement and providing therein an explanation of each such change and providing to each of its customers an option to adopt such changes or new form of container service agreement in lieu of its then extant contract;

11. An order directing the Respondent to provide a copy of this Order and a synopsis thereof as approved by the Applicant to each customer as of the date thereof;

12. An order directing the Respondent to similarly provide a copy of such order and a synopsis thereof to each of its managerial employees a statement of its policy of compliance with the Competition Act, an explanation of the said Act, and in particular the implications of ss. 78 and 79 thereof; and

13. Such other and further order as may to this Tribunal appear just.¹⁰⁸

¹⁰⁸ Written Argument of the Applicant at 57-60.

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The remedies which the Director seeks can be classified as: (a) prohibition of certain acquisition practices in the future and the voiding of restrictive covenants in existing acquisition agreements; (b) prohibition of certain contracting practices in the future and the alteration of existing contracts so that the anti-competitive terms are made inoperative; (c) other substantive orders designed to restore competition; and (d) notice requirements respecting any order which the Tribunal might make.

Subsection 79(1) authorizes the Tribunal to issue orders preventing the future occurrence of anti-competitive acts. In addition, subsection (2) provides:

79. (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.

The Tribunal is aware that its orders pursuant to subsections 79(1) and 79(2) must only go as far as it considers necessary in order to restore competition in the relevant markets. It agrees with counsel for Laidlaw's argument that it is not part of the Tribunal's function to impose penalties or punitive measures. What is necessary to restore competition is a judgment which must be made by reference to the evidence which has been put before the Tribunal as to how the markets in

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question operate and have operated and the effects the anti-competitive acts are having thereon. The Tribunal has taken these considerations into account in deciding which of the orders requested by the Director it is prepared to grant.

A. Acquisitions and Restrictive Covenants

The Tribunal is willing to grant an order prohibiting Laidlaw from acquiring any competitor in the market for a period of three years from the date of the order (Director's remedy 2). Laidlaw's acquisition practices clearly constituted anti-competitive acts which were a significant element leading to the substantial lessening of competition which occurred in these markets. The acquisition practices have, in some circumstances, made customers reluctant to use the services of a Laidlaw competitor because of a belief, resulting from past experience, that Laidlaw will acquire that new company in the not too far distant future and the customer will be disadvantaged as a result of having left Laidlaw. The Tribunal is therefore of the view that the three-year ban on acquisitions is a necessary aspect of an order designed to restore competition to the markets.

Insofar as declaring the restrictive covenants in the acquisition agreements to be null and void (Director's remedies 6 and 7), counsel for Laidlaw argues that this type of remedy is not within the jurisdiction of the Tribunal because it is a blatant interference with the property rights of the parties to those contracts. It is argued

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that the Tribunal is a creature of statute and not a court of inherent jurisdiction and therefore cannot grant the remedy sought.

There is no doubt that the Tribunal is not a court of inherent jurisdiction and is a creature of statute. At the same time, it is clear from the types of remedies which are expressly *included within* the Tribunal's mandate (ordering sales of shares and assets) that the Tribunal was given broad jurisdiction to interfere with property rights not only of the party or parties before it but also of third parties who have contracts with the respondent. This is clear not only from the remedies expressly described but also from the types of activity which the Tribunal is mandated to restrain: pre-emption of scarce resources; buying up products to prevent erosion of existing price levels; adoption of product specifications; requiring or ordering a seller to sell only or primarily to certain customers.

Five of the covenants in question have already expired. Three of the remaining four which relate to lift-on-board service, that given by Jones, that given by B & D, and that given by SCS Waste Systems, are clearly overly broad. The covenants given by Jones and B & D purport to cover areas within a 300-mile radius of Nanaimo and a 100-mile radius of Campbell River respectively. The covenant given by SCS Waste Systems is a step covenant of which the smallest decrement is a 50-mile radius from Nanaimo. This covers large parts of highly populated areas of mainland British Columbia, including at least parts of Vancouver. These

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are areas in which SCS Waste Systems never operated. The covenants are clearly wildly overly broad and therefore void.

With respect to the covenant given by Advance concerning lift-on-board service, it is carefully crafted so as to be no broader than 30 miles across following the spine of Highway No. 1 (which also follows the coastline of Vancouver Island). It is difficult to conclude that it is an unreasonable restriction on the basis of the applicable common law principles.

With respect to the two covenants respecting the roll-off business given by Laidlaw (one to Jones and the other to Advance), characterizing those covenants is more difficult. While intuitively one is led to the conclusion that given the size of the markets they must constitute either an undue restriction in the terms of section 45 or lead to a substantial lessening of competition in the terms of section 79, on reviewing the evidence there is simply insufficient information concerning the state of the roll-off market to allow such a conclusion.

Counsel for Laidlaw argues that even if the lift-on-board covenants are overly broad, they do not lead to a substantial lessening of competition because they keep such a small number of potential competitors out of the market. Therefore, it is argued that remedies with respect to them are not within the Tribunal's purview.

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While it may be clear that an application of the common law principles respecting restrictive covenants would lead to the conclusion that all of the unexpired covenants would be unenforceable as being overly broad, the Tribunal has not been convinced that declaring the unexpired restrictive covenants void is necessary to restore competition in the markets. There is merit in the argument that their effect on the markets and on competition therein is marginal. At the same time, in some sense, the Tribunal's refusal to issue a declaration in this regard is somewhat irrelevant since the parties to the lift-on-board covenants will by virtue of these reasons have an appreciation of the legal weakness of those covenants.

B. Contracts

With respect to future and existing contracts, as has already been noted, Laidlaw has removed the right of first refusal and the right to compete clauses from its standard form contracts. Thus future contracts will not contain those terms. Insofar as existing contracts are concerned, Laidlaw has undertaken not to enforce those clauses and to notify its customers of this position. Similarly, Laidlaw has undertaken to remove the liquidated damages clause from its standard form contracts. Laidlaw is willing to notify its customers that those terms contained in existing contracts will not be enforced (Director's remedies 1(i)(d), (e), (g) and (ii) as it relates to subparagraphs (d), (e), (g) of paragraph (i)).

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Laidlaw has revised its contract forms so that there is bold printing on the face which warns the customer that it is a contract for three years which is being signed (part of Director's remedy 5).

Laidlaw has also decided to alter the term of the roll-over renewal period found in the contracts. Under this arrangement the original term of the contract would be for three years but renewals thereafter would be for one year only. The Tribunal does not consider this sufficient to reduce the artificial barriers to entry caused by the contracts. The Tribunal is prepared to grant an order that the contracts, both present and future, shall have no longer initial term than one year. An automatic right of renewal is appropriate but only for a one-year period. At the expiration of the initial one-year term, cancellation of the contract may occur on one-month's notice by either party.¹⁰⁹ It would seem preferable that the existing contracts expire on their anniversary dates within a year of the Tribunal's order rather than all on one day (Director's remedies 1(i)(a), (b), (c) and (ii) as it relates to subparagraphs (a), (b), (c) of paragraph (i)).

¹⁰⁹ Madame Sarrazin is of the view that a more appropriate and perhaps effective method of eliminating the abusive practices would be to simply require that all Laidlaw contracts be terminable on 60 days notice. She notes, first, that there was much evidence that prior to Laidlaw's entry into the markets no formal written contracts were in use and termination of service in general was effected by 30 days notice, that the customer service agreements were not introduced as a result of the customer's preferences and that the competition used them only as a reaction to Laidlaw practices. Professor Noll pointed out that the contracts do not create efficiencies and are the key to maintaining and enforcing market power for Laidlaw. It is further emphasized that in all cases, simple clear cut remedies targeted at the fundamental issues are preferable to more complex and interventionist ones that will have a perpetual life and may not cover adequately all situations present and future. With the evidence before the Tribunal, and in light of the above principle, Madame Sarrazin notes that it would have been reasonable for the Director to have asked for contracts terminable on 60 days notice to overcome the effects of Laidlaw practices in the market. Such remedy would serve the purpose required and would allow the market to restore itself.

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The Tribunal is willing to grant an order that the standard form contracts not contain terms requiring a customer to obtain service exclusively from Laidlaw with respect to all its lift-on-board service (Director's remedy 1(i)(f) and (ii) insofar as it relates to subparagraph (f) of paragraph (i)). Laidlaw argued that these exclusivity clauses were included in order to ensure that the customer did not stream recyclable and therefore more profitable waste from the waste stream, which would otherwise have been available to Laidlaw. This is not convincing. In the first place, it is the customer not Laidlaw which does the streaming. In the second place, the reference to recyclable waste only appears in the latest Laidlaw contracts; there is no way that this can be seen as a situation relevant to the earlier contracts. More importantly, however, there is no reason to tie a customer to a location (or quality of service (e.g. recyclable)) for which he or she has not specifically initially contracted. In the context of the present application such clauses abet the anti-competitive reach of the contracts by excluding competitors from these other areas.

In deciding to grant an order relating to the contracts as described above, the Tribunal is aware that only Laidlaw will be bound to conduct itself in this fashion. Other firms in these markets will not be so constrained. No order will exist preventing Browning-Ferris Industries (B.F.I.) from seeking three-year contracts from its customers. This, however, is the consequence of the authority granted to the Tribunal under the Act. Orders can only be made pursuant to section 79

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against a dominant firm. While the situation created by such orders would seem to be unbalanced, the Tribunal is aware that if customers are faced with a choice between a three-year lock-in type contract such as that which Laidlaw now uses and a one-year contract from which the anti-competitive clauses have been removed, it seems likely that they would choose the less onerous version.

C. Other Substantive Remedies

The Tribunal is not willing to grant an order preventing Laidlaw from exiting any of the markets for a period of three years from the date of the order (Director's remedy 3). If the Director can provide a fairly precise definition of what is meant by "exiting", the Tribunal is prepared to include in its order a requirement that Laidlaw give the Director 60 days notice of any such intended action. The Tribunal is also willing to include in its order a provision that an application to amend or alter the existing order could be made in reference to this exit activity if it was deemed desirable to do so, despite the fact that section 106 of the Act provides for application for variation of an order in changed circumstances.

The Tribunal is willing to require that Laidlaw provide the Director with copies of all of its existing and future contracts (second half of Director's remedy 5). It is not prepared to require Laidlaw to provide an opportunity to each existing customer to change its contract to new contract forms whenever such forms are

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introduced (Director's remedy 10). The Tribunal notes that the existing contract between any given customer and Laidlaw will be based on a number of interrelated factors including price. The purpose to be served by obligating Laidlaw, merely because it introduces a new form of contract, to offer that contract to all existing contracted customers is not immediately obvious. At the same time, the Tribunal is willing to include in its order a requirement that if and when any new contract form is prepared, it should be accompanied by an explanation describing the differences between it and the contract which the customer had previously signed when submitted to existing customers.

That leaves for consideration what might be called the pricing remedies: (a) prohibition against Laidlaw charging a price in any of the markets for the purpose of undercutting a competitor unless the price so charged is made available uniformly to all its customers (Director's remedy 4); (b) Laidlaw to create and circulate price lists to all its customers for a period of five years (Director's remedy 9); and (c) requires Laidlaw to develop a system to determine a cost of service to each of its customers (Director's remedy 8).

The Tribunal has difficulty accepting that orders of this nature should be issued. The Tribunal's difficulty arises because no argument has been articulated as to why these remedies are sought and what will potentially be achieved through

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them. In addition, these remedies, on their face, raise serious questions for the Tribunal.

With respect to the request for an order requiring Laidlaw not to charge a price in any of the markets for the purpose of undercutting a competitor unless it is made available uniformly to all customers (Director's remedy 4), it is difficult to see how customers would benefit from a policy which prevented them from playing off suppliers against each other. Predatory pricing while originally pleaded was not seriously at issue in this case. More importantly, no argument has been made demonstrating that the possible pay-off from such activity would not be greatly reduced, if not eliminated, by the lowering of the barriers to entry which will result from the other remedies.

With respect to the request that Laidlaw be required to circulate price lists to its customers (Director's remedy 9), it has not been demonstrated to the Tribunal that this could serve any useful purpose since it is conceded that any such price list would be a "suggested price" list only. It is understood that any such list would not be binding on Laidlaw and that Laidlaw would be free to negotiate with individual customers. The list, at the same time, could become the focus for implicit pricing agreement by the suppliers in these very concentrated markets.

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With respect to the requirement that Laidlaw develop a cost of service for each of its customers (Director's remedy 8), the Tribunal notes that this remedy is conceptually inconsistent with the Director's remedies 4 and 9. The request that the cost of service to each individual customer be determined is inconsistent with the notion underlying remedies 4 and 9 that standardized pricing is possible. If the concern is that Laidlaw may be charging some customers too little compared to average variable cost, the disadvantage would be Laidlaw's as long as the rest of the customer base turned over quickly enough so that it was available to competition from other suppliers.

The Tribunal is willing to reconsider its refusal to include in the order what is referred to as the pricing remedies. It takes this stand because it wishes to ensure that all valid reasons for seeking such remedies have been brought to its attention. Accordingly, the Director, if he so wishes, may file written argument setting out the rationale on which the request for those remedies is based, within ten days of the date of these reasons. This should include, for example, an explanation as to what the remedies are intended to accomplish, why they are justified on the evidence and why they are necessary in the light of the other remedies which the Tribunal has agreed to grant. If the Director chooses to exercise this option the respondent will of course be given a corresponding ten days within which to reply.

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D. Notice Requirements

Laidlaw does not object to notifying all its customers of any order the Tribunal might make in accordance with a communication drafted by the Director (Director's remedy 11). Laidlaw does object to providing to its managerial employees notice of any order plus a statement that its policy is to comply with the Act (Director's remedy 12). It is argued that this last is a new remedy which did not appear in the notice of application nor in any documentation before counsel's final written argument. Counsel for the Director indicated that if it was necessary he would make a formal motion to amend the notice of application in this regard. Counsel for Laidlaw's argument, that it is not open to the Tribunal to make the order requested, is based on the Tribunal's decision in the *NutraSweet* case:

In formulating an appropriate order the Tribunal is of the view that it must confine itself essentially to the kind of orders requested by the Director in his original application with such modifications as may fairly be considered to have been in issue in the case. While other possible remedies were discussed during argument, no amendment was sought to the application in this respect. It is a matter of fairness that the respondent not now be faced with a remedy of which it had no formal notice.¹¹⁰ (underlining added)

If a formal notice to amend the application is required, then it is hereby granted. At the same time, the "additional" remedy being sought is not different in *kind* from that sought under the original application. It is merely an addition to the scope of the notice to be given with respect to any order the Tribunal might make, and a

¹¹⁰ *Supra*, note 2 at 57-58.

requirement that Laidlaw make an express commitment to abide by the provisions of the Act. The test regarding additions or alternatives to remedies is whether or not the respondent will be prejudiced as a result of not having had earlier notice of the request, of not having had an opportunity to adduce relevant evidence respecting the effects of the remedy or an opportunity to explain why it is inappropriate. The respondent will not be prejudiced in this manner by the expanded notice requirements now being requested and the Tribunal is willing to grant an order which includes such requirements.

E. Request that Order be Drafted

The Tribunal asks that counsel for the Director, in consultation with counsel for the respondent, draft an order for issuance by the Tribunal in accordance with these reasons. A draft shall be submitted within ten days of the date of these reasons.

DATED AT Ottawa, this 20th day of January, 1992.

SIGNED ON behalf of the Tribunal by the presiding judicial member.

(s) B. Reed
B. Reed

9

Competition Tribunal



Tribunal de la Concurrence

CT - 1994 / 003 – Doc # 204a

IN THE MATTER OF an application by
the Director of Investigation and Research
under sections 77 and 79 of the *Competition Act*,
R.S.C. 1985, c. C-34.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

Tele-Direct (Publications) Inc.

Tele-Direct (Services) Inc.

Respondents

- and -

Anglo-Canadian Telephone Company
NDAP-TMP Worldwide Ltd. and
Directory Advertising Consultants Limited
Thunder Bay Telephone

Intervenors

**REASONS AND ORDER**

Dates of Hearing:

September 5-8, 11-14, 27-29; October 2-3, 5-6, 10-13, 16-20, 23-27; 30;
November 2-3, 6-10, 14-17, 20-22, 24, 27-30; December 1, 4, 6-8, 1995;
January 22-26; February 12-16, 23, 26-29; March 1, 1996

Members:

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ASR	authorized selling representative
CANYPS	Canadian Yellow Pages Service
CCS	cost of customer service
CMR	Certified Marketing Representative
CPI	consumer price index
CPM	cost per thousand
CRTC	Canadian Radio-television and Telecommunications Commission
DAC Limited	Directory Advertising Consultants
DSP	Dial Source Plus, Inc.
GSF	general sales force
NAM	national account manager
NAR	national account representative
NDAP	NDAP-TMP Worldwide Ltd.
NYPSA Association	National Yellow Pages Service
RRC	raising rivals' costs
telco	telephone company
TPA	Total Performance Assessment
TYP	Talking Yellow Pages
VAN	Value-Added Network

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VIA
YPPA

Very Important Advertiser
Yellow Pages Publishers Association

COMPETITION TRIBUNAL

REASONS AND ORDER

The Director of Investigation and Research

v.

Tele-Direct (Publications) Inc. et al.

I. INTRODUCTION

This application is concerned, broadly speaking, with two aspects of telephone directory or, as it is commonly referred to "Yellow Pages", advertising. The first aspect is the provision of advertising space in a published directory or the publishing business. This aspect of the business encompasses activities such as the compilation, printing and distribution of the directory. The second aspect is the provision of the advertising services required to create a finished advertisement for publication in a directory. The services aspect of the business includes such elements as locating customers, selling advertising space, and providing advice and information to customers on the design, content, creation and placement of directory advertising.

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The applicant in this case is the Director of Investigation and Research ("Director"), the public official charged with enforcement of the *Competition Act* ("Act").¹ The Director brings an application against the respondents, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., under sections 77 and 79 of the Act, the provisions dealing with, as they are commonly known, tied selling and abuse of dominant position:

77. (1) For the purposes of this section . . .

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or
(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(2) Where, on application by the Director, the Tribunal finds that . . . tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,
with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in . . . tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

79. (1) Where, on application by the Director, 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,
the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

¹ R.S.C. 1985, c. C-34.

In relation to section 77, the Director alleges that the respondents have engaged in a practice whereby, as a condition of supplying advertising space in telephone directories, they have required or induced customers seeking advertising space in telephone directories to acquire another product from them, namely telephone directory advertising services. As the respondents are allegedly major suppliers of advertising space, this practice of tied selling has allegedly impeded entry into or expansion of firms in the market because advertising agencies or others would provide the services or would expand to provide increased services, were space and services not tied together by the respondents. The result, it is alleged, is that competition has been, is, or is likely to be lessened substantially.

With respect to the alleged abuse of dominant position, the Director alleges that the respondents substantially or completely control the classes or species of business they engage in, namely the provision of advertising space and the provision of advertising services. The respondents, it is alleged, have engaged in or are engaging in a practice of anti-competitive acts in each of the markets for space and for services. In the advertising space market, the alleged practice focuses on the actions taken by the respondents upon entry by competing publishers of telephone directories into some of their markets. In the services market, the alleged practice includes acts directed by the respondents against alternative or independent suppliers of services. The acts alleged to be anti-competitive in the services market cover a wide gambit, including, among others, refusal to deal directly with certain service suppliers as agents for advertisers, providing space to independent service suppliers on less favourable terms than to the respondents' internal sales staff, "squeezing" the return available to independent service

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providers by restricting the availability of commission over time, and refusing to license its Yellow Pages trade-marks to competing service suppliers. These practices allegedly have had, are having, or are likely to have the effect of preventing or lessening competition substantially in the markets for the provision of advertising space in telephone directories and advertising services, respectively.

The respondent Tele-Direct (Publications) Inc. is owned by Bell Canada and BCE Inc. It is comprised of two parts: a "directory" division and an "other business" division. The directory division embraces the directory publishing operations for Bell Canada in its territory, which covers most of Quebec and Ontario. The other business division is made up of various companies partly or wholly owned by BCE Inc., one of which is Tele-Direct (Services) Inc.² Tele-Direct (Services) Inc. publishes telephone directories under contract for non-Bell Canada telephone companies ("telcos") with discrete territories within Ontario,³ for Télébec (owned by BCE Inc.) in parts of Quebec, and for other telcos outside of Ontario and Quebec. Tele-Direct (Services) Inc. also has international operations and includes Tele-Direct (Media) Inc., an accredited advertising agency specializing in Yellow Pages created by Tele-Direct in 1994. There is overlap between Tele-Direct (Services) Inc. and Tele-Direct (Publications) Inc. at the officer level but Tele-Direct (Services) Inc. has its own employees who run its business. In these

² Others include the remaining portion of Bell Canada, Télébec, Maritime Tel & Tel, etc.

³ E.g., the Corporation of the City of Thunder Bay, Amtelecom Inc. (Aylmer, Straffordville and Port Burwell), the Corporation of the Town of Kenora.

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reasons, except where the context requires separate identification, the two respondents will be referred to together as "Tele-Direct" or the respondents.

The respondents deny each of the allegations in the Director's application. In particular, regarding the tied selling allegation, the respondents' primary position is that advertising services and advertising space form an inseparable package for reasons of efficiency and revenue growth. In response to the abuse of dominance allegations, the respondents maintain that they do not substantially or completely control, or have market power in, the alleged market as there are many adequate substitutes for telephone directory advertising, namely other local advertising media. With respect to the specific alleged anti-competitive acts, the respondents take the position that the allegations relate to acts directed at three specific groups operating in separate markets: other directory publishers, Tele-Direct's accredited agents and non-accredited service providers. Save for publishers, they assert that they are not in competition with the groups against whom their acts are said to be directed.

Five requests for leave to intervene were received and granted in this proceeding although two of those were later discontinued.

NDAP-TMP Worldwide Ltd. ("NDAP") and Directory Advertising Consultants Limited ("DAC") are accredited Yellow Pages advertising agencies which provide services to clients who wish to advertise in telephone directories, particularly those published by or for the various telcos across Canada. They arrange for the preparation and placement of the advertisements in

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these directories on behalf of their clients. They presented final argument on the issues relevant to the role of agencies in the market.

The Anglo-Canadian Telephone Company ("Anglo-Canadian"), through one of its divisions, publishes Yellow Pages directories in British Columbia for BC Tel and in parts of Quebec for Quebec Tel. Anglo-Canadian licenses the Yellow Pages trade-marks from the respondents. Anglo-Canadian presented final argument only on the issues related to the possible compulsory licensing of the Yellow Pages trade-marks requested by the Director as part of the abuse of dominance case.

InfoText Limited ("InfoText"), a subsidiary of Newfoundland Tel, and Thunder Bay Telephone supply subscriber listing information to Tele-Direct for directory publication for subscribers in Newfoundland and Labrador and in the city of Thunder Bay, respectively. InfoText subsequently discontinued its intervention. Both InfoText and Thunder Bay Telephone requested intervenor status only to place their requests for leave to intervene on the record, which the Tribunal allowed.

White Directory of Canada, Inc. ("White") is a non-telco publisher of telephone directories in St. Catharines, Niagara Falls and Fort Erie. White discontinued its intervention prior to the commencement of the hearing.

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Preliminary Comments of the Presiding Judicial Member

The notice of application in this matter was filed on December 22, 1994. The hearing commenced in September 1995 and ended at the beginning of March 1996. This decision has taken over 11 months to issue. In view of the Tribunal's usual practice of dealing with matters before it more expeditiously, some explanation is warranted.

There is no doubt that this has been the most complex case presented to the Tribunal since its inception. In addition to a strongly contested question of market definition, the case, in reality, consists of five cases, each requiring the Tribunal to address substantial competition issues (tied selling, abuse of dominance in respect of agents, consultants and publishers and trade-marks). Each of the five cases involves a multitude of sub-issues. Many of the Director's numerous specific allegations were multifaceted. To each allegation, the respondents raised a host of defences.

The record in this case provides a telling indication of its complexity. It consists of almost 15,000 pages of transcript taken over 70 days and involving 58 witnesses, including five expert witnesses. There were 36 volumes of documents produced in the joint book of documents alone. A further 156 exhibits not included in the joint book were entered in evidence by the parties. The parties submitted over 600 pages of written argument and oral argument took 11 days.

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In many respects, the approach of the Director and respondents to this case does not result in a joining of issues. Counsel for the Director referred to their respective positions as "ships passing in the night". The result is that the Tribunal has often been left to identify and define, as well as resolve, the issues.

Indeed, the appropriate conceptual frameworks for the various issues have been very difficult to determine. The application included novel allegations of anti-competitive acts (for example, "targeting" in respect of publisher entrants) and inter-relationships between issues, such as the alleged anti-competitive acts against agents in the abuse of dominance case and tying, which required considerable deliberation.

Finally, there was the troubling issue of tying. This is the first case in which tying has been raised as a "principal" or substantial allegation.⁴ This is a particularly difficult issue when related to services. There has been considerable debate among competition lawyers, economists and jurists about the difficulty of addressing alleged anti-competitive activity without adversely affecting efficiency in the context of tying, and the Tribunal was squarely faced with these issues in this case.

⁴ Tying was a minor portion of the case in *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 C.P.R. (3d) 1, [1990] C.C.T.D. No. 17 (QL).

Summary of Conclusions

1. Telephone directory advertising is a distinct advertising medium without close substitutes and is therefore the relevant product market. Geographic markets are local, corresponding roughly to the scope of each of Tele-Direct's directories. Tele-Direct has an overwhelming share of the product market in all relevant local markets.
2. Tele-Direct has control or market power since the condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied. Direct indicators of market power, such as the level of profits and methods of pricing, reinforce this conclusion.
3. With respect to the allegation of tied selling, telephone directory space and telephone directory advertising services constitute two products solely for national and regional advertisers and Tele-Direct has tied the supply of advertising space to the acquisition of advertising services for these customers. We have prohibited the practice of tied selling.
4. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts against entrants into telephone directory publishing, particularly in the Sault Ste. Marie and Niagara regions, is rejected.
5. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts directed against agents and resulting in substantial lessening of competition is rejected.

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6. The allegation that Tele-Direct has engaged in a practice of discriminatory anti-competitive acts against consultants which have or are likely to result in a substantial lessening of competition is accepted. Tele-Direct is ordered to cease the practice. Other allegations respecting consultants are rejected.

7. The allegation that Tele-Direct's refusal to license its trade-marks to certain competitors is a practice of anti-competitive acts is rejected because the refusal is protected from being an anti-competitive act by subsection 79(5) of the *Competition Act* as a legitimate exercise of its rights under the *Trade-marks Act*.

II. BACKGROUND FACTS

A. TELEPHONE DIRECTORY ADVERTISING

A white pages telephone directory is a comprehensive list of all telephone subscribers in a specified area. A listing includes a name, address and telephone number. A classified telephone directory, historically printed on yellow paper (hence "Yellow Pages"),⁵ includes all business telephone subscriber listings plus advertising arranged by heading or descriptive category. There are often multiple headings under which a directory user might search in order to find a certain type of business.

⁵ The words "Yellow Pages" and "Pages jaunes" are registered trade-marks of the respondents in Canada although they are considered generic or descriptive in the United States. Tele-Direct licenses its trade-marks to other telco directory publishers in Canada but not to non-telco directory publishers.

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Tele-Direct's Yellow Pages directories generally cover the same geographic area as the corresponding white pages. Some white pages directories, however, cover a much broader area than the Yellow Pages; in those cases, there would be several different Yellow Pages directories for a single white pages. Tele-Direct also publishes even more narrowly-scoped Yellow Pages directories for individual "neighbourhoods" in Montreal and Toronto.

Telcos are required by the Canadian Radio-television and Telecommunications Commission ("CRTC") to distribute the appropriate up-to-date telephone directory for their district, both white and Yellow Pages, to telephone subscribers at no additional charge. Tele-Direct pays the various telcos for subscriber listing information and the right to publish and distribute the directories to subscribers. It makes its profits from the net advertising revenues. Tele-Direct publishes directories annually.

Every business telephone subscriber is entitled to receive in its Yellow Pages directory one light-type listing free of charge under the heading of its choice. Any features added to a listing, for example, bold type or extra lines, a second heading or another directory must be purchased. Actual advertisements in the Yellow Pages must, of course, also be purchased. For Tele-Direct's purposes, an "advertiser" is a subscriber who has a paid item in either the white pages (an enhanced listing) or Yellow Pages of a directory. Revenues from Yellow Pages advertising is far greater than any "advertising" expenditures in the white pages.⁶

⁶ Approximately 10 percent of Tele-Direct (Publications) Inc. 1994 directory revenue came from expenditures in the white pages.

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Approximately 50 percent of business subscribers are "advertisers". The remainder are called "non-advertisers" or "non-ads". The percentage of advertisers is smaller in the largest centres such as Montreal and Toronto and larger in smaller centres. Excluding neighbourhood directories and agency clients,⁷ average advertising expenditures in 1994 in Tele-Direct (Publications) Inc. directories were approximately \$1,700, with advertisers spending that amount or less constituting around 30 percent of revenues but over 80 percent of advertisers. At the other end of the spectrum, the top 30 percent of revenues comes from only about two percent of advertisers, those who spend more than approximately \$10,000 annually. A few very large advertisers spending an average of \$113,000 provide 6.5 percent of revenues but represent only 0.1 percent of advertisers by number.

A number of different types of advertising can be purchased in a Tele-Direct Yellow Pages directory. Apart from the basic upgrades to its initial free listing (e.g., second heading, bold type), a business may purchase "in-column" or "display" advertising. The pages in Tele-Direct's directories are generally divided into four columns; an "in-column" advertisement fits within the confines of one of the columns with the variation being in the height of the advertisement. In-column advertisements are arranged alphabetically, interspersed among the simple listings.

A variation on the in-column advertisement is the trade item advertisement, including the trade-name, trade-mark and custom trade-mark advertisements (usually referred to together as

⁷ The very small and the very large accounts.

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"trade-marks" or "trade-mark advertisements"). In order to place this type of advertisement, the listed businesses must have authorization to use the trade-name or mark in their directory advertising. The trade-name or mark acts as the heading for the advertisement, followed by one or more listings of specific businesses.

Display advertisements range in size from a quarter column (1/16 of a page) to a full page. The placement of these advertisements is loosely alphabetical, as space on a page permits. Options like various types of borders, red, other colours, "white knockout" (white background instead of yellow) may be added to both in-column and display advertisements. They also feature a variety of design and layout techniques, print styles and sizes and graphics.

B. PUBLISHERS

Revenues from the telephone directory business in Canada amount to about \$900 million to \$1 billion annually. The vast majority of these are generated by the telco-affiliated directories. Apart from the Tele-Direct directories and other directories published by or on behalf of telcos, there are over 250 "independent" directories published in Tele-Direct's territory. These directories are independent in the sense that they have no connection to the provider of telephone service. They come in a wide variety of formats (size, subject, colour of paper) but can, generally, be characterized as two types: "niche" and "broadly-scoped" directories.

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Niche directories operate in geographic areas which are substantially smaller than the areas covered by the corresponding telco directories. These directories have a generally smaller, more tightly-scoped distribution area than the telco directory, allowing a local retailer to advertise to a smaller geographic area at a lower cost. Niche directories are often directed at a particular religious, ethnic or demographic group.

Two independent publishers of broadly-scoped directories currently produce directories in parts of Tele-Direct's territory. White, which was for a brief time an intervenor in this proceeding, has published directories in the Niagara region since 1993. Dial Source Plus, Inc. ("DSP") publishes a directory in the Sault Ste. Marie area and has also done so since 1993.

C. SERVICE SUPPLIERS

Telephone directory advertising services, including the sale of space in Tele-Direct's directories, are provided by three groups: Tele-Direct's internal sales force, advertising agencies and consultants. More detail on each of these groups and their particular method of operation will be provided as appropriate throughout these reasons. For the moment, the following should suffice to introduce the various players.

The internal sales force of Tele-Direct consists largely of unionized sales representatives who are remunerated through a combination of salary, commission and other incentives. Services similar to those provided by Tele-Direct's internal sales force are also offered by outside

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advertising agencies. These include general advertising agencies which, if they deal with Yellow Pages at all, usually have a department devoted to that function, advertising agencies specializing in Yellow Pages only and in-house advertising agencies.

Agencies are not remunerated directly by the advertiser but, rather, through a commission paid by the publisher as a percentage of the value of the advertising purchased. While the agency receives commission, the agency's employees earn salary for providing services to the agency's clients. Agencies are restricted in the accounts that they can service as Tele-Direct only pays commission on accounts which meet certain criteria. Tele-Direct's commissionable account definition has undergone a number of changes over the years which will be discussed in further detail later. It is not controversial that fewer accounts meet the current criteria than met prior definitions. The current criteria were adopted in 1993 and are sometimes referred to as the "national" account definition.⁸ In order to receive the 25 percent commission payable on these accounts, the agency placing the advertising must be accredited as a Certified Marketing Representative or "CMR" in accordance with the standards set by the Yellow Pages Publishers Association ("YPPA").

Services are also provided by Yellow Pages consultants. Consultants create advertisements for Yellow Pages advertisers and advise them on where and to what extent they should advertise in the Yellow Pages. Typically, consultants obtain cost savings on behalf of

⁸ Under this rule, in very general terms, to qualify for commission, an account must involve advertising in at least 20 Yellow Pages directories within Tele-Direct's territory and at least 20 percent of the total value of the advertising must be placed in directories of another publisher outside Tele-Direct's territory.

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advertisers by advising the purchase of smaller or less colourful advertisements, more limited geographic placement of advertisements or by redesigning the advertising. They are not recognized by Tele-Direct, which refers to them by the less complimentary term of "cut agents". Consultants do not receive commission. In general, consultants are paid by the advertiser out of the savings in advertising expenditures resulting from the adoption of the consultant's advice.

III. TIME LIMITATIONS

The respondents argue that the Director is subject to three time constraints which limit the allegations of anti-competitive acts that can be advanced for the purposes of the Director's case under section 79. These arguments are that: the *Competition Act* is not retrospective; the Director's allegations are statute-barred by the *Crown Liability and Proceedings Act*,⁹ and subsection 79(6) of the *Competition Act* further limits those allegations. Each argument will be dealt with in turn.

The particular allegations that are challenged relate to Tele-Direct's requirement of "issue billing" (payment from CMRs required at the time of issue of a directory as opposed to monthly payments when advertisers deal with Tele-Direct's general sales force) and its restricting of the commissionability criteria applicable to CMRs. The actual words at paragraph 65 of the application are:

⁹ R.S.C. 1985, c. C-50.

. . . the Applicant says that the Respondents have engaged in the following anti-competitive acts:

. . .

(c) providing advertising space to independent advertising agencies on less favourable terms and conditions than to its own sales staff, including: . . .

(ii) requiring that such independent agencies pay the total amount outstanding for a year's insertion of advertising in a given directory, while customers placing orders through internal sales staff may pay such amount monthly over the course of the year without interest charges; . . .

(d) squeezing the return available to independent advertising agencies by acts which include:

. . .

(iv) further restricting the availability of commission to such agencies over time.

A. RETROSPECTIVITY

There is no apparent difference between the parties with respect to the broad legal principles regarding retrospectivity. The general rule is 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 particular statute.¹⁰ Côté, one of the authorities cited by the respondents, states that a retrospective effect occurs when a new statute is applied "in such a way as to prescribe the legal regime of facts entirely accomplished prior to its commencement." He further states that it is *not* retrospective operation when a statute is applied to ongoing facts which began prior to the statute's commencement.¹¹ The Driedger text, also referred to by the respondents, describes ongoing facts or "continuing facts" as

¹⁰ *Gustavson Drilling (1964) Limited v. M.N.R.* (1975), [1977] 1 S.C.R. 271 at 279.

¹¹ P. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Quebec: Yvon Blais, 1991) at 118, 123.

... one or more facts that endure over a period of time, such as ownership or imprisonment or residency. A continuing fact can be any state of affairs or status or relationship that is capable of persisting over time. ...¹²

The dispute between the parties is whether the allegations advanced by the Director regarding issue billing and commissionability criteria imply retrospective application of the *Competition Act*.

The respondents submit that since no concept of an "anti-competitive act" existed before 1986, when the *Competition Act* came into force, no act which occurred prior to 1986 can now be characterized as anti-competitive for purposes of section 79. They also argue that section 79 on its terms can *only* be applied to discrete acts or events, of which there must be multiple instances to constitute a "practice".

With respect to commissionability, the respondents argue that the Director is alleging that they "narrowed" the definition by discrete acts which occurred in 1975 and again in 1993. The 1975 "narrowing" cannot be anti-competitive and the 1993 "narrowing" alone is only one act and cannot amount to a "practice". Likewise, they say that the Director has alleged that Tele-Direct's "decision" to require issue billing, another discrete act which took place long before 1986, cannot be an anti-competitive act. The fact that these decisions resulted in allegedly restrictive policies that have been applied continuously ever since, they submit, is irrelevant because there is no "new act" of "requiring issue billing" or of "narrowing" besides 1993.

¹² *Driedger on the Construction of Statutes*, 3d ed. by R. Sullivan (Toronto: Butterworths, 1994) at 514-15.

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The Director argues that the respondents have mischaracterized the pleadings. The Director submits that the current situation, the day-to-day restricted state of the commissionable market and the ongoing requirement of issue billing, are the focus of the allegations of anti-competitive acts, rather than the original decisions to implement these policies. The pre-1986 events, the Director submits, shed light on history, intent and progress. Thus, the Director says there is no question of retrospectivity.

We are of the view that section 79 is not restricted in its application to discrete acts or events as opposed to an ongoing course of conduct or state of affairs. The meaning of "practice" in subsection 79(1) was considered by the Tribunal in the *NutraSweet* case.¹³ There, the Tribunal found that a practice may exist where there is more than an "isolated act or acts". It also observed that the examples of anti-competitive acts listed in section 78 could entail both a course of conduct over time as well as discrete acts:

. . . The anti-competitive acts covered in s. 78 run a wide gamut. Some almost certainly entail a course of conduct over a period of time, such as freight equalization in para. 78(c), whereas others consist of discrete acts, such as the setting of product specifications in para. 78(g). The interpretation of "practice" must be sufficiently broad so as to allow for a wide variety of anti-competitive acts. Accordingly, the tribunal is of the view that a practice may exist where there is more than an "isolated act or acts". For the same reasons, the tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice.¹⁴

¹³ *Supra* note 4.

¹⁴ *Ibid.* at 35.

We are satisfied that the practice contemplated by subsection 79(1) must be more than an isolated act or acts but can include a number of individual anti-competitive acts taken together or a course of anti-competitive conduct over time.

Clearly, the Director's pleadings contemplate the violation of subsection 79(1) of the *Competition Act* by a current practice of anti-competitive acts by the respondents. The fact that the act or acts giving rise to the current practice took place prior to 1986 does not make application of the subsection retrospective. In this case, the Director is not challenging the initial decisions by Tele-Direct to commence issue billing and to restrict commission in 1975 as discrete anti-competitive acts in and of themselves. Requiring payment from CMRs at time of issue of a directory may have been instituted in 1959 but it continued after 1986 and existed when the Director's application was filed. Similarly, the "narrow" commissionability market which commenced with a change in the commissionability rules in 1975 continued after 1986. While it may have been narrowed further in 1993, it is not the discrete act of narrowing that is in issue in this case. Rather, it is the ongoing narrow commissionability rules that existed when the Director's application was filed and that were, in the view of the Director, exacerbated in 1993 with further narrowing, that are the focus of the allegations of anti-competitive conduct. As such, there is no retrospective application of the *Competition Act* in this case.

Nor is it inappropriate in these circumstances to have regard to events occurring prior to 1986 to consider fully the allegations made under section 79. We take guidance from the

approach adopted by the Supreme Court in *Gamble v. R. Wilson J.*, speaking for the majority, states:

. . . Frequently an alleged current violation [of the *Charter*] will have to be placed in the context of its pre-*Charter* history in order to be fully appreciated. . . . *Charter* standards cannot be applied to events occurring before its proclamation but it would be folly, in my view, to exclude from the Court's consideration crucial pre-*Charter* history.¹⁵

It is clear from the words of the application, and from the way the case developed before the Tribunal, that the current state of affairs is the focus of the Director's allegations of anti-competitive conduct. The respondents have not argued that the Director's pleadings misled them regarding the case they had to meet and that therefore they have suffered prejudice in preparing or presenting their case. Indeed, such an argument could not be advanced given the detailed and inclusive record regarding not only the current situation in the market but also the historical context.

B. CROWN LIABILITY AND PROCEEDINGS ACT

The respondents' second limitation argument is based on section 32 of the *Crown Liability and Proceedings Act* which reads:

¹⁵ [1988] 2 S.C.R. 595 at 625-26.

Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of a cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

The respondents argue that the *Crown Liability and Proceedings Act* statutorily bars the Crown (here, the Director) from acting on a cause of action which arose more than six years before the issuing of the application, that is, prior to December 22, 1988. Thus, they argue, all references to changes made in commissionability criteria or any other alleged anti-competitive act after 1986, when sections 78 and 79 were enacted, but prior to December 22, 1988 (six years before the application was filed), are statute-barred.

The respondents did not press this point and it will be dealt with summarily. First, as argued by the Director, the respondents cannot rely on the *Crown Liability and Proceedings Act* as they did not plead it in their response. The law is clear that a limitation period does not terminate a cause of action but provides a defendant with a procedural means of defence which must be pleaded in the defence.¹⁶

Second, section 32 of the *Crown Liability and Proceedings Act* is simply not applicable to this case. The opening words of section 32 indicate that if there is a specific limitation period in the statute governing the cause of action involved, here the *Competition Act*, that limitation period applies.¹⁷ It is only in the absence of a specific provision that either a provincial limitation

¹⁶ *Kibale v. Canada* (1990), 123 N.R. 153 (F.C.A.). See also rule 409 of the Federal Court Rules.

¹⁷ *Canada v. Maritime Group (Canada) Inc.*, [1993] 1 F.C. 131 (T.D.)

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period or the six-year limitation period in section 32 is considered. Subsection 79(6) of the *Competition Act*, to which the respondents have also made reference, provides a limitation period for proceedings brought under that section.

C. SUBSECTION 79(6)

Subsection 79(6) of the *Competition Act* states:

No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Again, the respondents did not plead this limitation period. Further, while they refer to subsection 79(6), the respondents made no effort to argue how it applies in this case. No more need be said.

IV. IMPACT OF THE CONSENT ORDER

The respondents argue that the Director is estopped from bringing this application before the Tribunal to the extent that it deals with issues adjudicated by the Tribunal in a previous proceeding. On November 18, 1994, the Tribunal issued an order, the terms of which were agreed to by the parties, as a result of an application brought by the Director against the Yellow Pages publishers in Canada.¹⁸ We will refer to that order as the Consent Order. The respondents in the present proceedings were among the respondents named in that order.

¹⁸ *Director of Investigation and Research v. AGT Directory Limited et al.*, CT-94/2.

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In the application which resulted in the Consent Order, the Director alleged that the respondents in those proceedings had jointly engaged in a practice of anti-competitive acts within the meaning of sections 78 and 79 of the Act. The specific allegations levied against those respondents and found at paragraph 74 of the application were as follows:

. . . it is the Director's submission that the Respondents engaged in the following anti-competitive acts to impede or prevent a competitor's entry into or eliminating a competitor from a market. The anti-competitive acts of the Respondents constituted a practice of anti-competitive acts by the Respondents which had the effect of substantially preventing or lessening competition in the relevant product market of the Selling of National Advertising into Telephone Directories in Canada. The Respondents:

(i) agreed that only Publishers could Sell National Advertising directly into Telephone Directories;

(ii) appointed each other as their exclusive Selling Companies for the Selling of National Advertising in Telephone Directories in each of their respective territories and therefore did not compete with such exclusive Selling Companies in those territories;

(iii) agreed to a Head Office Rule, thus precluding the National Advertiser from either placing the advertisement directly with all the Respondents which actually published the advertisements or using an entity unrelated to any of the Respondents to place the advertising directly in each Respondent's Telephone Directories.

The Consent Order contains prohibitions designed to prevent the respondents who agreed to it from engaging in certain acts in the selling of national advertising in Yellow Pages telephone directories, including:

With regard to the sale of national advertising in Yellow Pages telephone directories, each respondent shall be prohibited from:

. . .

(f) agreeing with any other respondent on the criteria for determining which national advertising accounts are commissionable;

(g) agreeing with any other respondent on the rate of commission

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payable, except during a transition period ending June 30, 1995 during which a minimum commission of 25% will be available to selling companies for national advertising which meets the commissionability criteria established by each respondent. . . .¹⁹

The parties appear to be in agreement with respect to the law of issue estoppel. The doctrine of issue estoppel precludes an action being brought against a party with respect to an issue which was already decided in an earlier proceeding. There are three requirements to be met before issue estoppel applies so as to bar a new proceeding. First, there must have been an earlier proceeding in which there was a determination of the same issue. Second, the determination of the issue in the earlier proceeding must have been a final decision. Finally, the parties to each of the two proceedings must be the same.²⁰ The doctrine of issue estoppel applies equally to issues decided in consent orders and in contested orders.²¹

The Supreme Court of Canada has held that the decision upon which a party relies for issue estoppel must have dealt directly and necessarily with the issue which is being raised for a second time:

. . . It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. . . . The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings.²² (references omitted)

¹⁹ *Director of Investigation and Research v. AGT Directory Limited* (18 November 1994), CT-94/2, Consent Order at para. 3, [1994] C.C.T.D. No. 24 (QL).

²⁰ *Angle v. M.N.R.* (1974), [1975] 2 S.C.R. 248.

²¹ G. Spencer Bower & A.K. Turner, *The Doctrine of Res Judicata*, 2d ed. (London: Butterworths, 1969) at 37.

²² *Supra* note 20 at 255.

Tele-Direct argues that the issues relating to its commissionability criteria alleged by the Director in this case, namely, that its policy of offering commission only on accounts which meet its "national" definition is an anti-competitive act and constitutes tied selling, were dealt with by the Tribunal in the Consent Order. Tele-Direct's position is that the Director is estopped from re-litigating these issues in the present proceeding. According to Tele-Direct, the Director, and the Tribunal by virtue of its issuance of the Consent Order, were satisfied that any substantial lessening of competition in the sales of national advertising would be alleviated by the terms of the order. If the Director seeks to vary the Consent Order, the Director can only do so by following the procedure for rescission and variation of consent orders which is governed by section 106 of the Act; this course was not pursued by the Director.

The respondents further argue that, by implication, the Consent Order authorizes them to set their own commissionability criteria without interference as long as they do not agree on the rate with any other publisher. Accordingly, they say that it is inconsistent for the Director to bring this proceeding, which could result in the Tribunal interfering with Tele-Direct's decisions relating to its commissionability criteria for national advertising.

The Director's position is that the issues raised in the two proceedings are not the same and that, therefore, the doctrine of issue estoppel does not apply. According to the Director, the anti-competitive acts which were the subject of the Consent Order were certain *joint* practices of the Canadian Yellow Pages Service ("CANYPS") members (the telco publishers) regarding the manner in which national advertising could be placed in their directories. It was the agreements

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between the respondents to the Consent Order which constituted the anti-competitive acts and resulted in a substantial lessening of competition which were remedied by the order. In the present proceeding, however, it is alleged anti-competitive acts of Tele-Direct itself which are the subject of review. There was no decision in the earlier proceedings regarding how Tele-Direct sets its own commissionability criteria or how it otherwise deals with independent agencies located in its territory.

The requirements for issue estoppel are not met in this case. While the Consent Order was a final decision of the Tribunal, the terms of which are binding on Tele-Direct, the issues which were dealt with in that proceeding are not the same as those in the present case. This is clear from the application and supporting documentation and the Consent Order. It was the substantial lessening of competition resulting from the respondents' joint practice of anti-competitive acts or joint abuse of dominance that the Director sought to remedy by the Consent Order. The instant case deals with entirely separate allegations of anti-competitive acts of Tele-Direct acting alone. The Consent Order prohibits the respondents named in it from agreeing amongst themselves on the rate of commission payable. That order does not address the commissionability criteria which an individual publisher may set. Nothing in the Consent Order limits the jurisdiction of the Tribunal to review the commissionability criteria set by Tele-Direct.

V. TRADE-MARKS

The Director alleges that the respondents, by "refusing to licence [their] trade-marks, such as the words `Yellow Pages' and `Pages Jaunes' and the walking fingers logo, to competing

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suppliers of advertising services", have engaged in a practice of anti-competitive acts contrary to section 79 of the Act. In particular, the Director seeks to prohibit the respondents' alleged practice of "selective licensing" whereby certain competitors are refused licences, allegedly arbitrarily or pursuant to an anti-competitive intent, and others are not. As a remedy, the Director seeks an order "that the respondents licence, at the request of independent advertising agencies, including consultants, and on commercially reasonable terms and conditions, the trade-marks registered for the respondents' own use in relation to telephone directories."

The Director's submissions raise two issues. First, the Tribunal must determine whether the refusal to license a trade-mark to certain persons or groups of persons is an anti-competitive act. Second, if it is an anti-competitive act, the Tribunal must determine whether it has jurisdiction to order the respondents to license their trade-marks. Having carefully considered the evidence and the submissions of counsel, the Tribunal is of the view that the selective refusal to license a trade-mark is not an anti-competitive act. Accordingly, the second question need not be answered.

The facts concerning the respondents' refusal to license their trade-marks are not disputed. The respondents license the use of their trade-marks to CMRs and other telco-affiliated directory publishers; they do not license other advertising agencies or consultants. The respondents aggressively defend their trade-marks against what they perceive to be infringement but they do not pursue every perceived infringement with equal zeal. The evidence is that Tele-

Direct overlooks certain uses of its trade-marks but threatens to, or institutes, legal action against the use of its trade-marks by, for instance, consultants.

Both the *Trade-marks Act*²³ and the *Competition Act* are relevant. The purpose of a trade-mark is to distinguish the wares or services of the owner from those of others.²⁴ The *Trade-marks Act* provides that the owner of a trade-mark has the exclusive right to its use.²⁵ Further, the owner of a trade-mark may license another to use that trade-mark, and that use is deemed to have the same effect as use by the owner.²⁶ Subsection 79(5) of the *Competition Act* provides:

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.

²³ *Trade-marks Act*, R.S.C. 1985, c. T-13.

²⁴

A "trade-mark" is defined in s. 2 of the *Trade-marks Act* as "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others. . . ."

²⁵ *Trade-marks Act*, s. 19.

²⁶ S. 50(1) of the *Trade-marks Act*, as am. S.C. 1993, c. 15, s. 69, provides:

For the purposes of this Act, if an entity is licensed by or with the authority of the owner of the trade-mark to use the trade-mark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark in that country as or in a trade-mark, trade-name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trade-mark in that country by the owner.

The Director submits that subsection 79(5) does not preclude a finding that "abuses" of intellectual property rights are anti-competitive acts. It is the Director's position that Tele-Direct's practice of selective licensing is an abuse of Tele-Direct's trade-mark rights. The Director asserts that an owner's "exclusive right to use" its trade-mark is not unlimited. The Director relies upon case law which has defined "use" not to include activities which are for purposes other than distinguishing wares or services of the owner from the wares or services of others.²⁷ Accordingly, the Director submits that the respondents' position that "any written use of the words 'Yellow Pages' would be dealt with" and the fact that the respondents have used their "superior resources" to assert this claim successfully is evidence of the respondents' exclusionary intent in respect of their trade-marks.

Tele-Direct argues that, as owner of the trade-marks, it has the statutory right to decide to whom it will or will not license those trade-marks, including the right to refuse to licence where it is not in its best interest to do so. It argues that there is no evidence that it has adopted a policy of refusing to license trade-marks to competitors for the purposes of restraining competition; rather, it does not make sense for Tele-Direct to license its trade-marks to consultants whose businesses are based on the premise that Tele-Direct "rips-off" its customers.

In support of his position, the Director relies on the decision of the United States District Court in *Car-Freshener Corp. v. Auto-Aid Manufacturing Corp.*, where the Court stated that

²⁷ E.g., comparative advertising or use of trade-mark in a merely descriptive sense, for example, does not constitute infringement: see *Clairol International Corp. v. Thomas Supply & Equipment Co.*, [1968] 2 Ex. C.R. 552 at 556; *Syntex Inc. v. Apotex Inc.* (1984), 1 C.P.R. (3d) 145 (F.C.A.).

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there was "no doubt that a trade-mark may be utilized in such a manner as to constitute a violation of antitrust laws"²⁸ and offered several examples: the use of a strong trade-mark to unlawfully tie a weaker product, unlawful price discrimination exercised with respect to a trade-mark, or other illegal anti-competitive practices. The Tribunal is in agreement with the Director that there may be instances where a trade-mark may be misused. However, in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trade-mark. Subsection 79(5) explicitly recognizes this.

The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.

The owner's exclusive jurisdiction over licensing accords with the scheme of the *Trade-marks Act*. There is no statutory means by which a person can petition the Registrar of Trade-

²⁸ 483 F.Supp. 82 at 86-87 (1977).

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marks for a licence to use a trade-mark, implying that the decision to license rests with the owner of the mark. Furthermore, the licensing provisions of the *Trade-marks Act* provide that, in order to constitute a valid licence, the trade-mark owner should have "direct or indirect control of the character or quality of the wares or services" to which the licensee was attaching the mark. Indeed, in *Unitel Communications Inc. v. Bell Canada*,²⁹ the Court expunged trade-marks owned by Bell Canada, in part because Bell Canada had failed to exercise control over the use of its trade-marks by an independent telco. In the case at bar, the lack of control over the quality of the goods or services is particularly relevant since the Director is suggesting that the respondents' trade-marks should be licensed to consultants with whom the respondents do not share identity of interest.

While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the *Trade-marks Act* allows trade-mark owners to decide to whom they will license their trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the *Trade-marks Act* does not prescribe any limit to the exercise of that right.

The respondents' legitimate desire to protect the value of the goodwill vested in their trade-marks by refusing to license them does not amount to an anti-competitive act. In view of the strength of their trade-marks, the respondents can be expected to be, and are entitled to be, protective of their rights. Indeed, if the respondents did not protect their marks, they would risk

²⁹ (1995), 61 C.P.R. (3d) 12 (F.C.T.D.).

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having them lose their distinctiveness, as in *Unitel*. This is a real concern, given that the Yellow Pages trade-marks are no longer registered in the United States.

While independent advertising agencies and consultants may wish to use the respondents' trade-marks, there is simply no basis for granting an order requiring the respondents to license their trade-marks.³⁰ Although the respondents may have been zealous in protecting their trade-marks, both in refusing to license and in threatening litigation for infringement, the irrefutable fact is that the respondents have been, through the provisions of the *Trade-marks Act*, accorded the right to refuse to license their trade- marks, even selectively. The exercise of this right is protected from being an anti-competitive act by subsection 79(5) of the Act.

VI. MARKET DEFINITION

A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s], throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Director of Investigation and Research v. D & B Companies of Canada*³¹ that "class or species of business" means product market and "control" means market power. The remaining phrase, "throughout Canada or any area thereof", refers to

³⁰ In fact, neither the Director nor the respondents directed the Tribunal to any cases where a party was ordered to license a trade-mark.

³¹ (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.).

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the geographic market. Therefore, in order for section 79 to apply, the Tribunal must first conclude that Tele-Direct has market power.

A market must also be defined in order to consider the allegation of tying, brought under section 77. Under subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market . . . is likely to" have a number of detrimental effects. If Tele-Direct is found to have market power, it would qualify as a "major supplier".

A. PRODUCT MARKET

The argument and the evidence presented to us regarding the relevant product market focus on whether there are close substitutes for telephone directory advertising. The Director includes in his relevant market advertising in Tele-Direct's Yellow Pages directories and in telephone directories produced by independent (non-telco affiliated) publishers.

The respondents concede that advertising in independent directories is in the same relevant market as advertising in Yellow Pages directories. Their position is that both independent and Yellow Pages directories form part of a broader product market comprised of all local advertising media. The respondents define "local advertising" in this context as advertising designed to promote business at a particular location. They would include, for example, direct mail, outdoor signage, community newspapers, daily newspapers, catalogues, trade magazines,

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flyers, radio, television -- in fact advertising in any medium as long as the advertising is designed to promote a particular location.

It is important to keep in mind that our goal in defining the relevant market in this case is to determine whether other local advertising media provide competitive discipline for Tele-Direct in respect of its Yellow Pages pricing³² and output decisions. The Director argues that they do not. The respondents argue that they do.

(1) Substitutability -- The Basic Test

The parties agree that the fundamental test or "touchstone" for determining the boundaries of the relevant product market is substitutability, as the Tribunal has consistently held in previous decisions, including three abuse of dominant position cases.³³ Products must be close substitutes in order to be placed in the same product market. The parties also agree that the appropriate approach to or framework for market definition is set out in the Federal Court of Appeal decision in *Director of Investigation and Research v. Southam Inc.*³⁴ Both parties quote the same passage from that decision:

³² Or surrogates such as service, quality, etc.

³³ *NutraSweet*, *supra* note 4; *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (QL); *D & B*, *supra* note .

³⁴ [1995] 3 F.C. 557 (C.A). An important issue in *Southam* was whether the two Pacific Press dailies and various community newspapers, all owned by Southam, were in the same product market. The Tribunal found that they were not; the Court of Appeal reversed on this point. An appeal to the Supreme Court is pending.

Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical *indicia*, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.³⁵ (reference omitted)

It is also common ground between the parties that this approach does not represent a radical departure from the approach used by the Tribunal in previous decisions.

(2) **The *Southam* Decision**

The *Southam* decision is the first Court of Appeal decision to deal in any depth with market definition under the Act.³⁶ That the parties differ considerably on how the general approach stated by the Court of Appeal in *Southam* is to be applied to the facts of the case before us is evident from the broad product market proposed by the respondents and the narrow product market proposed by the Director.

(a) Direct Evidence of Substitutability

³⁵ *Ibid.* at 632-33.

³⁶ *Southam* was followed in *R. v. Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4th) 500 (Ont. Ct. (Gen. Div.)), (1995) 64 C.P.R. (3d) 289. While the Director referred to that decision, it was not argued in any detail nor, apparently, relied on by either side.

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There is no dispute that, first, we must consider any direct evidence of substitutability. In

Southam the Court of Appeal states:

To the extent that it is possible to adduce statistical evidence of high demand elasticity, such evidence is virtually conclusive that two products are in the same product market. Evidence of price sensitivity can also come in anecdotal form which is a less conclusive, although still a persuasive factor tending to show that products are close substitutes.³⁷

The Director did not adduce any statistical evidence. The respondents mention the two "Elliott" reports, studies conducted for Tele-Direct in early 1993 for purposes other than this proceeding, as "statistical data" on advertisers' reaction to relative price increases.³⁸ The Elliott reports were general surveys of "customer satisfaction" which did not deal with price sensitivity of advertisers between different media.³⁹ Even if they had dealt with relative prices of various different media, in our view the Elliott reports would not qualify as the type of direct statistical evidence of demand cross-elasticity that was intended by the Court of Appeal. Such a study would have to be undertaken for the purpose of determining cross-elasticity between the products alleged to be in the market, be conducted in an appropriately rigorous fashion and meet tests of statistical significance. While the Elliott reports do not qualify as statistical evidence of demand cross-elasticity, they will be considered as part of the indirect evidence of substitutability.

³⁷ *Supra* note 34 at 633.

³⁸ Confidential exhibit CJ-14 (blue vol. 5), tab 173; confidential exhibit CJ-19 (blue vol. 10), tab 285 (Newfoundland).

³⁹ The participants were asked if they would shift their advertising from Tele-Direct to an independent *directory* in response to a 15 percent increase in Tele-Direct's prices.

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Although the Director called a number of buyers or advertisers as witnesses in this case, he does not rely on their evidence as "anecdotal evidence" of price sensitivity, from his point of view, low price sensitivity. He refers to their evidence as indirect evidence under various rubrics. The respondents likewise treat the testimony of the advertisers as indirect evidence. We will therefore not address the question of whether that testimony provides any direct evidence of price sensitivity or a lack thereof.

In the absence of direct evidence regarding buyer price sensitivity, we must therefore proceed to examine the available indirect evidence or "practical indicia" to draw inferences about price sensitivity.

(b) Indirect Evidence of Substitutability

The Director has organized the evidence of product market definition using headings similar to those set out in the *Merger Enforcement Guidelines*:⁴⁰ end use, physical and technical characteristics, views, strategies, behaviour and identity of buyers, trade views, strategies and behaviour ("inter-industry competition"), price relationships and relative price levels and switching costs. The respondents have also used the same headings to organize their evidence, although in a slightly different order. The *Merger Enforcement Guidelines* are not sacrosanct.

⁴⁰ Consumer and Corporate Affairs Canada, Director of Investigation and Research, *Merger Enforcement Guidelines*, Information Bulletin No. 5 (Supply and Services Canada, March 1991).

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But, as the parties are agreed that the evidence may be organized according to those guidelines, we accept that this is a practical and useful way in which to proceed.

The parties may use the same organizational structure but they do not agree on the respective roles to be accorded to the various practical indicia. In particular, they take different positions on the way in which the indicia of "functional interchangeability" and "inter-industry competition" should be employed in defining a product market based on the Court of Appeal decision in *Southam*. They also differ, of course, on the nature of the evidence and the conclusions to be drawn therefrom that should be considered under each heading. A detailed review of the evidence and the arguments under each heading will follow. We must first address, however, the arguments regarding the general approach to the practical indicia or indirect evidence of substitutability.

The Director submits that the Court of Appeal in *Southam* found that functional interchangeability is a "vital feature" and a "central part of the framework" of market definition, although it is not a sufficient condition for two products to be in the same market. The Director argues that the Court of Appeal did not state that functional interchangeability and inter-industry competition were the "sole" or "driving" factors in market definition but only found that *ignoring* those factors was an error of law.

The respondents in their written argument agree that the Tribunal must consider the evidence with respect to functional interchangeability and that it is central but alone does not

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conclusively demonstrate that two products belong in the same relevant market -- other factors must be considered. They point out that the additional factor that was "very important" to the Court of Appeal in *Southam* was inter-industry competition. During oral argument, counsel took the stricter position that the Court of Appeal held that if functional interchangeability and "broad" inter-industry competition are found, then it is an error not to place the products under consideration in the same market. If the two indicia mentioned are present, the Tribunal *must* infer price sensitivity and therefore a single product market.

The Tribunal must determine whether the Court of Appeal prescribed, as a matter of law, the role and importance of the factors or indicia of "functional interchangeability" and "inter-industry competition". With respect to functional interchangeability as one of the indirect indicia, the Court of Appeal stated that it was "not simply one of many criteria to be considered but a critical part of the framework." It also confirmed that functional interchangeability will generally be regarded as a "necessary but not sufficient condition to be met before products will be placed in the same market." With respect to inter-industry competition, the Court of Appeal found that evidence of "broad" competition, namely that the two types of newspapers were striving to reach many of the same advertisers with significant success by the community newspapers which, in turn, preoccupied Southam and generated responses by it, was sufficient to show competition "in fact".⁴¹

⁴¹ *Supra* note 34 at 635, 637-38.

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A finding that the products alleged to be in the same market serve the same relevant purpose is a necessary first step in the analysis. A finding of functional interchangeability, however, is not alone sufficient to place the products in the same market. As the Court stated:

. . . There are other factors which may tend to reinforce, or undermine, a finding that two products are functionally interchangeable.⁴²

With respect to evidence of "broad" inter-industry competition, we do not understand the Court to be saying that the presence of such evidence, along with evidence of functional interchangeability, will, in every case, dictate that the products in question should be placed in the same product market. If the Court intended to confine the analysis to these two practical indicia and effectively negate consideration of other factors, like, for example, the views, strategies and behaviour of buyers, the Court would have done so explicitly. It did not do so. In *Southam*, the Court confined its conclusions to the matter before it:

While evidence of substitutability through functional interchangeability and inter-industry competition was adduced, the Tribunal ultimately ignored such evidence. In doing so, the Tribunal adopted an overly narrow approach to substitutability as it dismissed "broad" conceptions of interchangeability and inter-industry competition. In doing so, the Tribunal erred in focusing predominantly on price sensitivity. *In this case, the similarity of use between Pacific Dailies and community newspapers, and the competitiveness which existed between them, is sufficient to place both in the same product market.*⁴³ (emphasis added)

⁴² *Ibid.* at 637.

⁴³ *Ibid.* at 640.

We conclude that consideration of functional interchangeability is essential in assessing indirect evidence of whether two or more products are in the same market. But this does not exclude other relevant evidence which may reinforce or undermine what functional interchangeability implies.

In considering the whole of the evidence, the Tribunal will bear in mind the ultimate reason why the market is being defined. In this case, the goal is to determine if the respondents have market power (or are "major suppliers"), that is, if the alleged close substitutes, other local advertising media, provide competitive discipline for Tele-Direct in making price (or quality) and output decisions.

(3) Functional Interchangeability

The Director submits that two headings from the *Merger Enforcement Guidelines*, "end use" and "physical and technical characteristics", are both related to the question of functional interchangeability. Certain characteristics of directories are, he argues, key factors which dictate the end use of a directory as a directional reference tool and which thus limit the "functional interchangeability" of directory advertising with directional advertising in other media.

The respondents argue that all local advertising has the same end use: to increase business at a particular location. They submit that the characteristics of the various media should not be considered as part of the determination of functional interchangeability.

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Regarding functional interchangeability, the Court of Appeal in *Southam* says:

. . . But the fact that community newspapers are more local in nature does not go to the question of functional interchangeability, but to the behaviour of buyers as to preference for geographical scope. This latter *subjective* factor should not be mingled with the purely *objective* factor of functional interchangeability which focusses on use or purpose.⁴⁴ (emphasis added)

The Court imposes the constraint that the views of buyers should not enter when functional interchangeability is being decided because they are "subjective". Only "objective" factors should enter at this point.

Under the criterion "end use", the *Merger Enforcement Guidelines* refer to the extent to which two products are "functionally interchangeable in end use". That is the way in which the term will be used in this decision. Physical and technical characteristics, along with other indicia, serve to determine whether the products found to be functionally interchangeable in end use are close substitutes. Rather than considering physical and technical characteristics as part of the determination of functional interchangeability, as the Director proposes, the Tribunal will treat them separately from functional interchangeability.

The Director and one of his economics expert witnesses, Richard Schwindt,⁴⁵ have defined the relevant end use of telephone directory advertising to be use as a "directional" medium. ("Directional" and "directive" were used interchangeably in the material before us.)

⁴⁴ *Ibid.* at 636-37.

⁴⁵ Associate Professor of Economics and Business Administration at Simon Fraser University.

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Two elements are said to characterize a directional advertising medium: (a) consumers consult the medium when they are at a point in the buying cycle when they are ready to buy, and (b) the medium is used as a reference tool. Directional advertising is distinguished from creative advertising, which is widely acknowledged to be used for creating or stimulating demand. The Director admits that other advertising media besides Yellow Pages might be considered directional but names catalogues, direct mail and classified newspaper advertising as the only candidates.

The respondents and their economics expert witness, Robert Willig,⁴⁶ take the view that all "local" advertising⁴⁷ has the same end use, to attract customers to a particular establishment. Thus, they argue, advertising in the Yellow Pages and advertising in other local media are functionally interchangeable. In response to the Director's argument, they argue that directionality is not generally regarded as encompassing the element of use as a reference tool. They further argue that the directional/creative dichotomy is not valid. They take the position that there is no such sharp distinction in the advertising done by local advertisers. In their submission, directional means only that the advertising directs consumers to a particular establishment -- which can be done in any medium. Given the respondents' definition of "local" advertising, all advertising by a local advertiser necessarily has a directional component. Similarly, since they are of the view that all local advertising, including advertising in telephone

⁴⁶ Professor of Economics and Public Affairs at Princeton University.

⁴⁷ As opposed to "national" or "brand awareness" advertising which promotes a product wholly apart from *any* location.

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directories, has as its goal the stimulation of demand at a location, all local advertising necessarily has a creative component.

Since the respondents have defined "local" advertising as advertising designed to promote business at a particular location, it follows that the purpose of all local advertising is to attract customers to a business. Such a definition is at a high level of generality. While we recognize that the "end use" indicia acts as a "filter" or a "first stage" in the analysis only, it should still cast some light on the ultimate question to be determined, i.e., whether all "local" media are *close* substitutes providing sufficient competitive discipline among themselves that they should be considered to be part of the same product market in this case. We find the words of Gibson J. in *R. v. J.W. Mills & Sons Ltd.*, which the Court of Appeal in *Southam* found "worthy of replication", to be instructive on this point:

Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.

At one extremity, an ill-defined description of competition is that every service, article, or commodity, which competes for the consumer's dollar is in competition with every other service, article or commodity.

At the other extremity, is the narrower scope definition, which confines the market to services, articles, or commodities which have uniform quality and service.

In analyzing any individual case these extremes should be avoided and instead there should be weighed the various factors that determine the degrees of competition and the dimensions or boundaries of the competitive situation. For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another.⁴⁸

⁴⁸ [1968] 2 Ex. C.R. 275 at 305-306.

The criterion of functional interchangeability in end use should not be treated at such a high level of generality that it precludes objective yet contextual analysis. To say that, for example, automobiles and bicycles are in the same product market because they both provide a means of transportation would make the level of generality so high that no meaningful analysis could be performed as a result of it. Some consideration must be given to context.

To put functional interchangeability in end use in context in this case, it is important to look at the buying cycle and which types of media are generally regarded as directional and thus particularly effective in reaching consumers who are at the end of the buying cycle. These consumers are "ready to buy" but must decide which commercial establishment to patronize. The question is which types of media effectively bring the particular establishment to the consumer's attention in those circumstances.

The respondents referred us to a number of American cases which, they argue, support their broad conception of end use. We do not find these authorities particularly helpful. First, and most importantly, the product market that is arrived at in a particular case is very much dependent on the facts of that case and the context in which the case is brought, that is, the alleged anti-competitive wrong that the plaintiff is seeking to cure. As Gibson J. stated in the passage quoted above, "two products may be in the same market in one case and not in another." Therefore, the mere fact that another court did or did not find that directory advertising was in the same market as other local media is not in itself compelling. Some of the cases cited by the

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respondents were not antitrust cases.⁴⁹ Others did not deal with directory advertising.⁵⁰ In addition, counsel for the Director was able to bring to our attention a number of other American cases in which the courts, either explicitly or implicitly, used Yellow Pages advertising as a relevant market.⁵¹ Further, while the reasoning with respect to market definition in another case might provide us with some insight, one would have to be reasonably certain that the court in question was applying the same conceptual framework or "test" as we have adopted. These considerations all highlight the futility of looking for a simple, neat answer to market definition in the case law.

Based on the evidence, particularly materials created by the respondents themselves outside of the context of this proceeding, which we will review in more detail below, we accept the Director's position that the distinction between creative and directional media is a valid one for determining the end use of Yellow Pages and other local advertising. A fair consideration of the evidence, which will shortly be addressed, supports the position that creative advertising creates awareness of and demand for goods and services at the beginning of the buying cycle and that directional advertising refers to advertising to consumers who are at the end of the buying cycle which "directs" them where to buy a product or service. This effectively limits the number of media that can be considered to be directional.

⁴⁹ Respondents' Book of Authorities, vol. 6, tabs A,B.

⁵⁰ Respondents' Book of Authorities, vol. 6, tabs C, D; vol. 3, tab 41.

⁵¹ Respondents' Book of Authorities, vol. 3, tabs 38, 47; Director's Book of Authorities in Reply, tabs 6, 7, 9.

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Although the respondents argued that directional advertising simply means advertising (in any media including those traditionally considered creative) that contains a name, address or phone number to "direct" a consumer to particular establishment,⁵² this was not Tele-Direct's view outside of this case. In the Multimedia Training Course created by Tele-Direct for its sales representatives, directional advertising is defined as:

Media used by the advertiser to direct the buyer where to buy or use a product or service. Examples: Yellow Pages, catalogues, direct mail. Directive media complements and supports creative media.⁵³

The three examples used suggest that directional media, in fact, have very specific characteristics beyond simply including a name, address or phone number. All are print media and in each case there is no editorial or entertainment content. The consumer has no reason to consult these media other than a reason related to making a purchase, i.e., at the end of the buying cycle.

The course material also discusses and sets out in chart form the role of the various media at the various stages of the buying cycle: awareness, interest, comprehension, trial, purchase and repurchase. The text explains:

. . . [S]uch traditional advertising media as TV, Radio and Magazines are by their nature designed to generate awareness for products and services. The impact or intrusion qualities of this advertising creates an interest for the products and services and has the ability to demonstrate the benefits to the consumer and is ultimately designed to create a need or desire in the mind of the consumer.

⁵² This is, of course, co-extensive with their definition of local advertising.

⁵³ Confidential exhibit CJ-16 (blue vol. 7), tab 215 at 118727.

...

Although creative advertising is crucial at the awareness, interest and comprehension stage of the buying cycle, it loses impact at the actual purchase stage because of the time or distance between the initial awareness and the purchase.⁵⁴

At the purchase stage, newspaper, direct mail, outdoor, radio and Yellow Pages are all considered to have some strengths. Television and magazines are not. Of those with strength at the purchase stage, only newspapers and direct mail (and Yellow Pages), however, are described as "directive". The strength of outdoor advertising at the purchase stage is as a "reminder message". The strength of radio at that stage is to offer price points and convey a "sense of urgency". Again, this course material supports the view that directionality imports something more than the ability to provide a consumer with a name and address. All of television, newspapers, direct mail, outdoor, radio and Yellow Pages are capable of including this information in advertising, yet Tele-Direct did not consider them all to be directional.

This interpretation is further supported by the letter sent to the Director by Tele-Direct during the course of the Director's investigation into the industry (referred to as the "Bourke letter"). The letter was intended to provide industry background.⁵⁵ It states that:

⁵⁴ *Ibid.* at 118801.

⁵⁵ At the hearing, counsel for the respondents attempted to convince the Tribunal to attribute less weight to the letter than we otherwise might on the grounds that it was not prepared with the assistance of an economist and that it was produced in a compressed period of time. The letter was written by Tele-Direct's Vice-president of Marketing with the assistance of a number of lawyers from counsel's office. We have no information as to the extent of the economic background of any of those lawyers. It is signed by the President of Tele-Direct. During the discovery process the respondents resisted production of the letter on the grounds that it was protected by settlement negotiation privilege. The Tribunal ruled that the letter did not fall within that privilege and ordered it produced. We have no hesitation, for the purposes for which we refer to the letter, of attributing significant weight to it.

The Yellow Pages traditionally is viewed as a "directional" or "considered purchase" advertising medium, which provides consumers with information on where they can purchase the goods and services they want. . . . Directional advertising is most attractive to local advertisers, particularly local retailers, who seek to motivate customers to visit their stores or to use their services. *Other directional media include direct marketing, catalogues, trade magazines, and specialty supplements to newspapers or magazines.*⁵⁶ (emphasis added)

There is no mention made of outdoor or television and radio as directional media. When Thomas Bourke, Tele-Direct's President, testified at the hearing he confirmed that the basic strength of Yellow Pages was to provide information on where to buy, as stated in the letter. In the list of directional media, he would, however, now include the classified sections of daily and community newspapers and specialty and other classified directories.

The letter continues:

By contrast, the other major advertising media - outdoor, newspapers, radio, television and magazines - are classified as "creative" advertising media, which create awareness of and demand for products and services. Creative advertising assists advertisers who are either trying to sell a product or service, or promote their name. This service is attractive to major manufacturers or suppliers, who usually do not have a preference as to where the consumer buys its product or services.⁵⁷

Since names, addresses and phone numbers could just as easily be included in advertising in the regular part of a newspaper and a magazine as in a special supplement or classified section, something more is involved in the way that the participants in the industry view directionality. As in the training material, all the examples of directional media are characterized by the absence of general editorial content. The characteristic that specialty supplements and classified sections in newspapers or magazines, other directories, catalogues and direct mail

⁵⁶ Exhibit J-5 (green vol. 3), tab 239 at 86008.

⁵⁷ *Ibid.*

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share with Yellow Pages is that the advertising in those media will be totally ineffective unless it is consulted by people who are "in the market" -- who are looking to make a purchase. As Mr. Bourke put it when describing how Yellow Pages complete the buying cycle, they must be in a "buying frame of mind". Consumers will not be involuntarily exposed to the advertising by virtue of going to the medium for entertainment or other reasons; they must voluntarily decide to consult the Yellow Pages or a catalogue, read the direct mail or an advertising supplement or classified section. These media are not picked up and browsed through idly in a spare moment.

The respondents argue that all directional advertising, even Yellow Pages advertising, has a "creative" component. Otherwise, they submit, no one would pay for a display advertisement in the Yellow Pages. The free business listing could provide a name, address and phone number. Clearly, there is "creativity" involved in designing an eye-catching Yellow Pages advertisement. This is not the same as creative ("creates" *demand*) as opposed to directional ("directs" consumers who are ready to buy) advertising as those terms are used in the industry, according to the evidence.

Mr. Bourke, echoing Raymond Greimel, Executive Director of YPPA, testified that the new attitude in the industry is that Yellow Pages are *both* directional and creative. He was unable, however, to explain how Yellow Pages advertising "creates awareness of and demand for products and services" in the words of the Bourke letter, as he recognized that people do not consult the Yellow Pages unless they already have a need for some product or service. He could

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only say that Yellow Pages advertising "reinforced" or "supported" the advertising in the creative media.

We are not satisfied from the paucity of evidence on the point that directional advertising means that the medium containing the advertising is a "reference tool", as the Director further submits. If this element were proven, virtually all media except directories would be excluded from potentially being part of the relevant product market at this point. We do not consider that the evidence supports narrowing the definition of "directional" in this respect.

Functional interchangeability is simply a preliminary filter to exclude those products which evidently do not have the same end use as Yellow Pages advertising. Nevertheless, certain conclusions can be stated. First, the respondents' position that local advertising in *all* media qualifies as directional is not tenable. In particular, television, radio and outdoor media are clearly not treated as directional in Tele-Direct's own materials. Television is seen as having little relevance to the latter stages in the buying cycle; it is strong in creating awareness and interest at the beginning of the cycle only. While radio and outdoor have a role at the later stages, that role was not to present a directive message but rather to create "urgency" or serve as a "reminder" of other advertising.

This is not to say that these media *cannot* be used for directional advertising in any circumstances. It is a possibility, but in deciding whether various media serve the same end use, one must look to usual uses and not mere possibilities unsupported by the evidence. We are of

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the view that both the electronic and outdoor media can be excluded at this point as they are not directional media and thus do not have the same end use as Yellow Pages advertising. Since the electronic and outdoor media have not met this "necessary" condition for inclusion in the relevant product market, we will not deal with them further.

Second, there is some doubt as to whether "regular" advertising (as opposed to special supplements or classifieds) in newspapers and magazines is properly included as directional advertising. Based on the list in the Bourke letter, which was updated by Mr. Bourke in his testimony and is therefore, presumably, as comprehensive as Tele-Direct considers it should be, we could exclude "regular" newspaper and magazine advertising at this point. The Multimedia Training Course, however, does refer to "newspaper" advertising, without further details, as directive. Given the preliminary nature of the criteria of functional interchangeability and in light of the overall model used by the respondents to argue their case, we will not exclude newspapers from further consideration. Magazines will not be dealt with further, as they were largely ignored in the remainder of the evidence and argument of both parties.

(4) Other Relevant Indicia

Having determined that some, though not all, local advertising media pass the threshold test of functional interchangeability, we will now consider the evidence and argument on the remaining practical indicia to decide if those media are close substitutes and belong to the same product market as telephone directory advertising.

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(a) Physical and Technical Characteristics

Telephone directories are issued annually, are comprehensive both with respect to including all suppliers and being delivered to all telephone subscribers, and they are governed by their own rules with respect to the content of advertising. The Director is of the view that these characteristics set Yellow Pages apart from other media.

The respondents argue that each advertising medium has different "strengths and weaknesses" and can claim to be unique. They submit that a "catalogue" of differences is not alone enough to place two products in separate markets. They state that the relevant question is whether the product is unique in some respect that significantly limits the extent to which *buyers* (here, advertisers) are willing to substitute other products for the product at issue. We agree that to deal with physical and technical characteristics separately from the views and behaviour of buyers is somewhat artificial. It is, however, the way in which the parties have chosen to organize their arguments and the evidence in this case. Therefore, in this portion of the judgment, we will restrict ourselves to the points raised by the parties in their respective arguments under that heading. We recognize that this factor is mainly important in the analysis as providing background for the next section on buyer views and behaviour.

(i) Time Insensitivity/Permanence

Advertisements in the Yellow Pages are finalized several months prior to publication and have to stand for the entire year between directories. This means that Yellow Pages advertising

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cannot be used to convey time-sensitive information. As noted by Professor Schwindt, for the Director, this sets Yellow Pages apart from other directional media, such as direct mail or supplements to magazines or newspapers, in which time-sensitive information such as prices tends to be featured. In fact, until recently Tele-Direct regulations prohibited the inclusion of prices in Yellow Page advertisements to avoid potential false advertising claims. This ban has now been lifted. It is doubtful whether, in a fast-changing world, price advertising can ever be an important part of telephone directory advertising while directories are a print medium that changes only every year.⁵⁸ The evidence of the advertiser witnesses amply supported the conclusion that Yellow Pages are *not* used for time-sensitive advertising.⁵⁹

The fact that Yellow Pages cannot be used to convey time-sensitive information is characterized by the respondents as a "weakness", the "flip side" of which is "permanence", a "strength". Based on a statement by Professor Willig in his rebuttal affidavit,⁶⁰ they conclude that a weakness in Yellow Pages does not suggest that advertisers *would not* substitute other media for Yellow Pages; a weakness probably suggests that they *would* substitute other media.

⁵⁸ Apparently there is some experimentation in some American centres with allowing restaurants to run advertisements that include menus. In a relatively stable economic environment firms in such an industry might be willing to risk committing themselves to prices for as long as a year.

⁵⁹ See, e.g., the testimony of Jack Forrester of HOJ Car and Truck Rentals, that he does not use Yellow Pages for specials or promotions: transcript at 5:778 (11 September 1995); the testimony of Jean-Yves Laberge of the Turpin Group of automobile sales and leasing businesses, that he puts prices and specials in his newspaper advertisement but not in the Yellow Pages: transcript at 13:2406-407 (3 October 1995); and the testimony of Steve Kantor of Tiremag Corp., who sells wheels and tires, that he cannot use Yellow Pages to advertise seasonal product offerings or prices: transcript at 17:3288-89 (11 October 1995).

⁶⁰ Paragraph 24 of Professor Willig's rebuttal affidavit (exhibit R-181) reads:

. . . As a matter of economics, it is difficult to see how negative characteristics can contribute to a showing of dominance in a narrow relevant market. Instead, negative characteristics contribute to the willingness of buyers to substitute out of the product at issue, and so their recognition should, if anything, argue for a wider market to be relevant, not a narrower one.

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Thus, any identified weaknesses are seen as evidence of Yellow Pages vulnerability and not as evidence that the products against which Yellow Pages is being compared may not be close substitutes.

We do not accept that a "weakness" alone provides evidence of or even suggests substitutability. Substitution is not a one-way process. The conclusion on whether there are close substitutes for the firm's products is not based on asymmetrical substitution. We must certainly consider whether there is ready substitution *from* Yellow Pages *to* other media but we must also be satisfied of the reverse, ready substitution *to* Yellow Pages *from* other media.

For the very reason that telephone directories are not suited to time-sensitive information, they are the one source of directional advertising that advertisers can be virtually certain will be retained for a long period by consumers. Apart from catalogues, which often are valid for periods of up to six months, the information in other vehicles is quickly dated and will be discarded. Catalogues, however, generally provide information on a single seller and do not cover the wide range of goods and services found in the Yellow Pages. The relative permanence of directories supports the Director's position that Yellow Pages are unique among directional media in serving as a continuing reference of all available suppliers.

(ii) Comprehensiveness

It is conceded by the respondents that telephone directories are unique with respect to their comprehensive list of suppliers. They argue, however, that comprehensiveness comes from

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the free listings and that the directory would still be comprehensive even if it contained no display advertisements. That is true. The respondents go on to state that an advertiser values comprehensiveness *only* if the advertiser is targeting customers who contact *all* listed suppliers before making a purchase, in which case the advertiser would not need a display advertisement. The latter statement simply does not follow. The advertiser witnesses who appeared before us made it clear that they value the comprehensiveness of the Yellow Pages because that is a feature that leads consumers in general to use the Yellow Pages. (Since we are talking about a directional medium, we are speaking of consumers who are ready to purchase some good or service and are looking for a supplier.) Once a consumer decides to consult the Yellow Pages because of its comprehensiveness, an advertiser finds it profitable to advertise in the Yellow Pages to cause that consumer to choose its establishment as opposed to that of another supplier.

On the distribution side, the respondents do not dispute that there is no other medium that is so comprehensively distributed. All telephone subscribers, the vast majority of the population, receive a telephone directory. The respondents attempt to counter this fact by pointing out that persons who receive the Yellow Pages, and thus are the potential customers of businesses listed or advertising in the Yellow Pages, are also exposed to other media which do not depend on their active involvement, that is, on their deciding to consult the Yellow Pages. This argument, in effect, simply reiterates the respondents' position that all media have the same end use, since it ignores the fact that the voluntary nature of Yellow Pages (consumers must decide to consult the Yellow Pages to be exposed to the advertising) means that it is *not* used for the same purpose as are the creative media (consumers are involuntarily exposed to the advertising by virtue of using

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the medium for the entertainment or information value). We have found that Yellow Pages are a directional medium. Exposure to creative media is not relevant as they serve a different purpose.

The respondents also point out that the scope of a particular directory may be too broad for a particular advertiser. That advertiser may wish to reach only a limited geographic area and could do so more cost-effectively with flyers. This will be addressed in the next section when we consider buyer views on whether the unique characteristics of Yellow Pages are significant to them and thus limit their choices among media.

(iii) Other Restrictions

In addition to the restriction on price advertising there are Yellow Pages rules regulating comparative advertising, the use of coupons and the use of superlatives. There is no evidence on the effect of these restrictions. However, their existence does indicate that the publishers of telephone directories were and are willing to create an advertising environment that sets their vehicle apart from others. Clearly Tele-Direct is not concerned that these restrictions make Yellow Pages less attractive such that advertisers would substitute other media.

In summary, all media have strength and weaknesses. Contrary to the respondents' arguments, however, we are of the view that "weaknesses" of the Yellow Pages as a medium do not imply that advertisers will readily switch from it to other media. If pricing information is important to advertisers and they *cannot* use Yellow Pages to convey prices because of restrictive rules or time-insensitivity, then their choice to use newspaper advertising instead

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cannot be seen as a *substitution of newspapers for Yellow Pages*. Likewise, if advertisers *cannot* achieve their goal of being in a "reference" medium by advertising in newspapers, then their decision to advertise in the Yellow Pages cannot be seen as a *substitution of Yellow Pages for newspapers*. In other words, strengths and weaknesses in areas important to advertisers are really characteristics that tend *against* substitutability. The existence of significant (to advertisers) differences between Yellow Pages and other media would lead to the inference that other media are not close substitutes to the Yellow Pages.

(b) Views, Strategies, Behaviour and Identity of Buyers

Both sides recognize the importance of the identity, views and behaviour of buyers, in this case, Yellow Pages advertisers. Before turning to the more detailed evidence, we first set out the position of each of the Director and the respondents on the question of substitutability from the perspective of the advertisers.

The Director submits that advertisers do not consider that there are any close substitutes for Yellow Pages advertising. He bases this on the testimony of the advertiser and agency witnesses, who although not a representative sample, gave cogent reasons for their views on substitution despite the diverse businesses involved. He argues that the advertisers cannot easily move their advertising spending from Yellow Pages to other media because of the value that they place on certain unique characteristics of Yellow Pages as a medium. In support of this position,

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he also points to evidence that Yellow Pages spending is not even part of the "advertising" budget at large for many Yellow Pages advertisers.

The respondents conceive of all advertisers, including Yellow Pages advertisers, as operating on a fixed advertising budget which is allocated among various media (the "media mix") based on the highest returns that can be obtained from the advertising expenditures. Decisions about media mix are driven by perceptions of relative cost-effectiveness. Therefore, Yellow Pages spending is vulnerable to reduction (by means of smaller size, less colour) or cancellation in favour of expanded spending on other local media which are perceived as more cost-effective. The respondents' position emphasizes the possibility of significant substitution between media "at the margin".

The respondents argue that the evidence supports the following propositions (although they state them in a somewhat different order):

(1) the businesses that advertise in Tele-Direct's directories ("current Tele-Direct customers") also advertise in a variety of other media;

(2) current Tele-Direct customers perceive that other media provide as good or better value than Yellow Pages advertising and may be assigned as high or a higher priority in the advertiser's media mix;

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(3) current Tele-Direct customers in the same line of business may each choose a different media mix, including a different emphasis on advertising in the Yellow Pages (bigger or smaller, black and white or colour Yellow Pages advertisement);

(4) many of the businesses that do not advertise in Yellow Pages ("Tele-Direct non-advertisers") advertise elsewhere;

(5) Yellow Pages advertisers who have cancelled their advertising in Yellow Pages ("former Tele-Direct customers") continue to advertise in other media; and

(6) former Tele-Direct customers are unenthusiastic about the value provided by Tele-Direct in relation to other suppliers.

They submit that these propositions support their theory that advertisers readily shift their spending between media and thus Yellow Pages advertising and advertising in all other local media are in the same product market. The respondents also point to some evidence which they say reflects *actual* switching behaviour by Yellow Pages advertisers to other media.

Two preliminary comments are in order. The first relates to the use of a term such as "at the margin" which, in effect, invites the Tribunal to ignore the cellophane fallacy because of its emphasis on current price levels rather than the competitive price.⁶¹ Any firm or group of firms

⁶¹ It is commonplace economics that a firm with market power will set prices where the demand for its product is elastic; that is, at the point where a further increase in price would cause a reduction in revenue. Some of the reduction in revenue may result from consumers switching to other products which are the closest substitutes *at that price*, but which would not be considered by

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that have fully exploited their market power might see some substitution if the relative price of their product goes up further. Their inability to raise their prices without buyer switching "at the margin" is, in these circumstances, because they have already exercised their market power *not* because they have *no* market power because of the presence of close substitutes.

Secondly, with regard to the proposition that advertising budgets are fixed, there is some support in the evidence that this is true for large companies. The situation is not so clear for small companies. We recognize, however, that some percentage of Tele-Direct's revenue is likely derived from advertisers who have advertising budgets that include Yellow Pages. Therefore, we will proceed to address the critical question of whether these advertisers and others treat Yellow Pages and other media as close substitutes. It will be convenient, in this instance, to organize our review of the evidence put forward by the parties by focusing in turn on each of the customer groups mentioned in the respondents' propositions. We will look first at the evidence regarding former Tele-Direct customers, then turn to non-advertisers and finally, current Tele-Direct customers.

these consumers as substitutes if the firm with market power were pricing its product *at a competitive level*. This so-called "cellophane fallacy" (originating from criticism of the decision of the Supreme Court of the United States in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956)) can result in the mistaken conclusion that a firm does not have market power because of the presence of substitutes when in fact the reverse is true -- the substitution is occurring *because of* the exercise of market power. In principle markets should be defined at competitive prices.

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(i) Former Tele-Direct Customers

This group comprises Tele-Direct customers who have *completely* cancelled their Yellow Pages advertising. One would expect, therefore, that these advertisers would provide the most compelling affirmation of the respondents' theory of ready shifts in spending between media.

At the outset, we note, however, that whatever is learned about former Tele-Direct customers cannot be generalized to the population of Yellow Pages advertisers as a whole. From Tele-Direct's 1994 Corporate Post Canvass Analysis Report we know that former Tele-Direct customers are relatively unimportant in terms of total Tele-Direct revenue, and individually they were spending far less than average annual amounts in the Yellow Pages. The 1993 revenue from advertisers who cancelled their Yellow Pages advertising completely in 1994 represented only 1.3 percent of total 1993 revenue for Tele-Direct (Publications) Inc. The average annual expenditure in the Yellow Pages for these advertisers was about \$700.⁶²

The respondents rely on the information about former customers provided by the January 1993 Elliott report on customer satisfaction.⁶³ The report indicates that former customers view Tele-Direct's products and services as "poor value" and generally of fair to poor quality, both absolutely and relative to other suppliers.

⁶² Confidential exhibit CJ-28 (black vol. 7), tab 42 at 129284. Customers who disconnected their business telephone service are not included. There was no general price change between 1993 and 1994, although there were a number of incentive plans.

⁶³ Confidential exhibit CJ-14 (blue vol. 5), tab 173.

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Because the former Tele-Direct customers could answer questions about other media suppliers, the results do indicate that *some* Tele-Direct former customers use other media. The study does not reveal what percentage of former customers are, in fact, using other advertising vehicles or which ones they are using. We know from the 1994 Corporate Post Canvass Analysis Report that former advertisers were spending relatively small amounts in the Yellow Pages. This would tend to indicate their options for buying other media on an annual basis with the dollars thus freed up are limited, given the cost of some of the media (particularly newspapers, radio and television) alleged to be close substitutes. The survey also found, not surprisingly, a low level of satisfaction with Tele-Direct among former customers. The study does not provide convincing evidence that a significant portion of former customers transferred advertising spending *from* the Yellow Pages *to* other media or that Yellow Pages is vulnerable to competition from other media as opposed to losing advertisers by virtue of its own failings.

With respect to former Tele-Direct customers the Director refers to two Tele-Direct reports which set out the reasons which customers gave to Tele-Direct sales representatives for cancelling their advertising: the "P.A.R. (Potential Advertiser Retrieval) Summary" report and the "Wipe Out Sampling Summary".⁶⁴ One can assume from the fact that the representatives were able to contact the customers that they remained in business and maintained a business listing.

⁶⁴ Confidential exhibit CJ-87 (black vol. 14), tab 111 at 134805; confidential exhibit CJ-33 (black vol. 12), tab 85 at 132815.

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Tele-Direct uses the P.A.R. form completed by cancelled customers to attempt to understand why advertising was cancelled. One of the choices on the form for reason for cancellation is "trying other media". Professor Willig found it "notable" that Tele-Direct listed "trying other media" as a choice on the P.A.R. form., i.e., that Tele-Direct was alive to the possibility of its advertisers switching to other media. However, the P.A.R. Summary report printed in September 1995 shows that only four out of 203 former customers (two percent) surveyed stated that they cancelled because they were "trying other media". Professor Willig conceded that this low number would have some significance and would suggest a low level of movement between media if the study were meant to be comprehensive.

To counter the low percentage, the respondents argue that the relevant denominator is actually smaller than 203. To the extent that 56 customers were probably going to go out of business, they should be excluded. If we remove these customers, only three percent of the former customers surveyed gave "trying other media" as their reason for cancelling their Yellow Pages advertising.

The respondents would also exclude a further 84 customers who gave a variety of reasons other than "trying other media" for their cancellation (e.g., "financial reasons", "restructuring", "wouldn't discuss", "clients are mostly from referrals") to bring the sample size to 63. They would also include in the numerator, with those advertisers who answered "trying other media", another 47 advertisers who gave various other responses⁶⁵ on the argument that these advertisers

⁶⁵ "Non-believers", "inadequate response from advertising" and "don't need large recognition".

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were probably already using other media and, therefore, would not say they were "trying" other media when they moved their dollars to what they considered a more effective medium. Thus restructured, they argue that the report yields an 81 percent response rate in favour of substitutability between all media.

There is nothing in the report which supports the changes advocated by the respondents. The inclusions and exclusions are based on speculation, at best. Beyond removing the customers who have gone out of business, the report must be taken as it stands. If it is significant, as Professor Willig maintained, that Tele-Direct wanted to know if former customers were "trying other media", and included it as a possible response for former customers to choose, then it is significant whether they did choose that response or not. Any of the customers who answered could have selected "trying other media" if that were indeed their primary motivation for leaving the Yellow Pages.

On the whole the P.A.R. Summary report demonstrates that only a handful of customers may have discontinued Yellow Page advertising in favour of other advertising vehicles. Even for these customers little can be concluded about substitutability. They said they were "trying other media". Without some follow-up as to whether they found other advertising vehicles more effective in boosting their sales, it is not possible to tell if the other media were close substitutes for them. Indeed, some of these customers may have returned to Yellow Pages because they did *not* find the other media adequate for their purposes.

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Similarly, the "Wipe Out Sampling Summary" by Tele-Direct shows only two of 87 (about two percent) former customers "trying other methods of advertising". The respondents attempt to re-interpret these results in the same manner as with the P.A.R. Summary report, i.e., by reducing the denominator. Again, there is no support in the document itself for such re-interpretation. This report tends to support the conclusion from the P.A.R. Summary report that very few customers discontinued Yellow Pages advertising in favour of other advertising vehicles.

(ii) Tele-Direct Non-advertisers

Tele-Direct's overall penetration rate is about 50 percent. This means, as the respondents state, that some businesses do not buy any Yellow Pages advertising. It is probably also true that most businesses advertise in some way. What does the evidence reveal, if anything, about this class of Tele-Direct non-advertisers? Is their advertising spending likely to be easily switched from whatever vehicles they are currently using into Yellow Pages (and vice versa)?

Tele-Direct divides non-advertisers into two groups: poor prospects for Yellow Pages advertising (Market 6)⁶⁶ and current non-advertisers with some potential (Market 7). Market 6 accounts are not contacted during a sales canvass; about 85 percent of Market 7 accounts are contacted. Both Valerie McIlroy, Tele-Direct's Vice-president of Marketing until July 1994, and David Giddings, a Vice-president of Sales, described the manner in which Tele-Direct contacts these non-advertisers as a "blitz". During a canvass, one or two days at various times are

⁶⁶ For example, individuals in professions prohibited from advertising, variety stores, construction sites.

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designated as "non-ad blitz days" and the telephone sales representatives focus on calling as many non-advertisers as they can each day, up to 20 to 30 calls. Tele-Direct's success in converting these non-advertisers is at most five percent.

If all media are close substitutes and advertising dollars are as fluid as the respondents argue, then Tele-Direct would seem to have a reasonable prospect of luring customers away from those other media and into the Yellow Pages. Yet, Tele-Direct's success rate with non-advertisers is very low. In addition, the approach taken to non-advertisers, namely telephone sales "blitz" days, provides little indication that Tele-Direct considers these non-advertisers "good" prospects which merit spending a lot of time and money to convert. Former Yellow Pages advertisers who have cancelled would presumably be especially good candidates but Tele-Direct does not appear to direct any special effort even to this group.

One of the studies referred to by the respondents that does include some specific information on non-advertisers is the 1990 study by Impact Research.⁶⁷ The study consisted of interviews with 36 business people in Montreal and Toronto, half of whom were Yellow Pages "non-advertisers".⁶⁸ There is some indication that the non-advertisers were probably using some other media but there is no data on how many advertisers or which media.

⁶⁷ Confidential exhibit CJ-18 (blue vol. 9), tab 249.

⁶⁸ Contrary to Tele-Direct's habitual use of the term, the "non-advertisers" studied may have had a bold listing.

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The results of the study do not, in any event, support the respondents' contention about the potential to shift advertising dollars between all local media in search of the most "cost-effective" alternative. Seventeen of the 18 non-advertisers did not advertise in the Yellow Pages "mainly because of the *perceived non-use of the Yellow Pages by their potential customers.*" Sixteen of the non-advertisers were not going to advertise in the next Yellow Pages edition because they were convinced it was an "*inappropriate medium* for their advertising needs".⁶⁹ Two were undecided.

The views of non-advertisers do not support the contention that there is ready substitution between Yellow Pages and all other local media. If anything, the evidence that is available tends in the opposite direction.

(iii) Current Tele-Direct Customers

The respondents place considerable emphasis on the fact that existing Yellow Pages advertisers use a variety of media and that many believe that other media are as good or a better value than Yellow Pages. Because many firms advertise in a number of different advertising vehicles, the respondents argue, they are thus able to shift advertising dollars among them as the returns on them vary.

⁶⁹ *Supra* note at 107661, 107681 (emphasis added). One non-advertiser was just starting up his business and could not make the current edition deadline.

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The evidence from the Director's advertiser witnesses, as well as from the Tele-Direct surveys,⁷⁰ confirms that Yellow Page advertisers tend not to be solely reliant on this one vehicle. Many advertisers use a variety of media. Even within a heading, some Yellow Pages advertisers have smaller advertisements, advertisements without colour or simply a free listing, thus potentially freeing advertising dollars to spend in other media. However, there is little that we can conclude from this fact alone. As acknowledged by Professor Willig, the use of more than one advertising vehicle tells us nothing about whether the vehicles in question are substitutes, complements,⁷¹ or have no relationship whatsoever. To draw conclusions about substitutability there must be evidence that advertisers do *in fact* shift between the various media in response to competitive moves by those media.

The principal evidentiary source referred to by the respondents respecting current customers is the January 1993 Elliott report. As with cancelled customers, current customers were asked to rate Tele-Direct in terms of, among other items, value for money and overall quality. Many existing customers believe that other media provide as good value or better value and quality than Yellow Pages advertising. Thirty-five percent say that the relative value for the money of Yellow Pages is much or somewhat worse than other suppliers while the relative quality is about the same as other suppliers. Likewise, 38 percent of all customers believe that

⁷⁰ E.g., Elliott reports: confidential exhibit CJ-14 (blue vol. 5), tab 173 (January 1993) and confidential exhibit CJ-19 (blue vol. 10), tab 285 (February 1993 - Newfoundland); V.I.A. survey: confidential exhibit CJ-11 (blue vol. 2), tab 89; Yellow Pages Satisfaction Study (Omnifacts Research): confidential exhibit CJ-15 (blue vol. 6), tab 199.

⁷¹ The term "complement" has been used in this context primarily in its ordinary sense and not in its strict economic sense. No one has asserted that the different advertising vehicles are complements in the sense that a reduction in the price of one vehicle would lead to an increase in the price of the other. Rather the term has been used to indicate that Yellow Pages perform a different function than other vehicles and are thus needed to complete an advertising programme.

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Yellow Pages are high or very high priced in relation to other suppliers. In the western region (Ontario), 56 percent of large customers believe that Yellow Pages are high or very high priced while only five percent say that Yellow Pages are very low or low priced. The respondents say this evidence shows that Yellow Pages are vulnerable to advertisers switching to other media.

We are of the view that these results tend to contradict rather than support the respondents' premise that all media are close substitutes. It is difficult to conclude that customers who had good substitutes would choose to continue to purchase a product that they believed was too high priced and of poor value. One would expect that, if all media were close substitutes, the medium perceived as providing better value and price would be purchased in preference to the others. Yet, dissatisfied Tele-Direct customers apparently continue to advertise in the Yellow Pages despite their opinion that other media are as good or better value and lower priced. The Elliott report provides more support for the proposition that Tele-Direct has a comfortable cushion of market power that permits it to keep its customers in spite of the fact that significant numbers of them were not complimentary about its service and pricing than it does for the proposition that Tele-Direct competes with other suppliers providing easily substitutable products.

The respondents also refer to a 1994 study by Omnifacts Research in Newfoundland.⁷² Four focus group sessions were conducted with a total of 31 Yellow Pages advertisers, two sessions with new advertisers and two sessions with established customers.⁷³ In-depth interviews

⁷² *Supra* note 70.

⁷³ *Ibid.* New advertisers were generally very small companies; established customers were larger.

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were conducted with 16 customers, 10 of whom had reduced their Yellow Pages spending. Many of the customers also used other media, primarily print, in the form of local trade magazines, flyers and direct mail for new customers and flyers and direct mail for established customers.

There was a general view among the participants that they *had* to advertise in the Yellow Pages. They generally found it difficult to judge the effectiveness of the advertising they did, including Yellow Pages. In particular, they expressed considerable uncertainty about the value of larger size and coloured advertisements in Yellow Pages. Established customers ". . . tend to follow the competition when deciding on placement and size of Yellow Pages advertising. Most are clearly not sure whether the advertising in the Yellow Pages actually works, but the consensus is that they have to be there."⁷⁴ Some expressed displeasure at the number of headings since they felt compelled to advertise in several headings if their competitors did.

Particularly significant are the results of the interviews with customers who had reduced their Yellow Pages expenditures. The report states:

Those companies who reported that their expenditures decreased fall into two main groupings: those who decreased as a cost cutting measure and those who decreased primarily because they do not perceive the Yellow Pages to be effective for reaching their target markets.

Those that decreased their expenditures as a cost cutting measure essentially felt that the current economic conditions were affecting their business revenues. . . .

⁷⁴ *Ibid.* at 116796.

Clients who have decreased their Yellow Pages expenditures because they did not consider the Yellow Pages to be effective, reported that their markets are primarily industrial or business-to-business and given the nature of the products and services that they offer, the Yellow Pages are not therefore consistent with their target markets.⁷⁵

There is no indication in either case that customers reduced their Yellow Pages advertising in order to shift dollars into other media.⁷⁶

Turning to the Director's evidence, the viva voce evidence of advertisers and other market participants who represent advertisers strongly supports the position of the Director that advertisers do not regard Yellow Pages and other media as close substitutes. Although several advertisers were approximately average size in terms of spending on Yellow Pages, most were in the top two or three percent of Tele-Direct customers. That is, average expenditures ranged from about \$2,000 annually to well in excess of \$100,000. For the most part a large percentage of advertising dollars were spent by these advertisers on other advertising vehicles, although a small number of the advertiser witnesses devoted almost all their advertising to Yellow Pages. Advertisers spending relatively large amounts in the Yellow Pages are, nevertheless, well placed to provide evidence on the opportunities for substituting between Yellow Pages and other advertising vehicles.

⁷⁵ *Ibid.* at 116811-12.

⁷⁶ In terms of actual switching behaviour, the respondents referred to evidence of a locksmith who cut his Yellow Pages spending and bought brochures, on the advice of a Yellow Pages consultant, and of a photographer who was visited by a newspaper consultant who designed a smaller Yellow Pages advertisement for him. The implications of the existence and practices of the consultants for substitutability will be dealt with in the next section. Both newspaper and Yellow Pages consultants use a similar methodology, in that they attempt to convince an advertiser that a smaller, less expensive Yellow Pages advertisement will be equally effective *in the Yellow Pages*. The Director also provided numerous examples of "non-switching" where increases or decreases in spending on other media were unrelated to spending on Yellow Pages.

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Although the circumstances of advertisers and the language used to describe their advertising strategies varied, none of the advertisers indicated that other media could be substituted for Yellow Pages. What they did say was that they use different media for different purposes. They use Yellow Pages advertising for purposes which take advantage of its unique characteristics. They advertise in the Yellow Pages because it is a reference of all available suppliers which is received and retained by most consumers and is consulted by them. They consider that Yellow Pages is cost-effective in this regard and generates a superior level of customer response.

Some, particularly large-budget, advertisers use other media to "create awareness". The witnesses use media other than Yellow Pages to advertise specials, include prices or to target a specific group or occasion. Steve Kantor of Tiremag Corp., who sells aluminum wheels and tires, uses other vehicles to convey a seasonal message, selling the "sporty" look in spring and "safety" in fall. Likewise, Kenneth Flinn, who operates a taxi and courier business (Lockerby Taxi Inc.) and relies almost exclusively on Yellow Pages, uses radio during the holiday season to convey the message "don't drink and drive". Yellow Pages cannot accommodate this time-sensitive advertising.

On this point, the respondents attempted to demonstrate the vulnerability of Yellow Pages to substitution by a review of advertisements in a number of newspapers from Toronto, Thornhill, London, Ottawa, Niagara, Sault Ste. Marie, St. Catharines and Montreal over a three-week period. The purpose was to show that some advertisers were using both Yellow

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Pages and newspapers and that they could substitute one for the other.⁷⁷ Professor Willig observes that a "limited number" of advertisers employed "much the same" advertisements in both the newspaper and the Yellow Pages. He puts forward only four examples, of which only two are identical. For the other two, "the newspaper ad includes some of the same information presented in the directory display ad, but . . . the newspaper ad also includes some timely information of the kind that a directory ad could not contain, due to its permanence."⁷⁸

The respondents provided three further examples of advertisements that were similar in both the Yellow Pages and a newspaper.⁷⁹ These types of advertisements evidently represent a very small percentage of Yellow Pages advertisements. Equally important is the conclusion that the respondents draw from Professor Willig's survey and the other examples, that the advertisements are only "essentially" the same and that where differences arise, they often stem from the *greater timeliness* of the newspaper. For example, the newspaper advertisement contains a price. They did not, however, provide us with any basis for concluding that prices and other time-sensitive information are trivial or unimportant to advertisers.

⁷⁷ Newspaper advertisements were identified for establishments in the businesses represented by the top five Yellow Pages headings in the region's Tele-Direct directories. Then, those establishments with newspaper advertisements were sought in their local Tele-Direct Yellow Pages directories. Overall, the search found 542 newspaper advertisers in these categories. Of this group, 39% had display advertisements in both the searched newspaper and in the local Tele-Direct Yellow Pages directory, while 61% of the newspaper advertisers had no display advertisement in their local Tele-Direct Yellow Pages directory. (The 61% is comprised of 42% who had no Yellow Pages business phone number, and hence no listing in the Tele-Direct Yellow Pages of any kind. Another 12% did have lightface classified listings in the local Tele-Direct Yellow Pages directory, but no advertisement in that directory of any kind. Yet another 6% had a boldface listing in their local Tele-Direct Yellow Pages directory, but no display advertisement in that directory.)

⁷⁸ Expert affidavit of R. Willig (17 August 1995): exhibit R-180 at paras. 20-22, appendix 2B.

⁷⁹ Exhibit R-116. One of the three contained pricing information in the newspaper and not in the directory.

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Time sensitivity for some advertisers cannot mean that those advertisers are likely to *switch from* Yellow Pages to newspapers and vice versa. Instead, they will use newspapers to convey time-sensitive information because that is what newspapers are good at doing. Likewise, they will use Yellow Pages to convey a message that is *not* time-sensitive but that takes advantage of other characteristics of Yellow Pages as a medium.

Agents specialized in selling Yellow Pages, general advertising agents, a witness with a large media buying agency and the former Vice-president of Marketing with Tele-Direct also testified that they did not consider other advertising vehicles a substitute for Yellow Pages and had not observed their customers to have ever done so.

Professor Schwindt's evidence supports the Director's argument that certain types of businesses use or do not use the Yellow Pages because Yellow Pages have particular characteristics that set them apart from other advertising vehicles. His evidence showed that businesses providing emergency services (glass repair, contractors, plumbers), infrequently consumed products (lawyers, moving and storage, exterminators), services used by travellers (automobile rental), products for which the use of the telephone is important (pizza), or any combination of these, tend to rely heavily on the Yellow Pages. Professor Schwindt also points out that there are types of businesses (grocers, department stores and theatres) that are known to advertise very heavily in other vehicles such as newspapers and flyers and spend virtually nothing on Yellow Pages.

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On the other hand, Professor Willig, for the respondents, pointed out that whether Tele-Direct has market power, i.e., is vulnerable to ready substitution by advertisers to other media, depends on the combined demand of all advertisers, including those who are not necessarily very reliant on Yellow Pages. While he concedes some advertisers are more reliant than others on Yellow Pages advertising and that this affects the *average* elasticity of demand and the ability of Tele-Direct to exercise market power, he is of the view that the presence of advertisers who are willing to switch serves to discipline Tele-Direct's pricing. He acknowledges, however, that his position is subject to exception if Yellow Pages publishers could be shown to have the ability to price discriminate.

Price discrimination allows a firm with market power to secure higher profits (strictly, price less marginal cost) on sales to some customers than on sales to others. A firm without the ability to price discriminate may be disciplined by the ready ability of at least some of its customers to switch if prices are increased and, when considering a price increase, must weigh what it will lose against what it will gain from that action.

However, where a firm has found a way to price discriminate, no weighing need be considered. The prices for customers who might switch will be left at a level where they will continue to purchase. However, for those customers who are so reliant on the firm that they cannot switch, the firm may extract higher prices and therefore higher profits on sales to them. The ability to price discriminate therefore tends to demonstrate that a firm is not, at least in respect to the customers who are subject to the discrimination, vulnerable to those customers substituting other products for that of the firm.

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On our assessment of the evidence, Tele-Direct does engage in price discrimination but not as between headings, i.e., it does not charge plumbers (a business likely to be heavily reliant on Yellow Pages) more for the same advertisement than it does grocery stores (likely to be less reliant). Rather, Tele-Direct price discriminates against those who tend to spend more in Yellow Pages by buying larger advertisements⁸⁰ or colour. Those customers are charged much more than can be explained by the additional costs associated with producing and servicing the enhanced advertisement. Thus, larger advertisers (by expenditure) under all headings contribute more to Tele-Direct's profits than smaller advertisers. Professor Willig agreed that if customers who use colour value Yellow Pages more than customers who do not, the pricing of colour is a way to price discriminate between customers who value Yellow Pages more and customers who value it less.

Tele-Direct does not have to target these firms; they in effect identify themselves. Firms that are heavily reliant on Yellow Pages are the ones that will buy a larger and more colourful advertisement in order to attract customers away from their competitors in the same Yellow Pages heading. This is indicated by the large average expenditures per subscriber and per advertiser under headings such as "moving and storage" and five other headings that stand out in the top 25 listed by Professor Schwindt in his report. The fact that there are advertisers under

⁸⁰ There is an important difference between Yellow Pages and non-classified advertising in other print media (or electronic media, for that matter) that results from the fact that media with editorial or entertainment content usually prefer to have minimum percentage of such content. The effect is to create an opportunity cost to having larger advertisements, because they absorb some of the available space for other content. This consideration is not present in the case of Yellow Pages and should not affect the pricing of larger advertisements.

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other headings who are less reliant on Yellow Pages can have no influence on the ability of Tele-Direct to extract higher returns from advertisers who compete heavily within headings.

Moreover, while headings provide an important first indicator of whether a business is likely to be a heavy advertiser, there may be important differences among advertisers within a heading. One advertiser in a heading may have a larger or more colourful advertisement than the advertising by its competition within that heading. This is illustrated by the evidence of Howard Kitchen of Lansing Buildall, whose firm of lumber supply outlets is a relatively large Yellow Pages advertiser in the Toronto area. When asked about the fact that a large new entrant in lumber supply was not advertising in the Yellow Pages, he pointed out that his firm encouraged telephone inquiries while his competitor did not. The pricing of Yellow Pages, therefore, is able to capture the greater need of particular customers within headings as well as between headings. Thus, Tele-Direct's ability to price discriminate causes us to conclude, at least in respect of those larger advertisers who are most reliant on Yellow Pages advertising and therefore purchase large size advertisements or colour, that there is no ready substitutability between Yellow Pages and other media.

(iv) Conclusion

There is little evidence supporting the respondents' position that all media are substitutes for local advertisers. Specifically, the evidence of switching behaviour between Yellow Pages and other media is extremely weak. There is almost no evidence that advertisers

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regard Yellow Pages as serving the same purpose as other media nor that they regard its purpose in the broad manner put forward by the respondents. While there is evidence of changes in advertising expenditures, they are associated with changes in economic conditions or advertising strategy rather than switching between media in response to competitive moves by those media.

While it is true as a matter of arithmetic that when expenditures are shifted within a fixed budget there will be winners and losers among the media, this fact tells us nothing about the willingness of firms to reallocate expenditures within the budget *as a result of competitive moves by advertising vehicles*. Advertisers' goals, situations and advertising needs are subject to change. Specific physical and technical differences among media limit the way that they can be used to accomplish a specific objective, such as the announcement of a sale, the listing of prices or a promotion related to a change in season and raise doubt about the willingness of advertisers to treat advertising dollars as fluid or as easily substitutable between Yellow Pages and other media. The respondents' proposition that both former and current Yellow Pages advertisers use a variety of advertising vehicles is likely correct. It was also proven that relatively large percentages of former and current advertisers do not think very highly of Yellow Pages. This tells us nothing about whether there is a sufficiently large body of Yellow Pages advertisers who are willing to switch their advertising dollars in the event that Yellow Pages were priced above the competitive level. There must be evidence that advertisers reallocate dollars in reaction to competitive moves by different media. It is insufficient just to demonstrate a fixed budget and changes in allocation by advertisers between media. In other words, there must be evidence in

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one form or another that advertisers regard other advertising vehicles as close substitutes for Yellow Pages.

The testimony of the advertiser witnesses about why they use Yellow Pages and the importance of Yellow Pages advertising to them is supported by Tele-Direct's own studies of advertisers. Many advertisers believe they *have* to be in Yellow Pages to be in a comprehensive reference tool, particularly if their competition is there. They feel they have no choice. As stated in the Omnifacts study:

. . . There were numerous comments concerning the fact that the Yellow Pages, like the telco, operates in a monopoly situation where their customers are to some extent captive advertisers, who have really no choice but to place their advertising with Tele-Direct.⁸¹

If they do not use Yellow Pages it is because it does not suit their purpose, not because they can readily move dollars between Yellow Pages and other media. The views of buyers, therefore, strongly tend to support the view that Yellow Pages and other local media are not close substitutes.

(c) Trade Views, Strategies and Behaviour (Inter-industry Competition)

The Director argues that there is little evidence that Tele-Direct or other market participants consider Yellow Pages to be in competition with other media. Whatever steps Tele-Direct took in relation to other media, he submits, are to be contrasted with its reaction to other

⁸¹ Confidential exhibit CJ-15 (blue vol. 6), tab 199 at 116802.

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market participants that it clearly regarded as competition. The other competitors referred to by the Director are consultants, agencies which sell Yellow Pages advertising, and independent publishers of telephone directories.

The respondents argue that Tele-Direct does not compete, for various reasons, with either consultants or agencies in providing *services* to advertisers. They do, however, admit that independent publishers are in the relevant market with Tele-Direct, whether that market includes only directories or all local media. We will, therefore, compare Tele-Direct's reactions to other media to its reactions to independent directory publishers, about which there is no dispute between the parties.

The respondents argue that the evidence reveals "broad competition" or "competition in fact", as referred to by the Court of Appeal in *Southam*, between Tele-Direct and all other local media. They submit that Tele-Direct views other media as competitors and has taken various initiatives to compete with other media. They argue that other media, in turn, view Tele-Direct as a competitor.

The respondents submit that evidence of "broad competition" places all local media in the same product market. The respondents say that differences in the type or intensity of response to different "competitors" should not eliminate some "competitors" from the relevant market. We cannot agree. The type and intensity of the alleged competitive response is an element for consideration in determining if the products argued to be in the same market are close

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substitutes. Substitutability, as pointed out in the *J.W. Mills* case quoted above, is always a question of degree. Differences in the intensity of the reaction to players admitted to be competitors by Tele-Direct and those alleged to be competitors by Tele-Direct can help us to determine where to draw the line in this case.

(i) Tele-Direct's Views and Behaviour

General

The evidence is unequivocal that other directory publishers have been referred to as competitors by Tele-Direct and the respondents concede that they are. A number of independent publishers not affiliated with a telco produce directories in Tele-Direct's territory. Over the years, Tele-Direct has collected information on and copies of directories of independent publishers. As of 1994, the information was organized into a "competitive database" as part of the creation of a "Sensitive Market Intelligence System". The sales representatives gather information and the marketing department analyzes information on independent publishers as part of this system. Tele-Direct goes to considerable lengths to track and compile data on the revenues, prices, scoping, circulation and other features of independent directories.⁸²

⁸² See Competition Database Binder (1994): confidential exhibit CJ-15 (blue vol. 6), tab 205; 1994 Sensitive Market Report: confidential exhibit CJ-29 (black vol. 8), tab 51; Directory Publishers in Tele-Direct Operating Area: confidential exhibit CJ-32 (black vol. 11), tab 77 at 132125-45.

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Further, it is not in dispute between the parties that when a broadly-scoped independent directory entered into Tele-Direct's territory in each of the Niagara region and in Sault Ste. Marie, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns, and improvements to its own directories.⁸³

While there are references within Tele-Direct documents to other media as "competitors" and to "competing for the advertising dollar", there was no effort on Tele-Direct's part to track revenues, prices, features or circulation in a comprehensive and detailed a fashion as there was with other directory publishers. When one compares the competition data base and sensitive markets material cited above to the documents put forward by the respondents as showing competition with other media, the difference in intensity is immediately apparent. They refer in their written argument, for example, to two speeches from 1984 and 1985 which refer to "competing with all other types of advertising media" and being in a "constant struggle for the customer's advertising dollar." Considerable emphasis is also placed on a 1993 document entitled "East Office Competition Analysis". The "east office" deals with only a portion of Tele-Direct's territory, namely the Peterborough, Orillia and Barrie areas. The document is a summary of a meeting regarding competition. It lists newspapers, flyers, consultants and television as competitors and canvasses various points of discussion. It does not identify particular competitors, give any detail on revenues likely lost, comparative pricing or features like circulation.

⁸³ For further details, see the facts set out in the section entitled "C. Market for Advertising Space - Publishing" in chapter "IX. Abuse of Dominant Position", *infra*.

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There was likewise no evidence of a Tele-Direct response to other media competition that bears any resemblance to the focused and intense response to the competing directory publishers. The respondents referred us to other initiatives by Tele-Direct that they submit are of particular significance and we will deal with them in further detail below.

Educational Efforts

Educating employees to deal with the existence of competitors might be some evidence of concern by Tele-Direct about the potential for its advertisers to switch to other media. The evidence regarding Tele-Direct's educational efforts indicates, at best, a weak concern about the necessity to compete with other media. The respondents rely on the Multimedia Training Course as the principal Tele-Direct initiative to compete with other media. The only clear evidence we have, which comes from a written answer by the respondents to a question on discovery, is that the course was given once in 1992 for four days to all sales "employees". The oral evidence on the issue was vague, suggesting that the course was not an initiative that was considered significant by Tele-Direct.⁸⁴

Based on the course having been given once in 1992 to all sales representatives, the investment by Tele-Direct was 1880 (470 x 4) person-days. Based on the average remuneration

⁸⁴ Mr. Giddings' testimony on this topic was confusing. He testified at various times that the course, or perhaps one module of it (which a discovery answer indicated had never been used for training purposes), was given to new representatives in about 1990 and that it, or some part of it, had been repeated for unknown numbers in 1993 and 1994. However, he also testified that no new premise sales representatives had been hired since 1992 casting doubt as to how many times and to how many persons the course was given.

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of a premise sales representative, the cost to Tele-Direct was *at most* \$500,000.⁸⁵ This was a one-time cost relating to *all* of Tele-Direct's territory with benefits spread over a number of years. By contrast, in reaction to the entry of DSP in Sault Ste. Marie, in one year (1993) in one relatively small market Tele-Direct spent over \$215,000. Evidence of educational efforts does not suggest a great concern on Tele-Direct's part about other media competition.

Sales Aids

The respondents point to a variety of "sales aids" produced by Tele-Direct which contain references to other media. They submit that the specific claims made in the documents with respect to other media in relation to Yellow Pages are unimportant. Rather, they say significance lies in the simple fact that Tele-Direct created material which refers to other media to provide to its sales force. They claim that if Yellow Pages were "unique", there would be no need for this type of promotional material.

We are of the view that in examining the documents prepared for use by Yellow Pages representatives, we should consider whether the content of those documents points to the treatment by Tele-Direct of Yellow Pages as a separate advertising medium (the Director's position) versus whether the content indicates signs of competitive activity with other media (the

⁸⁵ The use of the average premise remuneration errs on the side of being too high. The other type of sales representative, a telephone sales representative, earns, on average, only about 60 percent of what a premise representative earns. Also, Mr. Giddings did say at one point that this course was given to *new* representatives, who would likely earn less than average in any case.

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respondents' position). The mere existence of sales aids which mention other media in some context cannot be solely determinative of the issue.

Two memoranda dated 1983 and 1985, respectively, deal with direct mail (flyers) as an alternative to Yellow Pages and provide visual aids to salespeople. The first concludes:

We all know that any form of advertising is beneficial in one way or another but direct mail should never be an alternative to Yellow Pages when considering the circulation, permanence, or economy of the two mediums, and these visuals prove that.⁸⁶

The second states:

Unbelievable.

When comparing the economy of Yellow Pages with the cost of Direct Mail it is hard to imagine why someone would consider Direct Mail an alternative to Yellow Pages advertising.⁸⁷

Despite the fact that Tele-Direct sales representatives may have had, to some extent, to provide arguments on the superiority of Yellow Pages in relation to flyers and, indeed, any other media, the words used suggest non-, or at least low, substitutability between Yellow Pages and the alternative media. The authors of the memoranda appear to express disbelief and incredulity that anyone would ever consider direct mail as an economical alternative to Yellow Pages advertising.

Tele-Direct's Strategic Business Plan for the time period 1983-88 states:

⁸⁶ Exhibit J-2 (red vol. 2), tab 82 at 8833.

⁸⁷ *Ibid.*, tab 81 at 8827.

Part of a large, profitable but slow growth industry, the directory advertising business operates from a privileged position in a captive market.⁸⁸

Tele-Direct has characterized its own market as "captive" in this business plan. We infer that this high level document reflects the perception of Tele-Direct management as to competition from other media. It places in context the aforementioned memoranda.

The respondents also refer to a set of documents that was prepared for the 1992 sales canvass which includes comparisons between the cost of advertising in Yellow Pages and two dailies and three community newspapers in the Toronto area. Other documents give the same type of information for other cities and towns. Another similar package compares the cost of Yellow Pages to two Toronto dailies, and shows what could be purchased with the Yellow Pages dollars in television, radio, flyers, calendars, key chains and ball point pens.

When we examine the content of these documents, we find that, as with the direct mail examples, what is being emphasized is the *lack* of comparability between the cost of Yellow Pages and the other media. With respect to the comparisons with newspaper advertising, one document (from 1992), for example, compares a 1/4 page advertisement for 30 days in the Toronto Yellow Pages (circulation over 1.3 million) at \$677 with a 1/4 page single insertion in *The Globe and Mail* (circulation about 325,000) at over \$7,000. Mr. Giddings described this type of sales pitch as making a comparison to point out that there is *no* comparison between Yellow Pages and newspapers. Newspapers are simply so much more expensive that there is no

⁸⁸ Exhibit J-2 (red vol. 2), tab 116 at 13525.

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comparability. Another document has a similar tone; it focuses mainly on newspapers for comparisons but also highlights how *little* can be purchased with the Yellow Pages dollars if transferred to television ("2-60 second spots, non-prime time"), radio ("2-1 minute spots") and flyers, calendars, key chains and ball point pens (15,600 flyers, 709 calendars, 1,213 key chains and 1,365 pens while Yellow Pages circulation is over 900,000).

Tele-Direct, unlike other print media, does not use a "CPM" or cost per thousand measure in promoting its product to advertisers. A CPM is a calculation of the cost of the medium per thousand persons reached, which can be applied to the number of copies sold (assuming one reader per copy sold) or read (if that number is known) of, for example, a magazine or newspaper. The CPM allows comparisons between print media. Tele-Direct researched the possibility of developing a CPM for its directories in the late 1980s. Its survey of general and specialized advertising agencies revealed that the agencies thought such a measure

. . . entirely unnecessary since we [Tele-Direct] are the only ones in this field and there can be no similar comparison (they absolutely cannot imagine comparing us to the other "media").

. . .

In the event of serious competition, all agree that such a tool would be useful.

However, two of the largest agencies already understand the usefulness and even suggest the development of this type of measure to better acquaint people with the Yellow Pages on a "national" level, and to establish ourselves as the unbeatable leader in the industry.⁸⁹

⁸⁹ Confidential exhibit CJ-10 (blue vol. 1), tab 17 at 106527-28.

Although a later study concluded that a CPM measure should be developed for Yellow Pages that would be, to some extent, comparable to other media in order to "contribute to developing a media image for Y.P. directories, and would create a barrier for potential competition", none was developed. Tele-Direct does use a CPM-type formula internally in its pricing to ensure that its directories of similar circulation are priced similarly but CPM is not used as a marketing tool.

Equally relevant to the question of how Tele-Direct views its product in relation to other media is the large volume of Tele-Direct promotional material selling advertisers on the advantages of being dominant *in* a Yellow Pages heading. The virtues of size and colour are extolled in testimonial letters and other promotional material. The "YPROI study", which the respondents argue is a primary tool of their sales force in selling the "value of the medium", starts with a comparison of which media influenced persons who had made a recent purchase,⁹⁰ but also includes a page trumpeting the importance of size, colour and "impact" within the Yellow Pages so as to influence the buyer's selection of a firm once he or she consults the Yellow Pages.

The advantage of "standing out" that is being sold to customers is with respect to competitors advertising *in the Yellow Pages*, and not with reference to advertisements in some other medium. As pointed out by one of the Director's economics expert witnesses, Margaret Slade,⁹¹ the amount of advertising a firm does in the Yellow Pages is dependent on how much its

⁹⁰ Radio - 4%, television - 6%, other - 11%, newspapers - 19% and Yellow Pages - 60%: confidential exhibit CJ-18 (blue vol. 9), tab 243 at 107177ff.

⁹¹ Professor of Economics at the University of British Columbia.

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competitors do. When a Yellow Pages sales representative convinces a customer to increase its expenditures on Yellow Pages advertising, this creates pressure on its competitors to do likewise (referred to as the "prisoner's dilemma"). This phenomenon came through in the comments received from the established customers participating in the Omnifacts study in Newfoundland, that they tend to follow the competition when deciding on placement and size of their Yellow Pages advertising. The pressure on advertisers to observe and to some extent follow what their competitors are doing in the Yellow Pages indicates that Yellow Pages are a distinct medium, a separate arena within which firms seek to stand out.

The respondents stress that competition for the advertising dollar is not so much a matter of whether firms advertise in the Yellow Pages but of how *much* they advertise, primarily whether they buy coloured advertisements and larger advertisements. The number of headings would be an additional factor determining the expenditures of customers. It is noteworthy that the attempts by Tele-Direct to sell colour and size to its advertisers are based on comparisons with black and white advertisements or smaller advertisements *within* Yellow Pages.⁹² Thus, the success or failure of Tele-Direct representatives in capturing more of the advertising dollar depends on the extent to which they can convince customers that they need to upgrade their advertisements *to be more effective vis-à-vis the customers' competitors* in the Yellow Pages. It is difficult to perceive of this as "inter-media" competition.

⁹² While it is true that price comparisons with the newspapers are used, including different sizes of newspaper advertisements and advertisements with red, the message is that it is cheaper to use the Yellow Pages regardless of the size or colour of the advertisement.

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Pricing -- General Policy

Another relevant area in inter-media views and conduct concerns how, if at all, the prices of other media influence Tele-Direct's pricing. Tele-Direct generally establishes its prices about a year and a half to two years in advance, with prices, for example, for the 1995 directories set in late 1993.

The Pricing Policy documents placed on the record reveal that Tele-Direct considers various inputs in setting prices. For example, in the 1993 Pricing Policy produced in October 1991,⁹³ these included rate/circulation alignment policy,⁹⁴ recent Tele-Direct price-ups (1988-92), the consumer price index ("CPI") (1991-93), the paper and allied industry price index (1990-92), the percentage change year-to-year in the number of directory copies printed by Tele-Direct (1991-93), estimated price-ups in other media for 1992 and Tele-Direct's internal rate of inflation (1991-93). Given the timing, much of the information is estimated. The 1994 Pricing Policy is a two-page document only as all 1994 issues had a zero percent price-up. In the brief text, the following are mentioned: relationship with customers, impact on profitability, prevailing economic factors, cost containment including a recent, more favourable printing contract and the rate of inflation or CPI. In the 1995 Pricing Policy, the only change from the 1993 Pricing Policy is to replace the "paper and allied industry price index" heading

⁹³ The 1993 prices were revised in February 1992. The respondents rely heavily on this particular exercise; it is reviewed in detail below.

⁹⁴ Consistency in cost per thousand of circulation across directories.

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with "junked directories".⁹⁵ The 1996 Pricing Policy adds two additional items, gross domestic product and personal disposable income and reverts to using an indicator of paper cost increase, as for 1993.

In all cases, the information regarding the forecasted price-ups of other media that is contained in the policies was obtained from general advertising agencies, usually two or three different ones, and is stated as a range. The media included are television, dailies, magazines, outdoor and radio. "Business papers" also appeared in one year and "transit" in one other year.

To obtain insight on how the information with respect to other media entered into pricing decisions, we look to the testimony of Ms. McIlroy, who was intimately involved in the pricing decisions. According to her, the "key drivers" of pricing were, in order of importance: relationship to cost, rate/circulation re-alignment, revenue stream for the sales force and local considerations, both economic and the presence or feared entry of a competitive directory. She stated that there was no direct relationship between the prices of other media and Tele-Direct's pricing. Her view was based on her own experience and a review of all relevant pricing documents on the record, dating from the early 1980s to the 1995 Pricing Policy. Ms. McIlroy did not alter her position regarding the relative unimportance of other media in setting Yellow Pages prices when responding to questions on cross-examination.

⁹⁵ Ms. McIlroy explained that the "junked directories" are those that never enter into circulation. Tele-Direct used the volume of junked directories to forecast how many copies should be printed and to ensure that estimate was realistic. If many of the copies printed end up as junked directories, this over-inflates Tele-Direct's circulation figures.

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Douglas Renwicke was the Senior Vice-president to whom Ms. McIlroy reported from 1991-94 and was involved in sales or marketing from 1988. He expressed general agreement with Ms. McIlroy's description of the price setting process. He disagreed over certain details that are not germane to the present discussion. However, more importantly, he also disagreed with Ms. McIlroy concerning the relevancy of other media prices in Tele-Direct price setting.

Mr. Renwicke stated that the three "primary" key drivers for pricing in the 1990s are CPI, other media price-ups and local market knowledge. A group of "secondary" key drivers include growth and circulation, gross domestic product and Tele-Direct's internal rate of inflation (costs). He distinguished price setting in the 1980s when the key drivers were circulation, internal costs and, from 1987 to 1990, circulation alignment.

At least for the 1980s, during which Tele-Direct enjoyed exceptional growth, Mr. Renwicke agrees with Ms. McIlroy that factors such as the internal rate of inflation at Tele-Direct and circulation growth were primary determinants of Tele-Direct's prices. He also recognizes that towards the end of the 1980s discrepancies in rates per thousand in different directories became another important concern that entered at the local market level. The attempt to get prices in line across markets was abandoned for a couple of years following the recession but appears to be re-emerging as an ongoing factor. Considering Ms. McIlroy's and Mr. Renwicke's evidence together, we conclude that other media prices were not a "key driver" during the 1980s.

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Mr. Renwicke explicitly distinguishes the 1990s and it is here that he appears to take issue with Ms. McIlroy. We will, therefore, look in more detail at the information available to the officers engaged in price setting in 1991, 1993 and 1994 (for 1993, 1995 and 1996).⁹⁶

The 1993 Pricing Policy document sets out the following predicted increases in various items for 1993:

Increase in CPI for Ontario: 3.6%

Increase in CPI for Quebec: 3.7%

Tele-Direct internal rate of inflation: 5%

Increase in cost of printing: 4.7%

Increase in copies to be printed: 2.9%
(proxy for circulation increase)

The ranges of predicted percentage price-ups for other media set out in the document were obtained by Claude Phaneuf, Manager of Marketing Research, from two general advertising agencies and a media buying firm.⁹⁷ Notably, these predicted increases are for *1992 only*:

Television: 0% - 10%

Dailies: 3% - 7%

Business Papers: 5% - 8%

Magazines: 3% - 7%

Outdoor: 3% - 5%

Radio: 4% - 7%

⁹⁶ The 1992 exercise (for 1994) is not included as prices were not increased.

⁹⁷ Information on business papers and outdoor came from only one source.

According to Messrs. Phaneuf and Renwicke the predicted price changes for 1992 were considered relevant even though Tele-Direct was considering price changes for 1993 because the canvass of customers for the 1993 directories was done during 1992. However, Mr. Phaneuf could not explain why predicted changes for other factors such as the CPI were obtained for 1993.

Two notes accompany the information on other media price increases. They state: "Demand Driven Market" and "Anybody's Crystal Ball". According to Mr. Phaneuf, the second note is a warning about the discrepancy in the information received from different sources (as indicated by the wide range of predicted price changes, such as for television). Taking the first note at its face value, it means that the prices that would actually prevail in 1992 would depend on the state of demand at that time.

The average Tele-Direct price increase established in October 1991 for 1993 was five percent, with a minimum of 3.5 percent and a maximum of 5.9 percent for specific directories. The average price increase of five percent for 1993 falls within the range of other media price-ups (not difficult since the range is so large) but the same average increase could just as easily have been arrived at without any reference to other media prices. This observation also applies to the pricing documents for 1995 and 1996 that were used in setting prices in 1993 and 1994.

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Several other points emerge from a review of the information available to Mr. Renwicke and other officers. Although Mr. Renwicke stated that he would be concerned about the prices of community and daily newspapers, only the price-up of dailies was collected. While the general agencies that provided the information to Mr. Phaneuf were much more likely to be familiar with dailies than with community newspapers, it is instructive that there is no evidence of any effort by Tele-Direct to obtain pricing information about its other alleged competitors, community newspapers.

Further, no information on flyers or direct mail is included. Other Tele-Direct documents group flyers with Yellow Pages as directional media, indicating that prices for flyers would clearly be relevant, and perhaps more relevant than predicted prices for the electronic media, business papers and magazines. We also note that the information provided by Mr. Phaneuf for television does not reveal whether the prices in question relate to local television, network television or both. When questioned about this Mr. Renwicke was not sure but thought that the predicted price changes related to local television.

We conclude that Ms. McIlroy's view that the prices of other media had little or no influence on Tele-Direct's pricing policy in the 1990s is borne out. Mr. Renwicke's use of the term "key driver" when referring to the prices of other media is disingenuous. The documentary evidence does not support this characterization. Nor, in fact, does the remainder of Mr. Renwicke's own testimony. By a "key driver", he apparently meant a very tenuous

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relationship between Tele-Direct's price increases and the price increases of other media. He testified that other media prices enter into Tele-Direct's price setting as follows:

. . . [W]e wouldn't focus this closely on network TV as we would on community or daily newspapers, but we focus on that because we don't want to be way out of line with what newspapers are pricing up at or other comparable media that we feel our advertisers use amongst their choices of how to promote their business.

. . . We feel if the gap was too large and we didn't pay attention to that over time, there could be at least substitution on the margin that could take place.

I think that's a real concern throughout the recession.

. . .

Q. You said you would be concerned if the prices were way out of line. What do you mean by "way out of line"?

A. Frankly, particularly with newspapers, I would consider anything, five percent or greater, to be too much out of line.⁹⁸

A fear of losing *some* advertising dollars to other media if a *relatively large* difference in price *increases* persists over time (and during a recession) confirms only that newspaper or other media pricing provides little or no competitive discipline for Tele-Direct's pricing. Tele-Direct did not ignore the prices of other media; they were a part of the general economic environment. But given the types of media covered and the tentative conclusions that it could derive from the information we cannot conclude that it had the concern of a firm worried about close substitutes.

Pricing -- Revision of 1993 Prices in 1992

The respondents place considerable emphasis on the fact that in February 1992 Tele-Direct, for the first time ever, revised its 1993 prices during the canvass for the 1993 directories

⁹⁸ Transcript at 44:9285-86, 9290 (22 November 1995).

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as it ran into advertiser resistance due to the difficult economic times. For the remaining directories not yet canvassed the average price increase was reduced from five percent to 3.2 percent.

The respondents point to a brief statement in the minutes of a sales and marketing executive meeting held in February 1992 which they say reflects the reasons why prices were revised:

The rates that were implemented for 1993 have been revised to lower levels given the reaction of our customers to our 1992 prices, *the pricing of other media* and the expected rate of inflation in Ontario and Quebec.⁹⁹ (emphasis added)

They also rely on the revised Standby Statement for 1993 Pricing which was presented at the meeting and apparently accepted by all concerned. The Statement reads:

Our pricing policy for 1993 issues of Yellow Pages and White Pages directories has been revised downward to take into consideration the economic conditions prevailing in 1992.

This policy reflects the fact that most prices are on a downward trend for 1992. It is also in step with the advertising industry where media rates for 1992 are expected to be in the 3% to 5% range for daily newspapers, magazines and out-of-home (billboards, etc.). Radio and T.V. are expected to be in the 0% to 5% range with peaks of 10% for T.V. due to high demand for last-minute buying.

All media are expected to increase their rates towards the end of 1992 as the economy picks up. Forecasts for 1993 and 1994 are for prices increases of 10% or more. Based on these forecasts, it is evident that Yellow Pages directory advertising will be one of the media with the lowest price-ups during that period.

⁹⁹ Confidential exhibit CJ-12 (blue vol. 3), tab 115 at 109881.

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Finally, our pricing structure must also reflect our own internal cost increases which have been kept to a minimum for 1992 thus allowing us to keep price-ups at their very low levels.¹⁰⁰

Both Mr. Renwicke and Ms. McIlroy attended the meeting at which the prices were revised. Ms. McIlroy attributed no importance to the Standby Statement as a price setting document, regarding it purely as a document prepared for public relations purposes. Nor did Mr. Renwicke mention other media prices when describing the motivation for the revision in 1993 prices. He emphasized general economic conditions:

In 1991 we clearly did not project the decrease that would take place in CPI or the recession . . . [I]n February '92, we actually re-did prices for '93 for the books we could still catch and I am thinking of the border markets in particular that were being decimated with cross-border shopping, Niagara Falls, Sarnia, Windsor.

We reduced those all by a percentage point. So, we did our best to try and get back down to a point where we were near CPI because our customers were reading in the paper every day that inflation in Toronto was approaching zero and why were our rates up at four per cent, five per cent, six per cent. Partly it was a function of the lag we had in setting those prices initially and not foreseeing the downturn that did take place in the economy.¹⁰¹

Taking into account both the documents and the views of two of the officers involved in the exercise, the 1993 price revision does not change our view that other media prices are not "key drivers" in Tele-Direct's pricing.

New Products

¹⁰⁰ Confidential exhibit CJ-32 (black vol. 11), tab 76 at 132008-9 (public) (with covering memorandum).

¹⁰¹ Transcript at 44:9283-84 (22 November 1995).

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The respondents list four new product initiatives which they say show competition between Tele-Direct and the other media by the fact of their having been tried. These four products were coupons in directories, AdSpot and BrandSell (creative-type directory advertisements), colour and participation in the "Marketing the Medium" program which is designed to prove the value of Yellow Pages.

There was little evidence about the nature and cost of these programs and why they were launched, which media were considered important competitors in triggering them, what success they achieved in terms of revenue gain or loss for Tele-Direct and if they were discontinued and why. Contrary to the respondents' submissions, we cannot accept that the mere existence of these alleged new products is instructive. Their mere existence is not indicative of substitutability between Yellow Pages and any other advertising medium.

(ii) Newspapers

Newspaper Consultants

The respondents rely on the evidence of the activities of newspaper consultants as proof both of Tele-Direct's response to a "competitor" (daily newspapers) and of an initiative by another medium to compete against Yellow Pages. Newspaper consultants attempt to convince Yellow Pages advertisers that they are spending too much on their Yellow Pages advertising. Once the newspaper consultants have succeeded in persuading the advertiser to cut back on

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Yellow Pages spending, they then try to convince the advertiser to place some of the dollars "saved" in newspaper advertising.

Newspaper consultants first became active in Canada in 1987, having previously operated in the United States. One method used by the consultants was to hold seminars, sponsored by the newspaper that hired the consultants, to which Yellow Page advertisers were invited. A second method, apparently employed to a greater extent in recent years, is to locate good "prospects" among Yellow Pages advertisers (those with large or coloured Yellow Pages advertisements) and then visit them.

Newspaper consultant activity is not convincing evidence that newspapers and Yellow Pages are close substitutes. If Yellow Pages and newspapers were close substitutes, the newspaper's sales representatives would be fully familiar with Yellow Pages as part of the competitive environment. If the two media were close substitutes it would not be necessary for newspapers to hire outside "consultants" on a one-shot or periodic basis. Further, it would be expected that price discounting by the newspapers would be a more potent weapon than the rather circuitous approach of the use of consultants in regaining or capturing revenue from the Yellow Pages. The success of newspaper consultants depends on finding customers who are unhappy with Tele-Direct. An unmistakable implication is that such customers do not perceive other media as close substitutes for Yellow Pages, otherwise they would already have stopped or reduced their use of Yellow Pages.

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Further, a successful newspaper consultant must convince the advertiser that a different, less costly Yellow Pages advertisement or set of advertisements will work *as well* as the existing Yellow Pages advertising. In other words, the question is how much does that advertiser really need to spend to have an effective advertisement *in the Yellow Pages*? This is borne out by the fact that a consultant's methodology involves two distinct steps. First, the Yellow Pages advertiser must be convinced that he or she can reduce Yellow Pages expenditures without prejudicing the results from the Yellow Pages advertising. Then, the newspaper consultant must try and sell the advertiser on spending the dollars saved elsewhere. But, this is clearly a second step. This is recognized even by Tele-Direct in a document referring to newspaper consultants:

newspaper reps are recommending down-size YP and don't talk about newspapers (probably will go in later to make pitch).¹⁰²

The advertiser, of course, may simply decide to pocket the savings. This process is not indicative of shifting of spending from one competing media to another. The restriction of the context to the Yellow Pages as the first step taken by newspaper consultants is a critical point in defining the relevant market. It indicates that what is occurring is not the allocation of the advertisers' overall advertising budget between newspapers and Yellow Pages but rather focusing on whether money can be saved in Yellow Pages advertising without regard to other media.

On the whole, the presence of newspaper consultants has been sporadic, sometimes in one local market and sometimes in another. In no case have they been continuously active in any

¹⁰² East Office Competition Analysis: confidential exhibit CJ-13 (blue vol. 4), tab 158 at 115094.

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local market. With respect to the actual success of the newspaper consultants, Ms. McIlroy testified that "they were never successful in doing any damage really of any kind, at least that we monitored. I never noticed any significant damage."¹⁰³ Mr. Giddings also testified that he could not quantify their impact.¹⁰⁴ This is telling evidence regarding Tele-Direct's response to the alleged "competition". The success of newspaper consultants could be easily tracked. They visit advertisers individually and try to convince them to adopt a specific advertising plan. In these cases it is perfectly clear to the Tele-Direct sales representatives why the customer is making changes in his or her program. No data was gathered by Tele-Direct on the impact of newspaper consultants, which would have been expected had Tele-Direct considered the effort worthwhile. It apparently did not.

Community Newspapers

The respondents called one witness who represented community newspapers. Ginette Allard-Villeneuve of Quebecor testified that, in her opinion, community newspapers and Yellow Pages compete for the advertising budget and that the advertisements placed in each are "somewhat interchangeable". Since Ms. Allard-Villeneuve appeared to have very little familiarity with or knowledge about the Yellow Pages, it is evident that she is referring to a very attenuated form of "competition" between the two. The respondents do not, in fact, seem to be claiming anything more than that.

¹⁰³ Transcript at 20:3827 (16 October 1995).

¹⁰⁴ Transcript at 39:8077-78 (15 November 1995).

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(iii) Conclusion

The evidence on inter-industry views and conduct indicates that there was some limited competition between Yellow Pages and other media, principally newspapers. When the form of this competition and Tele-Direct's response to it are contrasted with the kind of head-to-head competition that occurred in Sault Ste. Marie and Niagara Falls, where there was entry of competing broadly-scoped telephone directories, there are pronounced differences in the intensity of Tele-Direct response.¹⁰⁵ The same difference in intensity is found in Tele-Direct's failure to track its successes and failures relative to other media and its assiduous efforts to track the sales volumes of independent publishers that it had identified as competitors. Tele-Direct did collect anticipated prices of other media in setting its prices. However, these were broad estimates and the prices for electronic media, for which there is virtually no evidence of direct competition with Yellow Pages, are included. On the other hand, media which are closer (as opposed to "close") substitutes such as community newspapers and flyers are excluded. It is difficult to see the predicted price changes of other media as an important ingredient in Tele-Direct's pricing. In short, the evidence of inter-media competition supports the Director's position that Yellow Pages and other media are not close substitutes.

¹⁰⁵ As already indicated, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns and improvements to its own directories.

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(d) Price Relationships and Relative Price Levels

There is little evidence that can properly be considered under this heading. Telephone directories and other media do not have a common standard of measurement that would allow valid price comparisons. While price comparisons were prepared for the use of Tele-Direct sales representatives, they were designed to show that Yellow Pages advertising was virtually non-comparable to other media (primarily newspapers). In any event, no common standard of measurement was used.

The respondents refer to two documents which purport to track a weighted average of annual price increases of other media and those of Tele-Direct over approximately a decade, along with the overall rate of inflation.¹⁰⁶ There is no rigorous analysis either in the internal documents of Tele-Direct or by the experts that would allow any conclusion to be drawn from these documents alone. Given that there are common economic forces driving prices even in very disparate industries, one would expect to see some correlation in overall price movement. An attenuated correlation in price movement does not indicate close substitutes. Even a high correlation between two sets of prices is only a *necessary* condition for the two products to be considered to be in the same market. But, it is not a *sufficient* condition to prove they are in the same market because other factors than substitutability may be responsible for the correlation.

¹⁰⁶ Pricing Policy - CPI & Media Price Evolution (1984-1994): confidential exhibit CR-158 at 111314; Tele-Direct Price Up vs. Canada Inflation Rate and Other Media: confidential exhibit CJ-29 (black vol. 8), tab 48 at 129708.

(e) Switching Costs

There is no dispute that the costs of switching from one medium to another are relatively low.

(5) Conclusions Regarding Substitutability

Each of the indicia points in the same direction. We have little difficulty in concluding that telephone directory advertising is a distinct advertising medium without close substitutes. Directory advertising is a directional medium with a function distinct from that of creative media. Within the group of media considered to be directional, a review of the evidence regarding physical and technical characteristics, advertiser perceptions and behaviour, inter-industry competition and price relationships leads us to conclude that telephone directory advertising is a relevant product market.

B. GEOGRAPHIC MARKET

There is no dispute between the parties that the geographic market is local in nature, corresponding roughly to the scope of each of Tele-Direct's directories.

VII. CONTROL: MARKET POWER

The exercise of defining a relevant market is only a step towards answering the critical question of whether Tele-Direct has "control" or market power in that market. As the Tribunal

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has said on previous occasions, market power is generally considered to mean an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms. In those cases, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry.¹⁰⁷

The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded. In this case, the parties addressed both the indirect or structural approach to market power (market share and barriers to entry) and "other evidence" of market power of a more direct nature. The Tribunal will likewise address both avenues in that order.

¹⁰⁷ *NutraSweet*, *supra* note 4; *Laidlaw*, *supra* note 33; *D & B*, *supra* note 31.

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A. INDIRECT APPROACH: MARKET STRUCTURE

Having determined that telephone directory advertising in local areas constitute relevant markets, it remains to determine Tele-Direct's market share and the conditions of entry into those markets. A large market share can support an initial determination that a firm likely has market power, absent other extenuating circumstances, in general, ease of entry.¹⁰⁸

We will deal with the question of market power in the supply of telephone directory advertising, which includes both publishing and advertising services. The issues relating to the possible "subdivision" of the market into two (or perhaps more) component parts will be canvassed later in these reasons.

(1) Market Share

Based on Tele-Direct's November 1995 revenue estimates for independent publishers operating in its markets and the data on the record regarding its own published revenues for Ontario and Quebec for 1994, Tele-Direct (Publications) Inc. has approximately 96 percent share of telephone directory revenues in Ontario and Quebec.¹⁰⁹ It is instructive to note that, in 1992, a

¹⁰⁸ *Laidlaw, ibid.* at 325; *D & B, ibid.* at 254-55.

¹⁰⁹ Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170; Tele-Direct (Publications) Inc. - Profitability Study for 1994: confidential exhibit CR-185. Tele-Direct's 1994 published revenues were the most recent available at the time of the hearing. Exhibit CR-170 was put forward by the respondents as their most up-to-date information on independents' revenues and so we will refer to it to the exclusion of the various other numbers and documents brought up during Mr. Renwicke's testimony. Exhibit CR-170 provides two different bottom line totals for number of independent directories and revenue. The difference is accounted for by cessation of publication by one publisher with ten directories and revenues of \$1.5 million. The totals that have been used are those that include that publisher and its revenues.

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Tele-Direct document estimated the total *potential* sales of independent directories in Ontario and Quebec at \$32 million.¹¹⁰ That would indicate an upper limit on the potential growth of the independents of well under 10 percent of Tele-Direct revenues. The same year, Tele-Direct estimated the *actual* sales of independents at less than one-third of the "potential" amount set out. The November 1995 estimates place the total revenues of the independents at slightly over one-half of what was described as their potential business in 1992. Even in Tele-Direct's worst case scenario regarding growth of independents, it would still be left with a market share of 90 percent.

Although there was no significant disagreement between the parties that the geographic markets are local in nature, largely corresponding to the scope of the relevant Tele-Direct directory, Tele-Direct's information on other publishers was presented for sales throughout the territory of Tele-Direct (Publications) Inc., namely Ontario and Quebec. No local market information was placed on the record except for the revenues of White and DSP in the Niagara and Sault Ste. Marie areas. White publishes a directory in each of Niagara Falls, St. Catharines and Fort Erie, as does Tele-Direct. DSP publishes one directory covering the area bounded by Sault Ste. Marie, Elliot Lake and Wawa in Canada. Tele-Direct publishes three separate directories for that area. On the basis that in each of those two local markets the large independent and Tele-Direct are the only significant players, in the Niagara region based on

¹¹⁰ Telephone Directory Competition in Ontario/Quebec: confidential exhibit CJ-13 (blue vol. 4), tab 164; testimony of D. Renwicke: transcript at 46:9679-80 (27 November 1995). This figure was calculated based on a research study conducted in the United States which determined that independents overall had 5.9 percent of telco directory revenues. The 1993 Simba/Communications Trends study places independents at under 7 percent of total national revenues: confidential exhibit CJ-14 (blue vol. 5), tab 174.

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1994 revenues, Tele-Direct has a market share of about 85 percent, while in the Sault Ste. Marie region its market share is about 80 percent.¹¹¹

Thus, even in the two markets in which Tele-Direct faces the most significant competition, its market share is still over 80 percent. In the absence of further detailed information on local market shares, which apparently even Tele-Direct does not compile, this fact, allied with Tele-Direct's overwhelming share of sales over its territory as a whole, leads us to conclude that Tele-Direct dominates telephone directory advertising in markets in Ontario and Quebec. *Prima facie*, we are of the view that Tele-Direct has market power based on its large share of the relevant market, absent compelling evidence of easy entry into the supply of telephone directory advertising.

(2) Barriers to Entry

In the absence of barriers to entry, even a single seller cannot exercise market power. Any attempt by the incumbent to price above the competitive level will attract immediate entry by competing sellers. We have concluded that Tele-Direct has a large share of the relevant

¹¹¹ According to the respondents' map of other publishers (exhibit R-159), only DSP and Tele-Direct are in Sault Ste. Marie, Elliot Lake and Wawa; only White and Tele-Direct are in St. Catharines and Niagara Falls. There are the Locator and Easy to Read directories in Fort Erie but there is no local revenue information on the record. It cannot be very high based on averages taken from Overview of Other Publishers in Tele-Direct Markets (confidential exhibit CR-170). Niagara calculation: Tele-Direct 1994 published revenues for Niagara Falls, St. Catharines and Fort Erie taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128980); White's 1994 revenue was stated by Richard Lewis to be 17 percent of Tele-Direct's revenue (transcript at 22:4363-64 (18 October 1995)). Sault Ste. Marie calculation: Tele-Direct 1994 published revenues for the Sault Ste. Marie, Elliot Lake and Wawa taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128983); DSP 1994 (year 2) revenues taken from DSP - Sault Ste. Marie Directory - Gross Revenue from 1993 to 1995 (confidential exhibit CA-109).

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market. Proof of easy entry would overcome the initial determination that Tele-Direct has market power in the supply of telephone directory advertising.

The parties have organized their arguments regarding barriers to entry under three headings, (a) observed entry and exit, (b) sunk costs and (c) incumbent advantages. We will use the same headings.

(a) Observed Entry and Exit

Observed entry into a market can provide some indication of the existence or non-existence and the nature of any barriers to entry. There is no dispute that entry into publishing a "niche" directory appears to be relatively easy. The Director has admitted as much, based on the large number of niche directories and the high level of observed entry and exit.

The Director argues that the smaller directories have captured only a "minuscule" portion of the market and that fact, combined with Tele-Direct's lack of competitive reaction to their presence, confirms that they are of little importance in constraining Tele-Direct's market power. Further, the experience of White and DSP confirms the existence of significant barriers to entry by a broadly-scoped directory.

The respondents submit that entry need not be on a large scale and that many independent publishers have entered on a small scale and then grown slowly, thus avoiding drawing a

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response from Tele-Direct. Although not directly stated, the implication is that the publishers that chose this strategy have become a competitive force in the market. They also point to White and DSP as proof that broadly-scoped directories have successfully entered, remain in the market and are even profitable.

(i) Niche/Smaller Directories

Relative ease of entry by niche directories is not particularly relevant to an assessment of Tele-Direct's market power as it is clear from the evidence that the presence of these directories has had and can have little competitive impact on Tele-Direct. There is no evidence of any response by Tele-Direct to the presence or entry of a niche directory. There is certainly no evidence that they currently limit Tele-Direct's pricing or encourage better service by their presence.

With the exception of directories published by White and DSP, virtually all of the independent directories cover smaller geographic areas than the directories produced by Tele-Direct. The Director is correct that these smaller directories account for only a small portion of the overall market (less than three percent by revenue). Further, level of activity of each of the smaller independent directories indicates why individually they are not a serious threat to Tele-Direct. If the directories of DSP and White are excluded, there are 279 other independent directories with estimated average annual sales of just over \$51,000 each. Of these, the 30 Locator directories had by far the largest estimated average annual sales, of the order of

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\$200,000 per directory. Mr. Renwicke thought that the largest Locator directory "could" be close to \$1 million in revenue, which would make the remaining directories even smaller on average. The remaining 249 directories had estimated average annual sales of approximately \$33,000 each. In contrast, in 1995, the broadly-scoped DSP directory had estimated annual revenues of over \$1 million while each of White's three broadly-scoped directories averaged over \$500,000 in revenues.

The respondents spent some time with their witness, Mr. Renwicke, reviewing examples of directories of three independent publishers in support of their position that, instead of going "head-to-head" with Tele-Direct, an independent could enter small and gradually expand and still be a competitive force in local markets. The respondents referred specifically to the Easy to Read directory, the Locator directories and the Other Book. There are Easy to Read directories in about a dozen, mainly small, Ontario communities. Locator publishes some 30 directories in various small to medium-sized Ontario towns. The Other Book published ten directories, all in the Ottawa area, but is not published anymore.¹¹²

The argument focuses on the Easy to Read directory in Stratford, Ontario. It is described in the argument as an "impressive" directory. The fact remains, however, that it is of negligible size. The total revenues of all the Easy to Read directories are not even stated separately on the Overview of Other Publishers in Tele-Direct Markets. Presumably they are included in the group

¹¹² Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170.

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of "Other Publishers in Ontario (geographic)" which have average total annual sales of only about \$31,000. Tele-Direct's 1994 revenues in Stratford were over 40 times that amount.¹¹³

Mr. Renwicke pointed out and made favourable comments about the features of the Locator directory entered in evidence, which included postal codes, audiotext¹¹⁴ and community pages. He also described the Other Book, which had postal codes, amortization tables and a babysitter's guide as some of its features, as a "good-looking book".

Yet, despite the apparent quality of these directories, some of which contain features not offered by Tele-Direct in its directories, the respondents did not refer us to any evidence of Tele-Direct reacting to their presence in a way that would indicate that they were actually a competitive concern, in the sense of providing some discipline on Tele-Direct's quality and pricing. It is indisputable that Tele-Direct is aware of the presence of these independents and to some extent monitors their progress. That is not, in our view, evidence that these directories are a competitive force in the market. There is no indication on the record before us of any positive reaction of the type that occurred when DSP and White entered. Other than the existence of the competitive database and Mr. Renwicke's opinions, the respondents referred only to a 1993 presentation by Mr. Renwicke to the Tele-Direct board which provided information on independents and named White, DSP and Locator.

¹¹³ Tele-Direct's 1994 Corporate Post Canvass Analysis Report: confidential exhibit CJ-28 (black vol. 7), tab 42 at 128982.

¹¹⁴ Phone numbers that people could call to get anything from up-to-date news, weather and sports, to medical information and their daily horoscope.

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Moreover, even if there was evidence of some competitive response by Tele-Direct to niche directories this by itself would hardly be sufficient to conclude that Tele-Direct did not have market power given its overwhelming market share. The smaller or niche directories are, by their very nature, limited in scope and influence. Thus, although entry on this scale is easy, up to a point (since each new entrant must find a new "niche" and there is a limited number), entry by smaller directories does not limit Tele-Direct's market power.

(ii) Broadly-Scoped Independent Directories

The conditions of entry by a broadly-scoped independent directory covering an area similar to the corresponding Tele-Direct directory, which will compete head-to-head with Tele-Direct, are highly relevant to the question of market power. Tele-Direct's responses to the entry of broadly-scoped directories in the Niagara and Sault Ste. Marie areas indicate that only such head-to-head competition has the potential to produce the benefits to consumers that one looks to competition for, namely lower prices and better products and services.

Can entry by publishers of broadly-scoped directories be considered sufficiently easy so that Tele-Direct is unable to take advantage of its large market share? Additionally, assuming that entry of a single competing publisher were to occur, would this assure that Tele-Direct would no longer have market power because of either the intensity of competition or easy entry conditions for additional publishers? The respondents urge us to conclude that because White and DSP managed to enter in particular markets and have remained in business, entry barriers are

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low enough that Tele-Direct has no market power. We decline to place so much emphasis on two isolated instances of entry in answering these questions. To answer both questions properly, we must review the arguments on entry conditions for broadly-scoped independent directories in some detail.

(b) Sunk Costs

The Director argues that sunk costs are a barrier to entry as they are perceived by potential entrants as unrecoverable if entry is unsuccessful. The respondents submit that, based on the Tribunal's decision in *Southam*, sunk costs alone are not enough. In *Southam*, the Tribunal held that neither sunk costs nor economies of scale were themselves sufficient to create an entry barrier but that together they were.¹¹⁵ The respondents contend that the other source of a barrier to entry identified by the Director in this case, namely incumbent advantages, is not like economies of scale and does not operate with whatever sunk costs are present to create entry barriers in the sense required by *Southam*.

We agree that *Southam* held that sunk costs or economies of scale individually are not sufficient. That decision, however, should not be taken to mean that the combination of sunk costs and economies of scale is the only way in which sunk costs can form part of a barrier to entry. What is important is whether the market in question is one in which the potential entrant faces the risk that the post-entry conditions will be less favourable than pre-entry conditions

¹¹⁵ *Director of Investigation and Research v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 at 281-82, [1992] C.C.T.D. No. 7 (QL).

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because of the likely response of the incumbent. Thus, in *Southam*, the presence of sunk costs and economies of scale meant that there was a credible threat that the incumbent would maintain output in the face of new entry even if doing so drove prices down towards cost.¹¹⁶ This acted as a deterrent to entry.

In this case, therefore, it will be necessary to ask, first, whether there are in fact significant sunk costs associated with directory publishing. Then, we must determine whether the nature of the market is such that prospective entrants face a credible threat that the incumbent will respond in a manner that will make entry unprofitable given the existence of the sunk costs.

Sunk costs are defined as the part of the investment required for entry that cannot be recovered in the event that the attempt fails. Assets that are of value only to a specific enterprise are sunk and those that are of value to other firms are not sunk, or only partially sunk. The Director submits that entry into the directory business requires substantial sunk costs: acquiring and compiling subscriber listing information, assembling advertising into the finished directory, canvassing clients to place advertising, publishing the directory (including the cost of enhancements), training the sales force and promoting the directory. The respondents admit that there is no doubt that there are "some" sunk costs associated with publishing a directory for the first time but submit that the Director has overstated the sunk costs. They say the sunk costs are not, in fact, significant. However, the evidence of the witnesses from White and DSP, which was

¹¹⁶ The same point is made in P.S. Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990) at 435-37.

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not contradicted, amply supports the premise that the activities listed must be carried out in order to produce a directory and that the costs incurred are substantial.

DSP and White both entered by publishing a "prototype" directory. With a prototype directory, the publisher offers advertising in the directory at no charge. The prototype is distributed to consumers and the publisher then has a history of usage to give it credibility in selling advertising in its next directory. The respondents argue that the sunk costs are substantially increased when an independent publisher chooses to enter by publishing a prototype because there are no advertising revenues to offset the costs. They say that the extent of the sunk costs is within the control of the entrant and a different entry strategy would generate lower sunk costs.

Establishing usage and selling advertising are inextricably linked for a directory publisher. As stated in the 1993 Simba/Communications Trends study, achieving credibility among local advertisers is one of the biggest hurdles that a publisher must overcome.¹¹⁷ It was precisely in order to overcome the credibility concerns of advertisers that both DSP and White chose initially to publish a prototype directory. Entering with a paid directory does not eliminate the credibility problem and achieving credibility, by whatever means chosen, involves costs. We have no basis on which to conclude, as urged by the respondents, that it would have been less costly overall for White and DSP to enter first with a paid directory.

¹¹⁷ "Lessons of Yellow Pages Competition": confidential exhibit CJ-14 (blue vol. 5), tab 174 at 115924.

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The respondents also submit that if the entrant chose to enter with an initial paid directory, it could avoid the cost of publishing entirely if a sufficient volume of business was not confirmed during the canvass and it then abandoned its plans to enter. While we agree that the only way to avoid the costs of producing a directory is to abandon the project, we do not agree that this is a strategy that could be used with impunity by would-be entrants. The mere possibility that such a strategy could be employed exacerbates the credibility problems facing a would-be entrant, and in the event it were employed, would detrimentally affect any prospects for the same firm or other firms to attempt entry in another market.

Recognizing that there are sunk costs involved in entry into directory publishing, do those sunk costs amount to a significant barrier to entry? We are of the opinion that those sunk costs do create a barrier to entry when a broadly-scoped directory is introduced because the entrant publisher is going "head-to-head" with the telco's directory. In those circumstances, the incumbent will respond and post-entry conditions will be less favourable for a would-be entrant than pre-entry conditions. As the Simba/Communications Trends study noted, under the heading "Disadvantages of Large, Head-to-Head Directories", "[u]tilities are willing to 'pull out the big guns' to protect large bread-and-butter markets."¹¹⁸ It is not disputed that when White and DSP entered into Tele-Direct's markets with broadly-scoped directories, Tele-Direct responded with price freezes, incentive programs, enhancements and promotional campaigns. Thus, the combination of sunk costs and likely response by the incumbent create a significant entry barrier

¹¹⁸ *Ibid.* at 115982.

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and entry would not necessarily occur even though Tele-Direct was pricing above competitive levels.

(c) Incumbent Advantages

(i)Subscriber Listing Information

Would-be entrants into the directory business do not have access to subscriber listing information from the telcos on the same terms as Tele-Direct. Access to subscriber listing information by independent publishers has been the subject of some controversy and has been dealt with on several occasions by the CRTC. In 1992, the CRTC ordered greater access to the subscriber listing information in the hands of Bell Canada. Because of the price of the information, and other conditions imposed on its distribution, this decision did not result in commercially viable access to the information. Both White and DSP witnesses testified that they were forced to wait until the Tele-Direct directory was published and then re-key, verify and update the listings to use in their own directories, a costly and time-consuming process.

In March 1995, the CRTC revisited the matter at the request of White and liberalized the availability of listing information, including reducing the price that could be charged by Bell Canada. There was no indication from the White or DSP witnesses who appeared before us of any problem with the 1995 resolution by the CRTC of the price and availability issues. Richard

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Lewis, the Executive Vice-president and Chief Executive Officer of White, stated, in fact, that White was very satisfied with that aspect of the decision.

The CRTC added an important proviso, however, when it ruled that consumers who wanted to opt out of having their listings sold to a "third party" could do so. From the point of view of the independent directory publishers, this caused a problem because the CRTC did not distinguish between types of "third parties". Thus, the independent publishers were grouped in with, for example, telemarketers, to whom many consumers would not want their information to be released. The 1995 decision was stayed pending an appeal to Cabinet which, in late June 1996, overturned that portion of the CRTC ruling.

In light of the Cabinet decision, which was rendered after the close of the hearing in this matter, the Tribunal invited further submissions from the parties regarding the impact of that decision on their respective positions. The respondents submit that the Cabinet decision has removed the only barrier to entry into publishing. The respondents point to Mr. Lewis's statement that after a favourable decision from Cabinet, White will proceed with additional directories in the Toronto/Niagara area. The Director agrees that the Cabinet decision will likely reduce *one of* the barriers to entry into directory publishing but maintains that there are still other, significant barriers into the market. The Director refers to the United States situation where, despite access to subscriber listing information for several years, independents have less than seven percent of total industry revenues.

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The only evidence before us is that the issues of importance to the independents, availability, price and opting out, have been dealt with satisfactorily to them. We conclude that, at present, subscriber listing information cannot be considered to be a significant barrier to entry.

(ii) Reputation/Affiliation with Telco

An entrant into directory publishing has the related tasks of convincing users of the value of its directory and of convincing advertisers that it is a worthwhile vehicle in which to advertise. The directory will only be widely used if it has a critical mass of advertising in it. If the directory is not widely used, few businesses will advertise in it and, in the absence of advertising by its competitors in a new directory, there is no pressure on a potential customer to advertise itself in the new directory. This is not a problem that Tele-Direct ever had to face because of its (or Bell Canada's) longstanding presence in the market as the only available directory. In addition, Tele-Direct benefits from its affiliation with a large and established telco which lends a certain authenticity.

To overcome the preference of advertisers for the incumbent directory requires enhanced expenditures on advertising and promotion and lower prices by the entrant. There is numerical evidence on the disadvantage of entrants *vis-à-vis* the incumbent only with respect to lower prices. The Simba/Communications Trends study of the directory industry in the United States revealed that in the top 10 competitive markets, the average telco (utility) rate for a double-half column was 53 percent higher than for independent publishers competing head-to-head in those

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markets. The average cost of advertising, per thousand of circulation, for the utility directories was 46 percent higher than for the independents.¹¹⁹

Mr. Lewis of White stated that his company usually plans on pricing about 40 percent lower than the telco directory in a market they are considering entering. Gary Campbell, the General Manager of DSP, testified that on average their prices were 30 percent less than those of Tele-Direct. A comparison of published prices between Tele-Direct and the initial White and DSP directories confirms these general statements although price differences vary considerably between types of advertisements.¹²⁰

In both markets, the entrants had invested in introducing new features (enhancements) into their directories that Tele-Direct had not hitherto introduced. For example, White's Niagara region directories included the following features not previously offered by Tele-Direct: free smaller size copy in addition to the regular size directory (a "mini"), audiotext, extensive community pages which provide information of regional or local interest,¹²¹ larger size print, three column format instead of four, postal codes included in the white pages, additional colour

¹¹⁹ *Ibid.* at 115984.

¹²⁰ White's prices in 1994 were generally about 25 percent less than Tele-Direct's for in-column, about 40 percent less for display and about 55 less for red display: exhibit A-103. White first published in Niagara in 1993 with a prototype directory in which advertisers could advertise free of charge. The 1994 prices are for its first "revenue" directory in which advertisers paid for their advertising. Likewise, in Sault Ste. Marie, the DSP rates reflected substantial discounts off Tele-Direct's, with greater discounts for display and coloured display than for other types of advertisements: YPPA Rates and Data Information for the period 1992-95: exhibit A-111.

¹²¹ For example, area sports team schedules, seating diagrams for theatres and arenas, a listing of local golf courses, highway access information, historical sites, schedule of events, maps, senior citizens' services listings, human services' listings, "kid's pages", bus routes, customs and goods and services tax information.

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in the advertisements. DSP also included many of the same enhancements in its directories plus other, unique, features.¹²² Thus, any advantage enjoyed by Tele-Direct clearly stemmed from its incumbency and its affiliation with Bell Canada and not from the superiority of its product.

Based on White's experience in the United States, it appears that the rate differential between the independent and the telco does narrow over time but still remains significant. Mr. Lewis testified that in Buffalo, New York, where White has published for 27 years, its prices are still 25 to 33 percent less than those of the telco directory.

As part of the survey resulting in the January 1993 Elliott report, customers of Tele-Direct were asked if they would advertise in a competing directory if it offered 15 percent lower prices. Only 36 percent said that they would advertise in the new directory and a mere eight percent that they would discontinue advertising in Tele-Direct's directory.¹²³ As indicated by the United States data and the experience of White and DSP, to attract a significant number of advertisers the entrant would likely have to offer discounts closer to 50 percent than to 15 percent.

Based on both the particular experiences of White and DSP in entering Tele-Direct's markets and the more general evidence relating to the United States experience, it is our

¹²² For example, it is a "flip" directory with the Canadian cities on one side and the neighbouring American cities on the other. The book also includes a "reverse directory" -- listings by phone number first.

¹²³ Confidential exhibit CJ-14 (blue vol. 5), tab 73 at 115416-18.

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conclusion that an incumbent directory publisher's "reputation" or affiliation with a telco constitutes a significant barrier to entry into publishing a competing broadly-scoped directory. An important part of this barrier is the advantage that the incumbent directory has because it already contains the advertisements of a business's competitors. A new entrant must overcome that fact in seeking to persuade the business to advertise in its new directory. New entrants must offer substantial price discounts, even when they are publishing a product with features not included in the incumbent's directory.

(iii) "Yellow Pages" Trade-mark

The words "Yellow Pages" and "Pages Jaunes" and the "walking fingers" logo are both registered trade-marks of Tele-Direct in Canada. Tele-Direct only licenses those marks to publishers which are affiliated with other telcos. The same words and the logo are in the public domain in the United States.

As attested to by Mr. Lewis, it probably would have been easier for White (and DSP or any other entrant) to explain the nature of the product it was seeking to introduce in the Canadian market if it had been permitted to use the marks, which have a high level of public recognition, as it can and does in the United States. In fact, Mr. Lewis would have paid a "substantial" fee to use the marks in Canada. The trade-mark situation appears to confer some marketing advantage on Tele-Direct and reinforces the other barriers already discussed.

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(iv) Strategic Behaviour

Under this heading, the Director first refers to the anti-competitive acts being alleged in a later portion of the argument regarding other publishers. Paragraph 120 states that

. . . It was Tele-Direct's objective to "make competition expensive" and "raising the bar" to entry and it succeeded.

The only way in which we could determine if the strategic behaviour referred to constitutes an entry barrier would be to assess the effects of that behaviour on the market. The Director did not deal with evidence of effects in relation to the issue of market power. The alleged anti-competitive acts regarding publishers will, of course, be dealt with in due course.

The Director also argues that the alleged anti-competitive acts in respect of services are relevant to entry conditions into publishing. It is submitted that one of Tele-Direct's objectives was to reduce the power of the specialized agencies in order to make it harder for new entrants into publishing to gain market share. If it had been proven that some Tele-Direct policy or initiative against agents did indeed have a deleterious effect on new publishing entrants, this would be relevant to our assessment of entry barriers. We are of the view, however, that the limited evidence provided on this point does not prove that there were such effects.

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(3) Conclusion

We are of the view that even with subscriber listings available to independent publishers on reasonable terms, significant entry barriers in the form of the reputation effects and sunk costs reviewed above will remain. The condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied.

B. DIRECT APPROACH: OTHER EVIDENCE OF MARKET POWER

As other evidence of market power the Director relies on the high profits earned by Tele-Direct, its lack of responsiveness to customer needs, and an allegation that it has lagged behind other media in supporting agents, in promoting the product and in using technology to process advertisements received from agents. We are of the view that there is insufficient evidence on the record, and that the question was not explored in sufficient depth, for us to draw a conclusion one way or the other regarding the allegation of lagging behind other media. The evidence regarding profitability and customer dissatisfaction, however, is extensive.

(1) Profits

The respondents acknowledge at paragraph 41 of their response that Tele-Direct earns very large accounting profits. It is also undisputed that Tele-Direct pays 40 percent of its collected revenues directly to Bell Canada and a similar percentage to the other telcos with

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which it contracts to publish a directory. This payment is said to be in return for access to subscriber lists and for services. The evidence revealed that the only service provided by the telcos is billing.

Where the respondents and their expert, Professor Willig, differ from the Director is with respect to the significance of Tele-Direct's admitted profitability as an indicator of market power. The respondents' argument first points out the well-known concerns about trying to convert accounting to economic profit. While we recognize the validity of those concerns in general, we do not consider that they apply with much force to the most compelling evidence of profitability, the payment by Tele-Direct to Bell Canada. That payment is a set percentage of collected revenues. It is not an accounting "profit" figure or a "bottom line" amount produced by the application of accounting conventions. Therefore, we are of the view that an examination of the payment to Bell Canada and its possible implications for market power is not clouded by accounting conventions at the outset. The presence of such a payment indicates that Tele-Direct has revenues of at least 40 percent over its recorded costs.

Professor Willig took the position that the profits which allow Tele-Direct to make the payment to Bell Canada reflect a return on intangible capital which is a necessary investment in the creation of the profits. In his rebuttal affidavit he stated:

46. . . . It is well known that there are many reasons why accounting measures of profits can deviate both randomly and systematically from being an indicator of the theoretical notion of economic profits. One reason for systematic deviation is of general significance in businesses where intangible assets are important. Here, the value of the intangible assets does not appear on the accounting books. Then, when operating margins are expressed as a percent of

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the book value of assets, the resulting percent is systematically too large, relative to economic meaning, simply because the book's list of assets misses the intangible ones. This effect is likely to be of specially great quantitative significance where trade-marks, brand-names, product or service reputation, proprietary technology, and organizational capital are important to the business.

47. Of course, service industries typically contain leading instances of businesses where intangible assets are important. For example, the business of any successful magazine is unlikely to rest on significant tangible assets, and instead to depend on intangible assets that include the name and design of the magazine, and perhaps the organizational capital embedded in the editorial and advertising sales teams. The rate of return on tangible assets earned by such a business will turn sensitively on whether the books include ownership of the business office and a fleet of trucks or autos, or whether the business leases such properties. In either event, the assets that really drive the success of the business will not be valued on the books, and so the rate of return on assets will indicate nothing about the economic profitability of the enterprise, and certainly nothing about market power.

48. It goes without saying that the directory publishing business is a prime example of the effects just discussed. For all the conventional reasons alluded to, the rate of return on assets, or other accounting measures of profits, are not reliable indicators of market power. . . .¹²⁴

In other words, Tele-Direct is only earning the requisite return on its intangible assets to remain in business and not any kind of economic rents. Professor Willig returned in his oral testimony to the example of a magazine and its intangible assets which create a loyal readership. We have some difficulty seeing the same effect at work with a directory which has no editorial content, unlike a magazine. There may be creativity in the way the directory is assembled so it is of maximum utility to consumers but the evidence was that Tele-Direct lagged behind new entrants like White and DSP in this respect.

When asked specifically about the intangible assets or activities of Tele-Direct, Professor Willig responded:

¹²⁴ Expert rebuttal affidavit of R. Willig (30 August 1995): exhibit R-181 at 13, paras. 46-48.

Evidently . . . there is some value to having, and having had, the "utility" franchise in a given area. If one tries to translate that into what it means today or next year, the operative word really is "reputation", and the reputation is of significance both to advertisers and also to consumers who have to decide whether to pick the book up or not and, if so, which book to pick up. Somehow that reputation attaches to that book because of its heritage, its history, evidently, and also to its identification with the current telco.

. . .

I agree . . . that it is hard to reach out and grab that reputation. But if we think about the character of the directory business . . . the notion that, if you are an advertiser and you are being asked to pay for an ad in advance of the completion of the book and in advance of evidence about what consumers are going to do in terms of using it, then you have to reach, as an advertiser, an expectation, an anticipation of how good the book is going to be.

You have to form an image in your mind before you commit yourself to your advertising expenditure: Is everybody going to use this and will the other advertisers take ads in it? If they don't, then consumers won't use the book and, if consumers don't use the book, then my ad which I am being asked to pay for today won't have its exposure.

The key to the underlying value proposition of the advertiser is the anticipation that 18 months later or 12 months later the book is going to be out and it is going to be a really good book and people are really going to use it.

It is unusual that you can't really tell the value of what it is you are buying until it is done and many months have passed. . . .¹²⁵

There are several difficulties with this hypothesis. First, on a factual level, there is evidence that Tele-Direct's advertisers (except the small group using agencies) do not pay for their advertising 12 to 18 months in advance. Monthly billing commences once the directory is published. Advertisers pay in instalments (interest free) after publication.

Second, Professor Willig emphasized that the key to the value of Tele-Direct's reputation asset was the anticipation that advertisers have that the directory is going to come out and will be a "good" directory that people are actually going to use. Surely all local media, which the respondents postulate are close substitutes for telephone directory advertising, face the same challenge in selling time or space to advertisers. Rather than paying Tele-Direct at a level that

¹²⁵ Transcript at 56:11663, 11667-68 (23 January 1996).

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allows Tele-Direct to earn a 40 percent premium, would not advertisers simply switch to one of the other alleged close substitutes? Tele-Direct's premium would soon disappear in that scenario.

If, on the other hand, telephone directory advertising is somehow unique because of the close link between a critical mass of advertising in the directory and use of the directory by consumers, then this uniqueness argues against other media being close enough substitutes to provide competitive discipline. Tele-Direct's ability to exploit its association with the telco to earn returns well above its costs would then indicate market power in the market for telephone directory advertising. This latter scenario is more in accordance with the other evidence on the record which reveals that as between the telco directory and other *directory* publishers, the fact of association makes a significant difference. As was already discussed above, one cannot attribute the premium to Tele-Direct having a "superior product" to other telephone directory publishers in terms of the features of the directory. If it had a superior product, Tele-Direct would not concern itself with competing directories, which it does, and the only evidence before us was that the entrants like White and DSP were initially the superior product, until Tele-Direct responded to their enhancements.

Further, Professor Willig's theory of profits as a return on intangible assets cannot co-exist with the respondents' pleading that Tele-Direct's profits go to cross-subsidize Bell Canada's local telephone service as set out in their second amended response:

20. . . . What was initially conceived as an essential but costly feature of telephone service has become a lucrative revenue source for the telcos. . . .

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21. In Ontario, for example, T-D Pubs pays each of the independent telcos with which it contracts 43% of the gross revenue collected from subscribers of the telco who advertise in the telephone directories. In the case of T-D Pubs, this revenue source, as well as the entire net income of T-D Pubs, are included by the CRTC in Bell Canada's revenues to reduce the cost of local service. Each residential telco subscriber in Ontario and Quebec receives a subsidy of over \$2 per month as a result of the revenues captured through telephone directory advertising.

Bernard Courtois, Vice-president, Law and Regulatory Matters for Bell Canada, explained:

. . . So, both the commission revenues from Tele-Direct [the 40 percent] and all the net income of Tele-Direct, that is equivalent to adding \$284 million to the revenues of Bell Canada in 1994 for regulatory purposes. Divide that by the number of residential subscribers and it amounts to \$3.38 per month on the average residence telephone bill.

I should say that the average residence basic telephone bill in Bell Canada with Touchtone is about \$12.75. So, if you didn't have the Tele-Direct activities going on, that bill would have to be more than \$16.00. Of course, if Tele-Direct were a completely arm's length company, we would still get some of that commission revenue.

. . .

Q. I think you did point out that in any telco basically they always collect some of this profit through the 40 percent. I mean every telco seems to collect that so they all get subsidized in that way by publishers. Is that what you were saying?

A. That's correct, and I should point out that it's a very large part. I guess the commission revenues might be two-thirds and the net income one-third of that subsidy. . . .¹²⁶

George Anderson, who was previously with NYNEX, described a similar situation in the United States. He testified that the utility directory publisher has to "impute" a substantial portion of its income, over and above the cost for subscriber listing information which has been widely available for some time in that country, back to the telco to help defer the cost of telephone service. In his words:

¹²⁶ Transcript at 32:6559-61 (3 November 1995).

The [AT & T] consent decrees . . . took an unregulated business, which was Yellow Pages, and at the ninety-ninth hour put it in with the regulated segment of the business to serve as a cash cow, not my words, to serve as a funding business that would help defray, defer, hold down the rate of return and hold down the cost of telephone service.¹²⁷

James Logan, currently President of YPPA and formerly with US West, confirmed this view.

We observe that if all Tele-Direct and other telco directory publishers were earning was a competitive return on all assets, including intangibles, the telcos would not have "profits" available to use for a completely different purpose, namely cross-subsidization of local telephone service. Unless intangibles are to be treated as a *deus ex machina* to explain away high economic profits, they must be identifiable, as must be the activities resulting in their creation. Otherwise, simply asserting "intangibles" would always preclude high profits from demonstrating market power. We cannot accept an approach leading to such a conclusion. Intangibles that can account for *apparent* high economic profit are the result of activities that are extraordinarily successful, such as those creating new products or ways of doing things better than others. In contrast to the example of successful magazines cited by Professor Willig, there is no evidence of this in the case of Tele-Direct or the other Yellow Pages publishers. Moreover, the fact that there is such widespread subsidization of telephone services by Yellow Pages publishers associated with telcos strongly suggests that the source of the subsidies is not any outstanding effort on the part of individual publishers.

¹²⁷ Transcript at 41:8556-57 (17 November 1995).

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The Director also argues that the fact that new entrants view the market as potentially profitable, even given the large price discounts off Tele-Direct's prices that they must offer and the other expenses they must incur to establish their own credibility or reputation, is an objective measure of Tele-Direct's profitability. We agree that market participants are responding to economic profit rather than to accounting profit.

We conclude, therefore, that the payment to the telcos by Tele-Direct is a form of "economic rent" whose value depends on the surplus that can be earned from publishing a directory associated with a telco. The cost to the telcos of providing the subscriber listings and doing the billing is minimal. The listings are a by-product of supplying telephone service and the billing for advertising is incorporated into the subscriber's monthly telephone bill. While it is true that it would be more costly for Tele-Direct to do the billing itself, it is unlikely that it would cost, at most, more than a few percent of revenue.¹²⁸

In the face of competition from other media the amount that Tele-Direct could afford to pay, and that the telcos could demand, would be considerably less. With sufficient competition the payments to the telcos would disappear entirely. Even if Tele-Direct earns no economic profit on its operations beyond what it pays out to Bell Canada, its price to average cost margin is extraordinarily high. While no benchmark was placed in evidence, merger guidelines, both in the United States and Canada, place products in separate markets if their existence would not

¹²⁸ All the work relating to contract verification and dealing with complaints is already done by Tele-Direct. What is performed by Bell Canada are simply the mechanical steps of bill preparation and mailing.

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prevent a hypothetical monopolist, post-merger, from increasing prices by five percent. Even allowing as much as two percent for mailing costs, one is left with a margin of 38 percent. We are of the view that the evidence of economic rents provides a direct indication of Tele-Direct's market power.

(2) Dissatisfied Customers

The Director submits that the respondents' actions towards the advertisers, their customers, display market power. Reference is made to Tele-Direct's requirement that advertisers give up copyright in their advertisement, its restrictions on group advertising and evidence of low customer satisfaction in general. There is evidence, in the form of studies like the Elliott reports and the presence of consultants, that a significant percentage of Tele-Direct customers are less than happy with the service provided by Tele-Direct. We reviewed the evidence to this effect in the section on Market Definition when dealing with the arguments of the respondents which emphasized the low degree of customer satisfaction. As a direct indicator of market power, however, we are reluctant to rely on customer dissatisfaction because of the practical difficulties in applying such a subjective test.

(3) Other: Pricing Policies

In addition to the evidence of profitability advanced by the Director, the Tribunal is of the view that Tele-Direct's approach to setting prices supports the conclusion that Tele-Direct is

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behaving more like a firm with a comfortable margin of market power than a firm facing close substitutes. We note Professor Willig's point that evidence of price discrimination, in isolation, would not reliably indicate market power. In combination with the other evidence it is, however, compelling. Two aspects of Tele-Direct's price-setting policy are important: the premiums charged for colour and larger size (price discrimination) and the effort to equalize price per thousand across geographic markets (circulation alignment).

(a) Price Discrimination

As we reviewed in the section on market definition, colour and increased size are more valuable to advertisers who rely more heavily on the Yellow Pages. In broad terms, these are advertisers whose business involves infrequently purchased or emergency services (e.g., plumber, exterminator, mover, auto repairs, lawyer), infrequently purchased, expensive durables where comparison shopping is likely (e.g., cars, major appliances), services used by travellers (e.g., car rental) or which encourage orders by telephone (e.g., pizza, lumber yard with telephone order business). They need to attract attention in the Yellow Pages so that a consumer is drawn to their Yellow Pages advertisement as opposed to the Yellow Pages advertisement of their competitor. In our view, Tele-Direct systematically price discriminates against advertisers who are heavily reliant on the Yellow Pages through its pricing of colour and size and its ability to do so is direct evidence of market power.

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Tele-Direct charges a 50 percent premium to add red to an advertisement. This premium is unrelated to costs of production. The representative of one of the independent publishers testified that at a 50 percent premium, a publisher would be realizing a very high profit margin. In other words, the additional printing and production costs are well below the price charged.

Ms. McIlroy explained that the object of Tele-Direct's pricing of colour at a premium is to control its penetration to ensure that it will be sufficiently uncommon so that the coloured advertisements "stand out" on the page. The price is set high enough that everyone will not buy it. In the same vein, Tele-Direct introduced multi-colour in those markets where there was already a lot of red in the directories as an alternative way of allowing advertisers to "stand out". This is not the kind of pricing policy that can be pursued by a firm under competitive pressure because its competitors would simply charge a lower price to take advantage of the profit opportunity and compete away the premium.

Further, the premium for red is largely invariant across local markets. It is difficult to see how there could be such uniform pricing in the face of "competition" from other local media, which would vary from market to market. Tele-Direct's pricing of red can hardly be seen as a response to these prices but is much more consistent with a company concerned only about its own, unique environment.

Based on the evidence before us, there is similar uniformity and lack of relationship to cost in Tele-Direct's pricing of larger advertisements. A comprehensive Tele-Direct rate card was

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not placed in evidence. In the 33 local markets included on the excerpt from the YPPA rates that was tendered as an exhibit, the price increases by about 90 percent for each doubling of advertisement size from a quarter column (1/16 page) to a double quarter column (1/8 page) and from a double quarter column to a double half column (1/4 page).¹²⁹ As in the case of colour, the evidence revealed that the additional costs of producing larger advertisements do not appear to justify the increase in price. Based on cost, one would expect a discount greater than ten percent for an advertisement twice as large.

The respondents do not dispute that Tele-Direct's premiums for red and for size cannot be explained by additional costs. Counsel conceded in argument that those were the facts but argued that Tele-Direct was engaging in "value pricing". He hypothesized that an advertiser buying a larger advertisement might get ten times the results that would have been obtained with a smaller advertisement and, therefore, paying almost twice as much for the larger advertisement is actually a bargain. The larger advertiser, the argument goes, is getting more value out of the medium. Value pricing is not a phenomenon readily associated with a competitive market, the hallmark of which is pricing which is ultimately cost-driven.¹³⁰ Value pricing is more likely to be associated with a regulated monopolist and is more an indication of the presence of market power than of its absence.

¹²⁹ YPPA Rates and Data Information for the period 1992-95: exhibit A-111 at 9.

¹³⁰ Leaving aside dynamic, innovation-driven industries, to which telephone directories do not belong.

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The ability of Tele-Direct to discriminate against customers who spend *more* on advertising by way of larger or coloured advertisements is of particular importance in assessing whether Tele-Direct lacks market power *because* other local media provide close substitutes for Yellow Pages, as argued by the respondents. Larger Yellow Pages advertisers have greater choice among the allegedly competitive media since, by definition, they have more dollars in Yellow Pages that they can switch to any other media. Smaller advertisers are less likely to be able to afford the full range of other media. While it may be true, as Professor Willig pointed out, that certain vehicles, such as community newspapers or church calendars might be more acceptable to smaller advertisers, there is no denying that, from a budget point of view, larger advertisers have more options. Thus, larger Yellow Pages advertisers should have the more elastic demand if there are, as the respondents argue, close substitutes to Yellow Pages. The fact that Tele-Direct's margin over cost increases with enhanced expenditures on colour and size indicates the opposite. The anomaly of Tele-Direct being able to price discriminate against advertisers who at first blush have the greatest range of options underscores its market power.

The two broadly-scoped independent publishers, White and DSP, also charge some premiums for colour or size, although neither charges a premium as high or as consistent across the board as Tele-Direct's.¹³¹ Certainly, no one has suggested that either White or DSP has market power. Yet, Mr. Campbell provided the same explanation of DSP's pricing of red, for

¹³¹ In Sault Ste. Marie, DSP charges a premium for red ranging from 36 to 50 percent for full page, half page, double half column (1/4 page), double quarter column (1/8 page) and quarter column (1/16 page). For each doubling in size, however, DSP price increases are 56 percent to 76 percent, considerably lower than Tele-Direct's size premium. In Niagara Falls, White charges only between eight and nine percent premium for red, with one exception, a quarter column advertisement, which reflects a 28 percent increase. For each doubling in size, White charges from 74 to 91 percent more.

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example, as Ms. McIlroy did -- that it is priced above incremental costs to ensure its scarcity. Does the independents' use of some premiums for colour or size imply that Tele-Direct has no market power? We think not. The presence of two publishers in Sault Ste. Marie and Niagara certainly does not indicate a "competitive" market.

The evidence regarding the independent publishers does not detract from our view that Tele-Direct's ability to price discriminate is evidence of market power. Although the independents can, to a much more limited extent, implement some of the same pricing policies, this is not surprising. Tele-Direct prices in each local market create an "umbrella" beneath which the new entrants can shelter which underlines that Tele-Direct has market power sufficient to create the umbrella.

(b) Circulation Alignment

Since 1987 (or for 1989 prices onwards), Tele-Direct has actively pursued a policy of "circulation alignment" in calculating its annual price increases. The only exception was in 1992 (for 1994 prices) when poor economic conditions resulted in a zero price increase across the board. The objective of this policy was to bring about consistency in cost per thousand or CPM between directories. Some directories had experienced rapid growth in circulation but since they were subject to the same general price increases as other directories which had not grown as much in circulation, their CPM or price relative to circulation was substantially lower. Ms. McIlroy referred to the Mississauga directory as one in which the rates were seen as too low

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given the circulation of the directory. A program was therefore instituted to bring the CPMs in all markets into line over a number of years by imposing additional price increases (but not price decreases) in particular local markets.

In applying the alignment policy absolutely no allowance was made, or is made, for differentials in the intensity of competition from other media in each local market. The entire process can be described as a very bureaucratic one and certainly not what one would expect if Tele-Direct was forced to respond to varying degrees of competitive pressure in the numerous (approximately 100) local markets where it operates.

Professor Willig conceded that this "bureaucratic" approach to pricing and apparent indifference to local market conditions was puzzling but theorized that it could result from Tele-Direct's connection to a utility company. Utilities come from a culture of regulation where pricing flexibility is frowned upon. Further, if individual sales people were given latitude to discount to individual customers, the result for a large organization like Tele-Direct would be chaos.

Pricing individually by customer goes well beyond responding to the supposedly competitive media in a local market and thus does not directly address the point. The regulatory "culture" of utilities, is, of course, undeniable. What is more pertinent is how Tele-Direct could maintain such a culture in the form of its approach to pricing in the presence of the alleged close substitutes. If its bureaucratic price-setting led Tele-Direct to set a price too high in a particular

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market, surely it would see a dramatic revenue loss to other media and would quickly change its approach. There is no evidence that this has happened.

(4) Conclusion

The other direct evidence of market power advanced by the Director along with Tele-Direct's pricing policies affirm our previous conclusion based on the indirect approach that Tele-Direct has market power in telephone directory advertising.

VIII. TIED SELLING

A. INTRODUCTION

Tying or "tied selling" is dealt with in section 77 of the *Competition Act*. The relevant parts of section 77 are:

(1) . . . "tied selling" means

- (a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to
 - (i) acquire any other product from the supplier or the supplier's nominee, or
 - (ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and
- (b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

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(2) Where, on application by the Director, the Tribunal finds that . . . tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in . . . tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

A tie is the supply of one product *on the condition that* the buyer takes a second product as well *or* on terms that *induce* the buyer to take the second product as well. Such an arrangement may be prohibited by the Tribunal under section 77 if it meets all the other requirements of that section, namely that the tying is a practice engaged in by a major supplier and results in a substantial lessening of competition. The requirement that Tele-Direct must be a major supplier is satisfied by our earlier finding of market power in the telephone directory advertising market. The other requirements of the section are still to be resolved.

The Director alleges that the respondents have engaged in a practice of requiring or inducing customers for advertising space in telephone directories (the tying product) to acquire another product, telephone directory advertising services (the tied product), from the respondents. The Director further alleges that the practice of tied selling has impeded entry into or expansion of firms in the market resulting in a substantial lessening of competition.

The advertising space or publishing business is described at paragraph 9 of the application as including:

. . . all matters relevant to the provision of advertising space in a directory, including access to a subscriber data base (including information relating to new subscribers) upon which the books are based, compilation, physical creation of hard copy, printing, promotion and distribution.

The advertising services business refers to:

. . . the provision of services relating to the sale of advertising space in a telephone directory, including establishing new customers, calling on customers, and providing advice, information and other services relating to the design, cost, content, location, creation and placing of the advertisements.

The Director further states that the purchaser of an advertisement in a telephone directory obtains two products related to the two businesses: advertising space and advertising services.

B. FACTS

Before we proceed further, it is necessary to review some facts relevant to the supply of advertising services to Yellow Pages advertisers.

(1) Tele-Direct's Internal Sales Force

Tele-Direct sells telephone directory advertising through its internal sales force. This group is sub-divided into those representatives who deal with customers over the telephone ("tel-sell") and those who attend at the customers' places of business ("premise"), together called the general sales force or "GSF". The premise sales representatives travel from place to place during the year to canvass advertisers for a particular area or directory within a confined time frame. In

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1994, premise sales accounted for about 60 percent of the revenues generated by Tele-Direct's internal sales force, while tel-sell generated less than 30 percent of revenues.

A further category of sales representatives, sometimes included as part of the GSF and sometimes considered apart from it by Tele-Direct, is that which services so-called "national accounts". These representatives are called national account managers ("NAMs") or national account representatives ("NARs"). This group accounts for the remaining approximately 10 percent of revenues.

There are no hard and fast rules governing which accounts are handled by the NAM/NAR group as opposed to the remainder of the GSF. Some large accounts are serviced by the GSF. The Tele-Direct witnesses indicated that, in general, accounts that require a great deal of servicing, for example, multiple visits over a year, are likely to be assigned to the NAM/NAR unit. Because of the canvass-based sales approach used by the GSF, often the GSF is involved in a canvass in another area and is unavailable to service a particular account repeatedly. The NAMs and NARs are located in certain centres all year long and can service these accounts more easily. A further factor is the account's complexity, including number of headings, the number of markets, and the amount of change required each year. If the account requires a lot of attention to ensure accuracy (for example, that no directories are missed) and perhaps clerical-type support, it will end up in the national group. There was also evidence that accounts which had little future growth potential or which had simply proven to be problem accounts in the past are handled by the NAM/NAR unit.

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Tele-Direct (Publications) Inc. is divided into two geographic regions, eastern and western. The eastern region is comprised of the province of Quebec, with parts of Ontario such as Ottawa, Kingston, Sault Ste. Marie and Sudbury. The western region covers the remainder of Ontario. The structure and organization of the company in both regions is broadly similar, although the eastern region is smaller both in terms of revenue serviced and number of sales representatives.

The facts regarding (a) remuneration, (b) evaluation and (c) account assignment and continuity for Tele-Direct's internal sales force are relevant because one of the Director's arguments regarding Tele-Direct's motivation to engage in the alleged tied selling is that its internal sales force can be more effectively motivated to sell more Yellow Pages advertising than agents.

(a) Remuneration

The remuneration of the Tele-Direct representatives is highly dependent on the revenues generated by each individual as they are paid through a combination of salary and commission. Both the tel-sell and premise representatives earn a base salary (which is higher for premise) and in addition are eligible for a number of commissions and incentives.

The amount of commission paid to a sales representative is determined by the nature of the advertising which is sold. If the sales representative manages to generate new business (an

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increase over the previous year's advertising expenditure), an annual commission of 13 percent is paid on the total new business. If the advertiser is renewing the advertising which was purchased in the previous year, the sales representative is paid a 2.4 percent commission on the renewal amount. Renewal commission is paid on any portion of an account which is renewed, even if the total amount of advertising purchased is less than the previous year. The renewal commission was first introduced in the early 1980s, prior to which the representatives were paid only salary and new business commission. The final basis upon which a commission is paid to a sales representative reflects rate increases. This applies in a situation where an advertiser renews exactly the same advertising program as it had in the previous year but there has been a rate increase which is applicable to that advertising program. The sales representative receives renewal commission on the amount spent the previous year and rate increase commission on the difference between the two account totals because of the rate increase. The rate increase commission is six percent.

Since 1993, a premise representative also has the potential of earning a yearly bonus in the amount of \$2,000. The bonus is based on factors such as the number of complaints made against the representative by advertisers, the representative's score in Tele-Direct's internal evaluation, the number of "lates" (advertising submitted after a directory closing date) and mistakes and the representative's overall work flow. Apart from the bonus, there are a number of other incentives offered to premise sales representatives, for example, awards and trips.

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The NAM/NAR group also earn base salary plus commission but with a much larger proportion of their income accounted for by salary. Their new business commission is nine percent, with a renewal commission of 0.5 percent and a rate increase commission of 1.2 percent. They may qualify for a bonus equal to seven percent of their income for maximizing net sales or a bonus of three percent for maximizing retained revenue. An average NAM earns less than an average premise representative.

Sales representatives are supervised by salaried sales managers. Sales managers also qualify for various incentives and bonuses, which may vary in nature from year to year, based on the results of the sales representatives that they supervise.

(b) Evaluation

In the western region Tele-Direct has a formal assessment program for its sales representatives called Total Performance Assessment ("TPA"). Each representative is assessed using the TPA every six months.

The TPA is comprised of three categories: sales results (worth 60 percent), customer satisfaction (worth 20 percent) and job administration (worth 20 percent). The sales results score is largely based on the representative's incremental revenues in relation to other representatives (25 points of 60). Customer satisfaction is broken down into customer disputes and an overall customer survey. Customer disputes refer to the number of times customers of the representative

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have called in with a complaint or a concern. The customer survey component is a Gallup survey.¹³² The final aspect is job administration which includes work flow (success in meeting benchmark requirements for servicing a certain percentage of revenue during a canvass by a certain date), number of internal queries and lates.

The TPA is not used in the eastern region which has not had a formal evaluation program since 1994 because of union disputes. Currently, sales representatives in the eastern region are evaluated by an internal management review in which their supervisors conduct follow-up interviews with clients. It is Tele-Direct's intention to replace this less formal evaluation process in the future.

(c) Account Assignment and Continuity

Tele-Direct uses a canvass approach to sell advertising. Each directory has a canvass period, the length of which depends on the size of the directory, during which the GSF focuses its attention on selling advertising for the next issue of that directory. The GSF is under time constraints to complete its sales and solicitations prior to the deadline, or the closing date, for the directory. Once one canvass is complete, the GSF moves on to the next one.

¹³² Each year 25 customers of each sales representatives are asked questions relating to the quality of the service provided by the representative.

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For each canvass, Tele-Direct canvass coordinators assign accounts to the sales representatives to ensure as much as possible that each salesperson ends up with a bundle of accounts which is balanced in revenue and in growth potential. Accounts are assigned based on a complex system of "markets" and "grades". For example, "Market 1" accounts are dealt with by premise representatives while "Market 2" accounts are dealt with by tel-sell. As well as being divided by market, accounts are also graded; the lower the grade assigned to an account the higher the potential that type of business will buy Yellow Pages. Grades are based on the type of business as represented by the heading under which it would appear in the directory.

For each canvass the grades and markets for the accounts are analyzed to determine whether, based on factors like time, the size of the cities or towns included and the number of sales representatives available, the premise representatives will cover all of the grades in Market 1, or whether, perhaps, some of the higher grades in that market should be assigned to tel-sell. For the same reasons, for a given canvass, not all accounts are assigned; those with lower potential or that are inactive may be dropped.

For both the premise and the tel-sell group, account assignment has traditionally been random. With a few minor exceptions, accounts were divided up at the beginning of each canvass with no intention of returning individual accounts to the same representative who serviced them in the previous year. In 1993, a test was conducted in a northern market whereby there was 100 percent continuity of tel-sell accounts. Ms. McIlroy's impression of the results was that they were positive in general; however, we have no information about whether tel-sell

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continuity has been adopted more generally. For premise sales, Tele-Direct adopted the Very Important Advertiser ("VIA") program in the late 1980s which provided a form of continuity: advertisers spending a certain amount per month were assigned the same representative every year. By 1992-93, there was a more general continuity policy in place whereby 30 percent of all premise accounts were assigned back to the sales representative for three years if \$500 or more was being spent or a pricing incentive was involved. Currently, about 55 percent of the accounts of a typical premise representative (about 85 percent of revenue) are subject to continuity.

(2) Tele-Direct's Commissionability Rules

Prior to 1958, a 15 percent commission was available on "national" advertising. The definition of "national" was, however, unclear. In 1958, Bell Canada adopted a new policy, developed in consultation with and endorsed by the Canadian Association of Advertising Agencies. To be commissionable at 15 percent, the advertising had to appear in two or more directories serving two or more "calling areas" with no more than 80 percent of the total advertising in one directory. No particular association membership was required of the agency; if the agency's ability to pay was in doubt, its credit was investigated.

Tele-Direct's definition of a commissionable account underwent a further change effective January 1, 1976. The amended definition of commissionability became known as the "eight-market rule". To qualify as a commissionable account under this rule, the advertiser had to purchase advertising with a minimum value of a trade-mark in eight "markets", as defined by

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Tele-Direct. Canada was divided into 19 markets, with six in Quebec and seven in Ontario. The entire United States constituted a single 20th market. If the account qualified and the agency provided completed artwork, Tele-Direct would pay a 15 percent commission on the account. Again, no particular membership in an industry association was required.

The commissionability rule was next changed effective July 1, 1993 to create the so-called "national definition" which is the current rule. Under this rule, to be commissionable an account must advertise, at a minimum, in directories in two provinces. Advertising must be placed in at least 20 directories and in each directory the value of the advertising must be a minimum of a trade-mark. Finally, 20 percent of the total value of the advertising must be placed in directories outside Tele-Direct's territory.

In order to receive 25 percent commission on "national accounts" the agency has to be a CMR and a member of YPPA. In addition, to be eligible for the 25 percent commission, the CMR must transmit its order to Tele-Direct via the Value-Added Network ("VAN") run by the YPPA. This facility provides for electronic transmission of account data and other information to a publisher. In order to access VAN, the CMR must be a member of the YPPA and must acquire the necessary computer hardware and software.

All accounts which met the eight-market rule as of July 1993 have been "grandfathered"; Tele-Direct still pays 15 percent commission on those accounts. Once an account ceases to qualify under the eight-market rule, it cannot be re-qualified. New accounts, those which reached

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eight-market status after July 1993, cannot be "grandfathered". Tele-Direct has made no commitment to how long the "grandfathering" of eight-market accounts will remain in place. It could be discontinued at any time.

C. ALTERNATE THEORIES OF THE CASE

As elaborated in the opening statement, the Director's theory of the case for tying is that the respondents, as a condition of supplying space, have required or induced customers to acquire the tied product, services, from them. We have already reviewed the structure of the market. The respondents offer a commission on accounts meeting their "national" definition and on grandfathered eight-market accounts. They service the remainder of the accounts themselves and do not offer a commission, or price space and services separately, for those "local" accounts, amounting to over 90 percent of Tele-Direct's revenue.

In accordance with his theory, the Director alleges that the respondents by refusing to sell either the space or the services in an unbundled fashion have violated section 77. Counsel for the Director described the Director's case in opening in alternative terms by referring to the respondents' refusal to pay commission except to the limited extent that they now do as a violation of section 77 because commission would be a means of recognizing or effecting an unbundling for the services that non-commissionable customers seek. The Director says that as matters now stand, non-commissionable customers have a choice of either obtaining services from respondents as part of the "package" price that they pay for their advertising or paying

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twice for the services -- once as part of the package price charged by the respondents and once directly to the service provider.

The respondents say that the Director's concept of tying is misconceived. They submit that there is no product known as "advertising services" separate from a product known as "advertising space". They focus on the *selling* portion of the services referred to by the Director and argue that the sales advice provided by Tele-Direct's internal sales force forms an inseparable package with the space which Tele-Direct supplies in its directories. Indeed, they emphasize, there is no advertising space without a sale. They argue that how advertisements in their directories are sold is a business decision to be made solely by Tele-Direct and is not justiciable. Tele-Direct determines when it is more appropriate to sell its product through its internal sales force and when it will "employ" and pay a commission to agents to sell its product.

In other words, the respondents argue that they have chosen a "hybrid" system. As their primary sales channel, they maintain an internal sales force. They have also chosen to employ agents to sell to a limited group of large advertisers who have distinct needs. Among the reasons given for primary use of the internal sales force were: efficiency, that the average cost of revenues serviced internally was lower than for revenues serviced by outside agents; revenue growth, that the internal sales force is more effective in growing revenue; and servicing, to ensure attention to small advertisers and non-advertisers that Tele-Direct considers important but external agents might not.

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The respondents take the position that the Director's application regarding tied selling is an attack on vertical integration. They characterize Tele-Direct's decision regarding commissionability as a choice in some instances to buy services from agents and in others to make the services in-house. They refer to the words of Posner J. in *Jack Walters & Sons Corp. v. Morton Buildings, Inc.* for guidance:

The end that Walters [a terminated dealer] alleges is that Morton [the manufacturer] wanted to take over the retail function; in the terminology of industrial organization, it wanted to integrate forward. But vertical integration is not an unlawful or even a suspect category under the antitrust laws: "Firms constantly face 'make-or-buy' decisions -- that is, decisions whether to purchase a good or service in the market or to produce it internally -- and ordinarily the decision, whichever way it goes, raises no antitrust question." . . . Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.

A common type of vertical integration is for a manufacturer to take over the distribution of his product. . . .

We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor.¹³³ (references omitted)

The respondents urge us to take from the words of Posner J. that their narrowing of the commissionability criteria is simply taking over the distribution function internally and Tele-Direct's decision about how to run its business, which it does not have to "justify" to anyone.

The Director underlines that he is not opposed to vertical integration in principle. He cautions, however, that if the method chosen for the vertical integration violates a section of the

¹³³ 1984-2 Trade Cas. (CCH) ¶ 66,080 at 66,024-25 (7th Cir. 1984).

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Act, with particular reference to sections 75, 77 and 79, then it is subject to challenge and the respondents cannot achieve immunity by "waving the flag of vertical integration". We agree that simply affixing the label of "vertical integration" does not conclusively decide anything. It does not preclude the Director from attempting to convince the Tribunal that what is going on in the case before it meets the requirements of a section of the Act. This view is not inconsistent with the *dicta* of Posner J. in the *Jack Walters* case, who indicates that the presence of market power may cast vertical integration in a different light and points out that market power was not present on the facts before him:

. . . some economists believe that monopolistic firms might integrate vertically in order to deny supplies or outlets to competitors, or to make it more costly for new firms to enter the market (because they would have to enter at more than one level of production or distribution), or to facilitate price fixing with their competitors. But nothing of this kind is suggested here. Walters does allege that Morton has a big name in the prefabricated farm buildings market, but there is no indication that this is a meaningful economic market that might be worth monopolizing, or that Morton's purpose in integrating into retail distribution was to make life harder for *its* competitors. Its object was to make more money by reducing the cost of retail distribution, not by coercing or excluding (or for that matter colluding with) its own competitors, whoever they may be, or discouraging potential competitors. *Indeed Walters' tie-in claim is premised on the ready availability, from other manufacturers, of the building parts that Morton sells in kits from which Morton Buildings are put together. This shows that Morton has no monopoly.*¹³⁴ (emphasis added; references omitted)

The recognition that vertical integration is generally pro-competitive on efficiency grounds raises another issue. The Director says there is no provision in section 77 for an efficiency "defence". We agree that there is no such explicit reference to an efficiency defence. However, many forced "package sales" are the product of efficiency and even a supplier with market power may sell items in combination for efficiency reasons.

¹³⁴ *Ibid.* at 66,025.

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A fundamental requirement of tying is the existence of two products, the tied product and the tying product. It is implicit in the determination of whether there are one or two products that efficiency considerations must be taken into account. We consider that demand for separate products and efficiency of bundling are the two "flip sides" of the question of separate products. Assuming demand for separate products, if efficiency is proven to be the reason for bundling, there is one product. If not, there are two products. As we will review below, this approach is consistent with the American jurisprudence regarding the test for separate products relied on by the Director.

The Director is of the view that, assuming that the necessary elements of the section have been met -- major supplier, two products, tying, and the exclusion of competitors resulting in a substantial lessening of competition -- it is not necessary for him to provide a plausible explanation of *why* or *how* the firm benefits from the tie. This is a valid position. The Tribunal would not impose such a requirement on the Director. It cannot be denied, however, that there is always more comfort in drawing conclusions the greater the depth of understanding.

In this case, the Director has in fact provided explanations as to why Tele-Direct might be engaged in tied selling. The Director submits that Tele-Direct is leveraging its market power in the sale of space into the market for advertising services through tying. One explanation of this is that Tele-Direct's policy of bundling advertising space and services allows Tele-Direct to exploit better an alleged information asymmetry it enjoys *vis-à-vis* its customers, the advertisers. As with any advertising medium, it is not possible to evaluate effectiveness of Yellow Pages

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advertising with any degree of precision. To the extent that data on effectiveness of the medium is available, it is in the control of Tele-Direct not the advertisers. In light of this, the Director argues that Tele-Direct prefers to keep advertising services in-house as much as possible because its representatives can be more effectively motivated to "oversell" than independent service providers. We will deal with this reasoning in due course.

The Director also says that the "usual" assumption of profit maximization used in determining whether a firm stands to gain from a tie does not apply in the instant case and the economic literature on the subject that relies on this assumption to analyze the possible effects of a tie is not a useful source. He says it is futile to seek a "rational" or "profit-maximizing" explanation for Tele-Direct's behaviour since Tele-Direct, because of its unique situation and relationship to Bell Canada, is not subject to the constraints of profit-maximization and its corollary, cost-minimization.

In support of the premise that Tele-Direct is not profit-maximizing, Thomas Wilson,¹³⁵ an economist expert witness for the Director, draws on the fact that the profits of Tele-Direct are included for regulatory purposes when decisions are made about Bell Canada's prices. He is of the view that the pressure to minimize costs is reduced and that there may also be systematic distortions such as the use of more capital than an unregulated firm would use in order to boost the capital base of the regulated firm (the "Averch-Johnson effect"). However, this particular

¹³⁵ Professor of Economics and Director of the Policy and Economic Analysis Program at the University of Toronto.

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hypothesis is not supported by the evidence which, in fact, points in the other direction insofar as Tele-Direct has chosen to subcontract capital intensive operations such as printing.

Professors Wilson and Slade, for the Director, are also of the view that management's decisions with respect to the commissionability of various accounts are motivated by a concern to maximize *sales* rather than to minimize *costs*. Professor Wilson sees the reduced pressure on regulated firms to minimize costs as allowing Tele-Direct's management to pursue personal interests, such as operating a larger enterprise, thereby garnering personal satisfaction and monetary rewards. Professor Slade is of the view that the ownership structure of Tele-Direct, whereby there is no threat of a takeover, contributes to allow management to pursue its hypothesized desire for larger size.

Even though there are several occasions when we have difficulty understanding the decisions of Tele-Direct's management if they really are pursuing cost-minimization, we are far from convinced that Tele-Direct's management is not generally constrained to follow a profit-maximizing course. The fact that Tele-Direct is a wholly-owned subsidiary should be sufficient to ensure that there is adequate ownership control. It is obvious from the evidence of Mr. Courtois, the Bell Canada representative on Tele-Direct's Board of Directors, that Bell does not practice micro-management. The main instrument of control appears to be the requirement that Tele-Direct pay Bell the same percentage of revenues as Tele-Direct is required to pay other telcos when it contracts to perform their directory functions. This requirement was introduced precisely to impose market discipline on Tele-Direct. In addition to the forty percent of revenue

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that Tele-Direct remits to Bell, it also makes a substantial contribution to Bell's profits in the form of dividends. The evidence does not support the conclusion that Bell has been cavalier about allowing Tele-Direct's management to pursue other than profit-maximizing goals. Moreover, in recent years Bell's earnings have been well below its regulated allowed rate of return, a situation not conducive to permissiveness. Even when Bell earnings were not below the allowed rate of return, higher profits from Tele-Direct would still benefit Bell between applications for rate increases.

While we do not rule out that Tele-Direct's management may be under less than the usual amount of pressure to perform, we are reluctant to discard the usual working assumption of profit-maximization in the absence of some compelling evidence that is consistent with the assumption that Tele-Direct is pursuing other goals. The only specific evidence cited in support of the premise that Tele-Direct's management pushes revenue growth beyond the point of profit-maximization is the stress that they place on canvassing businesses that do not advertise in the Yellow Pages, the non-advertisers. The success rate from this effort is low and Professor Slade concludes that the fact that the effort is made can be explained by management's greater concern with growth of revenue than with profits. On the whole, however, the evidence on the canvass of non-advertisers is that moderate resources are devoted to this task. We are not convinced that the canvass of non-advertisers is not profit-maximizing.

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We note here that there is another possible theory of the case. For reasons of clarity and coherence, however, it is more convenient to deal with it at a much later point in these reasons. We return to it below as an "Addendum" to our conclusion regarding the separate products issue.

We therefore do not accept that we should approach this case with a view to treating Tele-Direct as other than a profit-maximizing firm, albeit a firm with market power. Nor do we accept that efficiency considerations are not relevant to our section 77 analysis. Efficiency and demand, together, form the basis of the consideration of one or two products, to which we now proceed.

D. SEPARATE PRODUCTS

(1) Approach to Determining Separate Products or Single Product

The first element of section 77 to be considered is whether advertising space and advertising services are separate products. The Director takes the position that advertising services constitute a distinct product separate from advertising space. The respondents argue that advertising services are in fact an "input" into Yellow Pages advertising, not a separate product.

Merely labelling advertising services and advertising space as either two "products" or as "inputs" into a single product does not assist. As Areeda, Hovenkamp and Elhauge state:

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. . . just about any product could be described as a tie of its components. And just about any two products could be described as mere parts in a more encompassing single product. . . .¹³⁶

There must be some rationale for distinguishing between situations where there are two products involved, and thus at least the possibility of an illegal tie that should be prohibited, and those where there is a single product and no question of tying.

The parties are in agreement that the Canadian jurisprudence does not provide much guidance on the test to be applied. Both parties referred to the 1984 decision of the Supreme Court of the United States in *Jefferson Parish Hospital District No. 2 v. Hyde*¹³⁷ for guidance, although they emphasize different portions of the decision.

In *Jefferson Parish* the Court provided its most extensive discussion of the "single product" test. At issue in the case was the validity of an exclusive contract between the hospital and a firm of anaesthesiologists. Any patient who chose to have an operation performed at that hospital was required to use an anaesthesiologist employed by the firm in question (Roux & Associates). The Court had to decide if this constituted an illegal tying arrangement. In making that inquiry, the Court considered two questions, whether the hospital was selling two separate products that might be tied together and, if so, whether the hospital used market power to force its patients to accept the tying arrangement. The majority answered the first question in the affirmative but the second question in the negative (the hospital was found not to have

¹³⁶ P.E. Areeda, H. Hovenkamp & E. Elhaage, *Antitrust Law*, vol. 10 (Boston: Little, Brown, 1996) at 175.

¹³⁷ 466 U.S. 2.

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market power), so in the result it found no illegal tying arrangement. The minority found only one product and concluded for that reason that there was no illegal tying arrangement.¹³⁸

In discussing the question of separate products, the majority noted that the answer to the question of one or two products turns not on the functional relationship between them but rather on the character of the demand for the two items. The majority then stated:

. . . Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.¹³⁹ (reference omitted)

We adopt this statement of the majority as the applicable test for separate products. We believe that this test effectively captures both the demand and the efficiency elements necessary for us to distinguish between cases when a tie that is injurious to consumer welfare is possible and those in which the tie, although imposed by a major supplier, is efficient and should not be condemned. Demand is, of course, critical. If there is no demand, it would be pointless to require that the two products be offered separately. Efficiency is also critical as the existence of separate demand should not govern if providing the products separately would result in higher costs that would outweigh the benefits to those who want them separately.

¹³⁸ The majority consisted of Stevens, Brennan, White, Marshall and Blackmun JJ. The minority included O'Connor, Powell, Rehnquist JJ. and Burger C.J.

¹³⁹ *Supra* note 137 at 21-22.

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Our approach will be to examine first the evidence pertaining to the demand side of the equation, to determine whether the Director has proven buyer, in this case advertiser, interest in acquiring space and service separately. By this we mean an answer to the question: "Is there a significant set of advertisers who actually want the items separated?" If this question is answered in the affirmative, then we will turn to the evidence relating to whether it is efficient to separate the products.

The respondents rely on a portion of the minority judgment in *Jefferson Parish*. The minority wrote:

. . . there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services, so the hospital can acquire no *additional* market power by selling the two services together. . . . In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes.¹⁴⁰

In conclusion, they reiterated:

. . . Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the hospital may possess. *The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the hospital's decision to tie the two types of services.*¹⁴¹ (emphasis added)

¹⁴⁰ *Ibid.* at 43.

¹⁴¹ *Ibid.* at 46.

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The respondents did not provide us with any reason to adopt the minority judgment over the majority. In fact, the majority opinion explicitly rejected tests based on functional relationships, including the "useless without" test. In a footnote the majority noted:

The fact that anesthesiological services are functionally linked to the other services provided by the hospital is not in itself sufficient to remove the Roux contract from the realm of tying arrangements. We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices. . . .¹⁴²

There are also sound economic reasons to reject such a test. As pointed out in the Areeda text, it may perversely save the most dangerous ties and call for review when there is little likelihood of adverse effects. The authors of that text use the example of a manufacturer with a monopoly over can-closing machinery who requires all purchasers of the machinery to buy cans from it to point out that:

. . . [s]uch a tie would bring the [manufacturer] a complete monopoly over cans, for presumably no one would buy empty cans without the machinery to close them. Yet the useless-without test would immunize this tying arrangement. Moreover, while short-run profit maximization is *generally* not enhanced when the tied product has no other use, monopoly in the tied market can impair competition severely in the long-run. . . .¹⁴³

(2) Other Case Law

The respondents have also advanced a plethora of other American cases with respect to the question of separate products. In general, the respondents rely on these cases to urge us to view the facts before us solely from the supplier's (Tele-Direct's) perspective and to ignore

¹⁴² *Ibid.* at 19 n. 30.

¹⁴³ *Supra* note 136 at 269.

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demand considerations. Their fundamental premise appears to be that Tele-Direct's choice to "market" its product in a certain fashion is determinative and negates the possibility of any tying claim. We did not accept the Director's argument that considerations of demand govern; likewise we reject the respondents' argument that a supplier's choice is paramount. Both elements of demand and efficiency will be taken into account, as set out above. In any event, it is clear that the case before us is unique and does not "fit" exactly into any of the precedents cited to us. A more detailed treatment of the case law follows.

(a) Single Product

One tying case was referred to, *Souza v. Estate of Bishop*,¹⁴⁴ a case against a lessor of land in Hawaii based on the refusal of the lessor, like most other landowners in Hawaii, to sell the land. The tying product was argued to be the residences plaintiffs owned on the land while the tied product was the leasehold. The claim was dismissed on a motion for summary judgment, affirmed by the Court of Appeal.

From this decision, the respondents ask us to conclude that if a supplier presents two products as a package or, in other words, if they are being marketed together, that is the end of the matter and the Tribunal must conclude that there is a single product. The Court found that the plaintiffs' argument defied reason because the product being marketed was a house plus leased land and not a house purchasable separately from the land on which it stood. The Court also

¹⁴⁴ 1987-1 Trade Cas. (CCH) ¶ 67,628 (9th Cir. 1987).

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found that the plaintiffs presented no evidence that the house and the leased land constituted separate products. We have already set out the test we intend to apply, which takes into account both demand and supply. We do not accept that simply because a producer or a supplier bundles products together that they are, *ipso facto*, one product.

Four cases are relied on by the respondents because they involve the Yellow Pages industry or an analogous industry. The respondents argue that these cases indicate that the United States courts have uniformly rejected any concept of an antitrust violation because of a publisher's refusal to pay commission or its decision to change the accounts on which it will pay commission. Thus, they conclude that the courts "in effect" have treated directory advertising as one product. They make this argument despite the fact that none of these cases was based on a claim of tied selling and therefore the issue of separate products in the sense with which we are dealing here was not before the court. The respondents claim, however, that these cases indicate that there is only one product *because* the tying argument was not raised in any of them.

We do not accept that the absence of a tying claim makes the cases dispositive of the issues before us in a tying case. In general, we do not see how the results in these cases can be directly transferred to the case before us. We will, however, review the decisions in order to see what, if any, assistance we can draw from the findings in resolving the issue of separate products on the facts before us.

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In *Selten Agency, Inc. v. Pacific Telephone and Telegraph Co.*,¹⁴⁵ a specialized advertising agency brought an antitrust action involving numerous allegations against a number of telcos and telephone directory publishers that were members of the National Yellow Pages Service Association ("NYPSA") (the predecessor to YPPA). All of the allegations involved joint action by the NYPSA members. The only issue with any possible, although remote, relevance to this case was the claim by the agency that the NYPSA members *agreed* not to pay commissions on local advertising to agencies, constituting an illegal horizontal division of markets.

The Court concluded there was no evidence of an illegal agreement. The evidence was that the NYPSA agreement covered only national advertising; there was no prohibition on commissions for local advertising. Publishers were free to offer commission on local accounts and, the Court notes, some, in fact, did so. The Court also noted that those who did not offer commission on local accounts had their own sales force and therefore did not require the services of advertising agencies. The respondents rely heavily on the next sentence of the judgment, that "[i]t is not a violation of the antitrust laws for a publisher to refuse to buy a service that is not worth buying"¹⁴⁶ to argue that publishers do not have to buy services from agents or, in other words, provide a commission for any accounts they do not want to. As we have already stated, we do not accept that the supplier's choice is the sole governing factor in a tying case. Due consideration must be given to the supply side of the equation but we cannot ignore demand considerations.

¹⁴⁵ No. CV 77-3450-FW (Dist. Ct. C.D. Cal. 8 June 1981).

¹⁴⁶ *Ibid.* at 17.

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In *O'Connor Agency v. General Telephone Co.*,¹⁴⁷ an advertising agency alleged that a Yellow Pages publisher conspired with other publishers to change the definition of local or "B" accounts so that commission would no longer be paid on those accounts. The defendants brought a motion for summary judgment which was granted.

In granting the motion, the Court found an "agreement" to change the criteria based on adherence to the YPPA guidelines. Using a rule of reason approach, the Court then proceeded to consider and weigh both the anti- and pro-competitive effects of the change in the relevant market. The Court found that the plaintiff had provided no admissible evidence that the relevant product market was Yellow Pages and also provided insufficient admissible evidence of actual anti-competitive effect arising from the change. The Court also found that the publisher had a legitimate business reason for adhering to YPPA standards, namely the uncontroverted evidence that the defendant changed the commission criteria to increase its national Yellow Pages advertising which was not performing up to expectation.

The respondents rely on this case for the very broad proposition that "the U.S. jurisprudence directly involving Yellow Pages has rejected any concept of any antitrust violation because of the refusal of a publisher to pay commission to a CMR or as a result of the publisher changing the accounts on which it will pay a CMR" and that "[i]n effect the courts have said there is only one product that we're selling and we can sell it through whatever channel we

¹⁴⁷ No. CV-93-3650 LGB (U.S. Dist. Ct. C.D. Cal. 2 August 1994), appeal pending.

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want".¹⁴⁸ The case certainly does not support those broad generalizations. It was a conspiracy case resolved on a motion for summary judgment because of failure to prove either a relevant market or actual anti-competitive effect.

The respondents submit that the case of *Thompson Everett, Inc. v. National Cable Advertising, L.P.*¹⁴⁹ is analogous to the case at bar. In that case an independent cable television advertiser representative brought action against exclusive contracts between the cable company and their spot advertising sales agents on the basis that the "traditional" cable representatives or sales agents were engaged in a concerted effort to exclude the independent from the business. The Court of Appeal affirmed the decision of the lower court to grant summary judgment.

The Court found that the exclusive contracts were not being enforced through an illegal conspiracy. It also found that the independent did not have access to the exclusive contracts because it was not willing to compete with the exclusive agents for them and was simply seeking to substitute its own method of serving the cable company for that selected by the cable company. The Court also found that there was no unlawful monopoly in the cable representative market because cable companies are part of a larger market.

Once again, the respondents rely on this case to argue that the Court endorsed the cable company's choice of using exclusive representatives simply because that was the way the cable

¹⁴⁸ Transcript at 66:13762-63 (26 February 1996).

¹⁴⁹ 57 F.3d 1317 (4th Cir. 1995).

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company chose to do it. We have already indicated that the supplier's choice will not be the only consideration in a tying case. Indeed, the case itself does not go that far.

The most interesting decision referred to by the respondents is *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.*¹⁵⁰ The case involved a claim by an "authorized selling representative" ("ASR") for the placement of national advertising in telephone directories that the publisher had monopolized or attempted to monopolize the sale of Yellow Pages advertising. Because of problems in collecting payment for advertising placed by the ASR, the publisher started billing the advertisers directly. The ASR claimed that the publisher's direct contact with its customers resulted in a loss of accounts to it and its eventual failure.

The monopolization case failed because the ASR could not define any relevant market in which it and the publisher competed. The ASR had originally based its claim on the national advertising market where the publisher competed for the sale of national advertising as an ASR itself but could not show any market power on the part of the publisher in that market. The claim was then amended to allege that the relevant market was the sale of advertising space in a specific directory, shifting the focus to local advertising. Based on evidence that the ASR had received commission for the placement of advertisements for two local advertisers, apparently by accident, the ASR argued that it competed with the publisher's sales force for local advertising. The argument of the ASR was that the lawful power to publish the exclusive directory for a

¹⁵⁰ 1987-2 Trade Cas. (CCH) ¶ 67,683 (11th Cir. 1987).

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specific geographic area did not give the publisher the right to be the exclusive seller of advertising space within that directory as publication and sale were separate activities.

The Court commented that the ASR's market theory had a certain "superficial" appeal based on its similarity to a typical wholesale/retail monopolization case where a vertically integrated manufacturer uses its dominant position at one level of activity (manufacturing) to eliminate competition at another level (retailing). The Court noted that for the ASR's theory to work, the publisher must be viewed as a wholesaler or manufacturer of advertising space and the ASR as a retailer of this space. If not a retailer, the ASR could not be considered a competitor of the publisher at the retail level.

The Court concluded that, to the extent that the sale of Yellow Pages advertising is an activity separable from the publishing of the advertising, the sales made by independent ASRs were in the nature of an agency and not retail sales. Agents, the Court noted, do not compete with those whom they represent. The wholesale/retail analogy failed, in part, because there *could* be no "resale" of Yellow Pages:

. . . Yellow pages is not a product that is produced and distributed. The blank yellow pages do not exist prior to the sale of an advertisement, somehow awaiting distribution on a resale market. Each advertisement, that is, the space of the ad, is "created" when the advertisement is sold to the advertiser. . . . ASRs do not maintain an inventory of ad space to be sold. An ASR cannot purchase a page in the yellow pages and then distribute it to advertisers as it sees fit.¹⁵¹

¹⁵¹ *Ibid.* at 58,482.

The agency characterization was preferred, in part, because the Court considered the relationship between the publisher and the ASR in the case before it to be analogous to the relationship between an airline and a travel agent:

. . . The publisher lawfully establishes the price for its advertising and announces it to the public. It determines when it is going to publish directories, and has the ultimate say on how many advertisements it will accept. An advertiser may deal directly with the publisher, or may use an Authorized Sales Representative. However, should it use an ASR, the ASR must submit a request for advertising to the publisher, analogous to a reservation in the forthcoming publication. The ASR does not purchase an inventory of yellow pages space. The service which the advertiser has paid for is performed by the publisher, not the ASR. Further, should the advertisement fail to appear as requested in the appropriate directory, the publisher is under an obligation to refund the advertiser's money. Finally, should a publisher not receive enough advertisements to make a directory profitable, it must still publish the directory; the publisher retains the "risk" that not enough yellow pages advertisements will be "distributed" -- not the ASRs.¹⁵²

The Court found ample evidence in the record that the ASR functioned as an agent, including the NYPSA guidelines which provided that ASRs represented the publisher "when selling National Yellow Pages advertising to national advertisers or their advertising agencies, or when negotiating disputes with such national advertisers or their advertising agencies".¹⁵³ The Court noted that there was also evidence that the ASR acted as an agent of the advertiser, including liability to the publisher for payment, but concluded that "[e]ither way, an ASR functions as an agent, not an 'independent contractor,' and not, in any case, as a retailer of yellow pages advertising space."¹⁵⁴ Thus, the leveraging argument failed as there was no "second activity" to be monopolized by using the publisher's market power to publish directories as leverage.

¹⁵² *Ibid.* at 58,483.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* at 58,484.

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One element of this decision is the Court's insistence that the ASRs had to be considered retailers in order to be in competition with the publisher. A finding that the ASRs were merely agents of the publishers or, perhaps, agents of the customers, in the sense of having no independent existence from either or both of those two entities seems to preclude competition between the ASRs and the publisher. We do not believe, however, that the inapplicability of a strict retail model is conclusive. The Court did mention in passing, for example, independent contractors. The fundamental question is whether the publisher is in competition with the ASR or other person alleged to be excluded by the activity in question, which we agree is a question that should also be addressed in the context of a tying claim.

A second important element of the Court's conclusion concerned the functions performed by ASRs, that were apparently viewed as simple "order takers" insofar as the commission from the publisher was concerned. The Court indicated its assumption that the ASR was paid separately by the advertiser for other services such as layout¹⁵⁵ when it distinguished the case before it from a successful monopolization claim by an advertising agency against a television station. The television station had expanded its in-house advertising agency services by starting to produce commercials (for a fee) as well as selling air time. In *Ad-Vantage*, the Court stated:

¹⁵⁵ Or these might have been provided by the advertiser's "advertising agency" and not the ASR.

Thus, in *Six Twenty-Nine Productions*, a leveraging argument was possible. The production of [Yellow Pages] advertisements is a related activity separate from the sale of advertising space. Each is a separate source of revenue. In the context of this case, no evidence was presented indicating that ASRs receive no separate compensation from their clients when the ASRs engage in the production -- the lay out -- of the advertisements. In fact, testimony of a former NYPSA official indicated that *most* of the national yellow pages advertising is purchased through ASRs by advertising agencies on behalf of national advertisers, supporting the notion that ad agencies perform a separate function. Thus, the leveraging argument made in *Six Twenty-Nine Productions* is not available here.¹⁵⁶

What we take from this case is that it is important to examine the actual services performed by the agents for advertisers and the relationship between Tele-Direct and the agents, with a view to determining if they do, in fact, "compete" with Tele-Direct in any relevant sense.

(b) Relationship between Agents, Advertisers and Tele-Direct

The respondents say that, as in the *Ad-Vantage* case, agents in the case before us function as either representatives of Tele-Direct or, on occasion, as agents of the advertisers. In the first case, Tele-Direct does not compete with itself or its own representatives and in the second, it cannot be considered to compete with its customers. Based on the evidence of Charles Mitchell, Tele-Direct's Director of Marketing Sales Support, they submit that, in fact, Tele-Direct has not competed for agency accounts since 1992. The Director argues that, unlike in *Ad-Vantage*, the Canadian CMRs are not agents of Tele-Direct. The Director submits that the evidence supports the proposition that Tele-Direct has consistently considered, and still does consider, the agencies as its competitors.

¹⁵⁶ *Supra* note 150 at 58,484.

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The initial point at issue is the exact contractual relationship between agents and Tele-Direct. In 1988, Tele-Direct required the agencies to sign new contracts with it. Under those contracts, the agent warrants that it is duly authorized to enter into the agreement on behalf of the advertiser. Further, the agency agrees that "it is not acting and does not purport to act as agent for Tele-Direct."¹⁵⁷ This is exemplified by the provisions that the agent agrees to pay for the advertising; to indemnify and hold harmless Tele-Direct from claims by the advertiser; and to warrant on behalf of the advertiser the truth of all assertions in the advertising. Tele-Direct's Corporate Secretary and legal counsel, Patrick Crawford, confirmed that these contracts have not been revoked and that the agencies were not agents for or of Tele-Direct.

The respondents argue that the 1993 YPPA agreements entered into by the agencies in order to be accredited as CMRs supersede the earlier contracts although no steps have been taken to repudiate or amend the earlier contracts. In the application to be accredited as a CMR, the agency agrees to "represent" the publisher in the same terms as quoted in *Ad-Vantage* from the NYPSA guidelines.¹⁵⁸ The YPPA guidelines, however, describe a CMR as a member of YPPA which:

- a. Represents to the users the Publishers' product, services and policies, while representing to the Publishers the customers' needs, desires and concerns.

- b. Develops a comprehensive national Yellow Pages advertising program for prospects and/or advertisers.

¹⁵⁷ Confidential exhibit CJ-16 (blue vol. 7), tab 214 (public), art. 10.

¹⁵⁸ Exhibit J-5 (green vol. 3), tab 154 at 32277.

- c. Compiles and provides current information pertaining to all Publishers' practices affecting an advertiser's national Yellow Pages program.
- d. Develops market research and cost studies for the advertiser or its agency as a basis for making advertising proposals.
- e. Provides Publishers on a timely basis with the authorized list of dealers for solicitation under Advertiser's Trade Item.
- f. Pays Publishers' invoices without recourse within the time period set forth in the individual Publishers' credit terms, notwithstanding its own collection status with that advertiser or its agency, unless any individual Publisher provides otherwise.
- g. Absorbs all adjustment amounts incurred as a result of its own acts, errors, or omissions which including (*sic*) among other things, failure to notify Publishers of cancellations of orders, unless any individual Publisher provides otherwise.¹⁵⁹

What comes out of this somewhat contradictory documentation of the relationship is that agents are not agents or representatives of Tele-Direct in any sense that would preclude a finding that the two are in competition. The agents are not so allied with Tele-Direct as a publisher that they have no independent existence. Their relationship has elements of both co-operation and competition.

The agents rely on the Yellow Pages industry, as represented by YPPA, and Tele-Direct specifically, to provide information on the effectiveness of Yellow Pages advertising. They are

¹⁵⁹ Exhibit J-4 (green vol. 2), tab 99 at 28021-22.

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accredited based on industry standards. With respect to accreditation and the promotion of the medium, the relationship between Tele-Direct and the agents is undoubtedly cooperative.

However, the thrust of the Tele-Direct internal documentary evidence is that Tele-Direct treated the agents as competitors of its internal sales force. Prior to the 1990s, Tele-Direct sought to protect its client base from the agents by selling advertisers on using its services instead, stressing the advantages that dealing directly with Tele-Direct offered, including monthly billing and later closing dates, as well as considering more positive initiatives like assigning representatives to large accounts for a longer period of time. During the early 1990s, when Mr. Mitchell was head of the national accounts group, Tele-Direct actively competed for agents' clients. Mr. Mitchell testified that as of 1992, the approach changed to one of protecting internal accounts and revenue only but the documentation does not bear this out. Certainly, one of the reasons for the creation of Tele-Direct (Media) Inc. in 1994 was to combat the loss by Tele-Direct of national accounts to CMRs. The only "contradictory" evidence on this point is a somewhat unclear statement by Wayne Fulcher of DAC that prior to the formation of its CMR, Tele-Direct did not "normally" try to take away agency "headquartered" accounts. However, Mr. Fulcher does think that Tele-Direct's CMR is in competition with his agency.

Perhaps the most telling point is that Tele-Direct requires that agencies pay at the time of issue of a directory for advertising placed on behalf of their clients. If agents were only agents of Tele-Direct, they would not be financially responsible for the obligation of third parties -- the advertisers. This is compelling evidence that the agencies do not act as agents of Tele-Direct.

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The evidence is that Tele-Direct has always considered agents to be, and has reacted to them, as competitors.

Nor can the agents be considered to have no independent existence apart from the advertisers themselves that they also "represent" in the sense of placing orders for advertising on their behalf. Yellow Pages advertising is not a simple product to buy and advertisers desire assistance in making the purchase. Agents, however, are not *mere* "order placers" for advertisers or other advertising agencies employed by advertisers. The evidence before us, which is reviewed in more detail below, is that agents provide a range of services, including advice, layout, design and administration, for which they do not receive additional compensation beyond the commission paid by Tele-Direct.¹⁶⁰ Further, we have no evidence that much of the agents' business consists of simply placing orders for another advertising agency employed by the customer to do the remaining work involved in producing the advertising. Advertisers want these other services in relation to their Yellow Pages advertising from agents. Thus, for advertisers, agents have a separate existence from Tele-Direct.

The relationship between Tele-Direct and agents is complex. Tele-Direct treats the agents as independent businesses with which they cooperate to advance their own objectives but with which they also compete. While Tele-Direct apparently recognizes that agents can service certain accounts better than its internal sales force, by reason of its creation of a class of commissionable

¹⁶⁰ The evidence is that agents charged separately for artwork when the commission rate was 15 percent but do not do so at the 25 percent commission rate.

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accounts, it is also its goal, or at least the goal of certain groups within the corporation such as the national accounts group, to keep as much revenue as possible in-house and reduce its dependence on agencies to the absolute minimum possible. We conclude that the business relationship between Tele-Direct and agents is not inconsistent with Tele-Direct and agents treating each other as competitors.

(c) Additional Economic Benefit

The respondents argue that there is an "exception" to tying recognized in the American jurisprudence where the seller of the alleged tying product does not receive an "additional economic benefit" from the sale of the tied product. They say that Tele-Direct gets no additional economic benefit from the sale of services in this case because there is no "separate charge" for services.

The respondents cite two cases on this point. The first is *Directory Sales Management Corp. v. Ohio Bell*,¹⁶¹ a decision affirming summary judgment granted against the plaintiff in an antitrust suit by an independent directory publisher against the telco and its directory publisher. The two defendants were wholly-owned subsidiaries of the same parent. One of the allegations was that the defendants tied business telephone service (tying product) to a free Yellow Pages listing (tied product) by refusing to reduce the price of the telephone service if the subscriber chose not to be listed.

¹⁶¹ 833 F.2d 606 (6th Cir. 1987).

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The Court noted that an illegal tying arrangement might exist if the telco in some way charged for the "free" listing indirectly in the bill for telephone service, even though it did not charge for the listing directly. The evidence was that there was no hidden charge for the listing as the telco did not pay the publisher for the expenses incurred in publishing the listing. The Court stated that if the telco did not receive a "financial benefit" from the tied product, there could be no tying arrangement.

The second case is *Beard v. Parkview Hospital*.¹⁶² Dr. Beard, an osteopathic radiologist, was employed by a group of doctors that was the exclusive provider of radiological services to Parkview Hospital. Dr. Beard resigned from the group with the intention of providing radiological services on his own to patients at Parkview Hospital. The hospital did not permit him to do so and Dr. Beard sued, alleging that the exclusive contract for radiological services was an illegal tie of radiological services to other hospital services. Under the terms of the contract between the hospital and the group providing the radiological services, the group billed patients directly for its services and the hospital did not share in the fee. The lower court granted summary judgment for the hospital.

In affirming the dismissal, the appeal court approved the lower court's reliance on the requirement that the seller of the tying product must benefit directly from the sale of the tied product. The Court held that the requirement was also consistent with *Jefferson Parish*, which stated that an illegal tying arrangement is one where a firm with market power attempts to

¹⁶² 1990-2 Trade Cas. (CCH) ¶ 69,154 (6th Cir. 1990).

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impose restraints on competition in the market for the tied product, because the seller who "derives no economic benefit from sales of an alleged tied product or service is not attempting to invade the alleged tied product or service market in a manner proscribed by section 1 of the Sherman Act."¹⁶³

Areeda explains the purpose of this rule in American case law and its relationship to tying as a *per se* offence:

. . . a tie-in, though affecting a substantial volume of commerce in the tied product, is not *per se* unlawful when it does not foreclose any rival supplier or, perhaps, when any such foreclosure is inherently minor. . . .

One convenient and frequent way to capture the concept of a relevant foreclosure is to ask whether the defendant has a financial interest in the tied product. In most courts, ties do not cross the threshold of potential power or effect when the defendant lacks an economic interest in the tied product, primarily because such a tie does not ordinarily enhance the defendant's power in the tied market or bring about any other consequences of the kind that the *per se* rule against tying seeks to prevent. "Foreclosure" there may be but not a relevant one.¹⁶⁴ (reference omitted)

Further, using the example of a defendant firm accused of providing its product *A* only to buyers who purchase *B* from a second, separate firm *T*, thus "foreclosing" other suppliers of product *B*, he explains:

The defendant who gains not a penny, directly or indirectly, from firm *T*'s sales of product *B* is no "competitor" in the market for the tied product *B*. This much is clear, although there are difficulties ahead in deciding what type and magnitude of financial connection with firm *T* makes the defendant a "competitor" of those foreclosed suppliers.¹⁶⁵

¹⁶³ *Ibid.* at 64,348.

¹⁶⁴ P.E. Areeda, *Antitrust Law*, vol. 9 (Boston: Little, Brown, 1991) at 330-31.

¹⁶⁵ *Ibid.* at 333.

Therefore, where there is no financial interest in sales of the tied product or in the tied market, the alleged tie-in does not cross the threshold for *per se* illegality, although the alleged tie does remain subject to review under the rule of reason.¹⁶⁶

There are three points to be made regarding this argument of the respondents. First, the test of lack of any financial interest in the tied market or economic benefit from the sale of the tied product, however worded, is closely linked in American law to the *per se* nature of tying, which makes us reluctant to adopt it directly because Canadian law is based on a different standard, that of "substantial lessening of competition".

Second, there is some validity to the Director's argument that the question of economic benefit from the tied product, or of participation by the firm with market power in the tied market, only arises when two separate corporate entities are involved in the supply of the tying and the tied products. That was the case in both decisions cited and is not the case on our facts.

Further, in the *Beard* case it was abundantly clear that the hospital itself, the supplier of the alleged tying product, was not a participant in the radiological services, or tied product, market in any way as it did not receive any part of the fee for those services, which went directly from the patient to the unrelated doctors' group. In *Ohio Bell*, the situation was less clear as the two corporate entities were related but, in any event, the Court was definitive that there was no evidence of a "hidden" or "indirect" charge for the Yellow Pages listing in the telco's bill for

¹⁶⁶ *Ibid.* at 347.

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telephone service. The telco, the firm with market power, was not attempting to, in the words from *Beard*, "invade" the market for the supply of directory listings.

In contrast, on the facts before us, Tele-Direct itself supplies both space and services to all advertisers, both commissionable and non-commissionable. We also have evidence that it considers both consultants (detailed elsewhere) and agencies, the alternate service suppliers, to be its competitors. Since Tele-Direct provides services, it must be compensated for them. As a rational firm it would not provide something for nothing. Therefore, it cannot be concluded that it receives "no additional benefit" from its own sales of the alleged tied product. The precise form of that compensation or "benefit" is not at issue here.¹⁶⁷ Whether Tele-Direct has succeeded in foreclosing any alternate suppliers in the services market is evidently a relevant question but that is not what this argument of the respondents focuses on. This argument is that Tele-Direct gets no additional economic benefit from the provision of services and that, therefore, any exclusionary effects in that market are irrelevant because of the lack of linkage to the firm with market power over the tying product. The facts do not support this hypothesis.

(d) Separate Billing/Separate Payment

The respondents argue that if a producer pays for the "components" of a "product" directly and then sells the "product" complete with "necessary inputs" at a specified price, there

¹⁶⁷ The element of no separate charge, or separate billing, for services, which the respondents appear to allude to as part of this argument, is another issue which is dealt with in the next section.

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is no tying. They state that the concept of tying *only* applies where the customer pays *separately* for the alleged tied and tying products. In oral argument, this was expressed as the proposition that it is not a tie to bundle something because as long as there is only one "cost" to the buyer, what is being sold is the supplier's single "product".

A distinction was drawn between the case at bar and the facts in *Jefferson Parish*, in which the respondents submit the items found by the Court to be separate products were not "bundled" but were in "two pieces" because there were two bills. They argue that the patient in *Jefferson Parish* paid for both "parts", presumably hospital services and anaesthesiological services, and that if a buyer pays for two different things on two bills, there cannot be one product. Reference was also made to the case of *Collins v. Associated Pathologists, Ltd.*¹⁶⁸

Turning to *Jefferson Parish*, the distinction drawn by the respondents between that case and the instant case on the facts relating to billing is not as apparent as argued. In *Jefferson Parish*, the hospital and Roux & Associates had a contract which provided that all anaesthesiological services required by the hospital's patients would be performed by Roux. The hospital agreed with Roux to provide an anaesthesia department, including space, equipment, maintenance and other services, drugs and supplies, and nursing personnel (subject to approval by Roux). The use of the anaesthesia department was restricted to physicians employed by Roux. As the Court said:

¹⁶⁸ 1988-1 Trade Cas. (CCH) ¶ 67,971 (7th Cir. 1988).

The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations. At East Jefferson Hospital the package includes the services of the anesthesiologist.¹⁶⁹ (reference omitted)

The Court describes the billing arrangement as follows:

. . . The fees for *anesthesiological services* are billed separately to the patients by the hospital. They cover the hospital's costs *and* the professional services provided by Roux. After a deduction of eight percent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital.¹⁷⁰ (emphasis added)

The majority of the Supreme Court did consider the "separate billing" of anesthesiological services" as a factor that entered into its determination of whether there were separate products. Yet, the actual billing arrangement, as described by the Court, looks very much like a combined bill for the tied product (professional anaesthesiological services) and part of the tying product (hospital services), much like Tele-Direct's bills for Yellow Pages advertising. Specifically, the amount billed included both a professional services portion for anaesthesiological services and a hospital-supplied anaesthesia equipment, facilities, support personnel and drugs portion. The fee is simply divided equally between the two, irrespective of the actual extent of professional services required in the particular case. It is not explicit separate billing of professional services.

¹⁶⁹ *Supra* note 137 at 18.

¹⁷⁰ *Ibid.* at 6 n. 4.

In any event, there is no indication in the Court's decision that the factor of "separate billing" is essential or even critical. The most that can be said is that it is one factor to examine. We agree with the Director that if the entire resolution of the one or two products issue could be determined simply by the pricing or billing arrangements, this would allow suppliers to immunize all activity from tying claims simply by refusing to quote separate prices for items provided as a package.

Further, the Director submits that the mechanism or the route by which the money ends up in the hands of the separate service supplier is not relevant. In the commissionable market, the separate service supplier is paid by commission. A payment by commission may be somewhat more circuitous than, for example, direct billing by the hour by agents for their services (allied with a discounted price for space provided by Tele-Direct to persons who did not use its services) but the end result is the same -- the advertiser pays for the services, the advertiser receives the services of an agent, the agency receives payment for the services provided. Payment to agencies by way of commission was historically, and to a large degree still is, a fact of life in all advertising media.

The significance of the reference to *Collins* in this context escapes us. The Court in that case found that there was no distinct demand for pathology services as a product separate from hospital services. The Court did not refer to billing arrangements at all in making its findings. It based its conclusion solely on the lack of consumer or patient requests for specific pathologists or perception of pathology services as separate from other hospital services.

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In summary, none of the cases referred to convinces us that the approach we have adopted to the separate product question is inappropriate. Several were largely irrelevant because they dealt with completely different facts or different, non-tying, antitrust issues. To the extent issues were raised which we considered relevant, particularly in the other Yellow Pages cases, we dealt with them in that context. We will now proceed with the basic approach we outlined at the outset and consider the evidence and arguments relating to demand and efficiency.

(3) Demand by Advertisers

Are advertisers that fall in that portion of the market which Tele-Direct currently defines as non-commissionable interested in purchasing the services associated with creating and placing a Yellow Pages advertisement from a source other than Tele-Direct? In other words, does Tele-Direct's practice of bundling space and services for a single price "force" them to buy a product that they would rather not buy from Tele-Direct? Or, do they regard the two components as a package that they would rather not acquire separately in any event?

The Director called 19 advertiser witnesses; the respondents called two. All of the witnesses except the two called by the respondents expressed a desire to obtain the services associated with developing and placing Yellow Pages advertising from someone other than Tele-Direct. Seven of the 19 advertisers called by the Director are current agency clients;¹⁷¹ the remainder of the advertisers are serviced directly by Tele-Direct representatives. Of those, eight

¹⁷¹ One advertiser (Turpin Group Inc.) participates in a trade-mark advertisement for General Motors dealers for which General Motors, a national advertiser, uses DAC. Turpin's own advertising is treated as local and it deals with Tele-Direct's internal sales force.

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use or have used a consultant. Three would like to use an agent but cannot qualify for commission.

Fourteen witnesses represent multi-outlet (whether franchised, licensed or corporate-owned), multi-directory advertisers. The geographic dispersion of the outlets ranges from a metropolitan area to country-wide. Three are single outlet but multi-directory advertisers because of the wide territory from which they draw business. The remaining four advertisers are single outlet, single directory advertisers. All of the witnesses called are spending above-average amounts in the Yellow Pages. Two were spending close to the average of \$1,700 (at about \$2,000 annually each); the remainder ranged from \$7,000 to \$300,000.

The respondents have not attempted to rebut the specific evidence of the advertisers who indicate that they would prefer to obtain advertising services from someone other than Tele-Direct. They called two witnesses to show that some advertisers prefer Tele-Direct's services, although one of those witnesses stated that advertisers should have the choice of dealing with Tele-Direct or using an agent. Counsel admitted in oral argument that in the "top end" of the market, some advertisers find the bundling of services and space by Tele-Direct problematic. He argues, however, that these advertisers constitute a "statistically insubstantial sample" and that there will always be a number of people "who would like to get something for nothing" and "as long as they aren't paying for it".

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It is true that the customers called to give evidence constitute a very small proportion of total advertisers. They were not randomly selected and we do not treat them as a statistically significant sample. However, coupled with their anecdotal evidence of why they prefer to use agents is the evidence that in the current commissionable market, which includes grandfathered eight-market accounts, agents enjoy the lion's share of the business. When advertisers have the choice, the vast majority choose an agent, rather than Tele-Direct, for services. There is clearly separate demand beyond what Tele-Direct considers a "national" account (the 1993 definition) with respect to eight-market accounts, currently grandfathered. Moreover, there is no reason to believe that the line drawn by Tele-Direct between commissionable and non-commissionable accounts accurately reflects the boundary of demand; that those accounts that are commissionable prefer to use an alternate service provider while those who are not commissionable do not. Given the strength of demand for agents' services in the current commissionable market, we think it is reasonable to infer that the preference shown by the large majority of commissionable accounts for the use of agents extends down into the current non-commissionable market, at least to some extent. We are satisfied there is sufficient evidence before us to conclude that there is demand for separate advertising services below the existing commissionable market and that the advertisers called by the Director can tell us something about the nature of that demand.

Common amongst the Director's witnesses, whether single or multi-directory advertisers, was a preference for the advice or consultative services provided by an agent or a consultant over those of Tele-Direct. A recurring theme was that the agent or consultant provides an "overall"

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picture, reviewing all of the client's Yellow Pages advertising, including white pages listings, which headings were being used and which should be used, all the directories involved, what the client's competitors are doing and the nature of the business's markets. These service providers help plan the Yellow Pages advertising, including recommending headings and, in some cases where the level of expenditure is higher, budgeting. In the case of agents, a representative is assigned to the account for a long period of time and the clients have the perception that the agency "understands" its particular business. That these service providers tend to pay attention to the overall picture is suggested by the testimony of two advertisers, one the client of an agent and one of a consultant, that the agency or the consultant was the one to bring to its attention duplicative advertisements in its Yellow Pages program.

The advertisers using agents also mentioned creative services as one of the elements of the service provided. For the clients of consultants, creative services are at least equally important since by re-designing an advertisement and by substituting other design techniques, like, for example, screening, for the more expensive size and colour, the consultants are able to reduce the cost of advertising.

In the case of both agents and consultants, advertisers generally perceive that these "independent" service providers are more interested in helping them get more out of their Yellow Pages advertising dollar than is the typical Tele-Direct representative. Frequently, according to the advertisers, the Tele-Direct representative does not have time to sit down and consult with the advertiser. The advertiser has to accommodate itself to the schedule of the representative

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faced with a full schedule and deadlines in a particular canvass. Another recurring complaint is that the Tele-Direct representative is more interested in selling more colour or a larger size than in arriving at the level and type of advertising that is right for that client; representatives are perceived as quite aggressive and prone to "upsell". Most of the advertisers also recognize that these problems result from the way in which Tele-Direct operates its canvasses and compensates its representatives; their comments were not directed at the representatives as individuals. While the agencies are also paid commission, individual representatives are paid straight salary for servicing the agency's existing client base.¹⁷²

The multi-directory advertisers also prefer the services of third parties because they provide "co-ordination" or "administrative" services. These multi-directory advertisers are primarily the clients of agents rather than consultants.¹⁷³ They testified extensively about the advantages of using an agency which will keep track of publication dates for the various directories, control the uniformity of the advertisements, company image and message across directories and, where applicable, organize the contact between head office and franchisees or licensees for approval of advertisements and billing. Promoting a uniform message and image is particularly important to franchisers whose franchisees may be quite independent of head office

¹⁷² The evidence is that the agencies generally keep servicing existing clients and prospecting for new clients separate; adding new clients is usually the primary responsibility of one or more designated persons. Out of the five CMRs that testified, two pay commission for new clients; only one of those offers that incentive to all employees, the other has a vice-president who is responsible for new business.

¹⁷³ Only two of the multi-directory (leaving aside the one who is in only two directories) advertisers were clients of consultants and only one of those talked about uniformity of advertisements and co-ordinating dates and deadlines.

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and also to those which had enrolled businesses to their network which operate the franchised business as only a part of their overall business.¹⁷⁴

It might be argued that the administrative services provided by agents are not supplied at all by Tele-Direct.¹⁷⁵ On that reasoning, administrative services would not be a component of the advertising services at issue in the tying case. The argument would be that since Tele-Direct does not supply administrative services, it is not in competition with agents because it is supplying different services and customers who want administrative services are free to purchase them separately.

It appears that, in fact, Tele-Direct has made some effort to provide the administrative services emphasized by the advertiser witnesses who appeared before us (uniformity and coordination) through its national accounts group and with its efforts regarding continuity. Further, while it is possible that such administrative services could *conceivably* be purchased separately, there is no reason to believe that it would be efficient to do so. There is no evidence of agents providing these services to advertisers who use Tele-Direct for the remaining services, even

¹⁷⁴ E.g., the "Autopro" line of automobile parts is offered by licensed Autopro mechanics and service stations across the country; the franchisees of Location Pelletier offer short-term vehicle rentals under that banner but usually operate another business as well.

¹⁷⁵ A similar conclusion was reached in the United Kingdom by the Office of Fair Trading ("OFT") in its 1984 report on the Yellow Pages industry: exhibit J-6 (green vol. 4), tab 282. When British Telecom withdrew all commission and internalized services through an exclusive sales contractor, the advertising agencies argued that they were placed at a disadvantage in competing to offer services to advertisers as the advertiser had to pay for the sales contractor's services, included in the rate card price, and then pay again to use the services of an agent. The OFT concluded that the "administration of the account" on the advertiser's behalf, by which they meant the day-to-day running of the account (negotiating claims, authorizations, proof-checking, paying bills) could not be carried out by the sales contractor and would either be done by the advertiser using its own resources or an agent. In respect of those services, therefore, the agencies were not competing with the sales contractor but rather with the advertiser's own resources.

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though there is clearly a demand for them. The fact that Tele-Direct provides administrative services in some cases but not in others simply means that Tele-Direct and the agents are not providing precisely the same product. Indeed, one would not expect to find homogeneous packages of services. Otherwise, there would be no reason for customers to choose one service provider over the other. Therefore, we are satisfied that administrative services are a relevant and important aspect of advertiser demand for advertising services.

We now turn to the respondents' argument that advertisers only prefer agents because they are getting something for nothing or they are not paying for the agents. We do not accept this argument. The advertiser is paying for the advertising services whether provided by Tele-Direct or, if the account is commissionable, by an agent. With respect to the use of consultants, advertisers pay to use consultants as Tele-Direct's price remains the same but the consultant charges the advertiser a portion of the amount the advertiser saves by use of the consultant. Those savings would otherwise be for the advertiser to either spend on more Yellow Pages advertising or to pocket.

Even if we were to accept that the cost to advertisers of obtaining services is the same whether they choose Tele-Direct or an agent, we think it is still evidence of separate demand that where advertisers have the choice, the advertisers prefer to use agents. However, the evidence is, as will be explained, that when advertisers use agents, they bear costs additional to what they would have to bear if they placed their advertising through the Tele-Direct representative. Thus, it is apparent that customers prefer agents even if it is more costly to use an agent than to deal

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directly with Tele-Direct. This is strong evidence of demand for the services of agents by advertisers when they have the possibility of using them.

One source of higher cost derives from the billing practices of Tele-Direct. When advertising is placed through Tele-Direct's representative, the cost of advertising is divided into twelve equal parts and included in the Bell Canada telephone bill commencing upon issue of the directory. Advertisers who use agents are required to pay for their advertising on an issue basis, that is, to pay the full amount upon issue of the directory. When this occurs the advertisers' additional cost of using an agent is roughly one-half the annual cost of funds or, in other words, one-half of the commercial interest rate.¹⁷⁶ Given interest rates over the past 20 years, this has, depending upon the time, constituted approximately three to six percent of the advertising bill, a cost the advertiser does not pay if it uses Tele-Direct's services. In the words of Mr. Kitchen of Lansing Buildall, these advertisers are "paying a premium in terms of the payment schedule." While it is true that some advertisers that used agencies have arranged for periodic payments, no arrangement disclosed in the evidence is as favourable to them as the Tele-Direct monthly billing practice.

Another cost borne by some advertisers in order to use an agent is the placing of "extra" advertising in directories outside the areas from which the advertiser draws its customers so that

¹⁷⁶ Counsel for the respondents appeared to take the position that advertisers did not incur higher costs of using agents in those cases where the advertisers placed advertisements in a number of directories that were issued throughout the year. Although this argument has a superficial appeal because it appears that advertisers are paying on a periodic basis either way, it is not valid. Advertisers who use an agent must pay in advance for each directory as opposed to over a 12 month period if they use Tele-Direct.

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the criteria for the eight-market rule (grandfathered accounts) are met. Five advertiser witnesses buy "extra" advertising. In one case, the cost of the additional advertisements is paid by the agent; in another the agent pays 15 percent of the cost of the additional advertisements. The other advertisers bear the full cost of the "extra" advertising.

How far down does the demand for separate services extend? We have evidence from a number of advertisers, both agency clients and clients of consultants, probably best described as large local or regional advertisers. Despite the amounts they are spending in Yellow Pages, these advertisers would not qualify even under the eight-market rule if they only advertised in the areas where they have locations or from where they draw business.¹⁷⁷ Since there are only seven market areas in Ontario and six in Quebec, that rule requires advertising outside the boundaries of each province.¹⁷⁸

However, we did not hear from any truly "small" advertisers. Although two of the advertiser witnesses spend about average amounts in the Yellow Pages, they are the outlying examples. Most of the remaining witnesses, even those using consultants, spend at least \$10,000

¹⁷⁷ Of the seven agency clients, five, to all appearances, would not meet the eight-market criteria; the sixth apparently does but does not meet the 20-directory requirement for the 1993 rule. The seventh may meet the 1993 definition but as a group advertisement which is problematic for other reasons (see chapter "IX. Abuse of Dominant Position" under "D. Market for Advertising Services", *infra*). The three advertisers who currently use Tele-Direct but would like to use an agent are similar: a franchiser, a large regional advertiser and a company with three offices in two provinces.

¹⁷⁸ Among the agency clients, HOJ Car and Truck Rentals, for example, spends \$125,000 annually and has 36 franchises, all located in southwestern Ontario. Location Pelletier spends \$120,000 to \$160,000 annually but its 60 licensees are all within the province of Quebec. Stephenson's Rent-all Inc., as Mr. Day of Day Advertising Group, Inc. testified, became non-commissionable when the eight-market rule came in and that was when it began to do the "extra" advertising. Stephenson's has 38 retail outlets in southern Ontario and spends \$140,000 on Yellow Pages advertising. Among the consultant clients, Canac-Marquis Grenier has 10 outlets across Quebec and spends \$50,000 on its advertising; Tiremag Corp. spends \$20,000 although it has only one outlet.

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and most spend considerably more than that. Advertisers spending more than \$10,000 annually represent only two percent of Tele-Direct's total advertisers by number and about one-third of its advertising revenues. There are, therefore, a vast number of advertisers representing a significant amount of revenue about which we know little regarding the character of their demand for separate advertising services.

The Director refers us to documentary evidence dating from 1975 when Tele-Direct changed to the eight-market commission rule to show that approximately 20 percent of the pre-1976 agency customers purchased less than \$1,000 per year of Yellow Pages advertising. Many purchased as little as \$500 worth of advertising annually. We have no reason to doubt the accuracy of these statements. We are reluctant, however, to reach conclusions about "small" advertisers based only on documentary evidence that is some 20 years old.

On the other hand, we have the views of Michael Trebilcock, the respondents' economist expert witness,¹⁷⁹ regarding "smaller" advertisers, which imply that these advertisers do not demand advertising services from a source other than the publisher. Based on the data provided in the report of the Office of Fair Trading,¹⁸⁰ he notes that for smaller advertisers, the cost of providing advertising services overwhelmingly comprises space and selling effort rather than advisory services. The reasoning behind these statements is sound and there has not been any evidence or argument to the contrary. It is certainly plausible that the lowest-cost

¹⁷⁹ Professor of Law and Director of the Law and Economics Programme at the University of Toronto.

¹⁸⁰ *Supra* note 175.

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"advertisements", for example a bold listing, do not contain much, if any, creative content. We therefore accept that the general thrust of this argument is valid and that, for "smaller" advertisers, it is highly doubtful that a separate demand for advertising services exists.¹⁸¹

The evidence supports the view that there is buyer interest in obtaining advertising services from suppliers other than Tele-Direct over at least part of the spectrum of advertisers. While it is difficult to know where exactly to draw the line, we can conclude at this point that there is no evidence that would satisfy this threshold test of separate demand from "smaller", including new, advertisers. It is apparent that the larger advertisers would have the greater need for the services of agents or consultants based on the complexity of their advertising. Smaller, including new, advertisers whose advertising is relatively more simple likely would not have such need.

However, based on the evidence before us, we are not prepared to draw a firm line below which we could confidently say there is no evidence of buyer demand for services of independent advertising service providers. Therefore, at this point, we only conclude that there is evidence of buyer demand for advertising services for suppliers other than Tele-Direct for "larger" advertisers.

¹⁸¹ We note from Tele-Direct's 1994 Corporate Post Canvass Analysis Report that "new" advertisers, those using Yellow Pages for the first time or new businesses, are certainly among the smaller Tele-Direct advertisers. Selling effort is especially important with respect to new advertisers. The average *annual* expenditure by a new advertiser is \$839, less than half the average for all advertisers. Less than one-half of one percent of new advertisers spend \$1,000 or more *per month* where the corresponding percentage among established advertisers is about 3.5 times greater. Apparently, the typical new Yellow Pages advertiser starts with a small advertisement, in which case it is the value of the medium and the "sales pitch" which are important and not other advertising services.

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(4) Respondents' "Efficiency" Arguments

Given the evidence of demand for services from suppliers other than Tele-Direct, is there evidence that efficiency considerations would dictate a single product? Based on the historical practices of Tele-Direct, the Director has ample evidence that the products can and were, in fact, sold separately. Pre-1975, a large percentage of advertisers could acquire services from a source other than Tele-Direct. Under the eight-market rule and the 1993 rule, any advertiser that qualifies or can make itself qualify by some extra advertising can acquire services separately from an agent. The respondents have put forward a number of efficiency arguments which, if valid, they say would lead to the conclusion that there is a single product and therefore, no tie. These arguments are largely based on the analysis and evidence of Professor Trebilcock, their expert witness. There were also profitability studies entered in evidence by the respondents and they will be dealt with in the next section.

(a) Impossibility of Leveraging: Fixed Proportions

Professor Trebilcock, for the respondents, is of the view that the Director's theory that Tele-Direct is attempting to leverage its market power (assuming it has market power) over space into the services market by bundling space and services is not valid. He states that such leveraging cannot occur because advertising space and advertising services are complements which are consumed in fixed proportions. There is agreement between the experts on both sides that complementary goods used in fixed proportions imply that the only profit-maximizing

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motive to bundle the two products is in order to minimize costs; all opportunities to exploit market power could be accomplished with control over either product. This implies that the bundling is socially efficient and it should be concluded that there is only one product.¹⁸²

Professor Slade, for the Director, argues that space and services are at least partially substitutable. Professor Slade is of the view that:

. . . it is possible to achieve the same impact by using a large ad or one that is cleverly designed. In addition, astute targeting of the "right" directories can substitute for purchasing space in a larger group of directories. More generally, an agency that provides service can often advise on ways to cut expenditure on space while maintaining the same level of advertising impact. In addition, it might even suggest ways of obtaining a higher impact from lower expenditure by, for example, substituting white knockout for colour.¹⁸³

Because of the failure of the assumption of complementarity, she argues, leveraging is possible. Certainly the possibility of an extension of market power over a substitute, even if only a partial substitute, is one which causes concern and should be examined further.

The evidence supports variable rather than fixed proportions. To the extent that agents tend, compared to Tele-Direct representatives, to be less likely to promote increased expenditures on space, the additional expenditures on advertising services by agency clients (through the purchase of extra advertising, foregoing monthly billing) lead to the substitution of

¹⁸² We should note here that while the Director refers to space and services, Professor Trebilcock refers to three elements: space, consulting advice (design, graphics, layout, etc.) and selling effort (or pure promotion of the value of the medium). He recognizes that selling effort is clearly variable in relation to space. That is the genesis of the principal-agent problem dealt with later in this section.

¹⁸³ Expert rebuttal affidavit of M.E. Slade (28 August 1995): exhibit A-119 at 11.

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advertising services for advertising space. Furthermore, once it is recognized that there is an issue of the quality and content of advertising services, as indicated by the evidence of advertisers and their willingness to pay more for agents than it would cost them to use Tele-Direct's representatives, even assuming the same expenditure on space using an agent or Tele-Direct, it is difficult to see how advertising services are being consumed in fixed proportions with advertising space.

The evidence regarding the activities of consultants also suggests that advertising services and advertising space are not used in fixed proportions, and that they are partial substitutes. The purchase of services from a supplier other than Tele-Direct results in reduced expenditures on space. An example provided by a consultant concerned a very large and apparently inappropriate existing advertisement for a taxi company in the Hamilton area. The existing full page advertisement included a large picture of an airplane and reference to airport service. The consultant (Serge Brouillet of Ad-Vice Communications) determined from his marketing needs analysis for the client that he actually did very little airport business. The changes proposed by the consultant were both less costly and appeared to be more effective.

We conclude that advertising space and service are not consumed in fixed proportions and it cannot therefore be assumed, as argued by the respondents, that only efficiency explains why they are bundled by Tele-Direct.

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(b) Widespread Industry Reliance on Internal Sales Force

As part of his expert evidence on behalf of the respondents, Professor Trebilcock stated that any theory of the tying allegations in this case must explain four central facts. One of those facts is stated as:

Almost all yellow pages directory publishers organize their selling functions in a similar way to TD i.e. by heavy reliance on an internal sales force.¹⁸⁴

It is not in dispute that all North American publishers, whether telco-affiliated or independent, rely heavily on their internal sales force. The Director has, however, brought forward evidence indicating that where the line is drawn between accounts that are open to agency competition because they qualify for commission and those which are exclusive to the internal sales force differs from publisher to publisher. The Director further argues that Tele-Direct's current commissionability rule is one of the strictest in North America.

The respondents submit that Tele-Direct's national account definition simply represents the transposition of the YPPA national account definition (also referred to as the YPPA "A" account definition) into the Canadian context. The YPPA by-laws provide that, as a minimum standard, an advertising program involving two or more publishers, 20 or more directories, and at least three states with 30 percent of the advertising revenue outside the primary state is considered national Yellow Pages advertising. Publisher members must accept advertising

¹⁸⁴ Expert affidavit of M. Trebilcock (18 August 1995): exhibit R-174(b) at para. 27.

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meeting those criteria as national. They are not precluded from accepting advertising meeting less stringent criteria as national. Each publisher decides on the level of compensation for advertising it defines as national.

While the *terms* of the YPPA definition are similar to those used by Tele-Direct in its definition, the evidence was that the effect of applying the definition in Canada is very different. Where there are about 6,000 directories in the United States, there are only about 350 in Canada. Tele-Direct is one of only seven or eight publishers in Canada and controls 70 percent of Canadian Yellow Pages publishing revenue. Tele-Direct's definition incorporates a minimum of two provinces instead of three states. Tele-Direct requires 20 percent of the published revenue outside the primary *publisher's territory*; the YPPA definition requires 30 percent of the revenue but outside the primary *state*. Under the YPPA definition, as long as two publishers are involved, there could be minimum revenue in the second publisher's territory. According to the agency witnesses, the 20 percent requirement is especially onerous given that Tele-Direct's territory includes the two most populous provinces. Overall, commission is currently paid on 13 to 14 percent of total directory advertising revenues in the United States as opposed to seven to eight percent of total revenues in Canada.

Although it is true that an account wholly within a large state such as California (with a larger population than all of Canada) might not be commissionable under the "A" account definition, according to the President of the YPPA, most publishers, including telco affiliates (RBOCs) pay commission on regional accounts, called "B" accounts. For example, the evidence

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was that Pacific Bell has a commissionable account which could include accounts wholly within the state of California.

In Canada, with one exception, all the telco publishers require advertising to be placed in two publishers' territories to qualify for commission at 25 percent,¹⁸⁵ usually with a minimum of 20 percent of revenues required outside the dominant publisher's territory. Effectively, this generally means that two provinces will also be required.¹⁸⁶ Since the other publishers have much smaller territories than Tele-Direct, their "two publishers" requirement is easier to meet.

Professor Trebilcock places great stress on the fact that independent publishers also rely heavily on an internal sales force because "many of these directories do not remotely possess any market power (however measured) in many of the directory markets in which they operate."¹⁸⁷ Therefore, he concludes

*The stark and enormously significant implication of this fact is that the decision to vertically integrate advertising selling functions clearly has nothing to do with market power. It must be explained entirely by the kind of efficiency considerations . . . outlined earlier in this opinion.*¹⁸⁸

¹⁸⁵ AGT Directory Limited only pays 25 percent on foreign numbers (as do all publishers) but pays 15 percent on *any other* advertising, including local accounts.

¹⁸⁶ Except for Edmonton Tel: advertising in Calgary and Edmonton would qualify under its rule.

¹⁸⁷ *Supra* note 184 at para. 27.

¹⁸⁸ *Ibid.*

Based on the evidence from White and DSP, we know that, in Canada at least, despite the fact that they offer commission on all accounts brought to them by CMRs,¹⁸⁹ the independents rely heavily on their internal sales force. The evidence that we have is that an internal sales force is a *necessity* for their survival rather than a choice based on efficiency considerations. Despite the liberal commission rules, they receive a small proportion of their overall revenues from agents and must rely on their own sales force for the bulk of their revenues.¹⁹⁰ In fact, recruiting an effective sales force is one of the hurdles a new publisher has to overcome.

While we agree that the independent publishers are unlikely to have market power, we are reluctant to conclude solely on the basis of the fact that they rely on an internal sales force that the "bundling" of sales and service by a publisher with market power is competitively benign.¹⁹¹ We would likely be willing to draw that conclusion if we had evidence that the markets in which independents are operating, particularly in the United States, are competitive. If they were, yet most sales by publishers were on a bundled basis, that would be a very strong indication that efficiency was dictating the bundling and that there was only one product at issue.

¹⁸⁹ The evidence of Mr. Lewis of White was that White pays commission (in the United States and presumably also in Canada) on any account submitted by a CMR without restriction. The commission rate is 23 percent for established directories and 30 percent for newer directories. Likewise, DSP pays CMRs commission on any account.

¹⁹⁰ E.g., for White: eight percent of revenues in U.S. placed by agents; in Canada, one-half of one percent of revenues placed by agents.

¹⁹¹ In circumstances where the dominant players are telco publishers and those publishers only pay commission on national and regional accounts, it follows that agents are active mainly in those sectors. They are not set up to service local accounts even if independents pay commission on those. Thus, because the dominant players do not want to use agents for local accounts, independents *cannot*, even if they wanted to, rely solely on agents but must use an internal sales force. Professor Slade is of the view that agents would tend to serve this market over time if the major publishers changed their policies and provided a broader market. Further, as the independent is usually the newcomer into a market dominated by the telco publisher, agents are reluctant to recommend a new directory, even for national and regional accounts where at least some of the major players pay commission, until it has proven itself.

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The only evidence we have, however, is that those markets, like Tele-Direct's market, are dominated by the telco publisher. It was pointed out to us by the respondents that most RBOCs' prices are even higher than Tele-Direct's. We also referred in the section dealing with Tele-Direct's market power to testimony that indicates that American telco publishers also have sufficient profits to subsidize local telephone service. We are, therefore, not satisfied that widespread reliance on an internal sales force across publishers, including independents, dictates a single product on efficiency grounds because it may be a function of telco dominance in all markets.

(c) Agents' Views

The implication of finding and prohibiting the tied selling alleged by the Director is that agents would, one way or another, be permitted to offer their services to a wider range of accounts below the level of "national" accounts currently considered by Tele-Direct as commissionable. Professor Trebilcock is of the view that agents are not interested in servicing smaller accounts.

In interviews with agents that the Director's staff undertook in investigations prior to filing the application, the agents stated that they were not interested in the smaller accounts. As reported by Professor Trebilcock, who had access to the summary of the interviews prepared by the Director's counsel, the smallest accounts that any of the agents expressed an interest in ranged from those spending from \$10,000 to \$50,000 per year on Yellow Pages. A lower limit of

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\$10,000 excludes almost 98 percent of all customers and approximately 70 percent of total revenue but would represent a substantial increase over the amount of revenue currently commissionable.

When giving evidence the agents took a different position and stated that they would be interested in all customers but would handle the business differently. The only reasonable interpretation is that the early answers reflected the agents views given their current method of operation. Their answers when giving evidence, in contrast, reflected the willingness of businesspeople to consider any reasonable opportunity to turn a profit, including considering the possibilities of paddling into uncharted waters. On the whole, we regard their views during the interviews as the more reliable. Because the agents apparently have little or no interest in servicing smaller accounts, we infer that they regard themselves, at least in their current setup, as at a cost disadvantage *vis-à-vis* Tele-Direct in dealing with these smaller customers.

Therefore, we agree with Professor Trebilcock that agents are not interested in servicing smaller accounts, although neither he in his evidence nor the Tribunal at this stage can be more explicit than having regard to the \$10,000 to \$50,000 range about what constitutes "smaller" accounts.

(d) Justification for Tele-Direct's Practice of Bundling

Professor Trebilcock attempted the most complete explanation and justification of Tele-Direct's practice of bundling space and services over most advertiser accounts. Initially, he

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divides what the Director has alleged to be advertising services into selling effort and consulting advice regarding the advertisement (artwork, placement, etc.). He states that selling effort cannot be priced on its own as customers will not pay for a "sales pitch"; it must be bundled with either space or consulting advice. The overall problem facing Tele-Direct (and other publishers) is to exercise control over those selling its product and to motivate agents or internal staff, as the case may be, to provide an optimal mix of selling effort and consulting advice *from Tele-Direct's viewpoint*. The Tribunal agrees that there is what is known as a "principal/agent" problem at work here. The issue is the nature of the problem and whether Tele-Direct's viewpoint is the only relevant one or should be the operative one.

Professor Trebilcock divides his explanation concerning Tele-Direct's approach to commissionability into three categories: small advertisers, larger local advertisers (which presumably includes regional advertisers) and currently commissionable advertisers (larger national or regional accounts involving multiple publishers). We have accepted that it is likely that small advertisers have no separate demand for advertising services. New advertisers, with few exceptions, coincide with small advertisers. For the sake of completeness we continue with the "efficiency" or cost-side evidence for all advertisers including small advertisers.

Professor Trebilcock's primary explanation of why Tele-Direct prefers to rely on its own resources for servicing small customers is that it is highly likely that it is cheaper for Tele-Direct to service small customers internally. His view is that the most effective method of selling advertising to these customers, probably because of significant economies of scale, appears to

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entail "blanketing' directory territories in concentrated time blocks on a sequential basis" as Tele-Direct currently does. It is, however, not self-evident that this approach results in lower per unit costs than using smaller numbers of representatives who take a longer time to do a canvass. There is simply no evidence.

Another factor cited by Professor Trebilcock that is likely to lead to attenuated efforts by CMRs regarding small advertisers is the possibility that advertisers would engage in opportunistic conduct. The difficulty Professor Trebilcock foresees is that once the successful selling effort has been made, which the customer is unwilling to pay for, the customer is in a position to ask for, and other sellers are in a position to offer, a discount because they need only provide the consulting advice and not the selling effort, for which the first seller will be uncompensated. He believes that this problem is most acute for small advertisers, including first-time buyers. For large advertisers, selling effort constitutes a smaller percentage of overall advertising services. In addition, larger customers might have more difficulty engaging in opportunistic conduct because they are more likely to become known to agents. Tele-Direct can avoid this "free riding" by small advertisers by bundling space and selling effort. This is a version of the free riding argument often made in defence of vertical arrangements such as resale price maintenance which may be valid in some circumstances. There is, however, absolutely no evidence that it applies on the facts in the instant case.

Professor Trebilcock also points to a divergence of interest between Tele-Direct and agents which leads to an incentive compatibility problem should Tele-Direct use agents to

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service small advertisers, otherwise referred to as the "completeness externality". This externality, compounded by advertiser opportunism as explained above, is also the principal explanation advanced for why Tele-Direct prefers to provide services internally for "larger local" advertisers. As Professor Trebilcock recognizes, a simple cost difference cannot explain the reluctance of Tele-Direct to offer a commission on these accounts as the agents would not service them, even if commission were offered, if they were at a cost disadvantage to Tele-Direct.

According to Professor Trebilcock, there is a positive correlation between the "completeness" of a directory and the value that users place on it. Advertisers are willing to spend on a directory to the extent that the users find it valuable. But since each individual advertiser benefits only minimally from their own contribution to completeness, they are unwilling to pay for this effect. Tele-Direct, as the publisher, is able to internalize this externality over the longer term (the more "complete" and useful the directory, the more valuable the advertising space and the higher rates it can charge).

While there is no doubt that publishers value "completeness" for the reasons stated, it is largely an undefined term. There is no explanation in Professor Trebilcock's evidence, for example, of why a directory is in any sense more complete when there are paid bold listings rather than unpaid listings in ordinary type. Nor is there any adequate explanation of why users would value more advertisements in colour or larger advertisements unless they provide more information. There were also indications from the evidence that there can be *too much*

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advertising from the viewpoint of users. In large centres such as Montreal and Toronto, it has been necessary to split directories because of their size. Thus, while it is indisputable that directories must have sufficient representation by advertisers so that the directory is considered to be a useful reference, it is far from clear that *all* increases in advertising contribute to this objective. This point is critical because if Tele-Direct is encouraging increased selling effort beyond the range where further advertising contributes to completeness in any meaningful positive way, then the ability of Tele-Direct to sell additional advertising through its own sales force cannot be assumed to be socially beneficial in providing users with additional value.

Professor Trebilcock is of the view that the completeness externality leads to two results. First, Tele-Direct has a stronger incentive than CMRs to recruit new accounts; CMRs will focus most of their efforts on attracting existing advertisers from Tele-Direct or other CMRs. Second, while Tele-Direct is interested in retaining customers over the long term in order to enhance completeness, CMRs will be more concerned with immediate returns. Thus, when Tele-Direct recommends the, in Professor Trebilcock's words, "optimal" advertising package, the CMR will have an incentive to convince the advertiser that a less expensive or "sub-optimal" package is equally useful in order to recruit the customer. The risk of dissatisfaction on the part of the customer is increased; the customer may stop using Yellow Pages because of informational imperfections which make it difficult to distinguish between weakness in the medium and bad advice.

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Further, Professor Trebilcock is of the view that it would be difficult for Tele-Direct to structure incentives to CMRs to induce them to sell a "socially optimal" quantity and quality of advertising by way of contract because of significant transactions costs. On the other hand, Tele-Direct can and does motivate its internal sales force "to sell and advise clients to purchase optimal packages by offering training, encouragement, screening of advertising sales by managers, internal promotions, awards, a team ethic, etc."¹⁹²

The Tribunal is inclined to agree with Professor Trebilcock that it is probably easier for Tele-Direct to create incentives that motivate its own representatives to sell more than agents. The more important question is whether leaving Tele-Direct the unfettered choice of when to use agents and when to service internally leads to a truly "socially optimal" result. We have already indicated some doubts that the unrestricted pursuit of completeness, while it may be in Tele-Direct's interest, is wholly in the public interest or "socially optimal".

The Director argues that Tele-Direct chooses to retain services in-house because this allows it to motivate its sales force to exploit better the "information asymmetry" it enjoys *vis-à-vis* its customers or, in other words, to "oversell". He submits that Tele-Direct's incentive structure results in its sales representatives convincing advertisers to buy more than they would if they were provided with balanced information or the possibility of obtaining an alternative viewpoint from another service supplier. Witnesses stated that they did not regard the advice from Tele-Direct's representatives as objective. We have acknowledged that, as a general matter,

¹⁹² *Supra* note 184 at para. 22.

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the effectiveness of marginal dollars spent on advertising is difficult to determine. This leaves customers somewhat vulnerable to the advice they receive. The incentive structure for Tele-Direct's representatives makes the Director's argument that they are motivated to "oversell" at least plausible. To the extent that the Tele-Direct representatives succeed in selling "too much" advertising to one advertiser, the effect would multiply throughout a heading, since, as the evidence revealed, many firms base their Yellow Pages expenditures on that of their competitors (the "prisoner's dilemma"). We, therefore, cannot accept Professor Trebilcock's critical assumption that the advertising a Tele-Direct representative sells is necessarily socially optimal.

With regard to recruiting new customers, we accept that a publisher would want to ensure that there was a thorough and efficient canvass of potential new customers, in the sense that all were approached and there was no duplication of effort. Since the prospective new Yellow Pages advertisers are easily identifiable from business telephone subscriber information in the hands of the publisher, it makes sense to assign them to specific persons rather than creating a "free for all". This can be done on an individual basis, by territory, or any other method that avoids multiple contact of the same prospect by different persons. The assignment is key; if customers are assigned it makes little difference whether the persons making the contact are employees or outside agents.

Professor Trebilcock also believes that a reason why Tele-Direct does not make larger local customers commissionable is that agents would curry favour with customers by recommending less than the "optimal" amount of advertising (or the amount that a Tele-Direct

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representative would recommend), with long-term detrimental effects, because they are primarily interested in immediate returns. While Tele-Direct may worry about the advice being given by agents, it is far from clear that the quality of their advice is a cause for concern with respect to satisfying the needs of consumers. The facts before us do not support Professor Trebilcock's view that agents tend to take a short-term view. When the actual relationships between customers and agents and customers and the internal sales force are considered, it is the former who have the long-term relationship. Until recently most Tele-Direct representatives, *unlike* agents, predominantly had a short-run relationship with customers. Professor Trebilcock also acknowledged that agents might be reluctant to be perceived as pushing current sales because customers might be inclined to switch agents. Tele-Direct's representatives do not have this concern because customers do not have freedom of choice. Much of the representatives' livelihood depends on increased sales to existing customers whereas the employees of the agents are on salary and receive no additional compensation for increased sales to existing clients.¹⁹³ Moreover, there is no evidence that agents' clients have tended to cancel advertising for any reason.

In Professor Trebilcock's view, the fact that Tele-Direct chooses to pay commission on multiple publisher accounts is evidence that Tele-Direct is motivated by efficiency considerations with respect to all its decisions regarding commissionability. Otherwise why would Tele-Direct choose to make any part of its sales commissionable? Professor Trebilcock

¹⁹³ Based on the evidence of the representatives of CMRs who testified; together those CMRs account for a large portion of commissionable sales.

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interprets the fact that Tele-Direct pays commission on national accounts and that the bulk of sales to this segment is made by agents as proof that agents can more efficiently service this segment. While Professor Trebilcock believes that the tendency of agents to undersell and focus on existing advertisers and the possibility of opportunism are still present, the cost advantages of agents compensate for these weaknesses. These sophisticated advertisers are also better able to monitor whether they are being sold the "optimal" amount of advertising and the possibility of losing such a client effectively polices the agent. While the Director accepts that the agents are more efficient in servicing the commissionable segment, he disputes, as noted above, that agents in any circumstances sell "sub-optimal" amounts of advertising as defined by Tele-Direct's perspective. The Director takes issue with the view that Tele-Direct is more efficient in dealing with the rest of its customers. Detailed evidence on relative efficiency was placed before us and is the focus of the next section.

In summary, as indicated in the section on advertiser demand, we have accepted Professor Trebilcock's view that there is no separate demand for advertising services for "small" customers. With respect to those advertisers for which separate demand has been proven, called "larger local" advertisers by Professor Trebilcock, the Tribunal does not accept that either the completeness externality or the possibility of advertiser opportunism is supported on the evidence before us and, therefore, does not dictate that space and services are a single product with respect to those customers. The question of relative efficiency or cost advantages on the part of Tele-Direct with respect to servicing those advertisers will be addressed in detail in the next section.

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(5) Comparative Profitability Studies: Agents/Internal Sales Force

The respondents have introduced evidence bearing on the comparative efficiency of Tele-Direct's representatives and agents to argue that the commissionability rules are, and always have been, efficiency based. The primary evidence is a comparative cost study dated 1995 created for these proceedings and entered through Michel Beauséjour, Tele-Direct's Vice-president of Finance. In addition, there are two other internal contribution-to-profit studies from 1974 and 1985, along with the descriptive evidence of Donald Richmond, Director of Manufacturing and Contract Administration for Tele-Direct, and Jan Rogers, Director of Corporate Methods and Support.

Before turning to a detailed discussion of the evidence it is necessary to consider its import with respect to the respondents' claim that its policies with respect to the payment of commission and the utilization of agents are dictated by efficiency considerations. While the studies referred to are relevant to the respondents' position, there are very important caveats that seriously weaken the conclusions that can be drawn from the evidence. Firstly, in an ordinary "make or buy" decision what is being compared is only the *cost* of producing a particular product in-house or buying it. This basic requirement (of looking only at cost) is violated when a comparison is made between the *contribution to Tele-Direct's profit* by the internal sales force and agents, i.e., revenue considerations enter.

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More importantly, the products (i.e., the provision of services to commissionable and non-commissionable accounts) being compared in the Raheja study from 1974 and the 1995 study are very different. In fact, these studies are well described by the comparison of "apples and bananas". It is difficult to see what can be derived from the exercise of comparing the contribution to profit of agents and Tele-Direct's representatives who each deal with an entirely different set of customers. A significant percentage of the non-commissionable accounts are dealt with entirely over the telephone. Where representatives meet with customers, the customers' needs, for the most part, cannot be compared with the large multi-directory customers who rely on agents. What is the point of comparing the contribution to profit of agents, who are acknowledged to be relatively effective in serving complex "national" customers, with the contribution to profit of Tele-Direct's representatives in serving customers, many of whose requirements are relatively simple? While the comparison in 1985 between NAMs/NARs and agents might be considered to be a close, although not an exact comparison, the data are not current and not particularly detailed.

Overall, we have found these profitability studies not to be supportive of the respondents' position. The early studies are out-of-date (and Raheja is of limited relevance because of the difference in products being compared and an error in it), a critical point when considering current efficiency. At numerous points in the 1995 study, the differences in costs can be traced to differences in the characteristics of the customers being served rather than to any possible difference in the relative costs of agents and Tele-Direct's personnel. It also suffers from bias in favour of Tele-Direct because of its time frame and from methodological weaknesses.

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For completeness, we will comment on the studies to further explain why, in our opinion, they are not reliable for the purpose advanced by the respondents, that is, to demonstrate that Tele-Direct's internal sales force is more efficient than agents.

(a) Raheja Study (1974)¹⁹⁴

This study was prepared as part of a review of Tele-Direct's policy towards advertising agencies, including agencies specializing in Yellow Pages, which were a relatively recent phenomenon at the time, with a view to determining a commission payment. The study itself notes that the system of classifying accounts at Tele-Direct made it difficult to calculate profitability of the various components. Nevertheless, Mr. Bourke was of the view that management at the time placed sufficient confidence in the results of the study to make decisions on the basis of it. The study showed that in the "local market", defined as all sales within Tele-Direct's own directories, agency sales were less profitable. Although there is no evidence of the weight that the study played in the decision, in 1976 Tele-Direct sharply restricted the commissionable market by moving to the eight-market rule.

The odd thing about the exercise is that, taken on its own terms, there is an obvious error in the study: the commission to agents is counted both as a reduction from revenue *and* as an expense. When the error is corrected the comparative ratio is somewhat better for the agents than it is for Tele-Direct's own representatives. The respondents take the position that the existence of

¹⁹⁴ Confidential exhibit CJ-32 (black vol. 11), tab 83 at 132667ff.

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the error is irrelevant; management acted on the information, proving that Tele-Direct was motivated by efficiency considerations and not by any other motive. While the study may suggest that Tele-Direct was at least *interested* in efficiency at the time, it is peculiar that so simple an error was not easily immediately detected by those supposedly basing decisions on it. In the circumstances, and having regard to the many qualifications in the study, the existence and results of the study are not of assistance.

(b) Profitability Study: National Accounts - Selling (1985)¹⁹⁵

This study deals with the contribution to profit of national accounts serviced by agencies and NAMs in 1983 and 1984. Agencies included specialized and regular agencies while the NAMs included one Tele-Direct sales representative who dealt with high revenue potential customers and another who dealt with low revenue potential customers.

The study was entered in the record during the cross-examination of Mr. Beauséjour. Although the bottom line contributions to profit were noted, there was no examination of the study with the witness other than to establish that the then prevailing methodology regarding the payment to Bell Canada was employed. Based on the description in the document the only costs that were specifically attributed to the agents and NAMs were agency commissions and so-called sales expenses. The latter included the salaries of sales personnel in the national accounts group

¹⁹⁵ Exhibit J-1 (red vol. 1), tab 61.

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but also the personnel who processed orders submitted by agents.¹⁹⁶ All other costs were allocated on the basis of the net revenues generated by each of the two channels.

For the combined eastern and western regions, the contribution to profit as a percentage of total revenues generated for the agents and NAMs in 1983 was 18.7 percent and 17 percent respectively. In 1984 the contribution was 20 percent for both. While there are caveats,¹⁹⁷ the important point that emerges from the study is that Tele-Direct had no reason to believe at that time that it was less costly to rely on its own representatives who dealt with customers with the same or similar characteristics as those served by agents. The respondents did not bring to our attention any further study or any evidence whatsoever of internal consideration of relative efficiency leading up to the 1993 change in the commissionability rules. The only documentation on the record, and the evidence of Mr. Mitchell who was intimately involved in the preparation leading up to the change, focuses on effects on number of accounts and revenues that would be available to agents or the internal sales force under various scenarios.

(c) Profitability Study (1995)¹⁹⁸

Towards the end of the hearing counsel for the respondents introduced through Mr. Beauséjour a document comparing the relative contribution to profit in 1994 of agents and

¹⁹⁶ Total salaries were allocated to CANYPS, agencies, NAMs and GSF.

¹⁹⁷ To anticipate questions that might arise as a result of the discussion of Tele-Direct's latest contribution to profit study, the same percentage cost of customer service (the payment to Bell Canada) and "melt" is used for both agents and NAMs. There is some tipping of the scales in favour of agents with respect to the cost of customer service since it is applied net of commission in the case of agents. On the other hand, no account is taken of the fact that agents pay up-front and the customers of NAMs pay over a year.

¹⁹⁸ Confidential exhibit CR-185.

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the internal sales force, including the national accounts group. The document was admitted over the strenuous objections of counsel for the Director. During discovery, Tele-Direct provided a cost of sales figure for its internal sales force of 12.3 percent of revenue. The basis for that figure was explored through detailed follow-up questions and further explanation. There was no indication from the respondents that a second study was being undertaken by Tele-Direct, and that it contained results that were different from those that had been given on oral discovery and in follow-up answers. On December 4, 1995, counsel for the respondents produced the second study to counsel for the Director.

While we found the timing of the production and, in fact, counsel for the respondents' conduct of this whole matter of the new study to be, to say the least, unfortunate, we admitted the document while allowing the Director further discovery and preparation time. Despite the inappropriate timing, we were of the view that the Tribunal should not forego receiving information that could have an important bearing on the case and which apparently went to the heart of the respondents' position that the bundling of space and services by Tele-Direct was dictated by efficiency considerations.

(i) Unrepresentative Timing of Study

Apart from the general difficulty, already highlighted, of comparisons being made between the servicing of very different types of accounts, there is another serious defect in the recent study. The period for which the study is done almost certainly creates a bias in favour of

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the internal sales force *vis-à-vis* the agents because of the state of progress of certain improvements Tele-Direct was making to its process. The study fails to take account of the fact that the application of technology is in a period of transition. While improvements favouring the internal sales force have been put in place, those favouring agents are on the immediate horizon. Despite this, the latter have been ignored in the study.

The system that Tele-Direct was putting in place in 1994 with respect to the publishing process was much more efficient for the internal sales force than the system that it replaced. More specifically, a computer system was introduced that allowed the electronic storage of advertisements, including finished artwork. This means that advertisements that renew without change, about 70 percent of all advertisements, are already in the computer. This is contrasted by Mr. Richmond with the previous system:

. . . In the old system, when we used an outside supplier [for pre-press functions, e.g., layout, paste-up], if we got an ad from last year, we may or may not have found that artwork because it was kept in a filing cabinet somewhere. It meant that the next year we had to have an artist redraw the artwork to match what was in the book before. This was very inefficient. We had to store logos all over the place so that everybody could get hold of it.¹⁹⁹

There are also savings when there are changes to the advertisement. Under the new system, minor changes can easily be made on the electronic version of the advertisement.

Although agents submit their advertisements "camera ready" (as "veloxes"), they must be scanned into its system by Tele-Direct. If there is no change in an advertisement from the

¹⁹⁹ Transcript at 34:7026 (7 November 1995).

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previous year then it follows that it should be possible to avoid re-scanning the advertisement, as it is already in the system, so some savings should be possible. Mr. Richmond did not know the percentage of agents' advertisements that are repeated without change but he did state that *all* CMR advertisements are scanned, implying they are scanned even if there is no change. It is not clear why Tele-Direct does this.

Thus, until recently and certainly when commission was further restricted in 1993, the costs that Tele-Direct would have experienced for the internal sales force were those that existed prior to the introduction of the new system. Under the old system the fact that agents were submitting complete advertisements meant that the cost comparison in the publishing part of creating a directory was far more favourable to agents than is presently the case. According to Mr. Richmond the cost of implementing the new system is \$26 million and the annual savings are of the order of \$12 million, which would have made previous publishing costs for internally-generated advertisements almost twice as high as they were in 1994.

Using current data disadvantages the agents with respect to the near future. There would be no need to scan agents' advertisements if the advertisements could be transmitted electronically. Currently, newspapers and magazines have systems in place for this purpose. The Yellow Pages publishers are moving in this direction, according to Mr. Logan, the President of the YPPA. He foresees this capability on the VAN system, the electronic YPPA order system, in two to three years. The pay-off would be a smoother flow with lower costs for publishers and CMRs and a reduction in errors.

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The other area within publishing where change can be anticipated is in how Tele-Direct receives orders over the VAN. Currently a clerk in Montreal and one in Toronto take the information off the VAN as hard copy. After the order has been dealt with in this form, it is eventually re-entered into Tele-Direct's system. Ms. Rogers stated that Tele-Direct had hoped to be able to transfer all orders received through VAN directly into the contract data base without re-keying but this did not happen. According to Mr. Logan of the YPPA, "[t]he bigger publishers, both independents and utilities, now are developing and I think probably most of them -- not everybody, most of them -- can take the information directly off the VAN and run it into their systems without re-keying".²⁰⁰ For some reason Tele-Direct is lagging behind other North American publishers in taking advantage of the VAN, the system for which agents made significant investments and for which, in part, Tele-Direct agreed to raise commission rates from 15 to 25 percent over a two-year period. While there have been reductions in cost in processing agents' orders since the movement to VAN, according to Ms. Rogers these appear to be less related to the VAN than to internal reorganization and, therefore, this confirms that Tele-Direct has not taken full advantage of the VAN.

For all these reasons, we conclude that the study does not recognize the technological transition in publishing Yellow Pages and that failure to do so favours the internal sales force over the agents.

²⁰⁰ Transcript at 36:7370 (9 November 1995).

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(ii) Methodological Weaknesses

There are significant methodological problems with this study. The study is based on a "causal model". Costs were analyzed by Tele-Direct personnel to determine whether particular costs would be experienced in the absence of either agents or the internal sales force. If the answer was in the affirmative those costs were assigned to the group that caused the costs in question. Costs that could not be identified as caused by one or the other channel were treated as common costs and allocated to the two channels on the basis of relative revenue. This overall methodology was submitted to Tele-Direct's auditing firm for confirmation that the approach was sound. All cost assignments and allocations were performed by Tele-Direct personnel and the results were not audited by an outside firm. The testing of the results was done only through discovery and cross-examination during the hearing.

In the final result, the internal sales force's contribution to profit is shown to be approximately 13.5 percentage points higher than that of the agents. If we ignore for the moment the complications created by the difference in types of accounts serviced by each, this result would mean that in order for the agents to be competitive with the internal sales force the commission rate paid to them would have to be nine percent rather than the average of 22.5 percent that in fact is paid to them (22.5 less 13.5).

We turn first to the method used to allocate common costs. It is, in our view, valid to allocate these costs on the basis of revenue where the common costs can be considered to be

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related to the level of sales. This is true for an area such as manufacturing the directories, where the costs depend on the volume of advertisements and it may make little difference whether the advertisements are generated by the internal sales force or agents. This approach to allocating common costs is far less justifiable when the costs in question relate to personnel, e.g., the personnel department itself. This is important because sales representatives and all their support personnel are internal to Tele-Direct while the agents and their support personnel are not. In areas like these it would be more appropriate to allocate costs based on the relative proportion of employees identified as devoted to servicing the internal sales force and agents. Mr. Beauséjour admitted that this was an equally valid approach as using relative sales and that either method could have been used.

An analysis of each of the common cost areas to see whether it was more appropriate to use one or the other weighting procedure would have produced a more objective and defensible result. We note that Tele-Direct did depart from its approach to allocating common costs on the basis of revenue in at least one instance, which also happened to work in its favour.²⁰¹

In the study Tele-Direct has violated its own methodology for attributing costs on a causal basis in a way that increases the costs of dealing with agents. As noted earlier, the current system of storing advertisements in a computer is in the process of being introduced. The cost of duplication between the old and new systems which would, on the stated approach, be attributed

²⁰¹ Depreciation of the scanner (a common cost since it is caused neither by internal sales force or CMRs) is divided equally between internal sales force and agents based on relative volume of items by number scanned from these sources. Based on the revenue methodology otherwise employed most of the depreciation would be allocated to internal sales force.

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to the internal sales force, was treated in the study as a "transition" cost and was subtracted from the total internal costs. Similar costs related to moving to the VAN system were, however, attributed to the agents. To be even-handed, they too should have been considered "transition" costs and subtracted from the agents' costs. Further, it is questionable that the large investment in the new system for dealing with internal orders should simply be ignored, as was done in the study, rather than amortized over several years. The effect of not doing so is also to understate internal costs.

Counsel for the Director questioned the validity of the cost attribution in the study in several areas where a relatively small percentage of costs was taken to be caused by internal sales force even though the internal sales force and its direct support account for 61 percent of total employees. With respect to the costs of the Personnel and Benefits department, Tele-Direct concluded that there would only be a saving of about 16 percent from eliminating the internal sales force and thus only 16 percent of the total cost was attributed to the internal sales force. Similarly, in the Labour Relations department the saving assumed was only 30 percent. In defence of these decisions, Mr. Beauséjour explained that there were certain basic requirements that would have to be maintained to service the remaining personnel even if 61 percent of the personnel were eliminated. In effect, this approach treats the present organizational chart as inviolate. We question whether Tele-Direct would approach such a massive change on an "avoidable cost" basis.

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The Director's principal challenge to this study relates to the method of dealing with the "cost of customer service" ("CCS"), the 40 percent of net sales revenue that is paid to Bell Canada. In all past studies of profitability, CCS was treated as a cost. It was also so treated throughout the many months when there were successive drafts and refinements of the 1995 study, almost until the moment that the study was entered in these proceedings. As a result of the penultimate amendment to the figure for CCS, the contribution to profit of the agents changed from being slightly less than the internal sales force to almost five percent *more* than the internal sales force.²⁰² Subsequent to that, Mr. Beauséjour decided that there was no reason to treat CCS as a cost since Tele-Direct and Bell were part of the same corporate entity and it makes little difference whether Tele-Direct made payments to Bell in the form of CCS or as dividends. Despite the apparently fortuitous timing of this realization, we accept that the point is valid. It is one thing for Bell to insist that CCS be included as a cost in order to impose market discipline on Tele-Direct but it is another matter when a study of the relative costs of using agents and internal staff is being performed. It then makes better sense to treat Bell and Tele-Direct on a consolidated basis. This in itself is not a methodological weakness.

However, the same reasoning means that the Tele-Direct study should have taken into account the benefits accruing to Tele-Direct/Bell from the fact that agents pay up-front for advertisements whereas customers of the internal sales force pay monthly. Mr. Beauséjour recognized this benefit in cross-examination but it does not appear in the study. As discussed

²⁰² The reason why CCS has such a large impact is that under Tele-Direct's contract with Bell Canada the revenue from agents who are billed by Tele-Direct rather than Bell are not subject to the payment of CCS. Thus the average payment of CCS is much lower in the case of agents than of internal sales force.

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earlier, the difference in timing of payment amounts to interest for about half a year, an appreciable difference of three to six percent per year.

(iii) Particular Examples of Problems Arising from the Difference in Products

The respondents advance this study as evidence which they say proves the different, and greater, "interface" costs that they incur when processing orders originating with external agents as compared to the costs of processing orders originating internally. As we indicated at the outset, it is extremely difficult, in conducting a study of this nature, to distinguish the genuine interface costs, costs that arise because Tele-Direct is dealing with agents rather than the internal sales force, from costs that arise from the nature of the advertising, and thus are not clearly related to the channel submitting the order and are not true interface costs. This problem permeates the study and, thus, it cannot prove relative interface costs in its present form as the respondents maintain it can.

That is not to say that we think the problems arising from the difference in the products, unlike the unrepresentative timing and methodological weaknesses already identified, consistently operate in the respondents' favour by lowering internal costs and raising agents' costs. As detailed below, this is sometimes the case; sometimes the reverse is true.

We turn to some examples. One relates to the interpretation and treatment of credits to customers as a result of Tele-Direct's errors. Customers using the internal sales force were reimbursed 1.3 percent of gross revenues as a result of errors made by sales representatives or

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during the publishing process. The rate of reimbursement to agents as a result of publishing error was 3.5 percent. This difference in the rate of Tele-Direct's errors is a factor in the overall lower contribution to profit of agents.

In the notes to the study it is stated that the difference is due to the fact that orders from agents are handled by more people, that is, CMR personnel and the national accounts publishing group of Tele-Direct. It is, however, irrelevant how many people in the CMR handle orders because only errors attributable to *Tele-Direct* are reimbursed. One possibility that may explain part of the difference in error rates is the greater knowledge and, perhaps, incentive that agents have to discover and complain about errors compared with the customers of the internal sales force. Mr. Beauséjour admitted this was a possibility. While this explanation would probably not change Tele-Direct's view that the higher reimbursement is a "cost", it would hardly be a reflection of lower efficiency in the use of agents compared to the internal sales force.

On the other hand, Ms. Rogers stated that the higher error rate in processing agents' orders was due to the larger, more complex advertising programmes submitted by agents. This suggests that the error rates are related to the nature of the advertising programmes rather than the channel through which they flow. To the extent that the principal reason for the difference is the difference in the type of accounts serviced by each channel, it cannot be concluded that the difference in error rate is a cost of dealing with agents.

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The comparatively large error rate in dealing with agents' advertisements also shows up in other costs attributed to dealing with agents. A Tele-Direct employee checks the advertisements after the directories have been printed, a duplication of effort since the agents also verify their advertisements. In addition, there are the resources expended in error negotiations with the agents.

Apart from the difference in the size of advertising programmes mentioned by Ms. Rogers, we also know about one other respect in which there is a significant difference in the content of advertisements submitted by the internal sales force and agents. Approximately 80 percent of "trade-mark" advertisements are handled by agents. Three Tele-Direct clerks within the department which processes agents' orders are assigned to checking a proposed trade-mark advertisement to ensure it has been authorized by the owner of the trade-mark. This is a cost assigned totally to agents that depends on the nature of the advertisement rather than on the channel dealing with the advertisement.

In a related area, that of bad debts, the study may, in fact, underestimate the comparative cost of dealing with agents as opposed to the internal sales force. Over the years there is a regular, although fluctuating, percentage of unpaid bills to customers serviced internally. Until recently Tele-Direct has not had the same experience with agents. Mr. Beauséjour noted that Tele-Direct is currently owed money by an agent but no figure for non-collection from agents was included in the study. The area of "melt", bad debts along with discontinuance of phone service, which negatively affect the internal sales force contribution to profit, are probably due to

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the character of the clients served by the internal sales force rather than having anything to do with who is servicing them. This is consistent with the more "volatile" nature of smaller accounts commented on in internal Tele-Direct documents.

(d) Conclusion

The numerous points on which the various studies are subject to challenge confirm that they cannot be used for the purpose of comparing the relative efficiency of Tele-Direct's internal sales force and agents.

(6) Conclusion on Separate Products

The Director has alleged that tying is present over the entire demand spectrum, although counsel for the Director has, in effect, recognized that there may not be tying for "small" customers.²⁰³ According to the respondents, there is no tying for any of their customers. The parties' positions represent the two extremes. The Director would have us order the respondents to offer space and services separately (whether by separate prices or expanded commission) to all their customers. The respondents would have us make no order, thus allowing them to offer the two separately only to those customers that they choose.

²⁰³ By proposing the further alternative remedy of reverting to the pre-1975 commission rule.

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We are of the view that neither extreme is supported by the evidence. What we see is that customers or advertisers are not homogeneous in terms of their need for services, or demand, or in terms of the costs involved in servicing them, or efficiency considerations. On the contrary, they are very heterogeneous, ranging from an individual running a small business from home and spending a minimal amount on a simple advertisement in the Yellow Pages to large corporations advertising in a multitude of directories. Our view is that we cannot decide whether there is one product or two products for all these different customers in a blanket fashion. We must engage in an exercise of "line drawing".

We are of the view that the evidence on demand for separately supplied advertising services and the evidence and arguments relating to efficiency of supply indicate that advertising space and advertising services are separate products with respect to "large local" and regional advertisers. They are a single product for "small" advertisers. The difficulty is in knowing how reasonably or workably to distinguish regional and, more problematic "large local", advertisers from "small" advertisers, whether in terms of number of markets (as in the eight-market rule) or dollars spent on Yellow Pages. In approaching this task we have been mindful that the Director bears a burden in this regard of justifying any remedy granted. To the extent that the evidence and argument have left the matter unresolved, it behooves us to be cautious in our conclusions.

We know that in the current commissionable market, including grandfathered accounts, where advertisers have a choice, they overwhelmingly choose agents. We have found that

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demand extends well below the 1993 "national" definition and below the eight-market definition of commissionability.

The differences in the constituents of demand between the relatively smaller advertisers that employ the services of a consultant and those of larger, multi-directory advertisers that use agents or would use them if their accounts were commissionable are notable. The needs of the latter are more complex. In addition to advice and creative services, most require help in administration and in assuring uniformity of message. We infer that the intensity of demand, as measured by their willingness to pay, year after year, for these services by way of extra advertising or issue billing, is greater for larger customers that have multi-dimensional needs.

We turn to cost considerations to focus further on the appropriate dividing line. We have concluded that agents' interest, presumably driven by their view of their comparative efficiency *vis-à-vis* Tele-Direct, is primarily in customers with a minimum size ranging from \$10,000 to \$50,000 in annual expenditures on Yellow Pages advertising. This alone would dictate raising the bar for any unbundling of space and services to a minimum of \$10,000.²⁰⁴

While the evidence that at least some independent publishers are willing to pay commission on any business brought in by agents could be interpreted to mean that it would be efficient to unbundle across the entire demand spectrum, we are not comfortable going that far. It

²⁰⁴ We are referring to monetary amounts here because that is the way the evidence came in. Other criteria, such as number of markets, are more informative and other evidence was presented in that form. We attempt to relate the two measures below.

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is far from clear that these publishers are guided by the relative efficiency of agents and in-house staff in servicing customers since for the most part their market position requires them to rely heavily on in-house staff despite their liberal commission rules. Their policy on commission could as easily be reflective of their desire to attract additional demand as of the relative efficiency of agents and in-house staff.

The approach of the large American publishers associated with telcos is to bundle space and services for all accounts smaller than those classified as national accounts or, for those who use a "B" account definition, for accounts smaller than regional accounts. We are not satisfied, however, that the publishers in question operate in competitive markets and that their choice of a dividing line is necessarily efficiency driven. As a result, we conclude that while unbundling of national and "B" accounts by them is probably efficiency driven, we cannot say that bundling for the balance of their accounts is motivated by efficiency and is conclusive on the dividing line for one versus two products.

Tele-Direct's studies are not helpful in drawing conclusions with respect to relative efficiencies of agents and Tele-Direct's employees along the demand spectrum. What we do know is that the eight-market rule was created by Tele-Direct primarily to capture more accurately "national" accounts than did the original 1958 definition and, at the time, Tele-Direct apparently considered this rule to be in its interest. Further, it is also clear that Tele-Direct did no studies and had no internal discussion of relative efficiencies when it further restricted commissionability in 1993. In doing so it ignored demand from existing eight-market customers

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(including those that were forced to buy unneeded advertising to qualify for eight-market status). Given that agents had served these types of customers over many years, that other publishers have "B" accounts, and that Tele-Direct at no time addressed the comparative efficiency of agents and the internal sales force for these accounts, there is no evidence of any efficiency offset which would lead us to conclude that space and services were not separate products for all the accounts within reach of the eight-market rule.

The eight-market rule was not specifically designed to deal with the needs of regional advertisers. This is obvious from the fact that there are seven markets in Ontario and six in Quebec. By almost any definition an advertiser covering all the markets in a province would be considered "regional" although such an advertiser would not be commissionable under the eight-market rule. Many of them likely managed to bring themselves within the rule with extra advertising. At a minimum, a firm that covers an entire province the size of Quebec or Ontario should qualify without more. We have no reason to doubt that the strong demand for advertising services from agents displayed by currently grandfathered eight-market accounts extends to advertisers that cover six markets, which would mean, for example, the entire province of Quebec. It is difficult to see that the efficiency implications for separately supplied advertising services at the six-market level are significantly different than for eight markets.

There is a rough relationship between the number of markets served and the amounts spent on Yellow Pages advertising. According to Tele-Direct's internal studies, the average amount spent on Yellow Pages advertising among customers served by Tele-Direct

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representatives but that were in the commissionable category under the eight-market rule was \$54,000.²⁰⁵ The comparable figures for accounts that would qualify under a seven-market and six-market rule, respectively, are \$44,000 and \$26,000. While some agents might find six-market accounts below their threshold of interest, the evidence is that they are within the range that some agents are willing to service, perhaps in anticipation of future growth.

We are cognizant that looking only on the demand side a case might be made for unbundling well below the six-market level. The evidence with regard to efficiency, principally the agents' views on accounts that they would like to service, does not support this conclusion. The Director suggests that there is no harm in unbundling across the board -- the market can be allowed to decide. If agents are more efficient, they will end up servicing the accounts. If Tele-Direct's internal sales force is more efficient, especially for smaller accounts, it will end up servicing those accounts. This implies a simple solution to a complex problem. In large measure, Tele-Direct is "the market" since the pricing of advertising services is inevitably its responsibility, whether it chooses to set commission rates for various types of accounts or to charge separately for the services of its internal sales force. Given widespread unbundling, Tele-Direct might well decide to set several different prices (or commission rates) for advertising services depending on the relative costs of servicing various categories of accounts. As the study on relative profitability showed, this would likely be a difficult task. It is not one that should be imposed without some greater certainty that there will be a significant overall benefit from the

²⁰⁵ While the document is not explicit, the data were gathered in 1993 so we infer these are 1993 figures: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131635.

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change. Therefore, we find that space and services constitute two products down to the six-market level and a single product below that level.

Addendum on Tying

At the outset of our discussion on tying, we indicated that another theory of the tying case was possible and we address that now. While some of the respondents' arguments and evidence are related, they did not adopt the precise approach which we outline hereunder.

One interpretation of the evidence is that advertising space and services are not demanded nor provided separately even in the existing commissionable market. Rather, larger advertisers either wish to purchase the bundle of space and services from Tele-Direct or from agents, in either case they are purchasing bundled space and services. Tele-Direct insists that the agents it deals with be accredited. The Director acknowledges that the placing of advertising in telephone directories is complex and accepts accreditation of agents by Tele-Direct. Indeed we do not necessarily envision advertisers purchasing space from Tele-Direct and providing their own services (except perhaps in the case of advertisers with accredited in-house advertising departments).

Following from the fact that accreditation means that only accredited services providers (including Tele-Direct's internal sales force) can place orders for space and they do so along with providing other services, it could be concluded that space and services must be bundled to be

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sold and that, therefore, they constitute a single product. Another way of viewing the matter would be that advertising space and services could be considered a single finished product on the basis that the real complaint respecting tying is not that advertisers are precluded from purchasing space and services separately, but that Tele-Direct has simply refused to supply unbundled space (i.e., at a discount) to agents which prevents them from selling to advertisers the same bundle of advertising space and services that is sold by Tele-Direct.

The evidence does not support this interpretation for the following reasons. First, we are satisfied that agents are not resellers of Tele-Direct's advertising space such that advertisers are purchasing the space *from agents* along with services. Agents do not carry an inventory of advertising space which they purchase from Tele-Direct for resale to advertisers. They assume no risks with respect to advertising space. Rather, when the agent's customer decides to purchase Yellow Pages advertising, the agent submits an order to Tele-Direct together with all other necessary information and Tele-Direct processes the order. The fact that Tele-Direct contracts with and bills the agents for the space, and treats the agents as the "buyer" in that sense, is not determinative of the relationship between the agent and the advertiser. We think that the fact that the agent does not have an inventory of space for resale is more consistent with the agent acting as an agent for the advertiser for the acquisition of space from Tele-Direct.²⁰⁶ On this view of the evidence, the purchaser is not purchasing a bundle of space and services from the agent.

²⁰⁶ Agents are agents for or "represent" advertisers in the sense that they place advertising on the advertisers' behalf but, as indicated earlier, agents have an independent interest and existence apart from advertisers in other aspects of service provision.

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Second, the evidence does not indicate that advertisers wish to purchase advertising space from an agent as opposed to Tele-Direct. We think, all other things being equal, they are probably indifferent. However, there was evidence that they would prefer to pay Tele-Direct for space through monthly billing on their telephone bill rather than purchasing the space through agents on an issue billing basis. It is Tele-Direct that requires the latter arrangement, not the customer who demands it. This is not evidence that advertisers demand Yellow Pages space from agents as part of a service and space bundle. Nor have we been presented with evidence suggesting that efficiency would be adversely affected if Tele-Direct was to contract with and bill advertisers directly for space.

Finally, a purpose of the *Competition Act* is to encourage competition in order to provide consumers with competitive prices and product choice. There is evidence of demand for services from agents as opposed to Tele-Direct and efficiency considerations at the six-market level and above do not preclude facilitating such choice. For these reasons we have rejected this alternative interpretation of the evidence and have accepted that advertising space and advertising services constitute separate products.

E. TYING CONDITION

Having determined that there are separate products over at least part of the spectrum of Yellow Pages advertisers, we must now determine if those advertisers falling within that range were somehow "forced" to buy the products together rather than from separate sources. Since we

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have not found separate products below six markets, any references to the "local" market in this section refer only to that portion of the market from the current "national" definition down to six markets. In that range, where we have found separate products, we must establish that the two products were "tied" together as set out in subsection 77(1).

Paragraph 77(1)(a) provides one definition of tied selling. In essence, it is described as a practice whereby a supplier, as a "condition of" supplying the tying product to a customer, requires that customer to acquire another product from the supplier. Paragraph 77(1)(b) provides an alternative definition, the operative portion of which is that tied selling is a practice whereby a supplier "induces" a customer to meet the condition of acquiring another product from the supplier by offering to supply the tying product on more favourable terms and conditions if the customer agrees to acquire the second product.

The Director pleaded both the "requirement" or "condition" and the "inducement" in the application. The Director submits that, on non-commissionable accounts, the respondents require the customer to acquire their advertising services as a condition of supplying the space at a bundled price "and/or" the respondents induce customers to acquire their services by offering to supply space at no additional cost for the additional value if the customer also acquires their services.

It is undisputed that Tele-Direct does not segregate the charges for space and services in the non-commissionable market segment and that those "local" customers who get their services

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elsewhere than from Tele-Direct (for example, by using a consultant) or do not need any or some of the services, do not pay less or get a discount off the total price of their advertising. The Director submits that the effect of this is that "local" customers must buy space and services together from Tele-Direct; it is only economically viable to purchase services separately from an independent provider in the commissionable market. To do so in the non-commissionable market would require the customer to pay twice for services, once to Tele-Direct as part of the bundled price and once to the independent service provider that would actually provide the services. The Director argues that the effect of this is that it is either a "requirement" that both space and services be acquired from Tele-Direct or, perhaps the better fit on the facts, a compelling "inducement" to do so.

The Director points to evidence of the advertisers that recognize that if they use an independent service provider when commission is not available they will, in effect, be paying twice for services and this is why they stay with Tele-Direct despite dissatisfaction with the quality of service. Further, the Director emphasizes that Tele-Direct itself knew the value of this economic inducement and used claims that its services were "free" or included in the cost of the space to convince customers to choose its services.

The respondents advance a number of arguments relevant to the question of whether space and services are indeed tied together on the facts of this case. They argue that there is no "condition" involved because there is no contractual obligation to purchase services from Tele-Direct as local customers are free to acquire services from a CMR; however, Tele-Direct will not

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pay a commission on the account. They rely on the case of *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*²⁰⁷ for the proposition that it is not an antitrust violation to sell components as a package where the same items can be purchased separately but at greater cost. They argue that there are no *more favourable* terms and conditions offered to customers that take Tele-Direct's services over those that do not because there is only one set of terms and conditions in the local market -- the bundle.

We see no reason to conclude that the references in the section to "conditions" or even "terms and conditions" require that these be embodied in an explicit contractual document. As we understand this requirement, it is to determine that customers are effectively forced or coerced to take the two products, which have been determined to be separate products, from the supplier of the tying product rather than acquiring only the tying product from that source and getting the tied product from someone else. This obviously can occur where there is an explicit contractual requirement to that effect. It may, however, also be equally present where there is a discount or other advantage that constitutes an inducement to acquire the two from the same source. The "conditions" or coercion referred to in the section mean more than contractual terms; they may be economic conditions which have the effect of precluding choice of supplier. Whether customers actually do have an effective choice or not is a question of fact to be determined on the evidence before us, not of the legal nature of the purchase arrangement.

²⁰⁷ 1993-1 Trade Cas. (CCH) ¶ 70,266 (S.D.N.Y. 1993).

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The *Ortho* case is of no assistance to the respondents. The case involved an application for a preliminary injunction by Ortho to prevent the implementation of a contract between the Council of Community Blood Centers and Abbott for a number of blood tests. Ortho alleged both monopoly leveraging and tying based on the theory that Abbott's pricing of various "packages" of blood tests forced any rational buyer to purchase all five tests from Abbott rather than buying one or more tests from competing suppliers like Ortho. The preliminary injunction was denied on the basis that Ortho had shown no irreparable harm.

The passages quoted to us by the respondents were simply the Court's summary of Abbott's arguments and authorities on the monopoly leveraging point.²⁰⁸ The Court stated that Abbott's arguments gave it "pause" but all that it concluded in the end was that Ortho had shown that there were sufficiently serious questions on the merits to warrant litigation. On the tying claim, the Court, in fact, noted:

There is some case law to support the position that a tie does not have to be explicit but can instead be inferred from the pricing structure of two products and the market power which the party has. . . .

Absent an explicit condition in the contract, there is a question of fact for the fact-finder regarding the existence of the tie, and we are unable on this state of the record to determine if plaintiff is likely to prevail on the merits of the tying claims. What is evident however is that there are sufficiently serious questions going to the merits of the tying claim to make them a fair ground for litigation.²⁰⁹

²⁰⁸ *Ibid* at 70,333.

²⁰⁹ *Ibid.* at 70,334.

Therefore, the relevant question for us is whether, on the facts before us, the customers of Tele-Direct were "forced" to acquire services from it or did they have the option of acquiring space alone from Tele-Direct. We conclude that the evidence of the advertiser witnesses and Tele-Direct's own behaviour amply support the position of the Director that the lack of commission in the "local" market operated as a powerful inducement to acquire both space and services from Tele-Direct.

F. SUBSTANTIAL LESSENING OF COMPETITION

Has the extent of the exclusion resulting from Tele-Direct's limitation of commission to "national accounts" as defined in the 1993 rule resulted in, or is it likely to result in, a substantial lessening of competition? It is first necessary to establish the relevant comparator that should be employed in evaluating the magnitude of the lessening involved. There is no purpose in comparing the six to eight-market accounts with all other accounts that are currently bundled and that we have decided may remain that way because demand characteristics and likely efficiency comparisons dictate a single product. The most relevant comparator is the size of the existing commissionable market under the 1993 definition because we are considering expanding that market. Eight-market accounts are currently commissionable but this could be discontinued at any moment without an order of the Tribunal so we include eight-market accounts as part of the tied portion of the market to evaluate substantiality. Further, grandfathering currently prevents accounts from "growing into" eight-market status.

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In a word, it is clear that six to eight-market accounts constitute an appreciable volume of business that, without the tying practice, would be available for agents to service. The largest constituent is currently grandfathered eight-market accounts. In addition, there are the six and seven-market accounts now serviced exclusively by Tele-Direct. Based on the Tele-Direct documentation prepared in anticipation of the 1993 rule change and the evidence of Mr. Mitchell, both of which are far from being completely clear, we find that a fair approximation of the value of accounts which are now commissionable under the 1993 definition (thus, excluding grandfathered accounts and including "national" accounts serviced both by Tele-Direct and agents) is about \$30 million. Our best estimate of the accounts which have been found to be tied, namely six, seven and eight-market accounts, and would be added to the commissionable market is about \$19 million. Thus, the combined total of the accounts found to be tied adds up to well in excess of 50 percent of the current commissionable market. Both in relative and absolute dollar terms, the amount of revenue affected by the tie is undoubtedly sufficient to conclude that there is a substantial lessening of competition.

A final issue arises with respect to substantial lessening. The respondents advance in their written argument a "technical" argument based on the use of definite and indefinite articles in subsection 77(2). They submit that the substantial lessening of competition must be assessed in the market for the tying product, here the market for the supply of advertising space: has the tying of space and services impeded entry into or expansion of a firm or had any other exclusionary effect in the space market? This argument was not referred to orally.

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While the definite and indefinite articles can be read in different ways, the section should be read in a way that makes sense. Since tying generally, and certainly in this case, involves "leveraging" from the tying product market to the tied product market, it is only sensible to assess the effects of the practice, or the substantial lessening of competition, in the target or tied product market.

G. REMEDY

Section 77 of the Act provides that upon a finding by the Tribunal of tied selling by the supplier of the tying product (Tele-Direct), the Tribunal may make an order "prohibiting [the supplier] from continuing to engage in . . . tied selling. . . ."

Prohibiting Tele-Direct from continuing to engage in tied selling means that the tying product, advertising space, and the tied product, advertising services for six, seven and eight-market accounts, must be unbundled by Tele-Direct. The "unbundling" may take the form of separate prices: Tele-Direct could quote separate rates for space and services. It may also take the form of an expanded definition of commissionable accounts to allow six, seven and eight-market customers to use the services of an agent, who would earn commission at an appropriate rate.

While we do not rule out the possibility of advertisers acquiring space from Tele-Direct (at the separately quoted space price) and then paying a separate fee for services to Tele-Direct

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or to an agent, we think this scenario is unlikely. There are practical implications arising from Tele-Direct's predominance in the publishing market and the accreditation of agents that suggest that the marketplace in an "unbundled" environment after our order will work largely the same as it does today except that the commissionable market will be expanded to cover six, seven and eight-market accounts. Advertisers that wish to utilize Tele-Direct's services would continue to buy space and services from Tele-Direct at one price.

Because of the specialized nature of the Yellow Pages industry, the respondents regard accreditation as important and the Director and his witnesses, for example, Ms. McIlroy and Professor Slade, support it. Thus, Tele-Direct would be justified in requiring that services, including the placement of orders, be provided by accredited service providers only. Unbundling does not require that advertisers be given the opportunity to interface directly with Tele-Direct to place their orders, if they do not wish to utilize Tele-Direct's services. Advertisers would either deal with Tele-Direct for space and services or with an agent for services and, through an agent, with Tele-Direct for space. This contributes to our view that in all likelihood, the structural arrangement that exists today would likely continue, changed only to permit agents to compete with Tele-Direct to provide services to six, seven and eight-market accounts.

The prohibition on tying, however, does not carry with it a requirement that Tele-Direct pay a specified commission to agents. It will be up to Tele-Direct to pay such commission as it chooses. Commission rates could be identical for all accounts or might be variable. However, the prohibition on tying implies that the price charged by Tele-Direct for its space and services

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together cannot, in relation to the price at which it offers space to customers using agents (i.e., its price for both space and services together less the commission to the agent) be an inducement to customers' using Tele-Direct's services rather than agents, thus continuing the tie. In other words, the price for space to customers of agents cannot be artificially inflated (or the commission paid to agents artificially reduced) so that space is not realistically available separately. Tele-Direct cannot make it economically non-viable for customers to purchase space from Tele-Direct and use an agent's services because in those circumstances the space effectively costs more than if the customer were to use Tele-Direct's services.

The intervenor agents (and the Director in the alternative) submit that the Tribunal should order Tele-Direct to pay a minimum 15 percent commission to agents. Although this proposition was advanced in the context of the Tribunal finding a tie across the entire market for Yellow Pages advertising in Tele-Direct's directories, in the context of our finding that there is only tying down to the six-market level, the minimum 15 percent commission would apply in respect of six, seven or eight-market customers serviced by agents. We have no difficulty with Tele-Direct voluntarily complying with our order prohibiting tying by paying a minimum 15 percent commission. A 15 percent commission rate has historical precedent and is well accepted in the advertising industry. It appears to be a workable "average" that would be simpler to administer than variable commission rates for each of the six, seven and eight-market accounts, should Tele-Direct choose to use it.

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However, the setting of a commission rate by the Tribunal is not, in our opinion, envisioned in the powers given to it under section 77 of the Act regarding tying or in the general jurisdiction given to the Tribunal under section 8 of the *Competition Tribunal Act*.²¹⁰ The Tribunal is not a rate-setting body. The implication of rate-setting is an ongoing regulatory oversight which is the antithesis of the objectives of competition policy. To grant this remedy, the Tribunal would be required to hold itself open to revision to the 15 percent rate. We could not saddle Tele-Direct or the agents with a rate cast in stone forever and the alternative of ongoing rate regulation is, in our view, simply not part of the mandate of the Tribunal. It is true that the Tribunal issued the Consent Order providing for a 25 percent commission on national accounts, but that order was for a limited time and was on consent. It provides no justification for a gearing up of a general regulatory process implied by setting a rate for an indefinite period in this contested proceeding.

The Tribunal's order will therefore provide that Tele-Direct is prohibited from tying its advertising services to advertising space for six, seven and eight-market accounts. Should Tele-Direct choose to comply with the order by a commission arrangement with accredited agents at a minimum rate of 15 percent, the Tribunal would find such an arrangement acceptable compliance. Otherwise, Tele-Direct can price space and services separately or implement a commission arrangement for six, seven and eight-market accounts at an appropriate level or levels. The price Tele-Direct charges for its bundle of space and services, if it continues to offer them as a package, in relation to the price that it charges for space separately cannot be such that

²¹⁰ R.S.C. 1985 (2d Supp.), c. 19.

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it continues to tie space to services by way of an inducement offered to customers that take Tele-Direct's services. The order will specify that the parties may apply to the Tribunal for interpretation of the order or directions if they consider it necessary to ensure compliance.

IX. ABUSE OF DOMINANT POSITION

A. INTRODUCTION

For ease of reference, we set out again subsection 79 (1) of the Act, which deals with abuse of dominant position:

Where, on application by the Director, 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,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Unlike previous abuse of dominance applications that have come before the Tribunal, where only one market was at issue, the Director here is putting forward two abuse of dominance cases, one involving the alleged market for the supply of advertising space and the second, the alleged market for the supply of advertising services.

One case is that the respondents have market power in the market for the supply of telephone directory advertising space, or publishing, and have engaged in a practice of anti-

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competitive acts which has resulted in a substantial lessening of competition in that market. This case involves the responses of the respondents to the instances of new entry by competing broadly-scoped publishers in local markets, most significantly the entry of White in the Niagara region and the entry of DSP in Sault Ste. Marie.

The second case is that the respondents have market power in the market for the supply of telephone directory advertising services or, in the alternative, that they are leveraging their market power in the space market into the services market, and have engaged in a practice of anti-competitive acts which have resulted in a substantial lessening of competition in the services market. Among the anti-competitive acts alleged to form a practice affecting this market are both acts directed at agents and acts directed at consultants. For example, one of the alleged anti-competitive acts is the bundling of space and services (restricted commissionability rules for agents) which forms the basis of the tying portion of the Director's application. Another is the alleged refusal by Tele-Direct to deal with consultants.

B. APPROACH TO SECTION 79 ANALYSIS

In dealing with the particular allegations in this case, the purpose of section 79 must be kept in mind. Neither party disputed that 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

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firms on merit and not through abusing their market power.²¹¹ Such abuse includes, as pointed out by the Director, entrenchment and extension of market power.²¹² It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even "tough" competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task.²¹³

The Tribunal established in *NutraSweet* that the list of anti-competitive acts set out in section 78 is not exhaustive. The Tribunal held that the common feature of the acts included in section 78 is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."²¹⁴ The Tribunal's approach to assessing whether acts are anti-competitive was set out most recently in *D & B*:

. . . in evaluating whether allegedly anti-competitive acts fall within section 78, the Tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market". The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition. The decision in *Laidlaw* makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of a respondent. The respondent will be deemed to intend the effects of its actions.²¹⁵ (references omitted)

²¹¹ Consumer and Corporate Affairs Canada, *Competition Law Amendments: A Guide* (Supply and Services Canada, December 1985).

²¹² *NutraSweet*, *supra* note 4 at 47.

²¹³ *Laidlaw*, *supra* note 33 at 333.

²¹⁴ *NutraSweet*, *supra* note 4 at 34.

²¹⁵ *D & B*, *supra* note 31 at 257.

The Tribunal must determine the "purpose" of the act that is alleged to be anti-competitive. "Purpose" is used in this context in a broader sense than merely subjective intent on the part of the respondent. As counsel for the Director pointed out, it might be more apt to speak of the overall character of the act in question.

What the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, "exclusionary, predatory or disciplinary". Relevant factors include evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence. A "business justification" must be a "credible efficiency or pro-competitive" business justification for the act in issue.²¹⁶ Further, the business justification must be weighed "in light of any anti-competitive effects to establish the overriding purpose"²¹⁷ of the challenged act:

. . . The mere proof of *some* legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.²¹⁸

In their argument, the respondents advance several propositions regarding the nature of an anti-competitive act that they submit the Tribunal must determine as a matter of law in this case. One of these propositions is particularly relevant to the case relating to the publishing

²¹⁶ *Ibid.* at 261.

²¹⁷ *Ibid.* at 262.

²¹⁸ *Ibid.* at 265.

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market. They state that certain acts constitute "competition on the merits" and cannot ever be anti-competitive acts. In another formulation, they state that objectively competitive conduct cannot constitute an anti-competitive act. They would define "objectively competitive" conduct as conduct which a non-dominant firm would have undertaken in similar circumstances.²¹⁹ Applying this argument to the specific case of the allegations involving the publishing market, the respondents say that the Director cannot allege, for example, that "zero price increases" are an anti-competitive act because competitive firms sometimes use zero price increases or even price decreases to compete.

We do not take issue with the proposition that section 79 is not intended to prevent dominant firms from competing on the merits. We do, however, doubt that it is possible to define, in the abstract, a list of acts that are "objectively competitive" and that could never, therefore, engage section 79. Competition on price is surely one of the hallmarks of a competitive market. Yet even the act of "price cutting" cannot be given absolute immunity from review under section 79 because of the possibility of predation. In our view, a case-by-case, factual analysis will always be necessary to determine if, in the particular circumstances, an act is anti-competitive. All the relevant factors must be weighed in deciding whether a particular act is, in the circumstances, competition on the merits or an anti-competitive act. That question cannot be answered as a matter of law in a vacuum.

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They rely mainly on *Clear Communications Ltd. v. Telecom Corp. of New Zealand* (1994), 174 N.R. 266 (P.C.).

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C. MARKET FOR ADVERTISING SPACE - PUBLISHING

(1) Facts

The independent publishers DSP and White have already been discussed at various places in these reasons, largely in chapter "VII. Control: Market Power". We summarize here and add some further relevant facts.

Since 1993, DSP has produced a white pages and classified directory covering Sault Ste. Marie, Elliot Lake and Wawa in northwestern Ontario. Since January 1994, it has been a division of Southam Inc. but is still operated largely independently from the Southam newspapers in the area in question. Tele-Direct publishes three separate directories for the areas covered by the DSP directory.

The DSP Canadian directory is combined with a corresponding directory for the Sault Ste. Marie, Michigan area. The American portion is published by Noverr Publishing Inc. ("Noverr") which publishes several directories in the state of Michigan.

White publishes competing directories (Niagara Falls, St. Catharines and Fort Erie) to Tele-Direct's in the Niagara region in Canada. White also entered Canada in 1993. White is a wholly-owned subsidiary of the American company White Directory Publishers, Inc. which is a private company controlled by the Lewis family. The American company began operations in

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1968 with a classified directory (yellow pages only) in the Buffalo area. A white pages directory was later added and then in the second half of the 1980s and early 1990s additional directories containing both classified and white pages were started in other areas of New York state and Pennsylvania. White's entry into Canada was followed by further expansion in the United States in 1994 and 1995, into Florida and North Carolina.

Both DSP and White first published "prototype" directories in Canada, DSP in January 1993 and White in November and December 1993.²²⁰ DSP published its first revenue directory in November 1993. White began its canvass for its first revenue directory in late 1993 and continued in 1994. Its first revenue directory was published in late 1994.

In order to produce their directories, White and DSP had to generate subscriber listings for their white and yellow pages. As discussed earlier, despite the 1992 ruling of the CRTC, at the time of their entry DSP and White did not have commercially viable direct access to subscriber listings. They had to use the most recent Tele-Direct directories, re-key the data, verify and update each listing.

Included in the directories of White and DSP were features which were not present in the existing directories of Tele-Direct in either region, including audiotext, community pages, larger

²²⁰ Advertising in a prototype directory is provided free to businesses. A prototype serves to lend credibility to a new publisher's claim that it will, in fact, produce a directory and affords the publisher an opportunity to prove to advertisers the value of advertising in its directory.

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size print, three-column format, postal codes and additional colour plus a free smaller size copy in addition to the regular size directory (a "mini").²²¹

Less detail was provided on the other two competitive markets referred to by the Director. In October 1994, a competing directory was published in Joliette, Quebec by Les Pages Soleil, a joint venture involving the company which publishes the Locator directories in Ontario. Les Pages Soleil also feature enhancements like community pages, postal codes and only three columns per page.

In Newfoundland, a company called Unifone Files Inc. ("Unifone") intended to publish a province-wide directory called "The Big Phone Book", apparently some time in 1993 or 1994. Tele-Direct (Services) Inc. publishes seven directories in Newfoundland for Newfoundland Tel (St. John's, eastern Newfoundland (four), western Newfoundland and central Newfoundland). In addition to its broader scope, the Unifone directory was to feature larger print, community pages and a "mini" directory. As of February 1994, however, Unifone was no longer in existence and it never did publish a directory.

The two entrants for which we had evidence on this point (White and DSP) priced advertising in their directories 30 to 40 percent below Tele-Direct's rates.

²²¹ DSP also included a "reverse" directory -- listings by phone number first.

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Tele-Direct responded to these various entrants using a number of initiatives, including price freezes, advertiser incentive programs, advertising and promotional expenditures, and directory enhancements. Tele-Direct was also involved in litigation or threatened litigation against the entrants in Sault Ste. Marie and Niagara. Further details on these responses follow.

Tele-Direct adopted a zero percent price increase or price freeze in Sault Ste. Marie in 1993. Except for 1994, when there was a general price freeze across all of Tele-Direct's territory, prices were increased annually in the vast majority of Tele-Direct's directories outside of the competitive markets.²²² In 1995, there were zero price increases in Sault Ste. Marie, Joliette and the Niagara region. The information on the record regarding 1996 prices is that all markets were subject to a price increase, including the competitive markets.

Tele-Direct has offered advertiser incentive programs of various kinds throughout its territory at different times. The critical distinction between the programs offered in the competitive markets and those offered in other markets is that in the competitive markets the incentives were available to advertisers who *renewed or increased* their advertising whereas in the other markets only those advertisers who *increased* their level of spending were eligible.

The advertiser incentive program in Sault Ste. Marie was first offered in 1993. While originally intended as a one-year program it was extended to three years, ending in 1995.²²³ In

²²² The exceptions for Tele-Direct's directories were the neighbourhood directories and areas subject to rescoping or splitting of directories. At the request of other telcos, like Newfoundland Tel and Northern Tel, prices were also frozen in those directories in 1995.

²²³ In the first year (1993), all existing advertisers renewing or purchasing advertising received the next size up or colour, if applicable, at no extra charge. In 1994, all advertisers who participated in the program in 1993 were offered the next size up free,

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Niagara, a program similar to the Sault Ste. Marie advertiser incentive program was offered in 1994 and 1995. As of the hearing, no decision had been taken about proceeding to offer the program in Niagara for a third year. In Joliette, a program was offered in 1995 which provided that advertisers renewing or purchasing advertising would receive the next largest size advertisement or colour if applicable. In Newfoundland, the same program was offered in four directories in 1994. Mr. Beauséjour, Tele-Direct's Vice-president of Finance, confirmed that the program was instituted in response to the presence of Unifone.²²⁴

In each competitive market, Tele-Direct added a number of features to its directories that were introduced first by the entrant. Most of these features tend to be fairly standard in many American markets. For example, the enhancements used by White in its Canadian prototype are almost all standard features for it in its American markets. The features added by Tele-Direct in response are not generally used by it in its directories in other markets.

We have limited information about the Joliette and Newfoundland situations in this respect. Tele-Direct did add a community pages section to its Joliette directory. Mr. Renwicke thought that postal codes had also been added. A memorandum dated October 1993 records a

free colour or a 15 percent rebate if they renewed or increased their advertising. Those who had not participated in 1993 and new advertisers were given a 15 percent rebate. In the third and final year, the program became even more complex with different choices available to 1994 participants who were renewing depending on which option they had chosen (rebate/free size up or colour) in 1994. Non-advertisers and non-participants were again offered a 15 percent rebate as were 1994 participants who were increasing their advertising.

²²⁴ In 1995, when Unifone was no longer present, advertisers were offered a 15 percent rebate if they increased their advertising but participants in the 1994 program could receive the rebate if they renewed their upsized or colour item.

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recommendation by Tele-Direct (Services) Inc. that the Newfoundland directories contain "some enhancements starting with the central Newfoundland 1994 directory."²²⁵

In Sault Ste. Marie, Tele-Direct added enhancements to its directories similar to those offered by DSP, including four-colour format, postal codes, community pages and its own audiotext system (Talking Yellow Pages or "TYP"). Likewise, in Niagara Tele-Direct reacted to the entrance of White by adding enhancements similar to those of White to the Tele-Direct directories in that area. Tele-Direct did not introduce all of the enhancements included by the entrants. For example, it did not adopt larger type or distribute "mini" directories.

Some further detail is required about the audiotext system or TYP in order to understand the allegations advanced by the Director in this respect. Audiotext is an electronic technology which allows consumers with Touch-Tone phones to obtain access to audio messages which are stored on a computer. The directory publisher provides in its directory codes which can be used by consumers to gain access to the messages on topics of interest to the consumer. The provision of an audiotext service is comprised of both hardware components, the computer and satellite dish, for example, and the information lines which are fed to the satellite dish from a supplier. Depending on the information being offered, the lines are updated at regular intervals during the day, on a daily basis or on a monthly basis.

²²⁵ Confidential exhibit CJ-87 (black vol. 14), tab 104 at 134481.

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Tele-Direct introduced its first TYP in Kitchener in 1988 followed by Toronto and Quebec City that same year. Unlike the audiotext involving the provision of general information on various topics to consumers, the Kitchener and Quebec City services involved advertiser-specific information. The code was provided in the advertisement; the interested consumer could call for more detailed information regarding that supplier, for example, prices. These services were later abandoned for lack of advertiser interest; the Toronto service, which is of the general information type, is still offered. Since it first offered TYP, Tele-Direct's supplier of the information lines required has been a company called Perception Electronic Publishing ("Perception").²²⁶ As of November 1993, Perception is owned by Brite Voice Systems.

When it entered the Sault Ste. Marie market with its prototype directory in January 1993, DSP provided an audiotext service. This was the first time such a service was offered in Sault Ste. Marie. The information supplier for DSP was Perception. During the first two months that it was offered, the DSP audiotext service was heavily used.

Tele-Direct introduced its TYP in Sault Ste. Marie in April 1993 in advance of its June 1993 directory, some three months after DSP published its prototype directory, also using Perception for its information feed. Tele-Direct used flyers to distribute the relevant codes to consumers. It was roughly at the same time as the Tele-Direct TYP were introduced that DSP began to experience deterioration in its audiotext service because the information was no longer being updated in a timely manner. DSP was in constant contact with Perception in order to get

²²⁶ Formerly called BDR Audio Network.

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the lines updated within an acceptable time frame, but with no success. The quality of DSP information feed from Perception remained poor until November 1993, which was essentially the same time that Perception was acquired by Brite Voice Systems.

Tele-Direct also engaged in large advertising campaigns in Sault Ste. Marie and Niagara. No detailed information was provided in this respect regarding the other two competitive markets. Compared with pre-entry levels virtually all of the advertising and promotional expenditures were new. In Sault Ste. Marie, Tele-Direct spent only about \$50,000 on advertising in 1992 as compared to \$215,000 in 1993. By 1994, expenditures had dropped back to \$22,000. In Niagara, Tele-Direct spent \$43,000 in 1992, \$71,000 in 1993 and \$28,000 in 1994.²²⁷ In 1993, advertising expenditures in Sault Ste. Marie constituted approximately 11 percent of published revenues for that city; in 1993 in the Niagara area, advertising expenses amounted to less than one percent of published revenues.

Another circumstance relevant to the Director's allegations respecting publishers is that Tele-Direct initiated a suit against DSP in May 1993 for infringing the "walking fingers" trademark and Tele-Direct's copyright in the advertisements in the Tele-Direct directory with its prototype directory. In the spring of 1995, Tele-Direct notified DSP that it would also be challenging the 1994 and 1995 DSP directories. At the time of the hearing, the lawsuit had reached the stage of discoveries. A representative for Tele-Direct had been discovered and the discovery of the representative for DSP was scheduled for November 1995.

²²⁷ Exhibit R-152.

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Although no suit has been launched in relation to White, Tele-Direct made it abundantly clear to White early in 1993 that it would vigorously defend its trade-marks and its interpretation of its copyright interests arising from the advertisements in the Tele-Direct directories. In particular, Tele-Direct informed White that it could not make use of an advertiser's copy, layout or graphics as they existed in the current Tele-Direct directory in creating the first White directory.

(2) Control of a Class or Species of Business in Canada

The Tribunal has already found that the supply of telephone directory advertising constitutes a relevant product market and that the relevant geographic markets are local in nature. We have also found that Tele-Direct possesses market power in those markets. We are satisfied, therefore, that Tele-Direct has market power in the market for the supply of advertising space or the telephone directory publishing market and therefore controls the business in the relevant geographic markets.

(3) Practice of Anti-competitive Acts

(a) Allegations - Pleadings

The Director's application, as amended, says at paragraph 65 that the following acts together constitute a practice of anti-competitive acts affecting the market for advertising space, or the publishing market, which leads to a substantial lessening of competition in that market:

...

(g) targeting price reductions and other discounts to those markets in which entry by competing publishers has occurred or is occurring; and

(h) causing, directly or indirectly, advertising agencies to refuse to place advertising in telephone directories published by competing publishers or otherwise discriminating against or causing independent advertising agencies to discriminate against competing publishers; and

(i) making disparaging statements in regard to new market entrants.

In argument, the Director did not refer to the act set out in (i). Under the heading in the written argument, "Otherwise Discriminating between Publishers", the Director gathers evidence relating to the respondents' policy of not allowing the directories of competing publishers to count towards the 20 directory requirement of Tele-Direct's national account definition. Under the heading in the written argument, "Targeting/Raising Rivals' Costs", the Director refers to various actions by the respondents in response to entry by competing publishers in the local markets of Joliette (Quebec), Newfoundland, Niagara and Sault Ste. Marie which are alleged to constitute anti-competitive acts because of their targeted nature and intent and the degree or intensity of the response. The particular responses listed are zero price increases, incentive programs, advertising and promotional spending, directory enhancements, interfering with the DSP audiotext feed and litigation or threats of litigation.

The respondents say that the allegations involving directory enhancements, promotional spending and litigation or threats of litigation are not encompassed by the pleadings and cannot be relied on by the Director.

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It is not in dispute that the evidence and the argument put forward by the Director on this issue must be supported by the pleadings, either by the specific words in the application or by reasonable inference therefrom. It is trite to say that the pleadings are intended to define the issues in dispute between the parties, to give fair notice to each party as to the case that it will have to meet and to assist the decision maker in considering and deciding the allegations that have been made. Where, as here, an argument about the scope of the application is only raised at the stage of final argument, we agree with the Director that regard may be had to interlocutory proceedings, discovery and the conduct of the hearing itself to determine what the *parties* considered were the issues raised by those pleadings. We need not restrict ourselves to the pleadings in a vacuum.

(i) Enhancements

Directory enhancements were not explicitly mentioned in the application. However, in its request for leave to intervene, White specified, in paragraph 9 of the request, those matters in issue which affected it. Item (e) reads:

offering directory enhancements (community pages, an audio text system and postal codes) targeted to areas where competition or the threat of competition exists. . . .

As stated in the reasons of the Tribunal for granting leave to intervene, the respondents did not oppose the intervention. The respondents only objected to White being given leave to make representations with respect to certain issues which, the respondents argued, were outside

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the scope of the Director's application. The respondents submitted that the representations of an intervenor must be relevant to the proceedings and that relevance is defined by the parties' pleadings. The Tribunal agreed. The issues in White's intervention challenged by the respondents as being outside the scope of the application did not include item (e) "enhancements" but rather focused on six other items. The Tribunal accepted that four of the disputed six items were not supported by the application and excluded them from the purview of White's intervention.

If the respondents were genuinely of the view that the question of directory enhancements was outside the scope of the application as defined by the pleadings, then they would have challenged that part of White's intervention request. The question of what was and what was not supported by the pleadings regarding the alleged anti-competitive acts in relation to independent publishers was squarely in issue at the intervention hearing. The clear implication of the respondents' failure to challenge item (e) is that they considered that enhancements were within the pleadings.

Nothing occurred after the intervention hearing that would have led to any other conclusion. The Director requested the production of documents and conducted discovery on the question of enhancements. Eventually the relevant documents were produced, without objection.²²⁸ The Director submits that Tele-Direct has taken this "about face" on the question of enhancements in order to provide an after-the-fact explanation for its belated production of a

²²⁸ For a more complete discussion of this issue, see *infra* in this section on abuse of dominance in publishing under "(b) Alleged Anti-competitive Acts", "(ii) Targeting/Raising Rivals' Costs".

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boxful of relevant documents relating to its responses in competitive markets. The Director called evidence at the hearing on enhancements, without objection. The respondents themselves led evidence on the question of enhancements. Tele-Direct cannot now change a position that it took on an interlocutory proceeding and maintained throughout discovery, the hearing and up until the commencement of its final argument. The entire case has been conducted on the basis that directory enhancements are fairly in issue. Enhancements are properly before the Tribunal.

(ii) Advertising and Promotional Expenditures

Unlike directory enhancements, advertising and promotional expenditures were not specifically addressed at White's intervention hearing. If we looked only at the words of the pleadings, it might be arguable whether those words would support the allegation. Again, however, we have a course of conduct that sheds considerable light on whether the parties themselves thought promotional expenditures were at issue as part of the allegation of anti-competitive acts. It is clear that they did. Oral and documentary discovery was conducted by the Director on this issue. Counsel for the Director referred to it in his opening address. The Director called evidence in chief on the issue and the respondents called responding evidence. Advertising and promotional expenditures are properly before the Tribunal.

(iii) Litigation and Threatened Litigation

Counsel for the respondents pointed out that the Director was not seeking any remedy specifically relating to litigation. Counsel for the Director did not address the respondents'

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argument that litigation or threatened litigation falls outside the pleadings. In argument on the merits, however, the Director took the position that litigation or threats of litigation contribute to the anti-competitive act of "targeting" or "raising rivals' costs".

The words of the pleadings do not obviously incorporate such a concept. The original application, at paragraph 65(h), contained a specific allegation of an anti-competitive act of "threatening or taking legal action to restrict competing suppliers of advertising space from gaining access to, or from utilizing, subscriber listing information". This allegation was later withdrawn. However, as with promotional expenditures, litigation was dealt with in the evidence and argument. In view of the specific withdrawal by the Director of the reference in the pleadings to litigation or threatened litigation, the respondents' position is somewhat stronger on this point than on the others. But, it is not necessary to decide the issue on procedural grounds. As will become apparent, we are not satisfied on the merits of the argument that litigation or threatened litigation constitute anti-competitive conduct in this case.

(b) Alleged Anti-competitive Acts

(i) Causing Agencies to Refuse to Place Advertising with Independents

The independent publishers' directories do not count towards the 20-directory requirement that forms part of the 1993 definition of a Tele-Direct commissionable account. The Director argues that the effect of the Tele-Direct policy in this regard is that CMRs do not

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recommend independent directories to advertisers when they would do so if those directories counted towards qualification as a commissionable account. Thus, it is submitted, this excludes independents from revenues that they would otherwise obtain.

The Director relies on the evidence of Mr. Lewis of White comparing the situation in Canada with respect to advertising placed in his directories by CMRs to that in the United States. In distinction to Tele-Direct's policy, in the United States publishers include the directory of any other YPPA member in determining whether an account qualifies for commission. White is a YPPA member and therefore its directories count towards the minimum directory requirement in the United States. Mr. Lewis testified that in that country eight percent of White's advertising revenues are placed by CMRs while in Canada less than one-half of one percent comes from CMRs.

The respondents respond that this testimony alone does not constitute proof of the requisite exclusionary effect. Because White has been operating in the United States for a lot longer, and is therefore more established than it is in Canada, they question the validity of the comparison being made. Further, they rely on the evidence of Stephanie Crammond of Media Nexus, a specialized Yellow Pages advertising agency, that if she had confidence in the distribution figures cited by the various independents, she would consider them. Likewise, Richard Clark of DAC stated that his position on independent directories was to "wait and see" if they were going to stay around and then base a decision on which directory had greater usage. He did point out that typically the telco directory has the greater usage and, therefore, if a

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competing directory is used, generally it is on a secondary basis, with the primary advertising dollars allocated to the telco directory.

On balance, we are not persuaded by the Director's argument. While we recognize that monetary incentives are bound to enter into an agency's recommendation to a client, the Director's argument implies that agencies are entirely driven by earning commission and will compromise the quality of the advice they give by omitting to recommend a good, independent directory merely because it would not help the account qualify for a Tele-Direct commission. The burden of the remainder of the Director's case, as it involves agencies, is that they are, among other things, independent suppliers of advice to advertisers and therefore provide a valuable alternative to Tele-Direct's captive salesforce. For the Director to suggest now that agencies would not provide good advice seems to be somewhat inconsistent with that position. But apart from this, the independents, of course, pay their own commission on advertising placed in their directories.

There are factors at play other than Tele-Direct's criteria in agents' decisions when recommending directories to their clients. As Mr. Clark's testimony indicates, an important reason why independent publishers in Canada may not receive a high volume of business from agencies is that, because Tele-Direct is the established publisher, it is rarely a choice *between* Tele-Direct's directory and the independent directory for a particular area. Rather, the agency will generally recommend the Tele-Direct directory as the primary directory for advertising

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because of widespread usage and then, if additional money is available, recommend the independent *also*.

In summary, we do not accept that Tele-Direct's policy regarding the 20-directory requirement discourages agency recommendations of independent directories.

One final observation in this area arises from the respondents' written argument at paragraph 590, that as a matter of law "[i]t cannot be an anti-competitive act for a dominant firm to decline to assist or give aid to a competitor." We agree with the general proposition that a firm is not, and should not be, required to "assist" its competitors. The respondents, however, add an additional element to the proposition when they submit that:

Each of the anti-competitive acts listed in section 78 require the dominant firm to *actively initiate* some action. . . . None of the listed acts are triggered simply by the dominant firm *not doing something or refusing to assist*. . . . (emphasis added)

While the respondents did not advance this argument in relation to the specific allegation we are dealing with here (or, in fact, in relation to any specific allegation), it certainly seems relevant to the question of whether Tele-Direct should be obliged to recognize advertising in independent directories as counting towards Tele-Direct's commissionability requirement of a minimum of 20 directories. As stated above, as a general proposition, competitors should not be required to assist one another. But, this general proposition may be shown to be inapplicable in a given section 79 case by the Director proving that the "act" of the respondent meets the elements of that section and is an anti-competitive act leading to a substantial lessening of competition.

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Then, any order of the Tribunal which may issue is, by definition, not an order to "assist" a competitor but rather, in the case of subsection 79(1), an order to cease and desist from anti-competitive conduct.

It is, therefore, not sufficient, in circumstances such as these, to argue the general proposition. Nothing can be determined by simply labelling the alleged anti-competitive "act" as "doing something" (active) or "not doing something" (passive). The anti-competitive effect of the conduct of the respondents, whether "active" or "passive", must be weighed against any business justification in order to conclude whether there has or has not been a substantial lessening of competition. That can only be done by reference to the evidence. On this point, Tele-Direct only argued the general proposition.

(ii) Targeting/Raising Rivals' Costs

Reaction of Tele-Direct

Before turning to the evidence it is necessary to consider what the Director means when he alleges that "targeting/raising rivals' costs" is an anti-competitive act. There is a growing body of literature dealing with "raising rivals' costs" ("RRC"). The theory was proposed as a similar but more credible route to market power than predatory pricing because it does not depend on short-term price cutting beyond what is profit-maximizing followed by later recoupment. With RRC, it is not necessary to cause the rivals to exit, no "deep pockets" are necessary and the

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additional profits are gained immediately.²²⁹ Typically, an RRC strategy involves increasing rivals' costs by raising the price of some scarce input which in turn results in the rival reducing its output.²³⁰ In other words, there is a relatively immediate output reduction in the market concerned. Only two elements of the act alleged by the Director seem to bear any resemblance to this conception of RRC -- the audiotext affair and litigation and threats of litigation. As we shall see, the remaining actions of Tele-Direct relating to pricing, incentives and advertising did not result in output reduction in the markets in question. The considerations involved in RRC can provide little assistance in evaluating the allegations relating to those reactions of Tele-Direct in competitive markets or the "targeting" aspect of this act.

The Director has not attempted to explain what is meant by targeting in any detail, perhaps regarding the term as largely self-explanatory. It is, however, far from being a household word in competition law. While we have no reason to discourage novel approaches to discerning potentially anti-competitive conduct that might fall within section 79, we do see considerable difficulty in applying the targeting concept. It is always difficult to distinguish between anti-competitive practices and normal competition. The conduct in question may be generally benign and it is only in certain contexts that it is anti-competitive. The difficulty is even more pronounced in this case, given the actions on the part of Tele-Direct that the Director would have the Tribunal, if not prohibit completely, certainly restrict.

²²⁹ T.G. Krattenmaker & S.C. Salop, "Competition and Cooperation in the Market for Exclusionary Rights" (1986) 76:2 Amer. Econ. Rev. 109.

²³⁰ D.T. Scheffman, "The Application of Raising Rivals' Costs Theory to Antitrust" (1992) 37 Antitrust Bulletin 187.

In argument counsel for the Director described the nature of targeting as follows:

The reason that acts of predation or near-predation can be anti-competitive is because the firm is dominant in a larger market. The danger is that, rather than bringing the public the benefit of competition in a limited area, what is happening is that in the long-term analysis the dominant firm is leveraging its market power from its broadly-dominated market into specific targeted areas where competition enters, with a view to either eliminate that competition entirely or, as in the situation here where the expressed intent fell a bit short of that, to ensure that the competition didn't move into any other markets and to raise their costs so that those companies would know that it was not going to be a profitable enterprise to continue their expansion.

What we are suggesting is that this is really a test of degree, that we have in at least one of the markets evidence which is very close to predation. What we have is such a tightly focused and overwhelming marshalling of the dominant resources of the company to these targeted areas that there is a need for a remedy.

...

... While one may formulate various tests that would have different requirements in terms of the super-normal targeted response, this is probably the clearest case imaginable in terms of the absolutely overwhelmingly aggressive nature of the response to these targeted markets.²³¹

Counsel clarified that "leveraging" in this context means the use of monopoly rents from other markets to subsidize near-predatory behaviour in the markets in question.²³²

One of the ordinary meanings of the word "target" is

anything that is fired at or made an objective of warlike operations . . .²³³

²³¹ Transcript at 64:13167-68, 13170 (16 February 1996).

²³² *Ibid.* at 13169.

²³³ *The Concise Oxford Dictionary*, 7th ed. (Oxford: Clarendon Press) at 1094.

In one obvious sense, therefore, "targeting" simply refers to focused or aimed rather than general responses. The facts show that Tele-Direct behaved differently in the competitive markets. If the Director is arguing that the actions of Tele-Direct constitute the anti-competitive act of targeting merely because its actions in markets in which broadly-scoped entry was occurring were different from those in markets where no such entry had occurred, we do not accept the argument. Targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not. One competes where there is competition. Similarly there may be gradations of reaction depending on the nature of the competitive threats.

The earlier discussion regarding market power established that, whereas the broadly-scoped directories published by entrants in the "targeted" markets were considered by Tele-Direct as competition for its own directories, the same was not true of other publishers who sought market niches defined by geography or other specific characteristics of their intended audience (e.g., ethnic, religious, easy to read directories). Furthermore, both White and DSP introduced features into their directories such as postal codes, information about cultural events, coupons, etc., that provide value to users that could affect whether the Tele-Direct directories would be retained by telephone subscribers in those markets if Tele-Direct did nothing.

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If "targeting" does not depend solely on differentiated responses, how is it to be distinguished from competition on the merits? We do not take the Director to be proposing that an incumbent, even one with a dominant market position, is precluded from responding to entry. Entry would obviously be *encouraged* if the incumbent accommodated the entrant. It is, however, doubtful that anyone would suggest that this is a desirable competitive outcome. Anything short of accommodation is likely to make the post-entry prospects of an entrant less attractive than the pre-entry benefits enjoyed by the incumbent. It is, therefore, not enough for us to find that Tele-Direct's responses made entry less attractive.

Indeed, the Director's position seems to be that a firm is free to act to discourage entry but that there is a limit to what it may do. This is reflected in the Director's proposed remedy, which would allow Tele-Direct to use two out of three of price reductions or discounts, enhancements and an advertising campaign in individual markets.²³⁴ Once the incumbent passes this critical threshold, it is submitted that it has moved into the realm of anti-competitive conduct. The reasoning behind this, as we understand it, is that while what has been done in the particular markets may not be particularly harmful, the long-term harm caused by discouraging future entry outweighs any immediate benefit. In other words, the response in the markets where entry occurs is part of an effort to discourage entry into other markets by behaving in a fashion which is nearly, but not necessarily, predatory in the strict sense in which that word is usually used.

²³⁴ Tele-Direct would be unrestricted in its responses if it implemented those responses throughout its territory.

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In support of the position that Tele-Direct's response went beyond what is "normal", the Director relies on its expressions of corporate intent, the number, variety and degree of its responses and the intensity of those responses. As a standard for assessing how far Tele-Direct went the Director submits that we can look to the evidence that its response in Sault Ste. Marie caused Tele-Direct to incur losses, a comparison to the experience of independent entrants in American markets, and the difference between White's and DSP's expectations and their actual results and their future plans.

Counsel for the Director also suggests that Tele-Direct is using its monopoly rents from other markets to cross-subsidize its responses in competitive markets. This possible meaning of targeting would only apply, however, where the dominant firm is incurring losses in the targeted market. However, the Director does not appear to be suggesting that this is a necessary condition for the Tribunal to find that "targeting" is an anti-competitive act in this case.

First, we will examine the question whether what Tele-Direct did in the competitive markets was generally of benefit to consumers (advertisers) in those markets, largely neutral or, in fact, harmful. While Tele-Direct's actions clearly made it more expensive for the entrants than if it had accommodated them, seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the markets concerned are made better off. The Director has not attempted to argue that Tele-Direct's responses caused harm to advertisers in the particular markets in which entry occurred. The Director did, however, submit

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that at least some of Tele-Direct's actions were of negligible or temporary benefit to those advertisers.

With respect to the zero price increases, there is no question that advertisers benefitted from this initiative. The evidence indicates that the advertiser incentive program in competitive markets was carefully designed to absorb customers' directory advertising budgets so that little would be left for the new entrants when they canvassed for paid advertising. Yet, it is difficult to conclude that these programs did not benefit advertisers, particularly when rebates were involved. Making its directories more attractive by adding enhancements and increased advertising by Tele-Direct would both tend to increase usage of telephone directories and, thus, benefit advertisers in those markets. There was evidence that some of the enhancements to Tele-Direct's directories were viewed by the company as temporary expedients. For example, the postal code feature in Niagara was designed to be easily removable.²³⁵ Nevertheless, as no evidence was brought to our attention indicating actual removal of the postal code section, we can only conclude it has been maintained by Tele-Direct. Further, although the Director argued that much of Tele-Direct's advertising was "negative" advertising which only disparaged its competitors, we do not have enough information on the advertising campaign to be in a position to identify which portions were "negative" and if the negative outweighed the positive. Overall, the inescapable conclusion is that Tele-Direct's responses to entry resulted in an improvement for advertisers in the "targeted" markets.

²³⁵ Mr. Bourke wrote to Mr. Renwicke stating that postal codes should be left as a section rather than integrated as part of the listing (as White had done), otherwise "we'll [n]ever get rid of it": confidential exhibit CJ-86 (black vol. 13), tab 101 at 134297.

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What, then, about the likelihood of harm in Tele-Direct's territory as a whole because of the effect of these responses on future entry or expansion? There is evidence that Tele-Direct was not solely concerned with "meeting" competition in Sault Ste. Marie and Niagara. Tele-Direct also feared further entry into other areas, particularly from DSP which was associated with Southam and had the advantage of having local connections and organization through the publisher's newspapers. This is clear from the evidence of Ms. McIlroy, who was in a key position as Vice-president of Marketing at that time.

Ms. McIlroy testified that Tele-Direct designed its strategies first around the Sault Ste. Marie situation and then replicated them in Niagara when White appeared. She confirmed that one of her objectives in Sault Ste. Marie, as set out in document recording her notes for a presentation, was to "limit Southam motivation to continue Yellow Pages roll-out in Ontario".²³⁶ She further explained that as a "counter-strategy", if Southam's intention to enter directory publishing was a long-term, well-funded strategy, then her second objective was to "make the cost of carrying on business against [Tele-Direct] market-by-market exceptionally high."²³⁷

But those were not the sole objectives. Ms. McIlroy also described Tele-Direct's strategy in the following terms:

²³⁶ Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133221A.

²³⁷ Transcript at 21:4088-89 (17 October 1995).

. . . the basic premise was to make it expensive for the competitor to compete with us and to focus on doing everything and doing it right in the Sault, putting whatever investments or resources that was necessary to avoid unnecessary market share [loss] and to protect our interest in that market.²³⁸

Similarly, in a presentation that she made to her fellow officers she set out the following points as constituting Tele-Direct's "challenge":

- Protect usage and awareness - promotion
- Add value to advertiser - incentive
- Add value to user
 - product enhancements
 - size and colour
- Sustain leadership profile
- Compete on value vs. cost
- *Make competition an expensive proposition*²³⁹ (emphasis added)

Mr. Renwicke disputed whether the last point was ever accepted as corporate policy, but in matters of dispute between Ms. McIlroy and her fellow officers we accept her evidence. She left Tele-Direct on good terms and she has no discernible reason for colouring her evidence, particularly as she was the officer responsible for preparing tactics that the Director would have us label as anti-competitive.

It is only the reference to making competition "expensive" as part of Tele-Direct's strategy that raises any question of anti-competitive motivation. It is doubtful that Tele-Direct could make competition expensive without negatively affecting its own profitability. According

²³⁸ Transcript at 20:3918-19 (16 October 1995).

²³⁹ Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133316.

to Ms. McIlroy the participants at the officers' meeting were taken aback at the cost to the company of making it expensive for the competition. They agreed to "spend what it took" with the proviso that the expenditures would be selective and the officers would be kept current on what was transpiring, even as frequently as on a weekly basis. The fact that Ms. McIlroy convinced her fellow officers to adopt a policy of making competition expensive even when doing so would be detrimental to current profits provides some indication that Tele-Direct was trying to influence its competitors' future conduct to some extent.

There is as well another consideration. The documents relating to Tele-Direct's responses in Sault Ste. Marie and Niagara were not provided during documentary discovery within the time frame ordered. They did not make their appearance until after Tele-Direct apparently learned that the Director had contacted Ms. McIlroy and that she would appear as a witness in these proceedings for the Director. Counsel for Tele-Direct attempted to blame the delay in the production of these documents on inadvertence. He said that the relevant box of documents got lost but that no one seemed to know where or why. If the documents were lost, a detailed explanation is in order especially given the controversial issue to which they pertain and that the content of some of the documents is clearly adverse to Tele-Direct's position. A vague explanation carries little weight. The belated production and inadequate explanation cause the Tribunal to make an adverse inference with respect to Tele-Direct's intentions on this issue. Tele-Direct apparently considered that it might have "gone too far" in its responses in those markets. This, along with the statements of corporate policy, provides support for the view that Tele-

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Direct intended, in a subjective sense, to convey a warning about future entry as well as protecting its position in the individual markets subject to entry.

Nonetheless, the critical question is whether there is a reasonable likelihood that future entry will be discouraged by Tele-Direct's actions. If so, is that possible negative effect more compelling than the proven benefits in the individual markets from Tele-Direct's improving its product, freezing prices and increasing advertising expenditures, all of which contributed in some measure to increasing usage of telephone directories, which is generally seen as pro-competitive. A reasonable likelihood of significant long-run detriment must exist if these tactics are to be discouraged.

The Director relies to some extent on the evidence given by White and DSP, which will be canvassed below, regarding their intentions about future expansion, which he says shows that future entry and expansion *have been* deterred by Tele-Direct's behaviour. That evidence is, however, a small portion of the evidence put forward by the Director in support of his case. In effect, the Director asks us to *infer* from the "overwhelming intensity" of Tele-Direct's response in the markets where it faced entry that potential entry into other markets *will* be deterred.

Before we proceed to consider the more detailed arguments, we should indicate at the outset that we have serious reservations with respect to the overwhelming intensity approach adopted by the Director. The Director has not advanced any "objective" criteria by which the

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Tribunal is to assess whether Tele-Direct's responses in the competitive markets have the overall anti-competitive character or "purpose" required for section 79.

Although the Director is not arguing that Tele-Direct's conduct was predatory, predation is certainly the closest analogy to what is put forward here. The essence of an allegation of predatory pricing is that the firm foregoes short-run revenues by cutting prices, driving out rivals and thus providing itself with the opportunity to recoup more than its short-term losses through higher profits earned in the longer term in the absence of competition. A predatory pricing allegation is difficult because, at least in the short-run, consumers apparently benefit from lower prices. In addition, predation can only succeed if the predator has greater staying power than its rivals and a reasonable prospect of recouping its losses. In order to distinguish competitive pricing action from predation, therefore, the "Areeda-Turner test" for predatory pricing²⁴⁰ was developed and has been adopted by the courts.

Our difficulty here is that, unlike the predatory pricing case, no "test" or criteria of any kind were even proposed by the Director or his experts. Indeed, we acknowledge that the likelihood of being able to establish objective criteria to distinguish between harmful and beneficial conduct of the type in issue is remote. In effect, because of the absence of any criteria, the Tribunal is being asked by the Director to place itself in the shoes of a potential entrant with a view to assessing the credibility of the alleged "threat" being issued by Tele-Direct by its

²⁴⁰ In brief, the essence of the test is that a price below reasonably anticipated short-run marginal costs is predatory while a price above short-run marginal costs is not. Because marginal cost data are often unavailable, average variable cost is generally used as a proxy. For a summary of the conclusions of Areeda and Turner on this topic, see *Antitrust Law*, vol. 3 (Toronto: Little, Brown, 1978) at para. 711d.

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responses to entry. The Tribunal must determine whether the response in the initial markets in which entry occurred was so "overwhelmingly intense" that an entrant would be intimidated and future entry or expansion deterred.²⁴¹ What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising).

While Tele-Direct certainly made very strong responses to entry in Niagara and Sault Ste. Marie, there is no certain way for the Tribunal to judge what magnitude of response Tele-Direct would have employed had it not been concerned, among other things, with discouraging further entry. To say that the response was greater than it otherwise would have been assumes that we can judge how much Tele-Direct would have done had it been acting competitively and that, therefore, we can determine, with reasonable assurance, to what degree the observed responses went beyond that and became anti-competitive. In trying to make this comparison urged upon us by the Director, it must be recognized that Tele-Direct was facing pretty stiff competition from

²⁴¹ There would evidently be little point in the incumbent pursuing an aggressive course of responses in every market subject to entry solely to make an impression or deliver a threat since that strategy would have already been defeated. If there was widespread response by the incumbent in all markets in which entry occurred or was threatened, consumers would benefit in the short-term with no discernible long-term negative effects.

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the new entrants. The entrants' publications were initially superior with respect to features and they were priced up to 40 percent below Tele-Direct. While Tele-Direct's expenditures on advertising and promotion constituted a sea change from its previous expenditures, DSP spent more over the three years from 1992 to 1994 than Tele-Direct did, including large amounts in the local Southam newspaper.

The Director makes two broad arguments in support of the position that Tele-Direct's actions went beyond "normal" competition and, taken together, constitute anti-competitive acts. The first is that Tele-Direct's "bottom line" results in Sault Ste. Marie in 1993 reveal that Tele-Direct barely broke even in that market when the cost of introducing the improvements to the directory and the advertising and promotional expenditures are taken into account. This conclusion was not disputed by Mr. Beauséjour who agreed that the results shown were "very close to breakeven".

The analysis presented to the witness, however, included the payment to Bell Canada (CCS) as an "expense" deducted from revenue. When Bell and Tele-Direct are treated on an integrated basis, as we earlier found in the tying context to be appropriate when considering Tele-Direct's profitability study, it would be inaccurate to refer to Tele-Direct's results in Sault Ste. Marie as a "marginal profit" or "loss" situation. The pro-rated share of the payment to Bell would have to be added back to the Tele-Direct's results in Sault Ste. Marie. Given that the Bell payment is mostly contribution to profit and it is a substantial amount, this would move the Sault Ste. Marie results well above the breakeven point, even with the extra expenditures on

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enhancements and advertising. Indeed, it would appear that the payment to Bell constitutes the largest portion of the "profit" that attracts independent publishers to attempt to enter Tele-Direct's markets and which allows them to contemplate profitably pricing 30 or 40 percent below Tele-Direct. In the Niagara region, Tele-Direct earned a profit in 1993 even when the payment to Bell is treated as an expense.

The Director's second argument is that experience in the industry also demonstrates that Tele-Direct went beyond "normal" competitive responses. This includes the evidence regarding expectations of White and DSP versus their experience and their future intentions as well as evidence about how American telco publishers have responded to entry in their markets.

With respect to the experience of an American telco publisher responding to entry, Mr. Anderson, who was with NYNEX, testified in chief that when NYNEX perceived independent directory publishers as significant competition, it would make its sales force aware of their presence, possibly do more advertising, and consider the scoping of its directories and their features. He also pointed out that it had not been his experience that features would be introduced only in a competitive market. After a trial run, if the feature proved successful, it would be implemented "across the product line." In cross-examination, he admitted that NYNEX had never, at least to his knowledge, offered an incentive program similar to that used by Tele-Direct in its competitive markets in response to entry of a competing publisher. He gave the same response when asked about a specific market where, in response to entry, NYNEX might have frozen prices in specific markets in response to entry for two years, without rescoping. With

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respect to the remaining possibilities put to him by counsel for the Director, Mr. Anderson either had no knowledge (e.g., advertising as a separate budget item) or commented on the lack of applicability in the American context (e.g., telco publishers cannot offer audiotext, no trade-mark to protect through legal action). Without any knowledge about the marketplace in which NYNEX operates, we are unable to draw any conclusions about this evidence.

With respect to White, Mr. Lewis stated that his experience in entering markets in the United States had led him to believe that White would have larger sales in Niagara than turned out to be the case. In its first revenue year, White expected to capture between 30 and 40 percent of Tele-Direct's revenue.²⁴² In fact, White's revenue for its second directory (the first revenue-generating directory), published in 1994, was 17 percent of Tele-Direct's revenue. Revenue for the third directory (the 1995 directory) represented a nine percent increase from the previous year for a total of about 19 percent of Tele-Direct's revenue.

Mr. Lewis stated that his initial plans for expansion beyond the Niagara region in Canada had been put on hold indefinitely due to Tele-Direct's conduct *and* the inability to obtain complete subscriber listing information. At the time of the hearing, this matter of subscriber listings was on appeal to the federal Cabinet. Mr. Lewis also said that upon a favourable Cabinet decision on the privacy issue, he would anticipate starting a number of additional directories in the Toronto and Niagara region. Any conclusion that White was deterred from future expansion

²⁴² Anticipated sales are expressed as a percentage of estimated revenue of the existing directory. This does not mean that all sales are drawn from the incumbent as the demand for directory advertising is expected to increase when a second publication is introduced.

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by Tele-Direct's conduct and that, therefore, that conduct passes an anti-competitive threshold would be difficult in light of this evidence and the subsequent Cabinet decision overruling the CRTC decision that was to the effect that consumers should be able to opt out of having their listing information released to independent publishers.²⁴³

In formulating its entry strategy, DSP factored into its business plan both the risk of legal action by Tele-Direct and the possibility of a Tele-Direct competitive reaction. DSP, erroneously as it turns out, anticipated little response from Tele-Direct based on that company virtually ignoring the entry of the Locator directories in a large number of communities. As we have discussed, the Locator directories are simply not close substitutes for Tele-Direct's directories. DSP's expectation for its first revenue-generating directory was to capture about 50 percent of Tele-Direct's revenue. In developing this estimate, DSP reviewed the American experience and consulted extensively with its joint venture partner, Noverr. Instead, the directory generated about half of the expected revenue in dollar terms. The revenues for the second revenue-generating directory, published in 1994, were once again considerably lower than expected. It was, however, anticipated that the revenues for the 1995 directory would be higher and marginally profitable.

DSP has also decided not to expand in Ontario even though that was the original plan. While Tele-Direct's conduct was said to have been the reason for that decision, the evidence

²⁴³ For further explanation of this matter, see chapter "VII. Control: Market Power" under "A. Indirect Approach: Market Structure", "(2) Barriers to Entry", "(c) (i) Subscriber Listing Information", *supra*.

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suggests that there were other reasons as well. In particular, it would appear that DSP's expectations were quite aggressive for a new business and, to some extent (in relying on the Locator experience), in error. The Director says that the Sault Ste. Marie, Michigan part of the DSP joint directory, which did not experience a response like Tele-Direct's, had been far more successful than its Ontario counterpart. However, that side of the publication also fell well short of what had been anticipated as a "normal" first year revenue, further suggesting that the DSP's expectations may not have been realistic.

We do not have enough evidence to arrive at any conclusion about the effect of Tele-Direct's actions on deterring entry or expansion in the Newfoundland and Joliette situations.

The remedy suggested by the Director changed from the application to final argument. In our view, the remedy, as currently formulated, illustrates the difficulty of dealing with "targeting" as an anti-competitive act. The notice of application, at paragraph 1(b)(xiii), requested that:

the Respondents be prohibited from targeting price reductions and other discounts for advertising space to those markets in which entry by competing publishers has occurred or is occurring.

In oral argument, counsel for the Director explained that the remedy ultimately being requested by the Director would read as follows:

that the respondents be prohibited for a period of five years from: (i) targeting a price, a price reduction, or other discount including any advertiser incentive program offering free colour, free size up, or a first time placement discount where there is no annual increase in advertiser spending; *and* (ii) targeting any

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directory enhancement, including audio-text service; *and* (iii) targeting any advertising campaign; to a market where entry by a competing directory publisher has occurred, is occurring, or is reasonably anticipated to occur unless such listed item is offered or applied uniformly and simultaneously by the respondents in the majority of their directory markets.

The "and" between the listed items is critical. The Director proposes that Tele-Direct be permitted to do any *one* or *two* of the three enumerated actions in any market where entry has occurred. However, if all three should be undertaken then they would have to be followed in a majority of Tele-Direct's local markets.

We recognize that the Director is likely attempting, by this compromise remedy, to recognize that Tele-Direct's responses are of benefit to consumers in the market in which they occur. This effectively highlights the difficulty of the "targeting" allegation. First, the number of competitive responses (one or two) that Tele-Direct is allowed is completely arbitrary. The Director has not provided the Tribunal with any rationale as to why one or two (but not three) responses would not be anti-competitive. Further, there is no suggestion that the Tribunal should limit the extent to which Tele-Direct could invoke the competitive responses to which it would be entitled. Yet, the Director alleges that Tele-Direct's responses in the competitive markets were anti-competitive in part *because of* their intensity and ferocity.

Considering the difficulty in circumscribing "targeting" so that it does not result in discouraging desirable competitive activity, we do not find that Tele-Direct's conduct with regard to pricing, promotion and changes to its directories in the competitive markets, in particular in the Sault Ste. Marie and Niagara areas, is anti-competitive.

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Litigation or Threatened Litigation

Finally, we turn to the Director's argument that litigation or threatened litigation by Tele-Direct, when taken together with the other actions of Tele-Direct, contribute to targeting/raising rivals' costs.

The Director argues that Tele-Direct's use of litigation or threatened litigation "goes into the mix" to show intent and the excessive degree of the overall response to entry in the competitive markets. The Director does not rely on the nature of the litigation on its own. The Director does not argue, for instance, that the litigation was a "sham". "Sham" litigation, or litigation which the plaintiff knows is without foundation but uses to stifle or impair competition, can be a technique of predation.²⁴⁴ In the words of Robert Bork: "As a technique for predation, sham litigation is theoretically one of the most promising."²⁴⁵

Since no argument is being made that the litigation started by Tele-Direct against DSP was "without foundation",²⁴⁶ we need some other means to determine whether the litigation in question crossed the line to anti-competitive conduct. We do not consider that it is sufficient to look at the litigation only in combination with the other responses. There must be some evidence

²⁴⁴ Sham litigation could include a claim with no reasonable cause of action which might be struck out at an early stage of proceedings or a claim based on facts that were untrue or otherwise not supportive of the claim, in which case, the litigation could be extensive.

²⁴⁵ R.H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978) at 347.

²⁴⁶ Some mention was made that the copyright claim might be a "broad" interpretation of the existing American law but that is hardly definitive.

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specific to the bringing or the conduct of the litigation itself that would lead us to conclude that the purpose was to contribute to the impairment of competition over the protection of property rights.

The Director points out that while Mr. Crawford, Tele-Direct's Corporate Secretary and legal counsel, originally testified that Tele-Direct defended any unauthorized use of its trademarks and copyrights, it became apparent on cross-examination that this was not true. Tele-Direct overlooked unauthorized use on a number of occasions. Perhaps the difficulty with this witness's credibility on this issue and the fact that litigation seems only to be taken against specific competitors do lead to the view that Tele-Direct focused on those competitors. However, that alone is not enough if the litigation is not a sham.

On the facts of this case, we cannot conclude that Tele-Direct brought, conducted or gave warnings regarding otherwise apparently valid litigation in such a manner that its purpose was clearly to contribute to the impairment of competition in those markets where entry occurred rather than the protection of its intellectual property rights. There is no evidence, for instance, of undue delay. As of the date of the hearing, DSP had not yet been discovered but a major factor in this delay was the illness of Mr. McCarthy, the intended representative for DSP. Discovery of DSP was, however, scheduled for November 1995 with Mr. Campbell for DSP. Discoveries of Tele-Direct had been completed by the date of the hearing. There is no evidence that the litigation is following any other than the "normal" course. Unlike the *Laidlaw* case, there is no evidence of responding to an apparently minor matter in a "wildly overly aggressive manner"

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with multiple claims or of pointed threats to put a competitor "out of business" using, in part, the pursuit of legal action for which, as the Laidlaw representative informed the competitor, a large sum of money had been reserved.²⁴⁷ While Tele-Direct did not proceed against White after its warning regarding possible litigation, it is certainly plausible that it did not do so because of the similarity of the issues to the DSP case. That litigation would seem likely to settle at least the copyright question once and for all, by establishing a precedent for Tele-Direct's dealings with other publishers.

The Tribunal, therefore, cannot accept the Director's submission that litigation or threatened litigation in this case can contribute to a finding of anti-competitive acts by Tele-Direct.

Audiotext in Sault Ste. Marie

The Director alleges that Tele-Direct used its power as a major buyer to influence the supplier of audiotext information in Sault Ste. Marie, Perception, resulting in a degradation of the feed to DSP. The respondents acknowledge in their written argument that the allegation could be an anti-competitive act, if proven, but dispute that it is supported by the evidence. The critical questions are whether Tele-Direct was merely asserting its contractual rights and what responsibility, if any, can be assigned to Tele-Direct for the quality of service delivered by Perception to DSP.

²⁴⁷ *Laidlaw*, *supra* note 33 at 298.

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Did Tele-Direct have a contractual right to exclusivity?

The respondents state in their written argument, at paragraph 930, that "Perception recognized that Tele-Direct was entitled to the exclusive right to its only feed" This statement is not supported by the evidence. Up until January 1994, the only contract between Tele-Direct and Perception was for the Toronto area and it provided Tele-Direct with exclusive access to Perception's feed in the Toronto local calling area only. Perception had in fact refused to grant Tele-Direct exclusivity for other areas because of the limitation on its ability to market its service.

In the fall of 1992, when Tele-Direct became aware of the proposed entry into Sault Ste. Marie by DSP, including offering audiotext, Tele-Direct entered into negotiations with Perception to supply its TYP in that market. One of Tele-Direct's concerns was that the feed in Sault Ste. Marie be exclusive to it, that DSP not have access to the same feed. The evidence reveals that the parties did not, in fact, come to an agreement on exclusivity until much later. While exclusivity is mentioned in a letter in March 1993,²⁴⁸ the draft contract sent by Perception to Tele-Direct in May 1993 is instructive. The letter enclosing the contract states that with "all the excitement of getting `the Soo' up and talking" Perception had neglected to send Tele-Direct the contract for Sault Ste. Marie. The contract clearly states that it is a "non-exclusive" licence to receive and store information.²⁴⁹

²⁴⁸ Confidential exhibit CJ-86 (black vol. 13), tab 96 at 134118.

²⁴⁹ Draft contract and covering letter: confidential exhibit CJ-87 (black vol. 14), tab 114 at 134825-27.

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The contract was never signed by Tele-Direct but nonetheless provides proof that Perception, at least, did not consider at that time that Tele-Direct had exclusive rights to its feed. They were certainly not *ad idem* in that respect. The final contract covering Sault Ste. Marie, which does provide for exclusivity, was not signed until January 1994.²⁵⁰ A letter in September 1993 provides that upon acceptance of a new agreement by Tele-Direct, the "BDR Audio Network will be made available to only directory publishers in Canada and exclusively to Tele-Direct within Ontario and Quebec."²⁵¹ Peter Dolan, Director of Sales at Tele-Direct (Services) Inc., admitted, however, that Tele-Direct had to go "back and forth" with Perception a couple of times in order to get the wording regarding exclusivity re-inserted into the final contract. Tele-Direct does not appear to have had, until November 1993 at the earliest, a right to exclusivity with Perception and, therefore, had no right to insist or attempt to insist on exclusive service from Perception prior to that date.

Did Tele-Direct influence the delivery of service by Perception to DSP?

Upon becoming aware in late 1992 that Perception was supplying an information feed to DSP and that it had the same content as Tele-Direct's feed, Tele-Direct, through Mr. Dolan, expressed its displeasure to Perception. Perception agreed to remedy the situation prior to publication of the DSP directory. Mr. Dolan said that he thought Perception would acquire an

²⁵⁰ Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131548-54.

²⁵¹ *Ibid.* at 131555.

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alternate feed for DSP as a remedy. At the same time, Tele-Direct was pushing for exclusivity with Perception.

Tele-Direct's TYP were launched in mid-February 1993. Tele-Direct was not satisfied with Perception's response to its complaint regarding the feed to DSP, including an effort in early February whereby Perception started sending slightly re-arranged or reworded content to DSP. In cross-examination, Mr. Dolan indicated that Tele-Direct wanted a "superior feed" to that provided to DSP.²⁵²

A meeting was scheduled for February 23, 1993 with Perception. The agenda, which was provided to Perception, states that what Perception was doing with respect to the DSP feed was "not satisfactory" to Tele-Direct. Mr. Dolan explained that Perception was simply re-voicing the network and again stated that Tele-Direct was not satisfied because it wanted a "superior" feed. This concern was communicated to Perception at the meeting.

In re-examination, taking Mr. Dolan to clause 8 of the January 1994 contract with Perception which uses the word "superior", counsel for the respondents elicited a response that "superior" meant "of high quality" and that was the way in which Mr. Dolan had used the word in his cross-examination. Clause 8 of the contract reads:

²⁵² Transcript at 42:8856 (20 November 1995).

. . . Brite does commit that the BDR Audio Network will continue to be of the same exceptional quality as the affiliate has enjoyed. BDR will continue to be of superior quality and utilize its own personnel for the creation and dissemination of information.²⁵³

Clause 11.6, which was later brought to the witness's attention, is instructive:

. . . Brite will continue to supply the superior level of programming that the Affiliate has come to expect. Other audio networks offered by Brite Voice Systems or any Brite subsidiary or related company, will not exceed the BDR Audio Network in measurable deliverables including, but not limited to, frequency of reports, quantity of content, program choice and diversity as well as voice quality. Brite will make every effort to avoid American colloquialism. . . .²⁵⁴

Even in the contract, therefore, it is apparent that the word "superior" is used in a comparative, rather than an absolute, sense.²⁵⁵ When questioned by the panel about clause 11.6 of the contract, Mr. Dolan agreed that what the clause was meant to ensure was that nobody had anything *better* than Tele-Direct. We conclude, therefore, that, despite the later attempt at qualification, Mr. Dolan was using the word "superior" in its comparative sense throughout his testimony. Tele-Direct was pressing Perception for a better feed than Perception was giving DSP.

Of most significance, on January 25, 1993, Tele-Direct held out what can only be regarded as a major "carrot" to Perception. Mr. Dolan, on behalf of Tele-Direct, wrote asking Perception for its "advice and recommendations" on the most efficient way to provide a TYP

²⁵³ Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131550.

²⁵⁴ *Ibid.* at 131551.

²⁵⁵ The September 1993 letter also uses the word "superior" and essentially the same language about "measurable deliverables" (confidential exhibit CJ-31 (black vol. 10), tab 68 at 131555) as later appeared in the January 1994 contract.

service throughout Tele-Direct's territory.²⁵⁶ There is evidence that by March of 1993, consequent upon a February 25, 1993 officers' meeting, these plans were scaled down dramatically. TYP installation was to begin only in markets currently or potentially threatened by a competitor, some ten markets. TYP were treated as a strategic tool against competition rather than a widespread innovation. In fact, after Sault Ste. Marie TYP were introduced only in Niagara Falls, in response to White, and in Windsor, where Tele-Direct was concerned both about potential entry by White and the fact that the Windsor Star is owned by Southam. It is difficult to escape the conclusion that Tele-Direct was using the promise of the roll-out of TYP service throughout its territory in order to gain the cooperation of Perception when it introduced its TYP service in Sault Ste. Marie in February 1993.

That the promised roll-out of the TYP service was a factor in the relationship between Tele-Direct and Perception is clear from the letter Perception wrote Tele-Direct on March 1, 1993, following the February meeting. In it Perception informed Tele-Direct that an "alternative audio source" for DSP would be provided by March 29, 1993. The letter concludes ". . . you are a very important client to us and we want to work with you as you roll out audiotex (*sic*) throughout your territory."²⁵⁷

The deterioration to DSP feed was coincident with its first revenue canvass in the spring and summer of 1993. (Its first revenue directory was published in November 1993.) Because of

²⁵⁶ Confidential exhibit CJ-86 (black vol. 13), tab 95 at 134080.

²⁵⁷ *Ibid.* at 134107.

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the poor quality of the feed, the audiotext lines were not used to nearly the same extent as in the first two months of operation. Because of the reduced volume, DSP could not use the record of the number of calls to its audiotext service as evidence of widespread use of its directory by consumers. As a result, the audiotext service was not as positive a factor as it might have been in selling its directory to advertisers.

Mr. Campbell said that it would have been virtually impossible for DSP to change its information supplier when it experienced problems. Despite what Mr. Dolan said, there was little reason for Tele-Direct to think that Perception was able, even if willing, to produce an alternative high quality feed for DSP. As matters turned out, the feed to DSP only became acceptable again once the merger of Perception and Brite resulted in another source of feed becoming available in about November 1993.

We are of the view that Tele-Direct used its bargaining power, stemming from its dominant position in the market for the supply of telephone directory advertising, to pressure Perception to, in effect, withhold supply from DSP for the purpose of frustrating or, at least, negatively impacting, the DSP attempt at entry in Sault Ste. Marie.²⁵⁸ Unlike the other responses used by Tele-Direct in the competitive markets, the only perceptible effect on consumers and advertisers was a negative one. It would appear to us that the kind of conduct engaged in by

²⁵⁸ Entry meaning the attempt by DSP to establish itself in the Sault Ste Marie market on an economic basis with a revenue directory; that is, not the publication of a prototype directory alone.

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Tele-Direct regarding audiotext in Sault Ste. Marie unequivocally falls within the class of anti-competitive acts against which sections 79 is meant to guard.

Did Tele-Direct engage in a practice of anti-competitive acts in relation to audiotext in Sault Ste. Marie? Based on the standard set out in *Nutrasweet*,²⁵⁹ an "isolated act" does not constitute a practice. In the instant case the deterioration in the audiotext feed to DSP resulted from intensive and repeated efforts on the part of Tele-Direct that hardly qualify as an "isolated act". Nor do we find that the reasonably anticipated duration and seriousness of the consequences of the efforts by Tele-Direct suggest that they should be treated as "isolated" and thus outside the reach of section 79. We therefore consider that Tele-Direct's actions regarding the DSP feed for its audiotext service in Sault Ste. Marie constitute a practice of anti-competitive acts.

Further, we find no difficulty in concluding that the effects of the deterioration in the quality of the audiotext feed resulted in a substantial lessening of competition in the Sault Ste Marie market. In conducting its first revenue canvass, DSP was denied the anticipated marketing advantage of using its audiotext call volumes to prove usage of its directory to potential advertisers because the feed deteriorated just as the canvass started. Achieving credibility with advertisers is one of the biggest hurdles that an entrant publisher must overcome.²⁶⁰ The audiotext problem was a serious setback for DSP in its initial effort to attract paid advertising. However, as the Director has not requested a remedy specific to the audiotext problem or, more

²⁵⁹ *Supra* note 4 at 34-35.

²⁶⁰ See further discussion, *supra* at 123.

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generally, governing Tele-Direct's relationship with the suppliers, no remedy follows from this finding.

D. MARKET FOR ADVERTISING SERVICES

1) Class or Species of Business in Canada (Relevant Market): Agents

The Director alleges a number of anti-competitive acts which form a practice resulting in a substantial prevention or lessening of competition in the market for the supply of advertising services. These alleged anti-competitive acts affect agents and consultants or, in some cases, one or the other. The Director takes the position that when determining whether there is a substantial prevention or lessening of competition the effects of all of the listed acts found to be anti-competitive should be combined because they all affect the advertising services market. Further, one of the alleged anti-competitive acts is the tying of the provision of advertising services to advertising space, the same allegation we have already dealt with in the tying portion of this decision. Another alleged anti-competitive act which bears a striking resemblance to an allegation of tying is also included under the heading "Squeezing", namely, "further restricting the availability of commission [to other service providers] over time".

The respondents submit that, to the extent a separate "services" market exists, consultants and agents are in different services markets and acts affecting more than one market cannot be combined to form a practice and, thus, to determine whether there has been a substantial

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prevention or lessening of competition. A prevention or lessening of competition must take place *in a market* in the words of section 79. They also argue that Tele-Direct does not have market power in either services market.

As we have found that there is an anti-competitive tie covering only part of the alleged advertising services market, we cannot agree with the Director that there is one advertising services market in which both agents and consultants operate that encompasses *all* of Tele-Direct's customers. Customers meeting the 1993 commissionability rule are evidently included in the services market. The customer segment that we have determined is anti-competitively tied under section 77 -- namely regional customers -- is also included. (We will return below to the question of whether the tying practice should also form part of the section 79 case.) Agents are operating in this services market. And, Tele-Direct competes with the agents in providing services to those customers. Consultants do not.

It is difficult to see how acts taking place in different markets could be logically combined to determine if competition is substantially lessened or prevented in a particular market. Thus, only the acts affecting agents can be combined for the purpose of determining whether there has been a substantial lessening of competition in the services market.

Correspondingly, only acts affecting consultants can be combined to determine whether there has been a substantial lessening of competition in the relevant market in which they

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operate. It is a separate section 79 case. The details of the allegations against consultants will be dealt with below under the heading "Consultants".

Further, not all the alleged practices of anti-competitive acts respecting agents are of a sufficiently similar character so that they can be combined when assessing whether there has been a substantial prevention or lessening of competition in the services market. In particular, tying (and its restatement "restricting commission over time") differs significantly from the other alleged anti-competitive acts. The Director has brought the allegation of tying under both sections 77 and 79. The analysis and result are the same under both sections. Having found that tying results in a substantial lessening of competition by impeding entry of or expansion of agents into or excluding them from the part of the demand spectrum between six and eight markets, should this substantial lessening of competition be combined with the effects resulting from any other practice of anti-competitive acts that the Director succeeds in proving? If so, all anti-competitive acts so found would automatically lead to a finding of substantial prevention or lessening of competition by reason of our finding respecting tying.

In our view, it is not appropriate to combine the effects of tying with the effects of the practice of other anti-competitive acts. The other alleged anti-competitive acts (save for group advertising) relate to a specific historical market, the commissionable market including the eight-market grandfathered accounts. It is possible to evaluate the effects of the alleged anti-competitive acts in this well-defined context. The issue is whether there has been a substantial

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lessening of competition where agents have historically been competing. In the case of tying, the allegation is that the extent of the market itself has been limited.

In this case, there is a distinct difference between the nature and effect of tying and the other alleged anti-competitive acts, save for group advertising which we return to below. We note that this might not be true in other cases where there might be some interaction or a less distinct dividing line between the section 77 and section 79 claims. A finding that the respondents have engaged in tying does not act as a spring-board for a finding of substantial lessening in the market segment where the agents have been competing. Prohibiting tying should permit the agents to compete in the enlarged market as they have in the historically commissionable market. A finding of substantial lessening of competition in the historically commissionable market should therefore be based on a practice of acts with respect to that market.

Therefore, we need not deal with tying further under section 79. We will now turn to the allegations relating to the commissionable market and then the allegation regarding the prohibition on group advertising which is distinct.

(2) Control of the Existing Commissionable Market

It is evident that, despite the Director's submission to this effect, Tele-Direct does not have *direct* control or market power in the currently commissionable advertising services market.

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It has a modest market share of approximately 25 percent in that market.²⁶¹ The Director also advances an alternative position that is not based on direct control by Tele-Direct but rather on the hypothesis that it is leveraging its control in the publishing market into the services market. We have found that Tele-Direct has control in the telephone directory advertising market which gives it market power in the publishing of advertising space. The Director argues that Tele-Direct is using this market power as a lever to obtain market power in advertising services through its alleged anti-competitive acts. We agree that this is an arguable theory that could, if proven, fall within the parameters of section 79. Whether Tele-Direct has, in fact, leveraged its existing market power must now be determined.

(3) Analysis Respecting the Existing Commissionable Market

The alleged anti-competitive acts are set out in full at paragraph 65 of the application. We paraphrase them here (not necessarily in the order set out in paragraph 65) as they relate to agents and alleged abuse of dominance only:

(1) "squeezing" the return available to agents by transferring functions to, withholding services from and making terms of supply to agents more onerous;

(2) discriminating against agents by providing space to them on less favourable terms than available to Tele-Direct's internal sales force, including:

²⁶¹ See further discussion of market share below under "Analysis Respecting the Existing Commissionable Market".

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- *group advertising* - prohibiting advertisements containing the name of more than one local advertiser, e.g., franchisees;
- *issue billing* - requiring agents to pay for advertising on behalf of their clients at the time of issue as opposed to payment on a monthly basis which is the payment method employed when sales of advertising are made through Tele-Direct's own sales personnel;
- *closing dates* - requiring that agents submit advertising for publication earlier than the date applicable to Tele-Direct's sales personnel;
- *tear sheets, etc.* - refusing or delaying to provide tear sheets and other information and material to agents; and
- *promotional programs* - delaying to inform agents of or refusing to make certain promotional programs available to agents' clients, including:
 - a program whereby an advertiser using Tele-Direct's sales personnel could obtain a subsidy towards the cost of Yellow Pages advertising if Yellow Pages are mentioned in advertising in other media;
 - cooperative advertising programmes whereby a supplier contributes to the cost of advertising of its customer or distributor;
 - keyed advertising in which a new advertisement with a new telephone number is placed in the Yellow Pages and the calls to that number are monitored to assess the effectiveness of the advertisement; and
 - other trial and test programs.

The Director submits that these acts have had adverse effects on agents and that there is no business justification that would exempt the acts from being found to be anti-competitive. The Tribunal would observe that some of these acts appear to have created some difficulty for agents and, in some cases, there does not seem to be an acceptable business justification. However, it is not necessary to embark upon a detailed act-by-act analysis to weigh their effects on agents

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against their business justification because of our conclusion that the Director has not demonstrated that the acts have or are likely to prevent or lessen competition substantially in the relevant advertising services market.

Both parties referred us to the statement set out in the Tribunal's decision in *NutraSweet* that:

[i]n essence, the question to be decided is whether the anti-competitive acts engaged in ... preserve or add to ... market power.²⁶²

The Director's operative theory is that Tele-Direct is extending its market power from the space market to the services market through the alleged practice of anti-competitive acts. This means that the Director must demonstrate that Tele-Direct has or is establishing, or is likely to achieve, market power in the services market.

In order to assess whether Tele-Direct now controls the services market, we first look to market shares in the currently commissionable market. There is disagreement between the Director and Tele-Direct on the respective market shares of Tele-Direct and the agents. The parties rely on a variety of data that most supports their positions. Market share estimates range from 65 to 87 percent for agents and from 13 to 35 percent for Tele-Direct. We reject the extreme numbers put forward by the Director and Tele-Direct as not supportable on the evidence and, indeed, they were not seriously advanced by either side. While there are weaknesses in the

²⁶² *Supra* note 4 at 47.

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data, we are satisfied that a market share of about 75 percent for agents and 25 percent for Tele-Direct is reasonably accurate.²⁶³

A high market share for agents and a correspondingly low market share for Tele-Direct would suggest that, even if Tele-Direct has engaged in anti-competitive acts, it has not been successful in obtaining market power in the advertising services market. Indeed, the fact that Tele-Direct's market share is as high as it is may well be attributable to factors unique to Tele-Direct but which are not anti-competitive, such as the desire of some advertisers to deal directly with the publisher. From the available data, it is apparent that, even on an individual basis, Tele-Direct does not have as high a market share as DAC/NDAP, which has about a 40 percent share. Based on all these considerations, we are satisfied that Tele-Direct's 25 percent share falls well short of a level that might be considered to indicate market power.

We must also consider whether there is any evidence of a trend towards a material increase in Tele-Direct's market share, which might indicate that it is in the process or is likely in the future to acquire market power as a result of the acts which the Director alleges to be anti-competitive. Certainly, there is anecdotal evidence of individual advertisers switching from an agent to Tele-Direct for some of the reasons which constitute acts which the Director submits are anti-competitive, for example, issue billing. We have no evidence, however, of any declining trend in market share for agents or increasing trend in market share for Tele-Direct over any

²⁶³ Both sides agreed that the agents' market share in 1993 was about 80 percent: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131680. Adjusting to exclude sales into Tele-Direct's directories by agents based outside of Tele-Direct's territory, we arrive at approximately 75 percent for agents and 25 percent for Tele-Direct.

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period of time. Further, it would not seem that the agency business is unattractive or that agents are in any way systematically going out of business. On the contrary, we have had evidence of additional agents being accredited in recent years and others who are still seeking accreditation.

Is there any reason to believe that in the future the alleged anti-competitive acts will have any *greater* deleterious effect on the agents than they may have had in the past? We recognize that a new element has been added to the interactions in the marketplace by the relatively recent creation of Tele-Direct's CMR. Could it be that, in combination with Tele-Direct (Media) Inc. which provides an additional vehicle for Tele-Direct to use practices like the alleged anti-competitive acts, the alleged anti-competitive acts will likely cause competition to be prevented or lessened substantially in the future?

We are unable to arrive at such a conclusion. We have no evidence of the competitive impact of the advent of Tele-Direct's CMR into the market. It has been competing since 1994 but we were provided with no evidence whatsoever from which to infer that the combination of its presence and Tele-Direct's alleged anti-competitive acts have resulted or will result in a materially lower market share to agents and a correspondingly higher share for Tele-Direct. One would have expected that if this was an important factor, we would have seen some significant movement of accounts from the independent agents to Tele-Direct's CMR. There was no such evidence. It is true that Tele-Direct's CMR is in its early years and it may not be as effective now as it will be later. To be valid, however, inferences about the future must be based on evidence.

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Given the record before us, any conclusion about the future effect of Tele-Direct's CMR in combination with the alleged anti-competitive acts would be speculative.

The Director has the burden of proving a substantial lessening of competition. We conclude that while some of the disadvantages which form part of the Director's abuse of dominance case and were imposed on agents by Tele-Direct may have had some adverse effect on them, that effect could not have been and is not likely to be substantial or the agents would not hold 75 percent of the market or there would be evidence of a decline over time in the share held by agents.

(4) Group Advertising

Group advertising is display advertising consisting of the individual business names of a number of franchisees or distributors under a common logo or trade-mark.²⁶⁴ This type of advertisement is now prohibited by Tele-Direct and to all intents and purposes is not sold by agents or Tele-Direct.²⁶⁵ The revenues that might potentially be converted into group advertising are currently non-commissionable and are serviced by the internal sales force as local or individual business accounts.

²⁶⁴ The difficulty here is that some franchisees or licensees carry on a number of businesses besides the licensed or franchised one and they do not operate their business under a "corporate" name. They wish to be listed in the advertisement under their own name, which often has high recognition value in their community, while still participating in the group advertising to promote the licence or franchise. An example is the Autopro dealers: the licensed Autopro garages or service stations do not carry the "Autopro" name. Tele-Direct does not permit them to be listed under their individual names.

²⁶⁵ There was evidence of an occasional advertisement that appears to be a group advertisement or something resembling a group advertisement but we are satisfied that it is Tele-Direct's policy not to permit group advertising.

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The effect of the alleged practice of anti-competitive acts regarding group advertising is to prevent competition by limiting the size of the commissionable market available to agents, rather than limiting their ability to compete for existing commissionable accounts. Because of the difference in the nature of the allegations, whether there is a likely substantial prevention of competition as a result of Tele-Direct's practice regarding group advertising must be evaluated separately from the alleged practices of anti-competitive acts respecting the existing commissionable market.

We believe that Tele-Direct's policy on group advertising is dictated by its concern with a net revenue loss should advertisers abandon or reduce individual advertising in favour of group advertising. The incidental effect is to deny a type of advertising that would primarily be of interest to larger advertisers, for example, franchisers, some of whose accounts are likely targets for agencies. Although we heard anecdotal evidence of how certain advertisers would prefer to participate in group advertising, we were not presented with evidence as to the magnitude of the effect of this restriction. In the circumstances relating to agents we are of the opinion that such information should have been provided. Without such evidence, we cannot conclude that the prohibition against group advertising constitutes a substantial prevention of competition.

(5) Conclusion

We are unable to conclude that the evidence demonstrates that the acts alleged to be anti-competitive in the existing commissionable market and in respect of group advertising have had,

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are having or are likely to have the effect of preventing or lessening competition substantially. As a result, the Tribunal is without jurisdiction to grant a remedy under section 79 of the Act. It is, therefore, not necessary to consider in detail whether the individual acts complained of are anti-competitive and whether separately or in combination they amount to a practice.

We are not unmindful that some of Tele-Direct's actions in respect of agents seemed wilful and senseless. However, the Competition Tribunal does not exist to regulate industry practices generally. Rather, it has jurisdiction only to remedy the substantial prevention or lessening of competition and where this has not been proved, no remedy can be ordered.

E. CONSULTANTS

(1) Introduction

At paragraph 65(b) of the application, the Director alleges that Tele-Direct engaged in anti-competitive acts by refusing to deal directly with consultants as agents for advertisers purchasing space from Tele-Direct. The paragraph continues:

The Respondents have issued guidelines to their advertising space sales staff which provide that the customer must deal with the Respondent's salespersons and no consultant can deal with the salespersons as a customer's agent.

The following, more specific, aspects of refusing to deal directly with consultants were provided in the written argument at paragraph 297:

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[I.]

(a) written instructions: refusal to act upon written instructions received from consultants on behalf of advertisers;

(b) oral instructions: refusal to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same;

(c) follow-up: refusal to deal with consultants on subsequent errors or problems.

In paragraph 65(c)(v) of the application, the Director alleges that Tele-Direct also engaged in anti-competitive acts by providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged errors or other problems which would not result in delay or rejection of orders from Tele-Direct's own sales representatives. As set out in paragraph 296 of the written argument, the specific aspects of these acts are:

[II.]

(a) delivery and processing problems: refusal to acknowledge or accept delivery of orders involving consultants or denial of delivery resulting in the delay or rejection of same, refusal to process such orders or the return of such orders to the advertiser or consultant;

(b) alleged errors: the identification of errors or problems in such orders which would not result in the delay or rejection of orders handled by the Respondents' own sales staff;

(c) oral instructions: refusal to meet with the advertiser to take instructions originating in advice from consultants;

(d) consequential acts: rejecting or delaying the processing of consultant orders, permitting or facilitating the following consequential actions:

(i) informing advertisers that their orders may or may not be processed if prepared by consultants or that consultants are "scam artists", have committed errors or similar threats or derogatory comments;

(ii) inducing breach of the contract between advertisers and consultants.

The final alleged anti-competitive acts of relevance to consultants are found at paragraph 65(e) of the application. The Director maintains that Tele-Direct is engaging in anti-competitive acts by refusing to supply specifications to consultants for the placing of advertisements in its directories.

We will deal with the alleged anti-competitive acts under the headings (a) refusal to deal directly with consultants, (b) discriminatory acts and (c) specifications, starting in "(5) Anti-competitive Acts", below.

(2) Allegations - Pleadings

The respondents argue that the "consequential acts" listed under II. (d) above do not fall within paragraph 65(c)(v) of the application and should not, therefore, be considered by the Tribunal. They also submit that one of the remedies requested by the Director, pertaining to copyright in advertisements, was not pleaded. The Director conceded that the case for including the remedy is not strong and we will not deal with it further.

On the question of the construction of the pleadings and what may be considered as fairly within them, once we have reached the stage of final argument we have indicated that what is determinative is what the parties considered to be in issue, looking at the proceeding as a whole. We will use the same general approach to the arguments here.

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Counsel for the respondents admitted that aspects II.(a) and II.(b) were clearly in the application and II.(c) might be reasonably inferred from the application but II.(d) was outside the pleadings. The elements of (d) which were emphasized in oral argument by the respondents regarding their objection related to the question of inducing breach of contract and what was termed the "bad mouthing" claim or the making of disparaging remarks about consultants. In reply, counsel for the Director stated that the Director was not seeking a remedy with respect to the consequential acts and that there was little point in addressing whether they were part of the case. We have some difficulty with this position. The Director is clearly seeking a remedy for the alleged anti-competitive acts of providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged errors or other problems, of which II.(d)(i), at least, is a subset. The Director also accepted, however, and we agree that any issue of counselling breach of contract is a matter for the civil courts so we will not deal with it further. The remaining acts listed in II.(d) were addressed by *both* parties through evidence and argument. Based on their conduct of the proceedings, the respondents were aware that these acts were in issue and there is, therefore, no prejudice to them by the Tribunal dealing with them on the merits.

(3) Competition Between Consultants and Tele-Direct

For the Director to succeed in any of the allegations, it must first be shown that Tele-Direct and the consultants are competitors. The respondents submit that consultants do not "sell" anything; they merely "unsell". They describe consultants as being in the business of providing

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independent (or non-partisan) advice to disgruntled, local Yellow Pages advertisers. They say that Tele-Direct does not operate in this market since advertisers recognize that Tele-Direct's advice is partisan and not independent.

The Tribunal accepts that while the relationship between Tele-Direct and the consultants is not that seen in the more usual competitive context, they are nonetheless competitors. It is true that consultants exist by downselling, while it is highly unlikely that Tele-Direct representatives would offer the same type of advice. It is also true that consultants' advice is independent while Tele-Direct representatives are, by definition, partisan. Further, consultants normally do not have an ongoing relationship with an advertiser and their remuneration arrangement takes a different form than that for Tele-Direct. There may be other differences of detail.

At bottom, however, both consultants and Tele-Direct representatives provide services which a customer can use to achieve the final result of an advertisement in the Yellow Pages. As we have seen from the evidence put forward in this case, a customer may choose to use either a consultant or the Tele-Direct representative to obtain these services. In this sense, they are substitutes for one another and compete to serve the advertising customers. There was substantial evidence put before us that Tele-Direct, in fact, views consultants as significant competitors, monitors their progress and takes action to attempt to limit their inroads on its revenues.

This is not to say that consultants (and Tele-Direct) operate in the "separate" services market, an argument which we have already rejected. Both consultants and Tele-Direct are

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participants in the broad telephone directory advertising market. Tele-Direct controls that market, as set out in the chapter entitled "VII. Control: Market Power", above.

(4) Facts

(a) Consultants and their Method of Operation

Three directory advertising consultants testified before the Tribunal. Jim Harrison of Tel-Ad Advisors Ltd. ("Tel-Ad") has serviced the Ontario market from an office in the Toronto area since June 1984. Prior to that time, Mr. Harrison was an employee of Dominion Directory. Serge Brouillet, previously in sales and also training and promotion with Tele-Direct, started Ad-Vice Communications ("Ad-Vice") in mid-1989 in Sudbury to service northern Ontario. In the fall of 1990, he sold the northern Ontario operation to Charles Blais to be run as Ad-Vice North and moved into the Toronto market. Mr. Blais also appeared as a witness. Mr. Blais operated the Ad-Vice franchise in Sudbury from November 1990 to December 1992 when he sold it back to Mr. Brouillet who ran it in 1993.

A summary of the *modus operandi* of consultants in general will provide context for the relations between consultants and Tele-Direct and for the Director's allegations. Consultants operate on the basis that many Yellow Pages advertisers can reduce their Yellow Pages spending without reducing the effectiveness of the advertising. In other words, they target customers who are dissatisfied with the amount that they are spending with Tele-Direct and are willing to pay a

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fee to lower it. Consultants recruit customers by going through the Yellow Pages and identifying likely candidates for their services, those for whom they can save money. Two of the major factors are the size of the advertisement and the use of colour; number of headings and number of directories are also reviewed.

After contacting the client by telephone to determine interest, the consultant or an employee of the consultant meets with the client and makes a presentation showing the client various options for changing the advertising. The potential for conflict with Tele-Direct and its commissioned sales representatives is obvious from the outset. The consultants' income depends on reducing customers' expenditures on Yellow Pages. Thus, they attempt to convince the customer that the extra amount spent for options like larger size and colour is not worth paying. To do this, they might bring to the attention of the customer how much more those options cost and question their effectiveness for the customer. Tele-Direct's representatives, of course, emphasize the value and effectiveness of colour, size and the like by drawing on arguments and evidence put together by Tele-Direct to show that they are worth the cost.

With respect to submitting customers' orders to Tele-Direct for processing, when it first commenced operations Tel-Ad sent orders to Tele-Direct on behalf of customers. These were rejected by Tele-Direct. Then Tel-Ad sent in the orders on a generic order form with no identifiers; these were also rejected and returned either to Tel-Ad or the customer. Attempts to submit orders with a letter of power of attorney from the customer also failed. Eventually, Tel-Ad simply left the orders with the customers to be submitted to Tele-Direct. In July 1984, Tel-Ad

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started legal action against Tele-Direct for refusing to accept advertising orders directly from Tel-Ad. Tel-Ad also sought an interlocutory injunction requiring Tele-Direct to accept orders submitted by Tel-Ad on behalf of advertisers. The injunction application was denied on the basis of no irreparable harm and the action was later abandoned. Tel-Ad's activities led to the first version of Tele-Direct's guidelines for dealing with consultants, drafted in 1986. Tele-Direct's guidelines are reviewed in some detail below.

(b) Tele-Direct Reaction - General

The existence and activity of consultants strike at the trustworthiness of advice provided by Tele-Direct's sales representatives and place highly profitable revenues in jeopardy. Tele-Direct does all within its power to eliminate any possibility of consultants gaining the ear of its customers. It has taken out advertisements warning customers to beware of consultants. The same message is conveyed by the representatives and by letters to customers telling them to call Tele-Direct if contacted by consultants.

According to the 1986 Tele-Direct guidelines for dealing with consultants, the "official" line on consultants to be conveyed by representatives is that their objective is to reduce Yellow Pages advertising which will reduce the effectiveness of the advertising and likely adversely affect the customer's business, based on studies conducted by Tele-Direct. Emphasis is placed on the fact that consultants are only paid if the customer reduces Yellow Pages spending, implying that consultants are likely to give biased advice, and that Tele-Direct will perform the "same"

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service as the consultant (advice and artwork) and "not charge a fee".²⁶⁶ Tele-Direct also encouraged its representatives to point out to the customer that while Tele-Direct was concerned with the long-term, consultants do not have a continuing relationship with the customer and therefore have no incentive to take into account the possible negative repercussions on the customer's business if their advice is followed.

There is evidence that at least some sales representatives went considerably further in their efforts to discredit consultants, calling them "scam" artists and other epithets, saying they were unfamiliar with Tele-Direct's specifications and showing poor photocopies of artwork done by consultants to customers in an attempt to cast doubt on the ethics and professionalism of the consultants.

Tele-Direct has also taken other, positive steps to combat consultants by improving elements of its service to its customers. For example, Tele-Direct has attempted to create a better working relationship with customers through "consultative" selling and by assigning representatives to customers for up to three years rather than changing each year. While the changes made by Tele-Direct were not in response to consultants alone, they were rooted in customer dissatisfaction with Tele-Direct's service.

²⁶⁶ These assertions ignore the fact that Tele-Direct representatives would rarely, if ever, give advice on how to reduce spending.

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(c) Tele-Direct's Consultant Guidelines

The guidelines set out Tele-Direct's procedures and directives to its sales force for dealing with orders for advertising originating with consultants and for handling customer contact once involvement of a consultant has been detected or suspected. This stage of the relationship between consultants, customers and Tele-Direct forms the focus of the Director's allegations of anti-competitive conduct. While the application of the various guidelines has been somewhat erratic and interpretation of their terms varied, it is clear that Tele-Direct has at no time dealt directly with a consultant acting *on behalf of* or in a representative capacity for an advertiser. Tele-Direct has always insisted on visiting a customer suspected of using a consultant even after an order was received from the customer and obtaining the customer's signature on its own documents. The package provided by Mr. Brouillet of Ad-Vice to his clients, following futile attempts on his part to avert the visit of the Tele-Direct representative by providing Tele-Direct's contract or a similar document to his clients himself,²⁶⁷ advises the client that the Tele-Direct representative will be in contact to transfer the advertising program onto the Tele-Direct forms.

(i) 1986 Guidelines and Their Application

As general rules, the 1986 guidelines provided that:

²⁶⁷ Tele-Direct threatened him with legal action, apparently for breach of copyright in its contractual terms and conditions.

(c) Tele-Direct will not accept insertion orders directly from directory consultants who have not been granted accredited agency status by Tele-Direct.

(d) Tele-Direct sales representatives should continue to contact their customers directly and request that the customers actually sign the Tele-Direct contracts and layout sheets so as to ensure the accuracy of the Yellow Pages advertising proposal prepared by a directory consultant.²⁶⁸

While the Tele-Direct policy of refusing to accept orders directly from consultants may have been followed in Tele-Direct's western region, it was not followed in the eastern region, in particular in Montreal, Sudbury and Ottawa. Letters sent in 1989 by Tele-Direct to Consultant en publicité annuelle et communication (CEPAC 2000) Inc. (" CEPAC 2000 ") in Montreal and Ad-Vice in Sudbury and in 1990 to Steven White of Tel-Ad in Ottawa²⁶⁹ outlined for the consultants in question the procedure to follow in submitting orders to Tele-Direct.²⁷⁰ The orders had to be delivered to named Tele-Direct managers in the relevant offices, accompanied by proper authorization by the advertiser on the advertiser's company letterhead.

Paul de Sève, Tele-Direct's Vice-president of Sales for the eastern region, confirmed that, although Tele-Direct's policy was not to deal directly with the consultant on the advertiser's behalf, in the eastern region at least, it was accepting orders from consultants. Orders were not automatically rejected and returned to the consultant even though Tele-Direct was aware of consultant involvement. The orders were taken as an indication that the customer wanted to

²⁶⁸ Confidential exhibit CJ-10 (blue vol. 1), tab 5 (public).

²⁶⁹ Not affiliated with Mr. Harrison.

²⁷⁰ Initially, Tele-Direct refused to accept orders from Mr. Brouillet, until he obtained a copy of the letter sent to CEPAC 2000.

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change its advertising and a Tele-Direct representative would visit the advertiser and deal with him or her directly. In Tele-Direct's own words,

. . . Regardless of whether the "cut agent" or the customer was directing insertion/change/cancellation of Yellow Pages advertising through letter or order form, we would accept this information as notification that the customer wished to renegotiate his Yellow Pages advertising. The Tele-Direct representative would deal directly with our customer, using our forms and contracts in the setting up of Yellow Pages advertising.²⁷¹

(ii) 1990 Policy and Application

Tele-Direct implemented new consultant guidelines in December 1990. The opening words of the revised guidelines state that:

We changed our operating procedures on dealing with "cut agents" effective December, 1990, to further strengthen and reinforce our direct servicing philosophy with our customers.

These changes were made to ensure that we did not act on "cut agent" instructions, for the insertion/change/cancellation of our customers' Yellow Pages advertising. Furthermore, these changes were intended to leave no doubt in the minds of our customers that we do not do business with "cut agents".²⁷²

The "general procedures" established by these guidelines were as follows:

- we will always accept letters/packages sent or given to us by customers and act in accordance with their wishes.

²⁷¹ Operating procedures prior to December 1990: confidential exhibit CJ-11 (blue vol. 2), tab 58 at 107788 (public).

²⁷² Operating procedures, December 1990: *ibid.* at 107792 (public).

- to the best of our knowledge, we will not accept, nor act upon, information sent or given to us by "cut agents" on behalf of our customers, nor accept or act upon information sent or given to us by customers containing directives from "cut agents."

Instead, our procedure will be to not accept packages from "cut agents" or from customers for "cut agents" and in the event that a package is accepted in error, its contents will be returned to the "cut agent" with a covering letter designed for this purpose.²⁷³

The guidelines then provide more detail on the procedure to be followed in particular situations. The gist is that if, upon external examination of a letter or package, it became apparent that it was from a consultant or from a customer working with a consultant, the letter or package would be returned to the consultant. If the letter or package was apparently from a customer, with no external indication of consultant involvement, the letter or package would be opened but if further examination of the contents revealed the involvement of or a directive from a consultant, the letter or package would be returned to the consultant. Even when the letter or package appeared to come from or was, in fact, dropped off by the customer, if it was rejected because of consultant involvement, the customer would not be informed that the order had been returned to the consultant.

Mr. de Sève admitted that the procedures set out above represented a dramatic change from the 1986 guidelines, at least with respect to how the Montreal, Sudbury and Ottawa offices had been operating.²⁷⁴ It is also clear from his testimony that the principal reason for the change was that Tele-Direct was having second thoughts about having "legitimized" the consultants to

²⁷³ *Ibid.*

²⁷⁴ There is some question as to whether the consultants affected were notified specifically of the change in policy or of the exact terms of the new policy. Messrs. Brouillet and Blais said that they were not.

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the extent they had by writing the letters referred to above in 1989 and 1990. The 1990 strike by Tele-Direct's sales representatives meant that the consultants were particularly active in the fall of that year.

The 1990 guidelines were adhered to strictly in one respect. At no time did Tele-Direct accept orders that were not submitted on the customer's letterhead. Other aspects of the guidelines appear to have been unevenly applied. Despite the statement that Tele-Direct would *always* accept orders from its customers and "act in accordance with their wishes", there was evidently considerable uncertainty within Tele-Direct as to how the guidelines were to be applied with respect to rejecting customers' orders for consultant involvement. Some orders containing indications of consultant involvement or where a consultant was known to be involved were accepted without incident or accepted after an initial rejection. Yet, Mr. de Sève's evidence, which as Vice-president of Sales for the eastern region we take to be an "official" application of the guidelines, was that where there was doubt, it was *assumed* that the documents came from a consultant and they were returned to the consultant without advising the customer.

This is what happened in the summer of 1991 in the case of a package containing 23 orders under customers' signatures which were, in fact, prepared by Ad-Vice North (Mr. Blais). An internal Tele-Direct document dealing with how it should respond to a complaint by Mr. Blais about this incident indicates that packages were being returned to Ad-Vice North by the Sudbury office *even though* Ad-Vice North was not mentioned in any of the correspondence and *regardless of* the fact that the letter of direction was from the customer because the

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employees recognized the Ad-Vice "format". Mr. de Sève stated that consultant involvement was probably assumed because of the number of orders in one envelope.

Mr. de Sève also confirmed that in 1991 Tele-Direct adopted a further policy of not processing orders received at the closing date according to the customer's instructions if they originated with a consultant even though it would do so for orders coming from its own sales force. Tele-Direct would instead rely on its last year's contract with the customer or the latest contract signed by the customer.

(iii) 1992 Policy and Application

The difficulties with and the inconsistency in application of the 1990 guidelines led to the most recent Tele-Direct guidelines for dealing with consultants, dated February 1992. These guidelines are currently in force. The operating procedures in those guidelines state that they are designed to "formalize our existing policy of dealing directly with customers." Two important aspects of that policy are:

. . . Tele-Direct will not accept a customer's appointment of a consultant to act on his/her behalf in dealings with Tele-Direct; and, Tele-Direct will not knowingly take instructions from a consultant acting on behalf of a customer.²⁷⁵

The detailed procedures provide that when correspondence is received from a consultant, whether by mail, courier, delivery, etc., it is opened and the contents examined to determine what action (from a list of A to D) should be taken. According to the procedures, any correspondence

²⁷⁵ Confidential exhibit CJ-12 (blue vol. 3), tab 105 at 109796 (public).

from a customer appointing a consultant to act on his/her behalf is to be returned to the customer with a form letter indicating that Tele-Direct will only deal with its customers directly (B). Any "directive" from a consultant is to be returned to the consultant with a form letter which simply states that the material was received "in error" (C). A second form letter is to be sent to the customer explaining that the material has been returned to the consultant without being processed and stating Tele-Direct's policy of only dealing with the customer directly. The guidelines also state that any correspondence from a consultant regarding problems with or errors in published advertising are to be ignored altogether and the matter resolved directly with the customer (D).

Most importantly, if the correspondence contains instructions from a customer regarding his/her advertising, the procedures provide that the instructions should be accepted and handled "in the normal fashion, i.e., deal directly with the customer" (A). The evidence of Messrs. Renwicke and de Sève regarding when correspondence will be considered by Tele-Direct to contain instructions "from a customer" and will be accepted and handled in the "normal fashion" reveals that the guidelines are still open to interpretation. Mr. de Sève testified that even if the instructions are from the customer, on the customer's letterhead, if they include any reference to consultant involvement, the order will not be accepted. He was of the view that such a case fell within B or C set out above. Mr. Renwicke, on the other hand, first stated that such an order would be accepted. He then qualified this by saying that it depended on the "tonal quality" of the letter and of any references to a consultant. According to him, the defining criteria is

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whether it was perceived that the consultant "is going to be seen to or is actually playing a leadership role for that account".²⁷⁶

Assuming that the order is accepted, the guidelines also set out a "protocol" for customer contact by sales representatives when dealing "directly" with customers which reveals that little weight is given to the order already received from the customer. The representatives are to conduct themselves throughout in a "business-like and professional manner" but are expected to "only provide Yellow Pages selling services *directly to a customer.*" While Tele-Direct's representatives are permitted (but not required) to meet with a customer when a consultant is present, they must decline to take *any* instructions from a consultant even if the customer insists. The protocol provides that all instructions must come directly from the customer. If the customer refuses to deal with the Tele-Direct representative directly, the representative is to review with the customer the customer's legal obligations under the existing Tele-Direct contract, i.e., that the previous year's advertising will simply be renewed. If this approach fails, the sales representatives are advised to try again later to re-convene the meeting but if the customer still refuses to deal directly, then advise the customer that the contract will remain in force in accordance with its terms.

Mr. de Sève admitted that under this protocol, where a customer handed the Tele-Direct representative a package containing instructions prepared by a consultant and asked the

²⁷⁶ Testimony of P. de Sève: transcript at 44:9123-27 (22 November 1995); testimony of D. Renwicke: transcript at 46:9630-34 (27 November 1995).

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representative to follow them, that would lead to a termination of the interview and the instructions would not be followed. He also admitted that, in fact, Tele-Direct representatives would refuse to meet with the customer in the presence of the consultant because they would not be able to discuss with the client "one-on-one" the merits of the change in the advertising program.

(d) Specific Incidents

The Director relies on numerous specific incidents involving consultants and their customers as evidence in support of his allegations. The respondents dispute that some of those occurrences took place or if they took place, took place as related by the Director's witnesses.

We accept that there were times when Tele-Direct went beyond simply rejecting or returning orders from customers where consultant involvement was suspected and treated these in an extremely cavalier fashion. On one occasion in 1989, a package of customer orders prepared by Mr. Brouillet, including one from Ad-Vice's law firm, was left with a secretary who threw it out of the Tele-Direct office and into the hallway. The lawyer was able to confirm after a number of phone calls that his order had been retrieved and was processed. He inquired about the remaining orders but Tele-Direct refused to inform him of the fate of the other orders in the package.

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On another occasion in 1990, when the manager designated to receive orders from Ad-Vice in Sudbury was not in the office, the process server left the package on the counter and the receptionist threw it in the garbage. Apparently the order was not processed in accordance with those instructions, according to the respondents, because the advice was delivered late. The only evidence brought to our attention on this point was a recently written note by the Tele-Direct representative that stated "delivered past deadline - did not use their material".²⁷⁷ The affidavit of service sworn contemporaneously, however, indicates that the package was delivered on August 16, 1990. Mr. de Sève's evidence was that the closing date for Sudbury was in November. We therefore do not accept that the package was delivered late.

We accept the evidence of incidents in which orders from customers who had used a consultant were subject to "errors" in processing by Tele-Direct. In three cases Tele-Direct acknowledged to the customers that errors had been made and provided a credit. These included Todd Optical Ltd. (mistake in telephone number and location), Adler Moving Systems (advertisement in the Elliot Lake directory omitted), Forest Products and Builders (advertisement did not appear), all customers of Mr. Brouillet. The owner of Todd Optical Ltd. had written a letter of support for Ad-Vice. We note that these errors all had potentially serious adverse consequences for the businesses involved.

Another customer of Ad-Vice, Lockerby Taxi Inc., whose owner appeared as a witness, experienced an odd error when an unpaid "filler" advertisement was published featuring

²⁷⁷ Confidential exhibit CJ-27 (black vol. 6), tab 33 at 128522.

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Lockerby's name with the query "Sales Down?" in the background. Mr. Flinn was never provided an explanation or apology for the error. His attempt to obtain compensation was denied by Tele-Direct because he could not prove damage to his business.

The Director also called evidence that Tele-Direct informed customers that advertising prepared by a consultant did not comply with its specifications on the slimmest of pretexts.²⁷⁸ Several of the examples related to clients of Mr. Brouillet, who testified that to his knowledge the advertisements were in accordance with existing specifications. The respondents called no evidence that the advertising did not meet specifications. In one case, the respondents admitted that the advertisement prepared by CEPAC 2000 did, in fact, comply with specifications.²⁷⁹ We conclude that Tele-Direct would not have objected to these advertisements had it not been for the involvement of a consultant in each case.

As noted above, Tele-Direct's admitted practice is not to act on a customer's order, where a consultant is believed to be involved, until the customer has been visited by a Tele-Direct representative. Instead, Tele-Direct treats the order from the customer merely as an "indication" that the customer wants to change his or her advertising. Thus, in every case of suspected consultant involvement, the customer will be visited by a Tele-Direct representative. At the point of a meeting between the Tele-Direct representative and the customer, usually the customer

²⁷⁸ E.g., Postime Distributors (wrong paper, wrong size), Paul's Quality Woodcraft (non-compliance with specifications in general), M & L Service (wrong paper) and Canac-Marquis Grenier (borderless advertisement not allowed).

²⁷⁹ The advertisement was for Canac-Marquis Grenier.

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would have already signed a contract with the consultant approving the changes recommended by the consultant and agreeing to pay the consultant's fee. The respondents deny that there was any tendency within Tele-Direct to delay visiting a customer who was known or suspected to have used a consultant until the last minute and to use the visit as the occasion to make disparaging remarks implying that the customer had been "taken advantage of" by the consultant or to use other tactics to pressure the customer into changing his or her mind about the program recommended by the consultant.

We accept that these types of tactics were fairly widely used by Tele-Direct's representatives. Last minute contact resulting in pressure on the customer and some confusion as to what the customer had to do to ensure the advertising would run as originally ordered occurred in several examples put before us. Mr. Harrison recounted the example of Mr. Kantor of Tiremag Corp. Mr. Kantor's order was delivered by registered mail to Tele-Direct in April 1993. Mr. Kantor was contacted by the Tele-Direct representative six months later, close to the closing date for the Brampton directory, and informed that no order for that directory had been received and that unless something was done, his advertising for the previous year would have to be used. Mr. Kantor insisted that he had already given them his instructions but Tele-Direct never located the package. The previous year's advertisement was run, then Tele-Direct located the package and admitted it had made a mistake. Similar problems occurred for Pat's Party Rentals, a client of

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Mr. Brouillet.²⁸⁰ Other examples are the Britannia Restaurant & Banquet Hall, again a client of Mr. Brouillet, and the Muskoka Riverside Inn, a client of Mr. Blais.²⁸¹

Eric Beesley of Georgetown Quik-Lube Ltd., who appeared in person, testified that, having submitted his order much earlier, he was contacted by the Tele-Direct representative the day before the closing date to attempt to persuade him to stay with his existing program. Then on the final day, he was called again and advised that he had to attend at the Tele-Direct office in person to make the changes. Mr. Beesley, however, was aware of the contractual clause allowing him to make changes in writing by a certain date, pointed out that he had complied with it and the advertising was processed as he had ordered.

There is only one documented case in the evidence in which a Tele-Direct representative counselled a customer *outright* not to honour a contract with a consultant.²⁸² Tele-Direct's guidelines explicitly warn Tele-Direct representatives not to provide advice with respect to customers' legal obligations. There is, however, abundant evidence of instances where customers

²⁸⁰ The order was sent in under her signature on July 15, 1991. On September 30, 1991, the client received a form letter from Tele-Direct stating that the material had been returned to the consultant without processing. (As of that date, Ad-Vice had not received anything back.) The customer panicked, thinking her advertising would not appear. Mr. Brouillet was unable to obtain confirmation that the advertising would appear as ordered. The client ended up dealing directly with Tele-Direct and Mr. Brouillet had to sue to recover his fee.

²⁸¹ The Britannia Restaurant & Banquet Hall order was sent in on August 2, 1991. On September 25, 1991, shortly before the closing date, Tele-Direct faxed the client its contract documents, which described the previous year's program. The client simply signed the documents, thinking they represented the new order. The old program appeared, the client protested, Tele-Direct insisted on full payment, the client refused to pay and was eventually barred from placing further advertising in Tele-Direct's directories. A Tele-Direct notation on a document relating to this customer indicates some concern even on its part about what transpired. The Muskoka Riverside Inn submitted its order prior to the deadline for making changes. The order was returned to the consultant and the client notified he had to send the order himself. The client missed the deadline for changing artwork and Tele-Direct ran the old advertising.

²⁸² L.J. Sunshine Hardwood Flooring. Ad-Vice has sued the customer for breach of contract. In his defence, the customer claims that the Tele-Direct representative advised him that he had been "misrepresented" and should stop payment on his cheque.

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refused to pay consultants following a meeting with the Tele-Direct representative. If the customer refuses to pay, the consultant is obliged to take legal action to recover the fees owed.²⁸³

In general, where the consultants have gone to court, they have been successful in having the contract honoured. While it might be argued that the persistent refusals to pay by customers indicates dissatisfaction with the consultants' services rather than reflecting any tactics employed by Tele-Direct's representatives, on the evidence we accept that there is a link between the visit by the representative and the instances of refusal to pay the consultants' fees.

The issue in many of these incidents is whether Tele-Direct made innocent errors, or whether the climate in Tele-Direct towards consultants resulted in what was, in effect, sabotage of the consultants and their customers. An important reason for concluding that there was more than innocent errors at work is the evidence that Tele-Direct was willing to sacrifice the interests of customers by putting them in the middle of Tele-Direct's struggle against consultants. There is more than a hint of malevolence in the formal and explicit decision in the 1990 guidelines not to inform customers when orders submitted on their behalf were being refused (although this was changed in the 1992 guidelines).

(5) Anti-competitive Acts

The Director alleges a number of anti-competitive acts by Tele-Direct involving consultants relating to Tele-Direct's refusal to deal directly with consultants on behalf of advertisers, its discriminatory treatment of customers and customers' orders originating with

²⁸³ Or, evidently, write off the account or accept a reduced fee in settlement, as Mr. Blais did on one occasion.

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consultants and its refusal to supply specifications to consultants. None are specifically listed in section 78 of the Act. As the list is not exhaustive, there is no reason not to assess the actions characterized by the Director as anti-competitive acts by Tele-Direct to see if they have the requisite exclusionary, predatory or disciplinary purpose.

The respondents argue that the challenged conduct cannot be anti-competitive because it was generally in accordance with the Tele-Direct guidelines for dealing with consultants, which they say were not intended to and do not prevent the consultants from doing business but rather render Tele-Direct's dealings with consultants "fair and consistent". They further submit that they have valid business reasons for their policy. These "business justifications" will be dealt with in detail for each alleged anti-competitive act.

In a related argument, the respondents submit that, to the extent that the Director is able to prove that Tele-Direct engaged in any of the alleged acts, those acts ceased in 1992 with the implementation of the most recent guidelines for dealing with consultants which have been consistently applied, unlike prior versions. They submit that any practice cannot be caught by section 79 as more than three years have elapsed since it ceased. We do not see validity in the argument. The 1992 guidelines are obviously still in force. The Director has not alleged that it is only the failure to follow the guidelines that is anti-competitive but that certain actions of Tele-Direct, which may not be contrary to the guidelines (refusal to deal directly with consultants on behalf of advertisers) or are simply not dealt with in the guidelines (some discriminatory acts, refusal to supply specifications), are anti-competitive. To the extent that the guidelines sanction

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conduct that the Director is alleging is anti-competitive, then the Director is, in effect, challenging the guidelines and their application also. The guidelines certainly do not prohibit (and may actually encourage) the particular conduct by Tele-Direct that is the subject of the allegations.

(a) Refusal to Deal Directly with Consultants

The respondents here repeat the argument that we dealt with earlier under the section concerning the abuse of dominant position with respect to publishers and the 20-directory requirement. They argue that a refusal *cannot* be an anti-competitive act and that they are not required to assist their "detractors" by dealing with consultants as that would be akin to placing a positive duty to act on the respondents. As we stated in that section, semantic arguments about whether the act in question is active or passive do little to advance the real issues in dispute. We will therefore proceed to analyze the more substantive arguments without further comment.

The evidence is clear that Tele-Direct has engaged, since the advent of Mr. Harrison and Tel-Ad in 1984, in the specific aspects of refusing to deal directly with consultants on behalf of customers set out under I. in the introduction above. Tele-Direct has refused to act on written instructions received from consultants on behalf of advertisers; refused to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same; and refused to deal with consultants on subsequent errors or problems.

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In the eastern region between 1986 and 1990, Tele-Direct acted in contravention of its own 1986 guidelines by *accepting* orders from, at least, CEPAC 2000, Ad-Vice and Tel-Ad, as evidenced by the letters. Even those letters, however, make it clear that the order must be accompanied by a letter *from the customer on the customer's letterhead*.

There is also evidence that Tele-Direct refuses to accept oral instructions from consultants. The 1992 guidelines are clear that the Tele-Direct representative must not accept instructions, even indirectly, from anyone other than the customer. While the current guidelines allow the representative to meet with the customer with the consultant present, the representative is not required to do so. The evidence was that most of the time the representative refuses to meet with the customer with the consultant present. Likewise, Tele-Direct would not deal with consultants on follow-up matters on behalf of customers.

We must weigh the anti-competitive effects of the acts against the business justifications put forward by the respondents. There is no doubt that Tele-Direct was trying to make life difficult for the consultants by refusing to deal with them directly on behalf of advertisers. Tele-Direct did not want the consultants to have any legitimacy in their dealings with its customers. The 1990 guidelines were brought in to eliminate the slight leniency that had developed under the 1986 guidelines, which had placed letters from Tele-Direct in the hands of various eastern region consultants confirming that orders coming from them would be accepted and processed by Tele-Direct.

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There are two possible types of adverse effects that might arise from Tele-Direct's refusal to deal with consultants acting on behalf of customers. The first is the possible increase in costs to the consultants that would result from having to do business in a somewhat roundabout way, rather than submitting orders directly. The second, and more important, effect is the effect on the consultants' credibility with customers when they have to explain to customers that they are not permitted by Tele-Direct to submit orders directly on their behalf but must use an indirect procedure. This might put the consultants in a negative light in the eyes of the customer, particularly if the customer is already generally aware of the background of acrimonious relations between Tele-Direct and consultants. Against that backdrop, the indirect procedure that the consultants must use for submitting orders to Tele-Direct might appear as a form of subterfuge.

The evidence does not indicate that cost increases to consultants from Tele-Direct's refusal have been a real issue. The consultants' businesses have experienced ups and downs. While Mr. Harrison was unable to grow his business between 1986 and 1992, servicing an average of 60 new accounts a year, in the last few years he has expanded and is now handling 200 to 250 new accounts a year. Mr. Brouillet testified that Ad-Vice revenues from Yellow Pages consulting were at a high between 1992 and 1994 but dropped roughly to 50 percent of that amount in the last two years. He has also diversified into other businesses in recent years. Mr. Blais eventually gave up and left the business.

Although all three of the mentioned consultants testified at the hearing, none of them expressly linked whatever difficulties that they might have experienced to an *increase in costs*.

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Even Mr. Blais did not do so. Undoubtedly, the consultants would like to have the advantage of being able to deal directly with Tele-Direct on behalf of advertisers. We find it instructive that Mr. Harrison has been operating since the mid-1980's, and still operates, in spite of Tele-Direct's refusal to deal directly with him in a representative capacity. Evidently, he, and other consultants no doubt, have managed to find an alternative to direct submission of orders that does not impose significant increased costs, or any increased costs at all, on their businesses. We cannot, therefore, identify any adverse cost effects on consultants resulting from Tele-Direct's refusal to deal with them acting on behalf of advertisers.

The question of possible negative reputational effects or damage to consultants' credibility arising from Tele-Direct's refusal to deal with them acting for customers is complex. To the extent that consultants lose reputation or credibility, customers will be less likely to demand their services. We do have evidence from the consultants that they have suffered negative reputational effects. For example, Mr. Brouillet testified that he could not keep sales help because of the negative environment; sales personnel felt they were regarded by advertisers as not legitimate, as "scam" or "con" artists.

Unfortunately, it is difficult to determine whether these effects result from the refusal by Tele-Direct to deal directly or from other actions of Tele-Direct that are not alleged to be anti-competitive. The Director has not challenged as anti-competitive Tele-Direct's general hostility towards consultants, as manifested by the placing of advertising warning customers about consultants, writing letters to customers and sending out its representatives to their premises with

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messages to the same effect. In our view, the negative reputational effects on consultants are due largely to the general environment created by Tele-Direct rather than the specific refusal to deal directly with consultants acting for advertisers. Any connection between the negative reputational effect or loss of credibility on the part of consultants and the refusal to deal directly is very weak.

We turn to Tele-Direct's business justifications for its consultant guidelines and, thus, for its refusal to accept written or oral instructions from consultants or deal with them on follow-up matters. The respondents' general position is that their refusal to deal with consultants "is clearly an efficient response to the damaging effect of the consultants on their business". They point out that the objective of the consultants is to decrease directory advertising which is exactly the opposite of the respondents' objective, which is, in their words, to sell directory advertising "in order to increase the usage of their directories and produce a more complete directory." Because the consultants generally serve customers on a one-time basis, the respondents take the position that consultants have a "perverse" incentive to "undersell", which detracts from the completeness of the directories.

We have already dealt with the "completeness" argument as part of the analysis of tied selling. As we concluded there, it is far from clear that all increases in advertising (especially size and colour which are targeted by consultants for reduction) contribute to completeness. Therefore, the "upselling" of size and colour by Tele-Direct representatives cannot be assumed to be socially beneficial, nor can the "downselling" of those attributes by consultants be assumed to

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be socially detrimental. The optimal situation is one in which both points of view are freely available to advertisers so that the advertisers themselves can make the choice.

At paragraph 840 of their written argument, the respondents have also provided the following more detailed justifications for issuing and following their consultant guidelines:

- (i) the consultants do not accept responsibility for payment for the advertising;
- (ii) to ensure that the customer is fully informed with respect to the advertising they are purchasing and their available options;
- (iii) to ensure customers understand with whom they are dealing;
- (iv) to prevent the conflicts that may occur if the Respondents' sales representatives were to take instructions directly from the consultants;
- (v) to ensure that advertisers are aware of new programs and initiatives.

We need only deal with the first point. The Director has in effect admitted the validity of the respondents' first business justification, that consultants do not accept financial responsibility for the advertising, by the remedies he seeks. At paragraph 69(b)(iii) of the application, the proposed remedy was:

. . . that the Respondents accept orders for advertising space on behalf of any party that can satisfy the Respondents' reasonable requirements of evidence of authority to act on behalf of an advertiser and *capacity to pay for the space requested*. (emphasis added)

At paragraph 391 of the written argument, the following further remedy was added:

. . . that the Respondents be prohibited from requiring that customers who choose to utilize the services of a third party to place advertising be required to enter into a contract directly with the Respondents where the third party who has satisfied the Respondents' reasonable requirements of evidence of authority to

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act on behalf of the advertiser and *where the third party has guaranteed payment on behalf of the principal.* (emphasis added)

These proposed remedies imply that in the Director's view it is reasonable for Tele-Direct to insist on financial guarantees if Tele-Direct is to deal with consultants as representatives of the customer. The consultants do not currently accept any financial responsibility. What the Director has done is to suggest an alternative method of operations for Tele-Direct in its dealings with consultants. He is proposing, in effect, that Tele-Direct begin to deal directly with consultants acting for advertisers by creating a new third sales channel (in addition to the internal sales force and agents).

There is evidence that dealing directly with the consultants would require Tele-Direct to set up an additional interface to deal with them. As described by Mr. Logan of the YPPA, this was the experience of US West, which set up a group of specially trained employees to deal with consultants to avoid problems with its sales force when it dealt directly with consultants. Such direct dealing, therefore, would obviously entail an additional cost to Tele-Direct. Further, Tele-Direct does not currently deal with guarantees in the sense proposed by the Director. Agents, of course, simply pay up front. A system would have to be set up to accommodate this new procedure.

In the circumstances, we think that the additional costs that Tele-Direct would incur if it were forced to deal with consultants directly on behalf of advertisers is a valid justification for

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not doing so, given that no adverse cost effects on agents were proven and that any negative reputational effects that are attributable to the refusal to deal directly are, at best, weak. We conclude, therefore, that, overall, Tele-Direct is not engaging in anti-competitive acts by refusing to deal directly with consultants on behalf of advertisers and, in particular, by refusing to accept written or oral instructions from, or engage in follow-up communication with consultants acting on behalf of advertisers.

(b) Discriminatory Acts

The discriminatory acts involve Tele-Direct's actions after the customer has submitted an order based on a consultant's advice and the effects that flow therefrom. Notwithstanding Tele-Direct's stated policy, orders submitted by a customer are sometimes returned because Tele-Direct believes a consultant was involved in the preparation of the order. There is no justification for Tele-Direct precluding an advertiser from seeking the advice of a consultant if the advertiser so chooses. Indeed, that is what one part of Tele-Direct's written guidelines states. Yet, the guidelines, even the 1992 guidelines, also mandate the return of certain customer orders. The fact that Mr. De Sève, a senior executive of Tele-Direct, is aware, and apparently condones, the return of customer orders for suspicion of consultant involvement proves that these were not merely isolated instances or errors.

Further, the history of the 1990 guidelines underlines the fact that Tele-Direct was fully aware of and, in fact, sanctioned the foreseen negative consequences of those guidelines for its

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advertisers. The advertisers' interests were sacrificed in order to hamper the consultants. The effect of the 1990 guidelines, as Tele-Direct itself recognized when they were first drafted, was to place the advertiser in the middle of the battle between Tele-Direct and the consultants, to the detriment of the advertiser.

A document attached to the guidelines identifies "perceived weaknesses" in the guidelines which were to be reviewed with the legal advisors. The first related to the fact that Tele-Direct would be rejecting any package delivered by a consultant or bearing any external indication of consultant involvement even if delivered by the customer or also bearing customer information on its face. Packages would therefore be rejected even though they might contain instructions from the customer on the customer's letterhead. A second concern was whether it was a reasonable business approach not to notify customers that the letter/package delivered to Tele-Direct had been rejected and returned to the consultant. In spite of these misgivings, the new policy was put in place.

The internal document dealing with the incident where 23 orders prepared by Mr. Blais were rejected even though they were under customers' signatures states that legal counsel, in fact, recommended against the procedure in the guidelines which permitted this type of rejection. Counsel, as reported in the letter, was of the view that the customers had the right to deal with whomever they wished in designing their advertising and further had the right to send Tele-Direct their instructions on their letterhead and expect that they would be acted on as coming

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from them, provided that Tele-Direct was not required to deal directly with the consultant and the correspondence did not carry any consultant identification.

The respondents did not attempt to provide a business justification for rejecting or returning customer orders where there was no evidence of non-compliance with specifications or of late delivery. In the circumstances, we find that the rejection, return, denial of receipt or refusal to process customer orders involving consultants constitute anti-competitive acts.

As noted earlier, the Director is not of the view that Tele-Direct's insistence on visiting a customer after the customer has signed a contract with a consultant and submitted an order to Tele-Direct is by itself an anti-competitive act. He says that the issue relates to what the representative tells the customer and how the order received from the customer is treated. We agree that this is the crux of the difficulty. The anti-competitive acts are those that lead the customers to believe that they will be disadvantaged or that actually harm them because they have used a consultant. These include suspicious errors, last minute contact resulting in confusion for the advertiser about what must be done to have the new advertising run or resulting in missed deadlines, identifying errors or problems in the advertising that would not otherwise be a problem and informing customers that their orders might not be processed. We accept that such incidents occurred and that there is no assurance that they will not be repeated whenever consultants are seen as a threat.

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The respondents argue that they were trying in all cases to ensure that their business operated efficiently by requiring consultants to meet deadlines and specifications. We have found that non-compliance with specifications and deadlines were largely pretexts for an attempt to pressure customers into changing their minds about a consultant's recommendations. Most of the incidents in evidence are more accurately characterized as highly disruptive because of the negative impact on customers rather than ensuring the smooth operation of Tele-Direct's business as argued. We have no hesitation in finding that statements or actions by Tele-Direct to discourage advertisers from dealing with consultants by expressly or implicitly indicating that advertisers will thereby be disadvantaged by Tele-Direct constitute anti-competitive acts.

The Director alleges that the respondents discriminate against consultants by refusing to meet with customers to take instructions originating in advice from consultants. On its face this looks very much like the allegation listed in I.(b) and forming part of the refusal by Tele-Direct to deal directly with consultants on behalf of advertisers. Presumably, the discriminatory act being alleged here is a refusal to accept oral instructions from customers using consultants while oral orders from customers not using consultants are accepted and acted on. As has already been noted, Tele-Direct requires that customers using consultants sign Tele-Direct's documents. In and of itself, this is not an anti-competitive act. It might, however, be a discriminatory act if customers not using consultants are not required to sign a contract in like circumstances.

However, the evidence of Mr. Giddings is that, by and large, all of Tele-Direct's customers sign its documents. In fact, Mr. Giddings testified that the only contracts which do not

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require signing are those contracts renewing advertising worth less than \$100. Further, Mr. Giddings indicated that for those contracts which are not signed, if there is a conflict between the customer and the representative as to what advertising was actually ordered, which results in a "write-off", the representative is financially responsible for the write-off. This policy does not seem unreasonable on an operational basis. With respect to orders which Tele-Direct will accept orally from customers dealing with its representatives (that is, those under \$100), there is no evidence that consultants deal with or are interested in obtaining clients whose orders are so small. We do not find this allegation to constitute an anti-competitive act.

There is no doubt that those discriminatory acts of Tele-Direct which we have found to be anti-competitive constitute a practice. They are not "isolated acts".

(c) Specifications

The Director submits that Tele-Direct's refusal to supply specifications to consultants is an anti-competitive act. He argues that consultants cannot adequately advise the customers who choose to use their services without up-to-date access to basic technical information. The Director points to evidence of Tele-Direct using alleged non-compliance with specifications to delay orders or discredit consultants in customers' eyes.

(i) Majority View (Rothstein J. and C. Lloyd)

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The majority of the Tribunal are unable to agree with the Director for the following reasons. We see the refusal by Tele-Direct to provide specifications to consultants as another manifestation of Tele-Direct's general aversion to having any relationship with consultants. Looking at the experience of consultants and Tele-Direct's refusal to supply specifications to them, the evidence is that this has not adversely affected their ability to compete. Consultants have been in business since 1984 and we have heard of no difficulty experienced by them because Tele-Direct refused to provide them with specifications.²⁸⁴ In one way or another, they were aware of what Tele-Direct's specifications required.

As to whether Tele-Direct not providing specifications to consultants would cause a problem in the future, Mr. Brouillet stated:

... If there were changes in their specifications and we were not informed about it, then obviously, there would be a problem. If there was really a problem, the client only had to call us within 24 hours, we could fix what was wrong and forward that to Tele-Direct.²⁸⁵

There is no evidence before us that suggests that Tele-Direct's specifications change frequently. If anything we are left with the contrary impression from the absence of evidence from consultants that frequent changes were a problem. Mr. Brouillet stated that once a problem is pointed out it can be quickly fixed. On the basis of this evidence, we are satisfied that any

²⁸⁴ This is not to say that Tele-Direct did not reject some orders based on non-compliance with specifications. This may have been the fault of the consultant not to conform to the specifications of which he was aware or because Tele-Direct, without justification, wished to create difficulty for a consultant. But Tele-Direct's rejection of orders was not attributable to consultants not being aware of what Tele-Direct's specifications required.

²⁸⁵ Transcript at 15:2762 (6 October 1995).

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changes to specifications will become known by consultants quickly. We, therefore, have no basis upon which to infer that refusal to provide specifications to consultants will, in any material way, adversely affect their ability to compete in the future.

The respondents did not argue the business justification "that customers understand with whom they are dealing" to justify the refusal to supply specifications to consultants, although this was raised as a justification for other acts. However, we are of the view, based on the evidence, that this business justification is applicable here. There is evidence before us of a number of instances in which there was confusion on the part of advertisers as to the exact relationship of a consultant with Tele-Direct.²⁸⁶

We infer from the way in which some consultants operate that this confusion could be exacerbated if a consultant, on visiting a proposed customer, is armed with up-to-date specifications obtained from Tele-Direct. There are indications in the evidence that in their initial contact with advertisers, consultants do not go out of their way to distinguish themselves from Tele-Direct. In some cases, the evidence is that the customer remains confused as to the exact relationship between the consultant and Tele-Direct.²⁸⁷ In other cases, it is apparent that while an advertiser may initially be confused, the fact that the consultant does not represent Tele-Direct

²⁸⁶ Evidence of Mr. Lee of M & L Service, Mr. and Mrs. Jovandin of L.J. Sunshine Hardwood Flooring, Mr. Fox of Fox & Partners Limited, Mr. Harmic of Dominion Springs Corporation, Mr. McMaster of H.R. Home Renovations. Of course, the consultants blamed Tele-Direct for the confusion and Tele-Direct blamed the consultants. We cannot say for certain how the confusion about the relationship between Tele-Direct and consultants arose in each case but it does appear there was confusion in the minds of some customers.

²⁸⁷ E.g., Mr. Lee of M & L Service.

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eventually becomes apparent. It may become apparent in conversation between the advertiser and consultant or when the advertiser is requested to pay the consultant separate from Tele-Direct. In the case of Ad-Vice, a follow-up letter makes this clear.²⁸⁸

However, in our view, it is the initial confusion that creates the difficulty. We do not think consultants should be "getting their foot in the door" of advertisers because of such initial confusion. Being provided with specifications by Tele-Direct could be used by them as a form of "calling card" signifying a relationship with Tele-Direct that does not really exist. Notwithstanding that in many cases the confusion is eventually cleared up, we do think customers are best served when they know from the outset precisely with whom they are dealing and in this case, the relationship or lack of relationship between Tele-Direct and a consultant. We therefore think that Tele-Direct is justified in refusing to provide specifications to consultants and conclude that such refusal is not an anti-competitive act.

While we are not satisfied that the Director has made a case that the refusal to provide specifications to consultants is an anti-competitive act, we are not unmindful that ultimately it is the advertisers that might encounter difficulty if they retain the services of consultants who use incorrect specifications. It is for this reason that we have, in providing for a remedy for discriminatory acts against advertisers, required Tele-Direct, at its option, to take positive steps to revise a customer's order that is not submitted in compliance with its specifications so that the

²⁸⁸ The package provided by Mr. Brouillet to his clients advises the client that the Tele-Direct representative will be in contact to transfer the advertising program to the Tele-Direct forms.

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order complies or advise the customer what is wrong and how the customer may revise the order in accordance with its specifications.

(ii) Minority View (F. Roseman)

In my view, the refusal to supply specifications is an anti-competitive act. While differing from the majority in their conclusion, I accept that there is little evidence of past harm to consultants from the refusal. Nevertheless, consultants may suffer adverse effects in the future should Tele-Direct change its specifications. The consultants will eventually learn of the changes through trial and error but this leaves a considerable degree of uncertainty during an indeterminate transitional period. Therefore, there is the likelihood that the consultants will be significantly hampered so that the refusal to supply specifications should be considered an anti-competitive act given the complete absence of any sound business justification for the refusal.

The respondents have not advanced any valid business justification. They argue that the refusal is justified by the uniqueness and complexity of Tele-Direct's business and its desire to maintain the value and quality of its product. It is difficult to see how avoidable errors in orders prepared by consultants (and submitted by customers) contribute to quality.

I do not accept the majority's view that the evidence supports the conclusion that the availability of specifications to consultants would result in increased confusion on the part of customers as to the consultants' identity and purpose. I agree with the majority that it is

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impossible to identify the source of the confusion that apparently arose for some customers.²⁸⁹ However, it is noteworthy that none of the incidents of confusion referred to by the majority was linked to Mr. Harrison²⁹⁰ but only to Mr. Brouillet. Yet, it is Mr. Harrison who has been able to obtain ongoing access to Tele-Direct's specifications from YPPA through an affiliate in the United States. Because I am of the view that refusal to supply specifications will likely significantly hamper the consultants' ability to compete and that there is no valid business justification for the refusal, I conclude that the refusal constitutes an anti-competitive act.

(6) Substantial Lessening of Competition

The competitive effectiveness of consultants has been reduced as a result of Tele-Direct's practice of discriminatory acts. Consultants incur higher costs as a result of being forced to defend themselves before customers and by having to seek the aid of the courts in enforcing their contracts. These activities require time and expense that could otherwise be spent in attracting and serving customers.

In addition, the consultants' ability to attract new business is negatively affected when their customers are inconvenienced or harmed by Tele-Direct's discriminatory acts. Customers so

²⁸⁹ *Supra* note 287.

²⁹⁰ *Ibid.* All of the incidents cited related to clients of Ad-Vice except for Mr. Fox of Fox & Partners Limited, who was not linked to a specific consultant.

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affected are unlikely to be repeat customers or to recommend the services of consultants to other Yellow Pages advertisers.

Although consultants currently service a small portion of the total telephone directory advertising revenue, they are competitively significant. Tele-Direct was forced to respond positively to the presence of consultants by improving its servicing of its customers. Thus, consultants have had and can continue to have a significant positive influence on Tele-Direct's level of service to its customers as Tele-Direct legitimately strives to offset the inroads that consultants make into its sale of Yellow Pages advertising.

It is difficult to arrive at a numerical determination of the effect on consultants of the practice of discriminatory acts we have found to be anti-competitive because the acts are intermingled with other forces that hamper consultants. What we know, however, is that the consultants' ability to compete is limited and fragile as compared to Tele-Direct's virtual monopoly through its control of publishing. Consultants, by the nature of their services, have little ongoing business and must convince advertisers to pay for their services when these advertisers could place advertising in directories without incurring such expense, i.e., the market for their services is necessarily a "thin" one.

Where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin

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with.²⁹¹ In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial. Of course, in the future, in the absence of any order by the Tribunal, there would be no constraint on Tele-Direct intensifying discriminatory acts against consultants and exacerbating an already substantial effect on them. We have no difficulty concluding that Tele-Direct's proven practice of anti-competitive acts has had, is having or is likely to have the effect of lessening competition substantially in the market.

(7) Remedies

The Tribunal recognizes that consultants' interests are antithetical to Tele-Direct's and that Tele-Direct should not be forced to assist consultants. However, consultants must be able to compete with Tele-Direct to provide services to advertisers. Tele-Direct cannot use its market power to impede consultants' activities and to disadvantage customers who wish to retain the services of consultants. On the other hand, Tele-Direct must not be restrained from competing fairly with consultants.

²⁹¹ The approach we adopt is implicit in *Director of Investigation and Research v. Imperial Oil Ltd.* (26 January 1990), CT8903/390, Reasons and Decision at 16, [1990] C.C.T.D. No. 1 (QL) (Comp. Trib.) and in U.S. Dept. of Justice/Federal Trade Comm'n, *Horizontal Merger Guidelines*, (2 April 1992) at 1.51. Although dealing with a consent order, *Imperial* in effect addresses the issue of what constitutes a substantial lessening of competition when there are varying initial degrees of market power by evaluating what is required to cure the alleged substantial lessening of competition. Similarly, the Guidelines view any numerical increase in concentration more severely the higher the initial market share of the acquiring firm.

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We have concluded that Tele-Direct's refusal to deal with the consultants directly on behalf of advertisers is not an anti-competitive act. No remedy is provided in this respect. Nor is any remedy provided for Tele-Direct's refusal to provide specifications to consultants.

We have found that Tele-Direct engaged in a practice of discriminatory acts against consultants and customers who use consultants resulting in a substantial lessening of competition. While many of the acts in evidence occurred more than three years before the filing of the Director's application, the practice continues. The practice of these acts is prohibited. Customers using consultants must be treated by Tele-Direct no differently than customers who do not use consultants.

For greater certainty, we elaborate on this remedy. Where a customer uses a consultant and the customer submits an order for advertising in the Yellow Pages, Tele-Direct is prohibited from rejecting the order. Tele-Direct may accept the customer's order without revisiting or contacting the customer to attempt to change the customer's mind. It will be open to Tele-Direct to act on the documents submitted by the customer or, if it considers it necessary, require the customer to sign a Tele-Direct document. If Tele-Direct decides to accept the order as it is, Tele-Direct is prohibited from not processing it or unduly delaying its processing and from refusing to confirm to the customer that the order will be processed as submitted. If the order is accepted and it turns out there is non-compliance with Tele-Direct's specifications, then the order must be processed in accordance with a revision made by Tele-Direct that complies with the

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specifications or the customer must be advised promptly that the order does not comply with specifications and informed of the exact problem and how to rectify it.

Alternatively, Tele-Direct has the option of providing further advice to the customer to try to convince the customer to change the order submitted. It may do so, including visiting the customer, but it is prohibited from employing the techniques that we have condemned as anti-competitive when doing so. For example, Tele-Direct may not delay until close to the closing date for submitting orders for a directory to contact the customer about alleged problems in the order. Tele-Direct may not advise the customer who used a consultant that the order does not conform to Tele-Direct's specifications or is otherwise unacceptable unless there is a material problem, in which case, Tele-Direct must provide the necessary information so the customer can cure the problem. Tele-Direct cannot use problems with the order in such a way as to leave the customer only with the option of reverting to the prior year's advertisement or having no advertisement appear. Nor may Tele-Direct delay until close to the closing date so that if the Tele-Direct's representative is able to convince the customer to change the order from that recommended by the consultant, that the customer does not have the opportunity of contacting the consultant if the customer wishes further advice from that source.

Subsequent efforts by Tele-Direct to resell the advertisers should be restricted to the merits of the advertising recommended by the consultant. Tele-Direct is prohibited from having its representatives discuss the role of or advisability of using a consultant at this time. We recognize that it may be difficult to distinguish between legitimate "puffing" of Tele-Direct's

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service and disparaging comments or inferences about the consultant's service. In view of the instances of disparaging comments by Tele-Direct that have occurred, we caution Tele-Direct to ensure that its instructions to its representatives are clear that in their follow-up meetings they are not to disparage consultants. What would be of concern would be evidence of systematic continuous representations that are untrue or that disparage consultants in these follow-up meetings.

For example, it is simply untrue that customers would receive the same advice from Tele-Direct for no cost as from a consultant who charges a fee because Tele-Direct representatives will rarely if ever recommend a reduction in advertising, which is the essence of the consultants' advice. The fact that consultants have a short-term relationship with a customer may be true but comments to this effect are disparaging if made with a view to causing a customer to lose confidence in a consultant's advice, not based on the merits of that advice. Tele-Direct should ensure that in these meetings its representatives restrict their selling effort to the merits of the advertising.

Observation by C. Lloyd and F. Roseman

We would have preferred to see a prohibition on attempted reselling by Tele-Direct's representative after an order was received from a customer. In our view, Tele-Direct has ample opportunity to establish a situation of trust and confidence between its customers and its representatives. If it fails to use its opportunities and customers choose to take the advice of a

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consultant because they perceive that they have not received quality service from Tele-Direct, then, ideally, that would be the end of the matter for that directory year. We have chosen, however, not to dispute the Director's concession that Tele-Direct should not be precluded from visiting advertisers after they have submitted an order.

X. ORDER

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

Definitions

1. In this order,

(a) "market" shall mean a market as defined by Tele-Direct for purposes of its commissionability rules prior to the filing of the application in this matter, and, for greater certainty, there shall in future be no fewer than six markets in Quebec and seven markets in Ontario;

(b) "consultants" shall mean firms which advise telephone directory advertisers on how to increase the effectiveness of and reduce expenditures on telephone directory advertising, primarily in the Yellow Pages, and which assist advertisers in the placement of orders for telephone directory advertising, but does not include firms which are accredited advertising agencies.

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Tied Selling

2. The respondents are prohibited from continuing to engage in tied selling, namely tying the supply of advertising space by them to the acquisition of advertising services from them, for customers advertising in six, seven and eight markets.

Abuse of Dominant Position

3. The respondents are prohibited from engaging in the practice of discriminatory acts relating to consultants and customers of consultants.

Remaining Allegations

4. The remainder of the application of the Director is dismissed.

Interpretation

5. The Director or the respondents may apply to the Tribunal for directions or an order interpreting any of the provisions of this order.

Confidentiality

6. As required by paragraph 11(1) of the Confidentiality (Protective) Order issued by the Tribunal on March 30, 1995, the panel determines that a "reasonable period" for the retention, in a secure and organized manner, by the respondents of those protected documents returned to them by the Director upon completion or final disposition of this proceeding and any appeals relating thereto, shall be five years.

DATED at Ottawa, this 26th day of February, 1997.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Marshall Rothstein
Marshall Rothstein

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SUPREME COURT OF CANADA

CITATION: Douez v. Facebook, Inc., 2017 SCC 33,
[2017] 1 S.C.R. 751

APPEAL HEARD: November 4, 2016
JUDGMENT RENDERED: June 23, 2017
DOCKET: 36616

BETWEEN:

Deborah Louise Douez
Appellant

and

Facebook, Inc.
Respondent

- and -

**Canadian Civil Liberties Association, Samuelson-Glushko Canadian Internet
Policy and Public Interest Clinic, Information Technology Association of
Canada and Interactive Advertising Bureau of Canada**
Intervenors

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and
Côté JJ.

JOINT REASONS FOR JUDGMENT: Karakatsanis, Wagner and Gascon JJ.
(paras. 1 to 77)

REASONS CONCURRING IN THE Abella J.
RESULT:
(paras. 78 to 118)

JOINT DISSENTING REASONS: McLachlin C.J. and Côté J. (Moldaver J. concurring)
(paras. 119 to 177)

Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751

Deborah Louise Douez

Appellant

v.

Facebook, Inc.

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and

**Canadian Civil Liberties Association,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
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Interveners

Indexed as: Douez v. Facebook, Inc.

2017 SCC 33

File No.: 36616.

2016: November 4; 2017: June 23.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and
Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Private international law — Courts — Jurisdiction — Choice of forum — Forum selection clauses — Consumer contract of adhesion — Company with head office in California operating online social network — Company’s terms of use containing forum selection clause in favour of California courts — Resident of British Columbia and member of company’s online social network bringing action against company in British Columbia relying on statutory tort pursuant to British Columbia’s Privacy Act — Whether action should be stayed on basis of forum selection clause contained in terms of use — Common law test for forum selection clauses applied in consumer context — Whether analysis of forum selection clauses should be subsumed under forum non conveniens test adopted in s. 11 of the Court Jurisdiction and Proceedings Transfer Act — Privacy Act, R.S.B.C. 1996, c. 373, s. 4 — Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11.

Privacy — Courts — Jurisdiction — British Columbia’s Privacy Act providing that despite anything contained in another Act, actions under Privacy Act must be heard and determined by Supreme Court of that province — Statute silent on contractual provisions — Whether Privacy Act overrides forum selection clauses — Privacy Act, R.S.B.C. 1996, c. 373, s. 4.

Facebook, an American corporation headquartered in California, operates one of the world’s leading social networks and generates most of its revenues from advertising. D is a resident of British Columbia and has been a member of Facebook since 2007. In 2011, Facebook created a new advertising product called “Sponsored

Stories”, which used the name and picture of Facebook members to advertise companies and products to other members. D brought an action in British Columbia against Facebook alleging that it used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of British Columbia’s *Privacy Act*. D also seeks certification of her action as a class proceeding under the *Class Proceedings Act*. The proposed class includes all British Columbia residents who had their name or picture used in Sponsored Stories. The estimated size of the class is 1.8 million people.

Under s. 4 of the *Privacy Act*, actions under the Act must be heard in the British Columbia Supreme Court. However, as part of the registration process, all potential users of Facebook must agree to its terms of use which include a forum selection and choice of law clause requiring that disputes be resolved in California according to California law.

Facebook brought a preliminary motion to stay the action on the basis of this forum selection clause. The chambers judge declined to enforce the clause and certified the class action. The British Columbia Court of Appeal reversed the stay decision of the chambers judge on the basis that Facebook’s forum selection clause was enforceable and that D failed to show strong cause not to enforce it. This rendered the certification issue moot and the court declined to address it.

Held (McLachlin C.J., Moldaver and Côté JJ. dissenting): The appeal should be allowed. The forum selection clause is unenforceable. The chambers

judge's order dismissing Facebook's application to have the Supreme Court of British Columbia decline jurisdiction is restored.

Per Karakatsanis, Wagner and Gascon JJ.: In the absence of legislation to the contrary, the common law test for forum selection clauses established in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, continues to apply and provides the analytical framework for this case. The *forum non conveniens* test adopted in the *Court Jurisdiction and Proceedings Transfer Act* (“*CJPTA*”) was not intended to replace the common law test for forum selection clauses. The analysis of forum selection clauses thus remains separate, despite the enactment of the *CJPTA*.

Forum selection clauses serve a valuable purpose and are commonly used and regularly enforced. However, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. Where no legislation overrides the forum selection clause, the two-step approach set out in *Pompey* applies to determine whether to enforce a forum selection clause and stay an action brought contrary to it. At the first step, the party seeking a stay must establish that the clause is valid, clear and enforceable and that it applies to the cause of action before the court. If this party succeeds, the onus shifts to the plaintiff who must show strong cause why the court should not enforce the forum selection clause and stay the action. At this second step of the test, a court must consider all the circumstances,

including the convenience of the parties, fairness between the parties and the interests of justice. Public policy may also be a relevant factor at this step. The strong cause factors have been interpreted and applied restrictively in the commercial context, but commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. Thus, the *Pompey* strong cause factors should be modified in the consumer context to account for the different considerations relevant to this context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake.

As the Court recognized in *Pompey*, legislative provisions can override forum selection clauses. In the present case, s. 4 of the *Privacy Act* lacks the clear and specific language that legislatures normally use to override forum selection clauses. While the legislature intended s. 4 of the *Privacy Act* to confer jurisdiction to the British Columbia Supreme Court to resolve matters brought under the Act, nothing suggests that it was also intended to override forum selection clauses.

With respect to the first step of the *Pompey* test, the forum selection clause contained in Facebook's terms of use is enforceable. At the second step of the test, however, D has met her burden of establishing that there is strong cause not to

enforce the forum selection clause. A number of different factors, when considered cumulatively, support a finding of strong cause. Most importantly, the claim involves a consumer contract of adhesion between an individual consumer and a large corporation and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. It is clear from the evidence that there was gross inequality of bargaining power between the parties. Individual consumers in this context are faced with little choice but to accept Facebook's terms of use. Additionally, Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. This matter requires an interpretation of a statutory privacy tort and only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province. Overall, these public policy concerns weigh heavily in favour of strong cause.

Two other secondary factors also suggest that the forum selection clause should not be enforced. First, even assuming that a California court could or would apply the *Privacy Act*, the interests of justice support having the action adjudicated by the British Columbia Supreme Court. The lack of evidence concerning whether a California court would hear D's claim is not determinative. The British Columbia Supreme Court, as compared to a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice

of law clause in favour of a foreign jurisdiction. Second, the expense and inconvenience of requiring British Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook, further supports a finding of strong cause. The chambers judge found it would be more convenient to have Facebook's books and records made available for inspection in British Columbia than requiring D to travel to California to advance her claim. There is no reason to disturb this finding.

Per Abella J.: This is an online consumer contract of adhesion. To become a member of Facebook, a consumer must accept all the terms stipulated in the terms of use, including the forum selection clause. No bargaining, no choice, no adjustments. The automatic nature of the commitments made with online contracts intensifies the scrutiny for clauses that have the effect of impairing a consumer's access to potential remedies.

The operative test in *Pompey* for determining whether to enforce a forum selection clause engages two distinct inquiries. The first is into whether the clause is enforceable under contractual doctrines like public policy, duress, fraud, unconscionability or grossly uneven bargaining positions. If the clause is enforceable, the onus shifts to the consumer to show "strong cause" why the clause should not be enforced because of factors typically considered under the *forum non conveniens* doctrine. Keeping the two *Pompey* inquiries distinct means that before the onus shifts, the focus starts where it should, namely on whether the contract or clause itself is

enforceable based on basic contractual principles.

In this case, the forum selection clause is unenforceable under the first step of the *Pompey* test applying contractual principles.

The burdens of forum selection clauses on consumers and their ability to access the court system range from added costs, logistical impediments and delays, to deterrent psychological effects. When online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights, public policy concerns outweigh those favouring enforceability of a forum selection clause.

Public policy concerns relating to access to domestic courts are especially significant in this case given that it deals with a fundamental right: privacy. Section 4 of British Columbia's *Privacy Act* states that the particular protections in the *Act* "must be heard and determined by the Supreme Court" despite anything contained in another Act. This is statutory recognition that privacy rights under the *Act* are entitled to protection in British Columbia by judges of the British Columbia Supreme Court. It would be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court.

Tied to the public policy concerns is the "grossly uneven bargaining power" of the parties. Facebook is a multi-national corporation which operates in

dozens of countries. D is a private citizen who had no input into the terms of the contract and, in reality, no meaningful choice as to whether to accept them given Facebook's undisputed indispensability to online conversations.

The doctrine of unconscionability also applies in this case to render the forum selection clause unenforceable. Both elements required for the doctrine of unconscionability to apply — inequality of bargaining power and unfairness — are met in this case. The inequality of bargaining power between Facebook and D in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances D had could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gives Facebook an unfair and overwhelming procedural — and potentially substantive — benefit.

Per McLachlin C.J. and Moldaver and Côté JJ. (dissenting): When parties agree to a jurisdiction for the resolution of disputes, courts will give effect to that agreement, unless the claimant establishes strong cause for not doing so. In this case, D has not shown strong cause for not enforcing the forum selection clause to which she agreed. Therefore, the action must be tried in California, as the contract requires, and a stay of the underlying claim should be entered.

Section 11 of the *CJPTA* does not apply to oust forum selection clauses. Pursuant to *Pompey*, where the parties have agreed in advance to a choice of forum, there is no need to inquire into which of the two forums is the more convenient; the

parties have settled the matter by their contract, unless the contractual clause is invalid or inapplicable or should not be applied because the plaintiff has shown strong cause not to do so. A unified test that would apply forum selection clauses as an element of the *forum non conveniens* test should be rejected. While the *CJPTA* is a complete codification of the common law related to *forum non conveniens*, it does not supplant the common law principles underlying the enforcement of forum selection clauses. If the test in *Pompey* is satisfied and the forum selection clause is inapplicable, the result is a situation where there are two competing possibilities for forum. At this point, the *CJPTA* which codifies the common law provisions for *forum non conveniens* applies. In this case, the test in *Pompey* is not satisfied and therefore s. 11 of the *CJPTA* does not assist D.

With respect to the first step of the *Pompey* test, Facebook has discharged the burden of establishing that the forum selection clause is enforceable and applies in the circumstances: it is established that an enforceable contract may be formed by clicking an appropriately designated online icon; the contract on its face is clear and there is no inconsistency between a commitment to strive to apply local laws and an agreement that disputes will be tried in California; and finally, s. 4 of the *Privacy Act* grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims to the exclusion of other British Columbia courts but nothing in the language of s. 4 suggests that it can render an otherwise valid contractual term unenforceable.

While the court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts. No such overriding public policy is found on the facts of this case. Forum selection clauses, far from being unconscionable or contrary to public policy, are supported by strong policy considerations. They serve an important role of increasing certainty and predictability in transactions that take place across borders. And, the fact that a contract is in standard form does not affect the validity of such a clause. That is not to say that forum selection clauses will always be given effect by the courts. Burdens of distance or geography may render the application of a forum selection clause unfair in the circumstances. However, those considerations are relevant at the second step of *Pompey*, not the first. Here, the forum selection clause is valid and applicable and the first step of *Pompey* test has been met.

As to the second step of the *Pompey* test, requiring the plaintiff to demonstrate strong cause is essential for upholding certainty, order and predictability in private international law, especially in light of the proliferation of online services provided across borders. In this case, none of the circumstances relied on by D show strong cause why the forum selection clause should not be enforced. She has not shown that the facts in the case and the evidence to be adduced shifts the balance of convenience from the contracted state of California to British Columbia. Further, the British Columbia tort created by the *Privacy Act* does not require special expertise

and the courts of California have not been shown to be disadvantaged in interpreting the *Privacy Act* as compared with the Supreme Court of British Columbia. Nothing in D's situation suggests that the class action she wishes to commence could not be conducted in California just as easily as in British Columbia. There is also no suggestion that Facebook does not genuinely wish all litigation with users to take place in California. Finally, D has not shown that application of the forum selection clause would deprive her of a fair trial.

Applying the strong cause test in a nuanced manner or modifying the test to place the burden on the defendant in the context of consumer contracts of adhesion would amount to inappropriately overturning the Court's decision in *Pompey* and substituting new and different principles. Nuancing the strong cause test by considering the factor of the consumer's lack of bargaining power conflates the first step of the test set out in *Pompey* with the second step, in a way that profoundly alters the law endorsed in *Pompey*. It is at the first step that inequality of bargaining power is relevant. Inequality of bargaining power may lead to a clause being declared unconscionable – something not argued by D. In this case, Facebook has demonstrated that the forum selection clause is enforceable and D has failed to establish strong cause why the forum selection clause she agreed to should not be enforced.

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(P.E.I.), 2008 PESCAD 9, 276 Nfld. & P.E.I.R. 336; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Dymont*, [1988] 2 S.C.R. 417; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162; *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A.C. 277; *Avenue Properties Ltd. v. First City Dev. Corp. Ltd.* (1986), 7 B.C.L.R. (2d) 45.

By Abella J.

Applied: *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450; **referred to:** *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Zi Corp. v. Steinberg*, 2006 ABQB 92, 396 A.R. 157; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2001), 20 B.L.R. (3d) 289, aff’d. (2003), 63 O.R. (3d) 431; *Takefman v. Golden Hope Mines Ltd.*, 2015 QCCS 4947; *Nord Resources Corp. v. Nord Pacific Ltd.*, 2003 NBQB 213, 37 B.L.R. (3d) 115; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69.

By McLachlin C.J and Côté J. (dissenting)

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APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J.B.C. and Lowry and Goepel JJ.A.), 2015 BCCA 279, 77 B.C.L.R. (5th) 116, 374 B.C.A.C. 56, 642 W.A.C. 56, 73 C.P.C. (7th) 87, 387 D.L.R. (4th) 360, [2016] 1 W.W.R. 287, [2015] B.C.J. No. 1270 (QL), 2015 CarswellBC 1671 (WL Can.), setting aside a decision of Griffin J., 2014 BCSC 953, 313 C.R.R. (2d) 254, 53 C.P.C. (7th) 302, [2014] B.C.J. No. 1051 (QL), 2014 CarswellBC 1487 (WL Can.). Appeal allowed, McLachlin C.J. and Moldaver and Côté JJ. dissenting.

Ward K. Branch, Q.C., Christopher Rhone and Michael Sobkin, for the appellant.

Mark A. Gelowitz and W. David Rankin, for the respondent.

Cynthia Kuehl and Meredith E. Jones, for the intervener the Canadian Civil Liberties Association.

Paul J. Bates, Marina Pavlovic and Jeremy de Beer, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Matthew P. Gottlieb, Paul Michell and Ian C. Matthews, for the intervener the Information Technology Association of Canada.

Derek J. Bell and Jason M. Berall, for the intervener the Interactive Advertising Bureau of Canada.

The following are the reasons delivered by

KARAKATSANIS, WAGNER AND GASCON JJ. —

I. Overview

[1] Forum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction. To balance contractual freedom with the public good in having local courts adjudicate certain claims, courts have developed a test to determine whether such clauses should be enforced. This test has mostly been applied in commercial contexts, where forum selection clauses are generally enforced to hold sophisticated parties to their bargain, absent exceptional circumstances. This appeal requires the Court to apply this test in a consumer context.

[2] Deborah Douez is a resident of British Columbia and a member of the social network Facebook.com. She claims that Facebook, Inc. infringed her privacy rights and those of more than 1.8 million British Columbians, contrary to the *Privacy Act* of that province. Facebook is seeking to have the action stayed on the basis of the

forum selection clause contained in its terms of use, which every user must click to accept in order to use its social network.

[3] The chambers judge refused to stay the action, concluding that the *Privacy Act* overrides the clause, and that it provides strong reasons not to enforce it. The Court of Appeal reversed her decision, concluding instead that the clause was enforceable and that Ms. Douez had failed to show strong cause not to enforce it.

[4] Like our colleague Abella J., although for different reasons, we would allow the appeal. In our view, while s. 4 of the *Privacy Act* does not override forum selection clauses, Ms. Douez has established strong reasons not to enforce the clause at issue here. The grossly uneven bargaining power between the parties and the importance of adjudicating quasi-constitutional privacy rights in the province are reasons of public policy that are compelling, and when considered together, are decisive in this case. In addition, the interests of justice, and the comparative convenience and expense of litigating in California, all support a finding of strong cause in the present case.

II. Background

[5] The respondent, Facebook, Inc., is an American corporation headquartered in California. It operates Facebook.com, one of the world's leading social networks, and generates most of its revenues from advertising. The appellant, Ms. Douez, is a resident of British Columbia and has been a member of Facebook

since 2007.

[6] In 2011, Facebook created a new advertising product called “Sponsored Stories”. This product used the name and picture of Facebook members, allegedly without their knowledge, to advertise companies and products to other members on the site and externally.

[7] Ms. Douez brought an action against Facebook when she noticed that her name and profile picture had been used in Sponsored Stories. She alleges that Facebook used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373:

(2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

Ms. Douez also seeks certification of her action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The proposed class includes all British Columbia residents who had their name or picture used in Sponsored Stories. The estimated size of the class is 1.8 million people.

[8] Facebook is free to join and use, but all potential users — including Ms. Douez — must agree to its terms of use as part of the registration process. These terms include a forum selection and choice of law clause requiring that disputes be

resolved in California according to California law:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims. [A.R., vol. II, p. 138]

[9] Facebook brought a preliminary motion to stay Ms. Douez's action on the basis of this forum selection clause. Alternatively, it argued that the action should be stayed because British Columbia is *forum non conveniens* under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("CJPTA"). In our Court, however, Facebook focused its submissions exclusively on the forum selection clause and did not argue that British Columbia is *forum non conveniens*.

III. Decisions Below

A. *Supreme Court of British Columbia (Griffin J.), 2014 BCSC 953, 313 C.R.R. (2d) 254*

[10] The chambers judge declined to enforce the forum selection clause. Although she found it to be *prima facie* valid, clear and enforceable, she held that s. 4 of the *Privacy Act* overrides forum selection clauses and provides a strong public policy not to enforce them. In her view, the British Columbia Supreme Court has

exclusive jurisdiction under s. 4 to hear actions under the Act. As a result, she concluded that the plaintiff would be unable to bring her claim elsewhere if the claim was stayed.

[11] While the chambers judge's findings on s. 4 were sufficient to resolve the motion, she also found that there was strong cause not to enforce the forum selection clause. Enforcing it would, in her view, exclude Facebook from liability because only the British Columbia Supreme Court had jurisdiction over the matter. Ms. Douez did not need to prove California courts would refuse to hear her claim. In addition, she found that the jurisdiction clause and purposes of the *Privacy Act* provide strong public policy reasons supporting a finding of strong cause.

[12] Lastly, the chambers judge concluded on the basis of the factors in s. 11 of the *CJPTA* that the courts of California would not be more appropriate than the courts of British Columbia to hear the action. She found that it would be more convenient to hear the matter in British Columbia than in California. Thus, the chambers judge refused Facebook's request to stay the proceeding.

B. *Court of Appeal for British Columbia (Bauman C.J. and Lowry and Goepel J.J.A.), 2015 BCCA 279, 77 B.C.L.R. (5th) 116*

[13] The Court of Appeal reversed the decision of the chambers judge and ordered that the action be stayed on the basis of Facebook's forum selection clause. It confirmed that the analysis of forum selection clauses is distinct from the analysis of

the appropriate forum under s. 11 of the *CJPTA*.

[14] The Court of Appeal concluded that the chambers judge erred in her interpretation of s. 4 of the *Privacy Act*. In its view, the chambers judge failed to give effect to the principle of territoriality, under which provincial legislation cannot regulate civil rights in another jurisdiction. Section 4 concerns subject-matter competence, not territorial competence, and therefore it only confers jurisdiction to the Supreme Court of British Columbia to the exclusion of other courts in British Columbia. Had the legislature wanted to override forum selection clauses, it would have done so explicitly.

[15] The Court of Appeal held that the forum selection clause was enforceable, and that Ms. Douez had failed to show strong cause. In finding strong cause, the chambers judge's analysis was tainted by her erroneous interpretation of s. 4 of the *Privacy Act*. The fact that a stay would extinguish a claim might provide strong cause, but Ms. Douez failed to provide evidence establishing that this would be the case here. Since the clause should be enforced, the Court of Appeal did not consider s. 11 of the *CJPTA*.

IV. Issues

[16] Facebook does not dispute that British Columbia courts have territorial jurisdiction. The main issue is whether Ms. Douez's action should be stayed on the basis of the forum selection clause contained in its terms of use. The parties also

disagree on whether the analysis of forum selection clauses should be subsumed under s. 11 of the *CJPTA*, or whether they are distinct concepts.

V. Analysis

[17] As we shall explain, the *forum non conveniens* test adopted in the *CJPTA* was not intended to replace the common law test for forum selection clauses. In our view, this case should be resolved under the strong cause analysis established by this Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450.

A. *The Interaction Between Forum Selection Clauses and the CJPTA*

[18] At common law, forum selection clauses and the *forum non conveniens* doctrine command different analyses: “Each class of case has its own onus, test and rationale” (*Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467, at para. 37, aff’d 2012 SCC 9, [2012] 1 S.C.R. 359). Our Court has confirmed that “the presence of a forum selection clause” is “sufficiently important to warrant a different test”, and that “a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered” may not be preferable (*Pompey*, at para. 21).

[19] Ms. Douez argues that the *CJPTA* provides a complete framework to determine the court’s jurisdiction, and that forum selection clauses should be

considered as another factor within the *forum non conveniens* analysis under s. 11.

[20] In our view, the courts below rightly rejected Ms. Douez's proposed approach. Section 11 of the *CJPTA* "constitutes a complete codification of the common law test for *forum non conveniens* [that] admits of no exceptions" (*Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22 (emphasis added)). It was never intended to codify the test for forum selection clauses. Not only does s. 11 make no mention of contractual stipulations, the comments on the uniform act that served as a basis for the *CJPTA* are also silent on this point (Uniform Law Conference of Canada, *Uniform Court Jurisdiction and Proceedings Transfer Act* (online)). The analysis of forum selection clauses thus remains separate, despite the enactment of the *CJPTA*.

[21] Several Canadian provinces have adopted their own *CJPTA*, with identical or similar provisions. Their appellate courts have consistently held that the analysis of forum selection clauses remains distinct (see e.g. *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570, at para. 14; *Armoyan v. Armoyan*, 2013 NSCA 99, 334 N.S.R. (2d) 204, at para. 218). Even the Court of Appeal of Saskatchewan, which held that forum selection clauses should be considered as part of the *CJPTA* analysis, held that "*Pompey* continues to apply notwithstanding [its] enactment" (*Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146, at para. 10; see also *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156, at paras. 112-14).

[22] In short, the *CJPTA* was never intended to replace the common law test for forum selection clauses. In the absence of legislation to the contrary, the common law test continues to apply and provides the analytical framework for this case.

B. *The Forum Selection Clause at Common Law: Pompey*

[23] We turn next to the common law test for forum selection clauses adopted by this Court in *Pompey*, and to how we propose to apply it in a consumer context.

[24] Forum selection clauses serve a valuable purpose. This Court has recognized that they “are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law” (*Pompey*, at para. 20). Forum selection clauses are commonly used and regularly enforced.

[25] That said, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Courts are not merely “law-making and applying venues”; they are institutions of “public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies” (T. C. W. Farrow, *Civil Justice, Privatization, and Democracy* (2014), at p. 41). Everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters.

[26] Thus, forum selection clauses do not just affect the parties to the contract. They implicate the court as well, and with it, the court's obligation to hear matters that are properly before it. In this way, forum selection clauses are a "unique category of contracts" (M. Pavlović, "Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016), 62 *McGill L.J.* 389, at p. 396).

[27] Of course, parties are generally held to their bargain and are bound by the enforceable terms of their contract. However, because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. In common law provinces, a forum selection clause cannot bind a court or interfere with a court's jurisdiction. As the English Court of Appeal recognized long ago, "no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them" (*The Fehmarn*, [1958] 1 All E.R. 333, at p. 335).

[28] Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (*Pompey*, at para. 39). At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43; see also *Hudye Farms*, at para. 12, and *Pompey*, at para. 39). At this step of the analysis, the

court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

[29] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the “strong cause” test from the English court’s decision in *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237 (Adm. Div.). In exercising its discretion at this step of the analysis, a court must consider “all the circumstances”, including the “convenience of the parties, fairness between the parties and the interests of justice” (*Pompey*, at paras. 19 and 30-31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).

[30] The strong cause factors were meant to provide some flexibility. Importantly, *Pompey* did not set out a closed list of factors governing the court’s discretion to decline to enforce a forum selection clause. Both *Pompey* and *The “Eleftheria”* acknowledged that courts should consider “all the circumstances” of the particular case (*Pompey*, at para. 30; *The “Eleftheria”*, at p. 242). And the leading authority in England continues to recognize that the court in *The “Eleftheria”* did not

intend its list of factors to be comprehensive (*Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749, at para. 24).

[31] That said, the strong cause factors have been interpreted and applied restrictively in the commercial context. In commercial interactions, it will usually be desirable for parties to determine at the outset of a business relationship where disputes will be settled. Sophisticated parties are justifiably “deemed to have informed themselves about the risks of foreign legal systems and are deemed to have accepted those risks in agreeing to a forum selection clause” (*Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, 118 O.R. (3d) 81, at para. 47). In this setting, our Court recognized that forum selection clauses are generally enforced and to be encouraged “because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness” (*GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 22).

[32] In *Pompey*, for example, our Court enforced a forum selection clause contained in a bill of lading concluded between two sophisticated shipping companies. The parties were of similar bargaining power and sophistication, since they were “corporations with significant experience in international maritime commerce. . . . [that] were aware of industry practices” (para. 29). The Court held that the “forum selection clause could very well have been negotiated” between the parties (*ibid.*). This context manifestly informed the Court’s application of the strong cause

test.

[33] But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case (see e.g. *Straus v. Decaire*, 2007 ONCA 854, at para. 5 (CanLII)). And as one of the interveners argues, instead of supporting certainty and security, forum selection clauses in consumer contracts may do “the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account” (Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic Factum, at para. 7).

[34] Canadian courts have recognized that the test may apply differently, depending on the contractual context (see *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, 100 O.R. (3d) 241, at para. 24; *Stubbs v. ATS Applied Tech Systems Inc.*, 2010 ONCA 879, 272 O.A.C. 386, at para. 58). The English courts have also recognized that not all forum selection clauses are created equally. The underpinning of the transaction is relevant to the exercise of discretion under the strong cause test: “. . . a defendant who cynically flouts a jurisdiction clause which he

has freely negotiated is more likely to be enjoined than one who has had the clause imposed upon him” (*Welex A.G. v. Rosa Maritime Limited (The “Epsilon Rosa”*), [2003] EWCA Civ 938, [2003] 2 Lloyd’s Rep. 509, at para. 48; see also *The “Bergen” (No. 2)*, [1997] 2 Lloyd’s Rep. 710 (Q.B. (Adm. Ct.)), at p. 715; D. Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd ed. 2010), at para. 10.13). Similarly, Australian courts have found “that in a consumer situation [courts] should not place as much weight on an exclusive jurisdiction clause in determining a stay application as would be placed on such a clause where there was negotiation between business people” (*Quinlan v. Safe International Försäkrings AB*, [2005] FCA 1362, at para. 46 (AustLII); see also *Incitec Ltd. v. Alkimos Shipping Corp.*, [2004] FCA 698, 206 A.L.R. 558, at para. 50).

[35] As these cases recognize, different concerns animate the consumer context than those that this Court considered in *Pompey*, where a sophisticated commercial transaction was at issue. Because of these concerns, we agree with Ms. Douez and several interveners that the strong cause test must account for the different considerations relevant to this context.

[36] In our view, recognizing the importance of factors beyond those specifically listed in *The “Eleftheria”* is an appropriate incremental response of the common law to a different context (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 33-34 and 40). Such a development is especially important since online consumer contracts are ubiquitous, and the global reach of the Internet allows for

instantaneous cross-border consumer transactions. It is necessary to keep private international law “in step with the dynamic and evolving fabric of our society” (*R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670).

[37] After all, the strong cause test must ensure that a court’s plenary jurisdiction only yields to private contracts where appropriate. A superior court’s general jurisdiction includes “all the powers that are necessary to do justice between the parties” (*80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), at p. 282; *TCR Holding Corp. v. Ontario*, 2010 ONCA 233, 69 B.L.R. (4th) 175, at para. 26; *Kelly v. Human Rights Commission (P.E.I.)*, 2008 PESCAD 9, 276 Nfld. & P.E.I.R. 336, at para. 8).

[38] Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. The burden remains on the party wishing to avoid the clause to establish strong cause.

[39] Although the steps are distinct, some considerations may be relevant to both steps of the test. For example, a court may consider gross inequality of bargaining power at the second step of the analysis, even if the circumstances of the bargain do not render the contract unconscionable at the first step. Taking into

account the fact that the parties did not negotiate on an even playing field recognizes that the reasons for holding parties to their bargain carry less weight when there is no opportunity to negotiate a forum selection clause. This is not to say that the gross inequality of bargaining power will be sufficient, on its own, to show strong cause. However, it is a relevant circumstance that may be taken into account in the analysis.

[40] The two steps governing the enforcement of forum selection clauses ultimately play conceptually distinct roles. Professor Pavlović explains that at the first step, where the court determines the validity of the forum selection clause, “[c]ontract rules provide a core legal basis for the enforcement of jurisdiction agreements” (p. 402). On the other hand, the strong cause test at the second step “limits contractual autonomy in order to protect the authority (jurisdiction) of otherwise competent courts” (*ibid.*). This second step recognizes that there may be strong reasons to retain jurisdiction over a matter in the province.

C. *Application*

(1) Section 4 of the *Privacy Act*

[41] As this Court recognized in *Pompey*, legislative provisions can override forum selection clauses. In the present case, the chambers judge found that s. 4 of the *Privacy Act* had overtaken the forum selection clause in conferring exclusive jurisdiction to the Supreme Court of British Columbia. We disagree.

[42] Section 4 reads as follows:

4 Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court [of British Columbia].

[43] Section 4 lacks the clear and specific language that legislatures normally use to override forum selection clauses. This Court referred to such overrides on at least two occasions. First, it found an override in s. 46(1) of the *Marine Liability Act*, S.C. 2001, c. 6, which specifically mentions and sets aside contracts that purport to provide for the adjudication of claims in another forum (*Pompey*, at paras. 37-38). Second, it found that the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, was intended to override arbitration clauses (*Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 5-7 and 31). Section 3 of that enactment specifically prevents consumers from contractually waiving their rights under the statute.

[44] In contrast, although s. 4 of the *Privacy Act* expressly provides that it applies “[d]espite anything contained in another Act”, it is silent on contractual provisions. If the legislature had intended to override forum selection clauses, it would have done so explicitly. While the legislature intended s. 4 of the *Privacy Act* to confer jurisdiction to the British Columbia Supreme Court to resolve matters brought under the Act, nothing suggests that it was also intended to override forum selection clauses.

(2) The Pompey Test

[45] As discussed above, the *Pompey* test involves a two-step analysis. At the first step, the court must be satisfied that the contract is otherwise enforceable, having regard to general principles of contract law.

[46] In this regard, Ms. Douez argues that the clause is unenforceable primarily because it was made unclear by Facebook's statement that it "strive[s] to respect local laws". We disagree. This general statement, which is also contained in the terms of use, does not prevail over the clear and specific language of the forum selection clause. Indeed, "where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term" (*BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 24; see also G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 19). And as Facebook rightly notes, s. 15(1) of the *Electronic Transactions Act*, S.B.C. 2001, c. 10, permits offer and acceptance to occur in an electronic form through "clicking" online.

[47] Our colleague Abella J. concludes that the clause is not enforceable at this first step based upon other considerations. We prefer to address these considerations at the "strong cause" step of the test.

[48] At the second step of *Pompey* — the strong cause test — Facebook

argues that Ms. Douez has failed to meet her burden because she did not provide any evidence that her contract with Facebook is the result of grossly uneven bargaining power or that a California court would be unable to hear her claim. For her part, Ms. Douez emphasizes the distinctions between a commercial contract amongst sophisticated parties and the consumer context. She also stresses the importance of privacy rights and the public policy underpinning the British Columbia legislature's decision to enact a statutory cause of action to allow for vindication of these rights.

[49] As we note above, in exercising its discretion at this step of the analysis, a court must consider “all the circumstances”, including the “convenience of the parties, fairness between the parties and the interests of justice” (*Pompey*, at paras. 19 and 30-31). As we have said, public policy may also be an important factor at this step (*Holt Cargo*, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).

[50] We conclude that Ms. Douez has met her burden of establishing that there is strong cause not to enforce the forum selection clause. A number of different factors, when considered cumulatively, support the chambers judge's finding of strong cause. Most importantly, the claim involves a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. We begin with these compelling factors, which are decisive in this case when considered together.

(a) *Public Policy*

[51] There are strong public policy considerations which favour a finding of strong cause. As we have mentioned, this Court has emphasized party autonomy and commercial certainty in the context of contracts involving sophisticated parties. This usually justifies enforcement of forum selection clauses in the commercial context (*Pompey*, at para. 20; *GreCon Dimter*, at para. 22). Facebook argues that there is no reason to depart from this balance in the consumer context. We disagree.

[52] There are generally strong public policy reasons to hold parties to their bargain and it is clear that forum selection clauses are not inherently contrary to public policy. But freedom of contract is not unfettered. A court has discretion under the strong cause test to deny the enforcement of a contract for reasons of public policy in appropriate circumstances. Generally, such limitations fall into two broad categories: those intended to protect a weaker party or those intended to protect “the social, economic, or political policies of the enacting state in the collective interest” (C. Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010), 60 *U.N.B.L.J.* 12, at p. 15). In this case, both of these categories are implicated. It raises both the reality of unequal bargaining power in consumer contracts of adhesion and the local court’s interest in adjudicating claims involving constitutional or quasi-constitutional rights.

[53] First, the forum selection clause is included in a contract of adhesion formed between an individual consumer and a large corporation. As we discussed above, even if a contract is not unconscionable, gross inequality of bargaining power

is still a relevant factor at the strong cause step of the analysis in this context.

[54] Despite Facebook's claim otherwise, it is clear from the evidence that there was gross inequality of bargaining power between the parties. Ms. Douez's claim involves an online contract of adhesion formed between an individual and a multi-billion dollar corporation. The evidence on the record is that Facebook reported almost \$4.28 billion in revenue in 2012 through advertising on its social media platform. It is in contractual relationships with 1.8 million British Columbian residents, approximately 40 percent of the province's population. Ms. Douez is one of these individuals.

[55] Relatedly, individual consumers in this context are faced with little choice but to accept Facebook's terms of use. Facebook asserts that Ms. Douez could have simply rejected Facebook's terms. But as the academic commentary makes clear, in today's digital marketplace, transactions between businesses and consumers are generally covered by non-negotiable standard form contracts presented to consumers on a "take-it-or-leave-it" basis (Pavlović, at p. 392).

[56] In particular, unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach. British Columbians who wish to participate in the many online communities that interact through Facebook must accept that company's terms or choose not to participate in its ubiquitous social network. As the intervener the Canadian Civil Liberties Association emphasizes, "access to Facebook and social media platforms,

including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy” (I.F., at para. 16). Having the choice to remain “offline” may not be a real choice in the Internet era.

[57] Given this context, it is clear that the difference in bargaining power between the parties is large. This distinguishes the situation from *Pompey*, where the Court emphasized that the respondent in that case could have chosen to negotiate the forum selection clause in the bill of lading (para. 29). Nothing suggests in this case that Ms. Douez could have similarly negotiated the terms of use.

[58] Secondly, Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. There is an inherent public good in Canadian courts deciding these types of claims. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians.

[59] At issue in this case is Ms. Douez’s statutory privacy right. Privacy legislation has been accorded quasi-constitutional status (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paras. 24-25). This Court has emphasized the importance of privacy — and its role in protecting one’s physical and moral autonomy — on multiple occasions (see *Lavigne*, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-

66; *R. v. Dymont*, [1988] 2 S.C.R. 417, at p. 427). As the chambers judge noted, the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests. In this context, it is especially important that such harms do not go without remedy. And since Ms. Douez's matter requires an interpretation of a statutory privacy tort, only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province.

[60] Moreover, the British Columbia legislature's creation of a statutory cause of action evidences an intention to create local rights and protections for the privacy rights of British Columbia residents. As the chambers judge noted, local courts are better placed to adjudicate these sorts of claims:

. . . local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this. [para. 75]

[61] Similarly, the legislature's creation of a statutory privacy tort that can be established without proof of damages reflects the legislature's intention to encourage access to justice for such claims. As well, British Columbia's *Class Proceedings Act* provides important procedural tools designed to improve access to justice (*Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at para. 1).

[62] Yet commentators recognize the practical reality that forum selection

clauses often operate to defeat consumer claims (E. A. Purcell, Jr., “Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court” (1992), 40 *UCLA L. Rev.* 423, at pp. 446-49). Given the importance of constitutional and quasi-constitutional rights, it is even more important that reverence to freedom of contract and party autonomy does not mean that such rights routinely go without remedy.

[63] Overall, the public policy concerns weigh heavily in favour of strong cause.

(b) *Secondary Factors*

[64] In addition to the strong public policy reasons favouring strong cause, two other secondary factors also suggest that the forum selection clause should not be enforced. These factors are the interests of justice and the comparative convenience and expense of litigating in the alternate forum.

(i) Interests of Justice

[65] The interests of justice (*Pompey*, at para. 31), support adjudication of Ms. Douez’s claim in British Columbia. This factor is concerned not only with whether enforcement of the forum selection clause would unfairly cause the loss of a procedural advantage, but also with which forum is best positioned to hear the case on its merits. Of course, unlike in the *forum non conveniens* analysis, the burden is on

the party resisting enforcement of the clause to show good reason why the parties should not be held to their bargain.

[66] The lack of evidence concerning whether a California court would hear Ms. Douez's claim was a significant focus of the hearing before us. In front of the chambers judge, Facebook argued that the substantive law of California would defeat the application of the *Privacy Act*. Before this Court, Facebook emphasizes the lack of any expert evidence on whether this would in fact be the case if the claim proceeded in California. According to Facebook, the fact that Ms. Douez has not provided expert evidence establishing that a California court would not apply the British Columbia *Privacy Act* is decisive. Similarly, the British Columbia Court of Appeal placed significant weight on this lack of expert evidence.

[67] Yet, none of the leading authorities on the strong cause test, *Pompey* included, make proof that the claim would fail in the foreign jurisdiction a mandatory element of strong cause (see e.g. *The "Eleftheria"*, *Momentous* and *Pompey*). A plaintiff may choose to rely on expert evidence to establish that the selected forum would be unable or unwilling to litigate his or her claim. Similarly, the defendant may provide his or her own expert evidence to show that the selected forum would be willing and able to litigate the claim. However, while such evidence may be helpful, its absence is not determinative. Under the *Pompey* analysis, there is no separate requirement for the party trying to avoid the forum selection clause to prove that her claim would necessarily fail in the foreign jurisdiction.

[68] In addition, Ms. Douez’s claim is premised on a British Columbia cause of action. Yet, her contract with Facebook includes a choice of law clause in favour of California:

The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.

[69] We disagree with Facebook that the choice of law question is irrelevant. Although we do not decide which body of law will apply, and how the choice of law clause might interact with the *Privacy Act*, in our view, the interests of justice are best served if this question is adjudicated in British Columbia.

[70] Generally, common law courts will give effect to choice of law clauses as long as they are *bona fide*, legal and not contrary to public policy (*Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.), at p. 290). Furthermore, even if a choice of law clause is generally enforceable, local laws may still apply to a dispute if the local forum intends such laws to be mandatory and not avoidable through a choice of law clause (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at p. 299).

[71] Usually, courts consider laws of the *local* forum when determining whether the legislature intended there to be mandatory rules that supersede the parties’ choice of law (G. Saumier, “What’s in a Name? Lloyd’s, International Comity and Public Policy” (2002), 37 *Can. Bus. L.J.* 388, at pp. 395-97; J. Walker,

Castel & Walker: Canadian Conflict of Laws (6th ed. (loose-leaf)), at p. 31-2). Whether courts in common law legal systems may similarly consider the intention of foreign legislatures, as set out in statutes like the *Privacy Act*, is uncertain (*ibid.*). In *Avenue Properties Ltd. v. First City Dev. Corp. Ltd.* (1986), 7 B.C.L.R. (2d) 45 (C.A.), at pp. 57-58, McLachlin J.A. (as she then was) recognized the likelihood that a foreign court would be unable to consider the public policy evidenced in the local statute as a reason why the local court should refuse a *forum non conveniens* application.

[72] But even assuming that a California court could or would apply the *Privacy Act*, the interests of justice (*Pompey*, at para. 31) support having the action adjudicated by the British Columbia Supreme Court. This court, as compared to a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction.

(ii) Comparative Convenience and Expense of Litigating in the Alternate Forum

[73] Another consideration in the strong cause analysis is the comparative expense and convenience of litigating in the alternate forum (*Pompey*, at para. 31; *The “Eleftheria”*, at p. 242). Therefore, related to the concerns about fairness and access to justice discussed above, the expense and inconvenience of requiring British

Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook, further supports a finding of strong cause.

[74] Although Facebook argued its relevant books and records were located in California, the chambers judge found it would be more convenient to have Facebook's books and records made available for inspection in British Columbia than requiring the plaintiff to travel to California to advance her claim. There is no reason to disturb this finding.

[75] While these secondary factors might not have justified a finding of strong cause on their own, they nonetheless support our conclusion that Ms. Douez has established sufficiently strong reasons why the forum selection clause should not be enforced and the action should proceed in British Columbia.

VI. Conclusion

[76] We would allow the appeal with costs to the appellant. Ms. Douez provided strong reasons to resist the enforcement of the clause: most importantly, the gross inequality of bargaining power between her and Facebook and the quasi-constitutional privacy rights engaged by her claim. The forum selection clause is unenforceable.

[77] As a result, the chambers judge's order dismissing Facebook's application to have the British Columbia Supreme Court decline jurisdiction is

restored.

The following are the reasons delivered by

[78] ABELLA J. — Anyone who wants to use Facebook’s service must register as a member and accept Facebook’s terms of use. The issue in this appeal is the enforceability of the forum selection clause in Facebook’s terms of use, whereby all disputes are required to be litigated in Santa Clara County in California.

[79] In *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, this Court held that a party relying on a forum selection clause must first show that it is enforceable applying a contractual approach. If it is, the onus shifts to the other party to show that there is “strong cause” for the court to decline to apply the forum selection clause based on considerations grounded in *forum non conveniens* principles.

[80] In my view, Facebook’s forum selection clause is not enforceable under the first step of the *Pompey* test.

Background

[81] When a Facebook user “liked” a post associated with a business, Facebook occasionally displayed the user’s name and portrait in an advertisement on the newsfeeds of the user’s friends. These advertisements were referred to as

“Sponsored Stories”. One of those users whose name and portrait were used in a Sponsored Story was Deborah Louise Douez.

[82] Ms. Douez claims that she gave no consent to having her name or portrait used in Sponsored Stories. As a result, she brought proceedings in the Supreme Court of British Columbia alleging that Facebook violated her rights contrary to s. 3(2) of the British Columbia *Privacy Act*, R.S.B.C. 1996, c. 373:

3

...

(2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

[83] Under s. 4, actions under the *Privacy Act* must be heard in the Supreme Court of British Columbia:

4 Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.

[84] Ms. Douez also brought a class action proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The proposed class consisted of approximately 1.8 million British Columbia residents whose names or portraits had been used by Facebook in a Sponsored Story.

[85] Facebook applied for a stay of the proceedings based on the forum selection clause in its terms of use, which states in part:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims. [Emphasis added.]

[86] In the Supreme Court of British Columbia, Griffin J. declined to enforce the forum selection clause and certified the class action. She found that s. 4 of the *Privacy Act* grants exclusive jurisdiction to the Supreme Court of British Columbia to hear claims under that *Act*, overriding any forum selection clause. As such, it was unnecessary for Ms. Douez to show “strong cause” why the forum selection clause should not be applied.

[87] The Court of Appeal for British Columbia allowed the appeal and granted Facebook’s request for a stay of proceedings based on the forum selection clause.

Analysis

[88] *Pompey* involved a bill of lading between sophisticated commercial entities. This is the first time the Court has been asked to consider how *Pompey* applies to a forum selection clause in an online consumer contract of adhesion.

[89] In concluding that the forum selection clause in *Pompey* should be enforced, Bastarache J. set out the following test, based on the 1969 decision in *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237 (Adm. Div.):

Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case. [Emphasis added; para. 39.]

[90] He also framed it as follows:

. . . once it is determined that the bill of lading otherwise binds the parties (for instance, that the bill of lading as it relates to jurisdiction does not offend public policy, was not the product of fraud or of grossly uneven bargaining positions), [the “strong cause” test] constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice [Emphasis added; para. 31.]

[91] The Court found that the forum selection clause in the bill of lading was enforceable at the first step because the parties were experienced commercial entities who were aware of industry practices and were also, notably, in a position to negotiate the forum selection clause. As a result, there was no “grossly uneven bargaining power”:

Bills of lading are typically entered into by sophisticated parties familiar with the negotiation of maritime shipping transactions who should, in normal circumstances, be held to their bargain. . . . The parties

in this appeal are corporations with significant experience in international maritime commerce. The respondents were aware of industry practices and could have reasonably expected that the bill of lading would contain a forum selection clause. A forum selection clause *could very well have been negotiated* with the appellant *There is no evidence that this bill of lading is the result of grossly uneven bargaining power that would invalidate the forum selection clause contained therein.* [Emphasis added; para. 29.]

[92] The Court went on to conclude that strong cause had not been shown and that a stay should therefore be granted.

[93] It is clear that the *Pompey* test engages two distinct inquiries. The first is into whether the clause is enforceable under contractual doctrines like public policy, duress, fraud, unconscionability or grossly uneven bargaining positions, tools for examining the enforceability of contracts. If the clause is enforceable, the onus shifts to the consumer to show “strong cause” why the clause should not be enforced because of factors typically considered under the *forum non conveniens* doctrine. Those factors were set out in *The “Eleftheria”* as including:

- (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
- (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
- (c) With what country either party is connected, and how closely.
- (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
- (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would

- (i) be deprived of security for that claim;
- (ii) be unable to enforce any judgment obtained;
- (iii) be faced with a time-bar not applicable in England; or
- (iv) for political, racial, religious or other reasons be unlikely to get a fair trial. [p. 242]

[94] Unlike my colleagues in dissent, I think, with respect, that a compelling argument can be made for modifying the strong cause test to include a wider range of factors than the *forum non conveniens* kind of considerations that have been traditionally applied, but I am also of the view that keeping the *Pompey* steps distinct means that before the onus shifts to the consumer, the focus starts where it should, namely on whether the contract or clause itself satisfies basic contractual principles. A contractual approach for determining the enforceability of forum selection clauses in consumer contracts of adhesion finds significant academic support (William J. Woodward, Jr., “Finding the Contract in Contracts for Law, Forum and Arbitration” (2006), 2 *Hastings Bus. L.J.* 1, at p. 46; M. P. Ellinghaus, “In Defense of Unconscionability” (1969), 78 *Yale L.J.* 757; Linda S. Mullenix, “Another Easy Case, Some More Bad Law: *Carnival Cruise Lines* and Contractual Personal Jurisdiction” (1992), 27 *Tex. Int’l L.J.* 323; Stephen Waddams, “Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism” (2012), 53 *Can. Bus. L.J.* 475; Peter Benson, “Radin on Consent and Fairness in Consumer Boilerplate: A Brief Comment” (2013), 54 *Can. Bus. L.J.* 282).

[95] Starting with a contractual analysis also permits the necessary contextual scope to explore enforceability depending on what the nature of the contract or clause is and what contractual rights are at stake. Only if the clause is found to be enforceable do we move to the second step, where the consumer must demonstrate that there is strong cause why, even though the forum selection clause is enforceable, it should nonetheless be disregarded.

[96] Our first task in this case, as a result, is to determine whether the clause is enforceable using contractual principles. In my respectful view, the clause is not enforceable under the principles set out in the first step of *Pompey*.

[97] In deciding whether a clause is unenforceable for reasons of public policy, the court decides “when the values favouring enforceability are outweighed by values that society holds to be more important” (Stephen Waddams, *The Law of Contracts* (6th ed. 2010), at para. 560). As Prof. McCamus notes, “[a]greements contrary to public policy at common law rest on a judicial determination that the type of agreement in question is sufficiently inconsistent with public policy that it should be treated as unenforceable” (John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 453).

[98] I accept that certainty and predictability generally favour the enforcement at common law of contractual terms, but it is important to put this forum selection clause in its contractual context. We are dealing here with an online *consumer* contract of adhesion. Unlike *Pompey*, there is virtually no opportunity on the part of

the consumer to negotiate the terms of the clause. To become a member of Facebook, one must accept all the terms stipulated in the terms of use. No bargaining, no choice, no adjustments.

[99] Online contracts such as the one in this case put traditional contract principles to the test. What does “consent” mean when the agreement is said to be made by pressing a computer key? Can it realistically be said that the consumer turned his or her mind to all the terms and gave meaningful consent? In other words, it seems to me that some legal acknowledgment should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer’s access to possible remedies.

[100] As Prof. Waddams has pointed out:

. . . there may be scope for application of the concept of public policy in respect of unfair clauses that oust the jurisdiction of the court. It would be open to a court to say that, although arbitration and choice of forum clauses are acceptable if freely agreed by parties of equal bargaining power, *there is reason for the court to scrutinize the reality of the agreement with special care in the context of consumer transactions and standard forms*, since these are clauses that, on their face, offend against one of the traditional heads of public policy. [Emphasis added.]

(Waddams (2012), at p. 483; see also Judith Resnik, “Procedure as Contract” (2005), 80 *Notre Dame L. Rev.* 593; Woodward, at p. 46.)

[101] Much has been written about the burden of forum selection clauses on consumers and their ability to access the court system. They were described by Prof.

Edward Purcell as creating “an egregious disproportionality” (Edward A. Purcell, Jr., “Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court” (1992), 40 *UCLA L. Rev.* 423, at p. 514). They range from added costs, logistical impediments and delays, to deterrent psychological effects. Prof. Purcell refers to these constraints as “burdens of distance” or “burdens of geography”:

The deterrent effects of geography are numerous and weighty. The threshold task of merely retaining counsel in a distant location, which may seem routine to attorneys and judges, is profoundly daunting to ordinary people. The very decision to retain an attorney is so troublesome, in fact, that most claimants are content to accept a settlement without one. The result of that commonplace decision, as numerous studies have repeatedly shown, is that such claimants almost invariably obtain much less from their adversaries than they otherwise would. If claimants learn, perhaps from company representatives they contact, that they must retain an attorney in a distant contractual forum in order to initiate a legal action on their claims, that information alone may dissuade a significant number from proceeding and lead them to accept whatever offer, if any, the company might make.

...

Once litigation begins, the process quickly piles on additional burdens. One is the obvious need to travel and communicate over long distances, which makes the suit more costly as well as more inconvenient in terms of both litigation planning and client-attorney consultation. Another is the compounded costs and risks created by the attorney’s need to communicate with the client’s witnesses and to prepare them for depositions and trial testimony. The party may either have to pay additional travel costs for in-person meetings or risk the creation of potentially discoverable documents that could spur additional and costly motion practice and, if disclosed, weaken the party’s position in negotiations and at trial. A third burden is the likely additional delays involved in prosecuting the case, as distance and inconvenience combine to complicate various pretrial events and to remove from the attorney the spur of a human client who can or does present himself in person at his attorney’s office. A fourth burden is the added cost of participating in a distant trial, including the costs and risks involved in securing the attendance of witnesses at such a location. *All of these burdens will be especially heavy if the plaintiff’s claim arises from events in his home*

state and many or all of his witnesses reside there.

...

A final burden is the risk that the cumulative effect of some or all of the preceding complications may combine to so hamper the party's trial preparations that he will ultimately feel compelled to "cave" on the courthouse steps or end up putting on a materially weaker case than he otherwise would have. If settlement comes after full pretrial discovery and motion practice, costs will consume a larger proportion of any settlement payment. . . . The risks of geography increase the likelihood of such unfavorable outcomes, and that ultimate concern further compounds the pressures that push nonresident claimants toward earlier and less favorable settlements.

The burdens of geography are thus numerous and heavy. They are emotional as well as financial. Some are readily apparent, while others are subtle and surely unmeasurable. When placed on individuals who lack relevant interstate connections and experience or who lack extraordinary personal or financial resources, however, their *de facto* impact as a general matter is severe and certain. They impose sharp discounts on the value of the claims involved and discourage large numbers of plaintiffs from attempting to enforce their legal rights. [Emphasis added; pp. 446-49.]

(See also Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 *U.N.B.L.J.* 12, at p. 20.)

[102] As Prof. William Woodward has observed:

. . . unless the case is a large one or the "chosen" forum convenient, a choice-of-forum clause can eliminate a customer's legal claim entirely. Only in theory can a customer make a cross-country trip to pursue a \$100 warranty claim. [p. 17]

[103] These concerns are what motivated the statutory protections found in art. 3149 of the *Civil Code of Québec*, which render forum selection clauses in consumer or employment contracts unenforceable:

3149. Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

[104] In general, then, when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights, in my view, public policy concerns outweigh those favouring enforceability of a forum selection clause.

[105] Public policy concerns relating to access to domestic courts are especially significant in this case given that we are dealing with a fundamental right like privacy. In *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, this Court acknowledged the quasi-constitutional status of legislation relating to privacy protection:

The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as “quasi-constitutional” because of the fundamental role privacy plays in the preservation of a free and democratic society [para. 19]

[106] The *Privacy Act* in British Columbia sought to protect individuals from invasions of privacy by introducing two new torts:

- Using the name or portrait of another person for the purpose of advertising property or services, or promoting their sale or other trading in them, without that person's consent; [s. 3(2)]
- Wilfully violating the privacy of another person. [s. 1(1)]

[107] Section 4 of the *Privacy Act* states that these torts “must be heard and determined by the Supreme Court” despite anything contained in another Act. Section 4 is a statutory recognition that privacy rights under the British Columbia *Privacy Act* are entitled to protection in British Columbia by judges of the British Columbia Supreme Court. I do not, with respect, accept Facebook's argument that s. 4 gives the Supreme Court of British Columbia exclusive jurisdiction only vis-à-vis other courts *within* the province of British Columbia. What s. 4 grants is exclusive jurisdiction to the Supreme Court of British Columbia to the exclusion not only of other courts in British Columbia, but to the exclusion of all other courts, within and outside British Columbia. That is what exclusive jurisdiction means.

[108] Where a legislature grants exclusive jurisdiction to the courts of its own province, it overrides forum selection clauses that may direct the parties to another forum (see *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, at para. 25). It would, in my respectful view, be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court. To decide otherwise means that a clear legislative intention can be overridden by a forum selection clause. This flies in the

face of *Pompey's* acknowledgment that legislation takes precedence over a forum selection clause (*Pompey*, at para. 39).

[109] The approach used by Wittmann A.C.J.Q.B. in *Zi Corp. v. Steinberg* (2006), 396 A.R. 157, is apposite. The Alberta Court of Queen's Bench declined to enforce a forum selection clause mandating proceedings in Florida, because s. 180(1)¹ of the Alberta *Securities Act*, R.S.A. 2000, c. S-4, granted jurisdiction to the Court of Queen's Bench for applications under that provision. Wittmann A.C.J.Q.B. concluded that the effect of giving jurisdiction to the Court of Queen's Bench meant that it had exclusive jurisdiction *both within and outside Alberta*. In reaching his conclusion, Wittmann A.C.J.Q.B. relied on years of jurisprudence interpreting similar provisions as granting exclusive jurisdiction to the courts of a particular province to hear claims for oppression remedies (see also *Gould v. Western Coal Corp.* (2012), 7 B.L.R. (5th) 19 (Ont. S.C.J.), at paras. 319-39; *Ironrod Investments Inc. v. Enquest Energy*

¹ Section 180(1) of the *Securities Act*, R.S.A. 2000, c. S-4, stated:

180(1) On the application of an interested person, the Court of Queen's Bench, where it is satisfied that a person or company has not complied with this Part or the regulations made in respect of this Part, may make an interim or final order

- (a) compensating any interested person who is a party to the application for damages suffered as a result of a contravention of this Part or the regulations made in respect of this Part;
- (b) rescinding a transaction with any interested person, including the issue of a security or a purchase and sale of a security;
- (c) requiring any person or company to dispose of any securities acquired pursuant to or in connection with a bid;
- (d) prohibiting any person or company from exercising any or all of the voting rights attaching to any securities;
- (e) requiring the trial of an issue;
- (f) respecting any matter not referred to in clauses (a) to (e) that the Court considers proper.

Services Corp., 2011 ONSC 308; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2001), 20 B.L.R. (3d) 289 (Ont. S.C.J.), at paras. 112-17, aff'd (2003), 63 O.R. (3d) 431 (C.A.); *Takefman v. Golden Hope Mines Ltd.*, 2015 QCCS 4947; *Nord Resources Corp. v. Nord Pacific Ltd.* (2003), 37 B.L.R. (3d) 115 (N.B.Q.B)).

[110] Any uncertainty about the legislature's intention that privacy rights under the British Columbia *Privacy Act* be heard by the Supreme Court in British Columbia is dispelled by the introductory words in s. 4: "Despite anything contained in another Act . . .". That reflects a clear statutory intention that exclusive jurisdiction over the enforcement of the *Privacy Act* be retained by the Supreme Court despite what any other legislation states. It would defy logic to think that the legislature sought to protect the British Columbia Supreme Court's exclusivity from the reach of other statutes, but not from the reach of forum selection clauses in private contracts.

[111] Tied to these public policy concerns is the "grossly uneven bargaining power" of the parties. Facebook is a multi-national corporation which operates in dozens of countries. Ms. Douez, a videographer, is a private citizen. She had no input into the terms of the contract and, in reality, no meaningful choice as to whether to accept them given Facebook's undisputed indispensability to online conversations. As Prof. Cheryl Preston noted: ". . . if one's family, friends, and business associates are on Facebook . . . using a competitor's service is not a reasonable choice" (Cheryl B. Preston, "Please Note: You Have Waived Everything": Can Notice Redeem Online

Contracts?” (2015), 64 *Am. U. L. Rev.* 535, at p. 554).

[112] The doctrine of unconscionability, a close jurisprudential cousin to both public policy and gross bargaining disparity, also applies to render the forum selection clause unenforceable in this case.

[113] This Court confirmed in *Tercon* that unconscionability can be used to invalidate a single clause within an otherwise enforceable contract (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69, at para. 122).

[114] As Prof. McCamus notes, the doctrine of unconscionability is a useful tool for addressing the enforceability of some clauses in consumer contracts of adhesion:

. . . the doctrine of the unconscionable term may provide a common law device, long awaited by some, that can ameliorate the harsh impact of unfair terms in boilerplate or “adhesion” contracts, offered particularly in the context of consumer transactions on a take-it-or-leave-it basis. [Footnote omitted; p. 444.]

(See also Jean Braucher, “Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State” (2007), 45 *Can. Bus. L.J.* 382.)

[115] Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness. Prof. McCamus describes them as follows:

. . . one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests *and* undue advantage or benefit secured as a result of that inequality by the stronger party. [Emphasis added; pp. 426-27.]

[116] In my view, both elements are met here. The inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had, could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gave Facebook an unfair and overwhelming procedural — and potentially substantive — benefit. This, to me, is a classic case of unconscionability.

[117] For all these reasons, the forum selection clause is unenforceable under the first step of the *Pompey* test.

[118] I would allow the appeal with costs throughout and dismiss Facebook's application for a stay of proceedings.

The reasons of McLachlin C.J. and Moldaver and Côté JJ. were delivered by

[119] THE CHIEF JUSTICE AND CÔTÉ J. (dissenting) — The respondent, Facebook, Inc., is a successful global corporation based in California. It operates a social media website (www.facebook.com) used by millions of users throughout the

world. Facebook's website allows users to establish their own "facebook", through which they communicate with "friends", with whom they share news, information, opinions, photos and videos.

[120] To become a Facebook user, a person must enter into a contract with Facebook. The appellant, Deborah Louise Douez wanted to become a Facebook user. When Ms. Douez chose to sign up as a user of Facebook, she agreed to Facebook's terms of use, which included a forum selection clause. A version of the clause provides:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims. [A.R., vol. II, at p. 138]

[121] Ms. Douez wants to start a class action against Facebook. She says that Facebook used her name and face in an advertising product called "Sponsored Stories", without her consent, contrary to s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373, which creates a statutory tort of invasion of privacy. Facebook, for its part, says it obtained Ms. Douez's consent through the "terms of use" to which she consented in her contract with Facebook.

[122] The question on this appeal concerns the place where the lawsuit should

be heard. Facebook argues that the dispute must be tried before a state or federal court in Santa Clara County, California, as Ms. Douez agreed to in her contract with Facebook. Ms. Douez, on the other hand, argues that the lawsuit should be tried in British Columbia. She does not dispute that she agreed by contract to have all disputes with Facebook tried in California. However, she argues that the clause should not be enforced against her.

[123] The issue assumes great importance in a world where millions of people routinely enter into online contracts with corporations, large and small, located in other countries. Often these contracts contain a forum selection clause, specifying that any disputes must be resolved by the corporation's choice of court. In this way, global corporations, be they American, Canadian or from some other country, seek to ensure that they are not dragged into litigation in foreign countries.

[124] The principles of private international law support the enforcement of forum selection clauses, while recognizing that in exceptional cases courts may decline to enforce them. Forum selection clauses provide certainty and predictability in cross-border transactions. When parties agree to a jurisdiction for the resolution of disputes, courts will give effect to that agreement, unless the claimant establishes "strong cause" for not doing so.

[125] We see no need to depart from the settled principles of private international law on forum selection clauses — principles repeatedly confirmed by courts around the world, including the Supreme Court of Canada. The simple

question in this case, as we see it, is whether Ms. Douez has shown “strong cause” for not enforcing the forum selection clause to which she agreed. We agree with the Court of Appeal of British Columbia that strong cause has not been shown, and that the action must be tried in California, as the contract requires. A stay of the underlying claim should be entered.

I. Forum Selection Clauses and *Forum Non Conveniens*

[126] The test for the enforcement of forum selection clauses in contracts was settled by this Court 14 years ago in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450. The inquiry proceeds in two steps. First, the court must determine whether the forum selection clause is enforceable and applies to the circumstances: *Pompey*, at para. 39; *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43. Second, the court must assess whether there is strong cause in favour of denying a stay, despite the enforceable forum selection clause: *Pompey*, at paras. 19 and 39.

[127] Ms. Douez argues that the courts should not apply the settled *Pompey* test to her case. Instead, she argues, they should consider the forum selection clause within the context of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (“*CJPTA*”). We disagree.

[128] Section 11 of the *CJPTA* outlines the circumstances in which a court may decline jurisdiction where there is a more appropriate forum. It deals with the

situation where two different courts have jurisdiction, and provides instructions to settle which of the two courts should take jurisdiction. It provides:

- 11** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
 - (b) the law to be applied to issues in the proceeding,
 - (c) the desirability of avoiding multiplicity of legal proceedings,
 - (d) the desirability of avoiding conflicting decisions in different courts,
 - (e) the enforcement of an eventual judgment, and
 - (f) the fair and efficient working of the Canadian legal system as a whole.

As this Court noted in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22, “[s.] 11 of the *CJPTA* . . . constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions.”

[129] This code for deciding which of two available jurisdictions should, as a

matter of convenience, take jurisdiction, does not apply to oust forum selection clauses. Where the parties have agreed in advance to a choice of forum, there is no need to inquire into which of two forums is the more convenient; the parties have settled the matter by their contract, unless the contractual clause is invalid or inapplicable (the first step of the *Pompey* test) or should not be applied because the plaintiff has shown strong cause not to do so (the second step of the *Pompey* test). In such cases, the duty of the court is to enforce the contractual agreement, unless the plaintiff shows strong cause otherwise.

[130] What Ms. Douez suggests, in effect, is that the two-part *Pompey* test be changed for a unified test that would apply forum selection clauses as an element of the *forum non conveniens* test. This Court rejected this very contention in *Pompey*. Justice Bastarache stated that he was “not convinced that a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable” (para. 21). He shared the concerns expressed by author, Edwin Peel that such an approach would not give full weight to forum selection clauses because other factors weigh in the balance — factors that the parties must be deemed already to have considered when they agreed to a forum selection clause: E. Peel, “Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws”, [1998] *L.M.C.L.Q.* 182.

[131] We therefore agree with the British Columbia and Saskatchewan Courts of Appeal that *Pompey* continues to apply when the courts consider forum selection

clauses: see *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570, at para. 14; *Preymann*, at para. 39; *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156, at paras. 112-14; *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146, at para. 10. While the *CJPTA* is a complete codification of the common law related to *forum non conveniens*, it does not supplant the common law principles underlying the enforcement of forum selection clauses. Where the parties have agreed to a forum selection clause, the court must apply that clause unless the test in *Pompey* is satisfied. If the test is satisfied and the forum selection clause is inapplicable, the result is a situation where there are two competing possibilities for forum. At this point, the *CJPTA* which codifies the common law provisions for *forum non conveniens* applies.

[132] *Pompey* is considered first. Since we conclude that the test in *Pompey* is not satisfied, s. 11 of the *CJPTA* does not assist Ms. Douez.

II. Step One: Is the Forum Selection Clause Enforceable?

[133] Having rejected Ms. Douez's contention that the *Pompey* test should be rolled into the codified provisions for *forum non conveniens*, the next step is to apply the two-part *Pompey* framework.

[134] The first step in the *Pompey* test asks whether the forum selection clause is enforceable and applies in the circumstances. Facebook bears the burden of establishing this. In our opinion, Facebook has discharged this burden. On its face,

the answer is affirmative. The language of the clause is clear and appears to cover all disputes, including this one.

[135] Ms. Douez suggests three reasons why the forum selection clause is invalid or inapplicable to her situation. None of them withstand scrutiny. First, she argues that the forum selection clause was not brought to her attention. Second, she argues that the terms of use are unclear. Third, she argues that s. 4 of the *Privacy Act* renders the forum selection clause unenforceable. Abella J. adds a fourth; that the forum selection clause offends public policy. In our view, these arguments are not persuasive.

[136] The first argument is that the forum selection clause is unenforceable because Ms. Douez was simply invited to give her consent to the clause by clicking on it, without her attention being drawn to its specific language. In other words, she is not bound because electronic clicking without more does not indicate her agreement to the forum selection clause.

[137] We cannot accede to this submission. In British Columbia, s. 15(1) of the *Electronic Transactions Act*, S.B.C. 2001, c. 10, codifies the common law rule set out in *Rudder v. Microsoft Corp.* (1999), 2 C.P.R. (4th) 474 (Ont. S.C.J.), and establishes that an enforceable contract may be formed by clicking an appropriately designated online icon:

15 (1) Unless the parties agree otherwise, an offer or the acceptance of

an offer, or any other matter that is material to the formation or operation of a contract, may be expressed

...

(b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

[138] Ms. Douez relies on *Berkson v. Gogo LLC*, 97 F. Supp.3d 359 (E.D.N.Y. 2015), at para. 22, where a U.S. district court, in the absence of legislation on electronic formation of contract, adopted a four-step procedure to determine whether a contract was formed by accepting terms of use online. In British Columbia, s. 15(1) of the *Electronic Transactions Act* answers the question, providing that clicking on a screen suffices to indicate acceptance.

[139] Ms. Douez's second contention is that the terms of use contradict the forum selection clause, rendering it unclear. She points to the provision that Facebook will "strive to respect local laws", and suggests that this requires Facebook to defer to s. 4 of the British Columbia *Privacy Act*, which grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims, to the exclusion of other tribunals. The tension between the strict terms of the forum selection clause in the contract, and the provision that Facebook will "strive to respect local laws", introduces an ambiguity, rendering the forum selection clause unenforceable, Ms. Douez contends.

[140] This argument cannot succeed. The contract on its face is clear. There is no inconsistency between a commitment to “strive” to apply local laws and an agreement that disputes will be tried in California. A forum selection clause does not disrespect the laws of British Columbia.

[141] This brings us to Ms. Douez’s third argument — that s. 4 of the *Privacy Act* invalidates forum selection clauses for actions under this Act. Section 4 provides that “an action under [the *Privacy Act*] must be heard and determined by the Supreme Court [of British Columbia]”. Ms. Douez argues that this clause amounts to a stipulation that all actions under this Act must be heard in British Columbia, with the result that forum selection clauses providing other jurisdictions are invalid.

[142] We do not agree. Section 4 of the *Privacy Act* grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims to the exclusion of other British Columbia courts. Nothing in the language of s. 4 suggests that it can render an otherwise valid contractual term unenforceable.

[143] We do not dispute that legislation can limit the scope of forum selection clauses or render them altogether unenforceable: see *Pompey*, at para. 38. Nor do we dispute that some jurisdictions have adopted a “protective model” limiting the impact of forum selection clauses in consumer contracts: Z. S. Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd ed. 2015), at p. 357. However, when they have done so, they have used clear language. For example, *Regulation (E.U.) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on*

jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] O.J. L. 351/1, provides consumers with a positive right to bring proceedings in his or her home state (art. 18), unless the clause was agreed to after a dispute had arisen, provides additional forum options to the consumer, or concerns parties resident in the same state (art. 19). The *Civil Code of Québec* is more absolute: art. 3149 provides that Québec courts have jurisdiction to hear actions based on consumer contracts, and that “the waiver of such jurisdiction by the consumer or worker may not be set up against him”.

[144] The British Columbia legislature has not adopted the “protective model” approach. It has not legislated an absolute or limited right to bring an action in British Columbia, in the face of a forum selection clause stipulating a different jurisdiction. It has focussed not on where the action can be brought, but on the protection of consumer rights in the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“*BPCPA*”). The choice to focus on rights rather than forum was made after this Court’s decision in *Pompey*. Section 3 of the *BPCPA* provides that “[a]ny waiver or release by a person of the person’s rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.” If the legislature had intended to render forum selection clauses inoperable for claims made under the *Privacy Act*, it would have said so expressly: see *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 25. Courts are obliged to respect this choice.

[145] Ms. Douez does not argue that the forum selection clause is unconscionable. Such an argument would have to be based on evidence (see *Pompey*, at para. 29); none was adduced in this case. Inequality of bargaining power, even if it were established here, does not, on its own, give the court reason to interfere with the freedom to contract. As noted by Angela Swan and Jakub Adamski in *Canadian Contract Law* (3rd ed. 2012), at §9.114:

The mere fact that, as might happen in very many transactions, the parties are not equally competent in looking after their own interests or equally informed is not a basis for relief. There has to be, as has been suggested, some relation of dependence or likelihood of undue influence, *i.e.*, some element of procedural unconscionability, inequality or unfairness, *and* a bad bargain, *i.e.*, some element of substantive unfairness. [Emphasis in original.]

[146] Finally, we come to the argument that forum selection clauses violate public policy and should therefore be treated as invalid and inapplicable. This contention, too, cannot prevail.

[147] It is unclear to us how a court can invalidate a contractual provision simply because the court finds it is contrary to public policy in the abstract. While the court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove “the existence of an overriding public policy . . . that outweighs the very strong public interest in the enforcement of contracts”: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 123 (per Binnie J., in dissent, but not on this point). In our view, no such overriding public

policy is found on the facts of this case.

[148] Forum selection clauses, far from being unconscionable or contrary to public policy, are supported by strong policy considerations. Forum selection clauses are well-established and routinely enforced around the world: see e.g. *Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749, at para. 24; *Atlantic Marine Construction Co. v. U.S. Dist. Court for Western Dist. of Texas*, 134 S.Ct. 568 (2013), at pp. 581-82, citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), at pp. 17-18; *Akai Pty Ltd. v. People's Insurance Co.* (1996), 188 C.L.R. 418, at pp. 441-42 (H.C.A.); *Advanced Cardiovascular Systems Inc. v. Universal Specialties Ltd.*, [1997] 1 N.Z.L.R. 186 (C.A.). Forum selection clauses serve an important role of increasing certainty and predictability in transactions that take place across borders. The fact that a contract is in standard form does not affect the validity of such a clause: *Pompey*, at para. 28; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), at pp. 593-94.

[149] That is not to say that forum selection clauses will always be given effect by the courts. As Abella J. notes, “burdens of distance” and “burdens of geography” may render the application of a forum selection clause unfair in the circumstances. However, those considerations are relevant at the second step of *Pompey*, not the first. As we discuss below, a court in assessing strong cause can consider the relative convenience and expense of local and foreign courts, as well as any prejudice a plaintiff might suffer in being forced to bring their claim in a foreign court: see *The*

“Eleftheria”, [1969] 1 Lloyd’s Rep. 237 (Adm. Div.), at p. 242. But these considerations play no role at the first step of the *Pompey* test.

[150] We conclude that the forum selection clause is valid and applicable and that the first step of the *Pompey* test has been met. It remains to determine whether Ms. Douez has shown strong cause why it should not be given effect.

III. Step Two: Has Ms. Douez Shown Strong Cause?

[151] We have concluded that step one of the *Pompey* test has been met: Facebook has established that the forum selection clause is enforceable and applies to these circumstances. It remains to ascertain whether Ms. Douez has established strong cause why the clause should not be enforced in this case.

[152] The strong cause exception to the enforceability of forum selection clauses confers a discretion on the judge, to be exercised in accordance with settled factors, to decline to enforce the clause. The strong cause test means that forum selection clauses are enforced, upholding predictability and certainty, unless the plaintiff shows that enforcement of the clause would unfairly deny her an opportunity to seek justice.

[153] The party seeking to displace the forum selection clause bears the burden of establishing strong cause. There are good reasons for this. First, enforceability of forum selection clauses is the rule, setting them aside the exception. Generally,

parties seeking an exceptional exemption must show grounds for what they seek. Second, it is the party seeking the exception who is in the best position to argue why it should be granted, not for the party seeking to rely on the rule to show why the rule should not be vacated; generally, burdens fall on the party asserting a proposition and in the best position to prove it. Reversing the burden would require a defendant to prove a negative — that “strong cause” does not exist. This would ask a defendant to anticipate and counter all the arguments a plaintiff might raise in support of there being strong cause. Finally, to reverse the burden would undermine the general rule that forum selection clauses apply and introduce uncertainty and expense into commercial transactions that span international borders. It would detract from the “certainty and security in transaction” that is critical to private international law (*Pompey*, at paras. 20 and 25). For many businesses, having to prove in a foreign country why there is not strong cause would render the contract costly and in many cases, practically unenforceable. Businesses, small suppliers as well as giants like Facebook, would be required to amass proof of a negative in a host of foreign countries. Accordingly, the law in Canada and elsewhere has consistently held that it is the plaintiff — the party seeking to set aside the forum selection clause — who bears the burden of showing strong cause for not giving effect to the enforceable forum selection clause by entering a stay of proceedings: *Pompey*, at para. 25; *The “Eleftheria”*, at p. 242.

[154] In *Pompey*, Bastarache J. explained the reasons for embracing the strong cause test and the burden on the plaintiff to prove strong cause (para. 20):

These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law In the context of international commerce, order and fairness have been achieved at least in part by application of the “strong cause” test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the “strong cause” test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

[155] This brings us to what the plaintiff must show to establish strong cause why a forum selection clause should not be enforced. The factors that govern the judge’s exercise of his discretion were set out in *The “Eleftheria”*, at p. 242, and were adopted in *Pompey*, at para. 19, per Bastarache J.:

- (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
- (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
- (3) The burden of proving such strong cause is on the plaintiffs.
- (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.
- (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:
 - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would

(i) be deprived of security for that claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[156] Applying these factors to the case at bar, it is clear that the motions judge should not have found strong cause for not enforcing the forum selection clause to which Ms. Douez agreed. The court must consider all the circumstances of the case. None of the circumstances relied on by Ms. Douez show strong cause why the forum selection clause should not be enforced.

[157] The analysis starts with the proposition that the discretion should be exercised by enforcing the forum selection clause unless the plaintiff shows strong cause for not doing so. Strong cause means what it says — it is not any cause, but strong cause. The default position is that forum selection clauses should be enforced.

[158] There is good reason for this. By offering services across borders, online

companies risk uncertainty and unpredictability of the possible jurisdictions in which they may face legal claims. Professor Geist (M. A. Geist, “Is There a There There? Toward Greater Certainty for Internet Jurisdiction” (2001), 16 *Berkeley Tech. L.J.* 1345) describes this risk:

Since websites are instantly accessible worldwide, the prospect that a website owner might be haled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise; it is a very real possibility.
[p. 1347]

[159] Other commentators point out that since online companies do not know in advance where their customers are located, it is difficult for them to proactively determine jurisdiction issues in advance: Z. Tang, “Exclusive Choice of Forum Clauses and Consumer Contracts in E-commerce” (2005), 1 *J. Priv. Int. L.* 237. In our view, these risks are best addressed through adherence to the existing system of private international law that has been carefully developed over decades to provide a measure of certainty, order, and predictability. Requiring the plaintiff to demonstrate strong cause is essential for upholding certainty, order, and predictability in private international law, especially in light of the proliferation of online services provided across borders. Holding otherwise would ask the court to ignore valid and enforceable, contractual terms.

[160] It is not only large multi-national corporations like Facebook that benefit from emphasizing the need for order in private international law. The intervener, Information Technology Association of Canada, points out that small and medium-

sized businesses benefit from the certainty that flows from enforcing forum selection clauses, and that by reducing litigation risk they can generate savings that can be passed on to consumers. Facebook adds that the certainty which comes with enforcement of forum selection clauses allows foreign companies to offer online access to Canadians. In our view, these benefits accrue to online businesses of all sizes, and in all locations.

[161] We cannot help but note our profound disagreement with the suggestion in the reasons of Karakatsanis, Wagner and Gascon JJ., that forum selection clauses are inherently contrary to public policy. They state: “. . . forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good” (para. 25). The overwhelming weight of international jurisprudence shows that, far from being a subterfuge to deny access to justice, forum selection clauses are vital to international order, fairness and comity.

[162] We turn now to the specific factors that *Pompey* directs the court to consider in determining whether the plaintiff has established strong cause for not enforcing the forum selection clause.

[163] First, Ms. Douez has not shown that the facts in the case and the evidence to be adduced shifts the balance of convenience from the contracted state of California to British Columbia. The evidence in the case may be expected to revolve around Facebook’s use of Ms. Douez’s photo and name in its advertisement without her consent. This involves Facebook’s conduct from its headquarters in California.

Facebook's defence is that Ms. Douez consented, not by her actions in British Columbia, but by agreeing to the terms of use. The issue is a legal matter of construing the contract. There is no basis for suggesting this factor shows strong cause to oust the forum selection clause.

[164] Our colleague Abella J. makes reference to the “burdens of distance” and the “burdens of geography” that a plaintiff may carry when faced with a forum selection clause. Similarly, Ms. Douez argued that setting aside the forum selection clause would increase consumers’ access to justice. During oral argument, her counsel called it “a very important principle” (transcript, at p. 33), and in her factum she said that “no rational British Columbia resident would travel to California to litigate nominal damages claims” (A.F., at para. 90). Yet, there is no evidence regarding the “relative convenience and expense of trial” in California as compared to British Columbia. Strong cause cannot be established in absence of a sufficient evidentiary basis.

[165] Nor does the applicable law show strong cause to override the forum selection clause, in our view. It is true that the law giving rise to the tort is a British Columbia statute. However, the British Columbia tort created by the *Privacy Act* does not require special expertise. The courts of California have not been shown to be disadvantaged in interpreting the Act as compared with the Supreme Court of British Columbia. The most the motions judge could say on this factor was that

local courts may be more sensitive to the social and cultural context and

background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this.

(Trial reasons, 2014 BCSC 953, 313 C.R.R. (2d) 254, at para. 75)

If possible sensitivity to local context is sufficient to show strong cause, forum selection clauses will never be upheld where a tort occurs in a different country. What this factor contemplates is evidence that the local court will be better placed to interpret the legal provisions at issue than the court stipulated in the forum selection clause. Ms. Douez presented no such evidence.

[166] Ms. Douez did not adduce any evidence of California law or California procedure related to either private international law or the adjudication of privacy claims. She did not provide evidence of California law related to territorial jurisdiction. Bauman C.J.B.C. described the vacuum thus (para. 77):

In my opinion, Ms. Douez failed to provide the Court with any reason to conclude that this proceeding could not be heard in the courts of Santa Clara. There is no evidence in the record as to California private international law. This Court cannot conduct its own research and take judicial notice (see *Duchess di Sora v. Phillipps* (1863), 10 H.L. Cas. 624 (U.K.H.L.) at 640; *Bumper Development Corp. v. Commissioner of Police of the Metropolis*, [1991] 1 W.L.R. 1362 (Eng. C.A.), at 1369).

A court should not be put in the position of having to speculate as to whether a California court would exercise its discretion to assume jurisdiction over a matter, whether that court would apply the laws of British Columbia, whether privacy laws in

California are analogous to those in British Columbia, whether the procedural rules in California parallel those in British Columbia, or whether the remedies available in California would be capable of providing Ms. Douez with comparable remedies to what she might obtain in British Columbia. Without evidence, there is respectfully no basis for our colleagues Karakatsanis, Wagner and Gascon JJ. to raise the spectre of harms going “without remedy” (paras. 59 and 62).

[167] The country with which the parties are connected does not establish strong cause. Facebook has its headquarters in California. Ms. Douez, while resident in British Columbia, was content to contract with Facebook at that location. Nothing in her situation suggests that the class action she wishes to commence could not be conducted in California just as easily as in British Columbia. To show strong cause to oust a foreign selection clause on the basis of residence, the plaintiff must point to more than the mere fact that she lives in the jurisdiction where she seeks to have the action tried. If this sufficed, forum selection clauses would be routinely held inoperative.

[168] The next factor to consider is whether the defendant is merely seeking procedural advantages. If Ms. Douez could show that Facebook does not genuinely desire the trial to take place in California, but wants the trial there simply to gain procedural advantages over her, this might support her case that strong cause lies to oust the forum selection clause. However, she has not shown this. There is no suggestion that Facebook does not genuinely wish all litigation with users to take

place in California. Indeed, it is clear it does so, for reasons of substance and convenience. The purpose of the forum selection clause is to avoid costly and uncertain litigation in foreign countries, which in turn would increase its costs and divert its energy.

[169] Finally, Ms. Douez has not shown that application of the forum selection clause would deprive her of a fair trial because she would be deprived of security for the claim; be unable to enforce any judgment obtained; be faced with a time-bar not applicable in British Columbia; or because of political, racial, religious or other reasons. She does not and cannot take issue with the fact that the state of California has a highly developed and fair legal system, nor with the fact that she will get a fair trial there.

[170] It is thus apparent that all the factors endorsed by this Court in *Pompey* point to enforcing the forum selection clause to which Ms. Douez agreed. None of them establish strong cause.

[171] For this reason, Ms. Douez asks this Court to modify the strong cause test endorsed by this Court in *Pompey*. She urges two modifications. First, she suggests that “the strong cause test should be applied in a nuanced manner, accounting for parties’ inherent inequality or consumers’ lack of bargaining power” (A.F., at para. 71). Alternatively, she says that the test “should be modified to place the burden on the defendant in the context of consumer contracts of adhesion” (A.F., at para. 72). We cannot accept either of these proposals. They would amount to inappropriately

overturning this Court's decision in *Pompey* and substituting new and different principles, and would introduce unnecessary and unprincipled uncertainty into the strong cause test.

[172] Ms. Douez's first submission is that instead of considering the factors set out in *The "Eleftheria"* and *Pompey* in determining whether strong cause not to enforce the forum selection clause has been established, the court should consider a different factor — the consumer's lack of bargaining power. Our colleagues Karakatsanis, Wagner and Gascon JJ. accept this argument. With respect, we disagree.

[173] This argument conflates the first step of the test set out in *Pompey* with the second step, in a way that profoundly alters the law endorsed by this Court in *Pompey*. Consideration of "all the circumstances of the particular case" at the second step is not an invitation to blend the first step into the second. As discussed above, the party seeking to rely on the forum selection clause must first demonstrate that it is enforceable. It is at this step that inequality of bargaining power is relevant. Inequality of bargaining power may lead to a clause being declared unconscionable — something not argued in the case at bar. Short of unconscionability, the stronger party relying on a standard form contract faces the *contra proferentem* rule under which any ambiguity is resolved against them: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 51. As we have said, concerns about inequality of bargaining power may inspire

legislators to intervene by making forum selection clauses unenforceable — but the British Columbia legislature has chosen not to do so. There is no reason here to second guess this choice by conflating or modifying the *Pompey* analysis. In this case, Facebook has demonstrated that the forum selection clause is enforceable. We note parenthetically that the strength of the contention of unequal bargaining power seems tenuous, when one realizes that Ms. Douez received the Facebook services she wanted, for free and without any compulsion, practical or otherwise. Even if remaining “‘offline’ may not be a real choice in the Internet era”, as suggested by our colleagues Karakatsanis, Wagner and Gascon JJ. (at para. 56), there is no evidence that foregoing Facebook equates with being “offline”. In any case, enforcement of the forum selection clause does not deprive Ms. Douez, or anyone else, of access to Facebook.

[174] Ms. Douez’s alternative suggestion of reversing the burden of proof is inconsistent with the principles underlying the strong cause test: certainty, security, and fairness (*Pompey*, at para. 20). These principles remain as relevant in the 21st century domain of global online social media as they were in the 20th century climate of international commercial shipping. The principles of order and fairness underpin private international law and “ensure security of transactions with justice”: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1097. The twin goals of justice and fairness in private international law are only achievable by enforcing rules that ensure security and predictability: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at paras. 73 and 75; see also *Tolofson v. Jensen*, [1994] 3 S.C.R.

1022, at p. 1058. As already discussed, there are good reasons why this Court, like the courts in the United Kingdom and elsewhere, places the burden of showing strong cause for not enforcing a forum selection clause on the plaintiff seeking to avoid the clause.

[175] Ms. Douez’s submissions that we “nuance” *Pompey* or shift the burden of showing strong cause contrary to *Pompey*, are not supported by principle or policy. They would undermine certainty in private international law. And they amount to overruling this Court’s decision in *Pompey*. This Court has established stringent criteria for departing from a previous decision of recent vintage: see e.g. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 129-39; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 850-61; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 45-46. Those conditions are not met here.

[176] We conclude that Ms. Douez has failed to establish strong cause why the forum selection clause she agreed to should not be enforced.

IV. Disposition

[177] The forum selection clause is valid and enforceable, and Ms. Douez has not shown strong cause to not enforce it. We would dismiss her appeal.

Appeal allowed with costs, MCLACHLIN C.J. and MOLDAVER and CÔTÉ JJ. dissenting.

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Apotex Inc. (Appellant) (Plaintiff by Counterclaim)

Apotex Inc. (appelante) (demanderesse reconventionnelle)

v.

c.

Eli Lilly and Company and Eli Lilly Canada Inc. (Respondents) (Defendants by Counterclaim)

Eli Lilly and Company et Eli Lilly Canada Inc. (intimées) (défenderesses reconventionnelles)

and

et

Shionogi & Co. Ltd. (Respondent) (Defendant by Counterclaim)

Shionogi & Co. Ltd. (intimée) (défenderesse reconventionnelle)

and

et

Commissioner of Competition (Intervener)

Commissaire de la concurrence (intervenant)

INDEXED AS: ELI LILLY AND CO. v. APOTEX INC. (F.C.A.)

RÉPERTORIÉ : ELI LILLY AND CO. c. APOTEX INC. (C.A.F.)

Federal Court of Appeal, Desjardins, Evans and Sharlow J.J.A.—Toronto, September 27; Ottawa, November 2, 2005.

Cour d'appel fédérale, juges Desjardins, Evans et Sharlow, J.C.A.—Toronto, 27 septembre; Ottawa, 2 novembre 2005.

Patents — Infringement — Appeal from Federal Court decision granting motions for summary judgment, striking paragraphs from appellant's defence and counterclaim to patent infringement action brought by Eli Lilly and Company, Eli Lilly Canada Inc. (Lilly) — Lilly commencing action for infringement of seven patents relating to processes that may be used in making cefaclor, antibiotic — Lilly later claiming appellant infringing eighth patent; amending statement of claim — Four out of those eight patents assigned to Lilly by Shionogi & Co. Ltd. (Shionogi) — Lilly simultaneously granting Shionogi non-exclusive licence respecting patents assigned — Appellant alleging assignment of patents constituting conspiracy to unduly lessen competition contrary to Competition Act, s. 45; claiming damages under s. 36 — Patent Act, s. 50 providing patent issued for invention assignable in law — Federal Court of Appeal decision in Molnlycke AB v. Kimberly-Clark of Canada Ltd. establishing assignment of patent cannot be undue when lessening of competition resulting from assignment thereof — Molnlycke not applying if reduction of competition resulting from something more than mere exercise of patent rights — Federal Court erring when considering Molnlycke binding in present circumstances — Also erring when holding assignment of patents exempt from Competition Act, s. 45.

Brevets — Contrefaçon — Appel d'une décision de la Cour fédérale accueillant les requêtes en jugement sommaire et radiant certains paragraphes de la défense et demande reconventionnelle de l'appelante dans l'action en contrefaçon intentée par Eli Lilly and Company et Eli Lilly Canada Inc. (Lilly) — Lilly a intenté une action pour contrefaçon de sept brevets sur des procédés pouvant servir à la fabrication de l'antibiotique céfaclor — Lilly a modifié sa déclaration de manière à ajouter un huitième brevet à son action — Quatre des huit brevets ont été cédés à Lilly par Shionogi & Co. Ltd. (Shionogi) — Lilly concédait simultanément à Shionogi une licence non exclusive sur les brevets cédés — L'appelante a allégué que les accords de cession conclus constituaient un complot en vue de diminuer indûment la concurrence, en contravention avec l'art. 45 de la Loi sur la concurrence, et a réclamé des dommages-intérêts en vertu de l'art. 36 — L'art. 50 de la Loi sur les brevets dispose que tout brevet délivré pour une invention est cessible en droit — Dans l'arrêt Molnlycke AB c. Kimberly-Clark of Canada Ltd., la Cour d'appel fédérale a statué qu'une cession de brevet ne peut être indue si la diminution de la concurrence découle uniquement de la cession — Molnlycke ne doit pas être appliqué si la diminution de la concurrence découle de quelque chose qui dépasse le simple exercice des droits de brevet — En l'espèce, la Cour fédérale s'est trompée en se considérant liée par Molnlycke — Elle a également commis une erreur en

Competition — Appeal from Federal Court decision granting motions for summary judgment, striking paragraphs from appellant's defence, counterclaim to patent infringement action brought by Eli Lilly and Company and Eli Lilly Canada Inc. (Lilly) — Assignment of patent may as matter of law unduly lessen competition — When assignment increasing assignee's market power in excess of that inherent in rights assigned, Patent Act, s. 50 not precluding possibility assignment unduly lessening competition under Competition Act, s. 45 — Purpose of Competition Act to maintain, encourage competition in Canada to promote efficiency, adaptability of Canadian economy — Federal Court not erring when concluding patent assignment having effect of reducing competition — Appellant claiming loss, damages sustained as result of conduct proscribed in Competition Act, s. 45 — Submitting any potential amount required to pay for infringement constituting "loss or damages" — S. 36(1) providing claimant must prove proscribed conduct causing loss, damages — S. 36(4) establishing limitation period to claim loss, damages — Federal Court not erring in concluding issues of damages, limitation period to be resolved at trial, not on summary motion.

Practice — Summary Judgment — Appeal from Federal Court decision granting motions for summary judgment, striking paragraphs from appellant's defence, counterclaim to patent infringement action brought by Eli Lilly and Company and Eli Lilly Canada Inc. — Appellant's claim for loss, damages under Competition Act not matter to be resolved at summary judgment stage — Also inappropriate to decide by summary judgment matter in which application of discoverability rule (when facts discovered, could reasonably have been expected to be discovered) likely to be important, i.e. determining start of limitation period for damages claimed under Competition Act.

This was an appeal from a Federal Court decision granting motions for summary judgment and striking paragraphs from the appellant's defence and counterclaim to an action brought by the respondents Eli Lilly and Company and Eli Lilly Canada Inc. (Lilly) for patent infringement. In 1997, Lilly had

affirmant que les cessions de brevet ne sont pas assujetties à l'art. 45 de la Loi sur la concurrence.

Concurrence — Appel d'une décision de la Cour fédérale accueillant les requêtes en jugement sommaire et radiant certains paragraphes de la défense et demande reconventionnelle de l'appelante dans l'action en contrefaçon intentée par Eli Lilly and Company et Eli Lilly Canada Inc. (Lilly) — La cession de brevet peut, en droit, diminuer indûment la concurrence — Lorsque la cession confère au cessionnaire un pouvoir de marché plus grand que le seul pouvoir inhérent au brevet cédé, l'art. 50 de la Loi sur les brevets n'exclut pas la possibilité que la cession diminue indûment la concurrence en contravention avec l'art. 45 de la Loi sur la concurrence — L'objet de la Loi sur la concurrence est de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficacité de l'économie canadienne — La Cour fédérale ne s'est pas trompée lorsqu'elle a conclu que la cession de brevet avait pour effet de diminuer la concurrence — L'appelante a réclamé des dommages-intérêts pour la perte ou les dommages qu'elle a subis en raison des agissements contraires à l'art. 45 — L'appelante a soutenu que tout montant qu'elle pourrait être tenue de verser dans l'action en contrefaçon constitue « une perte ou des dommages » — En vertu de l'art. 36(1), le demandeur doit prouver qu'il a subi une perte ou des dommages en raison des agissements prohibés — L'art. 36(4) précise la prescription applicable à une action en dommages-intérêts pour perte ou dommages subis — La Cour fédérale ne s'est pas trompée en concluant que les questions de dommages et de prescription devaient être tranchées sur le fond et non dans le cadre d'une requête en jugement sommaire.

Pratique — Jugement sommaire — Appel d'une décision de la Cour fédérale accueillant les requêtes en jugement sommaire et radiant certains paragraphes de la défense et demande reconventionnelle de l'appelante dans l'action en contrefaçon intentée par Eli Lilly and Company et Eli Lilly Canada Inc. — La réclamation de l'appelante pour perte ou dommages sous le régime de la Loi sur la concurrence n'était pas une question devant être tranchée dans le cadre d'une requête en jugement sommaire — Il n'est pas davantage approprié de trancher un litige par jugement sommaire lorsque l'application du principe de la possibilité de découverte (moment où les faits ont été découverts ou pouvaient raisonnablement l'être) sera vraisemblablement une question importante en ce qu'elle marque le début de la période de prescription pour les dommages-intérêts réclamés sous le régime de la Loi sur la concurrence.

Il s'agissait d'un appel d'une décision de la Cour fédérale accueillant les requêtes en jugement sommaire et radiant certains paragraphes de la défense et demande reconventionnelle de l'appelante dans l'action en contrefaçon intentée par les intimées Eli Lilly and Company et Eli Lilly Canada Inc.

commenced an action against the appellant for infringement of seven patents, which relate to processes that can be used in the making of cefaclor, an antibiotic, to intermediates that can be formed using those processes and to a compound used in the processes. An eighth patent, which it claimed had been infringed, was later added to its statement of claim. Of the eight patents Lilly claimed were infringed by the appellant, four had been assigned to it by Shionogi & Co. Ltd. (Shionogi) in 1995. In turn, Lilly simultaneously granted Shionogi, the assignor, a non-exclusive licence with respect to those patents assigned. The last of the process patents assigned to Lilly expired in 2000. In its defence and counterclaim, the appellant alleged that the agreements between Lilly and Shionogi constituted a conspiracy to unduly lessen competition, thereby violating section 45 of the *Competition Act* and entitling it to damages under section 36. Prior to this appeal, the Federal Court had held that since any lessening of competition arose from Shionogi's assignment of the patents to Lilly, it could not be undue because it was authorized by *Patent Act*, section 50. It regarded *Molnlycke AB v. Kimberly-Clark of Canada Ltd.* as binding authority to this effect. The appeal was allowed on the ground that *Molnlycke* applied only when the lessening therefrom of competition resulted from the assignment alone. The matter was remitted to the Federal Court Judge to determine whether there was "something more" than the mere exercise of patent rights such that the *Competition Act* was not excluded. The Federal Court found that there was not. The main issue in this appeal was whether an assignment of a patent constitutes an agreement or arrangement to lessen competition unduly if the assignment results in an increase to the assignee's market power greater than that inherent in the patents assigned, contrary to section 45 of the *Competition Act*.

Held, the appeal should be allowed.

The assignment of a patent may as a matter of law unduly lessen competition. Section 50 of the *Patent Act* provides that a patent issued for an invention is assignable in law. However, when the effect of the assignment is to increase the assignee's market power by more than that inherent in the rights assigned, section 50 does not preclude the possibility that the assignment unduly lessens competition under section 45 of the *Competition Act*. An interpretation of section 50 that does not immunize the assignment of patents from section 45 when it lessens competition enables it and section 45 to operate harmoniously in accordance with the ordinary meaning of the

(Lilly). En 1997, Lilly a intenté une action contre appelante pour contrefaçon de sept brevets sur des procédés pouvant servir à la fabrication de l'antibiotique céfaclor, sur les intermédiaires qui peuvent être produits au moyen de ces procédés, ainsi que sur un composé utilisé dans ces procédés. Elle a modifié sa déclaration de manière à ajouter un huitième brevet qui, d'après elle, avait fait l'objet d'une contrefaçon. Des huit brevets qui, d'après Lilly, avaient fait l'objet d'une contrefaçon par l'appelante, quatre lui avaient été cédés par Shionogi & Co. Ltd. (Shionogi) en 1995. En retour, Lilly concédait simultanément à Shionogi, le cédant, une licence non exclusive sur les brevets cédés. Le dernier des brevets de procédé cédés à Lilly a expiré en 2000. Dans sa défense et demande reconventionnelle, l'appelante a allégué que les accords conclus entre Lilly et Shionogi constituaient un complot en vue de diminuer indûment la concurrence, en contravention avec l'article 45 de la *Loi sur la concurrence*, et lui donnaient droit à des dommages-intérêts en vertu de l'article 36. Avant le présent appel, la Cour fédérale avait statué que, étant donné que toute diminution de la concurrence découlait de la cession des brevets de Shionogi à Lilly, la cession en question ne pouvait pas être indue du fait qu'elle était autorisée par l'article 50 de la *Loi sur les brevets*. Elle considérait qu'elle était liée à cet égard par l'arrêt *Molnlycke AB c. Kimberly-Clark of Canada Ltd.* La Cour d'appel fédérale a accueilli l'appel au motif que *Molnlycke* s'appliquait seulement dans le cas où la diminution de la concurrence découlait uniquement de la cession. L'affaire a été renvoyée à un juge de la Cour fédérale pour qu'il apprécie s'il y avait preuve que ce n'était « pas uniquement » l'exercice des droits de brevets, de telle sorte que l'application de la *Loi sur la concurrence* n'était pas exclue. La Cour fédérale a conclu qu'il s'agissait uniquement de l'exercice de ces droits. La question principale soulevée dans cet appel était la suivante : la cession d'un brevet peut-elle constituer un accord ou un arrangement en vue de diminuer indûment la concurrence, en contravention avec l'article 45 de la *Loi sur la concurrence*, si cette cession confère au cessionnaire un pouvoir de marché plus grand que le simple pouvoir inhérent aux brevets cédés?

Arrêt : l'appel doit être accueilli.

La cession d'un brevet peut, en droit, diminuer indûment la concurrence. Suivant l'article 50 de la *Loi sur les brevets*, tout brevet délivré pour une invention est cessible en droit. Toutefois, lorsque la cession confère au cessionnaire un pouvoir de marché plus grand que le simple pouvoir inhérent aux brevets cédés, l'article 50 n'exclut pas la possibilité que la cession diminue indûment la concurrence en contravention avec l'article 45 de la *Loi sur la concurrence*. Une interprétation de l'article 50, qui n'exclut pas les cessions de brevet de l'application de l'article 45 lorsqu'elles diminuent la concurrence, permet une application harmonieuse de cette

statutory language. Since section 50 of the *Patent Act* neither compels nor expressly authorizes what section 45 forbids, there is no true conflict between these two provisions. Moreover, section 32 of the *Competition Act* provides that the Federal Court may make certain orders where use is made of the exclusive rights conferred by a patent so as to unduly restrain trade or lessen competition in an article. On that basis, Parliament clearly did not intend to exclude the exercise of patent rights from the reach of the *Competition Act* altogether. This interpretation is also consistent with the purpose of the *Competition Act*, which is "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy." Finally, this interpretation is consistent with administrative guidelines. Therefore, the Federal Court judge erred in law by holding that the assignment of patents is exempt from section 45 of the *Competition Act*.

The Federal Court also erred when it considered the Federal Court of Appeal decision in *Molnlycke AB v. Kimberly-Clark of Canada Ltd.* as authority for the proposition that, in the present circumstances, any lessening of competition could not be undue for the purpose of section 45 of the *Competition Act*. *Molnlycke* established that an assignment of patents could not be undue when the lessening of competition results from the assignment thereof. However, the situation in *Molnlycke* was distinguishable since the only market power created by the assignment in that case was that inherent in the patent assigned. In the present case, because of Lilly's existing ownership of related patents, the agreement between Lilly and Shionogi resulted in Lilly's acquiring patent rights that allowed it to control all of the commercially viable processes for making cefaclor. Before the patent assignment, those processes were controlled by two companies. Therefore, *Molnlycke* does not apply if there is evidence that something more than the mere exercise of patent rights may affect competition in the relevant market.

The Federal Court made an express finding of fact that there was a lessening of competition after the 1995 assignment of Shionogi's patents to Lilly. It concluded that the evidence amply demonstrated that, because of Lilly's existing ownership of other patents, the result of the assignment was to increase Lilly's monopoly power. Given the absence of a palpable and overriding error, the Federal Court of Appeal could not disturb the Federal Court's conclusion that the effect of the assignment was a lessening of competition.

disposition et de l'article 45, conformément au sens ordinaire du libellé de ces dispositions. Puisque l'article 50 de la *Loi sur les brevets* n'exige ou n'autorise pas expressément ce qui est interdit à l'article 45, il n'y a aucun conflit véritable entre ces deux dispositions. De plus, l'article 32 de la *Loi sur la concurrence* précise que la Cour fédérale peut rendre certaines ordonnances, lorsqu'il est fait usage de droits exclusifs conférés par un brevet en vue de restreindre indûment le commerce ou de diminuer la concurrence à l'égard d'un article. Pour ce motif, le législateur n'a clairement pas eu l'intention d'exclure complètement l'exercice des droits de brevet du champ d'application de la *Loi sur la concurrence*. Cette interprétation est également compatible avec l'objet de la *Loi sur la concurrence* qui est de « préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficacité de l'économie canadienne ». Enfin, cette interprétation est conforme aux lignes directrices du Bureau de la concurrence. En conséquence, le juge de la Cour fédérale a commis une erreur de droit en affirmant que les cessions de brevet ne sont pas assujetties à l'article 45 de la *Loi sur la concurrence*.

La Cour fédérale a également commis une erreur en concluant que suivant l'arrêt *Molnlycke AB c. Kimberly-Clark of Canada Ltd.* de la Cour d'appel fédérale, toute diminution de la concurrence, dans les circonstances, ne peut être considérée comme undue pour l'application de l'article 45 de la *Loi sur la concurrence*. *Molnlycke* a établi que les cessions de brevets ne peuvent pas être indues lorsque la diminution de la concurrence découle de celles-ci. Toutefois, il faut établir une distinction d'avec *Molnlycke* au motif que dans cette affaire le seul pouvoir commercial créé par la cession était le pouvoir inhérent au brevet cédé. Dans la présente espèce, étant donné que Lilly détenait déjà des brevets connexes, l'entente conclue entre Lilly et Shionogi a eu pour effet que Lilly a acquis des droits de brevet qui lui ont permis de contrôler tous les procédés rentables de fabrication du cefaclor. Avant l'entente, ces procédés étaient entre les mains de deux compagnies. Par conséquent, *Molnlycke* ne s'applique pas s'il y a une preuve que ce n'est pas uniquement l'exercice des droits de brevets qui peut avoir une incidence sur la concurrence au sein du marché.

La Cour fédérale a tiré une conclusion de fait explicite, soit qu'il y a eu diminution de la concurrence après la cession des brevets de Shionogi à Lilly en 1995. Elle a conclu que la preuve établissait amplement qu'en raison des autres brevets que détenait déjà Lilly, la cession a eu pour résultat d'augmenter le pouvoir monopolistique de Lilly. En l'absence d'une erreur manifeste et déterminante, la Cour d'appel fédérale ne pouvait modifier la conclusion de la Cour fédérale voulant que la cession ait entraîné une diminution de la concurrence.

The appellant counterclaimed against Lilly and Shionogi under section 36 of the *Competition Act* for damages for loss or damage sustained as a result of conduct proscribed in section 45. Subsection 36(1) provides that a claimant must prove that the proscribed conduct caused it loss or damage and subsection 36(4) provides that no claim for damages may be made after two years from “a day on which the conduct was engaged in”. Therefore, in this case, the start of the limitation period had to be determined. However, the evidence pertaining to both how much the appellant knew about the relevant facts (including details of the agreement) and when it acquired its knowledge was not so clear as to warrant the Federal Court of Appeal’s interference with the Federal Court’s conclusion that the issue of whether the appellant’s counterclaims are statute-barred should be resolved at trial. It will generally be inappropriate to decide by summary judgment a matter in which the application of the discoverability rule (when facts were discovered and could reasonably have been expected to be discovered) is likely to be important.

The appellant’s strange proposition that, for the purposes of subsection 36(1), any amount that it may be required to pay Lilly by way of damages as a result of Lilly’s infringement action constitutes “loss or damages” was a matter that had to be determined at trial, not at the summary judgment stage.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

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*), 32 (as am. by S.C. 1990, c. 37, s. 29; 2002, c. 16, s. 4(F)), 36 (as am. by R.S.C., 1985 (4th Supp.), c. 1, s. 11), 45 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 30; S.C. 1991, c. 47, s. 714), 79 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4).
Patent Act, R.S.C., 1985, c. P-4, s. 50 (as am. by R.S.C., 1985 (3rd Supp.), c. 33, s. 20).

CASES JUDICIALLY CONSIDERED

DISTINGUISHED:

Molnlycke AB v. Kimberly-Clark of Canada Ltd. et al. (1991), 36 C.P.R. (3d) 493; 132 N.R. 315; [1991] F.C.J. No. 532 (C.A.) (QL).

Dans ses demandes reconventionnelles contre Lilly et Shionogi fondées sur l’article 36 de la *Loi sur la concurrence*, l’appelante réclame des dommages-intérêts pour la perte ou les dommages qu’elle a subis en raison des agissements contraires à l’article 45. Pour se prévaloir du recours en dommages-intérêts en vertu du paragraphe 36(1), le demandeur doit prouver qu’il a subi une perte ou des dommages en raison des agissements prohibés, et le paragraphe 36(4) précise qu’aucune action en dommages-intérêts ne peut être intentée plus de deux ans après « la date du comportement en question ». En conséquence, en l’espèce, la Cour devait déterminer le point de départ du délai de prescription. Toutefois, la preuve sur ces deux aspects, à savoir la mesure dans laquelle l’appelante connaissait les faits pertinents (y compris le détail de l’entente) et à quel moment elle en a eu connaissance, n’était pas à ce point évidente qu’elle justifiait que la Cour d’appel fédérale modifie la conclusion de la Cour fédérale selon laquelle la question de la prescription des demandes reconventionnelles de l’appelante méritait un examen sur le fond. Il n’est généralement pas approprié de trancher un litige par jugement sommaire lorsque l’application du principe de la possibilité de découverte (moment où les faits ont été découverts ou pouvaient raisonnablement l’être) sera vraisemblablement une question importante.

La prétention étonnante de l’appelante selon laquelle, pour l’application du paragraphe 36(1), tout montant qu’elle pourrait être tenue de verser à Lilly à titre de dommages-intérêts dans l’action en contrefaçon intentée par Lilly, constitue « une perte ou des dommages », était une question qui devait être tranchée sur le fond et non à l’étape du jugement sommaire.

LOIS ET RÈGLEMENTS CITÉS

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), 1.1 (édicte, *idem*), 32 (mod. par L.C. 1990, ch. 37, art. 29; 2002, ch. 16, art. 4(F)), 36 (mod. par L.R.C. (1985) (4^e suppl.), ch. 1, art. 11), 45 (mod. par L.R.C. (1985) (2^e suppl.), ch. 19, art. 30; L.C. 1991, ch. 47, art. 714), 79 (édicte par L.R.C. (1985) (2^e suppl.), ch. 19, art. 45; L.C. 1990, ch. 37, art. 31; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.4).
Loi sur les brevets, L.R.C. (1985), ch. P-4, art. 50 (mod. par L.R.C. (1985) (3^e suppl.), ch. 33, art. 20).

JURISPRUDENCE CITÉE

DÉCISION DIFFÉRENCIÉE :

Molnlycke AB c. Kimberly-Clark of Canada Ltd. et al. (1991), 36 C.P.R. (3d) 493; 132 N.R. 315; [1991] F.C.J. No. 532 (C.A.) (QL).

CONSIDERED:

Eli Lilly and Co. v. Apotex Inc. (2004), 240 D.L.R. (4th) 679; 32 C.P.R. (4th) 195; 323 N.R. 180; 2004 FCA 232; *Eli Lilly and Co. v. Apotex Inc.* (2003), 28 C.P.R. (4th) 37; 2003 FC 1171; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; (1992), 114 N.S.R. (2d) 91; 93 D.L.R. (4th) 36; 313 A.P.R. 91; 74 C.C.C. (3d) 289; 43 C.P.R. (3d) 1; 15 C.R. (4th) 1; 10 C.R.R. (2d) 34; 139 N.R. 241.

REFERRED TO:

Smith v. The Queen, [1960] S.C.R. 776; (1960), 25 D.L.R. (2d) 225; 128 C.C.C. 145; 33 C.R. 318; *Multiple Access Ltd. v. McCutcheon et al.*, [1982] 2 S.C.R. 161; (1982), 138 D.L.R. (3d) 1; 18 B.L.R. 138; 44 N.R. 181; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185; (2001), 199 D.L.R. (4th) 130; 11 C.P.R. (4th) 289; 269 N.R. 109; 2001 FCA 204; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; (1983), 144 D.L.R. (3d) 193; [1983] 2 C.N.L.R. 89; [1983] CTC 20; 83 DTC 5041; 46 N.R. 41; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; 156 D.L.R. (4th) 222; 17 C.P.C. (4th) 219; 107 O.A.C. 115 (C.A.).

AUTHORS CITED

Bureau de la concurrence. "Lignes directrices pour l'application de la loi", Industrie Canada, 2000.
 Competition Bureau. *Intellectual Property Enforcement Guidelines*. Industry Canada, 2000.
 Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Toronto: Butterworths, 2002.

APPEAL from a Federal Court decision ([2005] 2 F.C.R. 225; (2004), 35 C.P.R. (4th) 155; 262 F.T.R. 154; 2004 FC 1445) granting motions brought by the respondents for summary judgment and striking paragraphs from the appellant's defence and counterclaim to an action by Eli Lilly and Company and Eli Lilly Canada Inc. for patent infringement. Appeal allowed.

APPEARANCES:

Harry B. Radomski and *David Scrimger* for appellant (plaintiff by counterclaim).
Anthony George Creber and *Patrick S. Smith* for respondents (defendants by counterclaim) Eli Lilly and Company and Eli Lilly Canada Inc.

DÉCISIONS EXAMINÉES :

Eli Lilly and Co. c. Apotex Inc., 2004 CAF 232; *Eli Lilly and Co. c. Apotex Inc.*, 2003 CF 1171; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606.

DÉCISIONS CITÉES :

Smith v. The Queen, [1960] R.C.S. 776; (1960), 25 D.L.R. (2d) 225; 128 C.C.C. 145; 33 C.R. 318; *Multiple Access Ltd. c. McCutcheon et autres*, [1982] 2 R.C.S. 161; *Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, [2001] 3 C.F. 185; 2001 CAF 204; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; 156 D.L.R. (4th) 222; 17 C.P.C. (4th) 219; 107 O.A.C. 115 (C.A.).

DOCTRINE CITÉE

Bureau de la concurrence. *Lignes directrices pour l'application de la loi*. Industrie Canada, 2000.
 Bureau de la concurrence. « Lignes directrices pour l'application de la loi », Industrie Canada, 2000.
 Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Toronto : Butterworths, 2002.

APPEL d'une décision de la Cour fédérale ([2005] 2 R.C.F. 225; 2004 CF 1445) accueillant les requêtes en jugement sommaire déposées par les intimées et radiant certains paragraphes de la défense et demande reconventionnelle de l'appelante dans l'action en contrefaçon intentée par Eli Lilly and Company et Eli Lilly Canada Inc. Appel accueilli.

ONT COMPARU :

Harry B. Radomski et *David Scrimger* pour l'appelante (demanderesse reconventionnelle).
Anthony George Creber et *Patrick S. Smith* pour les intimées (défenderesses reconventionnelles) Eli Lilly and Company et Eli Lilly Canada Inc.

A. David Morrow and Colin B. Ingram for respondent (defendant by counterclaim) Shionogi & Co. Ltd.

Randall Hofley for intervener.

SOLICITORS OF RECORD:

Goodmans LLP, Toronto, for appellant (plaintiff by counterclaim).

Gowling Lafleur Henderson LLP, Ottawa, for respondents (defendants by counterclaim) Eli Lilly and Company and Eli Lilly Canada Inc.

Smart & Biggar, Ottawa, for respondent (defendant by counterclaim) Shionogi & Co. Ltd.

Deputy Attorney General of Canada for intervener.

The following are the reasons for judgment rendered in English by

EVANS J.A.:

A. INTRODUCTION

[1] This is an appeal by Apotex Inc. from a decision of the Federal Court granting motions brought by the respondents, Eli Lilly and Company, Eli Lilly Canada Inc. (Lilly) and Shionogi & Co. Ltd. The Judge granted motions for summary judgment by Lilly and Shionogi and struck paragraphs from Apotex' defence and counterclaim to an action by Lilly for patent infringement. The Judge's decision is reported as *Eli Lilly and Co. v. Apotex*, [2005] 2 F.C.R. 225.

[2] The appeal raises an important question of law arising at the intersection of patent law and competition law. It is this. As a matter of law, can an assignment of a patent constitute an agreement or arrangement to lessen competition unduly, contrary to section 45 [as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 30; S.C. 1991, c. 47, s. 714] 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)], if it results in an increase to the assignee's market power greater than that inherent in the patents assigned?

A. David Morrow et Colin B. Ingram pour l'intimée (défenderesse reconventionnelle) Shionogi & Co. Ltd.

Randall Hofley pour l'intervenant.

AVOCATS INSCRITS AU DOSSIER :

Goodmans LLP, Toronto, pour l'appelante (demanderesse reconventionnelle).

Gowling Lafleur Henderson s.r.l., Ottawa, pour les intimées (défenderesses reconventionnelles) Eli Lilly and Company et Eli Lilly Canada Inc.

Smart & Biggar, Ottawa, pour l'intimée (défenderesse reconventionnelle) Shionogi & Co. Ltd.

Le sous-procureur général du Canada pour l'intervenant.

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

LE JUGE EVANS, J.C.A.:

A. INTRODUCTION

[1] Apotex Inc. (Apotex) a interjeté appel d'une décision de la Cour fédérale accueillant les requêtes des intimées, Eli Lilly and Company, Eli Lilly Canada Inc. (Lilly) et Shionogi & Co. Ltd. (Shionogi). Le juge a accueilli les requêtes en jugement sommaire déposées par Lilly et Shionogi, et radié certains paragraphes de la défense ainsi que de la demande reconventionnelle d'Apotex dans l'action en contrefaçon intentée par Lilly. La décision du juge est publiée à *Eli Lilly and Co. c. Apotex*, [2005] 2 R.C.F. 225.

[2] L'appel soulève une question de droit importante, à la frontière entre le droit des brevets et le droit de la concurrence : en droit, la cession d'un brevet peut-elle constituer un accord ou un arrangement en vue de diminuer indûment la concurrence, en contravention avec l'article 45 [mod. par L.R.C. (1985) (2^e suppl.), ch. 19, art. 30; L.C. 1991, ch. 47, art. 714] 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)], si cette cession confère au cessionnaire un pouvoir de marché plus grand que le simple pouvoir inhérent aux brevets cédés?

[3] Lilly and Shionogi say that it cannot. They rely on section 50 [as am. by R.S.C., 1985 (3rd Supp.), c. 33, s. 20] of the *Patent Act* [R.S.C., 1985, c. P-4], which authorizes a patentee to assign a patent. They argue that, by their nature, patents create monopolies. Since the right to assign is one of the rights conferred on patentees by Parliament, any lessening of competition following the exercise of the right to assign cannot be undue. Lilly and Shionogi say that there is binding authority to this effect: *Molnlycke AB v. Kimberly-Clark of Canada Ltd. et al.* (1991), 36 C.P.R. (3d) 493 (F.C.A.). However, they concede that it is different if, in addition to the assignment, the assignor and assignee enter into some other competition-restricting arrangement.

[4] Apotex, on the other hand, submits that section 50 of the *Patent Act* and section 45 of the *Competition Act* can be read harmoniously: section 50 enables patents to be assigned to comply with other laws, including section 45 of the *Competition Act*. Hence, it is argued, when the effect of an assignment is to increase the assignee's market power by more than that inherent in the rights assigned, section 50 does not preclude the possibility, as a matter of law, that the assignment unduly lessened competition.

[5] Apotex says that *Molnlycke* is distinguishable on the ground that the Court in that case was not considering a situation in which the assignment created in the assignee market power greater than that inherent in the patents assigned. In contrast, such power was conferred in the present case because of the assignee's existing ownership of related patents.

[6] The Commissioner of Competition was given leave to intervene to assist the Court on whether section 50 of the *Patent Act* precludes the application of section 45 of the *Competition Act* from the assignment of patents, and whether the Judge erred in concluding that his view on this issue was consistent with the *Intellectual Property Enforcement Guidelines* (Industry

[3] Lilly et Shionogi affirment que la réponse est non. Elles s'appuient sur l'article 50 [mod. par L.R.C. (1985) (3^e suppl.), ch. 33, art. 20] de la *Loi sur les brevets* [L.R.C. (1985), ch. P-4], qui autorise les titulaires de brevet à céder leur brevet. Elles soutiennent qu'il est de la nature des brevets de créer des monopoles. Puisque le droit de cession est l'un des droits conférés par le Parlement aux titulaires de brevet, la diminution de la concurrence découlant de l'exercice de ce droit ne peut être indue. Lilly et Shionogi prétendent que la Cour est liée par des décisions de jurisprudence sur cette question : *Molnlycke AB c. Kimberly-Clark of Canada Ltd. et al.* (1991), 36 C.P.R. (3d) 493 (C.A.F.). Toutefois, elles reconnaissent que la situation serait différente si, outre la cession, le cédant et le cessionnaire concluaient d'autres ententes de nature à nuire à la concurrence.

[4] Pour sa part, Apotex soutient que l'article 50 de la *Loi sur les brevets* et l'article 45 de la *Loi sur la concurrence* peuvent être interprétés de manière harmonieuse : l'article 50 autorise la cession des brevets mais ne vise pas à exclure les cessions de l'application des autres lois, y compris de l'article 45 de la *Loi sur la concurrence*. Apotex fait donc valoir que lorsque la cession confère au cessionnaire un pouvoir de marché plus grand que le simple pouvoir inhérent aux brevets cédés, l'article 50 n'exclut pas la possibilité, en droit, que la cession diminue indûment la concurrence.

[5] Apotex affirme que l'on peut établir une distinction avec *Molnlycke* puisque, dans ce cas, il n'était pas question d'une cession entraînant la création d'un pouvoir de marché plus grand que le pouvoir inhérent aux brevets cédés. Dans le cas qui nous occupe, au contraire, la cession a conféré un pouvoir renforcé au cessionnaire en raison des brevets connexes qu'il détenait déjà.

[6] Le commissaire de la concurrence a été autorisé à intervenir pour aider la Cour à décider si l'article 50 de la *Loi sur les brevets* exclut les cessions de brevet de l'application de l'article 45 de la *Loi sur la concurrence* et si le juge a commis une erreur en concluant que son avis sur la question était conforme aux principes énoncés dans *Lignes directrices pour l'application de la*

Canada, 2000) issued by the Commissioner.

loi (Industrie Canada, 2000), document publié par le commissaire de la concurrence.

B. BACKGROUND AND JUDICIAL HISTORY

B. CONTEXTE ET HISTORIQUE DES PROCÉDURES JUDICIAIRES

[7] The essential background to this appeal has already been described by Rothstein J.A. in the previous round of the present litigation, reported as *Eli Lilly and Co. v. Apotex Inc.* (2004), 240 D.L.R. (4th) 679 (F.C.A.), at paragraphs 2-5:

[7] L'essentiel des faits a déjà été décrit par le juge Rothstein dans une autre décision rendue dans la présente instance et rapportée dans *Eli Lilly and Co. c. Apotex Inc.*, 2004 CAF 232, aux paragraphes 2 à 5 :

On June 18, 1997, Eli Lilly and Company and Eli Lilly Canada Inc. ("Lilly") commenced an action against Apotex Inc. ("Apotex") for infringement of seven patents which relate to processes that can be used in the making of the antibiotic cefaclor, to intermediates that can be formed using those processes, and to a compound used in the processes. On January 11, 2001, Lilly amended its statement of claim to add an eighth patent which it claimed had been infringed.

Le 18 juin 1997, Eli Lilly and Company et Eli Lilly Canada Inc. (Lilly) ont intenté une action contre Apotex Inc. (Apotex) pour contrefaçon de sept brevets sur des procédés pouvant servir à la fabrication de l'antibiotique céfACLOR, sur les intermédiaires qui peuvent être produits au moyen de ces procédés, ainsi que sur un composé utilisé dans ces procédés. Le 11 janvier 2001, Lilly a modifié sa déclaration de manière à ajouter un huitième brevet qui, d'après Lilly, aurait fait l'objet d'une contrefaçon.

By amendments to its Statement of Defence and by Counterclaim made in 2001, Apotex alleged that certain conduct of Lilly violated s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34, thereby entitling Apotex to damages under s. 36 of that Act. In 2002, Apotex further amended its Statement of Defence and Counterclaim to add Shionogi & Co. Ltd. ("Shionogi") as a defendant by counterclaim in the proceedings as part of its claim for damages under the *Competition Act*.

Dans son exposé de la défense et sa demande reconventionnelle présentés en 2001, Apotex a allégué que le comportement de Lilly contrevenait à l'article 45 de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34, ce qui donnerait droit à Apotex à des dommages-intérêts aux termes de l'article 36 de la Loi. En 2002, Apotex a modifié son exposé de la défense et sa demande reconventionnelle de façon à inclure Shionogi & Co. Ltd. (Shionogi) parmi les défenderesses reconventionnelles, dans le cadre de sa requête pour dommages-intérêts aux termes de la *Loi sur la concurrence*.

Of the eight patents Lilly claimed were infringed by Apotex, four had been assigned to Lilly by Shionogi in 1995. Apotex says that these assignments constituted an agreement that resulted in an undue lessening of competition contrary to s. 45 of the *Competition Act*.

Des huit brevets qui, d'après les allégations de Lilly, avaient fait l'objet d'une contrefaçon par Apotex, quatre avaient été cédés à Lilly par Shionogi en 1995. Apotex affirme que ces cessions constituaient une entente qui a entraîné une réduction de la concurrence allant à l'encontre de l'article 45 de la *Loi sur la concurrence*.

Subsection 45(1) of the *Competition Act* makes it unlawful for parties to enter into agreements which lessen competition unduly:

Aux termes du paragraphe 45(1) de la *Loi sur la concurrence*, il est illégal de conclure des ententes qui réduisent indûment la concurrence :

[8] I would only add that the patent for cefaclor expired in 1994 and the last Shionogi process patent expired in 2000, shortly before the last of Lilly's process patents. Finally, contemporaneously with the assignment, Lilly granted a non-exclusive licence to Shionogi with respect to the patents, which Shionogi assigned to Lilly.

[8] J'ajouterai seulement que le brevet de céfACLOR est arrivé à échéance en 1994 et que le dernier brevet relatif à un procédé de Shionogi a pris fin en 2000, peu avant l'échéance des brevets relatifs aux procédés de Lilly. Enfin, Lilly a concédé à Shionogi, en même temps que la cession, une licence non exclusive sur les brevets que Shionogi lui avait cédés.

[9] In the first round of these proceedings, the Judge granted three motions. In the first, Lilly was awarded summary judgment striking the paragraphs of Apotex' defence and counterclaim that rested on section 45 and dismissing the counterclaim. In the second, Shionogi was awarded summary judgment on the counterclaim and, in the third, the Judge allowed Shionogi's appeal from a decision of a Prothonotary refusing to strike Apotex' counterclaim against it.

[10] The Judge held that, since any lessening of competition arose from Shionogi's assignment of the patents to Lilly, it could not be undue because it was authorized by section 50 of the *Patent Act*. He regarded *Molnlycke* as binding authority to this effect. The Judge's decision is reported as *Eli Lilly and Co. v. Apotex Inc.* (2003), 28 C.P.R. (4th) 37 (F.C.).

[11] Apotex appealed to this Court, which allowed the appeal and remitted the matter to the Judge, on the ground that *Molnlycke* only applied when the lessening of competition resulted from the assignment alone. If there was "evidence of something more than the mere exercise of patent rights" [underlining added] (at paragraph 15), the *Competition Act* was not necessarily excluded. Accordingly, the Court referred the matter back to the Judge, requesting him (at paragraph 22) to address the following questions "at a minimum":

... (1) whether subsection 45(1) can ever apply to an agreement involving the exercise of patent rights; and (2) if it can, whether the facts of this case are sufficient to prove that Lilly and/or Shionogi engaged in conduct that was contrary to section 45. Finally, even if Apotex can establish that section 45 applies and that Lilly and/or Shionogi's conduct was contrary to section 45, the motions judge will still have to determine if any of the other arguments raised by Lilly and Shionogi, which he did not originally consider, prevent Apotex from recovering damages under section 36 of the *Competition Act*.

The citation for the Federal Court of Appeal's decision was set out at paragraph 7 of these reasons.

[9] Lors de la première audience dans ce dossier, le juge a accueilli trois requêtes. Dans la première requête, Lilly a obtenu un jugement sommaire radiant certains paragraphes de la défense et de la demande reconventionnelle d'Apotex qui s'appuyaient sur l'article 45 et rejetant la demande reconventionnelle. Dans la deuxième requête, Shionogi a obtenu un jugement sommaire quant à la demande reconventionnelle et, dans la troisième, le juge a accueilli l'appel interjeté par Shionogi à l'encontre d'une décision du protonotaire refusant de radier la demande reconventionnelle d'Apotex contre Shionogi.

[10] Selon le juge, si la diminution de la concurrence découle de la cession des brevets de Shionogi à Lilly, elle ne peut pas être indue puisqu'elle est autorisée par l'article 50 de la *Loi sur les brevets*. Le juge a estimé qu'il était lié en ce sens par *Molnlycke*. La décision est rapportée dans *Eli Lilly and Co. c. Apotex Inc.*, 2003 CF 1171.

[11] Apotex a interjeté appel de cette décision devant la Cour, qui a accueilli l'appel et ordonné le renvoi de l'affaire devant le juge, au motif que *Molnlycke* s'applique seulement dans le cas où la diminution de la concurrence découle uniquement de la cession. « [I]orsqu'il y a preuve que ce n'est pas uniquement l'exercice des droits de brevets » [soulignement ajouté] (au paragraphe 15), l'arrêt *Molnlycke* n'exclut pas entièrement la mise en application de la *Loi sur la concurrence*. En conséquence, la Cour a renvoyé l'affaire devant le juge, l'enjoignant (au paragraphe 22) de répondre « à tout le moins » aux questions suivantes :

[...] (1) le paragraphe 45(1) peut-il s'appliquer à une entente visant l'exercice des droits de brevet? et (2) le cas échéant, les faits de la présente cause permettent-ils de démontrer que Lilly et/ou Shionogi ont agi de manière contraire à l'article 45? Enfin, même si Apotex peut établir que l'article 45 s'applique et que Lilly et/ou Shionogi ont agi de manière contraire à l'article 45, le juge des requêtes devra tout de même décider s'il y a, parmi les observations présentées par Lilly et Shionogi qu'il n'a pas examinées initialement, des arguments qui empêchent Apotex d'obtenir des dommages-intérêts aux termes de l'article 36 de la *Loi sur la concurrence*.

La décision de la Cour d'appel fédérale est déjà citée au paragraphe 7 des présents motifs.

[12] When the matter went back to the Judge, he asked himself whether there was some agreement or term, in addition to the assignment of the patents, which could constitute the “something more” to which the Federal Court of Appeal had alluded. Finding that there was not, he again granted the motions. He said (at paragraph 9):

. . . where an agreement deals only with patent rights and is itself specifically authorized by the *Patent Act*, any lessening of competition resulting therefrom, being authorized by Parliament, is not “undue” and is not an offence under section 45.

In the Judge’s view, therefore, since any lessening of competition resulted from the assignments alone, *Molnlycke* applied.

[13] Accordingly, the Judge (at paragraph 26) answered yes to the first question, but no to the second, because [at paragraph 15]:

The agreement which constitutes the conspiracy alleged by Apotex, however, is solely and exclusively the assignment of the Shionogi patents and there is no other agreement alleged or shown by the evidence which could be the basis of a section 45 offence.

As for the third question, the Judge said that [at paragraph 26], while it did not arise, “it too would receive a negative answer.”

[14] For the reasons that follow, I have concluded that the assignment of a patent may, as a matter of law, unduly lessen competition. I would allow Apotex’ appeal from the Judge’s decision, dismiss the motions, restore the paragraphs struck from the defence and counterclaim, and allow the matter to proceed to trial on all other issues, except whether there was a lessening of competition as a result of the assignment.

C. STATUTORY FRAMEWORK

Patent Act, R.S.C., 1985, c. P-4

50. (1) Every patent issued for an invention is assignable in law, either as to the whole interest or as to any part thereof, by an instrument in writing. [Underlining added.]

[12] Lorsque l’affaire est revenue devant le juge, il s’est demandé s’il existait une quelconque entente ou condition, en plus de la cession des brevets, qui pourrait constituer ce quelque chose de plus auquel la Cour d’appel fédérale avait fait allusion. Estimant qu’il n’y avait rien de plus, le juge a de nouveau accueilli les requêtes. Il affirme ce qui suit, au paragraphe 9 :

[. . .] lorsqu’un accord ne vise que des droits de brevet et qu’il est autorisé expressément par la *Loi sur les brevets*, la diminution de la concurrence qui en résulte, parce qu’elle est autorisée par le législateur, n’est pas « indue » et n’est pas une infraction en vertu de l’article 45.

De l’avis du juge, donc, puisque la diminution de la concurrence découle seulement de la cession, il est tenu d’appliquer *Molnlycke*.

[13] En conséquence, le juge (au paragraphe 26) répond oui à la première question mais non à la deuxième question parce que [au paragraphe 15] :

Toutefois l’entente qui constitue le complot allégué par Apotex est uniquement et exclusivement la cession des brevets de Shionogi et il n’y a aucune autre entente alléguée ou établie par la preuve susceptible de constituer le fondement d’une infraction en vertu de l’article 45.

Quant à la troisième question, le juge affirme [au paragraphe 26] que même si elle ne se pose pas, « la réponse serait également négative ».

[14] Pour les motifs exposés ci-après, je suis parvenu à la conclusion que la cession d’un brevet peut, en droit, diminuer indûment la concurrence. J’accueillerais l’appel interjeté par Apotex à l’encontre de la décision du juge, je rejetterais les requêtes, je rétablirais les paragraphes radiés dans la défense et la demande reconventionnelle, et je permettrais que l’affaire soit instruite sur toutes les autres questions, sauf celle de savoir s’il y a eu diminution de la concurrence par suite de la cession.

C. CADRE LÉGISLATIF

Loi sur les brevets, L.R.C. (1985), ch. P-4

50. (1) Tout brevet délivré pour une invention est cessible en droit, soit pour la totalité, soit pour une partie de l’intérêt, au moyen d’un acte par écrit. [Soulignement ajouté.]

Competition Act, R.S.C., 1985, c. C-34 [sections 32 (as am. by S.C. 1990, c. 37, s. 29; 2002, c. 16, s. 4(F)), 36 (as am. by R.S.C., 1985 (4th Supp.), c. 1, s. 11), 79 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4)]

32. (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to

(a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,

(b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,

(c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or

(d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.

...

36. (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Loi sur la concurrence, L.R.C. (1985), ch. C-34 [articles 32 (mod. par L.C. 1990, ch. 37, art. 29; 2002, ch. 16, art. 4(F)), 36 (mod. par L.R.C. (1985) (4^e suppl.), ch. 1, art. 11), 79 (édicte par L.R.C. (1985) (2^e suppl.), ch. 19, art. 45; L.C. 1990, ch. 37, art. 31; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.4)]

32. (1) Chaque fois qu'il a été fait usage des droits et privilèges exclusifs conférés par un ou plusieurs brevets d'invention, par une ou plusieurs marques de commerce, par un droit d'auteur ou par une topographie de circuit intégré enregistrée pour :

a) soit limiter indûment les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un article ou d'une denrée pouvant faire l'objet d'un échange ou d'un commerce,

b) soit restreindre indûment l'échange ou le commerce à l'égard d'un tel article ou d'une telle denrée ou lui causer un préjudice indu,

c) soit empêcher, limiter ou réduire indûment la fabrication ou la production d'un tel article ou d'une telle denrée, ou en augmenter déraisonnablement le prix,

d) soit empêcher ou réduire indûment la concurrence dans la production, la fabrication, l'achat, l'échange, la vente, le transport ou la fourniture d'un tel article ou d'une telle denrée,

la Cour fédérale peut rendre une ou plusieurs des ordonnances visées au paragraphe (2) dans les circonstances qui y sont décrites.

[...]

36. (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later

...

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(2) Dans toute action intentée contre une personne en vertu du paragraphe (1), les procès-verbaux relatifs aux procédures engagées devant tout tribunal qui a déclaré cette personne coupable d'une infraction visée à la partie VI ou l'a déclarée coupable du défaut d'obtempérer à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, ou qui l'a punie pour ce défaut, constituent, sauf preuve contraire, la preuve que la personne contre laquelle l'action est intentée a eu un comportement allant à l'encontre d'une disposition de la partie VI ou n'a pas obtempéré à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, selon le cas, et toute preuve fournie lors de ces procédures quant à l'effet de ces actes ou omissions sur la personne qui intente l'action constitue une preuve de cet effet dans l'action.

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date du comportement en question,

(ii) soit la date où il est statué de façon définitive sur la poursuite;

b) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,

(ii) soit la date où il est statué de façon définitive sur la poursuite.

[...]

45. (1) Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emménagement ou de négoce d'un produit quelconque;

...

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

...

(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

- (a) the exchange of statistics;
- (b) the defining of product standards;
- (c) the exchange of credit information;
- (d) the definition of terminology used in a trade, industry or profession;
- (e) cooperation in research and development;
- (f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;
- (g) the sizes or shapes of the containers in which an article is packaged;
- (h) the adoption of the metric system of weights and measures; or
- (i) measures to protect the environment.

...

(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

- (a) in the practice of a trade or profession relating to the service; or
 - (b) in the collection and dissemination of information relating to the service.
- (7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial

[. . .]

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

[. . .]

(3) Sous réserve du paragraphe (4), dans des poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable si le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à l'un ou plusieurs des actes suivants :

- a) l'échange de données statistiques;
- b) la définition de normes de produits;
- c) l'échange de renseignements sur le crédit;
- d) la définition de termes utilisés dans un commerce, une industrie ou une profession;
- e) la collaboration en matière de recherches et de mise en valeur;
- f) la restriction de la réclame ou de la promotion, à l'exclusion d'une restriction discriminatoire visant un représentant des médias;
- g) la taille ou la forme des emballages d'un article;
- h) l'adoption du système métrique pour les poids et mesures;
- i) les mesures visant à protéger l'environnement.

[. . .]

(7) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable s'il conclut que le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à un service et à des normes de compétence et des critères d'intégrité raisonnablement nécessaires à la protection du public :

- a) soit dans l'exercice d'un métier ou d'une profession rattachés à ce service;
 - b) soit dans la collecte et la diffusion de l'information se rapportant à ce service.
- (7.1) Le paragraphe (1) ne s'applique pas à un accord ou à un arrangement visé au paragraphe 49(1) lorsque cet accord

institutions that is described in subsection 49(1).

...

79. (1) Where, on application by the Commissioner, the Tribunal finds that

...

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

...

(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. [Underlining added.]

D. ISSUES AND ANALYSIS

Issue 1: As a matter of law, may an assignment of a patent unduly lessen competition by virtue of the assignee's ownership of related patents?

(i) *Molnlycke AB v. Kimberly-Clark of Canada Ltd. et al.*

[15] Lilly and Shionogi rely heavily on the decision in *Molnlycke*. They argue that, in the first round of this litigation (see paragraph 7 of these reasons), this Court held that *Molnlycke* is good law and should be followed. Consequently, they submit, as far as the present parties are concerned, the soundness of *Molnlycke* is *res judicata*. For present purposes, I accept this. However, the more important question is to define the scope of the proposition for which this Court affirmed *Molnlycke*.

[16] In my view, this Court's opinion of the scope of *Molnlycke* is clear from the reasons it gave when

ou arrangement a lieu entre des institutions financières fédérales.

[...]

79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

[...]

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.

[...]

(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. [Soulignement ajouté.]

D. QUESTIONS EN LITIGE ET ANALYSE

Question 1 : En droit, la cession d'un brevet peut-elle diminuer indûment la concurrence du fait que le cessionnaire possède des brevets connexes?

(i) *Molnlycke AB c. Kimberly-Clark of Canada Ltd. et al.*

[15] Lilly et Shionogi s'appuient essentiellement sur *Molnlycke*. Elles font valoir que, dans sa première décision (voir au paragraphe 7 plus haut), la Cour a jugé que *Molnlycke* est une décision valable en droit et qu'elle doit être appliquée. Par conséquent, soutiennent-elles, en ce qui concerne les parties en l'espèce, le principe énoncé dans *Molnlycke* a force de chose jugée. Pour les besoins du présent pourvoi, je reconnais qu'il en est ainsi. Cependant, la question la plus importante consiste à définir la portée du principe tel que confirmé par la Cour dans *Molnlycke*.

[16] À mon avis, l'opinion de la Cour quant à la portée de *Molnlycke* est clairement énoncée dans les

allowing the appeal from the first decision of the Judge. If, as Lilly and Shionogi argue, Apotex is bound by the Court's conclusion that *Molnlycke* should be followed, Lilly and Shionogi, in my opinion, are equally bound by the Court's view of the *ratio* of *Molnlycke*. This is what Rothstein J.A. said about *Molnlycke* [at paragraphs 14-15]:

In the case of *Molnlycke*, there was a single supplier lawfully entitled to sell the subject of the patent prior to the patent being assigned. The assignment merely transferred the patent to another company. The only effect of the assignment was that a different company could sue the defendant for infringement. There was no change in the number of patent-holders before and after the assignment. The defendant appears to have claimed that an agreement to assign a patent and thereby allow the assignee to enforce the patent monopoly, with nothing more, could itself be an agreement that unduly lessened competition under subsection 45(1).

Molnlycke held that, in order to provide scope for the statutory monopolies granted by the *Patent Act* to operate, Parliament must have intended that "undue impairment of competition cannot be inferred from evidence of the exercise of [patent] rights alone". Where, however, there is evidence of something more than the mere exercise of patent rights that may affect competition in the relevant market, *Molnlycke* does not purport to completely preclude application of the *Competition Act*. [Emphasis added.]

[17] Distinguishing *Molnlycke*, the Court said [at paragraph 17]:

In the present case, Apotex does not allege that it is the mere assignment of patent rights or the enforcement of those patent rights by Lilly that gave it a cause of action. Rather, Apotex says that the assignment in this case resulted in one company, Lilly, acquiring patent rights that allow it to control all of the commercially viable processes for making cefaclor where, before the agreement, those processes were controlled by two companies, Shionogi and Lilly. Apotex argues that this consolidation was something more than the mere exercise of patent rights. Therefore, it says, the assignment agreement gave rise to an undue lessening of competition which engaged subsection 45(1) of the *Competition Act*.

[18] Since the Court did not refer to any other basis on which Apotex sought to distinguish *Molnlycke*, the

motifs de sa décision accueillant l'appel interjeté à l'encontre de la première décision du juge. Si, comme le prétendent Lilly et Shionogi, Apotex est liée par la conclusion de la Cour selon laquelle *Molnlycke* doit être appliqué, Lilly et Shionogi ne sont pas moins liées, selon moi, par l'opinion de la Cour sur le raisonnement de *Molnlycke*. Voici ce qu'affirme le juge Rothstein, à propos de *Molnlycke* [aux paragraphes 14 et 15] :

Dans l'arrêt *Molnlycke*, un seul fournisseur était autorisé à vendre l'objet visé par le brevet avant la cession de ce brevet. La cession n'était que le transfert du brevet à une autre compagnie. La cession a eu pour seul effet qu'une autre compagnie pouvait poursuivre le défendeur pour contrefaçon. Le nombre de titulaires du brevet est demeuré le même avant et après la cession du brevet. Le défendeur aurait fait valoir qu'une entente visant la cession d'un brevet et, ainsi, visant à permettre au cessionnaire d'exercer le monopole du brevet, sans plus, pourrait en soi constituer une entente qui réduit indûment la concurrence aux termes du paragraphe 45(1).

D'après l'arrêt *Molnlycke*, afin d'accorder aux monopoles de droit prévus par la *Loi sur les brevets* la latitude requise pour leur fonctionnement, le Parlement devait avoir à l'esprit que : « on ne peut [. . .] déduire de la preuve de l'exercice de ces droits [de brevet] seulement qu'il y a eu amoindrissement indu de la concurrence » [non souligné dans l'original]. Toutefois, lorsqu'il y a preuve que ce n'est pas uniquement l'exercice des droits de brevets qui peut avoir une incidence sur la concurrence au sein du marché, l'arrêt *Molnlycke* n'exclut pas entièrement la mise en application de la *Loi sur la concurrence*. [Non souligné dans l'original.]

[17] Établissant une distinction avec *Molnlycke*, la Cour précise ce qui suit [au paragraphe 17] :

Dans la présente affaire, Apotex n'allègue pas que c'est uniquement la cession des droits de brevet ou l'exercice de ces droits de brevet par Lilly qui justifiait une action. Apotex affirme plutôt que la cession a eu l'effet suivant dans la présente affaire : une compagnie, Lilly, a acquis les droits de brevet qui lui permettent de contrôler tous les procédés rentables de fabrication du cefaclor alors que, avant l'entente, ces procédés étaient entre les mains de deux compagnies, soit Shionogi et Lilly. Apotex fait valoir que cette consolidation constituait une démarche autre que le simple exercice des droits de brevet. Par conséquent, d'après Apotex, l'entente de cession a entraîné une réduction indue de la concurrence, qui déclenche l'application du paragraphe 45(1) de la *Loi sur la concurrence*.

[18] Puisque la Cour ne mentionne aucun autre élément sur lequel Apotex se serait fondée pour tenter

Court's reference to "something more" must mean, in this case, the anti-competitive effects of the assignment, namely, the increased power of Lilly in the market for bulk cefaclor, as a result of its existing ownership of the patents for the other known, commercially viable processes for manufacturing the medicine.

[19] Hence, *Molnlycke* must be distinguished on the basis that it was dealing with a situation where the only market power created by the assignment was that inherent in the patent assigned. To the extent that there is broader language in *Molnlycke*, it must be understood to have been read down.

[20] In my respectful opinion, therefore, the Judge erred in confining his consideration to whether the parties entered into some agreement or other arrangement, in addition to the assignment itself.

(ii) Interpreting sections 45 of the *Competition Act* and 50 of the *Patent Act*

[21] My conclusion that, in the previous round of this litigation, this Court held that *Molnlycke* was not determinative of this case would be sufficient to allow the appeal. Nonetheless, because the merits were fully argued, and in case the matter should go further, I shall explain why I agree with the interpretation of the relevant legislation implicit in the conclusion of this Court in the previous round of this litigation: namely, section 50 of the *Patent Act* does not immunize an agreement to assign a patent from section 45 of the *Competition Act* when the assignment increases the assignees's market power in excess of that inherent in the patent rights assigned.

[22] First, this interpretation of section 50 of the *Patent Act* enables it and section 45 of the *Competition Act* to operate harmoniously in accordance with the ordinary meaning of the statutory language of the provisions. It avoids the need to imply limiting words into section 45 exempting the assignment of patents

d'établir une distinction avec *Molnlycke*, l'allusion de la Cour à « une démarche autre » doit signifier, dans ce cas, les effets anticoncurrentiels de la cession, à savoir le pouvoir accru de Lilly sur le marché du céfacylor en vrac, compte tenu du fait qu'elle détenait déjà les brevets sur les autres procédés connus et commercialement viables de fabrication de ce médicament.

[19] Il faut donc établir une distinction avec *Molnlycke* au motif que cette décision porte sur une situation où le seul pouvoir commercial créé par la cession était le pouvoir inhérent au brevet cédé. Dans la mesure où *Molnlycke* contient un énoncé de principe plus général, il doit être interprété de manière à en atténuer la portée.

[20] À mon humble avis, donc, le juge a commis une erreur en se limitant à décider si les parties avaient conclu un autre accord ou arrangement, outre la cession comme telle.

(ii) Interprétation des articles 45 de la *Loi sur la concurrence* et 50 de la *Loi sur les brevets*

[21] Ma conclusion voulant que, dans sa première décision, la Cour ait jugé que *Molnlycke* n'était pas déterminant en l'espèce est suffisante pour que l'appel soit accueilli. Néanmoins, puisque les parties ont déjà fait valoir tous leurs arguments sur le bien-fondé, et pour le cas où l'instance irait plus loin, j'expliquerai les raisons pour lesquelles je suis d'accord avec l'interprétation implicite des dispositions pertinentes de la loi, telle que l'on peut en déduire des conclusions de la Cour, dans sa première décision, c'est-à-dire que l'article 50 de la *Loi sur les brevets* n'immunise pas les accords de cession de brevet contre l'application de l'article 45 de la *Loi sur la concurrence*, lorsque la cession confère au cessionnaire un pouvoir de marché plus grand que le seul pouvoir inhérent au brevet cédé.

[22] Premièrement, une telle interprétation de l'article 50 de la *Loi sur les brevets* permet une application harmonieuse de cette disposition et de l'article 45 de la *Loi sur la concurrence*, conformément au sens ordinaire du libellé de ces dispositions. Elle évite d'obliger la Cour à conclure que l'article 45 contiendrait des

from its scope. Nor does it render section 50 otiose because the provision clarified what otherwise would have been, at best, uncertain: namely, that a patentee's rights include the right to assign the statutory rights conferred under the *Patent Act* on the grantee of a patent.

[23] Since section 50 neither compels nor expressly authorizes what section 45 forbids, there is no true conflict between these two provisions of statutes which have different purposes: see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at pages 262-266; see also *Smith v. The Queen*, [1960] S.C.R. 776, at page 800; *Multiple Access Ltd. v. McCutcheon et al.*, [1982] 2 S.C.R. 161, at page 191.

[24] Further, it is possible that an assignment pursuant to section 50 of the *Patent Act* which unduly lessens competition, and thereby potentially gives rise to criminal proceedings under section 45 and a claim for damages under section 36, may still be valid as between the assignor and assignee, even though section 45 may prevent the assignee from enforcing the rights assigned against certain third parties. However, this is not an issue that falls for decision here.

[25] To subject the right to assign patents to section 45 in the circumstances under consideration in this case is also consistent with the scheme of the *Competition Act*.

[26] For example, subsections 45(3), (7) and (7.1) provide specific exceptions and defences to the offences created by subsection 45(1). None deals with intellectual property rights. Moreover, it is clear that Parliament considered the interface of the *Competition Act* and intellectual property rights. For example, while subsection 79(1) prohibits the abuse of market dominance, subsection 79(5) provides that, for the purpose of section 79, "an act engaged in pursuant only to the exercise of any right . . . derived under the . . . *Patent Act* . . . is not an anti-competitive act." Section

restrictions excluant les cessions de brevet de la portée de cette disposition. Elle ne confère pas non plus un caractère superflu à l'article 50 puisque cette disposition apporte des précisions sur une règle qui aurait autrement eu, au mieux, un caractère vague, à savoir que les droits du breveté comprennent le droit de céder les droits que la *Loi sur les brevets* confère au titulaire d'un brevet.

[23] Puisque l'article 50 n'exige ou n'autorise pas expressément ce qui est interdit à l'article 45, il n'y a aucun conflit véritable entre ces deux dispositions législatives ayant chacune un objet différent : voir Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4^e éd. (Toronto : Butterworths, 2002), aux pages 262 à 266; voir également *Smith v. The Queen*, [1960] R.C.S. 776, à la page 800; *Multiple Access Ltd. c. McCutcheon et autres*, [1982] 2 R.C.S. 161, à la page 191.

[24] De plus, il est possible qu'une cession en vertu de l'article 50 de la *Loi sur les brevets* qui entraîne une diminution indue de la concurrence, et qui ouvre donc éventuellement la voie à des procédures criminelles en vertu de l'article 45 et à une action en dommages-intérêts en vertu de l'article 36, demeure néanmoins valable entre le cédant et le cessionnaire, même si l'article 45 risque d'empêcher le cessionnaire de faire valoir les droits qu'il a acquis à l'encontre de certains tiers. Cependant, cette question ne se pose pas en l'espèce.

[25] Par ailleurs, assujettir le droit de céder un brevet à l'application de l'article 45, dans les circonstances de la présente instance, est également conforme à l'esprit de la *Loi sur la concurrence*.

[26] Par exemple, les paragraphes 45(3), (7) et (7.1) prévoient des exceptions bien précises et des moyens de défense relativement aux infractions définies au paragraphe 45(1). Aucune ne concerne les droits de propriété intellectuelle. De plus, il est clair que le Parlement a tenu compte des interactions entre la *Loi sur la concurrence* et les droits de propriété intellectuelle. Ainsi, tandis que le paragraphe 79(1) interdit l'abus de position dominante, le paragraphe 79(5) prévoit que, pour l'application de l'article 79, « un agissement résultant du seul fait de l'exercice de quelque droit [. . .]

45 contains no analogous exemption for the exercise of rights under the *Patent Act*, including assignments pursuant to section 50.

[27] In light of the above, the presumption of statutory interpretation, *expressio unius est exclusio alterius*, supports an interpretation of section 45 that does not impliedly exclude an assignment of patents which lessens competition by increasing the market power of the assignee beyond that inherent in the rights assigned.

[28] Further, section 32 provides that the Federal Court may make certain orders where use is made of the exclusive rights conferred by a patent so as to unduly restrain trade or lessen competition in an article. It is clear from this that Parliament did not intend to exclude the exercise of patent rights from the reach of the *Competition Act* altogether. In order to achieve consistency with section 32, section 45 should be interpreted as applicable to an assignment of a patent which unduly lessens competition.

[29] Lilly and Shionogi argue that, if a person had applied for and been granted patents for all the known processes for making a product, the person would have a monopoly over the manufacture of that product. This would not be contrary to the *Competition Act*, unless the patentee abused its market power in breach of section 79. Why should it make a difference if the patentee acquired some or all of the patents as a result of an assignment?

[30] In my view, the answer is that the right to exclude others is an essential part of the bargain: the monopoly granted to the patentee is the recompense for ingenuity and the public disclosure of the invention. Moreover, as a unilateral act, the issue of a patent

découlant de la *Loi sur les brevets* [...] ne constitue pas un agissement anti-concurrentiel ». L'article 45 ne contient aucune exemption de cette nature concernant l'exercice des droits en vertu de la *Loi sur les brevets*, y compris les cessions prévues à l'article 50.

[27] Compte tenu de ce qui précède, la présomption applicable en matière d'interprétation des lois, à savoir que la mention de l'un implique l'exclusion de l'autre, appuie une interprétation selon laquelle les cessions de brevet qui diminuent la concurrence en conférant au cessionnaire un pouvoir de marché plus grand que le seul pouvoir inhérent aux brevets cédés, ne sont pas implicitement exclues de l'application de l'article 45.

[28] De plus, l'article 32 précise que la Cour fédérale peut rendre certaines ordonnances, lorsqu'il est fait usage de droits exclusifs conférés par un brevet en vue de restreindre indûment le commerce ou de diminuer la concurrence à l'égard d'un article. Cette disposition indique clairement que le Parlement n'a pas eu l'intention d'exclure complètement l'exercice des droits de brevet du champ d'application de la *Loi sur la concurrence*. Si on veut assurer la cohérence entre l'article 32 et l'article 45, cette dernière disposition doit être interprétée de manière à ce qu'elle s'applique à une cession de brevet qui entraîne une diminution indue de la concurrence.

[29] Lilly et Shionogi soutiennent que si une personne avait demandé et obtenu des brevets pour tous les procédés de fabrication connus d'un produit, cette personne détiendrait un monopole sur la fabrication de ce produit. Cette situation ne contreviendrait pas à la *Loi sur la concurrence*, à moins que le cessionnaire n'abuse de son pouvoir commercial, commettant ainsi une infraction à l'article 79. Pourquoi la situation serait-elle différente selon que le cessionnaire devienne propriétaire d'une partie ou de l'ensemble des brevets par suite d'une cession?

[30] Selon moi, la réponse est que le droit d'exclure les tiers est un élément essentiel de la transaction : le monopole conféré au cessionnaire est une récompense pour son ingéniosité et la divulgation publique de son invention. En outre, la délivrance d'un brevet est un acte

cannot be a conspiracy or agreement for the purpose of section 45.

[31] The right to assign a patent is also valuable, and Parliament has authorized patent holders to assign their patents. No doubt, a patent holder may expect to obtain a higher price from a purchaser who already owns patents that would give the assignee a monopoly in a relevant market. However, to deter a patentee from obtaining the full potential value of the patent in these circumstances in order to maintain competition in a market is not incompatible with the essential bargain between the patentee and the state.

[32] Second, an interpretation of section 50 of the *Patent Act* that does not immunize the assignment of patents from section 45 when it lessens competition is consistent with the purpose of the *Competition Act*, which is stated in section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] to be “to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy.” The importance of the Act and, within it, of section 45, was emphasized in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at page 648, where Gonthier J. described the Act as being “central to Canadian public policy in the economic sector” and said that “s. 32 [now section 45] is itself one of the pillars of the Act.” It would be inconsistent with this view of the *Competition Act*, and of the place of section 45 within it, to reduce the scope of section 45 by reading in words that exclude an assignment of patents that lessens competition in the relevant market.

[33] Third, this interpretation is consistent with the Competition Bureau’s *Intellectual Property Enforcement Guidelines*. Like other administrative interpretations, the Guidelines are not, and do not purport to be, legally binding nor determinative of the meaning of the *Competition Act: Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185 (C.A.), at paragraph 124. Nonetheless, they may be considered by the Court as an

unilatéral et, à ce titre, elle ne peut constituer un complot ou un accord pour l’application de l’article 45.

[31] Le droit de céder un brevet possède une certaine valeur et le Parlement a autorisé les titulaires de brevet à céder leur brevet. Il ne fait aucun doute qu’un titulaire de brevet peut s’attendre à obtenir un meilleur prix de la part d’un acheteur si ce dernier possède déjà des brevets lui conférant un monopole dans un marché pertinent. Toutefois, dans ces circonstances, dissuader un breveté d’obtenir la pleine valeur éventuelle de son brevet en vue de maintenir la concurrence sur le marché n’est pas incompatible avec le pacte essentiel liant le breveté et l’État.

[32] Deuxièmement, une interprétation de l’article 50 de la *Loi sur les brevets* qui n’exclut pas les cessions de brevet de l’application de l’article 45 lorsqu’elles diminuent la concurrence est conforme à l’objet de la *Loi sur la concurrence*, tel qu’énoncé à l’article 1.1 [édicte par L.R.C. (1985) (2^e suppl.), ch. 19, art. 19], soit « de préserver et de favoriser la concurrence au Canada dans le but de stimuler l’adaptabilité et l’efficacité de l’économie canadienne ». L’importance de la *Loi sur la concurrence* et en particulier de l’article 45 a été soulignée dans *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, à la page 648. Ainsi, le juge Gonthier précise que la « Loi est un élément central de l’intérêt public du Canada en matière économique et que l’art. 32 [devenu l’article 45] est lui-même l’un des piliers de la Loi ». Il ne serait pas conforme à cette vision de la *Loi sur la concurrence* et à l’importance de son article 45 de réduire le champ d’application de l’article 45 en y voyant une restriction qui aurait pour effet d’exclure les cessions de brevet lorsqu’elles entraînent une diminution de la concurrence sur le marché pertinent.

[33] Troisièmement, cette interprétation est conforme aux lignes directrices du Bureau de la concurrence, *Lignes directrices pour l’application de la loi*. Comme toute autre interprétation administrative, les Lignes directrices n’ont pas, et ne visent pas à avoir un caractère exécutoire, pas plus qu’elles ne visent à prêter un sens définitif à la *Loi sur la concurrence : Canada (Commissaire de la concurrence) c. Supérieur Propane Inc.*, [2001] 3 C.F. 185 (C.A.), au paragraphe 124.

aid to the Act's interpretation (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at page 37 (Revenue Canada Interpretation Bulletin)), especially since the Guidelines are promulgated after an extensive consultative process.

[34] The following paragraph of the Guidelines is particularly relevant.

4.2.1 General Provisions

The mere exercise of an IP right is not cause for concern under the general provisions of the *Competition Act*. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use or non-use of the IP also as being the mere exercise of an IP right.

The unilateral exercise of the IP right to exclude does not violate the general provisions of the *Competition Act* no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.

The Bureau applies the general provisions of the *Competition Act* when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an arrangement and not just from the mere exercise of the IP right and nothing else.

Applying the *Competition Act* in this way may limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the *Competition Act*. Part 7 of this document provides a series of hypothetical examples to illustrate how the Bureau would examine the licensing, transfer or sale of IP under the *Competition Act*. [Footnote omitted.]

Néanmoins, elles peuvent aider la Cour à interpréter la Loi (*Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, à la page 37 (Bulletin d'interprétation de Revenu Canada)), surtout que ces Lignes directrices ont été publiées après un long processus de consultation.

[34] Le paragraphe suivant des Lignes directrices est particulièrement pertinent.

4.2.1 Dispositions générales

Selon les dispositions générales de la *Loi sur la concurrence*, le simple exercice d'un droit de PI ne constitue pas un motif de préoccupation. Le Bureau définit le simple exercice d'un droit de PI comme l'exercice du droit du titulaire d'empêcher unilatéralement d'autres personnes d'utiliser la PI. Le Bureau considère également l'utilisation ou la non-utilisation d'une PI par un titulaire comme le simple exercice d'un droit de PI.

L'exercice restrictif du droit d'exclusion de la PI ne contrevient pas aux dispositions générales de la *Loi sur la concurrence*, peu importe jusqu'à quel point la concurrence est affectée. Soutenir le contraire pourrait en fait annuler les droits de PI et faire perdre ou compromettre les avantages économiques, culturels, sociaux et éducatifs qu'ils ont produits ainsi qu'entrer en contradiction avec l'opinion fondamentale du Bureau, qui veut que les lois sur la PI et sur la concurrence soient généralement complémentaires.

Le Bureau applique les dispositions générales de la *Loi sur la concurrence* lorsque les droits de PI constituent le fondement des arrangements conclus entre des entités indépendantes, que ce soit sous forme de transfert, d'accord de licence ou d'entente visant l'utilisation ou l'application des droits de PI, et quand le prétendu préjudice est le résultat de tels arrangements plutôt que du simple exercice du droit de PI, sans plus.

Appliquer la *Loi sur la concurrence* de cette façon peut imposer des limites au propriétaire d'une PI quant à la manière dont il peut octroyer une licence, transférer ou vendre la PI et à qui il peut le faire, mais cela ne remet pas en question les droits fondamentaux d'un propriétaire de PI de le faire. Si un titulaire de PI octroie une licence, transfère ou vend la PI à une entreprise ou à un groupe d'entreprises qui, n'eût été de cette entente, aurait représenté un concurrent réel ou potentiel, et si cet accord crée, maintient ou renforce la puissance commerciale, le Bureau peut tenter de contester cet arrangement en vertu de l'article applicable de la *Loi sur la concurrence*. La partie 7 du présent document contient une série de cas hypothétiques qui illustrent la manière dont le Bureau examine l'octroi de licences, le transfert ou la vente de PI en vertu de la *Loi sur la concurrence*. [Renvoi omis.]

[35] It should be noted, however, that none of the hypothetical examples provided in Part 7 of the Guidelines deals with the facts of the present case.

[36] To conclude, in my respectful opinion, the Judge erred in law by holding that the assignment of patents is exempt from section 45 when, by reason of the assignee's existing ownership of other patents, the assignment transfers more market power than that inherent in the patents assigned. He also erred in regarding *Molnlycke* as authority for the proposition that, in these circumstances, any lessening of competition could not be undue for the purpose of section 45.

Issue 2: Did the assignment of the patents by Shionogi to Lilly lessen competition?

[37] The alternative argument of Lilly and Shionogi is that the evidence does not establish that the assignment of Shionogi's patents to Lilly in 1995 lessened competition. Lilly says that this is because, as a result of the 1995 assignment and Lilly's grant of a non-exclusive licence back to Shionogi of the assigned patents, there were two sources, namely, Shionogi and Lilly, from which a competitor could purchase, or seek a licence to manufacture, cefaclor. Previously, only Lilly could utilize the Shionogi cefaclor patents in Canada because, in 1975, Shionogi had granted Lilly an exclusive licence with respect to these patents.

[38] Whether there was a lessening of competition after the 1995 assignment is a question of fact, on which the Judge made an express finding. After quoting a passage from the Federal Court of Appeal's decision in the previous round of this litigation, the Judge said [at paragraphs 13-14]:

To avoid any possible doubt, what was stated by the Court of Appeal in the quoted passage to be an allegation of Apotex is a fact amply demonstrated by the evidence and not seriously contested by either Lilly or Shionogi.

So, there is and never has been any doubt that the result of the assignment of Shionogi's patents to Lilly was to increase

[35] Soulignons, toutefois, qu'aucun des exemples hypothétiques de la partie 7 des Lignes directrices ne porte sur les faits de la présente espèce.

[36] Pour conclure, je pense que le juge a commis une erreur de droit en affirmant que les cessions de brevet ne sont pas assujetties à l'article 45 lorsque, compte tenu des droits que possède déjà le cessionnaire sur d'autres brevets, cette cession lui confère un plus grand pouvoir commercial que le seul pouvoir inhérent au brevet cédé. Le juge a également commis une erreur en concluant qu'aux termes de *Molnlycke*, toute diminution de la concurrence, dans les circonstances, ne peut être considérée comme indue pour l'application de l'article 45.

Question 2 : La cession des brevets de Shionogi à Lilly entraîne-t-elle une diminution de la concurrence?

[37] Subsidièrement, Lilly et Shionogi affirment que la preuve n'établit pas que la cession des brevets de Shionogi à Lilly a entraîné une diminution de la concurrence en 1995. Lilly affirme ainsi que, par suite de la cession de 1995 et de l'octroi par Lilly de licences non exclusives à Shionogi sur les brevets cédés, il existait deux sources, Lilly et Shionogi, auprès desquelles les concurrents pouvaient se procurer du cefaclor ou obtenir une licence de fabrication de ce produit. Auparavant, seule Lilly pouvait utiliser les brevets que détenaient Shionogi sur le cefaclor au Canada parce qu'en 1975, Shionogi avait concédé une licence exclusive à Lilly à l'égard de ces brevets.

[38] La question de savoir s'il y a eu diminution de la concurrence après la cession de 1995 est une question de fait sur laquelle le juge a tiré une conclusion explicite. Après avoir cité un extrait de la première décision de la Cour d'appel fédérale dans la présente instance, le juge affirme ce qui suit [aux paragraphes 13 et 14] :

Pour éviter tout doute possible, ce que la Cour d'appel a qualifié d'allégation de la part d'Apotex, dans la citation ci-dessus, est un fait qui a été amplement établi par la preuve et qui n'est pas réellement contesté ni par Lilly ni par Shionogi.

Ainsi, il n'y a aucun doute et il n'y en a jamais eu que le résultat de la cession des brevets de Shionogi à Lilly a été

the latter's monopoly power. Where formerly it had held four process patents useful in the production of cefaclor, it now held eight and no one else held any. In a word, it had a monopoly of the known production processes. It may well have been in a position of market dominance. [Emphasis added.]

To put his view beyond any doubt, he added (at paragraph 22) that the agreement between Lilly and Shionogi "had the effect of lessening competition".

[39] In the absence of a palpable and overriding error, this Court cannot disturb the Judge's conclusion that the effect of the assignment was a lessening of competition because of Lilly's existing ownership of other patents. The question for trial is whether the lessening of competition resulting from the assignment is sufficiently significant as to be *undue*: see *R. v. Nova Scotia Pharmaceutical Society*, at page 646 and following.

[40] Lilly argues that, since Shionogi was not in the Canadian market for cefaclor and, in 1975, had granted an exclusive licence to Lilly, Lilly held a monopoly in Canada prior to the assignment. After 1995, as a result of both the assignment, and Lilly's grant to Shionogi of a non-exclusive licence with respect to cefaclor, there were two potential sources from which Apotex could have sought either to purchase or to obtain a licence to manufacture bulk cefaclor. Thus, it was argued, the assignment merely enabled Lilly, rather than Shionogi, to sue for infringement of the assigned patents and actually increased competition.

[41] Moreover, Lilly and Shionogi say, since Apotex had not sought a licence from Lilly or Shionogi, before or after the assignment, it was in no position to say that the effect of the assignment was to shut it out of the cefaclor market. Indeed, Apotex had obtained bulk cefaclor from another source which, Apotex alleged, was manufactured by a process that did not infringe the Shionogi or Lilly patents.

[42] Although the Judge made his finding of fact on the lessening of competition without referring to the grant of the licence back to Shionogi in 1995, he based

d'augmenter le pouvoir monopolistique de cette dernière. Alors qu'autrefois, elle ne possédait que quatre brevets de procédés utiles dans la fabrication du céfACLOR, elle en possédait huit et personne d'autre n'en avait. Bref, elle avait le monopole des procédés connus de production. Elle était peut-être bien dans une position de domination du marché. [Non souligné dans l'original.]

Pour ne laisser aucun doute quant à son opinion, le juge ajoute (au paragraphe 22) que l'entente entre Lilly et Shionogi « avait pour effet de limiter la concurrence ».

[39] En l'absence d'une erreur manifeste et déterminante, la Cour ne peut modifier la conclusion du juge voulant que la cession ait entraîné une diminution de la concurrence en raison des autres brevets que détenait déjà Lilly. La question à trancher est la suivante : la diminution de la concurrence provoquée par la cession est-elle suffisamment importante pour être qualifiée d'*indue*? Voir *R. c. Nova Scotia Pharmaceutical Society*, aux pages 646 et suivantes.

[40] Lilly soutient que, puisque Shionogi n'était pas sur le marché canadien du céfACLOR et qu'en 1975, celle-ci lui avait concédé une licence exclusive, Lilly détenait déjà un monopole au Canada avant la cession. Après 1995, par suite de la cession et de l'octroi par Lilly d'une licence non exclusive sur le céfACLOR à Shionogi, il y avait désormais deux sources possibles auxquelles Apotex pouvait s'adresser, soit pour acheter du céfACLOR en vrac, soit pour acquérir une licence l'autorisant à fabriquer ce produit. Donc, affirme-t-elle, la cession a simplement habilité Lilly, et non Shionogi, à intenter une action en contrefaçon des brevets cédés et, dans les faits, elle a accru la concurrence.

[41] En outre, selon Lilly et Shionogi, puisqu'Apotex n'a pas tenté d'acquérir une licence auprès de Lilly ou de Shionogi, avant ou après la cession, elle n'était pas en position de dire que la cession avait pour effet de l'éjecter du marché du céfACLOR. De fait, Apotex a obtenu du céfACLOR en vrac auprès d'une autre source qui, selon Apotex, fabriquait ce médicament selon un procédé qui ne contrefait pas les brevets de Shionogi ou de Lilly.

[42] Même si, en parvenant à cette conclusion de fait concernant la diminution de la concurrence, le juge n'a pas mentionné la concession d'une licence à Shionogi en

his decision on the same arguments and record as were before us, including those relating to the grant of the licence back to Shionogi. The fact that Lilly granted a non-exclusive licence to Shionogi at the time of the 1995 assignment does not mean that it thereby lost control of the patents. For example, the licence prevented Shionogi from granting a sub-licence “without the written prior approval of, and at the sole discretion of, Lilly.”

[43] Affidavits filed by Apotex from experts in various fields, including competition policy, provided significant evidence of a lessening of competition in the market for bulk cefaclor. In contrast, Lilly served only one relatively short affidavit, by an employee, in support of its position. Shionogi filed none.

[44] As for the assertion that Shionogi had licensed its cefaclor process patents to Lilly in 1975, the evidence before the Judge about the pre-1995 relationship between Shionogi and Lilly with respect to those patents does not establish that the Judge’s finding that the 1995 assignment lessened competition was vitiated by palpable and overriding error.

[45] Nor do I regard the Judge’s reference in paragraph 14 of his reasons to the possibility that the assignment may have put Lilly in a position of “market dominance” as an indication that, in making a finding respecting a lessening of competition, he had in mind section 79, not section 45.

[46] On the basis of the evidence in the record, I would not disturb the Judge’s finding that the assignment lessened competition.

Issue 3: Are Apotex’ counterclaims statute-barred?

[47] Apotex’ counterclaims against Lilly and Shionogi under section 36 of the *Competition Act* are for damages for loss or damage sustained as a result of

1995, il a fondé sa décision sur les mêmes arguments et sur le même dossier que ceux présentés à la Cour aujourd’hui, y compris quant à la concession d’une licence à Shionogi. Le fait que Lilly avait concédé une licence non exclusive à Shionogi lors de la cession de 1995 ne signifie pas qu’elle a alors perdu le contrôle des brevets. Par exemple, aux termes de la licence, Shionogi ne pouvait concéder une sous-licence [TRADUCTION] « sans l’autorisation écrite préalable de Lilly, à son entière discrétion ».

[43] Les affidavits déposés par Apotex et signés par des experts dans différents domaines, y compris la politique de la concurrence, contiennent des éléments de preuve importants qui démontrent une diminution de la concurrence dans le marché du céfaclor en vrac. En comparaison, Lilly a signifié, au soutien de ses arguments, un seul affidavit relativement court, signé par un employé. Shionogi n’a déposé aucun affidavit.

[44] Quant à l’affirmation voulant que Shionogi ait concédé une licence sur le procédé de fabrication du céfaclor à Lilly en 1975, la preuve au dossier quant à la relation qui existait entre Shionogi et Lilly à propos de ces brevets avant 1995 ne démontre pas que le juge a commis une erreur manifeste et déterminante en concluant que la cession de 1995 entraînait une diminution de la concurrence.

[45] Je ne considère pas non plus que l’allusion du juge, au paragraphe 14 de ses motifs, à la possibilité que la cession ait placé Lilly en situation de « position dominante » sur le marché, indique que le juge, en parvenant à sa conclusion concernant la diminution de la concurrence, avait à l’esprit l’article 79 plutôt que l’article 45.

[46] Compte tenu de la preuve au dossier, je ne modifierais pas la conclusion du juge, à savoir que la cession a entraîné une diminution de la concurrence.

Question 3 : Les demandes reconventionnelles d’Apotex sont-elles prescrites?

[47] Dans ses demandes reconventionnelles contre Lilly et Shionogi fondées sur l’article 36 de la *Loi sur la concurrence*, Apotex réclame des dommages-intérêts

conduct proscribed in section 45. As applied to this case, subsection 36(4) provides that no claim for damages may be made after two years from “a day on which the conduct was engaged in.”

[48] In response to Lilly’s infringement action, Apotex issued a counterclaim against Lilly in March 2001 and against Shionogi in November 2002. In order to maintain these claims, they had to have been made within two years of the start of the limitation period. The question, therefore, is to determine when the limitation period commenced.

[49] The Judge concluded as follows (at paragraph 25) with respect to the issues of prescription, and the research and development:

. . . there is sufficient conflict and lack of clarity in the relevant evidence on the questions of foreseeability and the reach of the 1975 research and development agreement between Lilly and Shionogi that those questions are not suitable for summary judgment and should only be resolved after a full trial.

[50] Lilly and Shionogi say that, on the basis of the evidence before him, the Judge’s conclusion on the issue of prescription was vitiated by palpable and overriding error.

[51] First, they argue that the assignment of Shionogi’s patents was the conspiracy (“the conduct . . . engaged in” for the purpose of subsection 36(4)) and this occurred in 1995, six and seven years respectively before the counterclaims were issued against Shionogi and Lilly. Moreover, the assignment was registered with the Commissioner of Patents in 1995, a copy of the registration was given to Apotex’ counsel in 1999, and Apotex had knowledge of the assignment in 1997 when Lilly issued its statement of claim for infringement. Each of these possible starting dates for the running of time under subsection 36(4) is more than two years before Apotex issued its counterclaim against Shionogi. Only Apotex’ receipt of a copy of the registration occurred less than two years before Apotex issued its counterclaim against Lilly.

pour les pertes ou les dommages qu’elle a subis en raison des agissements contraires à l’article 45. En l’occurrence, le paragraphe 36(4) précise qu’aucune action en dommages-intérêts ne peut être intentée plus de deux ans après « la date du comportement en question ».

[48] En réponse à l’action en contrefaçon de Lilly, Apotex a déposé une demande reconventionnelle contre Lilly en mars 2001 et une autre contre Shionogi en novembre 2002. Pour que la Cour ne radie pas ces deux réclamations, ces dernières doivent avoir été faites dans les deux ans suivant le début de la période de prescription. La Cour doit donc décider à quel moment le délai de prescription a commencé à courir.

[49] Le juge a conclu ce qui suit (au paragraphe 25), sur les questions de la prescription et de la recherche et du développement :

[. . .] les contradictions et l’imprécision des preuves sont suffisamment importantes pour ce qui touche la prévisibilité et la portée de l’entente de 1975 sur la recherche et le développement entre Lilly et Shionogi que ces questions ne sont pas opportunes dans le cadre d’un jugement sommaire et qu’elles ne devraient être tranchées qu’après un procès.

[50] Lilly et Shionogi affirment que, compte tenu de la preuve au dossier, la conclusion du juge sur la question de la prescription est entachée d’une erreur manifeste et déterminante.

[51] Premièrement, elles font valoir que c’est la cession des brevets de Shionogi qui constituait un complot—le « comportement en question », pour l’application du paragraphe 36(4)—et que cette entente est intervenue en 1995, soit respectivement six et sept ans avant le dépôt des demandes reconventionnelles contre Lilly et Shionogi. De plus, la cession a été enregistrée auprès du commissaire aux brevets en 1995 et une copie de l’enregistrement a été remise à l’avocat d’Apotex en 1999; par ailleurs, Apotex connaissait l’existence de la cession en 1997, lorsque Lilly a déposé son action en contrefaçon. Lorsque Apotex a déposé sa demande reconventionnelle contre Shionogi, il s’était écoulé plus de deux ans depuis chacune de ces dates susceptibles de déclencher le début de la période de prescription prévue au paragraphe 36(4). Seule la date

[52] In my view, the problem with this argument is that it assumes that, for the purpose of subsection 36(4), the conspiracy is the assignment, considered in the abstract as a single act. However, Apotex' case is that the assignment must be seen in its context: its enhancement of Lilly's market power, that is, Lilly's additional ability to act independently of the market by virtue of its ownership of the patents for all known, commercially viable processes for manufacturing cefaclor. On this view, the conspiracy continued as long as the assignment had competition-lessening effect. Because of the evidential questions to be resolved, this is not the kind of issue on which it would be appropriate to grant summary judgment.

[53] Second, Shionogi argues that the last of the process patents that it assigned to Lilly expired in April 2000, two years and seven months before Apotex issued its statement of claim against Shionogi. The argument here is that, if Apotex' counterclaim is based on the assignment and its anti-competitive effects, these effects must have ended on the expiry of the last of the assigned Shionogi patents.

[54] I do not find this argument compelling either. The expiry of the last of Shionogi's process patents in 2000, more than two years before Apotex issued its counterclaim against Shionogi, is only relevant if it is not arguable that, after that date, there could be no competition-lessening effects as a result of the assignment.

[55] However, the expiry of the Shionogi patents will not necessarily mark the start of the limitation. On the assumption that the discoverability principle applies to claims under section 36, if Apotex did not discover, and could not reasonably have been expected to discover, details of the 1975 and 1995 agreements between Lilly and Shionogi, more than two years before it issued its

de réception d'une copie de l'enregistrement par Apotex précède de moins de deux ans le dépôt de la demande reconventionnelle d'Apotex contre Lilly.

[52] À mon avis, le problème avec cet argument est qu'il repose sur la présomption que, pour l'application du paragraphe 36(4), c'est la cession qui constitue le complot, considéré dans l'abstrait comme un acte unique. Toutefois, Apotex fait valoir que la cession doit être examinée dans son contexte, sur le fait qu'elle a entraîné un renforcement du pouvoir commercial de Lilly, autrement dit, sur le fait qu'elle a renforcé la capacité de Lilly à agir de manière indépendante sur le marché puisqu'elle détenait désormais les brevets de tous les procédés de fabrication du céfaclor connus et commercialement viables. Dans cette perspective, le complot a continué d'exister tant et aussi longtemps que la cession a eu des effets anticoncurrentiels. Compte tenu de tous les éléments de preuve en jeu, il ne serait pas approprié de trancher cette question par un jugement sommaire.

[53] Deuxièmement, Shionogi fait valoir que le dernier procédé breveté cédé à Lilly a pris fin en avril 2000, soit deux ans et sept mois avant qu'Apotex ne dépose sa demande reconventionnelle contre Shionogi. Son argument est le suivant : si la demande reconventionnelle d'Apotex est fondée sur la cession et ses effets anticoncurrentiels, ces effets ont cessé d'exister à la fin de la période de validité du dernier brevet cédé par Shionogi.

[54] Cet argument ne me convainc pas. L'échéance du dernier brevet de Shionogi, en 2000, soit plus de deux ans avant qu'Apotex ne dépose sa demande reconventionnelle contre Shionogi, est un élément pertinent seulement dans le cas où on ne peut pas prétendre qu'après cette date, la cession ne pouvait plus avoir aucun effet anticoncurrentiel.

[55] Toutefois, la fin de la période de validité des brevets de Shionogi ne déclenche pas nécessairement le début de la période de prescription. En présumant que le principe de la possibilité de découverte s'applique aux réclamations en vertu de l'article 36, si Apotex n'a pas découvert, et ne pouvait raisonnablement découvrir, le détail des ententes intervenues entre Lilly et Shionogi en

counterclaim, the counterclaim was not time-barred. Apotex says that it did not discover important details about the agreements until November 2001.

[56] I am not persuaded that the evidence pertaining to both how much Apotex knew about the relevant facts (including details of the agreements), and when it acquired its knowledge, is so clear as to warrant this Court's interfering with the Judge's conclusion that this issue should be resolved on the basis of a trial. It will generally be inappropriate to decide by summary judgment a matter in which the application of the discoverability rule is likely to be important: *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.), at paragraph 36.

[57] Apotex also says that Lilly's pursuit of the infringement action against it is a continuing competition-lessening effect. I would not be prepared to decide the correctness of this submission on a summary motion.

Issue 4: Did Apotex sustain any damage as a result of the conspiracy?

[58] In order to claim damages under subsection 36(1), a claimant must prove that the proscribed conduct caused it loss or damage. Lilly and Shionogi argued before us, as they had done before the Judge, that Apotex had suffered no loss or damage as a result of the assignment of the patents because there was no evidence that the assignment had delayed Apotex' entry into the cefaclor market. Apotex' reply is that any amount that it may be required to pay to Lilly by way of damages as a result of Lilly's infringement action constitutes "loss or damage" for the purpose of subsection 36(1).

[59] I can do no better than to adopt the Judge's conclusion on this issue (at paragraph 24):

1975 et en 1995, plus de deux ans avant qu'elle ne dépose sa demande reconventionnelle, sa réclamation n'est pas prescrite. Apotex affirme qu'elle n'a découvert certains détails importants des ententes qu'en novembre 2001.

[56] Je ne suis pas convaincu que la preuve sur ces deux aspects, à savoir la mesure dans laquelle Apotex connaissait les faits pertinents (y compris le détail des ententes) et à quel moment elle a eu connaissance de ces détails, est tellement évidente qu'elle justifie que la Cour modifie la conclusion du juge de première instance selon laquelle cette question mérite un examen sur le fond. Il n'est généralement pas approprié de trancher un litige par jugement sommaire lorsque l'application du principe de la possibilité de découverte sera vraisemblablement une question importante : *Aguonie c. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.), au paragraphe 36.

[57] Apotex affirme en outre que l'action en contrefaçon intentée par Lilly contre elle constitue un effet anticoncurrentiel continu. Je ne suis pas prêt à juger du bien-fondé de cet argument dans une requête en jugement sommaire.

Question 4 : Apotex a-t-elle subi des dommages en raison du complot?

[58] Pour se prévaloir du recours en dommages-intérêts en vertu du paragraphe 36(1), le demandeur doit prouver qu'il a subi des pertes ou des dommages en raison des agissements prohibés. Lilly et Shionogi font valoir à la Cour, comme elles ont fait valoir au juge, qu'Apotex n'avait subi aucune perte ni aucun dommage en raison de la cession des brevets parce qu'il n'existe aucune preuve indiquant que l'entrée d'Apotex sur le marché du céfaclor en a été retardée. Apotex répond que tout montant qu'elle pourrait être tenue de verser à Lilly à titre de dommages-intérêts dans l'action en contrefaçon intentée par Lilly, constitue « une perte ou des dommages » pour l'application du paragraphe 36(1).

[59] Je ne peux faire autrement que d'adopter la conclusion du juge sur cette question (au paragraphe 24) :

While that appears to me to be a rather strange proposition in law, it is not clear that it cannot succeed and if Apotex were otherwise successful on its section 36 claim, I would not be prepared to dismiss it on that basis alone at the summary judgment stage.

E. CONCLUSION

[60] For these reasons, I would allow the appeal with costs here and below, set aside the order of the Judge, and dismiss the motions for summary judgment and for striking Apotex' counterclaims and certain paragraphs from its defence to Lilly's action for infringement.

DESJARDINS J.A.: I concur.

SHARLOW J.A.: I concur.

Il me semble qu'en droit, cette demande est étonnante, mais il n'est pas certain qu'elle ne sera pas accueillie et si Apotex avait gain de cause relativement à sa demande en vertu de l'article 36, je ne serais pas disposé à la rejeter pour ce seul motif à l'étape du jugement sommaire.

E. CONCLUSION

[60] Pour ces motifs, j'accueillerais l'appel avec dépens en appel et en première instance, j'annulerais l'ordonnance du juge et je rejetterais les requêtes en jugement sommaire et la requête en radiation de la demande reconventionnelle d'Apotex et de certains paragraphes de sa défense contre l'action en contrefaçon intentée par Lilly.

LA JUGE DESJARDINS, J.C.A.: Je souscris aux présents motifs.

LA JUGE SHARLOW, J.C.A.: Je souscris aux présents motifs.

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Competition Tribunal



Tribunal de la concurrence

PUBLIC VERSION

Citation: *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 4
File No.: CT-2024-006
Registry Document No.: 43

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

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 103.1 granting leave to make an application under section 79 of the *Competition Act*.

BETWEEN:

JAMP Pharma Corporation
(applicant)

and

Janssen Inc.
(respondent)



Decided on the basis of the written record.
Before: Mr. Justice Andrew D. Little (Chairperson)
Date of order: August 22, 2024

**REASONS FOR ORDER AND ORDER GRANTING AN APPLICATION FOR LEAVE
TO FILE AFFIDAVIT EVIDENCE UNDER RULE 119(3)**

[1] By application filed on July 26, 2024, JAMP Pharma Corporation (“JAMP”) applied under section 103.1 of the *Competition Act* for leave to commence an application against Janssen Inc. (“Janssen”) under section 79.

[2] By informal motion to the Tribunal, Janssen seeks leave under Rule 119(3) of the *Competition Tribunal Rules* (the “Rules”) to file affidavit evidence in response to JAMP’s application for leave under section 103.1.

A. Applications for leave under section 103.1 of the *Competition Act*

[3] Section 103.1 contemplates that the Tribunal determine whether it has “reason to believe” that the applicant is “directly and substantially affected in the applicant’s business by any practice referred to in [section 79] that could be subject to an order under that section”: *Competition Act*, subsection 103.1(7). The Tribunal must determine whether the application for leave is supported by evidence that gives rise to a *bona fide* belief that the applicant may have been directly and substantially affected in its business by the impugned practice, and that the practice could be subject to an order under section 79: *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339, [2005] 2 FCR 254 (“*Symbol Technologies FCA*”), at paras 17-19; *CarGurus, Inc v Trader Corporation*, 2017 FCA 181 (“*CarGurus FCA*”), at para 9; *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 13 (“*Audatex F*”), at paras 9, 17; *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 12 (“*CarGurus CT*”), at para 9.

[4] In the leave application under section 103.1, the Tribunal proceeds summarily and expeditiously to carry out a screening function based on the sufficiency of credible, cogent and objective evidence advanced: *Symbol Technologies FCA*, at para 24; *CarGurus FCA*, at paras 9, 21-23, 25, 28; *Audatex I*, at paras 11, 16-17, 19; *CarGurus CT*, at paras 9, 32. A decision on an application for leave under section 103.1 is not meant to be a final determination made on the basis of a full evidentiary record: *Audatex I*, at paras 10, 12, 16; *CarGurus CT*, at para 15.

B. JAMP’s Proposed Application under Section 79

[5] JAMP’s proposed application under section 79 is, for present purposes, captured by the executive summary in its proposed notice of application. It proposes to allege:

2. An affiliate of the Respondent, Janssen Inc. (“J&J”), developed ustekinumab, a biologic medicine. In 2008, Health Canada approved the sale of Stelara, which is J&J’s drug product that contains ustekinumab as an active ingredient. Stelara proved to be an effective long-term treatment for many patients suffering from certain chronic diseases, such as psoriasis.

3. J&J’s monopoly over the Canadian market for ustekinumab spanned many years. Canada’s data protection regime ensured that Stelara could face no competition until December 2016. Canada’s patent regime, coupled with the Patented Medicines (Notice of Compliance) Regulations, ensured that Stelara could face no competition until August 2021, when the last of J&J’s patents for Stelara listed on the patent register expired.

4. J&J sells Stelara for more than \$4,000 per dose. As a result of the time-limited monopolies granted by Canada's data protection and patent regimes, J&J's revenues from Stelara in Canada ballooned, growing every year and totalling more than \$690 million on a wholesale basis in 2021. Between launch in 2008 and August 2021, J&J earned revenues of \$2.249 billion from sales of Stelara in Canada.

5. At that point, apparently unsatisfied with its thirteen years of monopolistic profits, and rather than accepting that its time-limited monopoly was at an end and engaging in competition for ustekinumab, J&J gamed the pharmaceutical regulatory system and used sham litigation to disincentivize rivals from launching their own ustekinumab drugs. This resulted in J&J being the only supplier of ustekinumab drugs in Canada between August 2021 and March 1, 2024. In that period alone, because it still did not face any competition, J&J almost doubled its total revenue from the first 13 years of selling Stelara in Canada, generating an additional \$2.138 billion of revenues.

6. The inevitable eventually happened and two of J&J's rivals (including the Applicant, JAMP Pharma Corporation ("JAMP")) launched competing new ustekinumab drugs called biosimilars in March 2024. Now that J&J faces actual rivals, it has again declined to compete as Parliament intended – for example, by lowering Stelara's price or innovating. Instead, J&J again seeks to defend and maintain its monopoly. To do so, J&J has conceived of and implemented a series of inter-connected anti-competitive acts, including:

- (a) the development of a fighting brand;
- (b) the misuse of a patient support program;
- (c) the dissemination of deceptive communications to prescribing physicians and health care professionals, patients and insurers;
- (d) predatory pricing; and
- (e) selective and discriminatory responses to a competitor for the purpose of impeding its expansion and eliminating it from a market.

7. Some of these anti-competitive acts come from a playbook that J&J developed when defending and maintaining its monopoly in another biologic drug. But Parliament recently updated the *Competition Act* and so yesterday's abusive practices are no longer shielded from legal scrutiny today.

8. All of these anti-competitive acts are intended to have an exclusionary negative effect on competitors and an adverse effect on competition. These anti-competitive acts are intended to maintain J&J's monopoly for ustekinumab drugs in Canada and preserve Stelara's high prices. The anti-competitive acts deprive Canadian patients of the ability to access new competitive options for ustekinumab drugs, and result in Canadian patients and payers (including provincial drug plans and private insurers) paying far more than they otherwise would for this vital medicine.

C. Legal Principles Applicable to the Present Motion under Rule 119(3)

[6] Part 8 of the Rules contains the procedure to be followed on applications for leave under section 103.1. Rule 115 provides that an application for leave shall include an affidavit setting out the facts in support of the proposed application, a proposed notice of application and a memorandum of fact and law. Rule 119 authorizes a respondent to file representations in writing. Rule 119(3) provides that the “[r]epresentations in writing shall not contain affidavit evidence, except with leave of the Tribunal”.

[7] As the Tribunal held in *Audatex I*, the general rule is therefore that a respondent is only allowed to file written representations, without affidavit evidence. A respondent filing affidavit evidence is the exception. The respondent must obtain the Tribunal's permission: *Audatex I*, at para 13. (The Tribunal addressed the requirements for an applicant to obtain leave under Rule 2 to file reply affidavit evidence in *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 (“*Audatex II*”), at paras 34-39.)

[8] To obtain permission under Rule 119(3), a respondent must demonstrate the existence of “specific facts and circumstances justifying the filing of affidavit evidence, bearing in mind that an application for leave [under section 103.1] is a screening process meant to be decided expeditiously and not on the basis of a full evidentiary record”: *Audatex I*, at para 16.

[9] The Tribunal stated in *Audatex I*, at paragraph 17:

[...] the party seeking leave to file affidavit evidence needs to set out, in as much detail as possible, the discrete facts and specific evidence that it wishes to include in the proposed affidavit. It also needs to indicate how the evidence intended to be filed is necessary to its written representations and would be of assistance to the Tribunal in its screening function.

See also *CarGurus CT*, at paras 11, 22, 31.

[10] The Tribunal provided guidance in *Audatex I* and *CarGurus CT* by way of illustrative lists of evidence that may (or may not) be included by way of affidavit evidence in response, focusing on the particular issues to be determined by the Tribunal under sections 75, 76 and 77. See *Audatex I*, at para 17; *CarGurus CT*, at paras 11, 14.

[11] In its decision on the merits of *Audatex*'s section 103.1 leave application, the Tribunal noted that when it granted leave under Rule 119(3), it did not have much detail on the actual

contents of the affidavits proposed to be filed. The Tribunal observed that filing a draft affidavit on the Rule 119(3) motion would be helpful to allow the Tribunal “to better and more quickly assess whether the contemplated evidence fell within the principles and guidance” set out in *Audatex I*; see *Audatex II*, at para 40. The moving parties did so in *CarGurus CT*: at paras 4, 16, 31.

[12] In prior motions seeking permission under Rule 119(3), the Tribunal has granted permission to file specific evidence in an affidavit related to narrowly-defined issues or discrete facts, principally linked to the elements of the statutory provisions for which the applicant sought leave under section 103.1 to commence an application: *Audatex I*, at paras 22-24, 28-29; *CarGurus CT*, at paras 22, 25-30, 31. The Tribunal may also grant leave to file affidavit evidence concerning whether the applicant was directly and substantially affected in its business (to the extent such factual evidence may be adduced by a respondent): see *CarGurus CT*, at paras 23, 30.

[13] The Tribunal has declined to admit “wide-ranging” affidavit evidence, as doing so would generally be contrary to the interests of justice on an application for leave under section 103.1. See *Audatex I*, at paras 19, 23; *CarGurus CT*, at paras 15, 20, 30.

D. Janssen’s Proposed Affidavit Evidence and JAMP’s Position

[14] Janssen’s informal motion advised that its proposed evidence will contain specific facts that are relevant to whether the alleged conduct could be subject to an order under section 79. Its proposed evidence will address certain of JAMP’s allegations which, according to Janssen, are based on speculation and/or hearsay and which Janssen’s evidence “will demonstrate” are “simply false or misleading”, or are in the exclusive knowledge of Janssen.

[15] Janssen advised that its proposed evidence is directly relevant to: (a) whether Janssen has engaged or is engaging in anticompetitive acts within the meaning of section 79 as alleged, and (b) whether JAMP’s business could have possibly been directly and substantially affected by those alleged acts. Janssen organized its proposed evidence under three headings:

- Janssen has not engaged in any anti-competitive acts,
- JAMP could not have been directly and substantially affected, and
- JAMP is barred from bringing many of its claims.

[16] Janssen provided additional information about its proposed evidence under each heading.

[17] JAMP opposed Janssen’s motion, arguing that Janssen’s proposed evidence is in the nature of “wide-ranging” evidence. JAMP submitted that Janssen failed to explain to the Tribunal how the proposed evidence under the second and third headings are related to the individual elements of section 79, and did not advise the Tribunal why all of its proposed topics were necessary to its written representations.

[18] JAMP also observed that Janssen did not provide the Tribunal with draft affidavits, despite the guidance in *Audatex II*.

[19] In reply, Janssen emphasized that its proposed affidavit evidence would go to the credibility and sufficiency of JAMP's evidence and provide evidence on topics that are in its exclusive knowledge, from persons with firsthand knowledge, on which JAMP provided speculative or inaccurate hearsay evidence. Janssen submitted that it is not in the interests of justice that an application under section 79 proceed on the "basis of factual allegations that can easily be dismissed as false".

[20] Janssen also made submissions on the Tribunal's jurisdiction to consider whether some of JAMP's claims are barred.

E. Analysis

[21] This proceeding will be the first time the Tribunal will decide whether to grant, under section 103.1, leave to commence an application under section 79: see S.C. 2022, c. 10, section 266. (Sections 78 and 79 have also been recently amended: see S.C. 2022, c. 10, sections 261-262; S.C. 2023, c. 31, sections 7.1, 7.2; S.C. 2024, c. 15, section 247.)

[22] As with prior leave applications under section 103.1, the Tribunal has a meaningful screening role to ensure that, considering the requirements in subsection 103.1(7), there is reason to believe that an applicant is directly and substantially affected in its business by the alleged practices and that the Tribunal "could" make an order under section 79.

[23] The nature and content of the elements of section 79 (as affected by the descriptions of anti-competitive acts in section 78) are different from the elements of sections 75, 76 and 77. The relative breadth and flexibility of the descriptions of anti-competitive acts in section 78 and paragraph 79(1)(a), and of the word "conduct" in paragraph 79(1)(b), may affect how the Tribunal approaches its task under section 103.1, which in turn may affect the kinds of evidence that may be properly the subject of a successful request for leave to adduce evidence under Rule 119(3).

[24] In this case, the proposed responding affidavit evidence must be assessed in light of the applicant's allegations, which include both past and ongoing conduct by the respondent alleged to be a "practice of anti-competitive acts" under paragraph 79(1)(a) or "conduct" for the purposes of paragraph 79(1)(b). The proposed section 79 application includes claims related to an alleged fighting brand (see paragraph 78(1)(d)) and predatory pricing (see paragraph 78(1)(j)), as well as various other alleged conduct, including communications with third parties that is claimed to affect competition substantially in the alleged market in which the respondent is claimed to be dominant.

[25] The applicant makes a fair point that the respondent's submissions on this motion do not expressly provide the Tribunal with all of the detailed information contemplated in *Audatex I* to assist the Tribunal. The absence of any draft affidavit evidence from Janssen makes the Tribunal's job more challenging in predicting the scope of appropriate evidence on this motion: the Tribunal does not know the extent of Janssen's proposed affidavit evidence. That said, Janssen also argued that the Tribunal should not be deprived of evidence to respond to factual allegations that can "easily be dismissed as false".

[26] In the circumstances, in order to exercise the discretion to permit Janssen to adduce responding evidence under Rule 119(3) while maintaining both the summary and expeditious nature of an application for leave under section 103.1 and the Tribunal's meaningful screening role, I must attempt to circumscribe the scope and nature of the permissible evidence in these Reasons.

[27] With these preliminary observations in mind, I will address Janssen's proposed affidavit evidence under the headings it used.

(1) Proposed affidavit evidence that Janssen has not engaged in any anti-competitive acts

[28] Janssen proposes four areas of affidavit evidence related to its position refuting that it has engaged in anti-competitive acts.

[29] First, Janssen seeks to introduce evidence that its product called Finlius is not a "fighting brand" and was not introduced for reasons related to patent litigation. Janssen proposes to submit confidential evidence as to why Finlius was introduced.

[30] Second, Janssen seeks to introduce evidence that the pricing of Stelara and Finlius is comparable to biosimilar alternatives, and to respond to two allegations made by JAMP – i.e., that Janssen has not lowered the price of Stelara in response to the introduction of biosimilars, and that Janssen is engaging in predatory pricing with respect to Finlius. Janssen proposes to submit confidential evidence about what it did as a competitive response to the introduction of ustekinumab biosimilars and about the pricing of Stelara and Finlius.

[31] Third, Janssen seeks to introduce evidence that it "did not mislead anyone" about Finlius or its patient support program, noting that JAMP adduced no direct evidence that it did. Janssen proposes to submit confidential evidence about what it did do in its marketing efforts. It also proposes evidence that its patient support program will support patients prescribed with one biosimilar alternative.

[32] JAMP's position on these first three areas is that this evidence is not appropriate for a section 103.1 leave application as it goes to the "heart of the dispute" and therefore, should be left to the application on the merits under section 79.

[33] Having considered the parties' submissions in light of JAMP's position on the section 103.1 leave application, as well as the contents of sections 78 and 79 of the *Competition Act*, I conclude that Janssen should be granted leave to file focussed responding affidavit evidence on these three topics, subject to certain conditions described below. The same conditions will also apply to other areas of proposed evidence requested by Janssen.

[34] On the first topic, evidence related to the allegation of a "fighting brand" is relevant to one or more elements of section 79, namely, whether the respondent engaged in a "practice of anti-competitive acts" under paragraph 79(1)(a) and/or engaged in relevant "conduct" under paragraph 79(1)(b): see the description of the "anti-competitive act" in paragraph 78(1)(d). While JAMP may be right that this area of evidence goes to the "heart of the dispute" under section 79, that

characterization alone does not preclude any and all evidence from the respondent on the subject at this stage. The absence of a “fighting brand” is a relevant topic for consideration in the section 103.1 leave application. The Tribunal can assess whether JAMP’s evidence could, in light of Janssen’s, lead to an order under section 79, on the lower standard of proof applicable at the leave stage.

[35] I have greater concerns about whether Janssen’s second proposed area is sufficiently discrete and precise for responding affidavit evidence, given the possible scope and complexity of the proposed evidence on product pricing (including evidence that could show an absence of predatory pricing). Without some limitations, evidence on these issues could easily become unwieldy for a section 103.1 leave application. It is not the Tribunal’s role on a section 103.1 leave application to make findings of fact that are properly made by a panel on a subsequent section 79 application on the merits. However, Janssen’s proposed area is relevant to the same aspects of paragraphs 79(1)(a) and (b) as its first proposed area of evidence, and to a possible anti-competitive act described in paragraph 78(1)(j).

[36] Janssen should be permitted to adduce focussed evidence in response if that evidence supports a finding that no order “could” be made under section 79 as a result of JAMP’s allegations and evidence on these topics.

[37] In my view, to be acceptable on the section 103.1 leave application, Janssen’s evidence in this area must be limited to factual (not expert) evidence and be tailored to negate or respond directly to JAMP’s factual allegations, keeping in mind the legal test and requirements under section 103.1 (including the requirement for credible, cogent and objective evidence at this stage). It also bears reinforcing that the role of a single judicial member of the Tribunal on the leave application is a summary and screening role, and is more constrained than the panel’s role in deciding a section 79 application on its merits.

[38] The third area proposed by Janssen also raises some concerns about scope and whether the responding evidence will be sufficiently specific. Janssen will be granted leave to file affidavit evidence related to its marketing and communications for Finlius, as actually implemented, including its communications scripts and training provided to its salesforce and BioAdvance coordinators concerning Finlius and the introduction of a biosimilar to its patient support program. In addition, to the extent that the proposed evidence about Janssen’s marketing and communications “strategies” may be material to its subjective or objective competitive intention in engaging in these activities (an element in the chapeau language of subsection 78(1) and discussed in the section 79 cases), Janssen may adduce evidence about its “strategies”. This area of responding evidence is subject to the same conditions as stated in paragraph [37].

[39] Janssen will be granted leave to adduce evidence that its patient support program will support patients prescribed with one biosimilar alternative, as proposed.

[40] Fourth, Janssen seeks to introduce evidence to show that it is “patently false” that it has non-disclosure agreements with prescribers that prohibit them from communicating with sales representatives of competitors. On this area of proposed evidence, JAMP contended in response that Janssen’s submissions had mischaracterized its allegations related to Janssen’s interactions with healthcare professionals and the alleged terms of non-disclosure agreements. In reply, Janssen

maintained that JAMP's submissions had expanded its original claim, but that Janssen was prepared and proposed to address the broadened claim with proposed affidavit evidence.

[41] Janssen may adduce evidence in this area that is responsive to the original allegations and factual evidence filed by JAMP on its section 103.1 leave application, and the terms of its agreements, if any, with prescribers who are on advisory boards. To be clear: the scope of allegations and responding evidence shall not be expanded by the positions taken on this motion.

(2) Proposed affidavit evidence that JAMP could not have been directly and substantially affected

[42] Janssen's position is that JAMP's claims regarding the effects of Janssen's alleged conduct do not paint an accurate picture of the competition between Stelara, Finlius, and biosimilars, or the public and private insurance landscape. While Janssen has proposed more discrete areas related to this position (discussed immediately below) which may need to be placed in some factual context tailored for the section 103.1 leave application, I emphasize that Janssen is not granted leave to file wide-ranging evidence about the competitive or payor landscape, akin to what might be introduced on the merits of a section 79 application.

[43] First, Janssen seeks to introduce evidence that JAMP's product, Jamteki, is not indicated for the majority of ustekinumab patients and that Jamteki cannot be marketed for most ustekinumab patients because of its medical classification. On this area of proposed evidence, JAMP contended that some or all of the facts are already in evidence before the Tribunal. While Janssen did not reply to confirm one way or the other, I conclude that Janssen may adduce its own evidence on this topic. This evidence relates to subparagraph 79(1)(b)(i) and to whether the applicant is substantially affected in its business by the respondent's alleged practices. Counsel's submissions will be able to address (among other things) any discrepancies that may be identified between the parties' evidence of permitted indications, and their possible impact.

[44] Second, Janssen seeks to introduce evidence that Stelara is being delisted from public formularies and that Finlius is only available to private payors. This evidence will, according to Janssen, show that: (i) any alleged conduct cannot substantially prevent or lessen competition with respect to public insurers, which represent a substantial proportion of the market for ustekinumab, and (ii) Janssen will not be competing for public payors at all. Janssen advised that JAMP's allegations relating to its performance fail to take into account the effect of when the biologic is delisted and non-medical switching implemented by provincial authorities, rather than any conduct of Janssen.

[45] On this area of proposed evidence, JAMP argued that many facts are already in evidence and again that this evidence goes to the heart of the dispute between the parties under section 79.

[46] Janssen's proposed evidence goes to the determination of whether JAMP is substantially affected in its business under subsection 103.1(7). The proposed evidence also goes to at least one element of section 79, namely, the required effect on competition in subparagraph 79(1)(b)(i). Janssen will again have to ensure that its focussed evidence respects the scope and nature of a section 103.1 leave application as described above in paragraph [37].

[47] Third, Janssen seeks to introduce evidence that JAMP's comparison to Simlandi is misleading because Simlandi entered the market under very different circumstances. JAMP's response was that this evidence is inappropriate to consider on a section 103.1 leave application. I agree with JAMP. This proposed area invites considerable, wide-ranging evidence comparing two different proposed markets for the sale of two different products. Janssen is not granted leave to adduce affidavit evidence on this topic for the purposes of the section 103.1 leave application.

(3) Proposed affidavit evidence that JAMP is barred from bringing many of its claims

[48] Janssen seeks to introduce evidence that it contends is of "vital importance" to the Tribunal's gatekeeping function, namely, an agreement that would bar JAMP from advancing a significant portion of the claims in its draft notice of application under section 79. JAMP's response was that the agreement does not bar its claim and that the Tribunal has no legal jurisdiction to decide the issue. As noted earlier, Janssen disagreed in its reply to this motion.

[49] Janssen will be permitted to adduce evidence related to the agreement in question. The evidence goes to whether the applicant has relinquished its ability to allege in legal proceedings that the respondent engaged in anti-competitive conduct by purportedly "gaming" the regulatory system and engaging in sham litigation. These claims go at least to the allegation of a practice of anti-competitive acts under paragraph 79(1)(a) and the Tribunal's assessment under section 103.1 of whether it could make an order under section 79 in the circumstances.

[50] Related to the scope of this proposed evidence, I note that Janssen did not seek to introduce any extrinsic evidence related to the parties' intentions that may affect the interpretation of the agreement.

F. Conclusion

[51] Janssen will be granted leave to file factual affidavit evidence on this section 103.1 leave application as stated above and on the conditions set out in these Reasons.

[52] With respect to the timing of the respondent's filings, the parties traded submissions related to urgency and delay given the allegations of exclusionary conduct, and advised the Tribunal about their communications leading to this motion.

[53] Janssen requested to file its responding affidavit evidence by September 20, 2024, based on the "inherent time requirements" to prepare its evidence (without elaboration) and owing to pre-planned summer holidays for several key Janssen personnel (who were not named or their roles identified, nor were their vacation dates provided).

[54] Under subsection 103.1(6) and Rule 119(1), a respondent has 15 days to respond with written representations after receiving the Tribunal's notice under subsection 103.1(5). In this case, the Tribunal extended the filing deadline from Wednesday, August 21, to Monday, August 26, 2024, in order to deal with this motion.

[55] Given the circumstances leading to this motion, including the passage of time since the filing of JAMP's application and the Tribunal's notice, and the extent of the evidence for which leave has been granted under Rule 119(3), the time for delivery of materials (including Janssen's responding affidavit evidence) will be extended to Friday, September 6, 2024.

[56] Costs of this motion will be reserved to the Tribunal's disposition of the section 103.1 leave application.

[57] Counsel for the parties are directed to review these Reasons and confer, and to propose any necessary redactions arising from confidentiality claims within 3 business days of their receipt of this Order and Reasons.

FOR THE ABOVE REASONS, THE TRIBUNAL THEREFORE ORDERS THAT:

[58] Janssen is granted leave to file affidavit evidence concerning the areas identified in the Tribunal's Reasons for this Order and on the conditions described in the Reasons.

[59] The time for delivery of materials under subsection 103.1(6) and Rule 119(1), including Janssen's responding affidavit evidence, is extended to Friday, September 6, 2024.

[60] Costs of this motion are reserved to the Tribunal's disposition of the leave application under section 103.1.

DATED at Ottawa, this 22nd day of August, 2024

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

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Federal Court



Cour fédérale

Date: 20230717

Docket: T-2627-22

Citation: 2023 FC 870

Ottawa, Ontario, July 17, 2023

PRESENT: The Honourable Madam Justice Ayles

BETWEEN:

JANSSEN INC.

Applicant

and

**THE MINISTER OF HEALTH AND THE
ATTORNEY GENERAL OF CANADA**

Respondents

PUBLIC JUDGMENT AND REASONS
(Confidential version issued on June 21, 2023)

[1] The Applicant, Janssen Inc [Janssen], seeks judicial review of a decision of the Office of Submissions and Intellectual Property [OSIP] on behalf of the Minister of Health dated November 15, 2022. OSIP determined that Canadian Patent No. 3,113,837 [837 Patent] was not eligible to be added to the Patent Register against STELARA® with respect to two supplementary new drug submissions.

[2] While Janssen has raised a number of issues on this application, of central importance are the following two issues: (i) whether OSIP's decision that a supplemental new drug submission approved for additional safety data that could provide a clinician more confidence in prescribing a drug long-term is not a "change in use of the medicinal ingredient" as prescribed by subsection 4(3) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [*PMNOC Regulations*] if the approved indication never included a temporal restriction on its use was reasonable; and (ii) whether the Canadian patent filing date requirement in subsection 4(6) of the *PMNOC Regulations* is *ultra vires* the *Patent Act*.

[3] For the reasons that follow, I am not satisfied that Janssen has demonstrated that there is any basis for the Court's intervention. Accordingly, the application for judicial review shall be dismissed in its entirety, with costs.

I. Background

A. *Drug Approval under the Food and Drug Regulations*

[4] Drug manufacturers who wish to advertise or sell a new drug in Canada must first obtain a Notice of Compliance [NOC] pursuant to the *Food and Drug Regulations*, CRC, c 870, by filing a drug submission with the Minister.

[5] The *Food and Drug Regulations* refer to several types of drug submissions, including a new drug submission [NDS] and a supplemental new drug submission [SNDS]. An NDS is

typically filed by the innovator drug manufacturer in order to obtain an NOC. An NDS contains a variety of clinical, non-clinical, chemistry and manufacturing data relating to the safety, efficacy and quality of the drug. The Minister evaluates this information to determine whether the drug meets the regulatory requirements in order to initially approve the drug for sale on the Canadian market. After an NOC for an NDS is issued, a manufacturer will typically continue to file information about the drug. Significant changes made to the information or material contained in the NDS are made by filing an SNDS. An NOC is also issued by the Minister for each approved SNDS.

B. *Product Monographs*

[6] As part of the drug review process for an NDS or SNDS, Health Canada reviews a Product Monograph which is a factual, scientific document that describes a drug product's properties, claims, indications, contra-indications, conditions, dosage, administration and any other relevant information that may be required for the optimal, safe and effective use of the drug. The "Indications and Clinical Use" section of a Product Monograph, among other things, lists the uses for which the drug has been approved through the issuance of an NOC.

C. *The PMNOC Regulations*

[7] The *PMNOC Regulations*, which were enacted in 1993 and have subsequently been amended on a number of occasions, were promulgated pursuant to the authority granted to the Governor in Council by subsection 55.2(4) the *Patent Act*, RSC 1985, c P-4, which provides:

The Governor in Council may make regulations respecting the infringement of any patent that, directly or indirectly, could result or results from the making, construction, use or sale of a patented invention in accordance with subsection (1), including regulations

(a) respecting the conditions that must be fulfilled before a document — including a notice, certificate or permit — concerning any product to which a patent may relate may be issued to any person under any Act of Parliament that regulates the manufacture, construction, use or sale of that product, in addition to any conditions provided for by or under that Act;

(b) respecting the earliest day on which such a document may be issued to a person and the earliest day on which it may take effect, and respecting the manner in which each day is to be determined;

(c) respecting the issuance, suspension or revocation of such a document in circumstances where, directly or indirectly, the document's issuance could result or results in the infringement of a patent;

(d) respecting the prevention and resolution of disputes with respect to the day on which such a document may be issued or take effect;

(e) respecting the prevention and resolution of disputes with respect to the infringement of a patent that could result directly or indirectly from the manufacture, construction, use or sale of a product referred to in paragraph (a);

Le gouverneur en conseil peut, par règlement, régir la contrefaçon de tout brevet qui résulte ou pourrait résulter, de façon directe ou autrement, de la fabrication, de la construction, de l'utilisation ou de la vente, au titre du paragraphe (1), d'une invention brevetée, et notamment :

a) régir les conditions complémentaires nécessaires à la délivrance à quiconque, relativement à un produit auquel peut se rapporter un brevet, de tout titre — avis, certificat, permis ou autre — en vertu de lois fédérales régissant la fabrication, la construction, l'utilisation ou la vente d'un tel produit;

b) régir la première date à laquelle un tel titre peut être délivré et celle à laquelle il peut prendre effet, ainsi que la manière de fixer chacune de ces dates;

c) régir la délivrance, la suspension ou la révocation d'un tel titre lorsque la délivrance de celui-ci entraîne ou pourrait entraîner, de façon directe ou autrement, la contrefaçon d'un brevet;

d) régir la prévention et le règlement de différends portant sur la date à laquelle un tel titre peut être délivré ou prendre effet;

e) régir la prévention et le règlement de différends portant sur la contrefaçon d'un brevet qui pourrait résulter, de façon directe ou autrement, de la fabrication, de la construction, de l'utilisation ou de la vente d'un produit visé à l'alinéa a);

f) régir le règlement de différends portant sur la contrefaçon d'un brevet qui résulte, de façon directe ou autrement, de la fabrication, de la

- (f) respecting the resolution of disputes with respect to the infringement of a patent that results directly or indirectly from the manufacture, construction, use or sale of such a product;
- (g) conferring rights of action with respect to disputes referred to in any of paragraphs (d) to (f);
- (h) restricting or excluding the application of other rights of action under this Act or another Act of Parliament to disputes referred to in any of paragraphs (d) to (f);
- (i) designating the court of competent jurisdiction in which a proceeding with respect to rights of action referred to in paragraph (g) is to be heard;
- (j) respecting such proceedings, including the procedure of the court in the matter, the defences that may be pleaded, the remedies that may be sought, the joinder of parties and of rights of action and the consolidation of other proceedings, the decisions and orders the court may make and any appeals from those decisions and orders; and
- (k) specifying who may be an interested person for the purposes of subsection 60(1) with respect to disputes referred to in paragraph (e).
- construction, de l'utilisation ou de la vente d'un tel produit;
- g) conférer des droits d'action concernant les différends visés à l'un ou l'autre des alinéas d) à f);
- h) limiter ou interdire le recours à d'autres droits d'action prévus par toute loi fédérale concernant les différends visés à l'un ou l'autre des alinéas d) à f);
- i) désigner le tribunal compétent à l'égard des procédures résultant de l'exercice des droits d'action visés à l'alinéa g);
- j) régir ces procédures, notamment la procédure devant ce tribunal, les moyens de défense qui peuvent être invoqués, les conclusions qui peuvent être recherchées, la jonction de parties, la réunion de droits d'action ou d'autres procédures, les décisions et ordonnances qui peuvent être rendues ainsi que les appels de ces décisions et ordonnances;
- k) préciser qui peut être un intéressé pour l'application du paragraphe 60(1) dans le cadre des différends visés à l'alinéa e).

[8] As confirmed by the Supreme Court of Canada in *AstraZeneca Canada Inc v Canada (Minister of Health)*, 2006 SCC 49 at paragraph 12, the *PMNOC Regulations* lie at the intersection of two regulatory systems with sometimes conflicting objectives – (i) the law governing the approval of new drugs (*Food and Drug Act*) with the objective of encouraging the bringing of safe

and effective medicines to market to advance the nation's health; and (ii) patent protection provided to innovators under the *Patent Act*.

[9] The Regulatory Impact Analysis Statement [RIAS] related to the 2006 amendments to the *PMNOC Regulations* describes the balancing function as follows:

The Government's pharmaceutical patent policy seeks to balance effective patent enforcement over new and innovative drugs with the timely market entry of their lower priced generic competitors. The current manner in which that balance is realized was established in 1993, with the enactment of Bill C-91, the *Patent Act Amendment Act*, 1992, S.C. 1993, c. 2.

On the one end of the balance lies subsection 55.2(1) of the *Patent Act*, better known as the "early-working" exception. In the pharmaceutical industry, early-working allows second and subsequent entry drug manufacturers (typically generic drug companies) to use a patented innovative drug for the purpose of seeking approval to market a competing version of that drug. Normally, conduct of this kind would constitute patent infringement but an exception has been made so that generic drug companies can complete Health Canada's regulatory approval process while the equivalent innovative drug is still under patent, in order to be in a position to enter the market as soon as possible after patent expiry. The generic pharmaceutical industry estimates that early-working can accelerate the market entry of its products in Canada by some three to five years.

The PM(NOC) Regulations represent the other half of the balance. As explained in the original Regulatory Impact Analysis Statement (RIAS) which accompanied their passage in 1993, in creating the early-working exception, Bill C-91 removed an exclusive right otherwise available to patentees and the PM(NOC) Regulations are therefore required "...to ensure that this new exception to patent infringement is not abused by generic drug applicants seeking to sell their products during the term of the competitor's patent..." The PM(NOC) Regulations do this by linking Health Canada's ability to approve a generic drug to the patent status of the equivalent innovative product the generic seeks to copy. Under the current scheme, a generic drug company which compares its product directly or indirectly with a patented, innovative drug in order to

establish the former's safety and efficacy and secure marketing approval from Health Canada (which comes in the form of a "notice of compliance" or "NOC") must make one of two choices. It can either agree to await patent expiry before obtaining its NOC or make an allegation justifying immediate market entry that is either accepted by the innovator or upheld by the court.

Thus, while early-working is intended to promote the timely market entry of generic drugs by allowing them to undergo the regulatory approval process in advance of patent expiry, the PM(NOC) Regulations are intended to provide effective patent enforcement by ensuring the former does not result in the actual issuance of a generic NOC until patent expiry or such earlier time as the court or innovator considers justified having regard to the generic company's allegations. Despite their seemingly competing policy objectives, it is important that neither instrument be considered in isolation as the intended policy can only be achieved when the two operate in a balanced fashion.

D. *The Patent Register*

[10] The Minister maintains a Patent Register, which is a list of patents and certifications of supplementary protection associated with each approved drug. Pursuant to subsections 3(2) to 3(8) of the *PMNOC Regulations*, the Minister has the discretion to maintain the Patent Register, including the ability to add or delete patents in various prescribed circumstances.

[11] A "first person" who files an NDS or SNDS may, pursuant to subsection 4(1) of the *PMNOC Regulations*, submit to the Minister a patent for listing on the Patent Register in respect of the drug for which approval is sought. A patent will only be added to the Patent Register if the Minister is satisfied that the relevant regulatory criteria are met.

[12] In the case of an SNDS, paragraph 4(3)(c) sets out the product specificity requirements that must be met for a patent to be listed on the Patent Register:

(3) A patent on a patent list in relation to a supplement to a new drug submission is eligible to be added to the register if the supplement is for a change in formulation, a change in dosage form or a change in use of the medicinal ingredient, and

[...]

(c) in the case of a change in use of the medicinal ingredient, the patent contains a claim for the changed use of the medicinal ingredient that has been approved through the issuance of a notice of compliance in respect of the supplement.

(3) Est admissible à l'adjonction au registre tout brevet, inscrit sur une liste de brevets, qui se rattache au supplément à une présentation de drogue nouvelle visant une modification de la formulation, une modification de la forme posologique ou une modification de l'utilisation de l'ingrédient médicinal, s'il contient, selon le cas :

c) dans le cas d'une modification d'utilisation de l'ingrédient médicinal, une revendication de l'utilisation modifiée de l'ingrédient médicinal, l'utilisation ayant été approuvée par la délivrance d'un avis de conformité à l'égard du supplément.

[13] Subsection 4(4) of the *PMNOC Regulations* prescribe what must be included in a patent list:

A patent list shall contain the following:

(a) an identification of the new drug submission or the supplement to a new drug submission to which the list relates;

(b) the medicinal ingredient, brand name, dosage form, strength, route of administration and use set out in the new drug submission or the

La liste de brevets comprend :

a) l'identification de la présentation de drogue nouvelle ou du supplément à la présentation de drogue nouvelle qui s'y rattachent;

b) l'ingrédient médicinal, la marque nominative, la forme posologique, la concentration, la voie d'administration et l'utilisation prévus à la

supplement to a new drug submission to which the list relates;

(c) for each patent on the list, the patent number, the filing date of the patent application in Canada, the date of grant of the patent and the date on which the term limited for the duration of the patent will expire under section 44 or 45 of the Patent Act;(d) for each patent on the list, a statement that the first person who filed the new drug submission or the supplement to a new drug submission to which the list relates

is the owner of the patent,

has an exclusive licence to the patent or to a certificate of supplementary protection in which that patent is set out, or

(iii) has obtained the consent of the owner of the patent to its inclusion on the list;

(e) the address in Canada for service, on the first person, of a notice of allegation referred to in paragraph 5(3)(a) or the name and address in Canada of another person on whom service may be made with the same effect as if service were made on the first person; and

(f) a certification by the first person that the information submitted under this subsection is accurate and that each patent on the list meets the eligibility requirements of subsection (2) or (3).

présentation ou au supplément qui s’y rattachent;

c) à l’égard de chaque brevet qui y est inscrit, le numéro de brevet, la date de dépôt de la demande de brevet au Canada, la date de délivrance de celui-ci et la date d’expiration du brevet aux termes des articles 44 ou 45 de la *Loi sur les brevets*;

d) à l’égard de chaque brevet qui y est inscrit, une déclaration portant que la première personne qui a déposé la présentation de drogue nouvelle ou le supplément à une présentation de drogue nouvelle qui s’y rattache :

(i) soit en est le propriétaire,

(ii) soit en détient la licence exclusive ou détient une telle licence à l’égard d’un certificat de protection supplémentaire qui mentionne ce brevet,

(iii) soit a obtenu le consentement du propriétaire pour l’inscrire sur la liste;

e) l’adresse au Canada de la première personne aux fins de signification de l’avis d’allégation visé à l’alinéa 5(3)a) ou les nom et adresse au Canada d’une autre personne qui peut en recevoir signification comme s’il s’agissait de la première personne elle-même;

f) une attestation de la première personne portant que les renseignements fournis aux termes du présent paragraphe

sont exacts et que chaque brevet qui y est inscrit est conforme aux conditions d'admissibilité prévues aux paragraphes (2) ou (3).

[14] The *PMNOC Regulations* also prescribe timing requirements related to patent listing, which depend on when the patent is issued. Specifically, subsections 4(5) and (6) provide:

(5) Subject to subsection (6), a first person who submits a patent list must do so at the time the person files the new drug submission or the supplement to a new drug submission to which the patent list relates.

(6) A first person may, after the date of filing of a new drug submission or a supplement to a new drug submission, and within 30 days after the issuance of a patent that was issued on the basis of an application that has a filing date in Canada that precedes the date of filing of the submission or supplement, submit a patent list, including the information referred to in subsection (4), in relation to the submission or supplement.

(5) Sous réserve du paragraphe (6), la première personne qui présente une liste de brevets doit le faire au moment du dépôt de la présentation de drogue nouvelle ou du supplément à une présentation de drogue nouvelle qui s'y rattachent.

(6) La première personne peut, après la date de dépôt de la présentation de drogue nouvelle ou du supplément à une présentation de drogue nouvelle et dans les trente jours suivant la délivrance d'un brevet faite au titre d'une demande de brevet dont la date de dépôt au Canada est antérieure à celle de la présentation ou du supplément, présenter une liste de brevets, à l'égard de cette présentation ou de ce supplément, qui contient les renseignements visés au paragraphe (4).

[15] As such, only patents that have a filing date in Canada before the filing date of an SNDS are eligible to be added to the Patent Register.

[16] For the purpose of the administration of the patent list, the Minister utilizes a form entitled “Form IV” that the Minister requires be completed by each first person. Form IV states in its header in bold to “COMPLETE ONE FORM PER PATENT PER SUBMISSION”.

[17] Having a patent listed on the Patent Register in relation to a particular drug affords significant protections to an innovator. If a second person files a drug submission that directly or indirectly compares their drug with, or makes reference to, a first person’s drug that is marketed in Canada under an NOC and which has one or more patents listed on the Patent Register, the second person must, pursuant to subsection 5(1) and (2.1) of the *PMNOC Regulations*, address each listed patent. One manner of addressing a listed patent is to serve on the first person a notice of allegation [NOA], pursuant to subsection 5(2.1)(c), alleging that the listed patent is invalid or would not be infringed by the second person making, constructing, using or selling their drug product. The first person then has the right, within 45 days of being served with a NOA, to bring an action against the second person pursuant to subsection 6(1) seeking a declaration that making, constructing, using or selling of the second person’s drug product in accordance with the second person’s drug submission would infringe the listed patent(s) addressed in the NOA. When such an action is brought, the Minister is prohibited from issuing a NOC to the second person for 24 months from the date of commencement of the action or such other periods of time prescribed by subsection 7(1) of the *PMNOC Regulations*.

[18] However, not all patents will receive the aforementioned protection afforded by the regulatory regime simply by relating to a drug for which an NOC has been issued. Only those

patents that meet the product specificity and timing requirements of the *PMNOC Regulations* will benefit from the regime's protections.

E. STELARA®

[19] STELARA® is a Schedule D biologic drug containing the medicinal ingredient ustekinumab [STELARA]. First approved in Canada in December of 2008 for the treatment of psoriasis, STELARA has since gained approvals for several other indications including its use to treat plaque psoriasis, active psoriatic arthritis and moderately to severely active Crohn's disease.

[20] There are currently no patents listed on the Patent Register in respect of STELARA. Canadian Patent No. 2,418,961 was previously listed on November 17, 2009, but expired on August 9, 2021.

[21] Health Canada's "Submissions Under Review" page shows at least one company has filed a submission for approval of a biosimilar of STELARA in January of 2023.

(1) SNDS 244739

[22] On February 15, 2019, the Applicant filed SNDS 224739 [SNDS 739] seeking approval for a new use of STELARA for the treatment of adult patients with moderately to severely active ulcerative colitis and updates to the Product Monograph. Supporting studies were submitted, including approximately one year of data (44 weeks) from a UNIFI-M maintenance study.

[23] On January 23, 2020, the Minister approved the use of STELARA for the treatment of ulcerative colitis, issuing an NOC for SNDS 739. The NOC stated, under the heading “Reasons for Supplement”:

New indication: The treatment of adult patients with moderately to severely active ulcerative colitis who have had an inadequate response with, lost response to, or were intolerant to either conventional therapy or a biologic or have medical contraindications to such therapies.

[24] The “Dosage and Administration” section of the approved Product Monograph included a recommended induction treatment regimen for ulcerative colitis, as well as a recommended maintenance dose regimen. No temporal limitation on the duration of treatment was included in the Product Monograph. Put differently, the NOC for SNDS 739 did not approve the use of STELARA to treat ulcerative colitis for a limited period of time.

(2) SNDS 244670

[25] On October 1, 2020, Janssen filed SNDS 244670 [SNDS 670] seeking to update the Product Monograph of STELARA with updated two-year safety and efficacy data (96 weeks) from the same on-going UNIFI-M study on its use for ulcerative colitis (which use had been previously approved with SNDS 739).

[26] The Clinical Evaluation Executive Summary notes, under the heading “Subject”, that SNDS 670 is to “update the product monograph to include results from the long-term extensions

of two Phase 3 studies for the treatment of adult patients with moderately to severely active Crohn's disease or ulcerative colitis".

[27] Both the General Note to Reviewer and Regulatory Executive Summary notes the purpose of the submission was to provide data on safety and efficacy of STELARA through five years of treatment in subjects with Crohn's disease and two years of treatment in subjects with ulcerative colitis, including relevant data in regard to a post-marketing adverse drug reaction for hypersensitivity vasculitis.

[28] Janssen indicated in the Product Information Regulatory Process Form for SNDS 670 that "there [were] no changes to the indication/Use/Dosage (including the maximum daily dose)".

[29] On September 9, 2021, Health Canada issued an NOC for SNDS 670. Under the heading "Reason for Supplement", the NOC states "Updates to the Product Monograph". The approval resulted in two changes to the Product Monograph, as shown in bold and underlined below:

Product Monograph (SNDS 739)	Product Monograph (SNDS 670)
(1) In the "Clinical Trial Adverse Drug Reactions" section addressing adverse drug reactions reported in studies related to ulcerative colitis, on page 12:	
The safety of STELARA®/STELARA® I.V. was evaluated in two randomized, double-blind, placebo-controlled studies (UNIFI-I and UNIFI-M) in 960 adult patients with moderately to severely active ulcerative colitis. The overall safety profile was similar for patients	The safety of STELARA®/STELARA® I.V. was evaluated in two randomized, double-blind, placebo-controlled studies (UNIFI-I and UNIFI-M) in 960 adult patients with moderately to severely active ulcerative colitis. The overall safety profile was similar for patients with psoriasis, psoriatic

<p>with psoriasis, psoriatic arthritis, Crohn's disease and ulcerative colitis.</p>	<p>arthritis, Crohn's disease and ulcerative colitis.</p> <p><u>The safety profile remaining generally consistent throughout the Week 96 safety analysis.</u></p>
<p>(2) In the "Study and Demographics and Trial Design" section on page 58:</p>	
<p>The maintenance study (UNIFI-M), evaluated 523 patients who achieved clinical response at Week 8 following the administration of STELARA® I.V. in UNIFI-I. These patients were randomized to receive a subcutaneous maintenance regimen of either 90 mg of STELARA® every 8 weeks, 90 mg STELARA® every 12 weeks or placebo for 44 weeks. Randomization was stratified by clinical remission status at maintenance baseline (yes/no), oral corticosteroid use at maintenance baseline (yes/no), and induction treatment.</p> <p>The primary endpoint was the proportion of patients in clinical remission at Week 44. Secondary endpoints included the proportion of patients maintaining clinical response through Week 44, the proportion of patients with improvement of endoscopic appearance of the mucosa at Week 44, the proportion of patients with corticosteroid-free clinical remission at Week 44, and the proportion of patients maintaining clinical remission through Week 44 in patients who achieved clinical remission 8 weeks after induction.</p>	<p>The maintenance study (UNIFI-M), evaluated 523 patients who achieved clinical response at Week 8 following the administration of STELARA® I.V. in UNIFI-I. These patients were randomized to receive a subcutaneous maintenance regimen of either 90 mg of STELARA® every 8 weeks, 90 mg STELARA® every 12 weeks or placebo for 44 weeks. Randomization was stratified by clinical remission status at maintenance baseline (yes/no), oral corticosteroid use at maintenance baseline (yes/no), and induction treatment.</p> <p>The primary endpoint was the proportion of patients in clinical remission at Week 44. Secondary endpoints included the proportion of patients maintaining clinical response through Week 44, the proportion of patients with improvement of endoscopic appearance of the mucosa at Week 44, the proportion of patients with corticosteroid-free clinical remission at Week 44, and the proportion of patients maintaining clinical remission through Week 44 in patients who achieved clinical remission 8 weeks after induction.</p> <p><u>Patients who completed the maintenance study through Week 44 were eligible to continue treatment through Week 96.</u></p>



(3) The 837 Patent

[30] On September 24, 2019, Janssen filed in Canada a patent application for the 837 Patent. The 837 Patent, entitled “Safe and effective method of treating ulcerative colitis with anti-IL-12/IL23 antibody”, claims priority from three U.S. provisional patents applications, the earliest one having been filed on September 24, 2018.

[31] The 837 Patent contains 68 claims generally directed toward the use of an anti-IL-12/IL-23p40 antibody (including ustekinumab) for the treatment of moderately to severely active ulcerative colitis, where the subject failed to respond to or was intolerant of at least one enumerated therapy or the subject demonstrated corticosteroid dependence and compositions for use in such treatment.

[32] The claims of the 837 Patent are directed to the treatment of ulcerative colitis, including numerous claims where the clinical response of the subject “continues at least 44 weeks after week 0”.

[33] The 837 Patent was issued on July 12, 2022.

[34] On July 25, 2022, Janssen sought to list the 837 Patent in relation to SNDS 670 by submitting three Form IVs for the 837 Patent (one for each DIN).

[35] No Form IV was ever submitted for the 837 Patent in relation to SNDS 739. The deadline by which Janssen could have submitted a patent list for SNDS 739 (as prescribed by subsection 4(6) of the *PMNOC Regulations*) was August 11, 2022. There is no evidence in the record as to why this was not done.

F. OSIP's Preliminary Decision

[36] By letter dated July 29, 2022, OSIP acknowledged receipt of Janssen's patent lists for the 837 Patent in relation to SNDS 670. OSIP advised Janssen, in detail, of the basis for its preliminary view that SNDS 670 was not approved for a change in use of the medicinal ingredient and as such, SNDS 670 did not provide a basis to list the 837 Patent. Even if SNDS was considered to be approved for a change in use of a medicinal ingredient, OSIP advised that its preliminary view was that the 837 Patent did not contain a claim to the very change sought for approval in the submission.

[37] OSIP also noted the existence of SNDS 739 and that had a patent list been submitted in respect of the 837 Patent and SNDS 739, it would not meet the timing requirements of subsection 4(6), as the filing date for SNDS 739 was February 15, 2019 and the date of filing in Canada of the 837 Patent was subsequent to that date.

[38] OSIP requested that Janssen provide representations as to the eligibility of the 837 Patent for listing on the patent register in respect of SNDS 670.

G. Janssen's Response to the Preliminary Decision

[39] By letter dated September 14, 2022, Janssen provided detailed submissions in response to OSIP's request. With respect to SNDS 670, Janssen asserted that the 837 Patent claims [REDACTED] are a new method of use approved through SNDS 670, which is the submission against which Janssen originally sought listing on July 19, 2022. Janssen asserted that it was of the view that the 837 Patent is also listable as against SNDS 739 and that there are in fact no timing issues under subsection 4(6) as the only rational date to be used is the claim date and not the Canadian filing date. Janssen asserted that the use of the Canadian filing date in the *PMNOC Regulations* was illogical, arbitrary and *ultra vires* the scheme of the *Patent Act* and of the *PMNOC Regulations* themselves. Janssen asserted that OSIP ought to apply the intent of the *PMNOC Regulations* with respect to the timing of the patent and the submission under subsection 4(6) and when the claim date is properly applied, the 837 Patent is listable.

[40] In relation to Janssen's request that the 837 Patent also be listed in relation to SNDS 739, Janssen stated at footnote 2 of its submission:

As a patent list was already submitted with respect to the '837 Patent within the requisite 30 days of its issuance we trust that the OPML will not consider this request to be out of time under subsection 4(6) of the *Regulations*. Further, we understand that the OPML has already considered the listing of the '837 Patent against SNDS 224739, as reflected in the Letter. If the OPML rejects this request, then we respectfully request that the OPML advise us of the reason and allow us an opportunity to respond.

[41] For reasons unknown to the Court, Janssen did not include a Form IV with its submission in relation to SNDS 739 and the 837 Patent.

[42] In support of its assertion that the 837 Patent claims [REDACTED] are a new method of use approved through SNDS 670, Janssen asserted that a clinician reviewing the new Product Monograph approved with SNDS 670 would change their prescribing practices, especially a clinician who may have been otherwise hesitant to prescribe STELARA beyond 44 weeks. Janssen supported this assertion regarding a clinician's understanding of the new additions to the Product Monograph with an expert statement from Dr. Brian Feagan and two publications.

[43] With respect to the publications, Janssen made the following submissions:

A clinician's understanding of the additions to the Product Monograph is also reflected in publications reporting on the data collected for the treatment of patients with ustekinumab up to Week 96, including Panaccione R, et al. Ustekinumab is effective and safe for ulcerative colitis through 2 years of maintenance therapy. *Aliment Pharmacol Ther.* 2020; **52**: 1658-1675 ("Panaccione (2020)"; enclosed). Panaccione (2020) concluded that the "efficacy of ustekinumab in patients with [ulcerative colitis] was sustained through 92 weeks" (abstract), that "[r]ates of symptomatic remission were maintained from Week 44 through Week 92" (page 1671), and that "[t]he results reported here in patients with moderately-to-severely active [ulcerative colitis], together with both clinical trial and registry data confirm the positive long-term efficacy and safety profile of ustekinumab-treated patients" (page 1672). With respect to safety, Panaccione (2020) concluded that "[n]o new safety signals were observed" (abstract) and that "[t]he safety profile observed for ustekinumab in the second year of maintenance treatment was consistent with that reported through the first year during the maintenance study and with the established ustekinumab safety profile" (page 1672). [...]

The importance of safety data for ustekinumab beyond one year was also stated in an integrated safety study, Sandborn WJ, et al. Safety

of Ustekinumab in Inflammatory Bowel Disease: Pooled Safety Analysis Results from Phase 2/3 Studies. *Inflamm Bowel Dis*. 2021; **27(7)**: 994-1007 (“Sandborn (2021)”, enclosed). Sandborn (2021) pooled data from six studies, including the UNIFI study for ulcerative colitis, through one year. The authors concluded (pages 1006-7):

Though these and previously reported findings are reassuring, longer-term longitudinal data and larger (eg, real-world observational) studies are ongoing to confirm current findings of no increased malignancy risk with IL-12/23 inhibition.

...

There are several limitations to this study. In a lifetime disease, 1 year of treatment is relatively short; longer-term data will be needed to further support these findings. This may limit comparisons, especially for long latency events like malignancies or certain infections. Although the data contained in this article are only from clinical trials, limitations on interpretation may differ from outcomes observed in real-world.

The information added to the Stelara Product Monograph via SNDS 24470 thus provided clinicians with support of the safety findings made one year after that Sandborn (2021) indicated was required.

[Emphasis in original.]

[44] With respect to the expert statement of Dr. Feagan, Dr. Feagan is a gastroenterologist at London Health Sciences Centre and a Professor of Medicine at the Schulich School of Medicine and Dentistry at Western University, with a research focus on the design, conduct and execution of large-scale randomized controlled trials in Crohn’s disease and ulcerative colitis. Dr. Feagan’s mandate was to: (i) provide brief background information on ulcerative colitis and its treatment options (including STELARA); and (ii) to advise how, if at all, a clinician’s prescribing practices would be influenced by the additions to the STELARA Product Monograph arising from the NOC

for SNDS 670. Dr. Feagan provided no evidence in relation to the aforementioned publications relied upon by Janssen.

[45] While Janssen did not make specific submissions related to Dr. Feagan's evidence (other than as detailed in paragraph 42 above), Dr. Feagan opined that community gastroenterologists (who are gastroenterologists not located in a teaching or research hospital) would "take comfort" in the additional information (as it would "alleviate fears relating to potential side effects") and would be more willing to prescribe or be more comfortable prescribing STELARA based on the additional information contained in the Product Monograph.

II. The Decision under Review

[46] On November 15, 2022, OSIP provided Janssen with its final decision. OSIP found that SNDS 670 was not approved for a change in formulation, change in dosage form or change in use of the medicinal ingredient and did not present an opportunity to list a patent on the Patent Register in accordance with subsection 4(3) of the *PMNOC Regulations*. OSIP noted that SNDS 670 amended STELARA's Product Monograph to include updated safety and efficacy data generated through an on-going study, which was the very same on-going study that had been previously included in the Product Monograph for SNDS 739. OSIP considered the text, context and purpose of subsection 4(3) of the *PMNOC Regulations*, the relevant jurisprudence and the submissions of Janssen, before concluding that updating the safety information in the product monograph did not result in a change in use in SNDS 670.

[47] OSIP went on to examine whether the 837 Patent would have been eligible for listing if one were to assume that SNDS 670 was in fact for a change in use. However, OSIP found that the 837 Patent did not contain a claim to the very change that Janssen alleged was approved by the NOC for SNDS 670 as required by subsection 4(3).

[48] In relation to SNDS 739, OSIP determined that Janssen had not filed a patent list to add the 837 Patent to the Patent Register against SNDS 739. The OSIP went on to find that, even if Janssen had submitted a patent list to add the 837 Patent against SNDS 739, Janssen would not have met the timing requirements in subsection 4(6) of the *PMNOC Regulations*, as the 837 Patent application was filed in Canada after the filing date of SNDS 739. OSIP held that to consider the claim date/priority date (as opposed to the Canadian filing date) as the appropriate date when assessing the application of subsection 4(6) as urged by Janssen would be to ignore the clear words of the *PMNOC Regulations*, circumvent the strict timing requirements and undo the balance struck by the *PMNOC Regulations* and subsection 55.2(1) of the *Patent Act*.

III. Issue and Standard of Review

[49] This application raises the following issues:

- A. Whether OSIP's decision not to add the 837 Patent to the Patent Register in relation to SNDS 670 and SNDS 739 was unreasonable and in particular:

- i. Whether OSIP's determination that SNDS 670 was not approved for a change in use of the medicinal ingredient was unreasonable;
- ii. Whether OSIP's determination that the 837 Patent was not eligible to be added to the Patent Register as it did not meet the product specificity requirements of paragraph 4(3)(c) was unreasonable; and
- iii. Whether OSIP's determination that Janssen failed to provide a patent list in relation to SNDS 739 was unreasonable.

B. Whether the Canadian filing date requirement in subsection 4(6) of the *PMNOC Regulations* is *ultra vires* the *Patent Act*.

[50] The parties agree and I concur that the first issue is reviewable on a standard of reasonableness. When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court must be able to trace the decision maker's reasoning without encountering any fatal flaws in the overarching logic and the Court must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the decision maker from the evidence before it to the conclusion at which it arrived [see *Vavilov, supra* at para 102].

[51] A number of elements will generally be relevant in evaluating whether a given decision is reasonable, including the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the decision maker and the potential impact of the decision on the individual to whom it applies [see *Vavilov, supra* at para 106].

[52] Where a decision involves a matter of statutory interpretation, the Court does not undertake a *de novo* analysis of the question. Rather, the Court still undertakes a reasonableness review, examining the administrative decision as a whole, including the reasons provided and the outcome reached. An administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. The modern principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements [see *Vavilov, supra* at para 115-116, 120, 121].

[53] The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenijj-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

[54] With respect to the second issue, both parties agree that the issue of whether the Canadian filing date requirement in subsection 4(6) of the *PMNOC Regulations* is *ultra vires* the *Patent Act* is reviewable on a reasonableness standard. However, they disagree as to whether, as the Respondent asserts, the pre-*Vavilov* case law (and in particular, *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64) remains instructive and applicable to *vires* challenges to regulations.

[55] Prior to *Vavilov*, the Supreme Court of Canada outlined the method to determine if regulations were *ultra vires* in *Katz, supra* at paragraphs 24 to 28. The *Katz* approach requires the party challenging the *vires* of the regulations to show that the regulations (which benefit from a presumption of validity) are inconsistent with the purposes and objectives of the enabling statute or the scope of the statutory mandate when read as a whole. The three parts to the *Katz* rule are: (1) the challenging party bears the burden of proof; (2) the Court is directed to take a broad and purposive approach to interpreting the challenged regulation and the enabling statute, consistent with general guidance on statutory interpretation; and (3) the challenging party must overcome the presumption that the regulations are valid, which can only be done by establishing that the regulations are irrelevant, extraneous or completely unrelated to objectives of the governing statute. In particular, the Supreme Court directs that a *vires* challenge does not involve assessing the policy merits of the regulations as the motives or other considerations (political, economic, social or partisan) are irrelevant.

[56] After *Vavilov* established a general framework for review of administrative decisions, this prompted a debate regarding the extent to which the principles established in *Katz* were affected

by *Vavilov*. Some decisions of this Court continued to be guided by the *Katz* approach, mindful of this debate [see *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at paras 66-72; *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at paras 73-76].

[57] The Federal Court of Appeal weighed into this debate in *Portnov v Canada (Attorney General)*, 2021 FCA 171. Justice Stratas, writing for the Court, explained how the approach outlined in *Katz* had been overtaken by *Vavilov* and thus, the Federal Court of Appeal did not follow the guidance of *Katz* but applied reasonableness review as per *Vavilov* [see *Portnov, supra* at paras 18-28].

[58] The Federal Court of Appeal weighed in again in *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211, also considering the jurisprudence on whether courts reviewing the validity of regulations should apply a *Vavilov* standard of review analysis or the *ultra vires* doctrine from *Katz*. In *International Air Transport Association*, the appellant challenged numerous provisions of new regulations (in particular, challenging the Minister's Direction requiring the Agency to make regulations in respect of tarmac delays of three hours or less) on the basis that they exceeded the Agency's authority under the *Canada Transportation Act*. The Federal Court of Appeal discussed the analytical framework in the *Dunsmuir* era, wherein the reviewing court interpreted the statutory grant of authority to determine whether it fell within or outside its ambit. Justice de Montigny, writing for the Court, goes on to discuss the judicial review framework that was later applied in cases such as *Katz*, concluding that *Vavilov* did not bring clarity to the confusion around what framework to apply in the context of delegated legislation. Further, the *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, wherein the

Supreme Court reviewed the validity of regulations at issue, made no mention of the *ultra vires* doctrine or *Vavilov* and reasonableness review. The Federal Court of Appeal noted that the issue is far from settled:

[188] Unfortunately, *Vavilov* did not bring much clarity to that confusion. Because the Supreme Court purported to adopt the reasonableness standard as the default standard of review to all administrative actions, most intermediate appeal courts adopted the view that delegated legislation would henceforth be reviewed against that standard: see, for example, 1193652 B.C. Ltd. v. New Westminster (City), 2021 BCCA 176 at paras. 48-59; Portnov v. Canada (Attorney General), 2021 FCA 171; Canadian Association of Refugee Lawyers v. Canada (Citizenship and Immigration), 2020 FCA 196 [2021] 1 F.C.R. 271; Paul Daly, “Regulations and Reasonableness Review” (January 29, 2021), online (blog): *Administrative Law Matters* <<https://www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/> and the cases cited therein>.

[189] This approach, however, has not been followed unanimously: see, for example, Hudson’s Bay Company ULC v. Ontario (Attorney General), 2020 ONSC 8046, 154 O.R. (3d) 103; Friends of Simcoe Forest Inc. v. Minister of Municipal Affairs and Housing, 2021 ONSC 3813 at para. 25. Indeed, the reasonableness standard review is fraught with difficulties, not the least of which is that it assumes the body or person that has been granted the power to adopt delegated legislation has also been vested with the power to decide questions of law and to determine the proper interpretation of the habilitating statute; yet, this is obviously not always the case: see John M. Evans, “Reviewing Delegated Legislation After *Vavilov*: *Vires* or Reasonableness?” (2021) 34:1 Can. J. Admin. L. & P. 1.

[190] More recently, the Supreme Court has brought grist to the mill of those who support the view that the *Vavilov* judicial review framework does not apply to delegated legislation. In *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1 [*Ref re Greenhouse Gas*], the Court reviewed the validity of the regulations at issue on the basis of its own interpretation of the enabling statute, without expressing any deference to Cabinet on the interpretative issue. It is true that the majority (in contrast to the dissenting opinion of Rowe J.) made no mention of the *ultra*

vires doctrine, but neither did it refer to Vavilov nor to reasonableness review. On the contrary, the majority took it upon itself to interpret the scope of the regulation-making powers found in the Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12. While this is clearly not the last word on the subject, it signals at the very least that the issue is far from settled.

[191] That being said, and whether we assess the validity of the Direction and of section 8 of the Regulations through the lens of the reasonableness standard of review or through the more exacting prism of the ultra vires doctrine, the result would be the same. For the appellants to succeed with their argument that subsection 86.11(2) of the CTA does not encompass the power to issue the *Direction* (and section 8 of the Regulations) because it relates to matters covered at paragraph 86.11(1)(f), they would have to show either that the Direction: 1) is irrelevant, extraneous or completely unrelated to the statutory purpose (*Katz* at para. 28; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, 1994 CanLII 115 (SCC) at p. 280), or 2) rests on an unreasonable interpretation of subsection 86.11(2). If the *Direction* (and section 8 of the CTA) satisfies the more exacting *ultra vires* framework, it will obviously meet the less stringent reasonableness standard of review analysis.

[59] However, in its most recent decision in *Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210, Justice Stratas, writing on behalf of the Court, held that *Portnov*, a unanimous and binding decision of this Court, binds future panels of the Federal Court of Appeal (and thus this Court), such that the methodology to be used to assess a regulation is that set out in *Vavilov*, not *Katz* [see *Innovative Medicines, supra*, at paras 26-27].

[60] The Federal Court of Appeal offers specific guidance in *Innovative Medicines, supra*, to the review of regulations enacted by the Governor in Council:

[39] ...Under *Vavilov*, the broader the regulation-making power in a statute, particularly in matters of policy that are quintessentially the preserve of the executive, the less constrained the regulation-

maker will be in enacting the regulation: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 at para. 28 (applying *Vavilov* and earlier cases consistent with it), aff'd 2022 SCC 30.

[40] This is especially so for the Governor in Council. The Governor in Council is “at the apex of the executive”, serves as “the grand coordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation”, and represents “different geographic, linguistic, religious, and ethnic groups”: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, 458 D.L.R. (4th) 125 at paras. 36-38. Thus, subject to limiting statutory language passed by our elected representatives, the Governor in Council’s regulation-making power is often relatively unconstrained. The key is the limiting statutory language. *Vavilov* goes straight to that key, focusing on what meanings the language of the regulation-making power can reasonably bear. *Katz* doesn’t. [...]

[61] In conducting a reasonableness review, the Court is to assess the constraints on the administrative decision-maker (the primary constraint being the empowering legislation) and whether the decision maker has remained within them. The Court is entitled to look at the reasons offered by the decision maker, associated documents that shed light on the reasoning process, any submissions made to the decision maker and the record before the decision maker. In the case of decisions of the Governor in Council, reasoned explanations can often be found in the text of the legal instrument it is issuing, prior legal instruments related to it and any associated RIAS. Express explanations can be quite brief, yet still “pass muster” [see *Portnov, supra* at paras 33-34; *Innovative Medicines, supra* at para 44].

[62] I am satisfied that in this case, as no exception set out in *Vavilov* to reasonableness review applies, the standard of review is reasonableness and that the Court is to be guided by *Vavilov* (not

Katz) and the cases of the Federal Court of Appeal that apply *Vavilov* in conducting its reasonableness review.

IV. Analysis

A. **OSIP's decision not to add the 837 Patent to the Patent Register for SNDS 670 and SNDS 739 was reasonable**

[63] Paragraph 4(3)(c) of the *PMNOC Regulations* sets out the relevant product specificity requirement that must be met for a patent to be listed on the Patent Register in relation to an SNDS. A patent is eligible to be added to the Patent Register if: (i) the SNDS is for a “change in use of the medicinal ingredient”; and (ii) the patent contains a claim for the changed use of the medicinal ingredient that has been approved through the issuance of an NOC in respect of the SNDS.

[64] In relation to SNDS 670, Janssen takes issue with OSIP's determination that: (a) SNDS 670 was not for a change of use of a medicinal ingredient; and (b) that the 837 Patent does not contain a claim for the alleged changed use of the medicinal ingredient. I will address those issues in turn.

[65] In relation to SNDS 739, Janssen takes issue with OSIP's determination that no patent list to add the 837 Patent was filed by Janssen in relation to SNDS 739. The *vires* of the filing date requirement in subsection 4(6) of the *PMNOC Regulations* and its impact on Janssen's ability to add the 837 Patent to the Patent Register in relation to SNDS 739 is addressed separately below.

(1) OSIP's determination that SNDS 670 was not approved for a change in use of the medicinal ingredient was reasonable

[66] Before turning to Janssen's submissions and a consideration of the decision under review, I want to begin by looking at any prior consideration (judicial or otherwise) of the phrase "a change in use of the medicinal ingredient".

[67] The phrase "change in the use of a medicinal ingredient" is not defined in the *Patent Act* or the *PMNOC Regulations*.

[68] One can have reference to subsection 2(1) of the *PMNOC Regulations* which defines a "claim for the use of the medicinal ingredient". Subsection 4(1) permits a first person to submit a patent list in relation to an NDS and paragraph 4(2)(d) provides that a patent on a patent list in relation to an NDS is eligible to be added to the register if the patent contains a "claim for the use of the medicinal ingredient" and the use has been approved through the issuance of an NOC in respect of the NDS. While the focus of paragraph 4(2)(d) is on whether the patent contains a claim for the changed use of a medicinal ingredient, it is focused on the "use of the medicinal ingredient" that is later sought to be "changed" in paragraph 4(3)(c). A "claim for the use of the medicinal ingredient" is defined in subsection 2(1) to mean "a claim for the use of the medicinal ingredient for the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms".

[69] In *Abbott Laboratories Ltd v Canada (Attorney General)*, 2008 FCA 244, one of the issues before the Court was whether the patent at issue contained a claim for the very change in use that was approved by the issuance of an NOC with respect to an SNDS. In that case, it was not disputed that a new indication for a drug (to treat NSAID ulcers) constituted a change in use in the medicinal ingredient.

[70] In *Solvay Pharma Inc v Canada (Attorney General)*, 2009 FC 102, this Court dismissed an application for judicial review of a decision of the Minister refusing to add Solvay's patent to the Patent Register pursuant to paragraph 4(3)(c). The Minister had refused to add the patent as the SNDS against which listing was sought did not approve a change in use of the medicinal ingredient. The drug in question, AndroGel, had initially been approved on the basis of safety and efficacy information from a clinical trial following patients to whom the drug was administered for six months. Solvay filed an SNDS to provide additional safety and efficacy information following the extension of that clinical trial to 42 months, including making associated updates to the Product Monograph. An NOC issued in connection with the SNDS and indicated that the reason for the SNDS was to "Update PM with long term extension study results".

[71] Solvay asserted that the SNDS approved a change in use of the medicinal ingredient "as the safe and effective duration of use is extended and important changes to the implied use of the product, as authorized to be described in the Product Monograph, are clearly the essential subject of the SNDS". The Minister rejected this argument and also found that the patent did not contain a claim for the changed use introduced in the Product Monograph by way of the SNDS. Specifically, the Minister held that the patent did not contain "a claim for the changed use of the

medicinal ingredient, for the long term use and relative safety of AndroGel”. Rather, the Minister held that the uses of AndroGel are the same uses that were previously approved by an earlier SNDS.

[72] The Court found that the evidence supported the Minister’s conclusion that Solvay did not meet either requirement for the listing of its patent on the Patent Register. With respect to the first requirement – that the SNDS represent a change in use of the medicinal ingredient – the Court held:

[79] The evidence in the record satisfies me that the SNDS, filed on March 11, 2005, did not represent a change in use of the medicinal ingredient of AndroGel testosterone in the form of topical gel. The jurisprudence supports the proposition that "change in use" as that term is used in subsection 4(3) of the NOC Regulations is measured by the approved use in AndroGel's product monograph, as approved by Health Canada, which is described in the Indications and Clinical Use section of that document. AndroGel is indicated for hormone replacement therapy in men suffering from conditions associated with a testosterone deficiency. No change of indication and use was made to Solvay's AndroGel product monograph as a result of the 2006 NOC.

[73] In discussing the amendments to the *PMNOC Regulations* in 2006, the 2006 RIAS also provides some insight into the intended meaning of the phrase “a change in use of the medicinal ingredient”, where it states:

The amendments to section 4 also formally confirm the right to list new patents on the basis of SNDS filings and introduce listing requirements governing that right. Under these requirements, a patent which had been applied for prior to the filing of an SNDS may be submitted in relation to that SNDS provided the purpose of the latter is to obtain approval for a change in use of the medicinal

ingredient (i.e. a new method of use or new indication), a change in formulation or a change in dosage form and the patent contains a claim to the formulation, dosage form or use so changed...

[Emphasis added.]

(a) *Janssen's submissions*

[74] Janssen asserts that OSIP's determination that SNDS 670 was not approved for a change in use is an improper fettering of OSIP's decision making power and is unreasonable. If a clinician's change in treatment duration or in prescribing practices would be changed by an SNDS, Janssen asserts that this should be sufficient to establish a change in use.

[75] Janssen asserts that OSIP's decision was unreasonable in light of the evidence before them – namely, the expert statement of Dr. Feagan and the two studies. In relation to Dr. Feagan, Janssen asserts that his evidence clearly demonstrated that the additional safety data would change prescribing practices of a community gastroenterologist. In the absence of any competing evidence procured by OSIP, Janssen asserts that there is no reasonable basis upon which OSIP could conclude that the approved health and safety data regarding the 96-week treatment and safety profile of STELARA in SNDS 670 is not a change in use.

[76] Janssen also points to the Sandborn and Panaccione studies, in which Janssen asserts the authors commented on the need for longer-term data to confirm findings of no increased malignancy risk with IL-12/23 inhibition. Janssen asserts that SNDS 670 provided that longer-term safety data that the authors called for and that Dr. Feagan stated would bring comfort or

confidence to Canadian clinicians to prescribe STELARA beyond 44 weeks. While OSIP held that a clinician who was “up to date” on ulcerative colitis research could have referred to either of the two studies before the approval of SNDS 670 to obtain information and “comfort” regarding prescribing STELARA for a longer period of time, Janssen says that this is irrelevant and does not change the fact that the addition of safety data to the approved Product Monograph is a change in use. Moreover, Janssen asserts that OSIP’s finding is unsupported by any expert evidence and importantly, would not apply to clinicians who are not up to date on ulcerative colitis research, which is the sector of clinicians that Dr. Feagan was opining about. Janssen notes that there is no requirement in paragraph 4(3)(c) that all physicians change their prescribing practices, rather simply that there be a change in use and that Janssen has demonstrated such a change.

[77] Janssen further asserts that OSIP unreasonably applied *Solvay* to conclude that the addition of safety data can never be a change in use, whereas there is no express exclusion of safety data from the possible changes in use that can be covered by paragraph 4(3)(c) of the *PMNOC Regulations*. At the hearing, Janssen argued that OSIP was “blinded” by the *Solvay* decision and it tainted the entirety of OSIP’s assessment of the meaning of “change in use”.

[78] Moreover, Janssen asserts that the *Solvay* decision was guided by the evidentiary record before OSIP and in this case, the evidentiary record is distinguishable. Specifically:

- A. In *Solvay*, there was no evidence before the Minister to support the conclusion that the SNDS contained a change in use, whereas in this case, the Minister had the evidence of Dr. Feagan and the two studies.

B. In *Solvay*, the Office of Patent Submissions and Liaison had sought the opinion of Health Canada experts, who concluded that there was no change in use, whereas in this case, the Minister did not adduce any of its own expert evidence or contradict Janssen's expert evidence.

C. In *Solvay*, the Court held that the patent claims contain no limitation on the duration of use and that the patent did not address the issue of the duration of testosterone therapy, whereas in this case, the nexus to the patent is present as the 837 Patent

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[79] Janssen asserts that OSIP failed to take into consideration these distinctions and that each of the aforementioned points of distinction alone undermines OSIP's "strong reliance" on *Solvay* and establish that OSIP's decision was based on a misapprehension of the law and evidence, thus rendering it unreasonable.

[80] Janssen further asserts that OSIP's interpretation of the product specificity requirement of a "change in use of the medicinal ingredient" is inconsistent with the context, language and purpose of the *Patent Act* and the *PMNOC Regulations*. Janssen asserts that the Governor in Council enacted paragraph 4(3)(c) with the broad terminology of change in use and the 2006 RIAS confirms an intention that a change in use was broad enough to include a new indication and a new method of use. Janssen asserts that the RIAS supports an understanding that change in use is not

to be restricted to changes to particular sections of the Product Monograph and that a change in use includes changes in the duration of treatment.

[81] Janssen asserts that the *PMNOC Regulations* must be read in line with the purpose of the *Patent Act* and should be considered in light of the societal imperative of encouraging new and better medical therapies and the difficulties associated with protecting pharmaceutical patent rights by way of conventional infringement litigation. Janssen asserts that the *PMNOC Regulations* are intended to protect that which the innovator has invested time and money to test and have approved for sale (or put different, to protect the patentee's contribution to the public through skill and ingenuity). The clinical trial data in SNDS 670 is the result of time and money invested by Janssen to obtain safety data for STELARA in patients with moderately or severely active ulcerative colitis, the exact type of substantive change intended to be protected by the *PMNOC Regulations*. By adopting an unduly restrictive meaning to change in use, Janssen asserts that it is being improperly denied the full benefit of the patent protection it should be provided as part of the balance of the early working exception. Such an unduly restrictive meaning also, according to Janssen, reduces incentives to research the safety and efficacy of existing medicinal ingredients because it stands in the way of listing patents tied to such research.

[82] Moreover, Janssen notes that the product specificity requirements were intended to prevent the listing of patents in respect of SNDSs for purely administrative changes (such as changes of manufacturer) and asserts that SNDS 670 is not akin to an administrative change.

(b) *Consideration of Janssen's submissions*

[83] In interpreting a “change in use of the medicinal ingredient”, the 2006 RIAS provides guidance that a change in use can be a new indication or a new method of use, but cannot be an administrative change (such as a change in drug or company name). There is no dispute that SNDS 670 was not for a new indication, as the treatment of ulcerative colitis was added to the Product Monograph by SNDS 739.

[84] The question then becomes whether, on the record before OSIP and considering the text, context and purpose of section 4(3)(c) of the *PMNOC Regulations*, the guidance provided by the RIAS, this Court’s decision in *Solvay* and Janssen’s submissions, OSIP reasonably determined that SNDS 670 was not approved for a change in use.

[85] In reaching their decision, OSIP considered the following evidence that was before them:

- A. The existing Product Monograph as approved in relation to SNDS 739 approved STELARA to be used to treat adult patients with moderately to severely active ulcerative colitis who have had an inadequate response with, lost response to, or were intolerant to either conventional therapy or a biologic or have medical contraindications to such therapies. That approved use did not include a limitation on the duration of time STELARA could be used to treat ulcerative colitis (notwithstanding that the clinical trial data was limited to 44 weeks). Moreover, SNDS 670 did not seek to add a limitation on the duration of time STELARA could be used to treat ulcerative colitis.

- B. The relevant NOC stated that SNDS 670 was approved for updates to the Product Monograph.
- C. SNDS 670 did not result in any changes to the “Indications and Clinical Use” section of the product monograph, but rather only added safety and efficacy data to the “Clinical Trial Adverse Drug Reaction” and “Study Demographics and Trial Design” sections of the Product Monograph.
- D. Dr. Feagan’s evidence was that community gastroenterologists would “take comfort” in the additional information and would be more willing to prescribe or be more comfortable prescribing STELARA based on the additional information contained in the Product Monograph. However, he did not state that community gastroenterologists (or any other gastroenterologists) would not have prescribed STELARA for longer than 44 weeks based on the prior Product Monograph.
- E. In Janssen’s Product Information Regulatory Enrollment Process form, Janssen wrote (as opposed to checking a box) in relation to SNDS 670 that “there are no changes to the indication/Use/Dosage (including the maximum daily dose)”.

[86] OSIP properly considered the aforementioned evidence, the text, context and purpose of the *PMNOC Regulations* (which I will address more fully below), considered the guidance provided in the 2006 RIAS, considered this Court’s decision in *Solvay* (which I will also address in more detail below) and considered the submissions of Janssen before concluding as follows:

The OSIP recognizes that a change to the method of use of a medicinal ingredient can be reflected in sections of the product monograph other than the “Indications and Clinical Use” section. For example, the “Contraindications”, “Warning and Precautions”, and “Dosage and Administration” sections. However, the OSIP disagrees with Janssen’s characterization that SNDS 244670 was approved for such a change. Rather, as detailed above, the OSIP is of the view that SNDS 244670 was approved for updates to the product monograph to include results from the long-term extensions of two Phase 3 studies for the treatment of adult patients with moderately to severely active Crohn’s disease or ulcerative colitis.

Following the approval of SNDS 224739, STELARA (I.V.) could be used in the treatment of ulcerative colitis for an indefinite period of time. Both Janssen and Dr. Feagan submit that a clinician would change their prescribing practices upon reading the two sentences added to the STELARA (I.V.) product monograph following the approval of SNDS 244670. It is the position of Janssen and Dr. Feagan that the clinician practice would have changed given their increased comfort in prescribing STELARA (I.V.) beyond 44 weeks. However a clinician’s reluctance to prescribe a drug is not a limitation on the approved use of that drug.

Clinicians were not prevented from prescribing the drug for the long-term use in treating ulcerative colitis. Dr. Feagan states at paragraph 21 that a community gastroenterologist may not be up to date on ulcerative colitis research and would have concerns about the potential for issues to arise after one year’s administration of STELARA (I.V.). Therefore, a clinician who was up to date on ulcerative colitis could have referred to either of the two studies enclosed in Janssen’s representations before the approval of SNDS 244670 and could have obtained the comfort needed to change their prescribing practices in accordance with the use for which SNDS 224739 was approved. In any event, a submission approved for additional data that could provide a clinician more confidence in prescribing a drug long-term is not sufficient for the submission to be considered as having been approved for a change in use of the drug if the indication never included a temporal restriction on its use.

Implicit in Janssen’s position is the idea that the use of STELARA (I.V.) was limited by the period of time during which ustekinumab was administered to patients in the clinical trials underlying the approval of SNDS 224739. Janssen had made this position explicit on page 7 of its representations, where it states that the use set out in SNDS 224739 is for the treatment of ulcerative colitis “for up to 44 weeks”. The OSIP disagrees with Janssen’s position that the

length of time for which STELARA (I.V.) could be used was limited. No such limitation was provided in the STELARA (I.V.) product monograph. As STELARA (I.V.) was approved for the use in treating ulcerative colitis for an indefinite period of time, the inclusion of updates to the product monograph to include results from the long-term extension of two Phase 3 studies could not have changed the approved use of STELARA (I.V.), irrespective of any additional confidence the information may provide clinicians.

As noted above, the Federal Court considered substantially similar facts in *Solvay* and held that the inclusion of safety and efficacy information into the product monograph following an extension of a clinical trial did not constitute a change to the use of the medicinal ingredient as required by paragraph 4(3)(c) of the *PM(NOC) Regulations*. Similarly, the inclusion of updates to the STELARA (I.V.) product monograph to include results from the long-term extensions of two Phase 3 studies does not meet the requirements of paragraph 4(3)(c) of the *PM(NOC) Regulations*.

[Emphasis added.]

[87] I find that OSIP's decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain OSIP. I see nothing unreasonable about OSIP's focus, in its interpretation and application of paragraph 4(3)(c), on the actual approved use of STELARA (i.e. the use as approved by the Minister) and not the prescribing practices of clinicians, as that which is being "changed" in subsection 4(3) is the use as previously approved by the Minister.

[88] I will now turn to address the specific arguments raised by Janssen.

[89] Turning first to the evidence of Dr. Feagan, OSIP clearly considered Dr. Feagan's evidence and did not dispute his statements regarding the influence that the additional safety and efficacy data would have on certain gastroenterologists. However, OSIP's decision turned on their

determination that STELARA was approved for use to treat ulcerative colitis with no temporal limitation on its use and that a clinician's reluctance to prescribe a drug is not a limitation on the approved use of that drug. Similarly, OSIP considered the two studies and regardless of whether a clinician may or may not have read the studies, OSIP found that a submission approved for additional data that could provide a clinician more confidence in prescribing a drug long-term is not sufficient for the submission to be considered as having been approved for a change in use of the drug if the indication never included a temporal restriction on its use. I see no error on OSIP's part in reaching these conclusions.

[90] With respect to *Solvay*, I reject Janssen's characterization of OSIP's treatment of the decision. On a fair reading, OSIP's reasons do not state that the addition of safety data can never be a change in use. Rather, OSIP considered this Court's decision in *Solvay*, outlined the facts of that case and summarized the Court's findings. OSIP noted the factual similarities between this case and *Solvay* and noted that its finding was supported by the Court's reasoning in *Solvay*.

[91] Janssen's suggestion that OSIP was "blinded" by *Solvay* and that *Solvay* tainted the entirety of OSIP's decision is baseless. OSIP is obligated to follow applicable precedents originating from this Court [see *Bank of Montreal v Li*, 2020 FCA 22 at para 37] and given the factual similarities between the two cases, it was reasonable for OSIP to rely on *Solvay* as an influential precedent. Moreover, a fair reading of OSIP's 23-page decision reveals that OSIP considered all relevant factors in interpreting and applying paragraph 4(3)(c), not just *Solvay*.

[92] While Janssen has attempted to distinguish *Solvay* and faults OSIP for failing to take into account the factual differences between the two cases, I would note that Janssen did not raise *Solvay* with OSIP or put any of its purported distinguishing facts to OSIP to suggest that OSIP should not follow *Solvay*. In any event, I am not satisfied that the factual differences identified by Janssen render OSIP's reliance on *Solvay* unreasonable. OSIP did not state that the two cases were identical, but rather that they were similar and the presence or absence of expert evidence did not play a central role in OSIP's determination that there had not been a change in use in either case. As for Janssen's third argument, that argument relates to the next issue and thus I will address it there.

[93] Moreover, while Janssen made much of the fact that Dr. Feagan's evidence was uncontradicted and that OSIP had failed to secure its own expert evidence on the issue of change of use, this ignores the fact that the burden rested on Janssen to demonstrate that it meets the product specificity requirements of the *PMNOC Regulations*. OSIP was under no obligation to produce an expert statement in response to Dr. Feagan or that otherwise addressed the issue of change in issue. As noted by the Respondent, the only obligation on OSIP was to make a reasonable and procedurally fair determination of the issues before them and in doing so, OSIP was entitled to rely on OSIP's own expertise.

[94] I also reject Janssen's submissions that OSIP's interpretation of the product specificity requirement is inconsistent with the context, language and purpose of the *Patent Act* and *PMNOC Regulations*. I begin by noting that there is no express inconsistency between OSIP's interpretation

of subsection 4(3) and the *Patent Act*. Rather, what Janssen asserts is that there is a “conceptual” inconsistency between the two.

[95] It must be recalled that OSIP agreed with Janssen’s interpretation of subsection 4(3) in part, expressly acknowledging that a change in use of a medicinal ingredient includes a change to the method of use (as recognized in the 2006 RIAS) and that a change to the method of use can be reflected in sections of the Product Monograph other than the “Indications and Clinical Use” section. Where OSIP and Janssen part ways is on the question of whether a change in use of the medicinal ingredient in subsection 4(3) includes the “change” asserted by Janssen.

[96] It is clear from a review of OSIP’s reasons that OSIP was very much alive to the dispute between OSIP and Janssen as to the interpretation of subsection 4(3). In considering the reasonableness of OSIP’s interpretation of subsection 4(3), the Court is guided by the following commentary of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Mason*, 2021 FCA 156:

[16] *Hillier* begins by reminding reviewing courts of three basic things they should appreciate when conducting reasonableness review. First, in many cases, administrators may have a range of interpretations of legislation open to them based on the text, context and purpose of the legislation. Second, in particular cases, administrators may have a better appreciation of that range than courts because of their specialization and expertise. And, third, the legislation--the law on the books that reviewing courts must follow--gives administrators the responsibility to interpret the legislation, not reviewing courts.

[17] For these reasons, *Hillier* tells reviewing courts to conduct themselves in a way that gives administrators the space the legislator intends them to have, yet still hold them accountable. Reviewing courts can do this by conducting a preliminary analysis of the text,

context and purpose of the legislation just to understand the lay of the land before they examine the administrators' reasons. But the lay of the land is as far as they should go. They should not make any definitive judgments and conclusions themselves. That would take them down the road of creating their own yardstick and measuring the administrator's interpretation to make sure it fits.

[18] Instead, *Hillier* recommends (at para. 16) that a reviewing court should "focus on the administrator's interpretation, noting what the administrator invokes in support of it and what the parties raise for or against it", trying to understand where the administrator was coming from and why it ruled the way it did: *Hillier* at paragraph 16.

[19] Under this approach, the reviewing court does not act in an "external" way, i.e., "arrive at a definitive conclusion about the best way to read the statutory provision under review before considering how the [administrator's] interpretation matched up with [the] preferred reading". Rather, as Professor Daly has observed, the reviewing court acts in an "internal" way, i.e., "a relatively cursory examination of the provision at issue, with a view to analyzing the robustness of the [administrator's] interpretation". See Paul Daly, "Waiting for Godot: Canadian Administrative Law in 2019" (online: <https://canlii.ca/t/t23p> at 11).

[20] By necessary implication, *Vavilov* supports the *Hillier* approach. *Vavilov* warns us that even though reviewing courts are accustomed in other contexts to interpret legislative provisions themselves, when conducting reasonableness review of administrative interpretations they should avoid that. Reviewing courts must not "ask how they themselves would have resolved [the] issue", "undertake a *de novo* analysis", "ask itself what the correct decision would have been" or "[decide] the issue themselves": *Vavilov*, at paragraphs 75, 83 and 116. In other words, reviewing courts must not "make [their] own yardstick and then use that yardstick to measure what the administrator did": *Vavilov*, at paragraph 83, citing *Delios*, at paragraph 28. Instead, reviewing courts must exercise "judicial restraint" and respect "the distinct role of administrative decision makers": *Vavilov*, at paragraph 75. They are to do this by examining the administrator's reasons with "respectful attention" and by "seeking to understand the reasoning process": *Vavilov*, at paragraph 84.

[97] Determining the meaning of “change in use of the medicinal ingredient” very much falls within OSIP’s area of expertise. In arriving at their interpretation of that phrase, OSIP considered the plain wording of subsection 4(3) and related provisions of the *PMNOC Regulations* and the intent of the 2006 amendments to subsection 4(3) as reflected in the 2006 RIAS (as cited above) and as acknowledged by the Court of Appeal in *GD Searle & Co v Canada (Health)*, 2009 FCA 35. I see nothing unreasonable with that approach and OSIP’s reasons allow the Court to understand how the text, context and purpose of the *PMNOC Regulations* factored into its reasoning process in arriving at its interpretation of subsection 4(3).

[98] There is no dispute between the parties as to the purpose of the *Patent Act* and the protections that it affords to innovators. However, I reject Janssen’s assertion that OSIP’s interpretation improperly denies Janssen the full benefit of the patent protection it should be provided as part of the balance of the early working exception. As stated above, the *PMNOC Regulations* seek to balance the patent rights associated with innovative drugs against the timely market entry of lower-priced competitor drugs [see *Fresenius Kabi Canada Ltd v Canada (Health)*, 2020 FC 1013]. In striking that balance, the product specificity requirements reflected in section 4 inherently acknowledge that not every patent is eligible for listing on the Patent Register, notwithstanding the time and money invested by the innovator. As noted by this Court in *Solvay*, supra at paragraph 69:

...Under the heading Patent Listing Requirements, the RIAS states, at page 1511, that the NOC Regulations "are intended to operate as a very potent patent enforcement mechanism", citing the 24-month automatic stay when an innovator launches a prohibition application, adding that "it is this very potency which calls for moderation in the application" with the result that "[o]nly those

patents which meet the current timing, subject matter and relevance requirements set out in section 4 of the regulations are entitled to be added to ... register and to the concurrent protection of the 24-month stay."

[Emphasis added.]

[99] It must also be recalled that Janssen is not without the protections of the *Patent Act* under OSIP's interpretation, retaining the right to bring a patent infringement action outside of the PMNOC regime.

[100] Subsection 4(3) limits the subset of patents eligible for listing and I am not satisfied that Janssen has demonstrated how OSIP's interpretation unreasonably denies Janssen the patent protection intended by the balance struck by the *PMNOC Regulations*.

[101] Having determined that OSIP's decision that SNDS 670 did not meet the first product specificity requirement of paragraph 4(3)(c) was reasonable, Janssen's application in relation to the listing of the 837 patent in relation to SNDS 670 cannot succeed. While I need not do so, I will nonetheless go on to consider whether OSIP's determination in relation to the second product specificity requirement was reasonable.

- (2) **OSIP's determination that the 837 Patent was not eligible to be added to the Patent Register as it did not meet the product specificity requirements of paragraph 4(3)(c) was reasonable**

[102] In considering whether the patent sought to be listed in relation to a particular SNDS meets the product specificity requirement of paragraph 4(3)(c) of the *PMNOC Regulations*, OSIP was

required to apply what is known as the *Abbott* test, as originally set out by Justice Hughes in *Abbott Laboratories Limited v Canada (Attorney General)*, 2008 FC 700 and later affirmed in *Canada (Attorney General) v Abbott Laboratories Limited*, 2008 FCA 354 and applied by the Federal Court of Appeal in a number of other cases, such as *Searle, supra*, *Purdue Pharma v Canada (Attorney General)*, 2011 FCA 132, *Gilead Sciences Canada Inc v Canada (Health)*, 2012 FCA 254 and *Eli Lilly Canada Inc v Canada (Attorney General)*, 2015 FCA 166.

[103] Pursuant to the *Abbott* test, OSIP was required to consider the following three questions: (i) what does the 837 Patent claim? (ii) what is the change approved by SNDS 670? and (iii) does the 837 Patent claim the very change approved in SNDS 670?

[104] The current version of the *PMNOC Regulations* makes product specificity between the patent claims and the NOC for the approved drug a key requirement for a patent to be considered eligible for listing on the patent register [see *Gilead, supra* at para 33]. Under the prior version of the *PMNOC Regulations*, if the patent claims were shown merely to be “relevant to” the approved drug, the submitted patents were generally accepted for listing. The wording of the current *PMNOC Regulations*, as well as their object and purpose, suggest that the product specificity requirement sets a high threshold of consistency between the patent claims and the NOC [see *Gilead, supra* at para 40].

[105] In *Canada (Attorney General) v Abbott Laboratories Limited*, 2008 FCA 244, leave to appeal refused, [2008] SCCA No 408, [2008] 3 SCR v (*Abbott Prevacid*) [*Abbott 244*], Justice Pelletier commented on the level of specificity required under paragraph 4(3)(c). The debate there

concerned the eligibility for listing of a patent in relation to an NOC issued pursuant to an SNDS approving a new use. The Federal Court concluded that the patent was eligible for listing because the patent could be construed as including the new approved use notwithstanding that it was not explicitly claimed in the patent. The Federal Court of Appeal disagreed, stating at paragraphs 47 and 49:

It stands to reason that if a patent must contain a claim for the changed use identified in Abbott's SNDS, that patent cannot simply claim the use which formed the basis of the original submission. Such a patent does not specifically claim the changed use, even though the changed use may come within the claims of the patent. In other words, the Regulations envisage as a condition of listing a patent in respect of a change in the use of a medicinal ingredient that the patent specifically claims the changed use as opposed to non-specific claims which are wide enough to include the changed use.

[...]

I conclude that paragraph 4(3)(c) of the Regulations requires, as a condition of listing a patent on the Patent Register, that the patent must specifically claim the very change in use which was approved by the issuance of a Notice of Compliance with respect to an SNDS.

[Emphasis added.]

[106] Before turning to Janssen's submission on this application, I note that before OSIP, Janssen asserted:

Further and contrary to the clear wording of the *Regulations*, which simply requires "a claim for the changed use ... that has been approved", in its Letter, the OPML instead identified what it framed as the very change approved in SNDS 244670 and asked whether the '837 Patent claims the "very change" approved in SNDS 244670. In doing so, the OPML's approach was too narrow and required a nexus between the change approved in SNDS 244670 and

the '837 Patent that is more stringent than what is in fact required by the *Regulations*.

[107] Janssen's aforementioned description of the product specificity requirement for the 837 Patent as prescribed by subsection 4(3) is reflective of the approach prior to the 2006 amendments to the *PMNOC Regulations* and inconsistent with the clear enunciation of the applicable test as affirmed repeatedly by the Federal Court of Appeal.

[108] Before this Court, Janssen persists with this position in part, refusing in its written submissions to agree with OSIP's interpretation of subsection 4(3) and its application of the *Abbott* test, yet taking no issue with the application of the *Abbott* test at the hearing. There is no merit to any suggestion that OSIP has misconstrued the applicable legal test and I find that OSIP properly formulated and applied the *Abbott* test by requiring that the 837 Patent claim the "very change in use" approved for SNDS 670.

[109] Without agreeing with OSIP's interpretation of the requirements of subsection 4(3), Janssen asserts that OSIP's decision is unreasonable as the 837 Patent meets the "very change in use" standard, as the 837 Patent contains claims covering the [REDACTED]

[110] [REDACTED] do not take issue with OSIP's determination in relation to step one of the *Abbott* test and [REDACTED], in simple terms, the 837 Patent claims the use of the antibody to treat ulcerative colitis for at least 44 weeks after week zero or for 44 weeks and after.

[114] Janssen asserts that OSIP placed unreasonable reliance on *Abbott 244*, which Janssen asserts is distinguishable from this case. Janssen asserts that in *Abbott 244*, the issue was whether a patent with claims to the treatment of ulcers generally claimed the very change in an SNDS approved for a new use of a drug to treat ulcers caused by non-steroidal anti-inflammatory drugs. In that case, the Court held that the patent did not specifically claim the changed use even though the changed use may come within the claims of the patent. By contrast, Janssen asserts that at least some of the 837 Patent's claims provide the required specificity [REDACTED]

[REDACTED]

[REDACTED]

[115] Janssen further asserts that *Solvay* is distinguishable, as none of the claims of the patent at issue contained a claim directed to the duration of treatment. By contrast, Janssen asserts that the 837 Patent has "claims that include [REDACTED]

[REDACTED]

[116] Janssen urged the Court to find that the circumstances in *Eli Lilly Canada Inc v Canada (Attorney General)*, 2015 FCA 166, were more akin to those in this case and that OSIP should have followed *Eli Lilly* rather than *Abbott 244* (despite Janssen not raising either authority with OSIP). In *Eli Lilly*, one of the issues before the Federal Court of Appeal was whether this Court had erred in determining whether the formulation claimed in the relevant patent was the formulation found in the appellant's drug submission for Trifexis. Janssen asserts that *Eli Lilly* is instructive as the Federal Court of Appeal held that a claim to a broader class of compound includes a specific compound in that class.

[117] I am not satisfied that Janssen has established that OSIP's determination regarding step three of the *Abbott* test is unreasonable. Rather, what Janssen urges the Court to do is to reassess the issue and come to a different result, which is not the role of the Court on an application for judicial review.

[118] I find that there was nothing unreasonable in OSIP's reliance on *Abbott 244*, which was a paragraph 4(3)(c) case. While Janssen urges the Court to find that *Eli Lilly* has somehow "overtaken" *Abbott 244*, I am not satisfied that that is the case. *Eli Lilly* was a change in formulation case, not a change in use case and on that basis alone, I find that it is distinguishable. More specifically, I agree with the Respondent that in *Eli Lilly*, at the first step of the *Abbott* test, the Federal Court of Appeal found that the general class of compounds that the patent claimed actually included the very specific formulation that was approved in the NDS. The Federal Court of Appeal found that in such circumstances, this Court was unreasonable in requiring identical wording at step three of the *Abbott* test. The circumstances in this case are distinct.

[119] As confirmed in *Abbott 244*, the *PMNOC Regulations* require that a patent specifically claim the change in use, as opposed to broader claims that are wide enough to subsume the specific change in use. With that principle in mind, I see nothing unreasonable in OSIP's determination that a patent having broad "temporal features" (as described by Janssen) for the use of ustekinumab for an indefinite period of time (for 44 weeks or more) is not the very change in use approved in relation to SNDS 670 (even on Janssen's interpretation thereof) which specifically included safety data to only 96 weeks.

[120] With respect to *Solvay*, I note that OSIP did not refer to *Solvay* in its reasons for decision on this issue.

[121] Accordingly, even if Janssen had established that OSIP's decision in relation to a "change in use of the medicinal ingredient" was unreasonable, Janssen's application in relation to the listing of the 837 patent in relation to SNDS 670 could not succeed on this ground either.

(3) OSIP's determination that Janssen failed to provide a patent list in relation to SNDS 739 was reasonable

[122] Janssen asserts that OSIP's determination that Janssen failed to file a patent list for the 837 Patent in relation to SNDS 739 was unreasonable as a patent list was filed for the 837 Patent within 30 days of the issuance of the 837 Patent and Janssen sought, by way of its September 14, 2022 submission, to add SNDS 739 to an already submitted patent list, given that it had been raised by OSIP in its preliminary decision letter. Janssen asserts that subsection 4(7) of the *PMNOC Regulations* obligates a first person to keep their patent list up to date, so the Minister clearly contemplated amendments to a patent list.

[123] Moreover, Janssen asserts that the *PMNOC Regulations* do not contain a requirement to add to a patent list by using Form IV, but rather only that a first person must provide all of the information set out in subsection 4(4). Janssen submits that its September 14, 2022 submission provided all of the necessary information prescribed by subsection 4(4). As such, to refuse to add the 837 Patent to the Patent Register on the basis that Janssen did not provide the same information

by way of a Form IV would be an unreasonably harsh result and an extreme example of “form over substance”.

[124] Turning to OSIP’s reasons for decision, OSIP held:

The *PM(NOC) Regulations* do not permit a patent list to be submitted in relation to multiple submissions. As noted above, subsection 4(1) of the *PM(NOC) Regulations* allows a first person to seek to add a patent to the Patent Register by submitting a patent list to the Minister. The content of a patent list is prescribed by subsection 4(4). Notably, paragraph 4(4)(a) of the *PM(NOC) Regulations* requires that the patent list identify the submissions to which the patent list relates. The patent list submitted in accordance with 4(6) provides a section dedicated for this purpose and allows the first person to identify the submission in relation to which it submits the patent list.

The patent lists submitted by Janssen seeking to add the ‘837 patent to the Patent Register identified SNDS 244670. Janssen did not seek to add the ‘837 patent to the Patent Register against SNDS 224739. Janssen’s suggestion that the submission in relation to which a patent list was filed can shift after its receipt would ignore the operation of paragraph 4(4)(a) of the *PM(NOC) Regulations*. The statements made on page 7 of Janssen’s representations purporting to change the submission in relation to which its patent lists were submitted are not akin to filing a patent list in accordance with subsection 4(1). As such, the OSIP is of the view that no patent list was filed in relation to SNDS 224739 and that Janssen has not met the requirements to seek to add the ‘837 patent against SNDS 224739.

In addition, the OSIP disagrees with Janssen’s view that the ‘837 patent was considered for addition to the Patent Register against SNDS 224739 in its preliminary decision letter dated July 29, 2022. Rather, the OSIP is of the view that the use for which SNDS 224739 was approved was included in its preliminary decision letter to contextualize the change for which SNDS 244670 was approved.

[125] I see nothing unreasonable in OSIP's analysis and determination of this issue. OSIP properly considered the requirements of subsection 4(4) of the *PMNOC Regulations*, noting that the regulations prescribe one SNDS per patent list (as also set out in Form IV) and to permit Janssen to add a second SNDS to a pre-existing patent list would run afoul of the express mandatory language of paragraph 4(4)(a), which limits a patent list to one SNDS.

[126] Moreover, I find nothing unreasonable in OSIP's determination that Janssen's attempt to change/amend the SNDS in relation to which its patent lists for the 837 Patent were submitted was not akin to filing a patent list. Janssen was well aware of the requirement to file one patent list per SNDS, given that it had already filed multiple Form IVs in relation to STELARA and given the language of paragraph 4(4)(a). Why Janssen did not file a patent list for SNDS 739 in relation to the 837 Patent is unknown, but Janssen is bound by the consequences of that decision.

[127] While not expressly addressed by OSIP, I would note that, even if I were inclined to find that Janssen's September 14, 2022 submission could constitute a patent list for the 837 Patent, Janssen's September 14, 2022 submission did not, in fact, contain all of the information required by subsection 4(4) of the *PMNOC Regulations*. For example, the submission does not set out the Canadian patent filing date, the patent issue date, the patent expiry date or the address for service of the first person of a NOA. While that information might otherwise be available to OSIP in other documents, there is no obligation on the part of OSIP to search for missing information. Rather, the obligation rested on Janssen to clearly identify all of the information required by subsection 4(4) in its "patent list" [see *Hoffmann-La Roche Ltd v Canada (Health)*, 2005 FC 1415 at para 21].

[128] As acknowledged by Janssen in its written submissions, the Minister has the discretion to determine the manner in which a patent list is to be submitted and the Minister has done so by requiring the use of Form IV. Form IV requires that, in completing the form, a first person provide all of the mandatory information required by subsection 4(4) of the *PMNOC Regulations*. Janssen has pointed to nothing that is unreasonable about the Minister's adoption of Form IV or the Minister's requirement that it be completed by first persons. Rather, Janssen appears to be inviting the Court to find that it was open to the Minister to accept a deviation to the Minister's practices, but without pointing to any error made by the Minister or any lack of coherent and rational chain of analysis in the Minister's determination.

[129] Janssen further asserts that in footnote 2 of its September 14, 2022 submission, Janssen requested that if OSIP rejected their request to add SNDS 739 to the patent list for the 837 Patent, that Janssen be advised of the reason and given an opportunity to respond. Janssen asserts that their procedural fairness rights were breached as OSIP never gave them a chance to address the issue. I reject this assertion. I am not satisfied that OSIP was under any duty to alert Janssen as to its views on Janssen's failure to file a Form IV patent list for SNDS 739 and to provide Janssen an opportunity to make further submissions on the issue. The burden rested on Janssen to take the appropriate steps to submit a patent list for the 837 Patent in relation to each of its SNDSs within the time limits prescribed by the *PMNOC Regulations* and in any event, by September 14, 2022, the deadline for submission of a patent list for the 837 Patent for SNDS 739 had already passed.

[130] In its reply oral submissions, Janssen asserted that it also relied on section 32 of the *Interpretation Act*, RSC 1985, c I-21, which provides that "where a form is prescribed, deviations

from that form, not affecting the substance or calculated to mislead, do not invalidate the form used” and identified two decisions of the Federal Court addressing section 32. This argument, and the related statute and case law, were not raised by Janssen in its memorandum of fact and law filed in this proceeding (nor were they raised in Janssen’s submissions before OSIP) and did not arise from something unexpectedly raised by the Respondent in their oral submissions. In the circumstances, it is not open to Janssen to raise the argument now and most certainly inappropriate to attempt to raise it only in reply. Accordingly, I will not consider this portion of Janssen’s submission, as to do so would be unfair to the Respondent.

[131] For the reasons stated above, I am not satisfied that Janssen has demonstrated that OSIP’s determination that Janssen did not file a patent list for the 837 Patent for SNDS 739 was unreasonable. While I appreciate that Janssen views the impact of OSIP’s determination of this issue as unreasonably harsh, the *PMNOC Regulations* contain numerous mandatory requirements (such as the 30 day requirement in subsection 4(6)) that result in harsh consequences when not met. This is a function of the nature of the regulatory regime [see *Fournier Pharma Inc v Canada (Attorney General)*, [1999] 1 FC 327; *Immunex Corporation v Canada (Health)*, 2008 FC 1409; *Merck Canada Inc v Canada (Minister of Health)*, 2021 FC 345].

[132] My finding on this issue is sufficient to dispose of Janssen’s application for judicial review in relation to OSIP’s refusal to list the 837 Patent in relation to SNDS 739. Notwithstanding, I will nonetheless go on to consider whether the Canadian filing date requirement in subsection 4(6) of the *PMNOC Regulations* is *ultra vires* the *Patent Act*.

B. The Canadian Filing Date Requirement in Subsection 4(6) of the *PMNOC Regulations* is *intra vires* the *Patent Act*

[133] Notwithstanding OSIP's determination that no patent list had been filed for the 837 Patent in relation to SNDS 739, OSIP went on to consider whether the 837 Patent could have been listed against SNDS 739 if such a patent list had been provided. OSIP determined that Janssen would not have met the timing requirement in subsection 4(6) as the 837 Patent was filed in Canada after SNDS 739 was filed. OSIP further determined that the consideration of the claim date or priority date of the 837 Patent when assessing the application of subsection 4(6) would be to ignore the clear wording of the *PMNOC Regulations* (which states "filing date in Canada"), circumvent the strict timing requirements and undo the balance struck by the *PMNOC Regulations* and subsection 55.2(1) of the *Act*.

[134] Janssen does not take issue with OSIP's interpretation of subsection 4(6) and acknowledges that the filing date requirement in subsection 4(6) refers to the date that the patent application was filed in Canada, rather than the claim date or priority date. Rather, Janssen asserted before OSIP and now before this Court that the filing date requirement in subsection 4(6) is *ultra vires*.

[135] In the alternative, Janssen asserts that the Canadian filing date is an illogical, irrational and/or arbitrary date to employ in subsection 4(6). However, Janssen did not, in its written submissions and at the hearing, develop these arguments and as such, I will not consider them separately. Rather, I will consider the arguments as they were advanced by Janssen.

[136] In conducting a reasonableness review of this issue, the Court is to determine the constraints on the Governor in Council and whether the Governor in Council remained within them, with the focus on any reasons given by the Governor in Council.

[137] In this case, the parties agree that the primary constraint on the Governor in Council is subsection 55.2(4) of the *Patent Act* (as set out above), which contains the Governor in Council's regulation making authority. Section 55.2(4) of the *Patent Act* provides for a broad grant of authority for the making of such regulations as the Governor in Council "considers necessary for preventing the infringement of a patent" by any person who makes use of the early working exception. The specific authority outlined in paragraphs (a) to (e) is said not to limit the generality of the initial grant. Rather, the only limitation lies in the limited purpose for which regulations may be made – the prevention of infringement by those who use the patented invention for the early working exception [see *Apotex Inc v Merck & Co Inc*, 2009 FCA 187 at para 40]. As such, in enacting the *PMNOC Regulations*, the Governor in Council had to interpret the scope of its regulation making power and enact a regulation (subsection 4(6)) that, in its reasonable view, was within that power [see *Innovative Medicines, supra* at para 44].

[138] In considering Janssen's submissions, I note that Janssen does not assert that including a reference to a filing date of the patent in subsection 4(6), in and of itself, exceeds the Governor in Council's regulation making authority. In that regard, I note that Janssen originally sought to quash the entirety of subsection 4(6) but, at the hearing, substantially modified the relief sought and now only seeks the quashing of the words "that has a filing date in Canada". This is an important point, as Janssen concedes that the Governor in Council has the authority to enact a regulation that

includes a filing date requirement. This is not necessarily surprising given this Court's determination in *Fournier, supra* at para 20, that the Governor in Council's authority and discretion in subsection 55.2(4) are sufficiently broad to embrace the enactment of subsections 4(3) and 4(4) of the *PMNOC Regulations*, which impose time limits on the registration of patent lists.

[139] On Janssen's wording, section 4(6) would read as follows:

A first person may, after the date of filing of a new drug submission or a supplement to a new drug submission, and within 30 days after the issuance of a patent that was issued on the basis of an application that precedes the date of filing of the submission or supplement, submit a patent list, including the information referred to in subsection (4), in relation to the submission or supplement.

[140] Janssen's argument therefore boils down to an assertion that the specific choice of the Canadian filing date over the claim date or priority date is *ultra vires*. In that regard, Janssen asserts that the Canadian filing date requirement does not conform with the purpose of the *Patent Act* and the *PMNOC Regulations*.

[141] Turning to the purpose of the *Patent Act*, Justice Manson described its purpose as follows in *Innovative Medicines*:

[76] The policy rationale underlying the *Patent Act* is the patent bargain, or *quid pro quo*. The patent bargain encourages innovation by offering an inventor exclusive rights in a new and useful invention for a limited period in exchange for disclosure of the invention so that society can benefit from this knowledge (*Teva Canada Ltd v Pfizer Canada Inc*, 2012 SCC 60, [2012] 3 S.C.R.

625, at paragraph 32). Two central objectives of the *Patent Act* as a whole are to “advance research and development and to encourage broader economic activity” (*Free World Trust v Électro Santé Inc*, 2000 SCC 66, [2000] 2 S.C.R. 104 at paragraph 42; *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45 (Harvard College) at paragraph 185).

[77] As acknowledged by both the applicants and the respondent, patent monopoly rights are not unlimited, and Parliament has at times balanced promotion of ingenuity against other considerations (*Harvard College*, above, at paragraph 185)...

[142] The purpose of the *PMNOC Regulations*, as noted previously, is to balance effective patent enforcement over new and innovative drugs with the timely market entry of their lower priced generic competitors.

[143] Only limited information is known about the rationale for the Governor in Council’s choice to use the Canadian patent filing date. The 2006 RIAS indicates that the Government was aware that “an increasing number of court decisions interpreting the PM(NOC) Regulations have given rise to the need to clarify the patent listing requirements” and that these decisions addressed issues of timing and relevance.

[144] Among those decisions was Justice Blanchard’s decision in *Pfizer Canada Inc v Canada (Attorney General) (TD)*, 2002 FCT 706, in which the Court was considering an earlier version of subsection 4(4) of the *PMNOC Regulations* which provided:

A first person may, after the filing of a submission for a notice of compliance and within 30 days after the issuance of a patent that was issued on the basis of an application that has a filing date that precedes the date of filing of the submission, submit a patent list, or

an amendment to an existing patent list, that includes information referred to in subsection (2).

[145] The issue before the Court was whether the “filing date” in subsection 4(4) should be interpreted to be the priority filing date (in that case, the date of filing in the United States) or the Canadian filing date. The Minister had determined that “filing date” meant the Canadian filing date. The Applicants advanced a number of arguments in support of their assertion that “filing date” meant the priority filing date, including that the Minister’s interpretation would place patentees who file their patent applications first in a country other than Canada at a disadvantage compared to patentees who choose to file first in Canada and results in a loss of rights during the priority period. In rejecting the Applicant’s submissions, Justice Blanchard stated:

[50] At the risk of stating the obvious, the *Patent Act* is Canadian legislation and provides for the grant of a patent to an inventor, “if an application for the patent in Canada is filed” (see subsection 27(1) [as am. *idem*, s. 31] of the *Patent Act*). Moreover, the *Patent Act* specifically defines “filing date” to be the Canadian filing date. In my view, any reference to “filing date” in the Act, or in the Regulations thereunder, must be read with regard to this definition. Such an interpretation is consistent with other provisions of the *Patent Act* and the Regulations which, for the most part, explicitly set out, in the context of the specific section, when “filing date” is meant as a date other than the Canadian filing date.

[146] Given the *Pfizer* decision, the Government was accordingly well aware of the issue raised by stakeholders as to the use of the Canadian filing date and the consequences thereof and engaged in consultations with stakeholders prior to the enactment of the current version of subsection 4(6) during which submissions could be made by stakeholders on this issue. The Governor in Council ultimately decided, in enacting subsection 4(6), to expressly include the Canadian filing date.

[147] With respect to subsection 4(6), the only commentary thereon in the 2006 RIAS provides as follows:

By stipulating that the application filing date of the patent precede the date of the corresponding drug submission, the timing requirement promotes a temporal connection between the invention sought to be protected and the product sought to be approved. This ensures that patents for inventions discovered after the existence of a product do not pre-empt generic competition on that product.

[148] No express rationale is given in the 2006 RIAS as to why the Canadian filing date was specifically chosen. In its reasons for decision, OSIP notes that the Governor in Council chose for subsection 4(6) to refer to the first date of a patent term, as opposed to a date relevant to considerations of novelty, inventiveness or prior use and that this was a deliberate choice.

[149] Janssen asserts that the choice of the Canadian filing date is inconsistent with the aforementioned purpose of the timing requirement (namely, to prevent patents for inventions discovered after the existence of a product from pre-empting generic competition on that product), as the date of the invention's discovery is actually the claim date and not the Canadian filing date. Janssen stresses that the claim date (which is defined in sections 2 and 28.1 of the *Patent Act*) is the relevant date in several sections of the *Patent Act*, including those directed at novelty, inventiveness and the prior use defence, which are concepts at the core of an invention, and demonstrate that within the overall scheme of the *Patent Act*, the invention sought to be protected is linked to the claim date.

[150] Further, Janssen asserts that the selection of the Canadian filing date fails to advance effective enforcement of patents that would be infringed by the use of the early-working exception, such that there is no rational connection between the early-working exception and the requirement that a Canadian patent application be filed before a drug submission to be listed.

[151] I am not convinced by Janssen's submissions. While the 2006 RIAS expresses a rationale for subsection 4(6), the expressed rationale is in regard to why the filing of the patent application must occur before the submission of the SNDS. It was about the sequencing of the patent application and the SNDS, not about the rationale for picking the Canadian filing date over the claim date.

[152] The Governor in Council was well aware that since 1998, the Minister has "sought to apply the amendments on timing and relevance in order to place reasonable limits on the ability of innovator drug companies to list new patents on the basis of SNDS filings" [see 2006 RIAS] and that:

It is recognized that there may be instances where a patent which does not qualify for the protection of the PM(NOC) Regulations is ultimately infringed by the fact of generic market entry. However, the Government's view is that where the patent fails to meet the listing requirements described above, policy considerations tip the balance in favour of immediate approval of the generic drug, and the matter is better left to the alternative judicial recourse of an infringement action. It follows that the continued viability of the regime greatly depends upon the fair and proper application of these listing requirements.

[Emphasis added.]

[153] The Governor in Council made a choice that struck a particular balance between the PMNOC regime's competing objectives. The enactment of subsection 4(6) was within the Governor in Council's regulation making authority. As recognized by the Federal Court of Appeal in *Innovative Medicines*, having acted within the limits of the statutory language, the Governor in Council's regulation-making power is relatively unconstrained and it certainly falls within Governor in Council's purview to make policy-based choices such as this when deciding the balance to be struck. Could the Governor in Council have chosen to use the claim date in subsection 4(6)? Certainly. But the balance chosen by the date selected need not be perfect and it is not the role of the Court on this application to consider whether a different balance (as urged by Janssen) could have or ought to have been struck [see *Sanofi-Aventis Canada Inc v Teva Canada Limited*, 2012 FC 551 at para 24]. The burden rested on Janssen to demonstrate that the inclusion of the Canadian filing date was not in pursuance of and connected with the prevention of patent infringement and I am not satisfied that they have done so. Rather, I am satisfied that requiring that a patent meet certain timing requirements based on its Canadian filing date, which ensures timely market entry of subsequent generic drugs, is reasonably in keeping with the balance of the competing policy interests at issue.

[154] In some circumstances, the operation of the regulatory regime may benefit a subsequent entry drug manufacturer and in others, the innovator, depending on when the innovator chooses to file their patent application in Canada. However, I am not satisfied that this renders subsection 4(6) *ultra vires* or otherwise arbitrary, illogical or irrational. I agree with the Respondent that, in Janssen's view, the language chosen by the Governor in Council must be the most beneficial to innovators in order to be rationally connected to the purpose of the *Patent Act* and the *PMNOC*

Regulations. But such an approach ignores the balancing of interests that must be undertaken. Moreover, it also ignores that innovators (whose patents benefit from a priority application) who chose to file their Canadian patent after their SNDS retain their right to bring patent infringement actions under the *Patent Act* regime and are not deprived of the benefit of their priority date in such actions.

[155] Janssen bears the burden of demonstrating that the Governor in Council's inclusion of the Canadian filing date in subsection 4(6) was unreasonable. For the reasons stated above, I am not satisfied that they have done so.

V. Conclusion

[156] Having found that Janssen has failed to demonstrate that any aspect of OSIP's decision is unreasonable and that the Canadian filing date requirement in subsection 4(6) of the *PMNOC Regulations* is *ultra vires*, illogical, irrational or arbitrary, the application for judicial review shall be dismissed.

VI. Costs

[157] At the hearing of the application, the parties advised that they agreed that the successful party should be awarded their costs fixed in the amount of \$7,500.00. As the Respondents were

successful on the application, they shall be awarded their costs in accordance with the parties' agreement.

JUDGMENT in T-2627-22**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. The Applicant shall pay to the Respondents their costs of this application fixed in the amount of \$7,500.00, inclusive of disbursements and taxes.

“Mandy Aylen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2627-22

STYLE OF CAUSE: JANSSEN INC. v THE MINISTER OF HEALTH AND
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 25, 2023

JUDGMENT AND REASONS: AYLEN J.

DATED: JULY 17, 2023

APPEARANCES:

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14

Federal Court



Cour fédérale

Date: 20210420

Docket: T-1476-20

Citation: 2021 FC 345

Ottawa, Ontario, April 20, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MERCK CANADA INC.

Applicant

and

THE MINISTER OF HEALTH

Respondent

JUDGMENT AND REASONSI. Overview

[1] Merck Canada Inc [Merck] seeks judicial review of the refusal by the Minister of Health [Minister] to add Canadian Patent No 2,830,806 [806 Patent] to the Patent Register pursuant to s 4(6) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [*PM(NOC) Regulations*]. The Minister found that Merck's patent lists were not submitted within the specified 30 day time period.

[2] Merck says the Minister unreasonably held that the *Time Limits and Other Periods Act (COVID-19)*, SC 2020, c 11, s 11 [*Time Limits Act*] did not have the effect of suspending the 30 day time period specified in s 4(6) of the *PM(NOC) Regulations*. In the alternative, Merck maintains that the Minister had a discretion to extend the 30 day time period, which she unreasonably refused to exercise given the extraordinary circumstances occasioned by the COVID-19 pandemic.

[3] The Minister's decision was justified, intelligible and transparent, and therefore reasonable. The application for judicial review is dismissed.

II. Background

[4] Merck markets KEYTRUDA®, a biologic drug containing the medicinal ingredient pembrolizumab. KEYTRUDA® was approved for use in Canada on May 19, 2015 for the treatment of certain advanced-stage cancers.

[5] KEYTRUDA® is a designated “innovative drug” listed pursuant to the data protection provisions of the *Food and Drug Regulations*, CRC, c 870 [F&DR]. KEYTRUDA® therefore benefits from an eight and a half year period of market exclusivity that expires on November 19, 2023. KEYTRUDA® also benefits from a six-year “no file” period under the F&DR, meaning that a subsequent market entrant cannot file a drug submission using KEYTRUDA® as its Canadian Reference Product until May 19, 2021.

[6] There is currently one patent listed on the Patent Register for KEYTRUDA®: Canadian Patent No 2,691,357 [357 Patent]. The 357 Patent was issued on September 23, 2014, and will expire on June 13, 2028.

[7] The 806 Patent was issued on May 12, 2020. The 806 Patent contains claims that are directed to a formulation of the drug KEYTRUDA®.

[8] The Canadian patent agent retained by Merck's United States parent company [Merck USA] did not report the issuance of the 806 Patent until June 15, 2020, more than a month after the patent was issued. However, on June 12, 2020, Merck USA independently discovered that the patent had been issued, and immediately instructed Merck to prepare and submit the necessary patent lists. The patent lists were submitted later that day, but after the close of business. Pursuant to Health Canada's electronic filing policies, the patent lists were considered by the Minister to have been filed on the next business day, Monday, June 15, 2020.

[9] Subsection 4(6) of the *PM(NOC) Regulations* provides as follows:

(6) A first person may, after the date of filing of a new drug submission or a supplement to a new drug submission, and within 30 days after the issuance of a patent that was issued on the basis of an application that has a filing date in Canada that precedes the date of filing of the submission or supplement, submit a patent list, including the information referred to in subsection (4), in

(6) La première personne peut, après la date de dépôt de la présentation de drogue nouvelle ou du supplément à une présentation de drogue nouvelle et dans les trente jours suivant la délivrance d'un brevet faite au titre d'une demande de brevet dont la date de dépôt au Canada est antérieure à celle de la présentation ou du supplément, présenter une liste de brevets, à l'égard de cette

relation to the submission or supplement.

présentation ou de ce supplément, qui contient les renseignements visés au paragraphe (4).

[10] On June 19, 2020, the Minister informed Merck of her preliminary determination that the patent lists relating to the 806 Patent were ineligible for listing on the Patent Register, because they had not been submitted within 30 days of the issuance of the 806 Patent. Merck responded with written representations and affidavit evidence.

[11] On November 6, 2020, the Minister confirmed that the patent lists relating to the 806 Patent were not eligible for inclusion on the Patent Register pursuant to s 4(6) of the *PM(NOC) Regulations*, holding as follows:

- the 30-day deadline provided in s 4(6) of the *PM(NOC) Regulations* is not discretionary;
- the 2017 amendments to s 3 of the *PM(NOC) Regulations* do not confer discretion on the Minister to extend the deadlines prescribed in s 4;
- prejudice to second persons is not a factor that is considered when applying the timing requirements;
- enforcing timing requirements does not contravene the purpose of the *PM(NOC) Regulations* or the *Patent Act*, and does not remove the rights afforded to Merck by the 806 Patent; and

- the *Time Limits Act* does not extend the deadline within which first persons may submit patent lists in accordance with s 4(6) of the *PM(NOC) Regulations*.

[12] Merck says the Minister's refusal to list the 806 Patent on the Patent Register deprives the patent holder of the substantial protections available under the *PM(NOC) Regulations*. Listing the 806 Patent would afford Merck four additional years of access to the summary litigation provisions of the *PM(NOC) Regulations*, beyond the expiry of the currently-listed 357 Patent. Any second person seeking approval to market a biosimilar version of KEYTRUDA® would have to either wait for both the 357 Patent and the 806 Patent to expire on March 29, 2032, or serve a notice of allegation [NOA] addressing both patents. Service of an NOA would enable Merck to commence litigation under the *PM(NOC) Regulations*.

[13] Merck asserts that listing the 806 Patent would not prejudice any subsequent market entrant, and is consistent with the overarching policy of the *PM(NOC) Regulations*: to balance effective patent enforcement for innovative drugs with the timely market entry of generic competitors. If the Minister's refusal to list the 806 Patent is confirmed, Merck says it will suffer prejudice because a subsequent entrant will be able to file a drug submission after the expiry of the six-year "no file" period for KEYTRUDA® on May 19, 2021. Due to s 5(4) of the *PM(NOC) Regulations*, also known as the "frozen register" provision, subsequent entrants are required to address only those patents listed on the Patent Register as of the date they file the submission.

III. Issues

[14] This application for judicial review raises the following issues:

- A. Was the Minister's determination that the *Time Limits Act* did not have the effect of suspending the 30 day time period specified in s 4(6) of the *PM(NOC) Regulations* reasonable?
- B. Was the Minister's determination that she had no discretion to extend the 30 day time period specified in s 4(6) of the *PM(NOC) Regulations* reasonable?

IV. Analysis

[15] The Minister's decision is subject to review against the standard of reasonableness. The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100; *Elanco v Canada (Attorney General)*, 2019 FC 5 at para 50).

[16] An administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. The usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where the words used are "precise and unequivocal", their ordinary meaning will usually play a more

significant role in the interpretive exercise (*Vavilov* at para 120, citing *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10).

[17] An administrative decision maker cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker’s responsibility is to discern meaning and legislative intent, not to “reverse-engineer” a desired outcome (*Vavilov* at para 121).

A. *Was the Minister’s determination that the Time Limits Act did not have the effect of suspending the 30 day time period specified in s 4(6) of the PM(NOC) Regulations reasonable?*

[18] The *Time Limits Act* suspended a number of federally-legislated deadlines, including time limits related to proceedings before a court:

Suspensions

6 (1) The following time limits are, if established by or under an Act of Parliament, suspended for the period that starts on March 13, 2020 and that ends on September 13, 2020 or on any earlier day fixed by order of the Governor in Council made on the recommendation of the Minister of Justice:

(a) any limitation or prescription period for commencing a proceeding before a court;

Suspension

6 (1) Les délais ci-après prévus sous le régime d’une loi fédérale sont suspendus pour la période commençant le 13 mars 2020 et se terminant soit le 13 septembre 2020, soit à la date antérieure fixée par décret pris sur recommandation du ministre de la Justice:

(a) tout délai de prescription du droit d’introduire une instance devant une cour;

(b) tout délai relatif à l’accomplissement d’un acte

(b) any time limit in relation to something that is to be done in a proceeding before a court; and

(c) any time limit within which an application for leave to commence a proceeding or to do something in relation to a proceeding is to be made to a court.

dans le cadre d'une instance devant une cour;

(c) tout délai dans lequel une demande visant à obtenir l'autorisation d'introduire une instance ou d'accomplir un acte dans le cadre d'une instance doit être présentée à une cour.

[19] It is clear from the language of the *Time Limits Act* that s 6(1) applies in only three circumstances: limitation or prescription periods for commencing a proceeding before a court; time limits for doing something in a proceeding before a court; and time limits where a party makes an application for leave of a court, either to commence a court proceeding or to do something in relation to a court proceeding.

[20] Merck says that s 4(6) of the *PM(NOC) Regulations* functions as a “gateway” to the summary litigation provisions that begin at s 6(1), which provides as follows:

Right of Action

6 (1) The first person or an owner of a patent who receives a notice of allegation referred to in paragraph 5(3)(a) may, within 45 days after the day on which the first person is served with the notice, bring an action against the second person in the Federal Court for a declaration that the making, constructing, using or selling of a drug in accordance with the submission or supplement referred to in subsection 5(1) or (2) would

Droits d'action

6 (1) La première personne ou le propriétaire d'un brevet qui reçoit un avis d'allégation en application de l'alinéa 5(3)a) peut, au plus tard quarante-cinq jours après la date à laquelle la première personne a reçu signification de l'avis, intenter une action contre la seconde personne devant la Cour fédérale afin d'obtenir une déclaration portant que la fabrication, la construction, l'exploitation ou la vente

infringe any patent or certificate of supplementary protection that is the subject of an allegation set out in that notice.

d'une drogue, conformément à la présentation ou au supplément visé aux paragraphes 5(1) ou (2), contreferait tout brevet ou tout certificat de protection supplémentaire visé par une allégation faite dans cet avis.

[21] Merck therefore argues that the 30 day period specified in s 4(6) of the *PM(NOC) Regulations* is a “limitation period within a limitation period”, comparable to the requirement of notifying a municipality within seven days of a possible civil action for personal injury. Merck relies on the Ontario Court of Appeal’s decision in *Bannon v Thunder Bay (City)*, 2000 CarswellOnt 1307 (ONCA) [*Bannon*] (rev’d on other grounds, 2002 SCC 20).

[22] In *Bannon*, a plaintiff’s failure to give timely notice to a municipality served as a bar to advancing a subsequent civil claim. The Ontario Court of Appeal held that the notice requirement was “akin” to a limitation period, and should be considered, together with the actual limitation period of three months, as the applicable limitation period (*Bannon* at paras 22-23).

[23] Merck says that the 30 day period in which to list a patent on the Patent Register is comparable to the notice requirement considered by the Ontario Court of Appeal in *Bannon*. Listing of the patent is “the first step” of the limitation period to commence litigation in accordance with the *PM(NOC) Regulations*. Absent a patent listing, the 45 day limitation period for commencing a court proceeding under s 6(1) of the *PM(NOC) Regulations* can never be triggered.

[24] In *Bannon*, the Ontario Court of Appeal found that the notice provision promoted the same interests served by limitation periods: it “prompts the plaintiff to pursue the claim diligently, affords the defendant an opportunity to make timely investigation of the incident giving rise to the action and allows the defendant to proceed with its affairs secure in the knowledge that it will not face claims for which notice was not given as required by the statute” (*Bannon* at para 22).

[25] The listing of a patent on the Patent Register performs a very different function from a limitation period. The listing of a patent is not inextricably connected to a prospective civil action, and it does not cause time to begin running. There is no precipitating event, and there is no defendant at the time of the listing. The listing of a patent on the Patent Register is not even the most proximate step to a possible court proceeding under s 6(1).

[26] While s 4(6) of the *PM(NOC) Regulations* has been described as the “gateway” to the advantages gained by a patent owner under the regulatory regime (*GD Searle & Co v Canada (Health)*, 2009 FCA 35 at para 13), these advantages are not limited to the commencement of an action under s 6(1). I therefore disagree with Merck’s assertion that the *PM(NOC) Regulations* are “centred around” the initiation of a possible court proceeding.

[27] Pursuant to s 5(1) of the *PM(NOC) Regulations*, if a second person applies for an NOC and compares its drug to another drug in respect of which an NOC has been previously issued and a patent list has been submitted, the second person must comply with s 2.1. This is done by:

- (a) confirming that the owner of the patent has consented to the making, constructing, using or selling the second person's drug in Canada;
- (b) confirming the second person's acceptance that the NOC will not issue until the patent or certificate of supplementary protection expires; or
- (c) serving an NOA on the first person that explains the legal and factual basis for the allegation that the issuance of an NOC to the second person will not improperly interfere with the first person's patent rights.

[28] It is only in the last of these circumstances that a first person in receipt of an NOA may, within 45 days, bring an action against the second person in respect of a listed patent. The dispute concerning the patent does not exist, nor are the parties known, until the second person files a drug submission and serves an NOA on the patent owner.

[29] I therefore conclude that the listing of a patent on the Patent Register pursuant to s 4(6) of the *PM(NOC) Regulations* is too remote from the commencement of a court proceeding under s 6(1) to constitute a "limitation period within a limitation period" for the purpose of s 6(1) of the *Time Limits Act*.

[30] Merck emphasizes the importance of flexibility in applying the *Time Limits Act*, as reflected in s 5:

Purpose

5 (1) The purpose of this Act is

(a) to temporarily suspend certain time limits and to temporarily authorize, in a flexible manner, the suspension or extension of other time limits in order to prevent any exceptional circumstances that may be produced by coronavirus disease 2019 (COVID-19) from making it difficult or impossible to meet those time limits; and

(b) to temporarily authorize, in a flexible manner, the extension of other periods in order to prevent any unfair or undesirable effects that may result from the expiry of those periods due to those exceptional circumstances.

Objet

5 (1) La présente loi a pour objet :

a) de suspendre temporairement certains délais et de permettre, temporairement et d'une façon souple, la suspension et la prolongation d'autres délais afin d'éviter que des circonstances exceptionnelles découlant de la maladie à coronavirus 2019 (COVID-19) n'en rendent le respect difficile ou impossible;

b) de permettre, temporairement et d'une façon souple, la prolongation d'autres périodes afin d'éviter que leur expiration n'entraîne des effets injustes ou indésirables en raison de ces circonstances exceptionnelles.

[31] However, the words “in a flexible manner” in s 5 relate to the ministerial discretion to order the temporary suspension or extension of time limits or other periods pursuant to s 7. This has nothing to do with the suspension of limitation and prescription periods relating to court proceedings mandated by s 6. The Minister of Industry has never suspended or extended the deadline in s 4(6) of the *PM(NOC) Regulations* pursuant to s 7 of the *Time Limits Act*, despite having the authority to do so.

[32] The recent decision of Justice Michael Manson in *ViiV Healthcare et al v Sandoz Canada Inc*, 2020 FC 1040 [*ViiV*] does not assist Merck. In *ViiV*, Justice Manson ruled that the

suspension of the time period in s 6(1) of the *PM(NOC) Regulations*, which is unquestionably in relation to “a proceeding before a court”, was lifted as of the date of the applicable order-in-council (*i.e.*, July 30, 2020). This has no bearing on the 30 day period specified in s 4(6) of the *PM(NOC) Regulations*, which was never suspended by s 6(1) of the *Time Limits Act* or pursuant to s 7.

[33] *ViiV* contradicts the Minister’s finding that the *Time Limits Act* did not affect any of the time limits prescribed by the *PM(NOC) Regulations*. However, the Minister’s determination that the *Time Limits Act* did not suspend the 30 day time period specified in s 4(6) remains sound.

B. *Was the Minister’s determination that she had no discretion to extend the 30 day time period specified in s 4(6) of the PM(NOC) Regulations reasonable?*

[34] Merck maintains that the Minister had a discretion to list the 806 Patent on the Patent Register, which she unreasonably declined to exercise. According to Merck, this discretion has been recognized in jurisprudence, and was enhanced by amendments to the *PM(NOC) Regulations* promulgated in 2017.

[35] Merck relies on this Court’s decision in *Procter & Gamble Pharmaceuticals Canada, Inc v Canada (Minister of Health)*, 2003 FCT 583 [*Procter & Gamble*] for the proposition that the Minister may add a “late” patent list to the Patent Register. In that case, Procter & Gamble had submitted a patent list more than 30 days after the date of issue that appeared on the face of the patent. The Minister nevertheless added the patent to the Patent Register (*Procter & Gamble* at paras 43-45). In subsequent legal proceedings, Genpharm Inc [Genpharm], a generic

pharmaceutical company, sought to strike Proctor & Gamble's application on the ground that the patent was ineligible for listing on the Patent Register.

[36] Justice Johanne Gauthier, then a judge of this Court, dismissed the motion to strike. Due to a printing problem, the patent in question had not been issued until several days after the date of issuance that appeared on its face. The clerical error was admitted by the Patent Office. The patent was added to the Patent Register within 30 days of the date on which it had in fact been issued. Justice Gauthier therefore concluded that it was not plain and obvious that the patent was ineligible for listing on the Patent Register (*Proctor & Gamble* at paras 43-53).

[37] An appeal of Justice Gauthier's decision was dismissed, but on the separate ground that Genpharm was estopped from challenging the listing of the patent on the Patent Register due to its failure to challenge the listing at its first opportunity (*Procter & Gamble Pharmaceuticals Canada, Inc v Canada (Minister of Health)*, 2003 FCA 467).

[38] Both the trial and appellate decisions in *Proctor & Gamble* provide very weak authority for the proposition that the Minister has a discretion to add a "late" patent to the Patent Register. The patent in that case was added within 30 days of its actual date of issuance. Even if one accepts that the Minister's decision in that case did involve an exercise of discretion, the litigation ultimately turned on whether the patent's ineligibility was plain and obvious, or whether the generic pharmaceutical company was estopped from raising the issue.

[39] It is well established that the timelines prescribed by the *PM(NOC) Regulations* are exact.

In *Hoffman-La Roche Ltd v Canada (Health)*, 2005 FC 1415 at paragraphs 22 and 23, Justice

Michael Phelan said the following with respect to the predecessor to s 4(6) of the *PM(NOC)*

Regulations:

Lastly, Hoffmann-La Roche argues that the Minister has the discretion to accept an out-of-time filing because the Minister has an obligation to maintain the accuracy and currency of the Patent Register.

With respect, I cannot read ss. 4(4)'s 30-day time limit as admitting to an exception. If it was intended to give the Minister this type of discretion, there must be a clearer indication of its existence than the obligation of the Minister under s. 3 of the NOC Regulations to maintain the Register. This is particularly so where s. 3 refers to s. 4 information but gives no suggestion of a power to extend the deadlines in s. 4.

[40] In *Fournier Pharma Inc v Canada (Attorney General)*, [1999] 1 FC 327, Justice Max Teitelbaum observed at paragraph 35 that “strict” timelines “are necessary to give effect to the intention of the legislator to strengthen the position of patentees and to ensure the availability of reasonably priced medicine for Canadian consumers”. In *Immunex Corporation v Canada (Health)*, 2008 FC 1409 at paragraph 15, Justice Judith Snider held that drug manufacturers are subject to strict timing deadlines for the listing of a patent, and amendments in 2006 did not change the timing requirement with respect to the submission of a patent for listing. Most recently, in *ViiV*, Justice Manson confirmed that the *PM(NOC) Regulations* “involve stringent timelines” (at para 74).

[41] Merck notes that, pursuant to amendments to the *PM(NOC) Regulations* that were promulgated in 2017 (Canada Gazette, Pt I, vol 151, No 28 at pp 3336-3337), s 3(2) was replaced with a more detailed scheme of ministerial powers in ss 3(2) to 3(2.3), including the ability to add and refuse patent lists in a greater range of circumstances. Merck argues that s 3(2.3) expressly grants authority to the Minister to perform discretionary reviews of the Patent Register.

[42] I am not persuaded that the 2017 amendments had the effect of altering the eligibility criteria for listing patents on the Patent Register, or conferred upon the Minister a new discretion to depart from those criteria. As the Minister noted in her decision, the Regulatory Impact Analysis Statement that accompanied the 2017 amendments specifically noted that the “eligibility requirements for listing a patent on the patent register remain unchanged.”

V. Conclusion

[43] The Minister’s decision was justified, intelligible and transparent, and therefore reasonable. The application for judicial review is dismissed.

[44] I commend counsel for both parties for the high quality of their written materials and oral submissions.

[45] By agreement of the parties, no costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1476-20

STYLE OF CAUSE: MERCK CANADA INC. v THE MINISTER OF HEALTH

PLACE OF HEARING: HELD BY VIDEOCONFERENCE BETWEEN TORONTO AND OTTAWA, ONTARIO

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JUDGMENT AND REASONS: FOTHERGILL J.

DATED: APRIL 20, 2021

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SUPREME COURT OF CANADA

CITATION: R. v. Breault, 2023
SCC 9

APPEAL HEARD: September 14,
2022

JUDGMENT RENDERED: April
13, 2023

DOCKET: 39680

BETWEEN:

His Majesty The King
Appellant

and

Pascal Breault
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Association
québécoise des avocats et avocates de la défense and Association des avocats
de la défense de Montréal-Laval-Longueuil**
Intervenors

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer,
Jamal and O’Bonsawin JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 69)

Côté J. (Wagner C.J. and Karakatsanis, Rowe, Martin,
Kasirer, Jamal and O’Bonsawin JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

* Brown J. did not participate in the final disposition of the judgment.

His Majesty The King

Appellant

v.

Pascal Breault

Respondent

and

**Attorney General of Canada,
Attorney General of Ontario,
Association québécoise des avocats et avocates de la défense and
Association des avocats de la défense
de Montréal-Laval-Longueuil**

Interveners

Indexed as: R. v. Breault

2023 SCC 9

File No.: 39680.

2022: September 14; 2023: April 13.

Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal
and O’Bonsawin JJ.

* Brown J. did not participate in the final disposition of the judgment.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Impaired driving — Testing for presence of alcohol or drug — Demand to provide breath sample forthwith — Failure or refusal to comply with demand — Individual stopped by police officers after being observed driving all-terrain vehicle while intoxicated — Police officer demanding that individual provide breath sample forthwith even though officers did not have approved screening device in their possession — Individual repeatedly refusing to provide requested sample — Individual arrested for refusing to comply with police officer’s demand — Whether validity of demand made by police officer requires that officer have immediate access to approved screening device at time demand is made — Criminal Code, R.S.C. 1985, c. C-46, ss. 254(2)(b), 254(5).

On April 2, 2017, two police officers were informed by forest trail patrollers that an individual who was intoxicated was driving an all-terrain vehicle (“ATV”). At about 1:35 p.m., the police officers arrived at the scene, saw B and stopped him as he was about to leave the scene on foot. One of the officers noticed that B’s eyes were bloodshot and that his breath smelled strongly of alcohol. At 1:41 p.m., that officer radioed for an approved screening device (“ASD”) to be brought to him, since the officers did not have one in their possession. Once he had requested an ASD, the officer demanded that B provide forthwith a breath sample pursuant to s. 254(2)(b) of the *Criminal Code*. Starting at 1:45 p.m., B refused three times to provide the requested sample on the ground that he had not been driving the ATV in question. He was arrested

for refusing to comply with a demand to provide a breath sample contrary to s. 254(5) *Cr. C.*

The Municipal Court judge held that the validity of the demand made by the police officer did not depend on the presence of an ASD at the scene. He convicted B of the offence of refusing to comply with a demand made under s. 254(2) *Cr. C.*, contrary to ss. 254(5) and 255(1) *Cr. C.* B's appeal to the Superior Court was dismissed, but his subsequent appeal to the Court of Appeal was allowed. The Court of Appeal found that, in order for a demand to be valid, the peace officer must be in a position to demand that the driver provide a breath sample forthwith, which means that the officer must have immediate access to an ASD. The court was of the view that the demand made to B by the police officer was invalid due to the absence of an ASD. It reversed the lower courts' judgments and directed that a judgment of acquittal be entered.

Held: The appeal should be dismissed.

The Crown has not shown that there was any unusual circumstance that would account for the absence of an ASD at the scene and thereby justify a flexible interpretation of the immediacy requirement. The demand made by the police officer was therefore invalid. Accordingly, B's refusal did not attract criminal liability, and the acquittal entered by the Court of Appeal must be upheld.

The word “forthwith” in s. 254(2)(b) *Cr. C.* must be given an interpretation that reflects its ordinary meaning, having regard to the text, context and purpose of this provision. According to the grammatical and ordinary meaning of the words “provide” and “forthwith” found in this provision, the driver must “supply” a breath sample to the peace officer “immediately” or “without delay”. The word “forthwith” qualifies the demand under s. 254(2)(b) *Cr. C.* that stopped drivers must obey. Such drivers are not free to provide a sample when they see fit. It is true that operational time is implicit in the word “forthwith”, because the police officer has to ready the equipment and instruct the suspect on what to do; however, operational time is different from the time needed for a device to be delivered to the scene.

The constitutionality of s. 254(2)(b) *Cr. C.* depends on an interpretation of the word “forthwith” that is consistent with its ordinary meaning, because this word implicitly limits the right to counsel guaranteed by s. 10(b) of the *Canadian Charter of Rights and Freedoms*. Since a detained driver must provide a breath sample forthwith, the driver may not consult counsel before doing so. This limit is justified under s. 1 of the *Charter* precisely because the detention is of very brief duration. The purpose of the detection procedure of which s. 254(2)(b) *Cr. C.* forms a part is to combat the menace of impaired driving. In the pursuit of this purpose, Parliament sought to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights. This balance must be kept in mind when interpreting s. 254(2)(b) *Cr. C.*

The existence of unusual circumstances may justify a flexible interpretation of the immediacy requirement. While it is neither necessary nor desirable to identify in the abstract, and in an exhaustive manner, the circumstances that may be characterized as unusual, given that it is preferable for those circumstances to be identified on a case-by-case basis in light of the facts of each matter, it is nonetheless important to provide some guidelines to assist lower courts in this inquiry. First, the burden of establishing the existence of unusual circumstances rests on the Crown. Second, the unusual circumstances must be identified in light of the text of the provision in order to preserve the provision's constitutional integrity by ensuring that courts do not unduly extend the ordinary meaning strictly given to the word "forthwith". Section 254(2)(b) *Cr. C.* specifies that the sample collected must enable a proper analysis to be made, which opens the door to delays caused by unusual circumstances related to the use of the device or the reliability of the result. Circumstances involving urgency in ensuring the safety of the public or of police officers might also be recognized as unusual. Third, unusual circumstances cannot arise from budgetary considerations or considerations of practical efficiency, because allocating a limited budget is the daily reality of any government. Fourth, the absence of an ASD at the scene at the time the demand is made is not in itself an unusual circumstance.

A demand made under s. 254(2)(b) *Cr. C.* cannot be presumed to be valid in the absence of an ASD at the scene. Nothing in this provision indicates that Parliament intended to create such a presumption of validity. A person cannot be

criminally liable for refusing to comply with a demand with which it was not actually possible to comply because of the absence of an ASD at the time the demand was made. Finally, the validity of a demand cannot be conditional on the time needed for an ASD to be delivered to the scene, because such an approach would create intolerable uncertainty for drivers. When a detained driver has to respond to a demand to provide a breath sample, the driver must be able to know whether the demand is valid and whether refusing will result in criminal liability. In a context where the driver is unable to retain and instruct counsel, it cannot be expected that the driver will agree in advance to comply and will then be capable of determining when the delay in the delivery of an ASD justifies a refusal.

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S.C.R. 204; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725; *R. v. Pierman* (1994), 19 O.R. (3d) 704, aff'd in part [1996] 1 S.C.R. 68; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *R. v. Danychuk* (2004), 70 O.R. (3d) 215; *R. v. Talbourdet* (1984), 9 D.L.R. (4th) 406; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *Leclerc v. R.*, 2022 QCCA 365.

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Criminal Code, R.S.C. 1985, c. C-46, ss. 249 to 261 [rep. 2018, c. 21, s. 14], 320.11 to 320.4.

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AZ-51688048, [2020] J.Q. n° 3168 (QL), 2020 CarswellQue 4458 (WL), affirming the conviction entered by Simard Mun. Ct. J., 2019 QCCM 114, [2019] AZ-51612277, [2019] J.Q. n° 6044 (QL). Appeal dismissed.

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English version of the judgment of the Court delivered by

CÔTÉ J. —

I. Introduction

[1] This appeal concerns the interpretation of the immediacy requirement in what was, at the relevant time, s. 254(2)(b) (now s. 320.27(1)(b))¹ of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”). According to this provision, if a peace officer has reasonable grounds to suspect that a driver has alcohol in their body, the peace officer may, by demand, require the driver “to provide forthwith a sample of breath that, in the peace officer’s opinion, will enable a proper analysis to be made” through an approved screening device (“ASD”).

[2] The immediacy requirement arising from this provision has both an implicit component and an explicit component. It is “implicit as regards the police demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample ‘forthwith’” (*R. v. Woods*, 2005 SCC 42, [2005] 2 S.C.R. 205, at para. 14). This case deals with the latter component.

[3] Under s. 254(5) *Cr. C.*, any person who, without reasonable excuse, fails or refuses to comply with such a demand commits an offence.

[4] The central issue in this case relates to the time within which a peace officer must enable a driver who is stopped for this purpose to provide the breath sample

¹ Section 254 was repealed in 2018 by the *Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21. It was replaced by s. 320.27, which is nearly identical.

required for a proper analysis to be made by means of an ASD. Specifically, this Court must determine whether the validity of a demand made by a peace officer under s. 254(2)(b) *Cr. C.* requires that the officer have immediate access to an ASD at the time the demand is made.

[5] This Court therefore has an opportunity to settle a jurisprudential debate over the interpretation of the immediacy requirement. This debate is illustrated by the approaches adopted, on the one hand, by the Ontario Court of Appeal in *R. v. Degiorgio*, 2011 ONCA 527, 275 C.C.C. (3d) 1, and *R. v. Quansah*, 2012 ONCA 123, 286 C.C.C. (3d) 307, and, on the other, by the Quebec Court of Appeal in the judgment under appeal. After interpreting s. 254(2)(b) *Cr. C.* in a manner consistent with the text, context and purpose of this provision, I conclude that the Quebec Court of Appeal's approach is substantially correct.

[6] Stops to provide breath samples are meant to be brief. Drivers stopped for this purpose are then being detained. This Court's jurisprudence allows a limit on the right to counsel guaranteed by s. 10(b) of the *Canadian Charter of Rights and Freedoms* during such detention. This limit is justified under s. 1 of the *Charter*, because s. 254(2)(b) *Cr. C.* reflects the balance struck by Parliament between the safeguarding of drivers' constitutional rights and the public interest in eradicating impaired driving (*Woods*, at para. 29). It is essential to this balance that the word "forthwith" be interpreted in a manner generally consistent with its usual or ordinary meaning.

[7] Exceptionally, unusual circumstances may justify giving the word “forthwith” a more flexible interpretation than its usual or ordinary meaning demands (*Woods*, at para. 43, citing *R. v. Bernshaw*, [1995] 1 S.C.R. 254). However, those circumstances must be just that: unusual. They cannot arise from utilitarian considerations or considerations of administrative convenience. Moreover, the determination of what constitutes unusual circumstances must be grounded primarily in the text of s. 254(2)(b) *Cr. C.*

[8] The Quebec Court of Appeal was correct in law in stating that the wording of the provision allows for a flexible interpretation of the word “forthwith” where there are unusual circumstances related to, among other things, the use of the device or the reliability of the result that will be generated, because the text of the provision indicates that the sample taken must enable a “proper analysis” to be made.

[9] It is neither necessary nor desirable to set out an exhaustive list of the circumstances that may be characterized as unusual. For the purposes of this case, it will suffice to say that the absence of an ASD at the scene at the time the demand is made is not *in itself* such an unusual circumstance. I would therefore dismiss the appeal.

II. Factual Background

[10] On April 2, 2017, Constables Dale Atkins and Jean-Michel Côté-Lemieux were informed by forest trail patrollers that an individual who was intoxicated was

driving an all-terrain vehicle (“ATV”) in Val-Bélair. While en route, they learned that the individual had parked his vehicle and was about to leave the scene on foot.

[11] The constables arrived at the scene at about 1:35 p.m. They saw the respondent and stopped him. Constable Atkins noticed that the respondent’s eyes were bloodshot and that his breath smelled strongly of alcohol. The respondent identified himself through his driver’s licence as Mr. Pascal Breault. When questioned by Constable Atkins, he admitted drinking one beer but denied driving the ATV. Constable Côté-Lemieux spoke with the patrollers, who confirmed that the respondent had been driving the vehicle; he conveyed that information to his colleague. At that point, the constables believed that they were indeed talking to the individual referred to by the patrollers.

[12] At 1:41 p.m., Constable Atkins radioed for an ASD to be brought to him, since the constables did not have one in their possession. Constable Côté-Lemieux later testified that he did not know why he and Constable Atkins did not have an ASD: [TRANSLATION] “. . . I can’t tell you whether we didn’t take one that day or whether there were no more available . . .” (A.R., vol. II, at p. 81). A colleague patrolling the Charlesbourg area responded that he had an ASD and that he was on his way. Constable Atkins estimated that Charlesbourg was about 10 minutes from his location, although a 15-minute delay was not impossible.

[13] Once he had radioed for an ASD, Constable Atkins demanded that the respondent provide forthwith a breath sample, pursuant to s. 254(2)(b) *Cr. C.* Neither

he nor Constable Côté-Lemieux told the respondent that there was no ASD at the scene. Starting at 1:45 p.m., the respondent refused not once but three times to provide the requested sample. Following the respondent's first refusal, Constable Atkins informed him of the consequences he faced. The respondent then reiterated his refusal twice. During that interaction, he said that he wished to retain and instruct counsel, a request that Constable Atkins denied. The reason given by the respondent for each of the three refusals was that he had not been driving the ATV in question. The respondent was therefore arrested for refusing to comply with a demand to provide a breath sample contrary to s. 254(5) *Cr. C.*

[14] At about 2:00 p.m., there was still no ASD at the scene. In view of the respondent's refusal, the constables cancelled their radioed request that an ASD be brought to them. They seized the respondent's ATV and released him.

III. Decisions Below

A. *Municipal Court of Ville de Québec, 2019 QCCM 114 (Judge Simard)*

[15] Relying on the Ontario Court of Appeal's decision in *Degiorgio*, Judge Simard held that the validity of the demand made by Constable Atkins did not depend on the presence of an ASD at the scene. The judge also noted that the respondent had been unaware of the absence of an ASD and had immediately refused to blow three times for an entirely different reason. As well, in Judge Simard's view, police cars do not all have to be equipped with an ASD. In the end, he held that the

prosecution had proved the essential elements of the offence. Indeed, the demand made by Constable Atkins had been clear, and the respondent had been duly informed of the consequences of his refusal and had provided no reasonable excuse to justify it. The respondent was convicted of the offence of refusing to comply with a demand made under s. 254(2) *Cr. C.*, contrary to ss. 254(5) and 255(1) *Cr. C.*

B. *Quebec Superior Court, 2020 QCCS 1597 (Pronovost J.)*

[16] In the Superior Court, counsel for the respondent acknowledged that Judge Simard’s analysis was legally sound in light of the *ratio decidendi* of *R. v. Piazza*, 2018 QCCA 948, and *R. v. Petit*, 2005 QCCA 687, 200 C.C.C. (3d) 514. Relying on Vauclair J.A.’s *obiter dictum* in *Piazza*, he announced his intention of asking the Quebec Court of Appeal to overturn *Petit*. Pronovost J. dismissed the appeal.

C. *Quebec Court of Appeal, 2021 QCCA 505, 75 M.V.R. (7th) 4 (Doyon, Vauclair, Hogue, Ruel and Rancourt JJ.A.)*

[17] In unanimous reasons written by Doyon J.A., the Court of Appeal allowed the appeal. In doing so, it relied heavily on Vauclair J.A.’s review of the jurisprudence in *Piazza*. It concluded from that review that, in order for a demand to be valid, the peace officer must be in a position to demand that the driver [TRANSLATION] “provide a breath sample forthwith, before the [driver] even has the time, realistically speaking, to contact counsel”, despite being detained. It also concluded that this means the peace officer must have immediate access to an ASD (C.A. reasons, at para. 42). The word

“forthwith” in s. 254(2)(b) *Cr. C.* must therefore be given an interpretation consistent with its ordinary meaning. However, departing from this meaning is justifiable where the delay is due to unusual circumstances related to, among other things, the use of the device or the reliability of the result that will be generated.

[18] The Court of Appeal considered it illogical for a driver to face criminal liability for refusing to comply forthwith with a demand with which it was, in any event, not actually possible to comply forthwith. The court also found it undesirable for the validity of a demand to be assessed after the fact based on how long it took for an ASD to become available; this creates uncertainty and leads to inconsistent results. A driver who refuses right away to comply with a demand to provide forthwith a breath sample when an ASD is not available at the scene might be convicted of the offence, whereas this would not be the case if the driver agreed but later changed their mind after “too” long a delay.

[19] The court was therefore of the view that the demand made by Constable Atkins in this case was invalid due to the absence of an ASD. As a result, the respondent was not criminally liable for refusing to comply. The court reversed the lower courts’ judgments, directed that a judgment of acquittal be entered and declared that *Petit*, which allowed a 10-minute delay for the delivery of an ASD, no longer had precedential value.

IV. Issue

[20] The resolution of this case lies in the answer to the following question: Does the validity of a demand made by a peace officer under s. 254(2)(b) *Cr. C.* require that the officer have immediate access to an ASD at the time the demand is made?

V. Positions of the Parties

[21] The Crown, appealing the judgment of the Court of Appeal, submits that this question must be answered in the negative. First, the appellant argues that the word “forthwith” should not be given an interpretation that reflects its ordinary meaning because this would lead to results contrary to what Parliament intended when it created the offence set out in s. 254(5) *Cr. C.*, namely to adopt a deterrent measure for the purpose of convincing drivers who are pulled over to provide a breath sample. In the Crown’s opinion, a flexible interpretation of the word “forthwith” is needed to combat the problem of drinking and driving and deter impaired individuals from driving. Relying on *Quansah*, the appellant submits that a short delay that is reasonable and necessary in light of all the circumstances must be permitted, including a delay due to the time required to bring an ASD to an officer who needs one. Adopting a flexible approach would also prevent problems in the performance of the work of police officers, who do not always have such a device with them or who, for a variety of practical reasons, cannot take a breath sample immediately. Second, the Crown argues that possession of an ASD at the time the demand is made is not an essential element of the offence under s. 254(5) *Cr. C.* The Crown contends that if Parliament had intended to make possession of an ASD a requirement, it would have said so clearly,

as it does in the current s. 320.27(2) *Cr. C.* Nonetheless, the Crown acknowledges that if this Court finds that the demand made by Constable Atkins was invalid because of the absence of an ASD, the respondent's acquittal entered by the Court of Appeal must be upheld.

[22] The respondent argues that, unless there are unusual circumstances, the word "forthwith" must be given an interpretation consistent with its ordinary meaning, because a driver who is stopped for a breath sample is being detained without the right to counsel. In the respondent's view, the Court of Appeal did not exhaustively define the unusual circumstances that may justify a more flexible interpretation of the word "forthwith", but it did correctly find that a shortfall in the number of ASDs for budgetary or administrative reasons is not such a circumstance. Because the Crown has not shown that there were unusual circumstances, the demand made by Constable Atkins was invalid and the acquittal entered by the Court of Appeal must be affirmed.

VI. Analysis

[23] It is important to begin by reproducing s. 254(2)(b) and s. 254(5) as they read at the relevant time:

254 . . .

Testing for presence of alcohol or a drug

(2) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the

operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and

(b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

...

Failure or refusal to comply with demand

(5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

[24] At the end of a statutory interpretation exercise, I am of the view that the Court of Appeal was correct in law in holding that, as a general rule, the word “forthwith” must be given an interpretation that reflects its ordinary meaning. This interpretation is consistent with the text, context and purpose of s. 254(2)(b) *Cr. C.* It is also in keeping with the decisions of this Court, from *R. v. Thomsen*, [1988] 1 S.C.R. 640, to *Woods*, in which the word “forthwith” has been interpreted in a manner consistent with its ordinary meaning, except in unusual circumstances.

A. *Applicable Principles of Statutory Interpretation*

[25] Every statutory interpretation exercise involves reading the words of a provision “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 para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; see also *R. v. J.D.*, 2022 SCC 15, at para. 21).

[26] Courts therefore have to interpret the “text through which the legislature seeks to achieve [its] objective”, because “the goal of the interpretative exercise is to find harmony between the words of the statute and the intended objective, not to achieve the objective ‘at all costs’” (*MediaQMI inc. v. Kamel*, 2021 SCC 23, at para. 39, quoting *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 174). Consequently, as laudable and important as the fight against impaired driving may be, it is not permissible, in the pursuit of that objective, to distort the meaning to be given to the text of s. 254(2)(b) *Cr. C.* in the statutory interpretation exercise.

[27] Finally, in interpreting a criminal law provision like s. 254(2)(b), courts must be careful not to create uncertainty, for “[i]t is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act” (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 14; see also *R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 203; *R. v. Levkovic*,

2013 SCC 25, [2013] 2 S.C.R. 204, at para. 1; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1155).

[28] I turn now to the interpretation of s. 254(2)(b) *Cr. C.*

B. *Section 254(2)(b) Cr. C.*

(1) Text

[29] It is important to consider the meaning of two words found in this provision: “provide” and “forthwith”. “Provide” means to “supply” something to someone (*Canadian Oxford Dictionary* (2nd ed. 2004), at p. 1245). “Forthwith” means “immediately” or “without delay” (*Woods*, at para. 13, quoting *Canadian Oxford Dictionary*, at p. 585; see also *R. v. Grant*, [1991] 3 S.C.R. 139, at p. 150).

[30] According to the grammatical and ordinary meaning of these words, a driver detained under s. 254(2)(b) *Cr. C.* must “supply” a breath sample to the peace officer “immediately” or “without delay”. In addition, the provision states that the sample “will enable a proper analysis to be made” by means of an ASD.

[31] Therefore, and contrary to what the Crown argues, the word “forthwith” qualifies the demand that drivers must obey. Stopped drivers “are bound by s. 254(2) to comply immediately” (*Woods*, at para. 45). They are not free to provide a sample when they see fit.

[32] It is true that operational time is implicit in the word “forthwith”, because the officer “has to ready the equipment and instruct the suspect on what to do” (*Bernshaw*, at para. 64). However, what is in issue in this case is not operational time, but rather the time needed for a device to be delivered to the scene.

(2) Context

[33] The power conferred by s. 254(2)(b) *Cr. C.* relates to an investigative procedure. It is the first step in a two-step detection and enforcement procedure, the second being the breathalyzer test that is generally administered at the police station and that requires the peace officer to have reasonable grounds to believe that the driver’s blood alcohol level exceeds the legal limit (*Woods*, at para. 6).

[34] The constitutionality of s. 254(2)(b) *Cr. C.* depends on an interpretation of the word “forthwith” that is consistent with its ordinary meaning:

Section 254(2) authorizes roadside testing for alcohol consumption, under pain of criminal prosecution, in violation of ss. 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms*. But for its requirement of immediacy, s. 254(2) would not pass constitutional muster. That requirement cannot be expanded to cover the nature and extent of the delay that occurred here.

(*Woods*, at para. 15)

[35] Although a stopped driver is being detained at the first step of the detection procedure, the driver has no right to counsel; this right exists only at the second step

(*Woods*, at para. 31). This is the case because the word “forthwith” implicitly limits the right to counsel guaranteed by s. 10(b) of the *Charter*. This is a condition for the application of s. 254(2)(b) *Cr. C.*; since the detained driver must provide a breath sample forthwith, the driver may not consult counsel before doing so. The Court has recognized that this limit on s. 10(b) of the *Charter* is justified under s. 1 (*Thomsen*, at p. 653; *Woods*, at para. 30) precisely because the detention is of very brief duration (*Bernshaw*, at para. 23). The more flexibly the word “forthwith” is interpreted, the less the recognized justification for limiting the right to counsel holds up.

[36] Furthermore, as I said above, a driver who refuses or fails to comply with a demand is subject to criminal sanctions under s. 254(5) *Cr. C.* It is therefore not an offence to express an intention to refuse *once the ASD arrives at the scene*; refusing without reasonable excuse to *provide forthwith* a sample is what constitutes the offence (*Woods*, at paras. 14 and 45). This suggests that compliance must actually be physically possible.

[37] Finally, in both its written and its oral submissions, the Crown invited this Court to interpret s. 254(2)(b) *Cr. C.* in light of the new scheme that came into force in 2018. I would decline the invitation, for the following reasons.

(a) *New Impaired Driving Detection Scheme*

[38] On June 21, 2018, the *Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, S.C. 2018, c. 21,

received royal assent. Through that Act, Parliament repealed ss. 249 to 261 of the *Criminal Code* and introduced ss. 320.11 to 320.4, which came into force on December 18, 2018.

[39] The wording of s. 320.27(1)(b) *Cr. C.* is substantially similar to that of s. 254(2)(b) *Cr. C.* Section 320.27(1)(b) *Cr. C.* provides that if a peace officer has reasonable grounds to suspect that a person has alcohol in their body and that the person has operated a conveyance within the preceding three hours, the peace officer may, by demand, require the person to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an ASD. Under s. 320.15(1) *Cr. C.*, everyone who fails or refuses to comply, without reasonable excuse, with such a demand is subject to criminal sanctions.

[40] One of the distinctions between the new scheme and the former one is s. 320.27(2) *Cr. C.*, which authorizes the random screening of drivers by peace officers who have an ASD in their possession and who are acting in the course of the lawful exercise of their powers, even if there are no reasonable grounds to suspect that a stopped driver has alcohol in their body.

[41] According to the Crown's argument, because s. 254(2)(b) *Cr. C.* does not expressly require peace officers to have an ASD in their possession when they make a demand, the word "forthwith" must not be interpreted as creating such an obligation in practice. At the hearing of the appeal, the appellant urged the Court to see in the new scheme an "indication" that Parliament took notice of and did not wish to repudiate the

jurisprudence of certain appellate courts in this country allowing delays of several minutes. In my view, this argument must be rejected, for two reasons.

[42] First, subsequent legislative history, that is, the amendments made to the version of a provision in force at the relevant time, “can cast no light on the intention of the enacting Parliament or Legislature” with respect to that version predating the amendments (*United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 45; see also *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 78). As stated by s. 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, “[t]he repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.” In the same vein, s. 45(4) of the *Interpretation Act* adds that “[a] re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.”

[43] Even if the retention of the word “*immédiatement*” in the French version of s. 320.27(1) *Cr. C.* (“forthwith” has been replaced by “immediately” in the English version) could be seen as confirmation of the interpretation given to this word by the courts (which Parliament is presumed to know), that body of jurisprudence consists primarily of this Court’s decisions in *Thomsen*, *Grant*, *Bernshaw* and *Woods*, in which this word was interpreted in a manner consistent with its ordinary meaning, except in unusual circumstances (C.A. reasons, at para. 67 *in fine*). As Doyon J.A. properly noted

in his reasons, if Parliament had wished to depart from that interpretation, it was free to use other words — such as [TRANSLATION] “as soon as reasonably possible” or “as soon as practicable” (para. 68). Yet it did not do so.

[44] Second, and more importantly, there is a conceptual difference between the possession requirement in s. 320.27(2) *Cr. C.* and the immediacy requirement, which relates to temporality. Indeed, the word “immediately” is also used in s. 320.27(2) *Cr. C.* It follows that the guidance provided by this judgment on the interpretation of the immediacy requirement in s. 254(2)(b) *Cr. C.* applies to the interpretation of the word “immediately” in s. 320.27(1)(b) *Cr. C.*

(3) Purpose

[45] The detection procedure of which s. 254(2)(b) *Cr. C.* forms a part has a purpose with both a preventive aspect and a remedial aspect, namely to combat the menace of impaired driving. First, with regard to the preventive aspect, the procedure increases the risk of detection in the minds of impaired drivers, with a view to deterring them from getting behind the wheel. Then, with regard to the remedial aspect, the procedure is intended to detect dangerous drivers quickly and get them off the road (*Woods*, at paras. 6 and 30; *Thomsen*, at p. 655).

[46] In the pursuit of this purpose, Parliament also sought to strike a balance “between the public interest in eradicating driver impairment and the need to safeguard

individual *Charter* rights” (*Woods*, at para. 29). The Court must keep this balance in mind when interpreting s. 254(2)(b) *Cr. C.*

(4) Conclusion on the Interpretation of Section 254(2)(b) *Cr. C.*

[47] The ordinary meaning of the word “forthwith” is in keeping with the purpose of s. 254(2)(b) *Cr. C.* and the context of this provision. Moreover, our Court has consistently interpreted this word by giving it this specific meaning, subject to unusual circumstances. For example, in *Grant*, this Court refused to interpret the word “forthwith” as allowing for a 30-minute delay for the delivery of an ASD to the scene (see also *Thomsen*, at pp. 653-55; *Woods*, at paras. 13 and 43-44).

[48] It was in *Bernshaw* that this Court opened the door to a flexible interpretation of the immediacy requirement. In that case, a driver was pulled over and a police officer smelled alcohol on his breath. In reply to a question by the police officer, the driver admitted that he had been drinking. The officer then demanded that the driver take a screening test using an ASD, which he failed. The reliability of the result was challenged because of the possible presence of alcohol in the driver’s mouth less than 15 minutes before the test, which could have falsely elevated the reading on the ASD. This Court held that the word “forthwith” allowed for a 15-minute waiting period in order to collect a reliable sample. To reach that conclusion, it relied on the wording of the provision in force at the time, which stated that the sample obtained had to be *necessary* to enable a proper *analysis* to be made by means of an ASD. The provision thus included requirements relating to the use of the ASD in order to ensure

that a proper analysis could be made, which justified a flexible interpretation of the immediacy requirement. Nevertheless, such a delay is not acceptable in every case, but only where the officer has information suggesting that a sample collected without waiting would not be reliable (*Bernshaw*, at paras. 71-73, citing *R. v. Pierman* (1994), 19 O.R. (3d) 704 (C.A.), aff'd in part [1996] 1 S.C.R. 68).

[49] This Court drew on *Bernshaw* in *Woods*. In that case, a driver was stopped by two police officers. Detecting a strong odour of alcohol in the driver's car, the officers demanded that he provide a breath sample pursuant to what was then s. 254(2) *Cr. C.* The driver refused and was arrested under s. 254(5) *Cr. C.* and taken to the police station, where he arrived about an hour after his arrest. At the station, the police demanded a second time that the driver provide a breath sample. The driver agreed. After several attempts, he provided a valid sample, which was a fail. He was therefore required to provide a breathalyzer sample. Based on the breathalyzer reading, the driver was charged with and later convicted of operating a vehicle with a blood alcohol level exceeding the legal limit.

[50] This Court, per Fish J., held that the breath sample was inadmissible in evidence because it had been provided approximately 1 hour and 20 minutes after the demand and not "forthwith" as required by s. 254(2) *Cr. C.* Citing *Bernshaw*, Fish J. stated that the word "forthwith" may in unusual circumstances "be given a more flexible interpretation than its ordinary meaning strictly suggests" (*Woods*, at para. 43). However, the Court noted that the immediacy requirement must generally be

interpreted in accordance with the usual meaning of the word “forthwith”, referring in particular to *R. v. Côté* (1992), 6 O.R. (3d) 667 (C.A.), in which Arbour J.A., as she then was, had found that a 14-minute delay due to the absence of an ASD at the scene did not satisfy the immediacy requirement:

Speaking for a unanimous court, Arbour J.A. (as she then was) cited the passage I have reproduced from *Grant*, and explained:

If the accused must be taken to a detachment, where contact with counsel could more easily be accommodated than at the side of the road, a large component of the rationale in *Thomsen* disappears. In other words, if the police officer is not in a position to require that a breath sample be provided by the accused before any realistic opportunity to consult counsel, then the officer’s demand is not a demand made under s. 238(2). The issue is thus not strictly one of computing the number of minutes that fall within or without the scope of the word “forthwith”. Here, the officer was ready to collect the breath sample in less than half the time it took in *Grant*. However, in view of the circumstances, particularly the wait at the police detachment, I conclude that the demand was not made within s. 238(2). As the demand did not comply with s. 238(2), the appellant was not required to comply with the demand and his refusal to do so did not constitute an offence. [Emphasis added; p. 285.]

It is for these reasons that we are prohibited on constitutional grounds from expanding the meaning of “forthwith” in s. 254(2) to cover the delays that occurred in this case.

(*Woods*, at paras. 35-36)

Therefore, the relevant time period for the explicit immediacy requirement is the period between the making of the demand and the moment when the breath sample can be provided (C.A. reasons, at para. 42). The above passage from *Woods* echoes the idea, originally stated in *Thomsen*, that a limit on the right to counsel results by implication from the language of s. 254(2)(b) *Cr. C.*, and specifically from the word “forthwith”.

Indeed, but for the immediacy requirement, the provision “would not pass constitutional muster” (*Woods*, at para. 15). The immediacy requirement is, of course, usually discussed in relation to the right to counsel guaranteed by s. 10(b) of the *Charter*. However, this is not the only constitutional right that may be engaged by this requirement; this may also be the case for the rights under ss. 8 and 9 of the *Charter*, which guarantee protection against, respectively, unreasonable search or seizure and arbitrary detention or imprisonment (*Woods*, at para. 15).

[51] It follows that the approach adopted by the Ontario Court of Appeal in *Quansah* needs to be qualified. It is true that the immediacy requirement is not met where the length of the detention was such that the stopped driver could realistically have consulted counsel. It is also true that, in the reverse case, the analysis is not at an end, because there are situations in which the immediacy requirement is not met *even though* there was not enough time to consult counsel (*Quansah*, at paras. 34-35). However, with respect, the Ontario Court of Appeal broadened the immediacy requirement unduly by finding that it must allow for the time “reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2)” (*Quansah*, at para. 47). “Forthwith” is not synonymous with “time reasonably necessary”; this word must be given an interpretation consistent with its ordinary meaning, except in the unusual circumstances referred to by Fish J. at para. 43 of *Woods*.

[52] That being so, what must be determined is whether the absence of an ASD at the scene at the time a demand is made under s. 254(2)(b) *Cr. C.* is an unusual circumstance that justifies a more flexible interpretation of the word “forthwith”.

C. *Unusual Circumstances That Allow for a Flexible Interpretation of the Word “Forthwith”*

[53] The Quebec Court of Appeal was correct in law in stating that unusual circumstances related to the use of the ASD or the reliability of the result that will be generated may justify a flexible interpretation of the word “forthwith” found in s. 254(2)(b) *Cr. C.*

[54] As I mentioned above, it is neither necessary nor desirable for the purposes of this appeal to identify in the abstract, and in an exhaustive manner, the circumstances that may be characterized as unusual and may justify a flexible interpretation of the immediacy requirement. It is preferable for those circumstances to be identified on a case-by-case basis in light of the facts of each matter. However, it is important to provide some guidelines to assist lower courts in this inquiry.

[55] First, the burden of establishing the existence of unusual circumstances rests on the Crown.

[56] Second, as in *Bernshaw*, the unusual circumstances must be identified in light of the text of the provision (*Piazza*, at para. 81 (CanLII)). This preserves the

provision's constitutional integrity by ensuring that courts do not unduly extend the ordinary meaning strictly given to the word "forthwith".

[57] Like the provision at issue in *Bernshaw*, s. 254(2)(b) *Cr. C.* specifies that the sample collected must enable a "proper analysis" to be made, which opens the door to delays caused by unusual circumstances related to the use of the device or the reliability of the result.

[58] That being said, courts might recognize unusual circumstances other than those directly related to the use of the ASD or the reliability of the result that will be generated. For example, insofar as the primary purpose of the impaired driving detection procedure is to ensure everyone's safety, circumstances involving urgency in ensuring the safety of the public or of peace officers might be recognized.

[59] Third, unusual circumstances cannot arise from budgetary considerations or considerations of practical efficiency. A flexible interpretation of the immediacy requirement cannot be justified by the magnitude of the public funding required to supply police forces with ASDs or by the time needed to train officers to use them. There is nothing unusual about such utilitarian considerations. Allocating a limited budget is the daily reality of any government (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 153).

[60] Fourth, the absence of an ASD at the scene at the time the demand is made is not *in itself* an unusual circumstance.

D. *A Demand Made in the Absence of an ASD Is Not Presumed To Be Valid*

[61] In oral argument, counsel for the Crown contended that a demand made in the absence of an ASD is presumed to be valid. According to counsel, a detained driver must therefore agree to provide the requested sample even though it is impossible for the driver to provide it given the absence of a device. Only if the device arrives too late (an expression that, I might add, is not clearly defined) can the driver then refuse to provide the breath sample and be shielded from any criminal liability; the presumed validity of the demand would, so to speak, lapse. On the other hand, again according to the Crown, if the driver from the outset expresses an intention to refuse to provide a sample, then the driver commits the offence provided for in s. 254(5) *Cr. C.*, despite the physical impossibility of complying with the demand made.

[62] The Ontario Court of Appeal adopted this reasoning in *Degiorgio*. The case involved a driver who refused three times to provide a breath sample when the officer had no ASD with him. The Court of Appeal, which upheld the guilty verdict, found that immediacy does not define the substance of the offence. Where a driver immediately refuses to comply, the prosecution is thus not required to show that, had it not been for the refusal, the police could have administered the test in accordance with the immediacy requirement (*Degiorgio*, at paras. 57-58, quoting with approval *R. v. Danychuk* (2004), 70 O.R. (3d) 215 (C.A.)).

[63] With respect, I do not agree. As I have already explained, the word “forthwith” qualifies the demand to provide a breath sample. It is refusing to obey that demand to *provide forthwith* a sample that constitutes a criminal offence, not stating in advance that one will refuse to comply with the demand once an ASD is available at the scene. Moreover, and as Doyon J.A. properly noted at paras. 49-50 and 55 of the Court of Appeal’s judgment, how can a person be criminally liable for refusing to comply with a demand — that is, a demand to provide a breath sample — with which it was not actually possible to comply because of the absence of an ASD at the time the demand was made? To ask the question is to answer it.

[64] More fundamentally, a demand cannot be both valid and invalid. In other words, to reiterate what the Court of Appeal in essence said, the validity of a demand cannot be conditional on the time needed for an ASD to be delivered to the scene (C.A. reasons, at paras. 51-61). This would be the situation if the approach of the Crown and the Ontario Court of Appeal were accepted.

[65] Such an approach creates intolerable uncertainty for drivers. It is a basic legal principle that ignorance of the law is no excuse. It must therefore be possible for people to know in advance, before committing an act, whether the act constitutes a crime (*Mabior*, at para. 14). When a detained driver has to respond to a demand to provide a breath sample, the driver must be able to know whether the demand is valid and whether refusing will result in criminal liability (C.A. reasons, at para. 51). In a context where the driver is unable to retain and instruct counsel, it cannot legitimately

and realistically be expected that the driver will agree in advance to comply and will then be capable of determining when the delay in the delivery of an ASD justifies a refusal. This also shows why a restrained approach must be taken in identifying what may constitute an “unusual circumstance” allowing for a flexible interpretation of the word “forthwith”. The more flexibly the word is interpreted, thereby turning immediacy into a variable requirement, the more necessary it becomes for drivers to retain and instruct counsel (*R. v. Talbourdet* (1984), 9 D.L.R. (4th) 406 (Sask. C.A.), at pp. 414-15, *a contrario*). Indeed, this was the wish expressed by the respondent after he first refused to provide a breath sample.

[66] Nothing in s. 254(2)(b) *Cr. C.* indicates that Parliament intended to create the presumption of validity proposed by the Crown. That being said, peace officers who have no ASD with them when they stop a driver who is suspected of having alcohol in their body are not entirely without options. They can require the driver to perform coordination tests, as permitted by the current s. 320.27(1)(a) *Cr. C.* These officers also have common law powers to check for sobriety. Where doing so is reasonable and necessary, they can, among other things, question a driver who is lawfully stopped about prior alcohol consumption or ask the driver to perform physical tests other than those provided for in the *Criminal Code* (*R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at paras. 43-49; *Leclerc v. R.*, 2022 QCCA 365, at paras. 45-48 (CanLII)).

[67] Finally, I should address the Crown’s argument that the respondent cannot rely on the absence of an ASD at the scene to justify his refusal because he was unaware

of that absence while stopped by the police. With respect, I disagree. Accepting this argument could encourage peace officers not to be transparent, because when they stop a driver, they are normally the only ones to know whether or not they are in possession of an ASD. This would mean that peace officers could, at their sole discretion and in an arbitrary manner, make valid a demand that otherwise would have been invalid if the driver had been informed of the absence of an ASD at the scene at the time the driver was stopped.

E. *Application to the Facts of the Case*

[68] The Crown has not shown that there was any unusual circumstance that would account for the absence of an ASD at the scene and thereby justify a flexible interpretation of the immediacy requirement. In fact, the appellant is unable to explain why Constables Atkins and Côté-Lemieux did not have an ASD in their possession. The demand made by Constable Atkins was therefore invalid. Accordingly, the respondent's refusal did not attract criminal liability, and the acquittal entered by the Quebec Court of Appeal must be upheld.

VII. Disposition

[69] For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Director of Criminal and Penal Prosecutions, Québec; Giasson et associés — Ville de Québec, Québec.

Solicitors for the respondent: Labrecque Doyon, Québec.

Solicitor for the intervener the Attorney General of Canada: Department of Justice Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates de la défense: BMD Avocats inc., Laval.

Solicitors for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil: Marcoux Elayoubi Raymond, Longueuil; Desjardins Côté, Montréal.

16

Her Majesty The Queen *Appellant*

v.

D.A.I. *Respondent*

and

Women’s Legal Education and Action Fund, DisAbled Women’s Network Canada, Criminal Lawyers’ Association (Ontario) and Council of Canadians with Disabilities *Interveners***INDEXED AS: R. v. D.A.I.****2012 SCC 5**

File No.: 33657.

2011: May 17; 2012: February 10.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Testimonial competence — Adults with mental disabilities — Whether adult witnesses with mental disabilities must demonstrate understanding of nature of obligation to tell truth in order to be deemed competent to testify — Whether finding of testimonial competence without demonstration of understanding of obligation to tell truth breaches accused’s right to fair trial — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.

The Crown alleges that the complainant, a 26-year-old woman with the mental age of a three- to six-year-old, was repeatedly sexually assaulted by her mother’s partner during the four years that he lived in the home. It sought to call the complainant to testify about the alleged assaults. After a *voir dire* to determine the complainant’s capacity to testify, the trial judge found that she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would

Sa Majesté la Reine *Appelante*

c.

D.A.I. *Intimé*

et

Fonds d’action et d’éducation juridiques pour les femmes, Réseau d’action des femmes handicapées du Canada, Criminal Lawyers’ Association (Ontario) et Conseil des Canadiens avec déficiences *Intervenants***RÉPERTORIÉ : R. c. D.A.I.****2012 CSC 5**

N° du greffe : 33657.

2011 : 17 mai; 2012 : 10 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D’APPEL DE L’ONTARIO

Droit criminel — Preuve — Habilité à témoigner — Adultes ayant une déficience intellectuelle — Les adultes ayant une déficience intellectuelle doivent-ils démontrer qu’ils comprennent la nature de l’obligation de dire la vérité pour être réputés habiles à témoigner? — La conclusion que le témoin est habile à témoigner sans qu’il ne soit démontré qu’il comprend l’obligation de dire la vérité porte-t-elle atteinte au droit de l’accusé à un procès équitable? — Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 16.

Le ministère public prétend que la plaignante, une femme âgée de 26 ans ayant l’âge mental d’un enfant de trois à six ans, a été agressée sexuellement de façon répétée par le conjoint de sa mère au cours des quatre années où il a vécu avec elles. La poursuite a tenté de faire témoigner la plaignante à propos des agressions alléguées. À l’issue d’un *voir-dire* afin de déterminer si la plaignante était habile à témoigner, le juge du procès a conclu qu’elle n’avait pas démontré qu’elle comprenait l’obligation de dire la vérité. À l’issue d’un autre *voir-dire*, le juge du procès a également exclu les déclarations extrajudiciaires que la plaignante avait faites à

compromise the accused's right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused's conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed, the acquittal set aside and a new trial ordered.

Per McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: The question in issue is whether the trial judge correctly interpreted the requirements of s. 16 of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. Section 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct abstract inquiries into whether the witness understands the difference between truth and falsity, the obligation to give true evidence in court, and what makes a promise binding. The plain words of s. 16(3) focus on the concrete acts of communicating and promising. Judges should not add other elements to the dual requirements imposed by s. 16(3). This approach does not transform the promise into an empty gesture. Adults with mental disabilities may have a practical understanding of the difference between the truth and a lie and know they should tell the truth without being able to explain what telling the truth means in abstract terms. When such a witness promises to tell the truth, the seriousness of the occasion and the need to say what really happened is reinforced.

Insofar as the authorities suggest that s. 16(3) requires an abstract understanding of the obligation to tell the truth, they should be rejected. That requirement was based on a version of s. 16 that explicitly required that the witness "understands the duty of speaking the truth". Although Parliament deleted that requirement in 1987, courts continued to require proof that child witnesses understood the duty to tell the truth. Parliament responded by enacting s. 16.1(7), which expressly forbade such inquiries of child witnesses. However, the existence of the s. 16.1(7) ban does not require us to infer that mentally disabled adults are to be questioned on the obligation to tell the truth. First, because s. 16(3)

la police et à son enseignante au motif que ces déclarations n'étaient pas dignes de foi et que leur admission en preuve compromettrait le droit de l'accusé à un procès équitable. Les autres éléments de preuve soulevaient de graves soupçons quant à la conduite de l'accusé, mais la preuve de la poursuite s'est effondrée et l'accusé a été acquitté. La Cour d'appel de l'Ontario a confirmé ce résultat.

Arrêt (les juges Binnie, LeBel et Fish sont dissidents) : Le pourvoi est accueilli, l'acquittement est annulé et la tenue d'un nouveau procès est ordonnée.

La juge en chef McLachlin et les juges Deschamps, Abella, Charron, Rothstein et Cromwell : La question en litige est de savoir si le juge du procès a correctement interprété les prescriptions de l'art. 16 de la *Loi sur la preuve au Canada* relativement à l'habilité à témoigner des personnes âgées de 14 ans ou plus (adultes) ayant une déficience intellectuelle. Le paragraphe 16(3) impose deux conditions relativement à l'habilité à témoigner d'un adulte ayant une déficience intellectuelle : (1) la capacité de communiquer les faits dans son témoignage et (2) une promesse de dire la vérité. Il n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite à la personne afin de voir si elle comprend la différence entre la vérité et la fausseté, l'obligation de dire la vérité devant le tribunal, et ce qui rend une promesse obligatoire. Le libellé explicite du par. 16(3) met l'accent sur les actes concrets que sont la communication et la promesse. Les juges ne devraient pas ajouter d'autres éléments aux deux conditions qu'impose le par. 16(3). Une telle approche ne vide pas de son sens la promesse de dire la vérité. Des adultes ayant une déficience intellectuelle peuvent concrètement faire la différence entre la vérité et le mensonge et savoir qu'ils doivent dire la vérité sans être capables d'expliquer en termes abstraits ce que signifie dire la vérité. Lorsqu'un tel témoin promet de dire la vérité, cela confirme le caractère sérieux de la situation et la nécessité de dire ce qui s'est vraiment produit.

Dans la mesure où les autorités prétendent que le par. 16(3) exige une compréhension, dans l'abstrait, de l'obligation de dire la vérité, elles doivent être rejetées. Cette exigence découlait d'une version de l'art. 16 qui prévoyait explicitement que le témoin « compren[ne] le devoir de dire la vérité ». Bien que le législateur ait éliminé cette exigence en 1987, les tribunaux ont maintenu l'exigence d'établir que les enfants qui témoignent comprennent l'obligation de dire la vérité. En réponse, le législateur a adopté le par. 16.1(7), qui interdit explicitement de tels interrogatoires lorsque des enfants sont en cause. Toutefois, l'interdiction prévue au par. 16.1(7) ne nous oblige pas à déduire que les adultes ayant une

only required a promise to tell the truth, Parliament had no need to ban such questioning of adult witnesses with mental disabilities. Second, s. 16(3) required only a promise to tell the truth, so there was no need for Parliament to enact a similar provision with respect to s. 16(3). Third, the enactment of s. 16.1(7) did not imply that the earlier judicial interpretation of s. 16(3) as it applied to children had been endorsed for adult witnesses. No inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children, and the re-enactment of s. 16(3) does not imply that Parliament accepted the judicial interpretation that prevailed at the time of the re-enactment. Fourth, the fact that s. 16 does not have a provision equivalent to s. 16.1(7) does not mean that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth — s. 16(3) sets two requirements for the competence of adults with mental disabilities, and nothing further need be imported. Fifth, there is no need to prove that, unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, they must be subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify.

The underlying policy concerns — bringing the abusers to justice, ensuring fair trials and preventing wrongful convictions — also support allowing adults with mental disabilities to testify. With respect to the first concern, rejecting the evidence of alleged victims on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms would exclude reliable and relevant evidence, immunize an entire category of offenders from criminal responsibility for their acts, and further marginalize the already vulnerable victims of sexual predators. With respect to the second, allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth does not render a trial unfair. Generally, the reliability threshold is met by establishing that the witness has the capacity to understand and answer the questions put to her and by bringing home the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness will tell the truth — the trial process seeks a basic indication of reliability. That, along with the rules governing admissibility and weight of the

déficience intellectuelle doivent être interrogés sur l'obligation de dire la vérité. Premièrement, parce que le par. 16(3) exigeait simplement une promesse de dire la vérité, il n'était pas nécessaire que le législateur interdise de tels interrogatoires dans le cas d'adultes ayant une déficience intellectuelle. Deuxièmement, étant donné que le par. 16(3) exigeait simplement une promesse de dire la vérité, il n'était pas nécessaire que le législateur adopte une disposition similaire en ce qui concerne le par. 16(3). Troisièmement, l'adoption du par. 16.1(7) ne permettait pas d'inférer que l'interprétation judiciaire du par. 16(3) relativement aux enfants s'appliquait aux adultes. Aucune inférence quant au sens du par. 16(3) ne découle de la simple adoption du par. 16.1(7) relativement aux enfants, et la nouvelle édicition du par. 16(3) ne permet pas d'inférer que le législateur a adopté l'interprétation judiciaire de la disposition qui prévalait à l'époque de la nouvelle édicition. Quatrièmement, l'absence, à l'art. 16, d'une disposition équivalente au par. 16.1(7) ne signifie pas que les adultes ayant une déficience intellectuelle doivent démontrer qu'ils comprennent la nature de l'obligation de dire la vérité afin de pouvoir témoigner — le par. 16(3) énonce deux conditions relatives à l'habilité à témoigner des adultes ayant une déficience intellectuelle, et il n'y a rien d'autre à y incorporer. Cinquièmement, il n'est pas nécessaire d'établir, sauf s'il peut être démontré qu'ils sont comme les enfants, ou leur ressemblent, que les adultes ayant une déficience intellectuelle doivent subir un interrogatoire pour que l'on vérifie, avant de déterminer s'ils sont habiles à témoigner, qu'ils comprennent la nature de l'obligation de dire la vérité.

Les considérations de politique générale qui sous-tendent la question, à savoir traduire en justice les agresseurs et garantir la tenue d'un procès équitable pour l'accusé ainsi que prévenir les déclarations de culpabilité injustifiées, militent également en faveur de permettre aux adultes ayant une déficience intellectuelle de témoigner. En ce qui concerne la première considération, rejeter le témoignage de victimes alléguées au motif qu'elles ne peuvent pas expliquer en termes philosophiques la nature de l'obligation de dire la vérité équivaldrait à écarter des témoignages fiables et pertinents, à dégager une catégorie entière de contrevenants de toute responsabilité criminelle relativement à leurs actes, et à marginaliser davantage les victimes déjà vulnérables des prédateurs sexuels. Pour ce qui est de la deuxième considération, permettre à l'adulte ayant une déficience intellectuelle de témoigner dans le cas où il est capable de communiquer les faits dans son témoignage et de promettre de dire la vérité ne rend pas le procès inéquitable. En règle générale, le seuil de fiabilité est satisfait s'il est établi que le témoin a la faculté de comprendre les questions qui lui sont posées et d'y

evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused has a fair trial.

When applying s. 16(3) in the context of the *Canada Evidence Act*, eight considerations are appropriate. First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues. Second, the *voir dire* should be brief, but not hasty. It is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner. Fourth, persons familiar with the proposed witness in her everyday situation understand her best. They may be called as fact witnesses to provide evidence on her development. Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness. Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence? Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements. Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

répondre, et si le témoin comprend qu'après avoir prêté serment ou fait une promesse ou une affirmation solennelle, il doit dire la vérité. Rien ne garantit qu'un témoin dira la vérité — on recherche simplement dans le cadre du procès un indice élémentaire de fiabilité. Cela, combiné aux règles régissant l'admissibilité et le poids de la preuve, permet de garantir qu'un verdict de culpabilité soit étayé par des éléments de preuve exacts et crédibles et que le procès de l'accusé soit équitable.

Lorsqu'il s'agit d'appliquer le par. 16(3) dans le contexte de la *Loi sur la preuve au Canada*, il faut tenir compte de huit considérations. Premièrement, le voir-dire relatif à l'habilité à témoigner d'un témoin éventuel constitue une enquête indépendante : il ne peut être combiné à un voir-dire relatif à d'autres questions. Deuxièmement, le voir-dire devrait être bref, mais non précipité. Il est préférable d'entendre toute la preuve pertinente disponible pouvant raisonnablement être prise en considération avant d'empêcher une personne de témoigner. Troisièmement, la source principale de preuve lorsqu'il s'agit de déterminer si une personne est habile à témoigner est la personne elle-même. Son interrogatoire devrait être autorisé. Pour interroger un adulte ayant une déficience intellectuelle, il faut tenir compte de ses besoins particuliers et prendre les mesures d'adaptation qui s'imposent; les questions devraient être formulées patiemment, de façon claire et simple. Quatrièmement, les personnes de l'entourage qui connaissent personnellement le témoin éventuel sont les mieux placées pour comprendre son état quotidien. Elles peuvent être appelées, à titre de témoins des faits, à témoigner sur son développement. Cinquièmement, une preuve d'expert peut être produite si elle satisfait aux critères d'admissibilité; on préfère cependant toujours le témoignage d'experts ayant eu un contact personnel et régulier avec le témoin éventuel. Sixièmement, le juge du procès doit répondre à deux questions durant le voir-dire relatif à l'habilité à témoigner : a) le témoin éventuel comprend-il la nature du serment ou de l'affirmation solennelle, et b) est-il capable de communiquer les faits dans son témoignage? Septièmement, pour répondre à la deuxième question relative à la capacité de la personne de communiquer les faits dans son témoignage, le juge du procès doit vérifier de façon générale si la personne est capable de relater des faits concrets en comprenant les questions qui lui sont posées et en y répondant. Il peut être utile de se demander si la personne est en mesure de différencier entre de vraies et de fausses affirmations factuelles de tous les jours. Finalement, la personne peut témoigner sous serment ou affirmation solennelle si elle satisfait aux deux volets du critère, ou, si elle satisfait uniquement au deuxième volet, en promettant de dire la vérité.

In the instant case, the trial judge erred in failing to consider the second part of the test under s. 16. This error of law led him to rule the complainant incompetent. This error cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference.

Per Binnie, LeBel and Fish JJ. (dissenting): The majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons by turning Parliament's direction permitting a person "whose mental capacity is challenged" to testify only "on promising to tell the truth" into an empty formality — a mere mouthing of the words "I promise" without any inquiry as to whether the promise has any significance to the potential witness

Section 16 mandates a single inquiry which presents the trial judge dealing with a witness whose mental capacity is challenged with three options. Section 16(2) provides that, if the challenged witness is able to communicate the evidence and understands the nature of an oath or a solemn declaration in terms of ordinary, everyday social conduct, he or she shall testify under oath or solemn affirmation. If the challenged witness is able to communicate the evidence but does not understand the nature of an oath or a solemn affirmation, s. 16(3) provides that he or she may provide unsworn testimony on promising to tell the truth. If the challenged witness does not satisfy either criterion, s. 16(4) provides that the individual with a mental disability shall not testify.

There is agreement with the majority that promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. It cannot be correct, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a prophylactic effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand the seriousness of the situation and the importance of being careful and correct, there is no prophylactic effect, and the fair trial interests of the accused under s. 16, as enacted in 1987, are unfairly prejudiced.

In 2005, when Parliament amended the *Canada Evidence Act* to prohibit asking child witnesses "any questions regarding their understanding of the nature

En l'espèce, le juge du procès a commis une erreur en n'examinant pas le deuxième volet du critère établi à l'art. 16. Cette erreur de droit l'a amené à conclure que la plaignante n'était pas habile à témoigner. Des commentaires formulés par le juge du procès à d'autres étapes de l'instruction ou le principe de la déférence judiciaire ne peuvent corriger cette erreur.

Les juges Binnie, LeBel et Fish (dissidents) : Les juges majoritaires diluent de façon inacceptable la protection que le législateur voulait accorder aux accusés en transformant la directive du législateur, qui permet à une personne « dont la capacité mentale est mise en question » de témoigner « en promettant de dire la vérité », en une formalité vide de sens — le témoin éventuel ne fait que prononcer les mots « je promets » sans que l'on vérifie s'il accorde de l'importance à sa promesse.

L'article 16 ne requiert qu'une seule enquête qui présente au juge du procès trois possibilités à l'égard d'une personne dont la capacité mentale est mise en question. Selon le par. 16(2), si cette personne est capable de communiquer les faits dans son témoignage et comprend la nature du serment ou de l'affirmation solennelle au sens de la conduite sociale ordinaire de la vie quotidienne, elle témoignera sous serment ou affirmation solennelle. Si la personne est capable de communiquer les faits dans son témoignage mais ne comprend pas la nature du serment ou de l'affirmation solennelle, le par. 16(3) prévoit qu'elle peut témoigner sans prêter serment en promettant de dire la vérité. Si la personne dont la capacité mentale est mise en question ne satisfait à ni l'une ni l'autre de ces exigences, le par. 16(4) prévoit qu'elle ne peut témoigner.

Il y a accord avec les juges de la majorité pour dire que la promesse est un acte visant à renforcer, dans l'esprit du témoin éventuel, le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique. On ne saurait toutefois affirmer qu'un juge du procès ne peut pas tenter de déterminer — en termes concrets de la vie quotidienne — si un tel effet prophylactique existe effectivement dans le cas d'une personne dont la capacité mentale est mise en question. Si cette personne est à ce point déficiente qu'elle ne comprend pas le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte, il n'y a aucun effet prophylactique et le droit de l'accusé à un procès équitable aux termes de l'art. 16 adopté en 1987 subit une atteinte injustifiée.

En 2005, lorsque le législateur a modifié la *Loi sur la preuve au Canada* pour interdire que l'on ne pose aux enfants appelés à témoigner « [a]ucune question sur

of the promise to tell the truth” (s. 16.1(7)), the empirical evidence before Parliament related exclusively to children. No such empirical studies were carried out with respect to adults with mental disabilities. In their case, no “don’t ask” provision was proposed, let alone adopted.

There is agreement with the majority that the words “on promising to tell the truth” in s. 16(3) must bear the same meaning as “to promise to tell the truth” in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) “don’t ask” rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words “promising to tell the truth” in s. 16(3), and thus treat adults with mental disabilities as equivalent for the purposes of s. 16 to children without mental disabilities. The fact that psychiatrists speak of persons with mental disabilities in terms of mental ages does not mean that an adult with mental age of six is on the same footing as a six-year-old child with no mental disability whatsoever — a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. No evidence was led to suggest equivalence and judicial notice cannot be taken of alleged “facts” that are neither notorious nor easily verifiable from undisputed sources.

On a competency *voir dire* where the mental capacity of an adult is challenged, and the adult is herself called as a proposed witness, the court may admit evidence from fact witnesses personally familiar with the complainant’s verbal and cognitive abilities and limitations to help the court gain a better understanding of the person’s capacity. These witnesses would not be in a position to express an expert opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box. However, ultimately, the judge must reach his or her own considered opinion about the mental capacity of the proposed witness prior to admitting the testimony.

In this case, the trial judge had serious concerns about the complainant’s ability to communicate the evidence. The complainant’s answers to a series of simple

la compréhension de la nature de la promesse » (par. 16.1(7)), la preuve empirique soumise au législateur se rapportait exclusivement aux enfants. Aucune étude empirique de ce genre n’a été effectuée relativement aux adultes ayant une déficience intellectuelle. Dans le cas de ces adultes, aucune règle interdisant de poser des questions n’a été proposée, et encore moins adoptée.

Il y a accord avec les juges de la majorité pour dire que les mots « en promettant de dire la vérité » au par. 16(3) doivent avoir le même sens que les mots « promettre [. . .] de dire la vérité » au par. 16.1(6). Cela étant, les juges majoritaires doivent incorporer, au par. 16(3) applicable uniquement aux adultes ayant une déficience intellectuelle, la règle du par. 16.1(7) interdisant de poser des questions, qui s’applique uniquement aux enfants, afin d’atténuer l’expression « en promettant de dire la vérité » au par. 16(3) et de traiter sur un pied d’égalité, pour le besoin de l’art. 16, les adultes ayant une déficience intellectuelle et les enfants n’ayant pas de déficience intellectuelle. Le fait pour les psychiatres de classer en fonction de l’âge mental les personnes ayant une déficience intellectuelle ne signifie pas qu’un adulte ayant l’âge mental d’un enfant de six ans soit sur un pied d’égalité avec un enfant âgé de six ans n’ayant aucune déficience intellectuelle — un enfant de six ans ayant la capacité mentale d’un enfant de six ans n’a pas une déficience intellectuelle. Aucun élément de preuve laissant croire que cette équivalence existe n’a été soumis et nous ne pouvons pas prendre connaissance d’office de « faits » allégués qui ne sont ni notoires, ni facilement vérifiables en ayant recours aux sources incontestées.

Dans le cadre d’un *voir-dire* relatif à l’habilité à témoigner, où la capacité mentale d’une personne adulte est mise en question et cette personne est assignée à témoigner, le tribunal peut admettre les dépositions de témoins des faits qui connaissent bien les habilités du témoin éventuel à s’exprimer et à comprendre, ainsi que ses limites, et ce, afin d’aider le tribunal à mieux saisir les capacités de la personne. Ces témoins ne seraient pas en mesure d’exprimer une opinion d’expert, mais ils pourraient témoigner à propos de ce qu’ils ont eux-mêmes directement observé chez le témoin éventuel. La preuve pourrait, si le juge du procès l’estime utile, aider le juge ou le jury à apprécier les réponses (ou l’absence de réponse) que lui donne la personne qui témoigne. Cependant, c’est le juge qui, en fin de compte, doit former sa propre opinion éclairée au sujet de la capacité mentale du témoin éventuel.

En l’espèce, le juge du procès avait de sérieuses réserves quant à la capacité de la plaignante de communiquer les faits dans son témoignage. Les réponses de la

and concrete questions left him fully satisfied that she did not understand what a promise to tell the truth involves. Much turned on the significance of the complainant's repeated "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether the complainant was actually able to "compute" her responses to what she was being asked. There was no allegation of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events and the crucible of cross-examination was useless because there was no secure method of testing her credibility. Her inability to deal with simple questions would mean her evidence would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial. Sitting on appeal from this determination, and not having had the advantage of observing and questioning the complainant, there is no valid basis for this Court to reverse the trial judge's assessment of her mental capacity.

The trial judge's conclusion that the complainant lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, his conclusion that her testimony lacked sufficient reliability. It was neither surprising nor an error however that the trial judge's reasoning on the threshold reliability in his hearsay ruling was quite similar to his reasoning on the s. 16 *voir dire*, and given his advantage in seeing and hearing the complainant, his exclusion of her out-of-court statements should equally be upheld by this Court.

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By McLachlin C.J.

Disapproved: *R. v. Farley* (1995), 23 O.R. (3d) 445; *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301; *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182; *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342; *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89; *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554; *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192; **distinguished:** *R. v. Khan* (1988), 42 C.C.C. (3d) 197; *R. v. Rockey*, [1996] 3 S.C.R. 829; **referred to:** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202; *R. v. Bannerman* (1966), 48 C.R. 110; *Attorney*

plaignante à une série de questions simples et concrètes ont entièrement convaincu le juge qu'elle ne comprenait pas ce que la promesse de dire la vérité signifie. L'instance reposait en grande partie sur l'importance des réponses de la plaignante lorsqu'elle répétait « je ne sais pas ». De toute évidence, il s'agissait d'un avantage important pour le juge du procès d'être témoin de l'enchaînement des questions et des réponses et de déterminer si la plaignante était réellement capable de « computer » les questions posées et d'y répondre. La bonne foi de la plaignante n'était aucunement en cause, mais elle aurait quand même pu se tromper pour ce qui est de percevoir ou de se rappeler les faits, et l'épreuve du contre-interrogatoire était inutile puisqu'il n'y avait aucun moyen sûr de vérifier sa crédibilité. Son incapacité de comprendre des questions simples et d'y répondre signifiait que son témoignage ne pourrait effectivement être attaqué par la défense, ce qui porterait atteinte à l'intérêt de la société et au droit de l'accusé à un procès équitable. Siégeant en appel de cette décision, et n'ayant pas eu l'avantage d'observer et d'interroger la plaignante, il n'y a aucune raison valable d'infirmer l'appréciation, par le juge, de sa capacité mentale.

Le fait que le juge du procès ait conclu que la plaignante n'avait pas la capacité de percevoir, de se souvenir et de raconter ce qui s'est passé et de comprendre la différence entre la vérité et la fausseté l'a amené, mais pas de façon automatique, à conclure que le témoignage de la plaignante n'était pas suffisamment fiable. Il n'était pas surprenant, et ce n'était pas une erreur, que le raisonnement du juge du procès sur la question du seuil de fiabilité dans sa décision relative au *voir-dire* ait été très semblable à son raisonnement sur le *voir-dire* prévu à l'art. 16. Comme il a eu l'avantage de voir et d'entendre la plaignante, la Cour devrait aussi maintenir la décision du juge du procès d'exclure ses déclarations extrajudiciaires.

Jurisprudence

Citée par la juge en chef McLachlin

Arrêts critiqués : *R. c. Farley* (1995), 23 O.R. (3d) 445; *R. c. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. c. McGovern* (1993), 82 C.C.C. (3d) 301; *R. c. S.M.S.* (1995), 160 R.N.-B. (2^e) 182; *R. c. Ferguson* (1996), 112 C.C.C. (3d) 342; *R. c. Parrott* (1999), 175 Nfld. & P.E.I.R. 89; *R. c. A. (K.)* (1999), 137 C.C.C. (3d) 554; *R. c. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. c. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. c. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192; **distinction d'avec les arrêts :** *R. c. Khan* (1988), 42 C.C.C. (3d) 197; *R. c. Rockey*, [1996] 3 R.C.S. 829; **arrêts mentionnés :** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Brasier* (1779), 1 Leach 199, 168 E.R. 202;

General of Quebec v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831; *R. v. Caron* (1994), 72 O.A.C. 287; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By Binnie J. (dissenting)

R. v. Rockey, [1996] 3 S.C.R. 829; *R. v. Khan*, [1990] 2 S.C.R. 531, aff'g (1988), 42 C.C.C. (3d) 197; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, MacPherson and Armstrong J.J.A.), 2010 ONCA 133, 260 O.A.C. 96, 252 C.C.C. (3d) 178, 73 C.R. (6th) 50, [2010] O.J. No. 665 (QL), 2010 CarswellOnt 880, affirming a decision of McKinnon J., 2008 CanLII 21725, [2008] O.J. No. 1823 (QL), 2008 CarswellOnt 2637. Appeal allowed, Binnie, LeBel and Fish JJ. dissenting.

Jamie C. Klukach and John Semenoff, for the appellant.

Howard L. Krongold and Leonardo Russomanno, for the respondent.

Joanna L. Birenbaum, for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada.

Joseph Di Luca and Erin Dann, for the intervener the Criminal Lawyers' Association (Ontario).

David M. Wright and Helga D. Van Iderstine, for the intervener the Council of Canadians with Disabilities.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, MacPherson et Armstrong), 2010 ONCA 133, 260 O.A.C. 96, 252 C.C.C. (3d) 178, 73 C.R. (6th) 50, [2010] O.J. No. 665 (QL), 2010 CarswellOnt 880, qui a confirmé une décision du juge McKinnon, 2008 CanLII 21725, [2008] O.J. No. 1823 (QL), 2008 CarswellOnt 2637. Pourvoi accueilli, les juges Binnie, LeBel et Fish sont dissidents.

Jamie C. Klukach et John Semenoff, pour l'appelante.

Howard L. Krongold et Leonardo Russomanno, pour l'intimé.

Joanna L. Birenbaum, pour les intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada.

Joseph Di Luca et Erin Dann, pour l'intervenante Criminal Lawyers' Association (Ontario).

David M. Wright et Helga D. Van Iderstine, pour l'intervenant le Conseil des Canadiens avec déficiences.

The judgment of McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

[1] THE CHIEF JUSTICE — Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society — children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.

[2] Parliament has addressed this challenge by a series of amendments to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that modify the normal rules of testimonial capacity for children and adults with mental disabilities. This Court has considered the provisions relating to children on a number of occasions. This appeal involves the provisions relating to adults with mental disabilities.

[3] At the heart of this case is a young woman, K.B., aged 26, with the mental age of a three- to six-year-old. The Crown alleges that she was repeatedly sexually assaulted by her mother's partner at the time, D.A.I. The prosecution sought to call the young woman to testify about the alleged assaults. It also sought to adduce evidence through her school teacher and a police officer of what she told them.

[4] The trial judge excluded this evidence, on the ground that K.B. was not competent to testify in a court of law (A.R., vol. I, at p. 2). As a result, the case collapsed and D.A.I. was acquitted (2008 CanLII 21725 (Ont. S.C.J.)). The Ontario Court of Appeal affirmed the acquittal (2010 ONCA 133, 260 O.A.C. 96).

[5] I respectfully disagree. In my view, the trial judge made a fundamental error of law in

Version française du jugement de la juge en chef McLachlin et des juges Deschamps, Abella, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE EN CHEF — L'agression sexuelle est un fléau. Trop souvent, ses victimes sont les personnes les plus vulnérables de notre société — les enfants et les personnes ayant une déficience intellectuelle. Or, les règles de preuve et la procédure en matière criminelle, qui sont fondées sur la norme du témoin moyen, peuvent compliquer la tâche de ces victimes qui sont appelées à témoigner dans des cours de justice. Le droit est confronté au défi de permettre que la vérité soit révélée tout en protégeant le droit de l'accusé à un procès équitable et en évitant toute possibilité de déclarations de culpabilité injustifiées.

[2] Le législateur a relevé ce défi en apportant, dans la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, une série de modifications aux règles relatives à l'habilité à témoigner afin d'accommoder les enfants et les adultes ayant une déficience intellectuelle. La Cour a examiné à plusieurs reprises les dispositions ayant trait aux enfants. Dans ce pourvoi, elle examine les dispositions relatives aux adultes ayant une déficience intellectuelle.

[3] La présente affaire met en cause une jeune femme, K.B., âgée de 26 ans, qui a l'âge mental d'un enfant de trois à six ans. Le ministère public prétend qu'elle a été agressée sexuellement de façon répétée par le conjoint de sa mère à l'époque, D.A.I. La poursuite a tenté de faire témoigner la jeune femme à propos des agressions alléguées. Elle a également tenté de présenter en preuve les révélations faites par K.B. à son institutrice et à un policier.

[4] Le juge du procès a exclu ces éléments de preuve au motif que K.B. n'était pas habile à témoigner dans une cour de justice (d.a., vol. I, p. 2). Par conséquent, la preuve de la poursuite s'est effondrée et D.A.I. a été acquitté (2008 CanLII 21725 (C.S.J. Ont.)). La Cour d'appel de l'Ontario a confirmé l'acquittement (2010 ONCA 133, 260 O.A.C. 96).

[5] En toute déférence pour l'opinion contraire, je ne souscris pas à cette décision. Selon moi, le juge

interpreting and applying the provisions of the *Canada Evidence Act* governing the testimonial competence of adult witnesses with mental disabilities. This error of law vitiates the trial judge's ruling that K.B. could not be allowed to testify. Subsequent evidence on other matters cannot overcome this fatal defect. I would therefore set aside the acquittal of D.A.I. and order a new trial.

I. Factual Background

[6] The complainant, K.B., was 22 at trial and 19 at the time of the alleged assault, but possessed the mental age of a three- to six-year-old. She lived with her mother and her mother's partner, D.A.I., as well as her sister. During the four years he was in the home, D.A.I. developed a close relationship with K.B.

[7] Sometime after D.A.I. separated from K.B.'s mother and left the home, K.B. told her special education teacher about a "game" that she and D.A.I. used to play together which involved D.A.I. touching her. She later repeated this statement to the police. K.B., through bodily gestures, described the game as involving touching her breasts and vagina. In her statement to the police, she indicated that D.A.I. had touched her vagina, buttocks and breasts beneath her pajamas, and that this had happened many times.

[8] At the preliminary inquiry, K.B. was ruled competent to testify on the basis that she was able to communicate the evidence. Her videotaped statement to the police was admitted as her examination-in-chief and she was cross-examined.

[9] The issue of K.B.'s testimonial capacity was raised at trial, and the trial judge held a *voir dire* to determine whether she could be allowed to testify. K.B. and Dr. K., the defence's expert witness, were the only ones to testify during the *voir dire* on competence. The Crown's examination of K.B.

du procès a commis une erreur de droit fondamentale dans l'interprétation et l'application des dispositions de la *Loi sur la preuve au Canada* régissant l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle. Cette erreur de droit vicie la décision du juge du procès de ne pas permettre à K.B. de témoigner. Une preuve produite ultérieurement relativement à d'autres questions ne peut remédier à ce vice fatal. Je suis donc d'avis d'annuler l'acquiescement de D.A.I. et d'ordonner la tenue d'un nouveau procès.

I. Le contexte factuel

[6] La plaignante, K.B., était âgée de 22 ans au moment du procès et de 19 ans au moment où elle aurait été agressée, mais elle avait l'âge mental d'un enfant de trois à six ans. Elle vivait avec sa mère et le conjoint de cette dernière, D.A.I., ainsi qu'avec sa sœur. Au cours des quatre années où il a vécu à la maison, D.A.I. a établi une relation étroite avec K.B.

[7] Quelque temps après que D.A.I. se soit séparé de la mère de K.B. et ait quitté la maison, K.B. a parlé à son enseignante spécialisée d'un « jeu » auquel elle se livrait avec D.A.I. et dans lequel ce dernier la touchait. Plus tard, elle a fait à la police une déclaration qui allait dans le même sens. K.B. a décrit par des gestes le jeu dans lequel l'intimé touchait ses seins et son vagin. Dans sa déclaration à la police, elle a mentionné que D.A.I. avait touché son vagin, ses fesses et ses seins sous son pyjama, et que cela s'était produit à plusieurs reprises.

[8] À l'enquête préliminaire, K.B. a été jugée habile à témoigner parce qu'elle était capable de communiquer les faits dans son témoignage. La déclaration enregistrée sur bande vidéo qu'elle a faite à la police a été admise à titre d'interrogatoire principal et elle a été contre-interrogée.

[9] La question de la capacité à témoigner de K.B. ayant été soulevée, le juge du procès a tenu un *voir-dire* afin de déterminer si K.B. pouvait être autorisée à témoigner. K.B. et le D^r K., le témoin expert de la défense, ont été les seules personnes à témoigner durant le *voir-dire* sur la question de l'habilité

demonstrated that she understood the difference between telling the truth and lying in concrete situations. However, the trial judge went beyond this to question K.B. on her understanding of the nature of truth and falsity, of moral and religious duties, and of the legal consequences of lying in court. K.B. was unable to respond adequately to these more abstract questions, to which she frequently answered “I don’t know” (A.R., vol. I, at pp. 117-19). Dr. K., a psychiatrist, testified for the defence. Dr. K.’s opinion was formed without personal contact with K.B. It was based on school and medical records, as well as on K.B.’s behaviour in her videotaped statement and during the *voir dire*. Dr. K. expressed the view that K.B. had “serious difficulty in differentiating the concept of truth and lie”, noted her low tolerance for frustration, and said, “I don’t think she ha[d] the ability to think what you’re asking and come up with an answer” (*ibid.*, at pp. 159 and 161).

[10] At the end of the *voir dire* on competence, the trial judge refused to hear from K.B.’s teacher of six years, Ms. W., and ruled that K.B. was incompetent to testify. K.B. was held incompetent because she had “not satisfied the prerequisite that she understands the duty to speak to the truth”, which the trial judge took to be required by s. 16(3) of the *Canada Evidence Act*: “She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies” (*ibid.*, at p. 3).

[11] A second *voir dire* was held to decide on the Crown’s application for admitting K.B.’s out-of-court statements to the police and to her teacher, Ms. W. The teacher testified that K.B. would not intentionally lie, but that her ability to understand was more developed than her ability to express herself: “This causes a lot of frustration for [K.B.], she frequently responds to questions by saying ‘I don’t know’” (*ibid.*, at p. 176; see also pp. 184-85).

à témoigner. L’interrogatoire de K.B. par le ministère public a démontré qu’elle comprenait la différence entre la vérité et le mensonge dans des situations concrètes. Cependant, le juge du procès est allé plus loin en interrogeant K.B. afin d’établir si elle comprenait la nature de la vérité et du mensonge, des obligations morales et religieuses, et des conséquences juridiques liées au fait de mentir au tribunal. K.B. n’a pas pu répondre adéquatement à ces questions plus abstraites, répétant à plusieurs reprises : [TRADUCTION] « Je ne sais pas » (d.a., vol. I, p. 117-119). Le D^r K., un psychiatre, a témoigné pour la défense. Son opinion était formée sans qu’il ait eu de contact personnel avec K.B. mais en se fondant sur des dossiers scolaires et médicaux de K.B. ainsi que sur le comportement de cette dernière sur la bande vidéo de sa déclaration et durant le *voir-dire*. De l’avis du D^r K., K.B. avait [TRADUCTION] « beaucoup de mal à différencier le concept de la vérité et celui du mensonge »; il a mentionné qu’elle avait une faible tolérance à la frustration et il a dit ce qui suit : « Je ne crois pas qu’elle a la capacité de penser à ce que vous demandez et de donner une réponse » (*ibid.*, p. 159 et 161).

[10] À l’issue du *voir-dire* relatif à l’habilité à témoigner, le juge du procès a refusé d’entendre le témoignage de la personne qui enseignait à K.B. depuis six ans, M^{me} W. Il a conclu que K.B. n’était pas habile à témoigner parce qu’elle n’avait [TRADUCTION] « pas satisfait à la condition préalable voulant qu’elle comprenne l’obligation de dire la vérité », ce qui, selon lui, est une condition exigée par le par. 16(3) de la *Loi sur la preuve au Canada* : « Elle est incapable de dire ce que comportent la vérité et le mensonge, ou de dire ce que sont les conséquences découlant de la vérité ou de mensonges » (*ibid.*, p. 3).

[11] Le juge du procès a tenu un deuxième *voir-dire* pour statuer sur la demande présentée par le ministère public en vue de faire admettre en preuve les déclarations extrajudiciaires faites par K.B. à la police et à son enseignante, M^{me} W. L’enseignante a indiqué dans son témoignage que K.B. ne mentirait pas intentionnellement, mais que sa capacité à comprendre était plus développée que sa capacité à s’exprimer : [TRADUCTION] « Cela lui [K.B.]

Also, evidence was led corroborating K.B.'s allegations. A family friend testified that, while he was in D.A.I.'s room for another purpose, he found a Polaroid photo of K.B. with her breasts exposed and another photo of two unidentified people having sex. D.A.I.'s explanation of the first photo was that K.B. had flashed him while he was taking a photo of her. K.B.'s sister also testified that she had found such photos. However, she did not report it to her mother and the photos were not available at trial. K.B.'s sister also said she once saw D.A.I. touch K.B.'s breasts while she was lying on her bed.

[12] The *voir dire* on hearsay admissibility was concluded by the trial judge's dismissal of the Crown's application. The trial judge rejected K.B.'s out-of-court statements to Ms. W. and to the police, holding that K.B.'s hearsay evidence was inadmissible because it was "unreliable, and its admission would seriously compromise the accused's right to a fair trial" (2008 CanLII 21726 (Ont. S.C.J.), at para. 57).

[13] At trial, the judge concluded that while the remainder of the evidence raised "some serious suspicions" about D.A.I.'s conduct, it was too scant to support a conviction (para. 11). The case essentially collapsed because of the trial judge's ruling that K.B. was not competent to testify.

[14] The question we must decide is whether the trial judge correctly interpreted the requirements of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. If he applied too high a standard, his decision to preclude K.B. from testifying must be set aside and the case remitted for a new trial.

cause beaucoup de frustration, elle répond souvent aux questions en disant "je ne sais pas" » (*ibid.*, p. 176; voir aussi p. 184-185). Des éléments de preuve étayant les prétentions de K.B. ont également été soumis. Un ami de la famille a affirmé dans son témoignage qu'il avait trouvé dans la chambre de D.A.I. une photo au polaroid de K.B. la montrant les seins nus et une autre photo montrant deux inconnus ayant des rapports sexuels. D.A.I. a expliqué que la première photo avait été prise par accident — que K.B. avait soudainement montré ses seins pendant qu'il prenait une photo d'elle. La sœur de K.B. a également indiqué avoir trouvé des photos de ce genre. Toutefois, elle ne l'a pas dit à sa mère et les photos n'ont pas été produites au procès. La sœur de K.B. a également dit avoir déjà vu D.A.I. toucher les seins de K.B. pendant qu'elle était étendue sur son lit.

[12] À l'issue du voir-dire relatif à l'admissibilité de la preuve par ouï-dire, le juge du procès a rejeté la demande du ministère public. Il a rejeté les déclarations extrajudiciaires faites par K.B. à M^{me} W. et à la police, affirmant que la preuve par ouï-dire de K.B. était inadmissible parce qu'elle n'était [TRADUCTION] « pas digne de foi, et que son admission en preuve compromettrait sérieusement le droit de l'accusé à un procès équitable » (2008 CanLII 21726 (C.S.J. Ont.), par. 57).

[13] Le juge du procès a conclu que, bien que la preuve ait soulevé [TRADUCTION] « de graves soupçons » quant à la conduite de D.A.I., elle ne permettait pas d'étayer une déclaration de culpabilité (par. 11). La preuve de la poursuite s'est effondrée essentiellement en raison de la conclusion du juge du procès selon laquelle K.B. n'était pas habile à témoigner.

[14] Nous devons décider si le juge du procès a correctement interprété les prescriptions de la *Loi sur la preuve au Canada* relativement à l'habilité à témoigner des personnes âgées de 14 ans ou plus (adultes) ayant une déficience intellectuelle. S'il a appliqué une norme trop élevée, sa décision d'empêcher K.B. de témoigner doit être annulée et l'affaire doit être renvoyée pour un nouveau procès.

II. Legal Analysis

A. *Testimonial Competence: A Threshold Requirement*

[15] Before turning to s. 16(3) of the *Canada Evidence Act*, it is important to distinguish between three different concepts that are sometimes confused: (1) the witness's competence to testify; (2) the admissibility of his or her evidence; and (3) the weight of the witness's testimony. The evidentiary rules governing all three concepts share a common purpose: ensuring that convictions are based on solid evidence and that the accused has a fair trial. However, each concept plays a distinct role in achieving this goal.

[16] The first concept, and the one most relevant to this appeal, is the principle of competence to testify. Competence addresses the question of whether a proposed witness has the capacity to provide evidence in a court of law. The purpose of this principle is to exclude at the outset worthless testimony, on the ground that the witness lacks the basic capacity to communicate evidence to the court. Competence is a threshold requirement. As a matter of course, witnesses are presumed to possess the basic "capacity" to testify. However, in the case of children or adults with mental disabilities, the party challenging the competence of a witness may be called on to show that there is an issue as to the capacity of the proposed witness.

[17] The second concept is admissibility. The rules of admissibility determine what evidence given by a competent witness may be received into the record of the court. Evidence may be inadmissible for various reasons. Only evidence that is relevant to the case may be considered by the judge or jury. Evidence may also be inadmissible if it falls under an exclusionary rule, for example the confessions rule or the rule against hearsay evidence. Among the purposes of the rules of admissibility are improving the accuracy of fact finding, respecting policy considerations, and ensuring the fairness of the trial.

II. Analyse juridique

A. *L'habilité à témoigner : une condition préliminaire*

[15] Avant de passer à l'examen du par. 16(3) de la *Loi sur la preuve au Canada*, il importe de faire une distinction entre trois notions différentes qui sont parfois confondues : (1) l'habilité du témoin à témoigner; (2) l'admissibilité de son témoignage; (3) la force probante de celui-ci. Les règles de preuve régissant ces trois notions poursuivent un même objectif : garantir que les déclarations de culpabilité soient fondées sur une preuve solide et que l'accusé ait un procès équitable. Toutefois, chaque notion joue un rôle distinct dans l'atteinte de cet objectif.

[16] La première notion — la plus pertinente dans ce pourvoi — est le principe de l'habilité à témoigner. L'habilité porte sur la question de savoir si un témoin éventuel a la capacité de faire une déposition dans une cour de justice. Ce principe a pour objet d'exclure d'entrée de jeu la déposition n'ayant aucune valeur au motif que le témoin n'est pas en mesure de communiquer les faits dans son témoignage à la cour. L'habilité est une condition préliminaire. Ordinairement, les témoins sont présumés « habiles » à témoigner. Toutefois, dans le cas d'enfants ou d'adultes ayant une déficience intellectuelle, la partie qui met en question la capacité d'un éventuel témoin de faire une déposition peut être appelée à démontrer qu'il existe des motifs de douter de cette capacité.

[17] La deuxième notion est l'admissibilité. Les règles d'admissibilité déterminent quels éléments de preuve donnés par un témoin habile peuvent être consignés au dossier de la cour. Un témoignage peut être inadmissible pour diverses raisons. Le juge ou le jury ne peuvent prendre en compte que les témoignages pertinents dans l'instance. Le témoignage peut également être inadmissible s'il est visé par une règle d'exclusion, par exemple la règle des confessions ou la règle interdisant le oui-dire. Les règles d'admissibilité visent notamment l'amélioration de l'exactitude des conclusions de fait, le respect des considérations de politique générale, et l'assurance que le procès est équitable.

[18] The third concept — the responsibility of the trier of fact to decide what evidence, if any, to accept — is based on the assumption that the witness is competent and the rules of admissibility have been properly applied. Fulfillment of these requirements does not establish that the evidence should be accepted. It is the task of the judge or jury to weigh the probative value of each witness's evidence on the basis of factors such as demeanour, internal consistency, and consistency with other evidence, and to thus determine whether the witness's evidence should be accepted in whole, in part, or not at all. Unless the trier of fact is satisfied that the prosecution has established all elements of the offence beyond a reasonable doubt, there can be no conviction.

[19] Together, the rules governing competence, admissibility and weight of the evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused person has a fair trial. The point for our purposes is a simple one: the requirement of competence is only the first step in the evidentiary process. It is the initial threshold for receiving evidence. It seeks a minimal requirement — a basic ability to provide truthful evidence. A finding of competence is not a guarantee that the witness's evidence will be admissible or accepted by the trier of fact.

B. *The Requirements for Competence of Adult Witnesses With Mental Disabilities: Section 16 of the Canada Evidence Act*

[20] Against this background, I come to the provision at issue in this case, s. 16(3) of the *Canada Evidence Act*, which governs the capacity to testify of adults with mental disabilities. Section 16 provides:

16. (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age

[18] La troisième notion — la responsabilité qui incombe au juge des faits de décider quels éléments de preuve, s'il en est, doivent être retenus — est fondée sur la prémisse que le témoin est habile à témoigner et que les règles d'admissibilité ont été correctement appliquées. Le respect de ces exigences n'établit pas que les éléments de preuve doivent être retenus. C'est au juge ou au jury qu'il revient d'apprécier la valeur probante de la déposition de chaque témoin au regard de facteurs comme le comportement, la cohérence et la compatibilité avec d'autres éléments de preuve et, donc, de déterminer si la déposition de la personne doit être retenue en entier, en partie ou pas du tout. Sauf si le juge des faits est convaincu que la poursuite a établi hors de tout doute raisonnable tous les éléments de l'infraction, il ne peut y avoir aucune déclaration de culpabilité.

[19] Ensemble, les règles régissant l'habilité à témoigner, l'admissibilité et le poids de la preuve permettent de garantir qu'un verdict de culpabilité est étayé par des éléments de preuve exacts et crédibles et que le procès de l'accusé est équitable. L'aspect important pour les besoins de l'analyse est simple : la condition relative à l'habilité à témoigner n'est que la première étape du processus de présentation de la preuve. C'est la première condition qui doit être satisfaite pour qu'un témoignage soit recevable. Elle repose sur une exigence minimale — une aptitude élémentaire à fournir un témoignage sincère. La seule conclusion que la personne est habile à témoigner ne garantit pas que sa déposition sera admissible ou retenue par le juge des faits.

B. *Les conditions relatives à l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle : l'art. 16 de la Loi sur la preuve au Canada*

[20] Dans ce contexte, j'examine maintenant la disposition litigieuse en l'espèce, le par. 16(3) de la *Loi sur la preuve au Canada*, qui régit l'habilité à témoigner des adultes ayant une déficience intellectuelle. L'article 16 prévoit ce qui suit :

16. (1) [Témoin dont la capacité mentale est mise en question] Avant de permettre le témoignage d'une

or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

- (a) whether the person understands the nature of an oath or a solemn affirmation; and
- (b) whether the person is able to communicate the evidence.

(2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

(4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[21] Section 16(1) sets out what a judge must do when a challenge is raised. First, the judge must determine “whether the person understands the nature of an oath or a solemn declaration” and “whether the person is able to communicate the evidence” (s. 16(1)). If these requirements are met, the witness testifies under oath or affirmation, as other witnesses do (s. 16(2)). If these requirements are not met, the judge moves on to s. 16(3). Section 16(3) provides that “[a] person . . . who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may . . . testify on promising to tell the truth.”

personne âgée d’au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :

- a) d’une part, celle-ci comprend la nature du serment ou de l’affirmation solennelle;
- b) d’autre part, celle-ci est capable de communiquer les faits dans son témoignage.

(2) [Témoignage sous serment] La personne visée au paragraphe (1) qui comprend la nature du serment ou de l’affirmation solennelle et qui est capable de communiquer les faits dans son témoignage témoigne sous serment ou sous affirmation solennelle.

(3) [Témoignage sur promesse de dire la vérité] La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l’affirmation solennelle, est capable de communiquer les faits dans son témoignage peut, malgré qu’une disposition d’une loi exige le serment ou l’affirmation, témoigner en promettant de dire la vérité.

(4) [Inaptitude à témoigner] La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l’affirmation solennelle et qui n’est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) [Charge de la preuve] La partie qui met en question la capacité mentale d’un éventuel témoin âgé d’au moins quatorze ans doit convaincre le tribunal qu’il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l’affirmation solennelle.

[21] Le paragraphe 16(1) énonce ce qu’un juge doit faire lorsque la capacité mentale d’un éventuel témoin est mise en question. Premièrement, le juge doit déterminer si la personne « comprend la nature du serment ou de l’affirmation solennelle » et si elle « est capable de communiquer les faits dans son témoignage » (par. 16(1)). Si ces conditions sont satisfaites, la personne témoigne sous serment ou sous affirmation solennelle, tout comme les autres témoins (par. 16(2)). Si ces conditions ne sont pas remplies, le juge passe au par. 16(3), selon lequel une « personne [. . .] qui, sans comprendre la nature du serment ou de l’affirmation solennelle, est capable de communiquer les faits dans son témoignage peut [. . .] témoigner en promettant de dire la vérité ».

[22] In brief, s. 16(1) provides that an adult witness whose competence to testify is challenged should testify under oath or affirmation, if the witness “understands the nature of an oath or a solemn affirmation” and can “communicate the evidence”. Here K.B. did not meet the first requirement. The inquiry therefore moved to s. 16(3), which states that if an adult witness cannot take the oath or affirm under s. 16(1), then she must be permitted to testify *if she is “able to communicate the evidence” and promises to tell the truth.*

[23] On its face, s. 16 says that in a case such as this where the witness cannot take the oath or affirm, the judge has only one further issue to consider — whether the witness can communicate the evidence. If the answer to that question is yes, the judge must then ask the witness whether she promises to tell the truth. If she does, she is competent to testify. It is not necessary to inquire into whether the witness understands the duty to tell the truth.

[24] The respondent argues, however, that the plain words of s. 16(3) do not suffice. They must be supplemented, he says, by the requirement that an adult witness with mental disabilities who cannot take an oath or affirm must not only be able to communicate the evidence and promise to tell the truth, but must also *understand the nature of a promise to tell the truth.*

[25] I cannot accept this submission. The words of an Act are to be interpreted in their entire context: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. The wording of s. 16(3), its history, its internal logic and its statutory context all point to the conclusion that s. 16(3) should be read as it stands, without reading in a further requirement that the witness demonstrate an understanding of the nature of the obligation to tell the truth. All that is required is that the witness be able to communicate the evidence and in fact promise to tell the truth.

[22] En bref, le par. 16(1) prévoit qu’une personne adulte dont l’habilité à témoigner est mise en question doit témoigner sous serment ou sous affirmation solennelle, si elle « comprend la nature du serment ou de l’affirmation solennelle » et si elle est capable de « communiquer les faits dans son témoignage ». En l’espèce, K.B. n’a pu satisfaire à cette première condition. Le juge a donc poursuivi en examinant le par. 16(3), selon lequel une personne adulte qui ne comprend pas la nature du serment ou de l’affirmation solennelle au sens du par. 16(1), mais *qui est « capable de communiquer les faits dans son témoignage »*, peut témoigner *en promettant de dire la vérité.*

[23] À première vue, l’art. 16 prévoit que, dans un cas tel celui qui nous occupe, où la personne ne peut prêter serment ni faire une affirmation solennelle, le juge n’a plus qu’une autre question à examiner — à savoir si la personne est capable de communiquer les faits dans son témoignage. Si tel est le cas, le juge doit alors demander à la personne si elle promet de dire la vérité. Dans l’affirmative, elle est habile à témoigner. Il n’est pas nécessaire de vérifier si elle comprend l’obligation de dire la vérité.

[24] Toutefois, l’intimé prétend que le libellé explicite du par. 16(3) n’est pas suffisant. Il doit être complété, selon lui, par l’ajout de la condition suivant laquelle un adulte ayant une déficience intellectuelle qui ne peut prêter serment ni faire une affirmation solennelle doit non seulement être capable de communiquer les faits dans son témoignage et promettre de dire la vérité, mais doit également *comprendre la nature de la promesse de dire la vérité.*

[25] Je ne peux pas accepter cette prétention. Il faut interpréter les termes d’une loi dans leur contexte global : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21. Le libellé du par. 16(3), son historique, sa logique interne et son contexte législatif nous amènent à conclure que le par. 16(3) doit être interprété littéralement, sans qu’il soit besoin d’exiger que la personne démontre qu’elle comprend la nature de l’obligation de dire la vérité. La disposition exige seulement que la personne soit capable de communiquer les faits dans son témoignage et qu’elle promette de dire la vérité.

[26] First, as already mentioned, this interpretation goes beyond the words used by Parliament. To insist that the witness demonstrate understanding of the nature of the obligation to tell the truth is to import a requirement into the section that Parliament did not place there. The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 44. However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.

[27] Second, the history of s. 16 supports the view that Parliament intended to remove barriers that had prevented adults with mental disabilities from testifying prior to the 1987 amendments (S.C. 1987, c. 24). The amendments altered the common law rule, by virtue of which only witnesses under oath could testify. To take the oath or affirm, a witness must have an understanding of the duty to tell the truth: *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Adults with mental disabilities might not be able to do this. To remove this barrier, Parliament provided an alternative basis for competence for this class of individuals. Section 16(1) of the 1987 provision continued to maintain the oath or affirmation as the first option for adults with mental disabilities, but s. 16(3) provided for competence based simply on the ability to communicate the evidence and a promise to tell the truth.

[28] This history suggests that Parliament intended to eliminate an understanding of the abstract nature of the oath or solemn affirmation as a prerequisite for testimonial capacity. Failure to show that the witness *could demonstrate an understanding of the obligation to tell the truth* was no

[26] Premièrement, comme je l'ai déjà mentionné, cette interprétation va au-delà des mots employés par le législateur. En insistant pour que la personne démontre qu'elle comprend la nature de l'obligation de dire la vérité, on introduit dans la disposition une condition que le législateur n'y a pas énoncée. Suivant le principe fondamental de l'interprétation des lois, il faut examiner le libellé explicite de la disposition. En cas d'ambiguïté, il peut être nécessaire d'avoir recours à des facteurs externes pour la dissiper : R. Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 44. Toutefois, le législateur a clairement indiqué les conditions requises pour conclure qu'un adulte ayant une déficience intellectuelle est habile à témoigner. L'article 16 ne comporte aucune ambiguïté.

[27] Deuxièmement, l'historique de l'art. 16 étaye le point de vue selon lequel le législateur voulait éliminer les obstacles qui, avant les modifications apportées en 1987 (L.C. 1987, ch. 24), avaient empêché des adultes ayant une déficience intellectuelle de témoigner. Les modifications ont changé la règle de common law en vertu de laquelle seules les personnes ayant prêté serment pouvaient témoigner. Pour prêter serment ou faire une affirmation solennelle, une personne doit comprendre l'obligation de dire la vérité : *R. c. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Des adultes ayant une déficience intellectuelle pourraient ne pas avoir cette faculté. Afin d'écartier cet obstacle, le législateur a prévu à l'égard des personnes de cette catégorie un autre fondement de l'habilité à témoigner. Le paragraphe 16(1) de la disposition de 1987 conservait encore le serment ou l'affirmation solennelle comme première possibilité dans le cas des adultes ayant une déficience intellectuelle, mais le par. 16(3) prévoyait que ces personnes étaient habiles à témoigner si elles étaient simplement capables de communiquer les faits dans un témoignage et si elles promettaient de dire la vérité.

[28] Cet historique donne à penser que le législateur voulait éliminer la condition préalable selon laquelle la personne, pour être habile à témoigner, devait comprendre la nature abstraite du serment ou de l'affirmation solennelle. Le défaut d'établir que la personne *pouvait démontrer qu'elle comprenait*

longer the end of the matter. Provided the witness (1) was able to *communicate the evidence*, and (2) promised to tell the truth, she should be allowed to testify.

[29] The drafters of s. 16(3) did not intend this provision to require an abstract understanding of the duty to tell the truth (see Appendix A). The original text of Bill C-15, which adopted the 1987 amendments, was changed by the Legislative Committee on Bill C-15 precisely to avoid that interpretation. The version of s. 16(3) first put before Parliament allowed testimony on promising to tell the truth if the witness was “sufficiently intelligent that the reception of the evidence is justified”. A discussion was held on the meaning of “sufficient intelligence”, after which the Committee concluded that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying. The Committee, fearing that this would open the door to abstract inquiries, ultimately replaced “sufficient intelligence” by “able to communicate the evidence”. The deliberations that followed emphasized the practical ability to communicate the evidence. There was no suggestion that ability to communicate the evidence accompanied by a promise to tell the truth implicitly imposed a requirement that the witness demonstrate a more abstract understanding of the duty to tell the truth.

[30] The historic background against which s. 16(3) was enacted explains why Parliament might have wished in 1987 to lower the requirements of testimonial competence for adults with mental disabilities, who are nonetheless capable of communicating the evidence. While adults with mental disabilities received little consideration in the pre-1987 case law, the inappropriateness of questioning children on abstract understandings of the truth had been noted and criticized. In *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), Dickson J. *ad hoc* (as he then was) rejected the practice of examining child witnesses on their religious beliefs and the philosophical meaning of truth. Meanwhile,

l'obligation de dire la vérité ne mettait plus fin à la question. Dès lors qu'elle (1) était capable de *communiquer les faits dans son témoignage* et qu'elle (2) promettait de dire la vérité, la personne devait être autorisée à témoigner.

[29] Les rédacteurs du par. 16(3) ne voulaient pas que cette disposition exige une compréhension abstraite de l'obligation de dire la vérité (voir annexe A). C'est précisément pour éviter une telle interprétation que le Comité législatif sur le projet de loi C-15 a modifié le texte original du projet de loi C-15 par lequel les modifications de 1987 ont été adoptées. La première version du par. 16(3) soumise au Parlement prévoyait qu'une personne pouvait témoigner en promettant de dire la vérité si elle était « suffisamment intelligente pour que le recueil de son témoignage soit justifié ». Après une discussion sur la signification de l'expression « suffisamment intelligente », le Comité a conclu qu'il fallait uniquement que le témoin apprécie la différence morale entre dire la vérité et mentir pour qu'il soit suffisamment intelligent. De crainte que cela n'ouvre la porte à des interrogatoires dans l'abstrait, le Comité a remplacé ces mots par « capable de communiquer les faits dans son témoignage ». Les délibérations qui ont suivi ont mis l'accent sur l'aptitude, en pratique, de communiquer les faits dans un témoignage. Rien n'indiquait que l'aptitude à communiquer les faits dans un témoignage, accompagnée d'une promesse de dire la vérité, exigeait implicitement du témoin qu'il comprenne de façon plus abstraite l'obligation de dire la vérité.

[30] Le contexte historique dans lequel le par. 16(3) a été adopté explique pourquoi le législateur a pu souhaiter, en 1987, assouplir les conditions relatives à l'habilité à témoigner imposées aux adultes ayant une déficience intellectuelle qui sont néanmoins capables de communiquer les faits dans leur témoignage. Bien qu'on ait accordé peu d'importance aux adultes ayant une déficience intellectuelle dans la jurisprudence antérieure à 1987, on avait souligné qu'il ne convenait pas de poser à des enfants des questions sur la compréhension qu'ils avaient, dans l'abstrait, de la vérité. Dans *R. c. Bannerman* (1966), 48 C.R. 110 (C.A. Man.), le juge Dickson *ad hoc* (plus tard Juge

awareness of the sexual abuse of children and adults with mental disabilities was growing. To rule out the evidence of children and adults with mental disabilities at the stage of competence — the effect of the requirement of an abstract understanding of the nature of the obligation to tell the truth — meant their stories would never be told and their cases never prosecuted. These concerns explain why Parliament moved to simplify the competence test for adult witnesses with mental disabilities.

[31] Third, and flowing from this history, the internal logic of s. 16 negates the suggestion that “promising to tell the truth” in s. 16(3) must be read as implying an understanding of the obligation to tell the truth. Two procedures are provided by s. 16. The preferred option is testimony under oath or affirmation (s. 16(1)), and the alternative procedure is testimony on a promise to tell the truth (s. 16(3)). If the witness is required under s. 16(3) to demonstrate that she understands the obligation to tell the truth, s. 16(3) adds little, if anything, to s. 16(1). In both cases, the witness is required to articulate abstract concepts of the nature of truth and the nature of the obligation to tell the truth in court. The result is essentially to render s. 16(3) a dead letter and to negate the dual structure of the provision. This runs against the principle of statutory interpretation that Parliament does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[32] Fourth, s. 16(4) indicates that ability to communicate the evidence is the only quality that an adult with mental disabilities must possess in order to testify under s. 16(3). Section 16(4) provides that

en chef du Canada) a rejeté la pratique consistant à poser à des enfants des questions sur leurs croyances religieuses et sur le sens philosophique de la vérité. Entre-temps, on prenait de plus en plus conscience de la violence sexuelle envers les enfants et les adultes ayant une déficience intellectuelle. En raison de l'exclusion, à l'étape de l'examen de l'habilité à témoigner, des dépositions des enfants et des adultes ayant une déficience intellectuelle — la conséquence de l'obligation, pour ces derniers, de démontrer une compréhension abstraite de la nature de l'obligation de dire la vérité — ils ne pouvaient jamais faire le récit de leur expérience et aucune poursuite n'était entreprise. C'est en raison de ces problèmes que le législateur a simplifié le critère relatif à l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle.

[31] Troisièmement, en lien avec cet historique, la logique interne de l'art. 16 contredit la thèse suivant laquelle les mots « en promettant de dire la vérité » qui figurent au par. 16(3) doivent être interprétés comme supposant une compréhension de l'obligation de dire la vérité. L'article 16 prévoit deux façons de procéder. Le témoignage sous serment ou affirmation solennelle constitue la solution privilégiée (par. 16(1)), l'autre possibilité étant le témoignage fait en promettant de dire la vérité (par. 16(3)). Si la personne est tenue, en vertu du par. 16(3), de démontrer qu'elle comprend l'obligation de dire la vérité, ce paragraphe n'ajoute rien, ou bien peu, au par. 16(1). Dans les deux cas, la personne doit formuler les concepts abstraits que sont la nature de la vérité et la nature de l'obligation de dire la vérité devant le tribunal. Cette interprétation a essentiellement pour résultat que le par. 16(3) devient lettre morte et que la structure en deux volets de la disposition est réduite à néant. Cela va à l'encontre du principe de l'interprétation des lois selon lequel le législateur ne parle pas en vain : *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838.

[32] Quatrièmement, le par. 16(4) indique que la capacité de communiquer les faits dans son témoignage est la seule qualité qu'un adulte ayant une déficience intellectuelle doit posséder afin de

the proposed witness is unable to testify if she neither understands the nature of an oath or solemn affirmation nor is able to communicate the evidence. It follows that the witness is competent to testify if she is able to communicate the evidence; she may testify on promising to tell the truth under s. 16(3). The qualities envisaged in s. 16 as basis for testimonial competence are mentioned in s. 16(4). Imposing an additional qualitative requirement to understand the nature of a promise to tell the truth would flout the utility of s. 16(4).

[33] Fifth, the legislative context speaks against reading s. 16(3) as requiring that an adult witness with mental disabilities understand the nature of the obligation to tell the truth. If this requirement is added to s. 16(3), the result is a different standard for the competence of adults with mental disabilities under s. 16(3) and children under s. 16.1 (enacted in 2005 (S.C. 2005, c. 32) pursuant to the “Brief on Bill C-2: Recognizing the Capacities & Needs of Children as Witnesses in Canada’s Criminal Justice System” (Child Witness Project, March 2005) (the “Bala Report”)). As will be discussed more fully below, s. 16(3) governing the competence of adults with mental disabilities, and ss. 16.1(3), (5) and (6) governing the competence of children, set forth essentially the same requirements. Broadly speaking, both condition testimonial capacity on: (1) the ability to communicate or answer questions; and (2) a promise to tell the truth. While it was open to Parliament to enact different requirements for children and adults with the minds of children, consistency of Parliamentary intent should be assumed, absent contrary indications. No explanation has been offered as to why Parliament would consider a promise to tell the truth a meaningful procedure for children, but an empty gesture for adults with mental disabilities.

pouvoir témoigner en vertu du par. 16(3). Le paragraphe 16(4) prévoit que le témoin éventuel est incapable de témoigner s’il ne comprend pas la nature du serment ou de l’affirmation solennelle et s’il n’est pas capable de communiquer les faits dans son témoignage. Il s’ensuit que la personne est habile à témoigner si elle est capable de communiquer les faits dans son témoignage; elle peut témoigner en promettant de dire la vérité aux termes du par. 16(3). Les qualités envisagées à l’art. 16 comme fondement de l’habilité à témoigner sont mentionnées au par. 16(4). L’imposition de la condition supplémentaire — comprendre la nature de la promesse de dire la vérité — équivaudrait à faire fi de l’utilité du par. 16(4).

[33] Cinquièmement, le contexte législatif va à l’encontre d’une interprétation du par. 16(3) exigeant qu’un adulte ayant une déficience intellectuelle comprenne la nature de l’obligation de dire la vérité. L’ajout de cette exigence au par. 16(3) créerait pour les adultes ayant une déficience intellectuelle une norme relative à l’habilité à témoigner différente de la norme prévue pour les enfants au par. 16.1 (adopté en 2005 (L.C. 2005, ch. 32) comme suite au mémoire « Brief on Bill C-2 : Recognizing the Capacities & Needs of Children as Witnesses in Canada’s Criminal Justice System » (Child Witness Project, mars 2005) (le « rapport Bala »)). Comme je l’expliquerai davantage plus loin, le par. 16(3) régissant l’habilité à témoigner des adultes ayant une déficience intellectuelle, ainsi que les par. 16.1(3), (5) et (6) relatifs à l’habilité à témoigner des enfants, énoncent essentiellement les mêmes exigences. De façon générale, dans les deux dispositions, l’habilité à témoigner dépend des éléments suivants : (1) la capacité de communiquer ou de répondre aux questions; (2) la promesse de dire la vérité. Bien qu’il ait été loisible au législateur d’adopter des exigences différentes selon qu’il s’agisse d’enfants ou d’adultes ayant les capacités mentales d’un enfant, il faut présumer la constance de l’intention législative en l’absence d’indications contraires. Aucune explication n’a été avancée quant à savoir pourquoi le législateur estimerait que la promesse de dire la vérité est une solution valable pour les enfants mais vide de sens pour les adultes ayant une déficience intellectuelle.

[34] The foregoing reasons make a strong case that s. 16(3) should be read as requiring only two requirements for competence of an adult with mental disabilities: (1) ability to communicate the evidence; and (2) a promise to tell the truth. However, two arguments have been raised in opposition to this interpretation: first, without a further requirement of an understanding of the obligation to tell the truth, a promise to tell the truth is an “empty gesture”; second, Parliament’s failure in 2005 to extend to adults with mental disabilities the s. 16.1(7) prohibition on the questioning of children means that it intended this questioning to continue for adults. I will examine each argument in turn.

[35] The first argument is that unless an adult witness with mental disabilities is required to demonstrate that she understands the nature of the obligation to tell the truth, the promise is an “empty gesture”. However, this submission’s shortcoming is that it departs from the plain words of s. 16(3), on the basis of an assumption that is unsupported by any evidence and contrary to Parliament’s intent. Imposing an additional qualitative condition for competence that is not provided in the text of s. 16(3) would demand compelling demonstration that a promise to tell the truth cannot amount to a meaningful procedure for adults with mental disabilities. No such demonstration has been made. On the contrary, common sense suggests that the act of promising to tell the truth may be useful, even in the absence of the witness’s ability to explain what telling the truth means in abstract terms.

[36] Promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. A witness who is able to communicate the evidence, as required by s. 16(3), is necessarily able to relate events. This in turn implies an understanding of what really happened — i.e. the truth — as

[34] Les motifs qui précèdent exposent de façon convaincante que, suivant l’interprétation du par. 16(3) qui s’impose, un adulte ayant une déficience intellectuelle est habile à témoigner s’il satisfait à deux exigences seulement : (1) la capacité de communiquer les faits dans son témoignage; (2) la promesse de dire la vérité. Toutefois, deux arguments ont été soulevés à l’encontre de cette interprétation. Premièrement, sans exiger en plus que la personne comprenne l’obligation de dire la vérité, la promesse de dire la vérité reste « vide de sens ». Deuxièmement, si le législateur a omis, en 2005, d’appliquer aux adultes ayant une déficience intellectuelle l’interdiction prévue au par. 16.1(7) de poser des questions à des enfants, c’est parce qu’il voulait que l’on continue de poser des questions aux adultes. Je vais examiner successivement chacun de ces arguments.

[35] Selon le premier argument, la promesse de dire la vérité « est vide de sens » si le témoin adulte ayant une déficience intellectuelle n’est pas tenu de démontrer qu’il comprend la nature de l’obligation de dire la vérité. Toutefois, cette prétention comporte une lacune en ce qu’elle s’écarte du libellé explicite du par. 16(3) car elle repose sur une hypothèse qui n’est étayée par aucun élément de preuve et qui est contraire à l’intention du législateur. L’imposition, relativement à l’habilité à témoigner, d’une condition qualitative supplémentaire que ne prévoit pas le texte du par. 16(3) exigerait une démonstration convaincante qu’une promesse de dire la vérité n’offre pas une façon valable d’obtenir le témoignage d’un adulte ayant une déficience intellectuelle. Cette démonstration n’a pas été faite. Au contraire, le bon sens donne à penser que la promesse de dire la vérité peut être utile, même si la personne n’a pas la faculté d’expliquer en termes abstraits ce que signifie dire la vérité.

[36] La promesse est un acte visant à renforcer, dans l’esprit du témoin éventuel, le caractère sérieux de la situation et l’importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique. Une personne qui est capable de communiquer les faits dans son témoignage, comme l’exige le par. 16(3), est nécessairement capable de relater des

opposed to fantasy. When such a witness promises to tell the truth, this reinforces the seriousness of the occasion and the need to do so. In dealing with the evidence of children in s. 16.1, Parliament held that a promise to tell the truth was all that is required of a child capable of responding to questions. Parliament did not think a child's promise, without more, is an empty gesture. Why should it be otherwise for an adult with the mental ability of a child?

[37] The second argument raised in support of the proposition that “promising to tell the truth” in s. 16(3) implies a requirement that the witness must show that she understands the nature of the obligation to tell the truth is that Parliament has not enacted a ban on questioning adult witnesses with mental disabilities on the nature of the obligation to tell the truth, as it did for child witnesses in 2005 in s. 16.1(7). To understand this argument, we must briefly trace the history of s. 16.1.

[38] In 2005, following the Bala Report, Parliament once more modified the *Canada Evidence Act's* provisions on testimonial competence, but this time only with respect to children. The central focus of the 2005 legislation relating to the *Canada Evidence Act* was the competence of *child* witnesses, with the aim of altering the restrictive gloss the case law had placed on the previous provisions relating to the capacity of children to testify. Chief among this case law was *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), which insisted that a child understand the nature of the obligation to tell the truth before the child could testify. Section 16.1, in unequivocal language, rejected this requirement. It stated:

16.1 (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

événements. Cela sous-entend que la personne comprend ce qui s'est vraiment passé — c'est-à-dire la vérité — par opposition à l'imaginaire. Lorsqu'une telle personne promet de dire la vérité, cela confirme le caractère sérieux de la situation et la nécessité de dire la vérité. En ce qui concerne le témoignage des enfants dont il est question à l'art. 16.1, le législateur a conclu que la promesse de dire la vérité était tout ce qui était exigé de la part d'un enfant capable de répondre aux questions. Le législateur n'a pas envisagé que la promesse faite par un enfant, sans rien d'autre, est vide de sens. Pourquoi en serait-il autrement pour un adulte ayant la capacité mentale d'un enfant?

[37] Selon le deuxième argument soulevé à l'appui de l'affirmation selon laquelle les mots « en promettant de dire la vérité » figurant au par. 16(3) sous-entendent que la personne doit démontrer qu'elle comprend la nature de l'obligation de dire la vérité, le législateur n'a pas adopté une interdiction de poser aux adultes ayant une déficience intellectuelle des questions quant à la nature de l'obligation de dire la vérité, comme il l'a fait pour les enfants en 2005, au par. 16.1(7). Pour bien saisir cet argument, il nous faut relater brièvement l'historique de l'art. 16.1.

[38] En 2005, comme suite au rapport Bala, le législateur a encore une fois modifié les dispositions de la *Loi sur la preuve au Canada* portant sur l'habilité à témoigner, mais cette fois uniquement en ce qui a trait aux enfants. La loi de 2005 relative à la *Loi sur la preuve au Canada* portait principalement sur la compétence des *enfants* à rendre témoignage et visait à modifier l'interprétation restrictive, dans la jurisprudence, des dispositions antérieures relatives à l'habilité des enfants à témoigner. La décision la plus importante dans cette jurisprudence était *R. c. Khan* (1988), 42 C.C.C. (3d) 197 (C.A. Ont.), laquelle exigeait d'un enfant qu'il comprenne la nature de l'obligation de dire la vérité avant de pouvoir témoigner. L'article 16.1, qui a rejeté cette exigence en termes non équivoques, est libellé comme suit :

16.1 (1) [Témoignage âgé de moins de quatorze ans] Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

[39] Section 16.1, like s. 16(3) governing adult witnesses with mental disabilities, imposed two preconditions for the testimony of children: (1) that the child be able to understand and respond to questions (s. 16.1(5)); and (2) that the child promise to tell the truth (s. 16.1(6)). But, taking direct aim at *Khan's* insistence that children be questioned on their understanding of the nature of the obligation to tell the truth, s. 16.1(7) went on to state explicitly that children not “*be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court*”.

(2) [Témoignage non assermenté] Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) [Témoignage admis en preuve] Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) [Charge de la preuve] La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) [Enquête du tribunal] Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) [Promesse du témoin] Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) [Question sur la nature de la promesse] Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) [Effet] Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

[39] Tout comme le par. 16(3) régissant le témoignage des adultes ayant une déficience intellectuelle, l'art. 16.1 a imposé deux conditions préalables au témoignage des enfants : (1) l'enfant doit être capable de comprendre les questions et d'y répondre (par. 16.1(5)); (2) l'enfant doit promettre de dire la vérité (par. 16.1(6)). Mais, pour contrer l'arrêt *Khan* qui insistait pour que les enfants soient interrogés sur leur compréhension de la nature de l'obligation de dire la vérité, le législateur a énoncé explicitement au par. 16.1(7) qu'« *[a]ucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.* »

[40] The argument is that if Parliament had intended adult witnesses with mental disabilities to be competent to testify simply on the basis of the ability to communicate and the making of a promise, it would have enacted a ban on questioning them on their understanding of the nature of the obligation to tell the truth, as it did for child witnesses under s. 16.1(7). The absence of such a provision, it is said, requires us to draw the inference that Parliament intended that *adult* witnesses with mental disabilities *must* be questioned on the obligation to tell the truth.

[41] First, this argument overlooks the fact that Parliament's concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children.

[42] Moreover, it is apparent from the Parliamentary works on Bill C-2 that s. 16.1(7) was intended to confirm the existing formal requirement of a promise alone, and not to modify the law: see Appendix B. The record of the standing House of Commons committee which studied Bill C-2 contains a discussion between Joe Comartin and Professor Nicholas Bala, during a debate on the phrasing of s. 16.1(7), which revealed that the original intent of s. 16(3) was to allow children and adults with mental disabilities to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence:

[Prof. Nicholas Bala:] . . . the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

[40] L'intimé plaide que si le législateur avait voulu que les adultes ayant une déficience intellectuelle soient habiles à témoigner tout simplement s'ils sont capables de communiquer les faits dans leur témoignage en promettant de dire la vérité, il aurait interdit expressément qu'ils soient interrogés sur leur compréhension de la nature de l'obligation de dire la vérité, comme il l'a fait pour les enfants au par. 16.1(7). L'absence d'une telle disposition, prétend-on, nous oblige à déduire que le législateur voulait que les *adultes* ayant une déficience intellectuelle soient *inévitavelmente* interrogés sur l'obligation de dire la vérité.

[41] Premièrement, cet argument ne tient pas compte du fait que, en adoptant en 2005 les modifications à la *Loi sur la preuve au Canada*, le législateur visait exclusivement les enfants. Les modifications ont été apportées comme suite au rapport Bala traitant des problèmes associés à la poursuite des actes criminels perpétrés contre les enfants. Les débats de la Chambre des communes portant sur l'art. 16.1 attestent que les modifications de 2005 avaient exclusivement trait aux enfants.

[42] En outre, il ressort des travaux parlementaires portant sur le projet de loi C-2 que le par. 16.1(7) visait à confirmer l'exigence formelle existante d'une promesse seulement, et non pas à modifier l'état du droit : voir l'annexe B. On trouve, aux procès-verbaux du comité parlementaire permanent de la Chambre des communes qui a étudié le projet de loi C-2, un échange entre Joe Comartin et le professeur Nicholas Bala survenu au cours d'un débat portant sur la formulation du par. 16.1(7); cet échange révèle que, à l'origine, le par. 16(3) devait permettre aux enfants et aux adultes ayant une déficience intellectuelle de témoigner en ne faisant que promettre de dire la vérité, dès qu'ils étaient jugés capables de communiquer les faits dans leur témoignage :

[Prof. Nicholas Bala:] . . . ma préoccupation découle du fait que la loi actuelle a été interprétée de façon très étroite par les juges. Quand on consulte les transcriptions — j'ai été témoin en 1988, quand les dispositions sont entrées en vigueur — je crois que les gens ont pensé : « Eh bien, nous n'avons pas besoin d'être explicites à cet endroit, car les juges comprendront. »

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"? [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

[43] This view was confirmed by Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of the Department of Justice Canada, during her opening statement to the Standing Senate Committee on Legal and Constitutional Affairs:

[Ms. Catherine Kane:] . . . These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the Evidence in an effort to permit children's evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional*

Évidemment, nous devons faire confiance à notre magistrature au sujet d'un grand nombre de questions, mais, pour certains enjeux, je crois qu'il est important de les orienter le plus possible. Je crains qu'un juge lise ceci — et nous avons une imposante jurisprudence qui reflète cela — et se dis[e] : « Bon, je ne peux t'interroger pour déterminer si tu comprends la nature de la promesse, mais est-ce que je peux te poser des questions sur le sens de la vérité? » Le Parlement prévoit explicitement, au paragraphe 16.1(6), qu'ils seront tenus de promettre de dire la vérité. On ne peut interroger les enfants sur la nature de la promesse, mais est-ce qu'on peut leur poser des questions sur le sens de « vérité » et de « mensonge »? [Je souligne; p. 7.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile*, n° 26, 1^{re} sess., 38^e lég., 24 mars 2005)

[43] Cette opinion a été confirmée par M^{me} Catherine Kane, directrice du Centre de la politique concernant les victimes du ministère de la Justice du Canada, au cours de sa déclaration d'ouverture devant le Comité sénatorial permanent des Affaires juridiques et constitutionnelles :

[Mme Catherine Kane :] . . . Ces modifications ont été apportées en 1988 pour rendre plus facilement acceptables les témoignages des enfants. Cependant, d'après la manière dont cette disposition a été interprétée dans certains procès, nous n'avons pas encore observé d'acceptation sans réserve de témoignages d'enfants.

Si ces deux critères sont respectés, un enfant témoigne sous serment ou sous affirmation solennelle. Cependant, si l'enfant ne comprend pas la nature du serment ou de l'affirmation mais est capable de communiquer la preuve, celle-ci est reçue sur promesse de dire la vérité. C'est la loi actuelle. Bien que cela puisse paraître logique à première vue, les interprétations et applications de ces dispositions ne reflètent pas l'intention du Parlement de modifier la Loi sur la preuve de manière à ce que les témoignages des enfants soient plus facilement acceptés.

Tel qu'il est interprété par les tribunaux, l'article 16 stipule qu'avant qu'un enfant soit autorisé à témoigner, il doit être assujéti à un interrogatoire pour déterminer son degré d'entendement de l'obligation de dire la vérité et du concept d'une promesse, et ses capacités de communiquer. [Je souligne; p. 105-106.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et*

Affairs, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Therefore, it cannot be inferred that Parliament's failure to extend the express ban on questioning in s. 16.1(7) to adult witnesses shows an intent to permit such questioning of adult witnesses with mental disabilities.

[44] Second, as already mentioned, the wording of s. 16(3) governing the competence of adult witnesses had since 1987 required only a promise to tell the truth. There was no need for Parliament to add a provision on questioning an adult witness's understanding of the nature of the obligation to tell the truth in s. 16(3). The fact that Parliament did so 18 years later for children's evidence under s. 16.1(7) reflects concern with the fact that courts in children's cases, such as *Khan*, were continuing to engage in this type of questioning, instead of accepting a simple promise to tell the truth. It does not evince an intention that Parliament intended the words "promising to tell the truth" to have different meanings in ss. 16(3) and 16.1(6).

[45] Third, the argument that the enactment of s. 16.1(7) for children but not for adults endorsed as applicable to adult witnesses the earlier judicial interpretation of the provisions relating to children does not take into account s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

45. (1) [Repeal does not imply enactment was in force] The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

(2) [Amendment does not imply change in law] 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.

constitutionnelles, n^o 18, 1^{re} sess., 38^e lég., 7 juillet 2005)

Par conséquent, on ne peut conclure que l'omission du législateur d'appliquer aux adultes l'interdiction explicite de poser des questions qui figure au par. 16.1(7) révèle une intention de permettre que des questions soient posées aux adultes ayant une déficience intellectuelle.

[44] Deuxièmement, comme je l'ai déjà mentionné, le libellé du par. 16(3) régissant l'habilité des adultes à témoigner exigeait uniquement, depuis 1987, une promesse de dire la vérité. Il n'était pas nécessaire que le législateur ajoute au par. 16(3) une disposition interdisant que l'on interroge un adulte pour vérifier s'il comprend la nature de l'obligation de dire la vérité. Le fait que le législateur ait, 18 ans plus tard, ajouté une telle disposition au par. 16.1(7) relativement au témoignage des enfants traduit son inquiétude de voir que, dans les affaires relatives à des enfants, comme l'affaire *Khan*, les tribunaux permettaient toujours ce type d'interrogatoire plutôt que d'accepter une simple promesse de dire la vérité. Cela ne démontre pas que le législateur voulait que les mots « en promettant de dire la vérité » aient des significations différentes au par. 16(3) et au par. 16.1(6).

[45] Troisièmement, l'argument selon lequel l'adoption du par. 16.1(7) relativement aux enfants et non aux adultes a confirmé que l'interprétation judiciaire des dispositions ayant trait aux enfants s'applique aux adultes ne tient pas compte de l'art. 45 de la *Loi d'interprétation* fédérale, L.R.C. 1985, ch. I-21, qui prévoit ce qui suit :

45. (1) [Absence de présomption d'entrée en vigueur] L'abrogation, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration portant que le texte était auparavant en vigueur ou que le Parlement, ou toute autre autorité qui l'a édicté, le considérait comme tel.

(2) [Absence de présomption de droit nouveau] 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.

(3) [Repeal does not declare previous law] The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

(4) [Judicial construction not adopted] A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

[46] Section 45(3) of the *Interpretation Act* provides that the amendment of an enactment (in this case the adoption of s. 16.1(7)) shall not be deemed to involve any declaration as to the meaning of the previous law (in this case s. 16(3)). Therefore, no inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children.

[47] Additionally, s. 45(4) of the *Interpretation Act* states that the re-enactment of a provision (in this case, s. 16 with respect to adults with mental disabilities) is not sufficient to infer that Parliament adopted the provision's judicial interpretation which prevailed at the time of the re-enactment. It follows that the fact that s. 16 was re-enacted for adults with mental disabilities in 2005 does not, alone, imply that Parliament intended to countenance the judicial interpretation of this section which required understanding the obligation to tell the truth.

[48] Fourth, the argument that the absence of the equivalent of s. 16.1(7) in s. 16(3) means that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth is logically flawed. The argument rests on the premise that s. 16(3), unless amended, requires an inquiry into the witness's understanding of the obligation to tell the truth. On this basis, it asserts that, unless the ban on questioning in s. 16.1(7) dealing with children is read into s. 16(3), such questioning must be conducted. Thus, my colleague Binnie J. states that “[t]he Crown invites us, in effect, to apply the ‘don’t ask’ rule governing

(3) [Absence de déclaration sur l'état antérieur du droit] L'abrogation ou la modification, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit.

(4) [Absence de confirmation de l'interprétation judiciaire] La nouvelle édicition d'un texte, ou sa révision, refonte, codification ou modification, n'a pas valeur de confirmation de l'interprétation donnée, par décision judiciaire ou autrement, des termes du texte ou de termes analogues.

[46] Le paragraphe 45(3) de la *Loi d'interprétation* prévoit que la modification d'un texte (en l'espèce, l'adoption du par. 16.1(7)) ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit (en l'espèce, le par. 16(3)). Ainsi, aucune inférence quant au sens du par. 16(3) ne découle de la simple adoption du par. 16.1(7) relativement aux enfants.

[47] De plus, le par. 45(4) de la *Loi d'interprétation* prévoit que la nouvelle édicition d'une disposition (en l'espèce, l'art. 16 relativement aux adultes ayant une déficience intellectuelle) ne permet pas d'inférer que le législateur a adopté l'interprétation judiciaire de la disposition qui prévalait à l'époque de la nouvelle édicition. Il s'ensuit que le fait que l'art. 16 ait été édicté de nouveau en 2005 en ce qui concerne les adultes ayant une déficience intellectuelle ne donne pas en soi à penser que le législateur voulait favoriser l'interprétation judiciaire de cet article qui exigeait que la personne comprenne l'obligation de dire la vérité.

[48] Quatrièmement, l'argument selon lequel l'absence, au par. 16(3), d'une disposition équivalente au par. 16.1(7) signifie que les adultes ayant une déficience intellectuelle doivent démontrer qu'ils comprennent la nature de l'obligation de dire la vérité n'est pas logique. Cet argument repose sur l'hypothèse selon laquelle le par. 16(3), s'il n'est pas modifié, exige que l'on vérifie si la personne comprend l'obligation de dire la vérité. Sur ce fondement, on fait valoir que les adultes doivent être interrogés à moins que l'interdiction de poser des questions aux enfants qui figure au par. 16.1(7) ne soit considérée comme incluse au par. 16(3). Ainsi,

children to adults whose mental capacity is challenged” (para. 127).

[49] The fallacy in this argument is the starting assumption that s. 16(3) requires importing a “don’t ask” rule. As explained earlier, it does not. Section 16(3) sets two requirements for the competence of adults with mental disabilities: the ability to communicate the evidence and a promise to tell the truth. It is self-sufficient. Nothing further need be imported.

[50] Fifth, and following from the previous point, the argument relies on the assumption that unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, adult witnesses with mental disabilities must be treated differently, and subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify. Thus Binnie J. states that before s. 16(3) can be read as importing the “don’t ask” rule, it is for the Crown to establish that there is no difference between children and adults with mental disabilities on the test of what reasonable people would accept. He opines that an assertion of equivalency is “pure assertion on a key issue” (para. 130).

[51] There are several answers to this “equivalency” argument. First, like the previous argument, it rests on the mistaken assumption that the Crown asks us to import a “don’t ask” rule into s. 16(3). The plain words of s. 16(3) do not require an understanding of the obligation to tell the truth, and it is for the party seeking to depart from the text of s. 16(3) to demonstrate that adults with mental disabilities should be treated differently from children. Second, the argument suffers from inconsistency. It claims that the equivalency of the vulnerabilities of these two groups of witnesses is “pure assertion

selon mon collègue le juge Binnie, « [l]e ministère public nous invite, en réalité, à appliquer aux adultes dont la capacité mentale est mise en question la règle interdisant de poser des questions aux enfants » (par. 127).

[49] Cet argument est fallacieux car il suppose au départ qu’il faut incorporer au par. 16(3) une règle interdisant de poser des questions. Comme je l’ai déjà expliqué, ce n’est pas le cas. Le paragraphe 16(3) énonce deux conditions relatives à l’habilité à témoigner des adultes ayant une déficience intellectuelle : la capacité de communiquer les faits dans leur témoignage et la promesse de dire la vérité. Cette disposition est complète en soi. Il n’y a rien d’autre à y incorporer.

[50] Cinquièmement, et dans la lignée de ce qui précède, l’argument repose sur l’hypothèse voulant que, sauf s’il peut être démontré que les adultes ayant une déficience intellectuelle sont comme les enfants, ou leur ressemblent, alors ils doivent être traités différemment et doivent subir un interrogatoire pour que l’on vérifie, avant de déterminer s’ils sont habiles à témoigner, qu’ils comprennent la nature de l’obligation de dire la vérité. Ainsi, le juge Binnie affirme que, avant que l’on incorpore au par. 16(3) la règle interdisant de poser des questions, le ministère public doit démontrer qu’il n’existe aucune différence entre les enfants et les adultes ayant une déficience intellectuelle selon le critère de ce qu’accepteraient des personnes raisonnables. Il est d’avis qu’une prétention d’équivalence n’est que « pure prétention relativement à une question clé » (par. 130).

[51] Il existe plusieurs façons de répondre à cet argument de l’« équivalence ». Premièrement, à l’instar de l’argument précédent, il repose sur l’hypothèse erronée voulant que le ministère public nous demande d’incorporer au par. 16(3) une règle interdisant de poser des questions. Le libellé explicite du par. 16(3) n’exige pas que la personne comprenne l’obligation de dire la vérité, et il appartient à la partie qui cherche à dévier du texte du par. 16(3) de démontrer que les adultes ayant une déficience intellectuelle doivent être traités différemment des enfants. Deuxièmement, l’argument est incohérent.

on a key issue”, but at the same time claims that the previous judge-made law for children (*Khan*) should apply to adult witnesses with mental disabilities. Third, one may question how equivalency, were it needed, should be established: Is the proper approach to competence what reasonable people would conclude, or judicial opinion informed by assessment of the situation and expert opinion?

[52] The final and most compelling answer to the equivalency argument is simply this: When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? Parliament, by applying essentially the same test to both under s. 16(3) and s. 16.1(3) and (6) of the *Canada Evidence Act*, implicitly finds no difference. In my view, judges should not import one.

[53] I conclude that s. 16(3) of the *Canada Evidence Act*, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision.

C. *The Jurisprudence*

[54] I have concluded that s. 16(3), on its plain words and in its context, reveals only two requirements for an adult with mental disabilities to have the capacity to testify: (1) that the witness be able to communicate the evidence, and (2) that the person promise to tell the truth. It is necessary next to consider whether the jurisprudence requires a different result. My colleague Binnie J. argues that the cases, and in particular *Khan*, require that “promising to

D’une part, selon cet argument, l’équivalence entre ces deux groupes de témoins vulnérables n’est que « pure prétention relativement à une question clé », mais d’autre part, toujours selon cet argument, le droit jurisprudentiel relatif aux enfants (*Khan*) devrait s’appliquer aux adultes ayant une déficience intellectuelle. Troisièmement, il faut se demander de quelle façon établir l’équivalence, si elle est nécessaire : la démarche qu’il convient d’adopter à l’égard de l’habilité à témoigner est-elle ce qu’une personne raisonnable pourrait conclure, ou ce que le juge peut conclure en se fondant sur une appréciation de la situation et les opinions d’experts?

[52] La réponse finale, et la plus convaincante, à l’argument de l’équivalence est tout simplement celle-ci : en ce qui concerne l’habilité à témoigner, on peut se demander quelle est la différence, précisément, entre un adulte ayant la capacité mentale d’un enfant de six ans et un enfant de six ans ayant la capacité mentale d’un enfant de six ans. En appliquant essentiellement le même critère aux par. 16(3), 16.1(3) et 16.1(6) de la *Loi sur la preuve au Canada*, le législateur conclut implicitement qu’il n’y a aucune différence. Selon moi, les juges ne devraient pas en introduire une.

[53] Je conclus que le par. 16(3) de la *Loi sur la preuve au Canada*, interprété correctement, prévoit deux conditions pour qu’un adulte ayant une déficience intellectuelle témoigne : il doit être capable de communiquer les faits dans son témoignage et promettre de dire la vérité. Il n’y a pas lieu d’incorporer à la disposition une condition supplémentaire voulant que la personne démontre qu’elle comprend la nature de l’obligation de dire la vérité.

C. *La jurisprudence*

[54] J’ai conclu que suivant le libellé explicite et le contexte du par. 16(3), seulement deux conditions sont requises pour qu’un adulte ayant une déficience intellectuelle soit habile à témoigner : (1) la personne doit être en mesure de communiquer les faits dans son témoignage, et (2) la personne doit promettre de dire la vérité. Il faut ensuite se demander si la jurisprudence exige un résultat différent. Mon collègue le juge Binnie prétend

tell the truth” in s. 16(3) must be read as impliedly importing an additional requirement — an understanding of the nature of the obligation engaged by the promise. With respect, I cannot agree.

[55] It is necessary at the outset to describe what *Khan* decided. *Khan* was concerned with the predecessor of s. 16, which was first enacted in 1893 (S.C. 1893, c. 31, s. 25) and dealt only with children. The provision required that the proposed witness “understan[d] the duty of speaking the truth”. This phrase was deleted when the provision was amended in 1987. Explaining the statutory requirement that the witness must “understan[d] the duty of speaking the truth” in *Khan*, Robins J.A. stated:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. [Emphasis added; p. 206.]

[56] This oft-cited statement of the law proved difficult to apply. The first sentence suggests that the threshold for testimonial competence is low, based on truth telling in “everyday social conduct”. This suggests that the judge need only be satisfied that the witness understands the difference between truth and falsehood in relation to everyday matters and activities — not in some abstract metaphysical sense. The second sentence in this passage from *Khan*, specifically the phrases “knows that it is wrong to lie” and “understands the necessity to tell the truth” (emphases added), move beyond everyday social conduct into more abstract, philosophical realms. In *obiter*, Robins J.A. opined that the same test should be applied to the post-1987 section, on the grounds that without the requirement

que la jurisprudence, et notamment l’arrêt *Khan*, exige que les mots « en promettant de dire la vérité » qui figurent au par. 16(3) soient interprétés comme incorporant implicitement une condition supplémentaire — que la personne comprenne la nature de l’obligation qui découle de la promesse. En toute déférence, je ne puis souscrire à cette opinion.

[55] D’entrée de jeu, il est nécessaire d’exposer la décision dans l’arrêt *Khan*. L’arrêt portait sur la disposition antérieure à l’art. 16, adoptée pour la première fois en 1893 (S.C. 1893, ch. 31, art. 25), qui n’avait trait qu’aux enfants. La disposition exigeait du témoin éventuel qu’il « compren[ne] le devoir de dire la vérité ». Ces mots ont été supprimés lorsque la disposition a été modifiée en 1987. Expliquant l’exigence prévue par la loi selon laquelle le témoin doit « comprend[re] le devoir de dire la vérité », le juge Robins de la Cour d’appel a déclaré ce qui suit dans *Khan* :

[TRADUCTION] Pour satisfaire aux normes moins sévères applicables au témoignage qui n’est pas donné sous serment, il suffit que l’enfant comprenne le devoir de dire la vérité au sens de la conduite sociale ordinaire de la vie quotidienne. On peut en faire la preuve par une série de questions simples permettant de déterminer si l’enfant comprend la différence entre la vérité et le mensonge, s’il sait qu’il n’est pas bien de mentir, s’il comprend la nécessité de dire la vérité et promet de le faire. [Je souligne; p. 206.]

[56] L’application de cet énoncé du droit maintes fois cité s’est révélée difficile. La première phrase donne à penser que le critère relatif à l’habilité à témoigner est peu exigeant; il suffit de dire la vérité au sens de la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne ». Cela donne à penser que le juge doit simplement être convaincu que le témoin comprend la différence entre la vérité et le mensonge dans le contexte de la vie quotidienne — et non pas dans un contexte métaphysique abstrait. La deuxième phrase figurant dans ce passage tiré de *Khan*, plus précisément les mots « sait qu’il n’est pas bien de mentir » et « comprend la nécessité de dire la vérité » (je souligne), vont plus loin que la conduite sociale ordinaire de la vie quotidienne. Ils relèvent du domaine plus abstrait

that the witness understand what a promise is and the importance of keeping it, the promise would be an “empty gesture”.

[57] In *R. v. Farley* (1995), 23 O.R. (3d) 445, the Ontario Court of Appeal adopted this *obiter dictum* and applied it to the post-1987 version of s. 16(3), the provision applicable in this case. Other provincial courts of appeal followed suit: *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182. In *R. v. Rockey*, [1996] 3 S.C.R. 829, a minority of this Court, *per* McLachlin J., held that a child was incompetent to testify on the basis of his inability to *communicate* the evidence, referring to *Farley* with approval; the question of whether s. 16(3) incorporated the *Khan* test was not at issue in that case. Appellate courts continue to require demonstration of an understanding of the duty to speak the truth under s. 16(3): *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C.); *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (Nfld.); *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. In the case at bar, the Ontario Court of Appeal affirmed that view, upholding the trial judge’s insistence on the understanding of the duty to speak the truth not merely in “everyday social conduct”, but on an understanding of the duty *abstracted* from everyday situations.

[58] This is the first case in which this Court has been squarely called upon to interpret s. 16(3) of the *Canada Evidence Act* and confront the legacy of the *obiter dicta* in *Khan*. In my view, the test proposed in *Khan* is unhelpful and inapplicable, insofar as it is read as requiring or condoning an

de la philosophie. Dans une remarque incidente, le juge Robins a exprimé l’avis que le même critère devrait être appliqué à la disposition adoptée en 1987, car la promesse serait un « geste vide de sens » si l’on n’exigeait pas du témoin qu’il comprenne ce qu’est une promesse et l’importance de la respecter.

[57] Dans l’arrêt *R. c. Farley* (1995), 23 O.R. (3d) 445, la Cour d’appel de l’Ontario a adopté cette remarque incidente et l’a appliquée à la version de 1987 du par. 16(3), la disposition applicable en l’espèce. D’autres cours d’appel provinciales ont emboîté le pas : *R. c. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. c. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. c. S.M.S.* (1995), 160 R.N.-B. (2^e) 182. Dans *R. c. Rockey*, [1996] 3 R.C.S. 829, la juge McLachlin, au nom des juges minoritaires de la Cour, a cité avec approbation l’arrêt *Farley* pour conclure qu’un enfant était inhabile à témoigner en raison de son incapacité à *communiquer* les faits dans son témoignage; la question de savoir si le par. 16(3) incorporait le critère formulé dans l’arrêt *Khan* n’a pas été soulevée dans cette affaire. Les tribunaux d’appel exigent toujours que la personne démontre qu’elle comprend l’obligation de dire la vérité en vertu du par. 16(3) : *R. c. Ferguson* (1996), 112 C.C.C. (3d) 342 (C.-B.); *R. c. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (T.-N.); *R. c. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. c. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. c. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. c. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. En l’espèce, la Cour d’appel de l’Ontario a confirmé ce point de vue, en approuvant l’accent mis par le juge du procès sur la nécessité pour la personne de comprendre l’obligation de dire la vérité non pas seulement dans la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne », mais également que la personne comprenne l’obligation *sans égard* aux situations de tous les jours.

[58] Il s’agit en l’espèce de la première affaire dans laquelle la Cour est directement appelée à interpréter le par. 16(3) de la *Loi sur la preuve au Canada* et est confrontée à l’héritage laissé par les remarques incidentes formulées dans *Khan*. Selon moi, le critère proposé dans *Khan* n’est d’aucune

abstract inquiry into the nature of the obligation to tell the truth.

[59] First and foremost, *Khan* was concerned with a substantially different pre-1987 version of s. 16, which was adopted in 1893 and which explicitly required that the proposed witness “understands the duty of speaking the truth”. The current provision requires only that the witness be able to communicate the evidence and promise to tell the truth. It speaks only of two practical, less abstract, requirements — the ability to communicate the evidence and a promise to tell the truth. In short, *Khan* imposed a requirement to demonstrate understanding of the nature of the obligation to tell the truth, based on the phrase “understands the duty of speaking the truth”. That phrase has been removed from the current s. 16(3). It follows that *Khan* simply does not apply to this case, and that the *obiter dictum* in *Khan* suggesting that it does should be rejected. In 1987, Parliament deleted the requirement of understanding the nature of the duty to tell the truth. Judges should not bring it back in.

[60] Second, the *Khan* test, as already noted, is ambivalent. It first suggests that all that is required is an understanding of the duty to speak the truth “in terms of ordinary everyday social conduct” (p. 206). However, it then goes on to illustrate this test in terms abstracted from everyday social conduct. In my view, the former approach is preferable.

[61] This lower threshold recognizes that witnesses of limited mental ability, whether by reason of age or disability, understand and articulate events in the concrete terms of the world around them. The capacity to abstract from the concrete and draw generalizations about conduct unrelated to concrete situations typically develops at a later, more advanced stage of mental development. A

utilité et est inapplicable, dans la mesure où il est interprété comme exigeant ou justifiant un interrogatoire dans l’abstrait sur la nature de l’obligation de dire la vérité.

[59] D’abord et avant tout, l’arrêt *Khan* portait sur une version très différente, antérieure à 1987, de l’art. 16. Cette version, adoptée en 1893, exigeait explicitement que le témoin éventuel « compren[ne] le devoir de dire la vérité ». La disposition actuelle exige seulement que la personne soit capable de communiquer les faits dans son témoignage et promette de dire la vérité. Elle n’impose que deux conditions pratiques, moins abstraites — la capacité de communiquer les faits dans son témoignage et une promesse de dire la vérité. En bref, en se fondant sur les mots « comprend le devoir de dire la vérité », la cour dans l’arrêt *Khan* a imposé l’obligation pour la personne de démontrer qu’elle comprend la nature de l’obligation de dire la vérité. Ces mots ont été radiés dans la version actuelle du par. 16(3). Il s’ensuit que l’arrêt *Khan* ne s’applique tout simplement pas en l’espèce et qu’il faut rejeter la remarque incidente formulée dans *Khan* donnant à penser que cet arrêt s’applique toujours. En 1987, le législateur a supprimé l’exigence pour la personne de comprendre la nature de l’obligation de dire la vérité. Les juges ne devraient pas la réintroduire.

[60] Deuxièmement, le critère formulé dans l’arrêt *Khan*, comme je l’ai déjà signalé, est ambivalent. Il laisse d’abord entendre que le par. 16(3) exige seulement une compréhension du devoir de dire la vérité [TRADUCTION] « au sens de la conduite sociale ordinaire de la vie quotidienne » (p. 206). Toutefois, il poursuit en décrivant ce critère en termes qui font abstraction de la conduite sociale ordinaire de la vie quotidienne. Pour ma part, je préfère la première approche.

[61] Selon ce critère moins exigeant, les personnes ayant une capacité mentale limitée, en raison de leur âge ou d’une incapacité, comprennent concrètement les événements dans le monde qui les entoure et sont en mesure de les décrire. La capacité de considérer les choses dans l’abstrait et de faire des généralisations à propos de comportements non liés à des situations concrètes apparaît

child or adult with mental disabilities may be able to distinguish between what is true and false or right and wrong in a particular situation, yet lack the ability to articulate in general language the reasons for this understanding. To insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations, may result in the witness's evidence being excluded, even though it is reliable.

[62] Third, as discussed above, Parliament's response to *Khan's* insistence on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to, was to expressly forbid such inquiries in the case of children by enacting s. 16.1(7) in 2005. Why then, one may ask, should courts struggle to read a contrary purpose into the plain language of s. 16, which requires only a concrete inquiry into whether the proposed witness can communicate the evidence and a promise to tell the truth?

[63] I conclude that, insofar as the authorities suggest that "promising to tell the truth" in s. 16(3) should be read as requiring an abstract inquiry into an understanding of the obligation to tell the truth, they should be rejected. All that is required is that the witness be able to communicate the evidence and promise to tell the truth.

D. *Policy Considerations*

[64] I have concluded that s. 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court. Mentally limited people may well understand the difference between the truth and

généralement à un stade plus avancé du développement mental. Un enfant ou un adulte ayant une déficience intellectuelle peut, dans une situation donnée, être capable de distinguer le vrai du faux, ou le bien du mal, mais ne pas pouvoir formuler en langage ordinaire les raisons de cette compréhension. Insister sur la formulation de la nature de l'obligation de dire la vérité, sans égard à des situations particulières, peut avoir pour conséquence que le témoignage de la personne soit exclu, même s'il est fiable.

[62] Troisièmement, comme je l'ai déjà mentionné, en adoptant le par. 16.1(7) en 2005 en réponse à l'accent mis dans l'arrêt *Khan* sur la compréhension, en termes abstraits, du devoir de dire la vérité et des questions d'ordre métaphysique que cet accent engendrait, le législateur a interdit explicitement ces interrogatoires lorsque des enfants sont en cause. Il faut alors se demander pourquoi les tribunaux s'évertueraient à donner un sens contraire au libellé clair de l'art. 16, lequel oblige seulement le juge à vérifier si, concrètement, le témoin éventuel est capable de communiquer les faits dans son témoignage et s'il promet de dire la vérité.

[63] Je conclus que dans la mesure où les autorités prétendent que les mots « en promettant de dire la vérité » figurant au par. 16(3) devraient être interprétés comme obligeant le juge de s'assurer que la personne comprend, dans l'abstrait, ce qu'est l'obligation de dire la vérité, leurs décisions doivent être rejetées. Tout ce qui est exigé, c'est que le témoin soit capable de communiquer les faits dans son témoignage et qu'il promette de dire la vérité.

D. *Considérations de politique générale*

[64] J'ai conclu que le par. 16(3) impose deux conditions relativement à l'habilité à témoigner d'un adulte ayant une déficience intellectuelle : (1) la capacité de communiquer les faits dans son témoignage et (2) une promesse de dire la vérité. Il n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite à la personne afin de voir si elle comprend d'une manière générale la différence entre la vérité et la fausseté et l'obligation de dire la vérité devant le tribunal. Des

a lie and know they should tell the truth, without being able to articulate in general terms the nature of truth or why and how it fastens on the conscience in a court of law. Section 16(3), in assessing the witness's capacity, focuses on the concrete acts of communicating and promising. The witness is not required to explain the difference between the truth and a lie, or what makes a promise binding. I have argued that this result follows from the plain words of s. 16 of the *Canada Evidence Act*, and that judges should not by implication add other elements to the dual requirements of an ability to communicate evidence and a promise to tell the truth imposed by s. 16(3).

[65] The discussion of the proper interpretation of s. 16(3) of the *Canada Evidence Act* would not be complete, however, without addressing the policy concerns underlying the issue. Two potentially conflicting policies are in play. The first is the social need to bring to justice those who sexually abuse people of limited mental capacity — a vulnerable group all too easily exploited. The second is to ensure a fair trial for the accused and to prevent wrongful convictions.

[66] The first policy consideration is self-evident and requires little amplification. Those with mental disabilities are easy prey for sexual abusers. In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the

personnes ayant des capacités intellectuelles limitées peuvent bien faire la différence entre la vérité et le mensonge et savoir qu'elles doivent dire la vérité, sans être capables d'énoncer en termes généraux la nature de la vérité ou pourquoi et en quoi cela fait appel à la conscience dans une cour de justice. En ce qui a trait à l'appréciation de la capacité du témoin, le par. 16(3) met l'accent sur les actes concrets que sont la communication et la promesse. Le témoin n'a pas à expliquer la différence entre la vérité et le mensonge, ou ce qui rend une promesse obligatoire. J'ai indiqué que cela découle du libellé explicite de l'art. 16 de la *Loi sur la preuve au Canada*, et que les juges ne devraient pas ajouter implicitement d'autres éléments aux conditions de capacité de communiquer les faits dans son témoignage et de promesse de dire la vérité qu'impose le par. 16(3).

[65] L'analyse relative à l'interprétation correcte du par. 16(3) de la *Loi sur la preuve au Canada* ne serait toutefois pas complète sans que soient abordées les considérations de politique générale qui sous-tendent cette question. Deux principes susceptibles de s'opposer entrent en jeu. Le premier est le besoin social de traduire en justice ceux qui agressent sexuellement des personnes ayant des capacités mentales limitées — un groupe vulnérable trop facilement exploité. Le deuxième est la nécessité de garantir la tenue d'un procès équitable pour l'accusé et de prévenir les déclarations de culpabilité injustifiées.

[66] La première considération de politique générale va de soi et demande peu de précision. Les personnes ayant une déficience intellectuelle sont des proies faciles pour les agresseurs sexuels. Dans le passé, les victimes d'agressions sexuelles ayant une déficience intellectuelle ont souvent été empêchées de témoigner, non pas parce qu'elles ne pouvaient pas relater ce qui s'était passé, mais parce qu'elles n'étaient pas capables d'exprimer en termes abstraits la différence entre la vérité et le mensonge et la nature de l'obligation qu'impose la promesse de dire la vérité. Comme je l'ai déjà expliqué, ces personnes sont peut-être capables de dire la vérité et, en fait, de comprendre que lorsqu'elles promettent de dire la vérité, elles doivent dire la vérité.

obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.

[67] The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged victim, and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunize an entire category of offenders from criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.

[68] What then of the policy considerations on the other side of the equation? Here again, the starting point is clear. The *Canadian Charter of Rights and Freedoms* guarantees a fair trial to everyone charged with a crime. This right cannot be abridged; an unfair trial can never be condoned.

[69] It is neither necessary nor wise to enter on the vast subject of what constitutes a fair trial. One searches in vain for exhaustive definitions in the jurisprudence. Rather, the approach taken in the jurisprudence is to ask whether particular rules or occurrences render a trial unfair. It is from that perspective that we must approach this issue in this case.

Rejeter leur témoignage au motif qu'elles ne peuvent pas expliquer en termes philosophiques la nature de l'obligation de dire la vérité, ce que même les personnes ayant une intelligence normale peuvent avoir de la difficulté à faire, équivaut à écarter des témoignages fiables et pertinents et à empêcher que soient traduits en justice des auteurs de crimes contre des personnes ayant une déficience intellectuelle.

[67] L'incapacité d'intenter des poursuites relativement à ces crimes afin que justice soit faite, quelle que soit l'issue de la cause, peut avoir un effet dévastateur pour la famille de la victime, et pour la victime elle-même. Mais le préjudice ne s'arrête pas là. En fixant des critères trop exigeants relativement à l'habileté à témoigner des adultes ayant une déficience intellectuelle, on permet à des contrevenants d'agresser sexuellement ces personnes presque impunément, ce qui compromet l'un des *desiderata* fondamentaux de la règle de droit, à savoir que la loi doit être susceptible d'application. Ainsi, une catégorie entière de contrevenants se trouvent dégagés de toute responsabilité criminelle relativement à leurs actes et l'on marginalise davantage les victimes déjà vulnérables des prédateurs sexuels. À défaut de véritables possibilités que des poursuites soient intentées, ces victimes sont laissées sans défense face à leurs agresseurs.

[68] Qu'en est-il alors des considérations de politique générale relatives à l'autre aspect de l'équation? Là encore, le point de départ est clair. La *Charte canadienne des droits et libertés* garantit la tenue d'un procès équitable à toute personne accusée d'un acte criminel. Ce droit ne peut pas être enfreint; un procès inéquitable n'est jamais acceptable.

[69] Il n'est ni nécessaire ni sage d'aborder le vaste sujet de ce qui constitue un procès équitable. On cherchera en vain des définitions exhaustives dans la jurisprudence. L'approche retenue par les tribunaux consiste plutôt à déterminer si des règles ou des faits particuliers rendent un procès inéquitable. C'est dans cette optique qu'il nous faut aborder ce sujet en espèce.

[70] The question is this: Does allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth render a trial unfair? In my view, the answer to this question is no.

[71] The common law, upon which our current rules of evidence are founded, recognized a variety of rules governing the capacity to testify in different circumstances. The golden thread uniting these varying and different rules is the principle that the evidence must meet a minimal threshold or reliability as a condition of being heard by a judge or jury. Generally speaking, this threshold of reliability is met by establishing that the witness has the capacity to understand and answer the questions put to her, and by bringing home to the witness the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness — even those of normal intelligence who can take the oath or affirm — will in fact tell the truth, all the truth, or nothing but the truth. What the trial process seeks is merely a basic indication of reliability.

[72] Many cases, including *Khan*, have warned against setting the threshold for the testimonial competence too high for adults with mental disabilities: *R. v. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. This reflects the fact that such witnesses may be capable of giving useful, relevant and reliable evidence. It also reflects the fact that allowing the witness to testify is only the first step in the process. The witness's evidence will be tested by cross-examination. The trier of fact will observe the witness's demeanour and the way she answers the questions. The result may be that the trier of fact does not accept the witness's evidence, accepts only part of her evidence, or reduces the weight accorded to her evidence. This is a task that judges and juries perform routinely in a myriad of cases involving witnesses of unchallenged as well as challenged mental ability.

[70] La question est la suivante : le fait de permettre à une personne adulte ayant une déficience intellectuelle de témoigner lorsqu'elle peut communiquer les faits dans son témoignage et qu'elle promet de dire la vérité rend-il un procès inéquitable? Selon moi, il faut répondre non à cette question.

[71] La common law, le fondement de nos règles de preuve actuelles, prévoit diverses règles régissant l'habilité à témoigner dans différentes circonstances. Le fil d'or qui unit ces règles différentes et variables est le principe selon lequel le témoignage doit satisfaire à un seuil minimal de fiabilité pour qu'il soit présenté à un juge ou un jury. En règle générale, ce seuil de fiabilité est satisfait s'il est établi que le témoin a la faculté de comprendre les questions qui lui sont posées et d'y répondre, et si le témoin comprend qu'après avoir prêté serment ou fait une promesse ou une affirmation solennelle, il doit dire la vérité. Rien ne garantit qu'un témoin — même un témoin doué d'une intelligence normale qui peut prêter serment ou faire une affirmation solennelle — dira vraiment la vérité, toute la vérité et rien que la vérité. On recherche simplement dans le cadre du procès un indice élémentaire de fiabilité.

[72] De nombreuses décisions, notamment l'arrêt *Khan*, ont mis en garde contre le danger de fixer des exigences trop élevées relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle : *R. c. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. Cela traduit le fait que ces personnes peuvent être capables de rendre un témoignage utile, pertinent et fiable, et qu'en leur permettant de témoigner, elles franchissent seulement la première étape du processus. La déposition du témoin sera vérifiée par contre-interrogatoire. Le juge des faits examinera le comportement du témoin et sa façon de répondre aux questions. Il peut arriver que le juge des faits écarte la déposition de cette personne, qu'il ne la retienne qu'en partie ou qu'il y accorde une importance moindre. Il s'agit d'une tâche que les juges et les jurés effectuent couramment dans d'innombrables affaires mettant en cause des témoins dont les capacités mentales peuvent être, ou ne pas être, mises en question.

[73] The requirement that the witness be able to communicate the evidence and promise to tell the truth satisfies the low threshold for competence in cases such as this. Once the witness is allowed to testify, the ultimate protection of the accused's right to a fair trial lies in the rules governing admissibility of evidence and in the judge's or jury's duty to carefully assess and weigh the evidence presented. Together, these additional safeguards offer ample protection against the risk of wrongful conviction.

E. *Summary of the Section 16(3) Test*

[74] To recap, s. 16(3) of the *Canada Evidence Act* imposes two conditions for the testimonial competence of adults with mental disabilities:

- (1) the witness must be able to communicate the evidence; and
- (2) the witness must promise to tell the truth.

Inquiries into the witness's understanding of the nature of the obligation this promise imposes are neither necessary nor appropriate. It is appropriate to question the witness on her ability to tell the truth in concrete factual circumstances, in order to determine if she can communicate the evidence. It is also appropriate to ask the witness whether she in fact promises to tell the truth. However, s. 16(3) does not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth *in abstracto*, or an appreciation of the moral and religious concepts associated with truth telling.

[75] The following observations may be useful when applying s. 16(3) in the context of s. 16 of the *Canada Evidence Act*.

[76] First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may

[73] La prescription selon laquelle le témoin doit être capable de communiquer les faits dans son témoignage et doit promettre de dire la vérité satisfait au seuil peu exigeant relatif à l'habilité à témoigner dans les cas comme celui en l'espèce. Dès lors que la personne est autorisée à témoigner, la protection du droit de l'accusé à un procès équitable repose ultimement sur les règles régissant l'admissibilité de la preuve et sur l'obligation du juge ou du jury d'examiner et d'apprécier soigneusement la preuve. Ensemble, ces mesures de sauvegarde supplémentaires offrent une protection adéquate contre le risque de déclaration de culpabilité injustifiée.

E. *Résumé du critère prévu au par. 16(3)*

[74] Pour résumer, le par. 16(3) de la *Loi sur la preuve au Canada* impose deux conditions relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle :

- (1) la personne doit être capable de communiquer les faits dans son témoignage;
- (2) la personne doit promettre de dire la vérité.

Il n'est ni nécessaire ni opportun de vérifier si la personne comprend la nature de l'obligation que cette promesse comporte. Il convient de poser à la personne des questions sur son aptitude à dire la vérité dans des circonstances factuelles concrètes, afin de déterminer si elle peut communiquer les faits dans son témoignage. Il convient également de demander à la personne si elle promet de dire la vérité. Toutefois, le par. 16(3) n'exige pas qu'un adulte ayant une déficience intellectuelle démontre qu'il comprend la nature de la vérité *in abstracto* ou qu'il comprend les concepts moraux et religieux liés au devoir de dire la vérité.

[75] Les observations suivantes peuvent être utiles lorsqu'il s'agit d'appliquer le par. 16(3) dans le contexte de l'art. 16 de la *Loi sur la preuve au Canada*.

[76] Premièrement, le *voir-dire* relatif à l'habilité à témoigner d'un témoin éventuel constitue une

not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-of-court statements.

[77] Second, although the *voir dire* should be brief, it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.

[78] Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.

[79] Fourth, the members of the proposed witness's surrounding who are personally familiar with her are those who best understand her everyday situation. They may be called as fact witnesses to provide evidence on her development.

[80] Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.

[81] Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence?

[82] Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to

enquête indépendante : il ne peut être combiné à un *voir-dire* relatif à d'autres questions, comme celui de l'admissibilité des déclarations extrajudiciaires du témoin éventuel.

[77] Deuxièmement, un *voir-dire* devrait être bref, mais il est préférable d'entendre toute la preuve pertinente disponible pouvant raisonnablement être prise en considération avant d'empêcher une personne de témoigner. Il ne faut pas conclure trop rapidement à l'incapacité d'une personne à témoigner.

[78] Troisièmement, la source principale de preuve lorsqu'il s'agit de déterminer si une personne est habile à témoigner est la personne elle-même. Son interrogatoire devrait être autorisé. Pour interroger un adulte ayant une déficience intellectuelle, il faut tenir compte de ses besoins particuliers et prendre les mesures d'adaptation qui s'imposent; les questions devraient être formulées patiemment, de façon claire et simple.

[79] Quatrièmement, les personnes de l'entourage qui connaissent personnellement le témoin éventuel sont les mieux placées pour comprendre son état quotidien. Elles peuvent être appelées, à titre de témoins des faits, à témoigner sur son développement.

[80] Cinquièmement, une preuve d'expert peut être produite si elle satisfait aux critères d'admissibilité; on préfère cependant toujours le témoignage d'experts ayant eu un contact personnel et régulier avec le témoin éventuel.

[81] Sixièmement, le juge du procès doit répondre à deux questions durant le *voir-dire* relatif à l'habilité à témoigner : a) le témoin éventuel comprend-il la nature du serment ou de l'affirmation solennelle, et b) est-il capable de communiquer les faits dans son témoignage?

[82] Septièmement, pour répondre à la deuxième question relative à la capacité de la personne de communiquer les faits dans son témoignage, le juge du procès doit vérifier de façon générale si la personne est capable de relater des faits concrets en

ask if she can differentiate between true and false everyday factual statements.

[83] Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

III. Application

[84] During the *voir dire* on K.B.'s testimonial capacity, the Crown posed a line of questions going to whether she could tell the difference between true and false factual statements in concrete circumstances. These were relevant to K.B.'s basic ability to communicate the evidence:

MR. SEMENOFF:

Q. How old are you now, [K.B.]?

A. I'm 22, you know that.

Q. 22? When's your birthday?

A. [Birth date].

Q. [Birth date]. Are you going to school now or are you done with school?

A. I'm not done in school yet.

Q. What school do you go to, [K.B.]?

A. [Name of school].

Q. How long -- do you know how long you've been going to [name of school]?

A. I don't know.

Q. Did you go to any school before you went to [name of school]?

A. From [name of previous school].

Q. From [name of previous school]. Okay.

comprenant les questions qui lui sont posées et en y répondant. Il peut être utile de se demander si la personne est en mesure de différencier entre de vraies et de fausses affirmations factuelles de tous les jours.

[83] Finalement, la personne peut témoigner sous serment ou affirmation solennelle si elle satisfait aux deux volets du critère. Si elle satisfait uniquement au deuxième volet du critère, elle peut témoigner en promettant de dire la vérité.

III. Application

[84] Au cours du *voir-dire* relatif à l'habilité de K.B. à témoigner, le ministère public a posé à K.B. une série de questions en vue de déterminer si elle pouvait dire la différence entre de vraies et de fausses affirmations factuelles dans des situations concrètes. Ces questions étaient pertinentes quant à la faculté élémentaire de K.B. à communiquer les faits dans son témoignage :

[TRADUCTION]

M. SEMENOFF :

Q. Quel âge as-tu actuellement, [K.B.]?

R. J'ai 22 ans, vous le savez.

Q. 22 ans? Quelle est ta date de naissance?

R. [Date de naissance].

Q. [Date de naissance]. Est-ce que tu vas présentement à l'école ou que tu as terminé tes études?

R. Je n'ai pas terminé mes études.

Q. À quelle école vas-tu, [K.B.]?

R. [Nom de l'école].

Q. Depuis combien de temps -- sais-tu depuis combien de temps tu vas à [nom de l'école]?

R. Je ne sais pas.

Q. Es-tu allée à une autre école avant d'aller à [nom de l'école]?

R. [Nom de l'autre école].

Q. [Nom de l'autre école]. D'accord.

Did you have a teacher from that school, a Ms. [W.]?

A. Ms. [R.].

Q. Oh, [R.]. Okay. And I call her Ms. [W.], do you know what her name is, is it [R.] or is it Ms. [W.]?

A. [R.].

Q. Okay.

. . .

Q. [K.B.], if I were to tell you that the room that we're in that the walls in the room are black[,] would that be a truth or a lie, [K.B.]?

A. A lie.

Q. Why would it be a lie?

A. It's different colours in here.

Q. There are different colours in here. What colour are the walls?

A. Purple.

Q. Purple. Okay. If I were to tell you that the gown that I'm wearing that that is black, would that be a truth or a lie?

A. The truth.

Q. And why is that?

A. I don't know.

Q. You don't know. Is it a good thing or a bad thing to tell the truth?

A. Good thing.

Q. Is it a good thing or a bad thing to tell a lie?

A. Bad thing.

(A.R., vol. I, at pp. 111-13)

However, the trial judge went on to question K.B. on her understanding of the meaning of truth, religious concepts, and the consequences of lying.

[THE COURT:]

[Q.] Do you go to church, [K.B.]?

A. No.

As-tu eu dans cette école une enseignante du nom de M^{me} [W.]?

R. M^{me} [R.].

Q. Oh, [R.]. D'accord. Et je l'appelle M^{me} [W.], sais-tu quel est son nom, est-ce [R.], est-ce M^{me} [W.]?

R. [R.].

Q. D'accord.

. . .

Q. [K.B.], si je te disais que la pièce où nous nous trouvons, les murs de cette pièce sont noirs, s'agit-il de la vérité ou d'un mensonge, [K.B.]?

R. Un mensonge.

Q. Pourquoi est-ce un mensonge?

R. Les couleurs sont différentes ici.

Q. Les couleurs sont différentes ici. De quelle couleur sont les murs?

R. Mauve.

Q. Mauve. D'accord. Si je te disais que la tige que je porte présentement est noire, s'agirait-il de la vérité ou d'un mensonge?

R. De la vérité.

Q. Et pourquoi donc?

R. Je ne sais pas.

Q. Tu ne sais pas. Est-il bon ou mauvais de dire la vérité?

R. C'est bon.

Q. Est-il bon ou mal de dire un mensonge?

R. C'est mal.

(d.a., vol. I, p. 111-113)

Toutefois, le juge du procès a poursuivi en posant à K.B. des questions sur sa compréhension de la vérité, sur des concepts religieux et sur les conséquences que comporte le mensonge.

[LA COUR :]

[Q.] Vas-tu à l'église, [K.B.]?

R. Non.

- Q.** No. Have you ever been taught about God or anything like that?
- A.** No.
- Q.** No? All right. What happens if you steal something?
- A.** I don't know.
- Q.** You don't know. If you steal something and no one sees it, will anything happen to you? Nothing will happen. Why won't anything happen?
- A.** I don't know.
- Q.** You don't know. Tell me what you think about the truth.
- A.** I don't know.
- Q.** You don't know. All right. Is it important to tell the truth?
- A.** I don't know.
- Q.** You don't know. Tell me what a promise is when you make a --
- A.** I don't know.
- Q.** -- promise. What's a promise?
- A.** I don't know.
- Q.** You don't know what a promise is. Okay. Have you ever been in court before?
- A.** Once.
- Q.** Once? And do you think it's an important thing to be in court?
- A.** I don't know.
- Q.** You don't know. All right. Do you know what an oath is, to take an oath?
- A.** I don't know.
- Q.** No. Do you have any idea what it means to tell the truth?
- A.** I don't know.
- Q.** You don't know. If you tell a lie does anything happen to you? Nothing happens.
- A.** No.
- Q.** Non. Est-ce qu'on t'a déjà parlé de Dieu ou de quelque chose du genre?
- R.** Non.
- Q.** Non? D'accord. Qu'est-ce qui se passe si tu voles quelque chose?
- R.** Je ne sais pas.
- Q.** Tu ne sais pas. Si tu voles quelque chose et que personne ne te voit, est-ce qu'il arrivera quelque chose? Il n'arrivera rien. Pourquoi est-ce qu'il n'arrivera rien?
- R.** Je ne sais pas.
- Q.** Tu ne sais pas. Dis-moi ce que tu penses de la vérité.
- R.** Je ne sais pas.
- Q.** Tu ne sais pas. Très bien. Est-il important de dire la vérité?
- R.** Je ne sais pas.
- Q.** Tu ne sais pas. Dis-moi ce qu'est une promesse lorsque tu --
- R.** Je ne sais pas.
- Q.** -- promets. Qu'est-ce qu'une promesse?
- R.** Je ne sais pas.
- Q.** Tu ne sais pas ce qu'est une promesse. D'accord. Es-tu déjà allée devant un tribunal?
- R.** Une fois.
- Q.** Une fois? Et crois-tu qu'être devant un tribunal est une chose importante?
- R.** Je ne sais pas.
- Q.** Tu ne sais pas. Très bien. Sais-tu ce qu'est un serment, ce que veut dire prêter serment?
- R.** Je ne sais pas.
- Q.** Non. Sais-tu ce que signifie dire la vérité?
- R.** Je ne sais pas.
- Q.** Tu ne sais pas. Si tu dis un mensonge, est-ce qu'il arrive quelque chose? Il n'arrive rien.
- R.** Non.

[THE COURT:]

[Q.] Do you know why you're here today?

A. I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

Q. If you tell big lies will you go to jail?

A. No.

(Ibid., at pp. 117-19 and 155-56)

[LA COUR :]

[Q.] Sais-tu pourquoi tu es ici aujourd'hui?

R. Je ne sais pas. Pour parler de [D.A.I.].

Q. Oui, et penses-tu que ce soit vraiment important?

R. Peut-être, oui.

Q. Peut-être oui? Te souviens-tu, plus tôt, quand je t'ai posé des questions à propos d'une promesse?

R. Non.

Q. As-tu déjà fait une promesse à quelqu'un?

R. Je ne sais pas.

Q. As-tu déjà promis d'être gentille, as-tu déjà dit cela? As-tu déjà entendu l'expression « je promets d'être gentille, maman »?

R. D'accord.

Q. Très bien. Alors, sais-tu ce qu'est une promesse, que tu vas agir de la bonne façon? Comprends-tu?

R. D'accord.

Q. Peux-tu me dire si tu comprends ça, [K.B.]?

R. Je ne sais pas.

Q. Est-ce qu'il arrive quelque chose si tu ne tiens pas une promesse?

R. Je ne sais pas.

Q. Tu m'as dit que tu ne vas pas à l'église, n'est-ce pas?

R. Exact.

Q. Et personne ne t'a jamais parlé de Dieu; est-ce exact? Personne ne t'a jamais parlé de Dieu?

R. Non.

Q. Est-ce qu'on t'a jamais dit que si tu dis de gros mensonges, tu vas aller en prison?

R. Exact.

Q. Si tu dis de gros mensonges, tu vas aller en prison?

R. Non.

(Ibid., p. 117-119 et 155-156)

[85] As these passages demonstrate, the trial judge was not satisfied with the Crown's questions on K.B.'s ability to recount events and distinguish between telling the truth and lying in concrete, real-life situations. He went on to question her on the nature of truth, religious obligations and the consequences of failing to tell the truth. Because K.B. was unable to satisfactorily answer these more abstract questions, he ruled that she could not be allowed to promise to tell the truth and refused to allow her to testify.

[86] This ruling was based on an erroneous interpretation of s. 16(3), which the trial judge read as requiring an understanding of the duty to speak the truth. Hence, K.B. was precluded from testifying on promising to tell the truth. The trial judge summed up his conclusions as follows:

Having questioned [K.B.] at length I am fully satisfied that [K.B.] has not satisfied the prerequisite that she understands the duty to speak the truth. She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies, and in such circumstances, quite independent of the evidence of [Dr. K.], I am not satisfied that she can be permitted to testify under a promise to tell the truth. [Emphasis added; *ibid.*, at p. 3.]

[87] The fatal error of the trial judge is that he did not consider the second part of the test under s. 16. He failed to inquire into whether K.B. had the ability to communicate the evidence under s. 16(3), insisting instead on an understanding of the duty to speak the truth that is not prescribed by s. 16(3). This error, an error of law, led him to rule K.B. incompetent and hence to the total exclusion of her evidence from the trial. This fundamental error vitiated the trial.

[88] This fundamental flaw in the trial cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference. My colleague Binnie J. suggests that the trial judge's comments during the *voir dire* and hearing on hearsay admissibility (paras. 136, 138 and 139)

[85] Comme le montrent ces passages de l'interrogatoire, le juge du procès n'était pas satisfait des questions posées par le ministère public relativement à la capacité de K.B. de relater des événements et de faire la distinction entre dire la vérité et mentir dans des situations concrètes. Il lui a ensuite posé des questions sur la nature de la vérité, les obligations religieuses et les conséquences découlant du fait de ne pas dire la vérité. Comme K.B. était incapable de répondre de manière satisfaisante à ces questions plus abstraites, il a statué qu'il ne pouvait lui demander de promettre de dire la vérité et a refusé de l'autoriser à témoigner.

[86] Cette conclusion reposait sur une interprétation erronée du par. 16(3) qui, selon le juge du procès, exige une compréhension du devoir de dire la vérité. K.B. n'a donc pas été autorisée à témoigner en promettant de dire la vérité. Le juge du procès a résumé ses conclusions comme suit :

[TRANSDUCTION] Après avoir longuement interrogé [K.B.], je suis entièrement convaincu que [K.B.] n'a pas satisfait à la condition préalable voulant qu'elle comprenne le devoir de dire la vérité. Elle est incapable de dire ce que comportent la vérité et le mensonge, ou de dire ce que sont les conséquences découlant de la vérité ou de mensonges. Dans de telles circonstances, tout à fait indépendantes de la déposition du [D^r K.], je ne suis pas convaincu qu'elle peut être autorisée à témoigner en promettant de dire la vérité. [Je souligne; *ibid.*, p. 3.]

[87] Le juge du procès a commis une erreur fatale en n'examinant pas le deuxième volet du critère établi à l'art. 16. Il n'a pas vérifié si, conformément au par. 16(3), K.B. était en mesure de communiquer les faits dans son témoignage et a insisté plutôt sur la nécessité qu'elle comprenne le devoir de dire la vérité, ce que n'exige pas le par. 16(3). Cette erreur, une erreur de droit, l'a amené à conclure que K.B. n'était pas habile à témoigner et à exclure complètement son témoignage du procès. Cette erreur fondamentale a vicié le procès.

[88] Des commentaires formulés par le juge du procès à d'autres étapes de l'instruction ou le principe de la déférence judiciaire ne peuvent corriger ce vice fondamental. Mon collègue le juge Binnie laisse entendre que les commentaires émis par le juge du procès durant le *voir-dire* et l'audience sur

support his conclusion on the earlier *voir dire* that K.B. was not competent to testify under s. 16(3). However, it is difficult to see how subsequent comments in the course of dealing with other issues could rehabilitate the trial judge's erroneous application of the requirements for competence under s. 16. The *voir dire* on competence and the *voir dire* on the admissibility of hearsay evidence were two different inquiries. The evidence of Ms. W., on which the trial judge relied in making the comments regarding hearsay, was not before the trial judge when he ruled K.B. incompetent to testify. Moreover, the threshold of reliability for hearsay evidence differs from the threshold ability to communicate the evidence for competence; a ruling on testimonial capacity cannot be subsequently justified by comments in a ruling on hearsay admissibility. Had the competence hearing been properly conducted, this might have changed the balance of the trial, including the hearing (if any) on hearsay admissibility. The trial judge's fundamental error in the s. 16 inquiry on competence cannot be corrected by speculation based on comments made in a different inquiry.

[89] Nor does the ruling that K.B. was incompetent, based as it was on a misstatement of the legal test under s. 16(3), attract deference. This amounted to an error of law, to be judged on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26-37. The defect in the trial judge's ruling cannot, in my view, be cured.

[90] I would allow the appeal, set aside the acquittal, and direct a new trial.

l'admissibilité de la preuve par ouï-dire (par. 136, 138 et 139) appuient la conclusion qu'il a tirée au voir-dire précédent, conclusion selon laquelle K.B. n'était pas habile à témoigner aux termes du par. 16(3). Il est toutefois difficile de voir comment des commentaires émis subséquentement par le juge du procès alors qu'il traitait d'autres questions pourraient remédier à une application erronée par celui-ci des exigences prévues à l'art. 16 relativement à l'habilité à témoigner. Le voir-dire relatif à l'habilité à témoigner et le voir-dire relatif à l'admissibilité de la preuve par ouï-dire constituaient deux enquêtes différentes. Le juge du procès ne disposait pas du témoignage de M^{me} W. — sur lequel il s'est fondé pour formuler les commentaires concernant le ouï-dire — lorsqu'il a jugé que K.B. n'était pas habile à témoigner. De plus, le seuil de fiabilité applicable à la preuve par ouï-dire diffère du seuil de la capacité à communiquer les faits dans un témoignage, applicable à l'habilité à témoigner; une conclusion sur l'habilité d'une personne à témoigner ne peut être justifiée après coup par des commentaires émis dans une décision sur l'admissibilité d'une preuve par ouï-dire. La tenue d'une audience régulière sur l'habilité à témoigner aurait peut-être modifié l'équilibre du procès, y compris l'audience (le cas échéant) sur l'admissibilité de la preuve par ouï-dire. On ne peut corriger l'erreur fondamentale commise par le juge du procès dans l'enquête relative à l'habilité à témoigner prévue à l'art. 16 en se fondant sur des conjectures tirées de commentaires formulés dans une enquête différente.

[89] La conclusion selon laquelle K.B. n'était pas habile à témoigner, fondée sur une mauvaise formulation du critère juridique applicable aux termes du par. 16(3), ne commande pas non plus la déférence. Il s'agissait là d'une erreur de droit devant être examinée selon la norme de la décision correcte : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26-37. Ce vice dans la décision de première instance ne peut, à mon avis, être corrigé.

[90] Je suis d'avis d'accueillir le pourvoi, d'annuler l'acquittal et d'ordonner la tenue d'un nouveau procès.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

[91] BINNIE J. (dissenting) — I agree with the Chief Justice that, in this case, “[t]wo potentially conflicting policies are in play”, the first being to “bring to justice” those accused of sexual abuse and the second being “to ensure a fair trial for the accused and to prevent wrongful convictions” (para. 65). In my view, by turning Parliament’s direction permitting a person “whose mental capacity is challenged” to testify only “on promising to tell the truth” into an empty formality — a mere mouthing of the words “I promise” without any inquiry as to whether the promise has any significance to the potential witness — the majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons.

[92] I prefer the contrary interpretation of s. 16(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, expressed by our Chief Justice herself in her concurring judgment in *R. v. Rokey*, [1996] 3 S.C.R. 829, where, as McLachlin J., drawing a distinction between “the ability to communicate the evidence and the ability to promise to tell the truth” (para. 25), wrote:

The only inference that can be drawn from this evidence is that while [the potential witness] Ryan understood the difference between what is “so” and “not so”, he had no conception of any moral obligation to say what is “right” or “so” in giving evidence or otherwise. In these circumstances, no judge could reasonably have concluded that Ryan was able to promise to tell the truth. [Emphasis added; para. 27.]

McLachlin J.’s views on the requirements of s. 16(3) were not disagreed with by the majority, and indeed on this point she simply reflected the Court’s earlier unanimous opinion in *R. v. Khan*, [1990] 2 S.C.R. 531, at pp. 537-38.

Version française des motifs des juges Binnie, LeBel et Fish rendus par

[91] LE JUGE BINNIE (dissident) — Je souscris à l’opinion de la Juge en chef selon laquelle, en l’espèce, « [d]eux principes susceptibles de s’opposer entrent en jeu » (par. 65). Le premier consiste à « traduire en justice » les personnes accusées d’agression sexuelle, et le deuxième vise à « garantir la tenue d’un procès équitable pour l’accusé et [à] prévenir les déclarations de culpabilité injustifiées » (*ibid.*). Selon moi, en transformant la directive du législateur, qui permet à une personne « dont la capacité mentale est mise en question » de témoigner « en promettant de dire la vérité », en une formalité vide de sens — le témoin éventuel ne fait que prononcer les mots « je promets » sans que l’on vérifie s’il accorde quelque importance à sa promesse — les juges majoritaires diluent de façon inacceptable la protection que le législateur voulait accorder aux accusés.

[92] Je préfère l’interprétation contraire du par. 16(3) de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, que notre Juge en chef elle-même a énoncée dans ses motifs concordants dans *R. c. Rokey*, [1996] 3 R.C.S. 829, où, alors juge puînée, elle a établi une distinction entre la « capacité de communiquer les faits dans son témoignage et celle de promettre de dire la vérité » (par. 25); elle a écrit ce qui suit :

La seule inférence que l’on peut tirer de ce témoignage est que même si [le témoin éventuel] Ryan comprenait la différence entre ce qui était « exact » et « pas exact », il n’avait aucune idée de l’obligation morale de dire ce qui est « vrai » ou « exact » lorsqu’on témoigne ou dans d’autres situations. Dans ces circonstances, aucun juge n’aurait pu raisonnablement conclure que Ryan était capable de promettre de dire la vérité. [Je souligne; par. 27.]

Dans cette affaire, les juges de la majorité n’avaient pas désapprouvé les propos de la juge McLachlin au sujet des exigences du par. 16(3). En fait, sur ce point, la juge McLachlin reprenait simplement l’opinion unanime que la Cour avait déjà exprimée dans *R. c. Khan*, [1990] 2 R.C.S. 531, p. 537-538.

[93] The majority judgment in the present case repudiates the earlier jurisprudence and the balanced approach it achieved. It entirely eliminates any inquiry into whether the potential witness has any “conception of any moral obligation to say what is ‘right’”.

[94] I agree with the Chief Justice that “allowing the witness to testify is only the first step in the process” (para. 72). More particularly, my colleague continues:

The witness’s evidence will be tested by cross-examination. The trier of fact will observe the witness’s demeanour and the way she answers the questions. [*Ibid.*]

In this case, the exchanges between the challenged witness, K.B., and the trial judge, demonstrated the futility of any such cross-examination. The trial judge noted that K.B. “did not ‘compute’ questions before giving answers, that she was not processing the information being communicated to her, and that she had serious problems relating to her ability to communicate and to recollect” (2008 CanLII 21726 (Ont. S.C.J.)) (the “hearsay decision”), at para. 7). As a practical matter, it is not possible to cross-examine such a witness meaningfully. The trial judge concluded correctly on this point that “there is no secure method of testing K.B.’s credibility” (para. 56). The result of the majority judgment in this case is to create unfair prejudice to the accused.

[95] What is fundamental, as was emphasized here by the Ontario Court of Appeal, is that the trial judge had the opportunity to observe the witness’s demeanour and the way she answers the questions (McLachlin C.J., at para. 72). We do not have that advantage. The trial judge concluded, based on his direct observation, that, in light of the severity of her mental disability, K.B.’s evidence could not be relied upon for the truth-seeking purposes of a criminal trial and it ought to be altogether excluded. In a judge-alone trial, it goes without

[93] Le jugement majoritaire en l’espèce répudie les décisions antérieures ainsi que l’approche équilibrée qu’elles avaient établie. Il écarte complètement l’enquête permettant de vérifier si le témoin éventuel a une « idée de l’obligation morale de dire ce qui est “vrai” ».

[94] Je suis d’accord avec la Juge en chef pour dire qu’« en [. . .] permettant [aux personnes adultes ayant une déficience intellectuelle] de témoigner, elles franchissent seulement la première étape du processus » (par. 72). Plus particulièrement, ma collègue ajoute ce qui suit :

La déposition du témoin sera vérifiée par contre-interrogatoire. Le juge des faits examinera le comportement du témoin et sa façon de répondre aux questions. [*Ibid.*]

En l’espèce, les échanges entre le juge du procès et K.B., la personne dont la capacité mentale est mise en question, ont démontré la futilité d’un tel contre-interrogatoire. Le juge du procès a souligné que K.B. [TRADUCTION] « ne “computait” pas les questions avant d’y répondre, qu’elle ne traitait pas l’information qui lui était communiquée et qu’elle avait de sérieux problèmes liés à sa capacité de communiquer et de se souvenir » (2008 CanLII 21726 (C.S.J. Ont.) (la « décision relative au ouï-dire »), par. 7). Concrètement, il n’est pas possible de contre-interroger de manière significative un tel témoin. Le juge du procès a correctement conclu sur ce point qu’« il n’y a aucun moyen sûr de vérifier la crédibilité de K.B. » (par. 56). Par conséquent, le jugement des juges majoritaires en l’espèce cause à l’accusé un préjudice inévitabile.

[95] La Cour d’appel de l’Ontario a souligné un aspect fondamental, soit que le juge du procès a eu l’occasion d’examiner le comportement du témoin et sa façon de répondre aux questions (la juge en chef McLachlin, par. 72). Nous ne bénéficions pas de cet avantage. Le juge du procès a conclu, selon ce qu’il a directement observé, que compte tenu de la gravité de la déficience intellectuelle de K.B., on ne pouvait se fier au témoignage de cette dernière pour les besoins de la recherche de la vérité — le but visé par un procès criminel — et que ce témoignage

saying, where the trial judge found that K.B.'s testimony did not meet even a threshold of admissibility, he would not — had the evidence been admitted — have accepted it as the basis for a proper conviction. An acquittal was inevitable.

[96] In the result, despite all the talk in our cases of the need to “defer” to trial judges on their assessment of mental capacity, a deference which, in my opinion, is manifestly appropriate, the majority judgment shows no deference to the views of the trial judge whatsoever and orders a new trial. I am unable to agree. I therefore dissent.

I. Judicial History

A. *Ontario Superior Court of Justice, 2008 CanLII 21726 (the “Hearsay Decision”)*

[97] The Chief Justice has set out the substance of the trial judge’s ruling. I should add that he found numerous contradictions in K.B.’s testimony. For example, K.B. testified that she had told her mother about D.A.I. touching her, but her mother contradicted this (para. 38). With respect to the out-of-court statements, the trial judge expressed serious concerns about the truth of the statements based on K.B.’s “serious problems in communicating her evidence, her incapacity to answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother” (para. 53 (emphasis added)). He also noted the testimony of K.B.’s teacher that K.B.’s mother had told her that she viewed K.B.’s story with “disbelief” (para. 54). Given the close relationship between K.B. and the respondent D.A.I., the trial judge found that “[w]hat may have been innocent in intent has the potential to be misinterpreted” (para. 55).

[98] The trial judge concluded:

devait être complètement exclu. Il va sans dire que, dans un procès devant un juge seul, où le juge du procès a conclu que le témoignage de K.B. ne satisfaisait pas à un critère même minimal d’admissibilité, si le témoignage avait été accepté, il n’aurait pu servir de fondement d’une déclaration de culpabilité. Un verdict d’acquiescement était inévitable.

[96] Par conséquent, malgré toutes les décisions dans lesquelles notre Cour signale la nécessité de « faire preuve de retenue » à l’égard de l’appréciation de la capacité mentale par les juges des procès — une retenue manifestement appropriée selon moi —, les juges majoritaires ne font preuve d’aucune retenue à l’égard des opinions du juge du procès et ordonnent la tenue d’un nouveau procès. Il m’est impossible de souscrire à leur décision. J’inscris donc ma dissidence.

I. Historique judiciaire

A. *Cour supérieure de justice de l’Ontario, 2008 CanLII 21726 (la « décision relative au ouï-dire »)*

[97] La Juge en chef a exposé la substance de la décision du juge du procès. J’ajouterais qu’il a relevé plusieurs contradictions dans les réponses de K.B. Par exemple, K.B. a déclaré avoir dit à sa mère que D.A.I. l’avait touchée, mais cette dernière l’a nié (par. 38). En ce qui concerne les déclarations extrajudiciaires, le juge du procès a exprimé d’importantes réserves sur la véracité des déclarations de K.B. en raison des [TRADUCTION] « sérieuses difficultés [de K.B.] à communiquer les faits dans son témoignage, de son incapacité à répondre à des questions relativement simples portant sur ses allégations, de sa confusion quant à savoir si elle avait ou non parlé à sa mère » (par. 53 (je souligne)). Il a aussi signalé que l’enseignante de K.B. a affirmé dans son témoignage que la mère de K.B. lui avait dit « ne pas croire » ces dires de sa fille (par. 54). Vu l’étroite relation entre K.B. et l’intimé, D.A.I., le juge du procès a conclu que « [c]e qui pouvait se vouloir inoffensif risquait d’être mal interprété » (par. 55).

[98] Le juge du procès a conclu comme suit :

I am convinced that to admit K.B.'s statement for its truth would effectively deprive the court of any reliable method of testing its truth. It is clear from the short cross-examination undertaken . . . at the preliminary inquiry, there is no secure method of testing K.B.'s credibility. . . . What the Crown purports to be confirmatory evidence is either ambiguous or itself unreliable. [Emphasis added; para. 56.]

B. *Ontario Court of Appeal, 2010 ONCA 133, 260 O.A.C. 96 (Doherty, MacPherson and Armstrong J.J.A.)*

[99] Doherty and MacPherson J.J.A. applied a “very deferential” standard of review to the trial judge’s assessment under s. 16, noting that the trial judge heard not only what the proposed witness said, but also how it was said (paras. 20-21). In their view, Parliament chose to create a new testimonial competence test for children but to limit it so as only to apply to children under 14 (para. 41). For whatever reason, Parliament intended to treat children and adults with a mental disability differently when it comes to testimonial competence (para. 43).

[100] The Court of Appeal also held that the trial judge had correctly rejected the confirmatory evidence tendered by the Crown, namely K.B.’s sister’s evidence and the photograph found in the respondent’s bedroom (para. 50). He had carefully considered the sister’s testimony, but decided that it was unreliable. The trial judge had also found that the respondent’s explanation that K.B. flashed him when he took the photograph could have been true. Doherty and MacPherson J.J.A., speaking for a unanimous Court of Appeal, held that both of these conclusions were open to the trial judge (*ibid.*). The appeal was accordingly dismissed.

II. Analysis

[101] The substantial issue in this appeal concerns the correctness of the trial judge’s approach to

[TRANSLATION] Je suis convaincu que le fait d’admettre comme véridique la déclaration de K.B. priverait effectivement la cour de toute méthode fiable pour en vérifier la véracité. Il ressort clairement du bref contre-interrogatoire mené [. . .] à l’enquête préliminaire qu’il n’y a aucun moyen sûr de vérifier la crédibilité de K.B. [. . .] Ce que le ministère public estime être une preuve corroborante est ambigu ou sujet à caution. [Je souligne; par. 56.]

B. *Cour d’appel de l’Ontario, 2010 ONCA 133, 260 O.A.C. 96 (les juges Doherty, MacPherson et Armstrong)*

[99] Les juges Doherty et MacPherson ont appliqué une norme de contrôle qui commande [TRANSLATION] « une très grande retenue » à l’égard de l’appréciation faite par le juge du procès aux termes de l’art. 16, soulignant que le juge du procès n’a pas seulement entendu ce que le témoin éventuel a dit, mais aussi comment il l’a dit (par. 20-21). Selon eux, le législateur a choisi de créer pour les enfants un nouveau critère relatif à l’habilité à témoigner, mais de le limiter de sorte qu’il ne s’applique qu’aux enfants de moins de 14 ans (par. 41). Pour une raison ou une autre, le législateur a voulu traiter les enfants différemment des adultes ayant une déficience intellectuelle lorsque l’habilité à témoigner est en cause (par. 43).

[100] La Cour d’appel a également conclu que le juge du procès avait rejeté à bon droit la preuve corroborante présentée par le ministère public, à savoir le témoignage de la sœur de K.B. et la photographie trouvée dans la chambre de l’intimé (par. 50). Le juge a soigneusement examiné le témoignage de la sœur de K.B., mais il a décidé qu’il était sujet à caution. Le juge du procès avait aussi conclu que l’explication de l’intimé — que K.B. lui avait soudainement montré ses seins au moment où il a pris la photographie — pouvait être vraie. Les juges Doherty et MacPherson, au nom d’une formation unanime de la Cour d’appel, ont affirmé qu’il était loisible au juge du procès de tirer ces deux conclusions (*ibid.*). L’appel a donc été rejeté.

II. Analyse

[101] La question importante dans le présent pourvoi porte sur le bien-fondé de la démarche retenue

assessment of the testimonial capacity of the complainant, K.B. The admissibility of her evidence turns on the interpretation of the rules established by Parliament in s. 16 of the *Canada Evidence Act*, which delineates the circumstances in which a proposed witness “of fourteen years of age or older whose mental capacity is challenged” may or may not testify.

[102] A trial judge is faced with three options. If the challenged witness is “able to communicate the evidence” and “understands the nature of an oath or a solemn affirmation”, the person “shall testify under oath or solemn affirmation” (s. 16(2)). A person who satisfies the first criterion (“able to communicate the evidence”) but not the second (i.e. does not understand “the nature of an oath or a solemn affirmation”) may provide unsworn testimony “on promising to tell the truth” (s. 16(3)). A person who does not satisfy either criterion “shall not testify” (s. 16(4)).

[103] The few questions posed by the trial judge touching on religion in this case were relevant to the first option of having K.B. testify under oath or affirmation which, as the Chief Justice recognizes, is the “preferred option” (para. 31). If the trial judge had found that K.B. understood the nature of the oath, he would have been obliged to have her testimony given under oath. It was proper for the trial judge to test K.B.’s ability to satisfy this standard rather than assuming, on account of her mental disability, that she would fail the s. 16(1) test.

[104] As to the second option (unsworn evidence), it is clear that Parliament did not consider an ability to communicate the evidence to be the sole and sufficient condition of admissibility. A person giving unsworn testimony must nevertheless promise to tell the truth, and this additional requirement is not, in my view, an empty formality but is intended to bolster the court’s effort to establish the true facts

par le juge du procès pour apprécier l’habilité à témoigner de la plaignante, K.B. L’admissibilité de son témoignage repose sur l’interprétation des règles établies par le législateur à l’art. 16 de la *Loi sur la preuve au Canada*, lequel énonce les circonstances dans lesquelles un témoin éventuel âgé « d’au moins quatorze ans dont la capacité mentale est mise en question » peut ou non témoigner.

[102] Trois possibilités s’offrent au juge du procès. Si la personne dont la capacité mentale est mise en question est « capable de communiquer les faits dans son témoignage » et « comprend la nature du serment ou de l’affirmation solennelle », elle « témoigne sous serment ou sous affirmation solennelle » (par. 16(2)). Une personne qui répond au premier critère (« capable de communiquer les faits dans son témoignage »), mais pas au deuxième (soit qu’elle ne comprend pas « la nature du serment ou de l’affirmation solennelle ») peut témoigner sans prêter serment « en promettant de dire la vérité » (par. 16(3)). Une personne qui ne satisfait à ni l’un ni l’autre de ces critères « ne peut témoigner » (par. 16(4)).

[103] Les quelques questions que le juge du procès a posées en l’espèce relativement à la religion avaient trait à la première possibilité, soit que K.B. témoigne sous serment ou sous affirmation solennelle, ce qui, comme le reconnaît la Juge en chef, constitue la « solution privilégiée » (par. 31). Si le juge du procès avait conclu que K.B. comprenait la nature du serment, il aurait été tenu de la faire témoigner sous serment. Il était approprié pour le juge du procès de vérifier si K.B. pouvait satisfaire à cette norme au lieu de supposer qu’elle échouerait le test du par. 16(1) en raison de sa déficience intellectuelle.

[104] En ce qui concerne la deuxième possibilité (témoignage sans avoir prêté serment), le législateur n’a manifestement pas considéré la capacité de communiquer les faits dans un témoignage comme étant une condition unique et suffisante d’admissibilité. Une personne qui témoigne sans avoir prêté serment doit tout de même promettre de dire la vérité, et cette condition supplémentaire n’est pas,

and to protect the legitimate interest of the accused to a fair trial.

[105] I agree with the Chief Justice that “[p]romising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose” (para. 36). I do not agree with my colleague, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a “prophylactic” effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand “the seriousness of the situation and the importance of being careful and correct”, there is no prophylactic effect, and the fair trial interests of the accused are unfairly prejudiced.

A. *The Khan Test*

[106] It is, of course, true that an inability to deal with concepts (“oaths”, “solemn affirmations” and “promises”) does not mean that a person suffering from a mental disability is by that fact unable to relate the factual events that he or she encountered. Many individuals whose mental capacity is not open to challenge may have difficulty giving a correct explanation of these concepts.

[107] In an effort to solve this dilemma, this Court in *Khan* adopted the approach formulated by Robins J.A. in *Khan* when it was before the Ontario Court of Appeal ((1988), 42 C.C.C. (3d) 197, at p. 206):

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity

selon moi, une formalité vide de sens; elle vise à soutenir les efforts de la cour en vue d’établir les faits authentiques et à protéger le droit légitime d’un accusé à un procès équitable.

[105] Je suis d’accord avec la Juge en chef pour dire que « [l]a promesse est un acte visant à renforcer, dans l’esprit du témoin éventuel, le caractère sérieux de la situation et l’importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique » (par. 36). Je ne suis cependant pas d’accord avec ma collègue pour affirmer qu’un juge du procès ne peut pas tenter de déterminer — en termes concrets de la vie quotidienne — si un tel effet « prophylactique » existe effectivement dans le cas d’une personne dont la capacité mentale est mise en question. Si cette personne est à ce point déficiente qu’elle ne comprend pas « le caractère sérieux de la situation et l’importance de répondre de façon prudente et correcte », il n’y a aucun effet prophylactique et le droit de l’accusé à un procès équitable subit une atteinte injustifiée.

A. *Le critère formulé dans l’arrêt Khan*

[106] Assurément, une incapacité de saisir des notions (« serments », « affirmations solennelles » et « promesses ») ne signifie pas qu’une personne ayant une déficience intellectuelle soit par le fait même incapable de décrire les événements dont elle a été témoin. Bien des personnes dont la capacité intellectuelle n’est pas mise en question peuvent avoir de la difficulté à expliquer correctement ces notions.

[107] Cherchant à résoudre ce dilemme, notre Cour a adopté dans *Khan* la solution élaborée par le juge Robins alors que l’affaire *Khan* se trouvait devant la Cour d’appel de l’Ontario ((1988), 42 C.C.C. (3d) 197, p. 206) :

[TRADUCTION] Pour satisfaire aux normes moins sévères applicables au témoignage qui n’est pas donné sous serment, il suffit que l’enfant comprenne le devoir de dire la vérité au sens de la conduite sociale ordinaire de la vie quotidienne. On peut en faire la preuve par une série de questions simples permettant de déterminer si l’enfant comprend la différence entre la vérité et

to tell the truth, and promises to do so. [Emphasis added.]

This approach (adopted at a time before the *Canada Evidence Act* introduced its present distinction between children and adults with challenged mental capacity) gives meaningful content to the statutory language while recognizing that the “simple line of questioning” is to be factual, not metaphysical.

[108] It is true, as the Chief Justice points out, that *Khan* was decided under an earlier version of s. 16 which referred expressly to “the duty of speaking the truth”. However, as both *Khan* and McLachlin J. in *Rockey* were at pains to point out, those words were not interpreted as contemplating an abstract inquiry. In *Rockey*, decided at a time when s. 16(3) read the same as it does now, McLachlin J. insisted on a determination of “the ability to promise to tell the truth” (para. 25 (emphasis added)), but not as the mere physical ability of a potential witness to say the words. In that case, the child witness was not called to testify and the issue was whether his out-of-court statements could nevertheless be admitted against the accused under the principled hearsay exception. To do so required a demonstration of necessity and reliability. McLachlin J. held that “necessity” was established. In her view, the child was incompetent to testify under s. 16(3) because, not only was it “unrealistic to conclude that Ryan could have communicated his evidence in any useful sense either in the courtroom or in a smaller room via closed circuit television”, but, as stated, because “no judge could reasonably have concluded that Ryan was able to promise to tell the truth” (paras. 26-27). Although Parliament had by that time eliminated the words “duty of speaking the truth” from s. 16(3), McLachlin J. nevertheless concluded that the words “on promising to tell the truth” incorporated the understanding in practical terms of a “moral obligation to say what is ‘right’” (para. 27).

le mensonge, s’il sait qu’il n’est pas bien de mentir, s’il comprend la nécessité de dire la vérité et promet de le faire. [Je souligne.]

Cette approche (adoptée avant que la *Loi sur la preuve au Canada* n’établisse la distinction que l’on trouve maintenant entre les enfants et les adultes dont la capacité mentale est mise en question) donne un contenu significatif au texte de la loi tout en reconnaissant que la « série de questions simples » doit porter sur des faits et ne doit pas relever de la métaphysique.

[108] Certes, comme la Juge en chef le souligne, lorsque l’arrêt *Khan* a été rendu, une version antérieure de l’art. 16 mentionnait expressément « le devoir de dire la vérité ». Toutefois, comme l’arrêt *Khan* et la juge McLachlin dans *Rockey* ont pris bien soin de le signaler, ces mots n’envisageaient pas, dans leur interprétation, une enquête menée dans l’abstrait. Dans l’arrêt *Rockey*, rendu alors que le texte du par. 16(3) était le même qu’aujourd’hui, la juge McLachlin a insisté sur une détermination de « [l]a capacité [. . .] de promettre de dire la vérité » (par. 25 (je souligne)) qui ne soit pas simplement la capacité physique d’un témoin éventuel de prononcer les mots. Dans cette affaire, l’enfant n’a pas été appelé à témoigner et la question en litige était de savoir si ses déclarations extrajudiciaires pouvaient tout de même être admises à l’encontre de l’accusé en vertu de l’exception raisonnée à la règle du oui-dire. À cette fin, il fallait démontrer la nécessité et la fiabilité des déclarations de l’enfant. La juge McLachlin a conclu que la « nécessité » avait été établie. Selon elle, l’enfant était inhabile à témoigner aux termes du par. 16(3) parce que, non seulement « il n’[était] pas réaliste de conclure que Ryan aurait pu communiquer les faits d’une façon utile, que ce soit dans la salle d’audience ou depuis une plus petite pièce, au moyen d’un système de télévision en circuit fermé », mais parce qu’« aucun juge n’aurait pu raisonnablement conclure que Ryan était capable de promettre de dire la vérité » (par. 26-27). Même si le législateur avait déjà enlevé au par. 16(3) les mots « devoir de dire la vérité », la juge McLachlin a néanmoins conclu que les mots « en promettant de dire la vérité » supposaient concrètement une « obligation morale de dire ce qui est “vrai” » (par. 27).

[109] In the result, the child was held under s. 16(3) to be incompetent to testify. The necessity for the hearsay evidence was therefore established. His out-of-court evidence was admitted and the accused was convicted.

[110] There is nothing in McLachlin J.'s reasons in *Rockey* to suggest that the "ability to promise to tell the truth" is to be ascertained on a "don't ask" basis, i.e. not to endeavour to determine whether the potential witness has any sense of what it means in simple concrete terms to promise to tell the truth. On the contrary, McLachlin J. rested her conclusion on the evidence heard by the trial judge concerning the ability of the potential witness to explain events and to understand the difference in practical terms between telling the truth and lying.

[111] Nor was it suggested in *Rockey* that, by insisting on "the ability" to make the promise, McLachlin J. was reading extraneous words into the statute, which is now the cornerstone of the majority judgment in this case. The making of a promise is not just a physical act. The question is whether the potential witness recognizes a sense of obligation, however articulated or unarticulated, to stick to the truth. This interpretation was consistent with the Parliamentary record which, as we will see, demonstrates a legislative intention under s. 16(3) that a trial judge be satisfied that a witness — as a condition precedent to testimonial capacity — understands the difference in practical everyday terms between telling the truth and not telling the truth.

[112] Of course, there are witnesses who suffer no mental disability and who recognize perfectly well that they are undertaking an obligation to tell the truth but nevertheless do not do so. That is a different problem. Their mental capacity is not in issue. In their case, the courts rely on cross-examination and other techniques to ferret out the truth. In the case of K.B., there was no allegation whatsoever of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events, and the crucible of cross-examination was considered by the trial judge to be useless because, as

[109] En définitive, l'enfant a été jugé inhabile à témoigner aux termes du par. 16(3). La nécessité de la preuve par ouï-dire a donc été établie. Sa déclaration extrajudiciaire a été admise et l'accusé a été déclaré coupable.

[110] Les motifs de la juge McLachlin dans *Rockey* n'indiquent nullement que la « capacité de promettre de dire la vérité » doit être déterminée « sans poser de questions », c'est-à-dire sans que l'on tente de déterminer si le témoin éventuel peut saisir ce que signifie, en termes simples et concrets, la promesse de dire la vérité. Au contraire, la juge McLachlin a appuyé sa conclusion sur la déposition faite devant le juge du procès concernant la capacité du témoin éventuel d'expliquer des faits et de comprendre la différence, en termes concrets, entre dire la vérité et mentir.

[111] L'arrêt *Rockey* ne donne pas non plus à penser que, en insistant sur « la capacité » de promettre, la juge McLachlin introduisait dans la loi des mots extrinsèques, ce qui constitue maintenant la pierre d'assise du jugement majoritaire en l'espèce. Faire une promesse ne se résume pas à un acte physique. La question est de savoir si le témoin éventuel se reconnaît une obligation, articulée ou non, de s'en tenir à la vérité. Cette interprétation était conforme à l'histoire parlementaire qui démontre, comme nous le verrons, qu'aux termes du par. 16(3), le juge devait être convaincu que la personne comprend la différence, en termes ordinaires, entre dire et ne pas dire la vérité — une condition préalable à la reconnaissance de l'habilité à témoigner.

[112] Évidemment, certains témoins n'ayant aucune déficience intellectuelle ne diront pas la vérité tout en sachant parfaitement bien qu'elles se sont engagées à dire la vérité. Il s'agit là d'un problème différent. Leur capacité mentale n'est pas mise en question. Dans ces cas, le contre-interrogatoire et d'autres moyens permettront au tribunal de découvrir la vérité. Dans le cas de K.B., sa bonne foi n'était aucunement en cause, mais elle aurait quand même pu se tromper pour ce qui est de percevoir ou de se rappeler les faits, et le juge du procès considérerait que l'épreuve du

stated, he found that “there is no secure method of testing K.B.’s credibility” (hearsay decision, at para. 56).

[113] The *Khan* test specifically framed the inquiry as being into “ordinary everyday social conduct” (C.A., at p. 206). At no point did this Court in *Khan* or McLachlin J. in *Rockey* require that the potential witness be able to *articulate* or even understand in the abstract concepts such as oaths, affirmations or promises. Leaving aside McLachlin J.’s reference to a “moral obligation” in *Rockey* — which, if anything, proposed a more strict test for admissibility than the Court’s judgment in *Khan* — if it appears to the trial judge that the potential witness whose mental capacity is challenged has demonstrated an understanding of a promise to tell the truth in terms of ordinary, everyday social conduct, the witness has met the test for giving unsworn testimony. The same would be true in my view of a witness who understands the seriousness of the situation and “the importance of being careful and correct”, to use the Chief Justice’s words in this case (para. 36). However, even this approach could not be satisfied by K.B. according to the trial judge who was uniquely placed to observe her demeanour.

[114] I respectfully disagree with the Chief Justice’s characterization of *Khan* as insisting “on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to” (para. 62). The *Khan* test, in my view, did just the opposite. In that case, Robins J.A. found that the trial judge had erroneously applied the standards applicable to a child giving sworn testimony to a situation in which only the unsworn testimony of a child was sought and to which less onerous standards were applicable. Robins J.A. underscored the difference between the two standards in no uncertain terms:

contre-interrogatoire serait inutile puisque, comme il l’a dit, [TRADUCTION] « il n’y a aucun moyen sûr de vérifier la crédibilité de K.B. » (décision relative au ouï-dire, par. 56).

[113] Le critère de l’arrêt *Khan* mentionne précisément que l’interrogatoire ne doit pas sortir du cadre de la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne » (C.A., p. 206). Notre Cour dans *Khan*, ou la juge McLachlin dans *Rockey*, n’exigeaient aucunement que le témoin éventuel soit capable d’articuler ou même de comprendre dans l’abstrait des concepts comme le serment, l’affirmation ou la promesse. Abstraction faite de la mention d’une « obligation morale » par la juge McLachlin dans *Rockey* — qui a même proposé un critère d’admissibilité plus rigoureux que celui retenu par notre Cour dans *Khan* — s’il semble au juge du procès que le témoin éventuel dont la capacité mentale est mise en question a démontré qu’il comprend au sens de la conduite sociale ordinaire de la vie quotidienne ce qu’est une promesse de dire la vérité, le témoin a satisfait au critère requis pour témoigner sans avoir prêté serment. Il en serait de même, selon moi, d’un témoin qui comprend le sérieux de la situation et « l’importance de répondre de façon prudente et correcte », pour reprendre le propos de la Juge en chef en l’espèce (par. 36). Toutefois, K.B. ne pouvait satisfaire même à ces conditions, selon le juge du procès qui était particulièrement bien placé pour observer son comportement.

[114] Avec égards, je ne suis pas d’accord avec la Juge en chef pour dire que l’arrêt *Khan* insiste « sur la compréhension, en termes abstraits, du devoir de dire la vérité et des questions d’ordre métaphysique que cet accent engendrait » (par. 62). Le critère énoncé dans *Khan*, selon moi, a un effet diamétralement opposé. Dans cette affaire, le juge Robins a conclu que le juge du procès avait commis une erreur en appliquant à un enfant qui témoigne sous serment les normes applicables à une situation dans laquelle on cherchait seulement à obtenir le témoignage d’un enfant qui n’a pas prêté serment et auquel des normes moins rigoureuses s’appliquaient. Le juge Robins a souligné en termes on ne peut plus clairs la différence entre les deux normes :

An appreciation of the assumption of “a moral obligation” or “getting a hold on the conscience of the witness” or . . . an “appreciation of the solemnity of the occasion” or an awareness of an added duty to tell the truth over and above the ordinary duty to do so are all matters involving abstract concepts which are not material to a determination of whether a child’s unsworn evidence may be received. A child need not comprehend “what it is to tell the truth in court” or to appreciate “what happens when you tell a lie in the courtroom” before he or she can give unsworn evidence. [Emphasis added; emphasis in original deleted; pp. 205-6.]

Therefore, I have no disagreement with the Chief Justice insofar as she affirms the existing law that the judge’s inquiry should not ask the potential witness to “articulate abstract concepts” (para. 31) or tell what “the truth means in abstract terms” (para. 35) or venture into “abstract, philosophical realms” (para. 56) or conduct “an abstract inquiry into the nature of the obligation to tell the truth” (para. 58). Nor did *Khan*, or McLachlin J. in *Rockey*, in my view, “insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations” (para. 61). On the contrary, it seems to me that *Khan* affirms — not denies — that “[i]t is unnecessary and indeed undesirable to conduct an abstract inquiry” (para. 64). At no point does *Khan* require an explanation of “the nature of the obligation to tell the truth in philosophical terms” (para. 66). The reasons of McLachlin J. in the later case of *Rockey* expressed no disagreement with the *Khan* approach. It is the present majority opinion that effects a marked departure from the existing jurisprudence.

B. *An Issue of Statutory Interpretation*

[115] The bottom line of the majority judgment in this case is that s. 16(3) precludes a court from conducting an inquiry into whether (as McLachlin J. in *Rockey* put it) the proposed witness has “the ability to promise to tell the truth” (para. 25). This is based, it is said, on “[t]he first and cardinal principle of statutory interpretation [which] is that one must look to the plain words of the provision. Where

[TRANSLATION] Apprécier le fait d’assumer « une obligation morale » ou « la prise de conscience du témoin » ou [. . .] « apprécier le caractère solennel de l’occasion » ou être conscient d’un devoir de dire la vérité qui va au-delà du devoir normal de dire la vérité sont toutes des questions comportant des concepts abstraits qui n’ont pas d’incidence au moment de déterminer si le témoignage d’un enfant qui n’a pas prêté serment peut être admis. Avant de faire une déposition sans avoir prêté serment, un enfant n’a pas à comprendre « ce que signifie dire la vérité devant le tribunal » ni à apprécier « les conséquences d’un mensonge dans la salle d’audience ». [Je souligne; italiques dans l’original omis; p. 205-206.]

Par conséquent, je ne conteste pas l’exposé que donne la Juge en chef de l’état du droit lorsqu’elle dit que, dans son interrogatoire, le juge ne devrait pas demander au témoin éventuel de « formuler [d]es concepts abstraits » (par. 31) ou d’expliquer « en termes abstraits ce que signifie dire la vérité » (par. 35) ni s’aventurer dans le « domaine plus abstrait de la philosophie » (par. 56) ou mener « un interrogatoire dans l’abstrait sur la nature de l’obligation de dire la vérité » (par. 58). Et selon moi, ni l’arrêt *Khan* ni la juge McLachlin dans l’arrêt *Rockey* n’ont « [i]nsist[é] sur la formulation de la nature de l’obligation de dire la vérité, sans égard à des situations particulières » (par. 61). Au contraire, il me semble que *Khan* confirme — au lieu de nier — qu’« [i]l n’est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite » (par. 64). L’arrêt *Khan* n’exige aucunement une explication « en termes philosophiques [de] la nature de l’obligation de dire la vérité » (par. 66). Dans ses motifs dans l’arrêt *Rockey*, la juge McLachlin ne rejette nullement l’approche retenue dans *Khan*. C’est l’opinion des juges de la majorité en l’espèce qui rompt nettement avec la jurisprudence.

B. *Une question d’interprétation de la loi*

[115] Les juges de la majorité affirment essentiellement en l’espèce que le par. 16(3) empêche le tribunal de procéder à une enquête visant à déterminer si (comme l’a dit la juge McLachlin dans *Rockey*) le témoin éventuel a « [l]a capacité [. . .] de promettre de dire la vérité » (par. 25). Ils disent se fonder sur « le principe fondamental de l’interprétation des lois, [suivant lequel] il faut examiner

ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity Section 16 shows no ambiguity” (McLachlin C.J., at para. 26).

[116] A more contextual approach to statutory interpretation has been emphasized by our Court on numerous occasions in recent years, as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting Professor Driedger:

Today there is only one principle or approach, namely, 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)

[117] Leaving aside for the moment the amendments relating to children in s. 16.1 added by the 2005 amendments, the relevant “three options” for persons with mental disability are set out in s. 16(1) to (4) as follows:

16. (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

- (a) whether the person understands the nature of an oath or a solemn affirmation; and
- (b) whether the person is able to communicate the evidence.

(2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

le libellé explicite de la disposition. En cas d’ambiguïté, il peut être nécessaire d’avoir recours à des facteurs externes pour la dissiper [. . .] L’article 16 ne comporte aucune ambiguïté » (la juge en chef McLachlin, par. 26).

[116] À plusieurs reprises au cours des dernières années, notre Cour a insisté sur une méthode d’interprétation des lois plus contextuelle telle qu’énoncée dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au par. 21, où la Cour cite le professeur Driedger :

[TRADUCTION] Aujourd’hui il n’y a qu’un seul principe ou solution: il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur.

(E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87)

[117] Abstraction faite pour l’instant des modifications applicables aux enfants apportées en 2005 par l’ajout de l’art. 16.1, les « trois possibilités » applicables aux personnes ayant une déficience intellectuelle sont énoncées comme suit aux par. 16(1) à (4) :

16. (1) [Témoin dont la capacité mentale est mise en question] Avant de permettre le témoignage d’une personne âgée d’au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :

- a) d’une part, celle-ci comprend la nature du serment ou de l’affirmation solennelle;
- b) d’autre part, celle-ci est capable de communiquer les faits dans son témoignage.

(2) [Témoignage sous serment] La personne visée au paragraphe (1) qui comprend la nature du serment ou de l’affirmation solennelle et qui est capable de communiquer les faits dans son témoignage témoigne sous serment ou sous affirmation solennelle.

(3) [Témoignage sur promesse de dire la vérité] La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l’affirmation solennelle, est capable de communiquer les faits dans son témoignage peut, malgré qu’une disposition d’une loi exige le serment ou l’affirmation, témoigner en promettant de dire la vérité.

(4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[118] Section 16 mandates only one “inquiry” by the trial judge in dealing with a witness “whose mental capacity is challenged”. Section 16(3) is simply part of a single evaluation in which the trial judge considers the gamut from permitting the challenged witness to testify under oath to not being able to testify at all.

[119] As to whether the expression “promising to tell the truth” means more than the mere verbal ability to mouth the words I refer to what McLachlin J. herself said in *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 236: “The phrase ‘communicate the evidence’ indicates more than mere verbal ability.” Equally, it seems to me, the requirement that a witness promise to tell the truth requires more than “mere verbal ability” to say the words. The trial judge is required to ascertain whether the witness possesses not only the “mere verbal ability” but understands “in ordinary, everyday terms” the difference between truth and fiction and the importance of sticking to the former in his or her testimony.

[120] In the initial version of s. 16 proposed by the government, there appeared a requirement that a child be “of sufficient intelligence” to testify. This was deleted. The Chief Justice suggests that the record of the Legislative Committee on Bill C-15 shows that “sufficient intelligence” was essentially understood as the ability to appreciate the moral difference between telling the truth and lying (para. 29). I disagree. As I read the legislative record, the term “sufficient intelligence” was dropped from the draft bill because in the

(4) [Inaptitude à témoigner] La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) [Charge de la preuve] La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle.

[118] L'article 16 ne requiert du juge du procès qu'une seule « enquête » à l'égard d'une personne « dont la capacité mentale est mise en question ». Le paragraphe 16(3) s'inscrit simplement dans une analyse unique par laquelle le juge du procès envisage toutes les solutions possibles, allant du témoignage sous serment à l'incapacité à témoigner.

[119] Quant à savoir si l'expression « en promettant de dire la vérité » signifie plus que la simple capacité verbale d'articuler les mots, je renvoie aux propos de la juge McLachlin elle-même dans l'arrêt *R. c. Marquard*, [1993] 4 R.C.S. 223, p. 236 : « L'expression “communiquer les faits dans son témoignage” indique plus qu'une simple capacité verbale. » Il me semble de même que si l'on exige de la personne qu'elle promette de dire la vérité, il faut plus que la « simple capacité verbale » de prononcer les mots. Le juge du procès doit s'assurer que la personne possède non seulement la « simple capacité verbale », mais également qu'elle comprend « au sens ordinaire de la vie quotidienne » la différence entre la vérité et la fiction, ainsi que l'importance de s'en tenir à la vérité lors de son témoignage.

[120] Dans la version initiale de l'art. 16 proposée par le gouvernement, il était exigé de la personne qu'elle soit « suffisamment intelligente » pour témoigner. Cette exigence a été supprimée. Selon la Juge en chef, les procès-verbaux du Comité législatif sur le projet de loi C-15 révèlent que l'expression « suffisamment intelligente » s'entendait essentiellement de la capacité d'apprécier la différence morale entre dire la vérité et mentir (par. 29). Je ne partage pas cette opinion. Selon mon interprétation de ces procès-verbaux, l'expression « suffisamment

Committee's view it potentially risked being interpreted as requiring judges to evaluate a child witness's IQ rather than his or her capacity to communicate and understand the difference between truth and lies. The Parliamentarians were assured that s. 16(3), without the words "sufficient intelligence", still required that "the child understands the difference between telling the truth and lying", as demonstrated in the following exchange:

[The Hon. Mary] Collins: Yes. However, if we leave in the "sufficient intelligence", and with the interpretation that has been given, I still feel that is going to be a potential barrier.

Mr. Pink: It may be that the committee is going to have to decide on words other than "sufficient intelligence". What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

[The Hon. Mary] Collins: I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

Mr. Pink: I agree.

[The Hon. Mary] Collins: Thank you. [Emphasis added; p. 27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

[121] This seems as clear a demonstration as one could ask for from the Parliamentary record that it was intended under s. 16(3) that the trial judge be satisfied that the witness "understands the difference between telling the truth and lying" (emphasis added). Nothing in the legislative record of the 1987 amendments suggests that the mere verbal ability to mouth the words of a promise would be sufficient.

[122] As to the "object of the Act", it seems clear that Parliament, in making the amendments to s. 16

intelligente » a été radiée de l'avant-projet de loi parce que, de l'avis du Comité, elle aurait pu prêter à une interprétation obligeant les juges à évaluer le quotient intellectuel des enfants plutôt que leur capacité de communiquer et de comprendre la différence entre la vérité et le mensonge. Les membres du Comité ont obtenu l'assurance que, même sans les mots « suffisamment intelligente », le par. 16(3) exigeait toujours que « l'enfant compren[ne] la différence entre dire la vérité et dire un mensonge », comme l'illustre l'échange qui suit :

[L'hon. Mary] Collins : Oui. Cependant, si nous conservons le concept de « l'intelligence suffisante », et si on l'interprète de la même façon que précédemment, j'ai quand même l'impression que cela constituera peut-être un obstacle.

M. Pink : Il faudra peut-être que le Comité choisisse alors d'autres termes que « intelligence suffisante ». De toute façon, pourquoi pose-t-on d'abord toutes ces questions? S'agit-il vraiment de savoir si le témoin sait distinguer entre le vrai et le faux? Est-ce que tout ne revient pas à cela?

[L'hon. Mary] Collins : Je le pense. Oui. En conséquence, si l'enfant comprend la différence entre dire la vérité et dire un mensonge, il me semble que l'on disposerait là de tout ce dont on a vraiment besoin.

M. Pink : J'abonde en ce sens.

[L'hon. Mary] Collins : Merci. [Je souligne; p. 27.]

(Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15*, n° 2, 2^e sess., 33^e lég., 4 décembre 1986)

[121] Cet extrait des procès-verbaux du Comité démontre on ne peut plus clairement, il me semble, que le législateur voulait, au par. 16(3), que le juge du procès soit convaincu que la personne « comprend la différence entre dire la vérité et dire un mensonge » (je souligne). Les procès-verbaux du Comité relatifs aux amendements de 1987 ne donnent nullement à penser que la simple capacité verbale d'articuler les mots d'une promesse serait suffisante.

[122] En ce qui concerne l'« objet de la loi », il semble évident que le législateur, en modifiant

in 1987 (S.C. 1987, c. 24), was attempting to strike a balance between access to justice and the rights of an accused in enacting s. 16 (*ibid.*, No. 1, November 27, 1986, at pp. 21, 24 and 33). A promise to tell the truth affords some protection to an accused, but not if “the promise” is reduced to an empty formality (or, to use McLachlin J.’s phrase in *Marquard*, to a “mere verbal ability” (p. 236)), which is the unfortunate result of the majority judgment in this case.

C. *The Proper Interpretation of Section 16(3) Was Not Altered by the 2005 Amendments Related to the Evidence of Children Under 14 Years Old*

[123] In 2005, Parliament amended the *Canada Evidence Act* with respect to the unsworn evidence of children based in part on the report of the Child Witness Project at Queen’s University. I agree with the Chief Justice that “Parliament’s concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children” (para. 41 (emphasis added)).

[124] The 2005 amendments provide as follows (S.C. 2005, c. 32):

16.1 (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

l’art. 16 en 1987 (L.C. 1987, ch. 24), tentait en adoptant cette disposition d’établir un juste équilibre entre l’accès à la justice et les droits de l’accusé (*ibid.*, n° 1, 27 novembre 1986, p. 21, 24 et 33). Une promesse de dire la vérité fournit à l’accusé une certaine protection, mais pas si « la promesse » est réduite à une formalité vide de sens (ou une « simple capacité verbale », les mots qu’emploie la juge McLachlin dans *Marquard* (p. 236)), ce qui est le résultat regrettable auquel parviennent les juges majoritaires en l’espèce.

C. *Les modifications apportées en 2005 relativement au témoignage des enfants âgés de moins de 14 ans n’ont pas changé l’interprétation qu’il convient de donner au par. 16(3)*

[123] En 2005, en se fondant en partie sur le rapport du Child Witness Project de l’Université Queen’s, le législateur a modifié la *Loi sur la preuve au Canada* en ce qui concerne les dispositions relatives au témoignage des enfants qui ne prêtent pas serment. Je suis d’accord avec la Juge en chef pour dire qu’« en adoptant en 2005 les modifications à la *Loi sur la preuve au Canada*, le législateur visait exclusivement les enfants. Les modifications ont été apportées comme suite au rapport Bala traitant des problèmes associés à la poursuite des actes criminels perpétrés contre les enfants. Les débats de la Chambre des communes portant sur l’art. 16.1 attestent que les modifications de 2005 avaient exclusivement trait aux enfants » (par. 41 (je souligne)).

[124] Les modifications apportées en 2005 prévoient ce qui suit (L.C. 2005, ch. 32):

16.1 (1) [Témoignage admis en preuve] Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) [Témoignage admis en preuve] Malgré toute disposition d’une loi exigeant le serment ou l’affirmation solennelle, une telle personne ne peut être assermentée ni faire d’affirmation solennelle.

(3) [Témoignage admis en preuve] Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d’y répondre.

(4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

[125] The Crown acknowledges that there are “obvious distinctions” between Parliament’s test for adults with limited mental capacity under s. 16 and children under 14 years of age under s. 16.1 (A.F., at para. 57). For adults, s. 16(3) retains the more expansive test developed in the jurisprudence regarding the ability to communicate the evidence: see *Marquard*. A child need only be able “to understand and respond to questions” (s. 16.1(5)). Section 16(1) retains the potential for a challenged adult to testify under oath, whereas s. 16.1(2) provides that a child witness shall *not* take an oath or make a solemn affirmation. The child, as in the case of the challenged adult, must promise to tell the truth (s. 16.1(6)), but s. 16.1(7) specifically prohibits asking children “any questions regarding their understanding of the nature of the promise to tell the truth”. The Crown contends that research shows “that regardless of an inability to define these abstract concepts, the making of a promise to tell the truth by a child makes it more likely that a

(4) [Charge de la preuve] La partie qui met cette capacité en question doit convaincre le tribunal qu’il existe des motifs d’en douter.

(5) [Enquête du tribunal] Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d’y répondre.

(6) [Promesse du témoin] Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) [Question sur la nature de la promesse] Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) [Effet] Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

[125] Le ministère public reconnaît qu’il existe des [TRADUCTION] « distinctions évidentes » entre le critère établi par le législateur à l’art. 16 à l’égard des adultes ayant une capacité mentale limitée et celui établi à l’art. 16.1 à l’égard des enfants âgés de moins de 14 ans (m.a., par. 57). Pour les adultes, le par. 16(3) conserve le critère plus large élaboré dans la jurisprudence en ce qui concerne la capacité de communiquer les faits dans un témoignage : voir *Marquard*. Pour l’enfant, il suffit qu’il soit capable « de comprendre les questions et d’y répondre » (par. 16.1(5)). Aux termes du par. 16(1), un adulte dont la capacité mentale est mise en question peut témoigner sous serment alors qu’aux termes du par. 16.1(2), un enfant *ne* peut prêter serment *ni* faire une affirmation solennelle. L’enfant, tout comme l’adulte dont la capacité mentale est mise en question, doit promettre de dire la vérité (par. 16.1(6)), mais le par. 16.1(7) interdit expressément de poser aux enfants une « question sur la compréhension de la nature

child will tell the truth” (A.F., at para. 79 (emphasis added)).

[126] I agree with the Chief Justice that the words “on promising to tell the truth” in s. 16(3) and s. 16.1(6) should receive the same interpretation. It is for that very reason that, in my view, Parliament felt it necessary in 2005 to introduce the s. 16.1(7) “don’t ask” rule. Otherwise, the “simple line of questioning” to determine whether the potential witness understands “the seriousness of the situation and the importance of being careful and correct” would continue to apply to children under the 2005 amendments as well as to adults whose mental capacity is challenged. The point, however, is that s. 16.1(6), unlike s. 16(3), must be read together with s. 16.1(7) (the “don’t ask” rule), and s. 16.1(7) was limited to children because the empirical research related to “children, and only children”. Thus, the witness from the Department of Justice told the Parliamentary Committee:

Professor Bala’s research seems to highlight that there’s significance in giving that promise because children understand what a promise is all about. [Emphasis added; 17:20.]

(House of Commons, *Evidence of the Standing Committee on Justice and Human Rights*, No. 77, 2nd Sess., 37th Parl., October 29, 2003)

Senator Landon Pearson emphasized the empirical foundation of the “don’t ask” rule:

I want to put on the record the degree to which this provision of the bill is based on a considerable body of research on the capacity of children to understand that when they say “I promise to tell the truth,” that

de la promesse ». Le ministère public plaide que la recherche démontre [TRADUCTION] « que même s’il n’est pas en mesure de définir ces notions abstraites, un enfant qui promet de dire la vérité est plus susceptible de dire la vérité » (m.a., par. 79 (je souligne)).

[126] Je suis d’accord avec la Juge en chef pour dire que l’expression « en promettant de dire la vérité » qui figure au par. 16(3) et au par. 16.1(6) devrait être interprétée de la même manière dans les deux dispositions. C’est exactement pour cette raison, selon moi, que le législateur a cru nécessaire d’introduire en 2005 la règle du par. 16.1(7) interdisant de poser des questions. Autrement, la « série de questions simples » visant à déterminer si le témoin éventuel comprend « le caractère sérieux de la situation et l’importance de répondre de façon prudente et correcte » continuerait de s’appliquer aux enfants aux termes de la modification apportée en 2005 ainsi qu’aux adultes dont la capacité mentale est mise en question. Le fait est, toutefois, que contrairement au par. 16(3), le par. 16.1(6) doit être interprété conjointement avec le par. 16.1(7) (l’interdiction de poser des questions), et l’application du par. 16.1(7) a été limitée aux enfants parce que la recherche empirique avait « exclusivement trait aux enfants ». Ainsi, la représentante du ministère de la Justice a dit ce qui suit en comité parlementaire :

Selon les recherches de M. Bala, le fait pour des jeunes de faire une promesse a de l’importance puisqu’ils comprennent de quoi il retourne. [Je souligne; 17:20.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice et des droits de la personne*, n^o 77, 2^e sess., 37^e lég., 29 octobre 2003)

La sénatrice Landon Pearson a insisté sur le fondement empirique de la règle interdisant de poser des questions :

Je veux simplement dire, pour mémoire, dans quelle mesure les dispositions de ce projet de loi sont fondées sur un corpus impressionnant de recherches sur la capacité des enfants à comprendre leur affirmation « Je

they know what they are doing. [Emphasis added; p. 19.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 17, 1st Sess., 38th Parl., June 23, 2005)

No such empirical studies were carried out with respect to adults with mental disabilities. In their case, there was no “don’t ask” equivalent to s. 16.1(7) even proposed, let alone adopted. As the Chief Justice emphasizes, the 2005 amendments deal with “children, and only children” (para. 41).

[127] The Crown invites us, in effect, to apply the “don’t ask” rule governing children to adults whose mental capacity is challenged, despite evidence of legislative intent to the contrary. It does so on the basis that both are members of a “vulnerable group” (A.F., at para. 58) and should be treated as equivalent. That is a policy argument for Parliament, not a change to be brought about by judicial amendment.

[128] The Chief Justice endorses a version of this equivalence argument in posing a rhetorical question:

When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? [para. 52]

In my view, the difference is that a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. The fact that psychiatrists speak of persons with mental disabilities calibrated in terms of mental ages is a useful way of describing the relative extent and severity of a person’s disability, but it does not mean that a 22-year-old woman with a severe mental disability is on the same footing as a six-year-old child with no mental disability whatsoever, and of course the empirical evidence before Parliament in 2005 did not suggest otherwise.

promets de dire la vérité », c’est-à-dire qu’ils comprennent ce serment. [Je souligne; p. 19.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, n° 17, 1^{re} sess., 38^e lég., 23 juin 2005)

Aucune étude empirique de ce genre n’a été effectuée relativement aux adultes ayant une déficience intellectuelle. Dans le cas de ces adultes, aucune règle interdisant de poser des questions, équivalente à la règle du par. 16.1(7), n’a même été proposée, et encore moins adoptée. Comme l’a souligné la Juge en chef, les modifications de 2005 avaient « exclusivement trait aux enfants » (par. 41).

[127] Le ministère public nous invite, en réalité, à appliquer aux adultes dont la capacité mentale est mise en question la règle interdisant de poser des questions aux enfants et ce, en dépit de la preuve de l’intention du législateur au contraire. Il fait valoir qu’il s’agit dans les deux cas de membres d’un [TRADUCTION] « groupe vulnérable » (m.a., par. 58) qui doivent être traités de manière équivalente. Il s’agit d’un argument de politique générale à l’intention du législateur et non d’une modification introduite par voie judiciaire.

[128] La Juge en chef se prononce en faveur d’une version de cet argument d’équivalence en posant une question d’ordre rhétorique :

. . . en ce qui concerne l’habilité à témoigner, on peut se demander quelle est la différence, précisément, entre un adulte ayant la capacité mentale d’un enfant de six ans et un enfant de six ans ayant la capacité mentale d’un enfant de six ans. [par. 52]

Selon moi, la différence est qu’un enfant de six ans ayant la capacité mentale d’un enfant de six ans n’a pas une déficience intellectuelle. Le fait pour les psychiatres de classer en fonction de l’âge mental les personnes ayant une déficience intellectuelle se veut une manière utile de décrire l’ampleur et la gravité relatives de la déficience d’une personne, mais cela ne signifie pas qu’une femme âgée de 22 ans ayant une déficience intellectuelle grave est sur un pied d’égalité avec un enfant âgé de six ans n’ayant aucune déficience intellectuelle et, bien sûr, la preuve empirique soumise au législateur en 2005 ne donnait pas à penser autrement.

[129] The rhetorical question posed by the Chief Justice seeks to reverse the onus of proof. It *presumes* without proof the fact of equivalence and demands a rebuttal, but it was for the government to persuade Parliament, if it could, that there is no relevant difference between an adult with a severe mental disability and a child with no mental disability. It made no effort to do so because there was no evidence on which such an argument *could* have been made.

[130] No evidence was led in these proceedings to suggest equivalence and we cannot take judicial notice of alleged “facts” that are neither notorious nor easily verifiable from undisputed sources: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 53. While greater latitude is allowed in the judicial notice of legislative facts (as opposed to adjudicative facts), it would still be necessary for the Crown to show that its assertion of equivalence of children and adults with a mental disability in this respect “would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the ‘fact’ to the disposition of the controversy” (*ibid.*, at para. 65 (emphasis deleted)). The Crown’s assertion of equivalence is pure assertion on a key issue, and mere assertion does not meet the *Spence* standard.

[131] Section 16(3) *does not* require an inquiry into the proposed witness’s understanding of the abstract “nature of the obligation to tell the truth”. The argument about abstract concepts was rejected in *Khan* and by McLachlin J. in *Rockey*, and there is no need for the majority to resurrect it at this point for the sole purpose of rejecting it yet again. That is not a point of disagreement between us

[129] La question d’ordre rhétorique posée par la Juge en chef vise à inverser le fardeau de la preuve. La question *suppose* sans aucune preuve à l’appui le fait de l’équivalence et exige que l’on réfute ce fait, mais il appartenait au gouvernement de convaincre le législateur, s’il le pouvait, qu’il n’existe aucune différence palpable entre un adulte ayant une déficience intellectuelle grave et un enfant n’ayant aucune déficience intellectuelle. Le gouvernement n’a déployé aucun effort en ce sens puisqu’il n’existait aucune preuve *susceptible* d’appuyer un tel argument.

[130] Aucun élément de preuve laissant croire que cette équivalence existe n’a été soumis en l’espèce et nous ne pouvons pas prendre connaissance d’office de « faits » allégués qui ne sont ni notoires, ni facilement vérifiables en ayant recours aux sources incontestées : *R. c. Find*, 2001 CSC 32, [2001] 1 R.C.S. 863, par. 48; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458, par. 53. Si les juges ont plus de latitude pour prendre connaissance d’office des faits législatifs qu’ils n’en ont à l’égard des faits en litige, le ministère public devrait tout de même démontrer, relativement à l’équivalence qu’il invoque entre les enfants et les adultes ayant une déficience intellectuelle, qu’« une personne raisonnable ayant pris la peine de s’informer sur le sujet considérerait que ce “fait” échappe à toute contestation raisonnable quant à la fin à laquelle il sera invoqué, sans oublier que les exigences en matière de crédibilité et de fiabilité s’accroissent directement en fonction de la pertinence du “fait” pour le règlement de la question en litige » (*ibid.*, par. 65 (italiques omis)). La prétention du ministère public relative à l’équivalence n’est que pure prétention relativement à une question clé, et une simple prétention ne satisfait pas au critère établi dans l’arrêt *Spence*.

[131] Le paragraphe 16(3) *n’exige pas* que l’on vérifie si le témoin éventuel comprend, dans l’abstract, la « nature de l’obligation de dire la vérité ». L’argument au sujet des concepts abstraits a été rejeté dans *Khan* et par la juge McLachlin dans *Rockey*, et point n’est besoin que les juges majoritaires reviennent avec cet argument à ce moment-ci à seule fin de le rejeter de nouveau. Nous ne

and should not be portrayed as such. Section 16(3) requires only the “ability to promise to tell the truth” (quoting *Rockey*) in terms of ordinary, everyday social conduct.

[132] It is the majority, not the minority here, that must resort to extraneous language not found in s. 16(3) to achieve the result it seeks. As stated, I agree with the Chief Justice that the words “on promising to tell the truth” in s. 16(3) must bear the same meaning as “to promise to tell the truth” in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) “don’t ask” rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words “promising to tell the truth” in s. 16(3), and thus rob the words of s. 16(3) of their ordinary meaning, in my opinion.

[133] The Chief Justice refers to s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, for the proposition that no inference as to the meaning of s. 16(3) flows from the adoption of s. 16.1(7) with respect to children (para. 46). Professor P.-A. Côté puts the point somewhat differently:

The provisions [s. 45] do not, for example, prevent interpreting the act of amendment as an expression of the legislature’s opinion; they simply eliminate an *a priori* presumption (“shall not be deemed”). The context, or even the formulation (in the form of a preamble, for example), of an amendment is quite capable of marking a clear desire to change the state of the law.

(P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 569)

In any event, this is not the foundation of the respondent’s argument. He relies on s. 16(3) as it was enacted in 1987. He does not rely, nor does he need to rely, on the 2005 amendments which, as the majority concedes, apply only to children.

sommes pas en désaccord sur ce point et il ne faudrait pas laisser croire que tel est le cas. Le paragraphe 16(3) exige uniquement la « capacité [. . .] de dire la vérité » (citant *Rockey*) au sens de la conduite sociale ordinaire de la vie quotidienne.

[132] Ce sont les juges de la majorité, non les juges dissidents, qui doivent, pour obtenir le résultat qu’ils souhaitent, avoir recours à des termes extrinsèques qu’on ne trouve pas au par. 16(3). Je le répète, je suis d’accord avec la Juge en chef pour dire que les mots « en promettant de dire la vérité » au par. 16(3) doivent avoir le même sens que les mots « promettre [. . .] de dire la vérité » au par. 16.1(6). Cela étant, les juges majoritaires doivent incorporer, au par. 16(3) applicable uniquement aux adultes ayant une déficience intellectuelle, la règle du par. 16.1(7) interdisant de poser des questions, qui s’applique uniquement aux enfants, afin d’atténuer l’expression « en promettant de dire la vérité » au par. 16(3) et, à mon avis, de priver ce paragraphe de son sens ordinaire.

[133] La Juge en chef cite l’art. 45 de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21, comme fondement de l’affirmation suivant laquelle aucune inférence quant au sens du par. 16(3) ne découle de l’adoption du par. 16.1(7) relativement aux enfants (par. 46). Le professeur P.-A. Côté exprime ce point de vue un peu différemment :

. . . les textes [l’art. 45] n’interdisent pas de voir dans une modification une manifestation d’opinion du Parlement : ils ne font qu’écarter toute présomption à ce sujet (« *shall not be deemed* »). Il pourrait très bien arriver que le contexte d’une modification, ou même la formulation de la loi modificative, le préambule par exemple, fasse voir une volonté de changer le droit.

(P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4^e éd. 2009), p. 617)

Quoi qu’il en soit, il ne s’agit pas là du fondement de l’argument de l’intimé. Ce dernier se fonde sur le par. 16(3) tel qu’il a été adopté en 1987. Il ne se fonde pas, et n’a pas besoin de se fonder, sur les modifications apportées en 2005 qui, les juges de la majorité le concèdent, s’appliquent uniquement aux enfants.

D. *Was the Section 16(3) Test Misapplied in This Case?*

[134] The Crown contends that, even if the *Khan* test is affirmed, it was not applied properly in this case. Firstly, the trial judge should have sought assistance from individuals apart from Dr. K., a forensic psychiatrist called by the defence, whose evidence was, in any event, put aside by the trial judge as unnecessary. The trial judge did not hear from K.B.'s teacher or other support workers who were familiar with K.B.'s strengths and weaknesses for purposes of the s. 16 inquiry. The Crown argues that they could have assisted the court to pose questions in a way that K.B. was capable of dealing with. To do so could have disclosed K.B.'s true capacity to deal with concrete facts without the distraction of conceptual issues, which, as the *voir dire* confirmed, K.B. could not handle. Secondly, the Crown says that the trial judge, having chosen to proceed without such assistance, misdirected his questions to metaphysical issues which could not and did not provide the basis for a fair determination of K.B.'s mental capacity.

[135] I approach the trial judge's assessment of K.B. on the basis of "the ability to communicate the evidence and the ability to promise to tell the truth" (*Rockey*, at para. 25).

(1) The Ability to Communicate the Evidence

[136] The trial judge clearly had serious concerns about this first branch of the test. He reminded K.B.'s teacher, Ms. W., of testimony she had given at the preliminary inquiry, in which Ms. W. had said the following:

If the purpose of her testifying is to determine the truth of what happened, her capacity to express her recollections could be severely limited. So the court may be asking her to do something that she can't do, and her failure to do that may skew her knowledge of what happened. In other words, the outcome — there's a

D. *Le critère du par. 16(3) a-t-il été mal appliqué en l'espèce?*

[134] Le ministère public prétend que, même si le critère de l'arrêt *Khan* est confirmé, il n'a pas été appliqué correctement en l'espèce. Premièrement, le juge du procès aurait dû demander l'aide de personnes autres que le D^r K., un psychiatre légiste cité par la défense, dont le témoignage a été de toute façon écarté par le juge du procès au motif qu'il n'était pas nécessaire. Le juge n'a pas entendu, pour les besoins de l'enquête prévue à l'art. 16, l'enseignante de K.B. ni les autres personnes de soutien qui connaissaient les forces et faiblesses de K.B. Le ministère public prétend que ces personnes auraient pu aider la cour à poser des questions de façon à ce que K.B. soit capable de les comprendre et d'y répondre. Ainsi, il aurait été possible de voir la véritable capacité de K.B. d'examiner des faits concrets sans être distraite par des notions conceptuelles que K.B., comme le voir-dire l'a confirmé, n'était pas en mesure de saisir. Deuxièmement, le ministère public affirme que le juge du procès, ayant choisi de procéder sans demander d'aide, a posé par erreur des questions d'ordre métaphysique qui ne permettaient pas de rendre une décision équitable sur la capacité mentale de K.B.

[135] J'aborde l'appréciation que le juge du procès a faite de K.B. en fonction de « sa capacité de communiquer les faits dans son témoignage et celle de promettre de dire la vérité » (*Rockey*, par. 25).

(1) La capacité de communiquer les faits dans son témoignage

[136] Le juge du procès avait manifestement de sérieuses réserves quant à ce premier volet du critère. Il a rappelé à l'enseignante de K.B., M^{me} W., la déposition qu'elle avait faite à l'enquête préliminaire, dans laquelle M^{me} W. avait déclaré ce qui suit :

[TRADUCTION] Si son témoignage doit servir à déterminer ce qui s'est réellement produit, sa capacité d'exprimer ses souvenirs pourrait être très limitée. La cour pourrait lui demander de faire quelque chose qu'elle ne peut pas faire, et le fait qu'elle ne puisse pas le faire peut fausser sa connaissance de ce qui est arrivé. Autrement

potential for the outcome to not get at the truth, because of . . . her incapacity to express that. [Emphasis added; hearsay decision, at para. 4.]

This evidence, given earlier at the preliminary inquiry, was properly considered by the trial judge at the subsequent competency hearing.

[137] Moreover, during the competency *voir dire* itself, Dr. K., observing K.B.'s low tolerance for frustration, testified, "I don't think she has the ability to think what you're asking and come up with an answer" (A.R., vol. I, at p. 161). The expert also stated, as noted by the trial judge, and echoing the words in *Rockey*, that K.B. "had serious problems relating to her ability to communicate and to recollect" (hearsay decision, at para. 7 (emphasis added)). She could not adequately communicate evidence because, by reason of her mental disability, she was simply unable to "compute" what she was being asked.

[138] The accuracy of the trial judge's assessment of the extent of K.B.'s mental disability was corroborated and confirmed at subsequent stages of the trial. In the course of her testimony at the hearsay *voir dire*, for example, Ms. W., K.B.'s teacher, referred to a statement K.B. had made to an educational assistant, claiming that she, K.B., had spent the weekend at the respondent's house (which was not true). Ms. W. said that if K.B. were asked what she had done that weekend, and replied "[D.A.I.]'s place", this might have meant that she had been *thinking about* D.A.I. and *wanted* to go to his place, not that she had gone there at all (A.R., vol. II, at pp. 25 and 27; see also p. 7). Communication of wishful thinking is not communication of evidence.

[139] Further, the trial judge, in rejecting K.B.'s out-of-court statements, adverted to the earlier observations that K.B. had "serious problems in communicating her evidence, her incapacity to

dit, en fin de compte — il est possible en fin de compte de ne pas apprendre la vérité, en raison de [. . .] son incapacité de l'exprimer. [Je souligne; décision relative au ouï-dire, par. 4.]

Cette déposition, qui avait été faite lors de l'enquête préliminaire, a été prise en compte comme il se doit par le juge du procès au cours de l'audition ultérieure relative à l'habilité à témoigner.

[137] En outre, au cours même du voir-dire relatif à l'habilité à témoigner, le D^r K., constatant la faible tolérance de K.B. face à la frustration, a affirmé ce qui suit : [TRADUCTION] « Je ne crois pas qu'elle ait la capacité de penser à vos questions et de donner une réponse » (d.a., vol. I, p. 161). Le juge du procès a souligné que l'expert, répétant les propos tenus dans *Rockey*, a déclaré aussi que K.B. [TRADUCTION] « avait de sérieux problèmes liés à sa capacité de communiquer et de se souvenir » (décision relative au ouï-dire, par. 7 (je souligne)). Elle ne pouvait pas communiquer adéquatement les faits dans son témoignage parce que, du fait de sa déficience intellectuelle, elle était tout simplement incapable de « computer » ce qu'on lui demandait.

[138] Les étapes subséquentes du procès ont corroboré et confirmé la justesse de l'appréciation, par le juge du procès, de la gravité de la déficience intellectuelle de K.B. Au cours de son témoignage lors du voir-dire relatif au ouï-dire, par exemple, M^{me} W., l'enseignante de K.B., a fait part d'une déclaration dans laquelle K.B. avait dit à une aide-éducatrice avoir passé la fin de semaine chez l'intimé (ce qui n'était pas vrai). M^{me} W. a dit que si l'on demandait à K.B. ce qu'elle avait fait pendant la fin de semaine et qu'elle répondait [TRADUCTION] « chez [D.A.I.] », cela pouvait signifier qu'elle avait *pensé* à D.A.I. et qu'elle *voulait* aller chez lui, et non qu'elle y était allée (d.a., vol. II, p. 25 et 27; voir aussi p. 7). La communication de ses rêveries n'est pas une communication des faits dans un témoignage.

[139] De plus, en rejetant les déclarations extrajudiciaires de K.B., le juge du procès a fait allusion à ses observations antérieures à propos de K.B., à savoir [TRADUCTION] « [ses] sérieuses difficultés à

answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother” (hearsay decision, at para. 53 (emphasis added)).

[140] While it is true that the trial judge emphasized the second branch of the test (the ability to promise to tell the truth), his concerns about K.B.’s ability to communicate the evidence are plain and obvious and were in themselves sufficient to conclude that she lacked the capacity to testify by reason of her severe mental disability.

(2) The Ability to Promise to Tell the Truth

[141] As noted by the Chief Justice, this was the principal ground for the rejection of K.B.’s evidence. However, I believe, as did Doherty and MacPherson J.J.A., for a unanimous Court of Appeal, that this conclusion was certainly open to the trial judge on the evidence.

[142] At the competency hearing, Dr. K. counselled the trial judge that “when you ask about truth, honesty, lie, these are difficult concepts for anybody” (A.R., vol. I, at p. 137). The inquiry, he said, could better be pursued by asking K.B. what she had for breakfast or “other areas in her life, day to day events, and see whether she can understand what is true and what is lie” (p. 140). Such questions would yield an answer that could be verified one way or another (p. 145) and, according to Dr. K., could assist to “see whether she has any ability to discriminate between what is real or just come up with an answer kind of thing” (p. 137).

[143] Armed with this guidance, the trial judge embarked on a second round of questions to ascertain K.B.’s capacity. He asked K.B. a series of simple and concrete questions about her family, school, breakfast routine, and so on. He then posed

communiquer les faits dans son témoignage, [. . .] son incapacité à répondre à des questions relativement simples portant sur ses allégations, [. . .] sa confusion quant à savoir si elle avait ou non parlé à sa mère » (décision relative au oui-dire, par. 53 (je souligne)).

[140] Le juge du procès a effectivement mis l’accent sur le deuxième volet du critère (la capacité de promettre de dire la vérité), mais les réserves qu’il a exprimées quant à la capacité de K.B. de communiquer les faits dans son témoignage sont claires et évidentes et lui suffisaient pour conclure qu’elle n’avait pas la capacité de témoigner du fait de sa grave déficience intellectuelle.

(2) La capacité de promettre de dire la vérité

[141] Comme l’a souligné la Juge en chef, il s’agissait du principal motif justifiant le rejet du témoignage de K.B. Toutefois, tout comme les juges Doherty et MacPherson qui s’exprimaient au nom d’une Cour d’appel unanime, j’estime qu’il était certainement loisible au juge du procès de conclure comme il l’a fait en se fondant sur la preuve.

[142] À l’audience relative à l’habilité à témoigner, le D^r K. a dit au juge du procès que [TRADUCTION] « les questions au sujet de la vérité, l’honnêteté et le mensonge portent sur des notions difficiles à saisir pour tous » (d.a., vol. I, p. 137). Selon lui, l’enquête serait facilitée si l’on demandait à K.B. ce qu’elle a mangé au petit-déjeuner ou en lui posant des questions à propos « d’autres aspects de sa vie, sa routine quotidienne, et voir si elle peut comprendre ce qu’est la vérité et ce qu’est le mensonge » (p. 140). De telles questions apporteraient des réponses vérifiables d’une façon ou d’une autre (p. 145) et, selon le D^r K., aideraient à « savoir si elle est capable de distinguer ce qui est réel ou si elle répond ce qui lui passe par la tête » (p. 137).

[143] Fort de ces conseils, le juge du procès a entrepris de poser une seconde série de questions en vue de vérifier la capacité de K.B. Il a posé à cette dernière une série de questions simples et concrètes à propos de sa famille, de son école, de

the following questions to K.B. and received the following responses (*ibid.*, at pp. 155-56):

[THE COURT:]

Q. You don't know. Do you know why you're here today?

A. I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

la routine du déjeuner, et ainsi de suite. Il a ensuite posé les questions suivantes à K.B. qui a répondu comme suit (*ibid.*, p. 155-156) :

[TRADUCTION]

[LA COUR :]

Q. Tu ne sais pas. Sais-tu pourquoi tu es ici aujourd'hui?

R. Je ne sais pas. Pour parler de [D.A.I.].

Q. Oui, et penses-tu que ce soit vraiment important?

R. Peut-être, oui.

Q. Peut-être oui? Te souviens-tu, plus tôt, quand je t'ai posé des questions à propos d'une promesse?

R. Non.

Q. As-tu déjà fait une promesse à quelqu'un?

R. Je ne sais pas.

Q. As-tu déjà promis d'être gentille, as-tu déjà dit cela? As-tu déjà entendu l'expression « je promets d'être gentille, maman »?

R. D'accord.

Q. Très bien. Alors, sais-tu ce qu'est une promesse, que tu vas agir de la bonne façon? Comprends-tu?

R. D'accord.

Q. Peux-tu me dire si tu comprends ça, [K.B.]?

R. Je ne sais pas.

Q. Est-ce qu'il arrive quelque chose si tu ne tiens pas une promesse?

R. Je ne sais pas.

Q. Tu m'as dit que tu ne vas pas à l'église, n'est-ce pas?

R. Exact.

Q. Et personne ne t'a jamais parlé de Dieu; est-ce exact? Personne ne t'a jamais parlé de Dieu?

R. Non.

Q. Est-ce qu'on t'a jamais dit que si tu dis de gros mensonges, tu vas aller en prison?

R. Exact.

Q. If you tell big lies will you go to jail?

A. No.

Q. No?

THE COURT: Those are all the questions I'm going to pursue at this point.

The Crown also posed a second set of questions (*ibid.*, at pp. 156-58):

Q. We asked you the last time if you knew the difference between a truth and a lie, do you remember that, [K.B.]?

A. Yeah.

Q. Okay. We talked about the room and the colour of the room?

A. Sometimes.

Q. Okay. Do you think it's important to tell the truth or do you think it matter (*sic*)?

A. Does it matter?

Q. It matters?

A. Does it matter?

Q. Does it matter. Do you understand when I say "matter", do you understand what that means?

A. I don't know.

. . . .

Q. Okay. We talked about the room. If I were to say to you that you had eggs for breakfast would that be a truth or a lie?

A. I don't know.

Q. You don't know? How about lunch, if I said you had eggs for lunch, ---

A. Yuk.

Q. --- would that be a truth or a lie?

A. I don't know.

Q. You don't know? Okay.

A. It's getting hard.

Q. It's getting hard?

A. Yeah.

Q. Si tu dis de gros mensonges, tu vas aller en prison?

R. Non.

Q. Non?

LA COUR : Ce sont là toutes mes questions pour l'instant.

Le ministère public a lui aussi posé une seconde série de questions (*ibid.*, p. 156-158) :

Q. Nous t'avons demandé la dernière fois si tu savais la différence entre la vérité et le mensonge, tu t'en souviens, [K.B.]?

R. Oui.

Q. D'accord. Nous avons parlé de la pièce et de la couleur de la pièce?

R. Des fois.

Q. D'accord. Penses-tu qu'il est important de dire la vérité ou penses-tu que cela ait de l'importance?

R. Est-ce que c'est important?

Q. C'est important?

R. Est-ce que c'est important?

Q. Est-ce important. Comprends-tu quand je dis « important », comprends-tu ce que cela signifie?

R. Je ne sais pas.

. . . .

Q. D'accord. Nous avons parlé de la pièce. Si je disais que tu as mangé des œufs au petit-déjeuner, est-ce que ce serait la vérité ou un mensonge?

R. Je ne sais pas.

Q. Tu ne sais pas? Et pour le dîner, si je disais que tu as mangé des œufs au dîner, ---

R. Eurk.

Q. --- ce serait la vérité ou un mensonge?

R. Je ne sais pas.

Q. Tu ne sais pas? D'accord.

R. Ça commence à être difficile.

Q. Ça commence à être difficile?

R. Oui.

Q. Why is it getting hard?

A. I don't know why.

Q. You don't know. Okay.

MR. SEMENOFF: Thank you.

At the conclusion of K.B.'s testimony, the trial judge ruled her unsworn testimony to be inadmissible. He explained:

What I'm saying is I wouldn't have to hear from [Dr. K.]. I've heard from him but it doesn't in any way add or detract or anything from the opinion I've come to, having watched and questioned this witness, which is my obligation.

In other words, I suppose what I'm saying to you is I'm fully satisfied that this witness does not understand what a promise to tell the truth involves, has no concept of that. None. Zero. Then that's what this inquiry is about. [*Ibid.*, at p. 165]

Contrary to the majority opinion, I do not read the trial judge's assessment as based on K.B.'s inability to articulate concepts. It was based on her inability — by virtue of her mental disability — to “understand what a promise to tell the truth involves”. The trial judge made the sort of practical inquiry in everyday terms that *Khan* required.

[144] This was a borderline case. The Crown complains that some of the questions were too abstract, while the question about going to church was beside the point once it became clear that K.B. would give testimony unsworn or not at all. The trial judge could certainly have proceeded further with pointed and concrete factual questions to get at the degree of K.B.'s disability but he saw and heard K.B. and clearly he believed that he had heard enough. Sitting on appeal with nothing but a bare transcript in front of us, in my opinion, we are not in a position to say that his appreciation of K.B.'s capacity was wrong.

Q. Pourquoi c'est difficile?

R. Je ne sais pas pourquoi.

Q. Tu ne sais pas. D'accord.

M. SEMENOFF : Merci.

À la fin du témoignage de K.B., le juge du procès a décidé que son témoignage non assermenté était inadmissible. Voici son explication :

[TRADUCTION] Ce que je dis, c'est que je n'aurais pas eu à entendre le [D^F K.]. J'ai entendu ce qu'il avait à dire, mais ça n'ajoute ni n'enlève quoi que ce soit à la conclusion à laquelle je suis arrivé, après avoir regardé et interrogé ce témoin, ce que je suis obligé de faire.

Autrement dit, je suppose que ce que je vous dis, c'est que je suis entièrement convaincu que ce témoin ne comprend pas ce que la promesse de dire la vérité signifie, n'en a aucune idée. Aucune. Zéro. Alors, voilà ce en quoi consiste cette enquête. [*Ibid.*, p. 165]

Contrairement à l'opinion des juges majoritaires, j'estime que le juge du procès n'a pas fondé son appréciation sur l'incapacité de K.B. d'articuler des concepts. Il s'est fondé sur son incapacité — attribuable à sa déficience intellectuelle — à « comprend[re] [. . .] ce que la promesse de dire la vérité signifie ». Le juge du procès a mené, en utilisant des termes concrets et ordinaires, une enquête conforme aux prescriptions de l'arrêt *Khan*.

[144] Il s'agissait d'un cas limite. Le ministère public allègue que certaines questions étaient trop abstraites et que la question à propos de l'église n'était aucunement pertinente lorsqu'il est devenu évident que K.B. témoignerait sans prêter serment ou ne témoignerait pas du tout. Le juge du procès aurait certainement pu continuer à poser des questions factuelles précises et concrètes afin de déterminer l'importance de la déficience intellectuelle de K.B., mais, il a vu et entendu K.B. et, de toute évidence, il estimait en avoir assez entendu. Comme nous siégeons en appel et que nous disposons seulement d'une transcription de l'instance, nous ne sommes pas en mesure de dire, selon moi, que son appréciation de l'habileté de K.B. à témoigner était erronée.

(3) Conclusion on the Competency Issue

[145] Much of the dispute in this case turned on the significance of K.B.'s "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether K.B. was actually able to "compute" her responses to what she was being asked — a condition precedent, surely, to any ability to test her evidence by cross-examination. The trial judge observed K.B.'s demeanour as she struggled with the attempted dialogue. The trial judge was responsible for protecting the fair trial interests of the accused, as well as society's interest in the prosecution of crimes. The inability of K.B. to deal with simple questions would mean that her evidence — however erroneous it might be, and however much (to pick up on her teacher's observation) it might be the product of K.B.'s wishful thinking — would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial.

[146] The teacher, Ms. W., thought that a skilled questioner who possessed direct personal knowledge of K.B. might be able to help K.B. overcome these limitations. On this view, a judge would need to rely on the teacher's guidance not only to formulate the questions, but also to interpret K.B.'s responses. Generally speaking, of course, only an expert witness can put opinions before the court and, even then, only when the trial judge would be unable to determine the issue in question properly without expert assistance: *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178. At the end of the day, it has to be the judge or jury — not the lay witness — to assess the witness's testimony.

[147] In *Parrott*, the complainant was a mature woman who was said to possess the mental development equivalent in some respects to that of a three- or four-year-old child. The Crown declined

(3) Conclusion relative à la question de l'habilité à témoigner

[145] Une grande partie du litige en l'espèce reposait sur l'importance des réponses de K.B. lorsqu'elle disait [TRADUCTION] « je ne sais pas ». De toute évidence, il s'agissait d'un avantage important pour le juge du procès d'être témoin de l'enchaînement des questions et des réponses et de déterminer si K.B. était réellement capable de « computer » les questions posées et d'y répondre — une condition essentielle, certes, à toute possibilité de vérifier sa déposition lors d'un contre-interrogatoire. Le juge du procès a observé le comportement de K.B. alors qu'elle avait des difficultés à suivre le dialogue. Il incombait au juge du procès d'assurer la protection du droit de l'accusé à un procès équitable ainsi que de l'intérêt de la société à ce que les criminels soient poursuivis. L'incapacité pour K.B. de comprendre des questions simples et d'y répondre signifiait que son témoignage — si erroné soit-il, surtout s'il devait résulter (pour reprendre le propos de l'institutrice de K.B.) des rêveries de K.B. — ne pourrait effectivement être attaqué par la défense, ce qui porterait atteinte à l'intérêt de la société et au droit de l'accusé à un procès équitable.

[146] L'enseignante, M^{me} W., était d'avis qu'un interrogateur qualifié qui connaissait bien K.B. pouvait être en mesure de l'aider à surmonter ces limites. Dans cette optique, un juge devrait se fier aux conseils de l'enseignante non seulement pour formuler les questions, mais aussi pour interpréter les réponses de K.B. Bien entendu, de façon générale, seul un témoin expert peut exprimer ses opinions devant la cour et, même alors, seulement dans le cas où le juge du procès n'est pas en mesure de trancher comme il se doit une question donnée sans l'aide d'un expert : *R. c. Mohan*, [1994] 2 R.C.S. 9; *R. c. Parrott*, 2001 CSC 3, [2001] 1 R.C.S. 178. En bout de ligne, c'est au juge ou au jury — non au témoin profane — qu'il appartient d'apprécier la déposition du témoin.

[147] Dans *Parrott*, la plaignante était une femme adulte dont le développement mental pouvait équivaloir à certains égards à celui d'un enfant de trois ou quatre ans. Le ministère public a refusé

to call the complainant herself on the basis that a court appearance might cause her trauma or other adverse effects, and instead called expert witnesses to lay the foundation for the admission of her earlier out-of-court statements. In this context, we held that the experts could not be substituted for calling the complainant herself, but that

[i]f she had been called and it became evident that the trial judge required expert assistance to draw appropriate inferences from what he had heard her say (or not say), or if either the defence or the Crown had wished to pursue the issue of requiring an oath or solemn affirmation, expert evidence might then have become admissible to assist the judge. [para. 52]

[148] I think we should go further in this case and hold that on a competency *voir dire* where the mental capacity of an adult is challenged and the adult is herself called as a proposed witness, the court may also admit evidence from *fact* witnesses personally familiar with the proposed witness's verbal and cognitive abilities and limitations to help the court gain a better understanding of the person's capacity. These witnesses, unlike Dr. K., would not be in a position to express an opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box.

[149] Ultimately, however, it is the judge who must reach his or her own considered opinion about the level of mental capacity of the proposed witness. Where, as in this case, the judge, after hearing from the proposed witness, considers the calling of additional fact witnesses to be unnecessary, I do not think we are in a position to second-guess that procedural conclusion.

[150] Accordingly, I would reject the Crown's appeal with respect to the trial judge's ruling that

d'assigner la plaignante à témoigner au motif que sa comparution devant le tribunal risquait de la traumatiser ou de lui porter préjudice. Il a plutôt assigné des experts afin de justifier l'admission de ses déclarations extrajudiciaires antérieures. Dans ce contexte, nous avons conclu que les experts ne pouvaient pas être appelés à témoigner en remplacement de la plaignante elle-même, mais que

[s]i elle avait été assignée à témoigner et qu'il était devenu évident que le juge du procès avait besoin de l'aide d'experts pour tirer les inférences appropriées de ce qu'il l'a entendue dire (ou ne pas dire), ou si la défense ou le ministère public avait souhaité soulever la question de l'opportunité d'exiger un serment ou une affirmation solennelle, la preuve d'expert aurait alors pu devenir admissible comme aide apportée au juge. [par. 52]

[148] Je crois que nous devrions aller plus loin en l'espèce et conclure que, dans le cadre d'un voir-dire relatif à l'habilité à témoigner, où la capacité mentale d'une personne adulte est mise en question et la personne adulte est assignée à témoigner, le tribunal peut également admettre les dépositions de témoins des *faits* qui connaissent bien les habilités du témoin éventuel à s'exprimer et à comprendre, ainsi que ses limites, et ce, afin d'aider le tribunal à mieux saisir les capacités de la personne. Ces témoins, contrairement au D^r K., ne seraient pas en mesure d'exprimer une opinion, mais ils pourraient témoigner à propos de ce qu'ils ont eux-mêmes directement observé chez le témoin éventuel. La preuve pourrait, si le juge du procès l'estime utile, aider le juge ou le jury à apprécier les réponses (ou l'absence de réponse) que lui donne la personne qui témoigne.

[149] Cependant, c'est le juge qui, en fin de compte, doit former sa propre opinion éclairée au sujet de la capacité mentale du témoin éventuel. Lorsque, comme en l'espèce, le juge estime qu'il n'est pas nécessaire de citer d'autres témoins de faits après avoir entendu le témoin éventuel, je ne crois pas que nous soyons en mesure de remettre en question cette conclusion de nature procédurale.

[150] Par conséquent, je suis d'avis de rejeter le pourvoi interjeté par le ministère public

the unsworn evidence of K.B. is inadmissible. In his view, the quality of the proposed evidence did not meet the s. 16(3) threshold. Sitting on appeal from this determination, and not having had the advantage of observing and questioning K.B., I see no valid basis for reversing that evidentiary ruling.

E. *Admissibility of Out-of-Court Statements*

[151] The Crown contends that the trial judge erred by effectively deciding that K.B.'s testimonial incompetence predetermined the unreliability of her hearsay statements. The admissibility analysis in a hearsay *voir dire* is to be focused on whether the hearsay dangers have been overcome: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 71. These hearsay dangers include the inability to inquire into the declarant's perception, memory and credibility. The trial judge's conclusion in the competency hearing that K.B. lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, the trial judge's conclusion that K.B.'s testimony lacked sufficient reliability. I agree with Doherty and MacPherson J.J.A., that "it is not surprising, and it is not an error, that the trial judge's reasoning on the issue of the threshold reliability in his hearsay ruling was quite similar to his reasoning on the *CEA* s. 16 voir dire" (para. 48). I would therefore not give effect to this ground of appeal.

III. Disposition

[152] I would dismiss the appeal.

APPENDIX A

Until 1987, s. 16 of the *Canada Evidence Act* provided:

16. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in

relativement à la décision du juge du procès selon laquelle le témoignage non assermenté de K.B. est inadmissible. Selon ce dernier, le témoignage envisagé n'avait pas la qualité nécessaire pour satisfaire au critère énoncé au par. 16(3). Siégeant en appel de cette décision, et n'ayant pas eu l'avantage d'observer et d'interroger K.B., je ne vois aucune raison valable d'annuler cette décision sur l'admissibilité de la preuve.

E. *Admissibilité des déclarations extrajudiciaires*

[151] Le ministère public prétend que le juge du procès a commis une erreur en décidant en fait que l'incapacité à témoigner de K.B. a entraîné automatiquement la non-fiabilité de ses déclarations relatives. L'analyse relative à l'admissibilité lors d'un voir-dire doit être axée sur la question de savoir si les dangers associés au oui-dire ont été surmontés : *R. c. Khelawon*, 2006 CSC 57, [2006] 2 R.C.S. 787, par. 71. Ces dangers incluent l'incapacité d'examiner la perception, la mémoire et la crédibilité du déclarant. Le fait que le juge du procès ait conclu, lors de l'audience visant à déterminer l'habilité à témoigner, que K.B. n'avait pas la capacité de percevoir, de se souvenir et de raconter ce qui s'est passé et de comprendre la différence entre la vérité et la fausseté l'a amené, mais pas de façon automatique, à conclure que le témoignage de K.B. n'était pas suffisamment fiable. Je suis d'accord avec les juges Doherty et MacPherson pour dire que [TRADUCTION] « ce n'est pas surprenant, et ce n'est pas une erreur, que le raisonnement du juge du procès sur la question du seuil de fiabilité dans sa décision relative au oui-dire était très semblable à son raisonnement sur le voir-dire prévu à l'art. 16 de la *LPC* » (par. 48). Je suis donc d'avis de rejeter ce motif d'appel.

III. Dispositif

[152] Je suis d'avis de rejeter le pourvoi.

ANNEXE A

Jusqu'en 1987, l'art. 16 de la *Loi sur la preuve au Canada* prévoyait ce qui suit :

16. (1) Dans toute procédure judiciaire où l'on présente comme témoin un enfant en bas âge qui, de l'avis

the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

The origin of this provision, at stake in *Khan*, can be traced back to s. 25 of the *Canada Evidence Act, 1893*, S.C. 1893, c. 31. This was the first instance in Canadian history that Parliament legislated on the testimonial competence of children. At the time however, and until 1987, no statutory provision addressed the capacity to testify of adults with mental disabilities. Section 25 of the 1893 *Canada Evidence Act* provided:

25. In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

On October 29, 1986, Minister of Justice Ramon Hnatyshyn presented the House of Commons with Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*. During the first reading of Bill C-15, cl. 17 proposed to repeal s. 16 of the *Canada Evidence Act* and to replace it with a new provision:

17. Section 16 of the said Act is repealed and the following substituted therefor:

“**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

du juge, juge de paix ou autre fonctionnaire président, ne comprend pas la nature d'un serment, le témoignage de cet enfant peut être reçu, bien qu'il ne soit pas rendu sous serment, si, de l'avis du juge, juge de paix ou autre fonctionnaire président, selon le cas, cet enfant est doué d'une intelligence suffisante pour justifier la réception de son témoignage, et s'il comprend le devoir de dire la vérité.

(2) Aucune cause ne peut être décidée sur ce seul témoignage, et il doit être corroboré par quelque autre témoignage essentiel.

L'origine de cette disposition, en cause dans l'arrêt *Khan*, remonte à l'art. 25 de l'*Acte de la preuve en Canada, 1893*, S.C. 1893, ch. 31. Pour la première fois dans l'histoire du Canada, le Parlement légiférait sur l'habilité des enfants à témoigner. À l'époque, toutefois, et ce jusqu'en 1987, aucune disposition législative ne traitait de l'habilité à témoigner des adultes ayant une déficience intellectuelle. L'article 25 de cette loi prévoyait ce qui suit :

25. Dans toute procédure légale où l'on offrira un jeune enfant comme témoin, et si cet enfant, de l'avis du juge, juge de paix ou autre fonctionnaire président, ne comprend pas la nature d'un serment, le témoignage de cet enfant pourra être reçu, bien qu'il ne soit pas rendu sous serment, si, de l'avis du juge, juge de paix ou autre fonctionnaire président, selon le cas, cet enfant est doué d'une intelligence suffisante pour justifier la réception de son témoignage, et s'il comprend le devoir de dire la vérité.

2. Mais aucune cause ne sera décidée sur ce témoignage seul, et il devra être corroboré par quelque autre témoignage essentiel.

Le 29 octobre 1986, le ministre de la Justice Ramon Hnatyshyn a déposé à la Chambre des communes le projet de loi C-15, *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*. En première lecture, l'art. 17 du projet de loi C-15 proposait l'abrogation de l'art. 16 de la *Loi sur la preuve au Canada* et son remplacement par une nouvelle disposition :

17. L'article 16 de la même loi est abrogé et remplacé par ce qui suit :

« **16.** (1) Avant de permettre à une personne âgée de moins de quatorze ans ou dont la capacité mentale est mise en question de témoigner, le tribunal procède à une enquête visant à déterminer si :

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is sufficiently intelligent that the reception of the evidence is justified.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is **sufficiently intelligent that the reception of the evidence is justified** shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is sufficiently intelligent that the reception of the evidence is justified may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is sufficiently intelligent that the reception of the evidence is justified shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.”

A crucial amendment, for present purposes, was made to the original text of Bill C-15 by the *ad hoc* Legislative Committee on Bill C-15. This amendment replaced the requirement to be “sufficiently intelligent” initially provided in Mr. Hnatyshyn’s proposal with the criterion that the proposed witness be “able to communicate the evidence”.

What is striking from the lengthy works of the Legislative Committee on Bill C-15 is the focus on the “ability to communicate the evidence” as the sole qualitative requirement for the competence of children or adults with mental disabilities who do not understand the nature of an oath. There is nothing in the record of the Committee which suggests that a “promise to tell the truth” also imposed an understanding of the nature of such a promise.

a) d’une part, celle-ci comprend la nature du serment ou de l’affirmation solennelle;

b) d’autre part, celle-ci est suffisamment intelligente pour que le recueil de son témoignage soit justifié.

(2) La personne visée au paragraphe (1) qui comprend la nature du serment ou de l’affirmation solennelle et qui est suffisamment intelligente pour que le recueil de son témoignage soit justifié témoigne sous serment ou affirmation solennelle.

(3) La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l’affirmation solennelle, est suffisamment intelligente pour que le recueil de son témoignage soit justifié peut témoigner sur promesse de dire la vérité.

(4) La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l’affirmation solennelle et qui n’est pas suffisamment intelligente pour que le recueil de son témoignage soit justifié ne peut témoigner.

(5) La partie qui met en question la capacité mentale d’un éventuel témoin âgé d’au moins quatorze ans doit convaincre le tribunal qu’il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l’affirmation solennelle. »

Un amendement important, pour les besoins de l’espèce, a été apporté au libellé original du projet de loi C-15 par le Comité législatif sur le projet de loi C-15 (un comité *ad hoc*). Par cet amendement, on a remplacé la condition selon laquelle la personne devait être « suffisamment intelligente », qui figurait à l’origine dans la proposition de M. Hnatyshyn, par la condition voulant que le témoin éventuel soit « capable de communiquer les faits dans son témoignage ».

Ce qui retient l’attention dans les longs travaux du Comité législatif sur le projet de loi C-15, c’est l’importance que le Comité a attachée à la « capacité de communiquer les faits dans le témoignage » comme seule condition de nature qualitative relative à l’habilité à témoigner des enfants ou des adultes ayant une déficience intellectuelle qui ne comprennent pas la nature du serment. Les procès-verbaux du Comité n’indiquent aucunement que la « promesse de dire la vérité » exigeait aussi que la personne comprenne la nature de cette promesse.

In fact, the requirement to be “sufficiently intelligent” in the original draft was understood by the Committee as requiring an understanding of the moral difference between telling the truth and lying. On December 4, 1986, the Committee held a discussion on the meaning of “sufficient intelligence”. It came to the conclusion that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying:

Mr. Nicholson: Well, that is the first test. I think the section Mrs. Collins referred to, proposed subsection 16(3) of our proposed section 16, says that if the person does not understand the nature of an oath, well it is fine, because it often happens that the children may not know the concept of God and hell and all that sort of thing. I have seen it happen in a trial, but if the person testifies on the promise of telling the truth then let the judge after that just decide how much weight he or she will place on that evidence without making the other determination of “sufficient intelligence”.

Mr. Pink: Under section 16 of the Canada Evidence Act it says:

. . . .

Now, it has been my experience in determining the so-called “sufficient intelligence” — that is, when the judge goes through the series of questions he normally does about how far is he in school, how is he doing in school, and things of that sort, and he knows where he lives, he knows the difference between speaking the truth and speaking a falsity and things of that sort, then the judge concludes he is of sufficient intelligence, we will accept his evidence, but because he does not understand the nature of an oath, it will be unsworn evidence, that is all.

Mr. Nicholson: Do you think that is still a necessary element?

Mr. Pink: Absolutely.

Mr. Nicholson: Do you think it is important to have this, that we cannot just eliminate it and have the judge decide the weight that he gives to the evidence, which is basically what we do with adults?

Mr. Pink: I personally feel that before a child’s evidence is received, he must understand the difference

En fait, pour les membres du Comité, les mots « suffisamment intelligente » figurant dans le projet initial sous-entendaient que la personne comprenne la différence morale entre dire la vérité et mentir. Le 4 décembre 1986, le Comité a discuté de la signification de ces termes. Il est arrivé à la conclusion que tout ce qui était exigé pour qu’un témoin soit suffisamment intelligent était qu’il comprenne la différence morale entre dire la vérité et mentir :

M. Nicholson : Eh bien, il s’agit d’un premier test. À ce sujet, je crois que M^{me} Collins a mentionné le paragraphe 3 de l’article 16, et elle disait que si l’enfant ne comprend pas la nature d’un serment, eh bien il n’y a rien de mal à cela étant donné qu’il arrive souvent que les enfants ne comprennent pas des idées comme Dieu, l’enfer et tout ce genre de choses. Je l’ai d’ailleurs observé moi-même lors d’un procès. Toutefois, si quelqu’un comparait après avoir promis de dire la vérité, alors laissons au juge le soin d’établir quel poids il accordera aux preuves ainsi fournies sans nous occuper de vérifier s’il y a « intelligence suffisante ».

M. Pink : En vertu de l’article 16 de la Loi sur la preuve au Canada, il est dit ce qui suit, et je cite :

. . . .

Or d’après mon expérience lorsqu’il s’agit d’établir cette « intelligence suffisante », c’est-à-dire lorsque le juge pose toute une série de questions, il demande d’habitude à l’enfant où il en est dans ses études, quels sont [ses] résultats scolaires et des choses de ce genre. Il vérifie en outre où habite l’enfant, s’il connaît la différence entre dire la vérité et dire un mensonge et des choses de ce genre. Ensuite, il peut établir qu’il est d’intelligence suffisante et que son témoignage sera donc recevable, mais que son témoignage ne sera pas reçu sous serment, étant donné qu’il ne comprend pas la nature d’un serment, c’est tout.

M. Nicholson : Croyez-vous que cela reste nécessaire?

M. Pink : Tout à fait.

M. Nicholson : Est-il important de conserver cela; ne pouvons-nous pas l’éliminer et tout simplement nous en remettre au juge pour décider de l’importance à accorder aux preuves fournies, c’est-à-dire de procéder comme on le fait avec les adultes?

M. Pink : Personnellement, j’estime qu’avant d’entendre le témoignage d’un enfant, il faut vérifier si

between telling the truth and a falsity; he has to know that before his evidence can be received.

Mrs. Collins: How do you deal with the problem of a mentally retarded child? We know that sometimes those children are the victims or are easily the victims of sexual abuse. Also, how do you deal then with children of very, very tender years, who we also know can be victimized by sexual abuse, three-year-olds?

Mr. Pink: First of all, I do not think you will ever see a three-year-old giving evidence. I have seen cases where mentally retarded children have in fact given evidence, because the judge was satisfied, after querying him, that he knew the difference between telling the truth or a falsehood. He knew it was right to tell the truth, he knew it was wrong to tell a lie. He did not understand the nature of an oath and all that, so his evidence was not sworn.

Mrs. Collins: Yes. However, if we leave in the “sufficient intelligence”, and with the interpretation that has been given, I still feel that is going to be a potential barrier.

Mr. Pink: It may be that the committee is going to have to decide on words other than “sufficient intelligence”. What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

Mrs. Collins: I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

Mr. Pink: I agree. [Emphasis added; pp. 26-27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

One week later, on December 11, 1986, the Legislative Committee on Bill C-15 heard evidence from Professor Nicholas Bala, then Director of the Canadian Council on Children and Youth. Professor Bala expressed his fears about the

celui-ci comprend la différence entre dire la vérité et dire un mensonge; il doit savoir cela avant qu'on entende son témoignage.

Mme Collins : Qu'avez-vous prévu dans le cas d'un enfant souffrant d'arriération mentale? Nous savons en effet que ces enfants peuvent parfois être assez facilement les victimes d'agression sexuelle. En outre, qu'avez-vous prévu dans le cas d'enfants en très bas âge, qui sont eux aussi l'objet d'agressions sexuelles? Je pense à des enfants de trois ans, par exemple.

M. Pink : D'abord, je crois qu'on ne verra jamais le jour où l'on fera comparaître un enfant de trois ans. J'ai observé certaines causes où on avait fait témoigner des enfants souffrant d'arriération mentale, mais c'était parce que le juge les avait interrogés et savait donc qu'ils connaissaient la différence entre dire la vérité et dire un mensonge. Les enfants savaient qu'il était bien de dire la vérité et mal de dire un mensonge. Ils ne comprenaient cependant pas la nature d'un serment, et leur témoignage n'avait donc pas été reçu sous serment.

Mme Collins : Oui. Cependant, si nous conservons le concept de « l'intelligence suffisante », et si on l'interprète de la même façon que précédemment, j'ai quand même l'impression que cela constituera peut-être un obstacle.

M. Pink : Il faudra peut-être que le Comité choisisse alors d'autres termes que « intelligence suffisante ». De toute façon, pourquoi pose-t-on d'abord toutes ces questions? S'agit-il vraiment de savoir si le témoin sait distinguer entre le vrai et le faux? Est-ce que tout ne revient pas à cela?

Mme Collins : Je le pense. Oui. En conséquence, si l'enfant comprend la différence entre dire la vérité et dire un mensonge, il me semble que l'on disposerait là de tout ce dont on a vraiment besoin.

M. Pink : J'abonde en ce sens. [Je souligne; p. 26-27.]

(Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15*, n° 2, 2^e sess., 33^e lég., 4 décembre 1986)

Une semaine plus tard, le 11 décembre 1986, le Comité législatif sur le projet de loi C-15 a entendu le professeur Nicholas Bala, qui était alors directeur du Conseil canadien de l'enfance et de la jeunesse. Le professeur Bala a fait part de ses craintes

“sufficient intelligence” requirement for testimonial capacity as understood by the Committee, and he proposed replacing it with the ability to communicate criterion:

Dr. Nick Bala . . .

Our concern is that standard of sufficient intelligence. A layperson or indeed even a lawyer not familiar with the case law might think well, of course, you are not going to want to hear from a child not sufficiently intelligent enough to testify. But when one starts looking at the case law and when one realizes that the concept of “sufficient intelligence” is one which appears in the present section 16 of the Canada Evidence Act, one realizes it therefore will be brought to the courts with all the precedents decided and all the traditions decided. That will make it very difficult for children to testify; in particular children under 10 may well be considered, for example, to be of average intelligence, but not of sufficient intelligence to testify.

Therefore we would submit that there should be another test, and the test we have suggested in our brief is a test of ability to communicate; that is to say the judge should be satisfied the child is able to communicate, and if the child seems able to communicate the case should be left to the trier of the fact, the jury or the judge. Obviously a prosecutor who is calling a child as a witness is not going to do that unless the prosecutor is satisfied the child has something to say of value and some recollection of the events, and is not going to be wasting everybody’s time.

(*Ibid.*, No. 3, 2nd Sess., 33rd Parl., December 11, 1986, at p. 7)

The debates that followed in the Committee supported the view that it was not prudent to condition testimonial capacity on sufficiency of intelligence, which was conceived as including an understanding of the difference between truth and falsity. As a result, the Committee modified the proposed amendment to s. 16 of the *Canada Evidence Act* in order to replace the requirement of sufficient intelligence for ability to communicate the evidence, as was originally suggested by Professor Bala.

concernant la compréhension qu’avait le Comité de la condition selon laquelle la personne devait être « suffisamment intelligente » relativement à l’habilité à témoigner, et il a proposé de la remplacer par le critère de la capacité de communiquer les faits dans son témoignage :

M. Nick Bala . . .

Nous nous demandons comment on entend déterminer qu’un enfant est suffisamment intelligent. En effet, un non-initié ou même un avocat qui ne connaît pas bien la jurisprudence, pourrait très bien penser que, de toute manière, on ne voudrait pas entendre le témoignage d’un enfant qui n’est pas suffisamment intelligent. Mais qu’est-ce que cette notion figure dans ce projet de l’article 16 de la Loi sur la preuve, cela veut dire qu’il y aura des précédents et des traditions. Nous craignons donc que cette disposition fasse obstacle aux témoignages des enfants, surtout des enfants âgés de moins de 10 ans qui, même s’ils sont d’intelligence moyenne, pourraient être considér[és] comme pas suffisamment intelligents pour témoigner.

Nous préconisons par conséquent l’adoption d’un autre critère qui est la capacité de communiquer. C’est-à-dire que dans les cas où l’enfant semble capable de communiquer, c’est le jury ou le juge qui devrait décider de l’admissibilité du témoignage. Il nous semble assez évident qu’un procureur qui cite un enfant comme témoin ne le fera que s’il est persuadé que l’enfant se souvient assez bien des événements, qu’il ne fera pas perdre le temps de tout le monde et que son témoignage sera utile.

(*Ibid.*, n° 3, 2^e sess., 33^e lég., 11 décembre 1986, p. 7)

Dans les débats qui ont suivi, le Comité a souscrit à l’opinion selon laquelle il n’était pas prudent de faire dépendre l’habilité à témoigner de la condition selon laquelle une personne devait être suffisamment intelligente, laquelle condition était censée sous-entendre que la personne comprenait la différence entre la vérité et la fausseté. Par conséquent, le Comité a amendé la modification envisagée à l’art. 16 de la *Loi sur la preuve au Canada* afin de remplacer la condition selon laquelle la personne devait être suffisamment intelligente par la condition qu’elle devait être capable de communiquer les faits dans son témoignage, comme le professeur Bala l’avait initialement proposé.

As such, s. 18 of the *Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, provided the following:

18. Section 16 of the said Act is repealed and the following substituted therefor:

“**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

- (a) whether the person understands the nature of an oath or a solemn affirmation; and
- (b) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.”

The amendment to Bill C-15 shows that Parliament did not intend children and adults with mental disabilities to be questioned on their understanding of the difference between truth and falsehood in order to testify.

Additionally, the fact that the legislative debates emphasized that ability to communicate was the qualitative condition for testimonial capacity under s. 16(3), and that no mention was made that promising to tell the truth required understanding of a promise to tell the truth, demonstrate the intent of Parliament that a mere promise would suffice.

Ainsi, l’art. 18 de la *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*, L.C. 1987, ch. 24, prévoyait ce qui suit :

18. L’article 16 de la même loi est abrogé et remplacé par ce qui suit :

« **16.** (1) Avant de permettre à une personne âgée de moins de quatorze ans ou dont la capacité mentale est mise en question de témoigner, le tribunal procède à une enquête visant à déterminer si :

- a) d’une part, celle-ci comprend la nature du serment ou de l’affirmation solennelle;
- b) d’autre part, celle-ci est capable de communiquer les faits dans son témoignage.

(2) La personne visée au paragraphe (1) qui comprend la nature du serment ou de l’affirmation solennelle et qui est capable de communiquer les faits dans son témoignage sous serment ou affirmation solennelle.

(3) La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l’affirmation solennelle, est capable de communiquer les faits dans son témoignage peut témoigner sur promesse de dire la vérité.

(4) La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l’affirmation solennelle et qui n’est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) La partie qui met en question la capacité mentale d’un éventuel témoin âgé d’au moins quatorze ans doit convaincre le tribunal qu’il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l’affirmation solennelle. »

L’amendement apporté au projet de loi C-15 démontre que le législateur ne voulait pas que les enfants et les adultes ayant une déficience intellectuelle soient interrogés sur leur compréhension de la différence entre la vérité et le mensonge afin de pouvoir témoigner.

De plus, le fait que, dans les débats législatifs, il ait été souligné que la capacité de communiquer les faits dans le témoignage était la condition de nature qualitative relative à l’habilité à témoigner prévue au par. 16(3), et que l’on n’ait pas mentionné que la promesse de dire la vérité sous-entendait une compréhension de la promesse de dire la vérité, démontre que le législateur voulait qu’une simple promesse de dire la vérité soit suffisante.

APPENDIX B

The second important amendment to s. 16 of the *Canada Evidence Act* began in 2004, when Minister of Justice Irwin Cotler presented the House of Commons with Bill C-2. In 2005, Parliament adopted the *Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32. Sections 26 and 27 provided:

26. The portion of subsection 16(1) of the *Canada Evidence Act* before paragraph (a) is replaced by the following:

16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

27. The Act is amended by adding the following after section 16:

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their

ANNEXE B

La deuxième modification importante apportée à l'art. 16 de la *Loi sur la preuve au Canada* a été introduite en 2004, lorsque le ministre de la Justice Irwin Cotler a déposé le projet de loi C-2 à la Chambre des communes. En 2005, le législateur a adopté la *Loi modifiant le Code criminel (protection des enfants et d'autres personnes vulnérables) et la Loi sur la preuve au Canada*, L.C. 2005, ch. 32. Les articles 26 et 27 de cette Loi prévoyaient ce qui suit :

26. Le passage du paragraphe 16(1) de la *Loi sur la preuve au Canada* précédant l'alinéa a) est remplacé par ce qui suit :

16. (1) Avant de permettre le témoignage d'une personne âgée d'au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :

27. La même loi est modifiée par adjonction, après l'article 16, de ce qui suit :

16.1 (1) Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en

understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

A reading of the works of the two standing committees which studied Bill C-2 shows that Parliament did not intend the prohibition of questions to children on whether they understand the duty to tell the truth under s. 16.1(7) to change the law. On the contrary, s. 16.1(7) was seen as reaffirming the requirement of s. 16(3) that the ability to communicate the evidence was the sole qualitative condition for capacity and that a mere promise to tell the truth would suffice.

During a debate on the phrasing of s. 16.1(7), held in the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, a discussion between Joe Comartin and Professor Nicholas Bala revealed the perception that s. 16(3) had been misinterpreted by courts. The original intent of the provision was to allow challenged witnesses to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence. This discussion, which occurred on March 24, 2005, shows that s. 16.1(7) was aimed at clarifying the state of the law:

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Professor Bala, to start, I read your material in the paper around the changes you want to proposed subsection 16.1(7), but I don't understand, quite frankly, how you would change it. Proposed subsection 16.1(6) provides, as you're promoting strongly, that no oath be issued, that they simply be required to promise to tell the truth.

So I don't know exactly how you want (7) amended, from its current proposal.

Prof. Nicholas Bala: The concern I have about proposed subsection 16.1(7) is that it says no child shall be

vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

Les procès-verbaux des deux comités permanents qui ont étudié le projet de loi C-2 indiquent que le législateur ne voulait pas modifier l'état du droit en interdisant, au par. 16.1(7), que des questions soient posées aux enfants quant à savoir s'ils comprennent le devoir de dire la vérité. Au contraire, on considérait que le par. 16.1(7) réitérait l'exigence prévue au par. 16(3) selon laquelle la capacité de communiquer les faits dans le témoignage constituait la seule condition de nature qualitative relative à l'habilité à témoigner et qu'une simple promesse de dire la vérité suffisait.

Au cours d'une séance du Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile, de la Chambre des communes, portant sur la formulation du par. 16.1(7), une discussion entre Joe Comartin et le professeur Nicholas Bala a révélé que l'on estimait que le par. 16(3) avait été mal interprété par les tribunaux. À l'origine, le législateur voulait, par cette disposition, permettre aux personnes dont la capacité mentale est mise en question de témoigner en ne faisant que promettre de dire la vérité, et ce, dès qu'ils avaient été jugés aptes à communiquer les faits dans leur témoignage. Cette discussion, tenue le 24 mars 2005, révèle que le par. 16.1(7) visait à préciser l'état du droit :

M. Joe Comartin (Windsor—Tecumseh, NDP) : Monsieur Bala, pour commencer, j'ai pris connaissance de votre mémoire et des changements que vous suggérez à l'égard du paragraphe 16.1(7) proposé, mais, en toute franchise, je ne comprends pas comment vous le changeriez. Le paragraphe 16.1(6) proposé prévoit que les enfants ne prêteront pas serment, qu'ils seront simplement tenus de promettre de dire la vérité, et cela correspond à ce que vous préconisez avec tant de vigueur.

Je ne comprends pas exactement de quelle façon vous voulez modifier le paragraphe (7), dans sa forme actuelle.

M. Nicholas Bala : Ce qui me préoccupe du paragraphe 16.1(7) proposé, c'est qu'il prévoit qu'aucun

asked any questions regarding their understanding of the nature “of the promise” for the purpose of determining whether their evidence shall be received by the court, and I would submit to you that it should be “of the promise to tell the truth”.

It’s a relatively small change, but again, the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don’t have to be very explicit here, because the judges will get this right.

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it’s important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can’t ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you’ll be required to promise to tell the truth. We can’t ask about the nature of the promise, but can we ask you about “truth” and “lie”?

Some judges will continue to interpret it that way. In some ways, it’s a very small amendment, but I assume it’s consistent with your actual intent. My concern, as I say, has been based on how some of these previous provisions have been interpreted. [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

This perception was also shared, at the time, by the Department of Justice. Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of Justice Canada, testified that s. 16 was originally intended by Parliament to allow witnesses to give evidence without inquiring into their comprehension of the duty to tell the truth. During her opening statement before the Standing Senate Committee on Legal and Constitutional Affairs, on July 7,

question sur la compréhension de la nature de la « promesse » ne peut être posée à l’enfant en vue de vérifier si son témoignage peut être reçu par le tribunal, et j’avance qu’il faudrait reformuler afin qu’il s’agisse de « la promesse de dire la vérité ».

C’est un changement relativement modeste, mais, encore une fois, ma préoccupation découle du fait que la loi actuelle a été interprétée de façon très étroite par les juges. Quand on consulte les transcriptions — j’ai été témoin en 1988, quand les dispositions sont entrées en vigueur — je crois que les gens ont pensé : « Eh bien, nous n’avons pas besoin d’être explicites à cet endroit, car les juges comprendront. »

Évidemment, nous devons faire confiance à notre magistrature au sujet d’un grand nombre de questions, mais, pour certains enjeux, je crois qu’il est important de les orienter le plus possible. Je crains qu’un juge lise ceci — et nous avons une imposante jurisprudence qui reflète cela — et se dis[e] : « Bon, je ne peux t’interroger pour déterminer si tu comprends la nature de la promesse, mais est-ce que je peux te poser des questions sur le sens de la vérité? » Le Parlement prévoit explicitement, au paragraphe 16.1(6), qu’ils seront tenus de promettre de dire la vérité. On ne peut interroger les enfants sur la nature de la promesse, mais est-ce qu’on peut leur poser des questions sur le sens de « vérité » et de « mensonge »?

Certains juges continueront de l’interpréter de cette façon. Dans une certaine mesure, c’est une modification très modeste, mais je suppose que cela correspond au but de votre projet de loi. Ma préoccupation, comme je l’ai dit, concerne la façon dont certaines de ces dispositions antérieures ont été interprétées. [Je souligne; p. 7.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile*, n° 26, 1^{re} sess., 38^e lég., 24 mars 2005)

Cette perception était également partagée, à l’époque, par les juristes du ministère de la Justice. M^{me} Catherine Kane, directrice du Centre de la politique concernant les victimes, au ministère fédéral de la Justice, a affirmé que le législateur voulait, à l’origine, que l’art. 16 permette aux enfants de témoigner sans que l’on cherche à savoir s’ils comprennent le devoir de dire la vérité. Au cours de sa déclaration d’ouverture devant le Comité sénatorial

2005, Ms. Kane explained how the initial purpose of s. 16 had been misinterpreted by courts:

Ms. Catherine Kane . . .

The other part concerns the amendments to the Canada Evidence Act with respect to children. Under the current law, the Canada Evidence Act treats children under 14 in the same way as it treats other people whose mental capacity is challenged. There is a current section 16 that requires the judge to conduct a two-part inquiry whether they are dealing with a person who has some mental disabilities or whether they are dealing with a child under 14. The two-part inquiry requires the judge to first determine, in the case of a child, whether the child understands the nature of an oath or the nature of a solemn affirmation and, second, to determine if the child is able to communicate the evidence. These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the [e]vidence in an effort to permit children's evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Appeal allowed, BINNIE, LEBEL and FISH JJ. dissenting.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

permanent des Affaires juridiques et constitutionnelles, le 7 juillet 2005, M^{me} Kane a expliqué en quoi l'objet initial visé par l'art. 16 avait été mal interprété par les tribunaux :

Mme Catherine Kane . . .

L'autre partie concerne les modifications à la Loi sur la preuve [au] Canada, relativement aux enfants. En vertu de la loi actuelle, la Loi sur la preuve au Canada traite les enfants de moins de 14 ans de la même manière qu'elle traite d'autres personnes dont la capacité mentale est mise en question. Il y a un article actuellement, l'article 16, qui oblige le juge à mener une enquête en deux parties, qu'il ait affaire à une personne qui a quelque incapacité mentale ou à un enfant de moins de 14 ans. L'enquête en deux parties exige du juge, d'abord, qu'il détermine, dans le cas d'un enfant, si celui-ci saisit la nature d'un serment ou d'une affirmation solennelle, et, deuxièmement, qu'il détermine si l'enfant est capable de communiquer la preuve. Ces modifications ont été apportées en 1988 pour rendre plus facilement acceptables les témoignages des enfants. Cependant, d'après la manière dont cette disposition a été interprétée dans certains procès, nous n'avons pas encore observé d'acceptation sans réserve de témoignages d'enfants.

Si ces deux critères sont respectés, un enfant témoigne sous serment ou sous affirmation solennelle. Cependant, si l'enfant ne comprend pas la nature du serment ou de l'affirmation mais est capable de communiquer la preuve, celle-ci est reçue sur promesse de dire la vérité. C'est la loi actuelle. Bien que cela puisse paraître logique à première vue, les interprétations et applications de ces dispositions ne reflètent pas l'intention du Parlement de modifier la Loi sur la preuve de manière à ce que les témoignages des enfants soient plus facilement acceptés.

Tel qu'il est interprété par les tribunaux, l'article 16 stipule qu'avant qu'un enfant soit autorisé à témoigner, il doit être assujéti à un interrogatoire pour déterminer son degré d'entendement de l'obligation de dire la vérité et du concept d'une promesse, et ses capacités de communiquer. [Je souligne; p. 105-106.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, n^o 18, 1^{re} sess., 38^e lég., 7 juillet 2005)

Pourvoi accueilli, les juges BINNIE, LEBEL et FISH sont dissidents.

Procureur de l'appelante : Procureur général de l'Ontario, Toronto.

Solicitors for the respondent: Webber Schroeder Goldstein Abergel, Ottawa.

Solicitor for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada: Women's Legal Education and Action Fund, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Di Luca Copeland Davies, Toronto.

Solicitors for the intervener the Council of Canadians with Disabilities: Aikins, MacAulay & Thorvaldson, Winnipeg.

Procureurs de l'intimé : Webber Schroeder Goldstein Abergel, Ottawa.

Procureur des intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada : Fonds d'action et d'éducation juridiques pour les femmes, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Di Luca Copeland Davies, Toronto.

Procureurs de l'intervenant le Conseil des Canadiens avec déficiences : Aikins, MacAulay & Thorvaldson, Winnipeg.

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Sattva Capital Corporation (formerly Sattva Capital Inc.) *Appellant*

v.

Creston Moly Corporation (formerly Georgia Ventures Inc.) *Respondent*

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

INDEXED AS: SATTVA CAPITAL CORP. v. CRESTON MOLY CORP.

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract

Sattva Capital Corporation (anciennement Sattva Capital Inc.) *Appelante*

c.

Creston Moly Corporation (anciennement Georgia Ventures Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique et BCICAC Foundation *Intervenants*

RÉPERTORIÉ : SATTVA CAPITAL CORP. c. CRESTON MOLY CORP.

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1^{er} août.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation

as a whole — Whether contractual interpretation is question of law or of mixed fact and law.

S and C entered into an agreement that required C to pay S a finder's fee in relation to the acquisition of a molybdenum mining property by C. The parties agreed that under this agreement, S was entitled to a finder's fee of US\$1.5 million and was entitled to be paid this fee in shares of C. However, they disagreed on which date should be used to price the shares and therefore the number of shares to which S was entitled. S argued that the share price was dictated by the date set out in the Market Price definition in the agreement and therefore that it should receive approximately 11,460,000 shares priced at \$0.15. C claimed that the agreement's "maximum amount" proviso prevented S from receiving shares valued at more than US\$1.5 million on the date the fee was payable, and therefore that S should receive approximately 2,454,000 shares priced at \$0.70. The parties entered into arbitration pursuant to the B.C. *Arbitration Act* and the arbitrator found in favour of S. C sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *Arbitration Act*, but leave was denied on the basis that the question on appeal was not a question of law. The Court of Appeal reversed the decision and granted C's application for leave to appeal, finding that the arbitrator's failure to address the meaning of the agreement's "maximum amount" proviso raised a question of law. The superior court judge on appeal dismissed C's appeal, holding that the arbitrator's interpretation of the agreement was correct. The Court of Appeal allowed C's appeal, finding that the arbitrator reached an absurd result. S appeals the decisions of the Court of Appeal that granted leave and that allowed the appeal.

Held: The appeal should be allowed and the arbitrator's award reinstated.

Appeals from commercial arbitration decisions are narrowly circumscribed under the *Arbitration Act*. Under s. 31(1), they are limited to questions of law, and leave to appeal is required if the parties do not consent to the appeal. Section 31(2)(a) sets out the requirements for leave at issue in the present case: the court may grant leave if it determines that the result is important to the parties and

et recours à l'arbitrage — L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble? — L'interprétation contractuelle constitue-t-elle une question de droit ou une question mixte de fait et de droit?

S et C ont conclu une entente selon laquelle C devait payer à S des honoraires d'intermédiation relativement à l'acquisition d'une propriété minière de molybdène par C. Les parties reconnaissaient qu'en vertu de l'entente, S a droit à des honoraires d'intermédiation de 1,5 million \$US, versés en actions de C. Cependant, elles ne s'entendaient pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que S doit recevoir. S prétendait que la valeur de l'action était dictée par la date établie dans la définition du cours prévue dans l'entente et, par conséquent, qu'elle devait recevoir environ 11 460 000 actions, à raison de 0,15 \$ l'unité. C prétendait que la stipulation relative au « plafond », qui figure dans l'entente, empêchait S de recevoir des actions d'une valeur supérieure à 1,5 million \$US à la date du versement des honoraires et donc que S devait obtenir environ 2 454 000 actions, à raison de 0,70 \$ l'unité. Les parties ont soumis le différend à l'arbitrage conformément à l'*Arbitration Act* de la Colombie-Britannique et l'arbitre a statué en faveur de S. C a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*Arbitration Act*. La demande a été rejetée au motif que la question soulevée n'était pas une question de droit. La Cour d'appel a infirmé la décision et accueilli la demande, présentée par C, en autorisation d'interjeter appel, jugeant que l'omission par l'arbitre d'examiner la signification de la stipulation de l'entente relative au « plafond » soulevait une question de droit. Le juge de la cour supérieure saisi de l'appel a rejeté l'appel de C et conclu que l'interprétation de l'entente par l'arbitre était correcte. La Cour d'appel a accueilli l'appel de C, concluant que l'interprétation de l'arbitre menait à un résultat absurde. S interjette appel des décisions de la Cour d'appel ayant accordé l'autorisation d'appel et ayant accueilli l'appel.

Arrêt : Le pourvoi est accueilli et la sentence arbitrale est rétablie.

L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*Arbitration Act*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit, et l'autorisation d'appel est requise lorsque les parties ne consentent pas à l'appel. L'alinéa 31(2)(a) énonce les critères d'autorisation sur lesquels porte le présent litige, à savoir que le tribunal peut accorder

the determination of the point of law may prevent a miscarriage of justice.

In the case at bar, the Court of Appeal erred in finding that the construction of the finder's fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. 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 of the contract.

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; however, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. The goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. Accordingly, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Legal errors made in the course of contractual interpretation 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. Concluding that C's application for leave to appeal raised no question of law is sufficient to dispose of this appeal; however, the Court found it salutary to continue with its analysis.

In order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

l'autorisation s'il estime que, selon le cas, l'issue est importante pour les parties et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire.

En l'espèce, la Cour d'appel a assimilé à tort l'interprétation de l'entente relative aux honoraires d'intermédiation à une question de droit. Un tel exercice soulève une question mixte de fait et de droit, et la Cour d'appel a donc commis une erreur en accueillant la demande d'autorisation d'appel.

Il faut rompre avec l'approche historique selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit ressortit à une question de droit. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel de ce dernier.

Il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit, mais le rapport étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. Le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Par conséquent, le tribunal doit faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. L'interprétation contractuelle peut occasionner des erreurs de droit, notamment appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent. Conclure que la demande d'autorisation d'appel présentée par C ne soulevait aucune question de droit suffit à trancher le présent pourvoi; toutefois, la Cour juge salutaire de poursuivre l'analyse.

Pour que l'erreur de droit reprochée soit une erreur judiciaire pour l'application de l'al. 31(2)(a), elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat. Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law by the leave court is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case. The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit, meaning that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the standard of review. The leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal.

The words "may grant leave" in s. 31(2) of the *Arbitration Act* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met. Discretionary factors to consider in a leave application under s. 31(2)(a) include: conduct of the parties, existence of alternative remedies, undue delay and the urgent need for a final answer. These considerations could be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria have been met. However, courts should exercise such discretion with caution.

Appellate review of commercial arbitration awards is different from judicial review of a decision of a statutory tribunal, thus the standard of review framework developed for judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. As a result, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, le tribunal saisi de la demande d'autorisation doit procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier l'issue du litige. Ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable, à savoir que l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit.

L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet cette norme. Le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire à l'égard de la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel.

Les termes « peut accorder l'autorisation » figurant au par. 31(2) de l'*Arbitration Act* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés. Les facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) comprennent : la conduite des parties, l'existence d'autres recours, un retard indu et le besoin urgent d'obtenir un règlement définitif. Ces facteurs pourraient justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères légaux. Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

L'examen en appel des sentences arbitrales commerciales diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif, de sorte que le cadre relatif à la norme de contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Par conséquent, certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences arbitrales commerciales.

In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

In the present case, the arbitrator reasonably construed the contract as a whole in determining that S is entitled to be paid its finder's fee in shares priced at \$0.15. The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both that definition and the "maximum amount" proviso and reconciles them in a manner that cannot be said to be unreasonable. The arbitrator's reasoning meets the reasonableness threshold of justifiability, transparency and intelligibility.

A court considering whether leave should be granted is not adjudicating the merits of the case. It decides only whether the matter warrants granting leave, not whether the appeal will be successful, even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. For this reason, comments by a leave court regarding the merits cannot bind or limit the powers of the court hearing the actual appeal.

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Referred to: *British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn v. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78; *WCI Waste Conversion Inc. v. ADI International Inc.*,

En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou 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. La question dont nous sommes saisis n'appartient pas à l'une ou l'autre de ces catégories; la norme de la décision raisonnable s'applique donc à la présente affaire.

En l'espèce, l'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble en déterminant que S était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 \$ l'action. La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond » en les conciliant d'une manière qui ne peut être considérée comme déraisonnable. Le raisonnement de l'arbitre satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité.

Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond. Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli, même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. C'est pourquoi les remarques sur le bien-fondé de l'affaire formulées par le tribunal saisi de la demande d'autorisation ne sauraient lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs.

Jurisprudence

Arrêts mentionnés : *British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn c. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII); *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309

2011 PECA 14, 309 Nfld. & P.E.I.R. 1; 269893 *Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300; *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63; *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262; *R. v. Fedossenko*, 2013 ABCA 164 (CanLII); *Enns v. Hansey*, 2013 MBCA 23 (CanLII); *R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174; *R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011; *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; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, leave to appeal refused, [2013] 3 S.C.R. viii; *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566.

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Nfld. & P.E.I.R. 1; 269893 *Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744; *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69; *Moore Realty Inc. c. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300; *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63; *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257; *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712; *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII); *Enns c. Hansey*, 2013 MBCA 23 (CanLII); *R. c. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174; *R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270; *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326; *Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011; *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; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, autorisation d'appel refusée, [2013] 3 R.C.S. viii; *Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566.

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Jonathan Eades and Micah Weintraub, for the intervener the Attorney General of British Columbia.

David Wotherspoon and Gavin R. Cameron, for the intervener the BCICAC Foundation.

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Michael A. Feder et Tammy Shoranick, pour l’appelante.

Darrell W. Roberts, c.r., et *David Mitchell*, pour l’intimée.

Jonathan Eades et Micah Weintraub, pour l’intervenant le procureur général de la Colombie-Britannique.

David Wotherspoon et Gavin R. Cameron, pour l’intervenante BCICAC Foundation.

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APPENDIX I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

APPENDIX II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

APPENDIX III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the *Arbitration Act*)

The judgment of the Court was delivered by

[1] ROTHSTEIN J. — When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the “AA”), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

[2] The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital

E. <i>La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel</i>	120
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ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

Version française du jugement de la Cour rendu par

[1] LE JUGE ROTHSTEIN — Dans quelles circonstances l'interprétation contractuelle est-elle une question mixte de fait et de droit et dans quelles circonstances est-elle une question de droit? Comment établir l'équilibre entre le caractère révisable et l'irrévocabilité des sentences arbitrales commerciales prononcées sous le régime de la *Commercial Arbitration Act*, R.S.B.C. 1996, ch. 55 (maintenant l'*Arbitration Act*, ci-après l'« AA »)? Les conclusions relatives au bien-fondé de l'appel tirées par le tribunal qui autorise l'appel peuvent-elles lier celui qui est appelé à trancher l'appel? Voilà trois questions qui sont soulevées dans le présent pourvoi.

I. Faits

[2] Les questions soulevées dans le présent pourvoi découlent de l'obligation de Creston Moly Corporation (anciennement Georgia Ventures Inc.) de

Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US\$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

[3] Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

[4] On January 30, 2007, Creston entered into an agreement to purchase the property for US\$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

[5] The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US\$1.5 million.

[6] According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

payer des honoraires d'intermédiation à Sattva Capital Corporation (anciennement Sattva Capital Inc.). Les parties reconnaissent que Sattva a droit à des honoraires d'intermédiation de 1,5 million \$US, qui peuvent lui être versés en argent, en actions de Creston, ou en argent et en actions. Elles ne s'entendent pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que Sattva recevra.

[3] M. Hai Van Le, un directeur de Sattva, a fait part à Creston de la possibilité d'acquérir une propriété minière de molybdène au Mexique. Le 12 janvier 2007, les parties ont conclu une entente (l'« entente »), selon laquelle Creston devait payer à Sattva des honoraires d'intermédiation relativement à l'acquisition de cette propriété. Les dispositions pertinentes de l'entente sont énoncées à l'annexe I.

[4] Le 30 janvier 2007, Creston a conclu une convention d'achat de la propriété, le prix étant fixé à 30 millions \$US. Le 31 janvier 2007, Creston a demandé que la négociation de ses actions à la Bourse de croissance TSX (la « Bourse ») soit suspendue afin d'empêcher la spéculation le temps d'achever le contrôle diligent préalable à l'achat. Le 26 mars 2007, Creston a annoncé qu'elle avait l'intention de conclure l'achat, et la négociation à la bourse a repris le lendemain.

[5] Aux termes de l'entente, Sattva doit recevoir des honoraires d'intermédiation correspondant au plafond autorisé par le point 3.3 de la politique 5.1 qui se trouve dans le Guide du financement des sociétés de la Bourse. Le point 3.3 est incorporé par renvoi à l'entente, à l'art. 3.1, et il est reproduit à l'annexe II des présents motifs. Dans le cas qui nous occupe, le plafond autorisé au point 3.3 de la politique 5.1 est de 1,5 million \$US.

[6] Aux termes de l'entente, à moins d'indication contraire, les honoraires sont payés sous forme d'actions de Creston. Ils ne seraient versés en argent ou en argent et en actions que si Sattva avait indiqué avoir fait tel choix, ce qu'elle n'a pas fait. Ses honoraires devaient donc lui être versés sous forme d'actions au plus tard cinq jours ouvrables après la conclusion de l'achat de la propriété minière de molybdène.

[7] The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares “as calculated on close of business day before the issuance of the press release announcing the Acquisition”. The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was \$0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder’s fee of US\$1.5 million).

[8] Creston claims that the Agreement’s “maximum amount” proviso means that Sattva cannot receive cash or shares valued at more than US\$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at \$0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at \$0.15 per share.

[9] The parties entered into arbitration pursuant to the AA. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator’s decision pursuant to s. 31(2) of the AA. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (CanLII) (“SC Leave Court”). Creston successfully appealed this decision and was granted leave to appeal the arbitrator’s decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (“CA Leave Court”).

[10] The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC

[7] Le différend qui oppose les parties porte sur la date à retenir pour fixer le cours de l’action de Creston et, par conséquent, le nombre d’actions auquel Sattva a droit. Cette dernière prétend que la valeur de l’action est dictée par la définition du « cours », à l’art. 2 de l’entente, c.-à-d. la valeur de l’action [TRADUCTION] « le dernier jour ouvrable avant la publication du communiqué de presse annonçant l’acquisition ». Le communiqué de presse a été publié le 26 mars 2007. Avant la suspension de la négociation des actions le 31 janvier 2007, le dernier cours de clôture de l’action de Creston s’établissait à 0,15 \$. Suivant cette interprétation, Sattva recevrait environ 11 460 000 actions (selon le calcul effectué en fonction des honoraires d’intermédiation de 1,5 million \$US).

[8] Creston prétend que la stipulation relative au « plafond », qui figure dans l’entente, a pour effet de limiter à 1,5 million \$US la somme d’argent ou la valeur des actions que peut recevoir Sattva à la date de versement des honoraires. Les actions devaient être cédées au plus tard cinq jours après le 17 mai 2007, date de conclusion de l’achat. À ce moment-là, l’action de Creston valait 0,70 \$, selon les calculs effectués par une société bancaire d’investissement en vue d’un placement privé par voie de prise ferme le 17 avril 2007. Suivant cette interprétation, Sattva recevrait environ 2 454 000 actions, soit environ 9 millions d’actions de moins que si chacune valait 0,15 \$.

[9] Les parties ont soumis le différend à l’arbitrage conformément à l’AA. L’arbitre a statué en faveur de Sattva. Creston a demandé l’autorisation d’interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l’AA. La Cour suprême de la Colombie-Britannique a refusé l’autorisation (2009 BCSC 1079 (CanLII) (« formation de la CS saisie de la demande d’autorisation »)). Creston a appelé de cette décision et obtenu l’autorisation de la Cour d’appel de la Colombie-Britannique d’interjeter appel de la sentence arbitrale (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (« formation de la CA saisie de la demande d’autorisation »)).

[10] Le juge de la Cour suprême de la Colombie-Britannique chargé de statuer sur le bien-fondé de

597, 84 B.L.R. (4th) 102 (“SC Appeal Court”)) upheld the arbitrator’s award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (“CA Appeal Court”)). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

II. Arbitral Award

[11] The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US\$1.5 million finder’s fee in shares priced at \$0.15 per share.

[12] The arbitrator based his decision on the Market Price definition in the Agreement:

What, then, was the “Market Price” within the meaning of the Agreement? The relevant press release is that issued on March 26 Although there was no closing price on March 25 (the shares being on that date halted), the “last closing price” within the meaning of the definition was the \$0.15 at which the [Creston] shares closed on January 30, the day before trading was halted “pending news” This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

[13] Both the Agreement and the finder’s fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV’s approval and that Creston did not apply its best efforts to this end.

[14] As previously noted, by default, the finder’s fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that

l’appel (2011 BCSC 597, 84 B.L.R. (4th) 102 (« formation de la CS saisie de l’appel »)) a confirmé la sentence arbitrale. Creston a interjeté appel de cette décision devant la Cour d’appel de la Colombie-Britannique (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (« formation de la CA saisie de l’appel »)), laquelle a infirmé la décision de la formation de la CS saisie de l’appel et a donné gain de cause à Creston. Sattva interjette appel des décisions des deux formations de la CA, soit celle saisie de la demande d’autorisation et celle saisie de l’appel, devant la Cour.

II. Sentence arbitrale

[11] L’arbitre, Leon Getz, c.r., a donné gain de cause à Sattva, concluant qu’elle était en droit de recevoir des honoraires d’intermédiation de 1,5 million \$US en actions, à raison de 0,15 \$ l’action.

[12] L’arbitre a fondé sa décision sur la définition du « cours » figurant dans l’entente :

[TRADUCTION] Qu’était donc le « cours » au sens de l’entente? Le communiqué de presse pertinent est celui qui a été publié le 26 mars [. . .] Il n’y avait pas de cours de clôture le 25 mars (la négociation des actions était suspendue à cette date). Par conséquent, le « dernier cours de clôture », au sens où cette expression est employée dans la définition, était de 0,15 \$, soit le cours de clôture des actions de [Creston] le 30 janvier, le jour précédant la suspension des opérations « jusqu’à nouvel ordre » [. . .] Cette conclusion ne nécessite aucune extension de sens des mots employés dans la définition qui figure au contrat. Au contraire, elle concorde littéralement avec la définition. [par. 22]

[13] L’entente et les honoraires d’intermédiation devaient être approuvés par la Bourse. Creston était chargée d’obtenir cette approbation. L’arbitre a conclu qu’il était implicitement ou expressément prévu dans l’entente que Creston ferait de son mieux pour obtenir l’approbation de la Bourse. Selon lui, Creston n’avait pas fait de son mieux pour y arriver.

[14] Comme nous l’avons expliqué, les honoraires d’intermédiation se payaient en actions à moins d’avis contraire de la part de Sattva. L’arbitre a

Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US\$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at \$0.70.

[15] Sattva maintained that it was entitled to have the finder's fee paid in shares priced at \$0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was \$0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at \$0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

[16] The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at \$0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

[17] The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between \$0.40 and \$0.44 per share, netting proceeds of between \$4,583,914 and \$5,156,934.

conclu que Sattva n'avait pas manifesté de choix. Malgré cela, Creston a déclaré à la Bourse que les honoraires d'intermédiation seraient versés en argent. La Bourse a donc approuvé conditionnellement le versement d'une somme de 1,5 million \$US en argent. Sattva a appris qu'un versement en argent de ses honoraires avait été approuvé au début du mois de juin 2007. Quand Sattva a abordé ce point avec Creston, cette dernière a répondu que Sattva avait le choix de percevoir ses honoraires en argent ou en actions, à raison de 0,70 \$ l'action.

[15] Sattva a soutenu qu'elle avait droit au versement des honoraires d'intermédiation en actions, à raison de 0,15 \$ l'action. Creston a demandé à ses avocats de communiquer avec la Bourse afin qu'elle indique la valeur minimale de l'action qu'elle approuverait pour le versement des honoraires d'intermédiation. La Bourse a confirmé, par téléphone le 7 juin 2007 et par courriel le 9 août de la même année, qu'un cours minimal de 0,70 \$ l'action s'appliquait aux fins du calcul des honoraires d'intermédiation. Selon l'arbitre, Creston [TRADUCTION] « a constamment fait des déclarations inexactes quant à l'obligation qu'elle avait contractée envers Sattva ou, à tout le moins, omis d'en divulguer complètement la nature » (par. 56(k)) et qu'« à moins que Sattva n'en décide autrement, elle a le droit aux termes de l'entente de percevoir ces honoraires sous forme d'actions, à raison de 0,15 \$ l'action » (par. 56(g)). Selon l'arbitre, la position de Sattva a été véritablement présentée à la Bourse pour la première fois dans la lettre de l'avocat de celle-ci datée du 9 octobre 2007.

[16] L'arbitre était d'avis que si Creston avait fait de son mieux, la Bourse aurait pu approuver le versement des honoraires d'intermédiation sous forme d'actions, à 0,15 \$ l'action, et qu'une telle décision aurait été conforme à ses politiques. Il a affirmé que [TRADUCTION] « [la Bourse] aurait fort probablement donné son approbation » (par. 81) et il a évalué cette probabilité à 85 p. 100.

[17] Selon l'arbitre, Sattva aurait pu vendre ses actions de Creston après quatre mois à un prix variant entre 0,40 et 0,44 \$ l'unité, ce qui aurait représenté un produit net situé dans une fourchette de

The arbitrator took the average of those two amounts, which came to \$4,870,424, and then assessed damages at 85 percent of that number, which came to \$4,139,860, and rounded it to \$4,140,000 plus costs.

[18] After this award was made, Creston made a cash payment of US\$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the trust account of Sattva's solicitors.

III. Judicial History

A. *British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079*

[19] The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the AA. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

[20] The judge found that even had he found a question of law was at issue he would have exercised his discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [AA] is to foster and preserve the integrity of the arbitration system" (para. 41).

4 583 914 \$ à 5 156 934 \$. Établissant la moyenne de ces deux sommes d'argent à 4 870 424 \$, l'arbitre a ensuite évalué les dommages-intérêts à 85 p. 100 de ce nombre, soit 4 139 860 \$, qu'il a ensuite arrondis à la hausse, pour obtenir 4 140 000 \$, plus les dépens.

[18] Après le prononcé de cette sentence arbitrale, Creston a versé 1,5 million \$US (ou l'équivalent en dollars canadiens) à Sattva. Le solde des dommages-intérêts accordés par l'arbitre a été placé dans le compte en fiducie des avocats de Sattva.

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2009 BCSC 1079*

[19] La Cour suprême de la Colombie-Britannique a rejeté la demande d'autorisation d'appel parce qu'elle était d'avis que la question soulevée n'était pas une question de droit, un critère prévu à l'art. 31 de l'AA. Selon le juge, il s'agissait d'une question mixte de fait et de droit puisque l'arbitre avait appuyé sa conclusion sur le [TRADUCTION] « fondement factuel ». Plus précisément, pour déterminer sous quelle forme les honoraires d'intermédiation devaient être versés, il fallait examiner « les politiques de la TSX se rapportant au plafond applicable aux honoraires d'intermédiation, ainsi que les pouvoirs discrétionnaires dont dispose la Bourse pour déterminer le montant des honoraires » (par. 35).

[20] Le juge a conclu que, même s'il avait été d'avis que le litige soulevait une question de droit, il aurait exercé son pouvoir discrétionnaire pour refuser l'autorisation d'appel en raison des déclarations inexactes faites par Creston à propos des honoraires d'intermédiation à la Bourse et à Sattva, et par égard pour le [TRADUCTION] « principe selon lequel l'[AA] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41).

B. *British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239*

[21] The CA Leave Court reversed the SC Leave Court and granted Creston’s application for leave to appeal the arbitral award. It found the SC Leave Court “err[ed] in failing to find that the arbitrator’s failure to address the meaning of s. 3.1 of the Agreement (and in particular the ‘maximum amount’ provision) raised a question of law” (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the “maximum amount” proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

[22] The CA Leave Court acknowledged that Creston was “less than forthcoming in its dealings with Mr. Le and the [TSXV]” but said that “these facts are not directly relevant to the question of law it advances on the appeal” (para. 27). With respect to the SC leave judge’s reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the AA that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when “a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected” (para. 29).

C. *British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597*

[23] Armstrong J. reviewed the arbitrator’s decision on a correctness standard. He dismissed the

B. *Cour d’appel de la Colombie-Britannique — décision sur la demande d’autorisation d’appel, 2010 BCCA 239*

[21] La Cour d’appel a infirmé la décision de la Cour suprême et a accueilli la demande, présentée par Creston, en autorisation d’interjeter appel de la sentence arbitrale. Selon elle, la Cour suprême avait [TRADUCTION] « commis une erreur en ne reconnaissant pas que l’omission par l’arbitre d’examiner la signification de l’art. 3.1 de l’entente (et plus particulièrement de la stipulation relative au “plafond”) soulevait une question de droit » (par. 23). La Cour d’appel a conclu que l’interprétation de l’art. 3.1 de l’entente, et plus particulièrement de la stipulation relative au « plafond », constituait une question de droit parce qu’elle ne reposait pas sur les faits de l’affaire, à savoir les renseignements communiqués à la Bourse et la décision de cette dernière.

[22] La Cour d’appel a reconnu que Creston s’était montrée [TRADUCTION] « moins que franche dans ses démarches auprès de M. Le et de [la Bourse] », mais a déclaré que « ces faits n’intéressent pas directement la question de droit qu’elle soulève en appel » (par. 27). Au sujet de la remarque sur la préservation de l’intégrité du système d’arbitrage formulée par la formation de la CS saisie de la demande d’autorisation d’appel, la formation de la CA saisie de la demande d’autorisation a dit que les parties, quand elles ont choisi de soumettre leur différend à l’arbitrage en vertu de l’AA, savaient que l’appel d’une question de droit était possible. De plus, bien que l’irrévocabilité de la sentence arbitrale constitue un facteur important dans l’exercice du pouvoir discrétionnaire, lorsqu’« une question de droit importante est soulevée et qu’il y a risque d’erreur judiciaire en cas d’impossibilité d’interjeter appel, l’intégrité du processus exige, du moins dans les circonstances de l’espèce, que le droit d’appel conféré par la loi soit respecté » (par. 29).

C. *Cour suprême de la Colombie-Britannique — décision sur l’appel, 2011 BCSC 597*

[23] Le juge Armstrong a contrôlé la sentence arbitrale selon la norme de la décision correcte. Il

appeal, holding the arbitrator's interpretation of the Agreement was correct.

[24] Armstrong J. found that the plain and ordinary meaning of the Agreement required that the US\$1.5 million fee be paid in shares priced at \$0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US\$1.5 million in \$0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

[25] According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US\$1.5 million.

[26] Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

[27] In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement

a rejeté l'appel et conclu que l'interprétation de l'entente proposée par l'arbitre était correcte.

[24] Le juge Armstrong estimait que, selon le sens ordinaire de l'entente, les honoraires de 1,5 million \$US devaient être versés en actions, à raison de 0,15 \$ l'unité. Il n'estimait pas une telle interprétation absurde du simple fait que le cours de l'action à la date du versement des honoraires était supérieur à celui déterminé suivant la définition du cours. Selon lui, avec le temps, la fluctuation des cours est inévitable, et dès lors qu'elles ont prévu la possibilité du versement des honoraires en actions, les parties, des entreprises averties, devaient raisonnablement s'attendre à la fluctuation du marché. De l'avis du juge Armstrong, c'est d'ailleurs à cause de cette fluctuation qu'il faut indiquer une date précise qui servira à déterminer la valeur de l'action avant le versement. Il est arrivé à la conclusion que pour ce faire, le « cours » était défini dans l'entente et que le montant des honoraires demeurait 1,5 million \$US, à payer sous forme d'actions à raison de 0,15 \$ l'unité, cette valeur étant établie suivant la définition du cours, sans égard à la valeur de l'action à la date du versement des honoraires.

[25] Selon le juge Armstrong, il était prévisible que le cours de l'action à la date du versement soit supérieur à celui établi conformément à la définition du cours et il s'agissait là d'une [TRADUCTION] « conséquence naturelle de l'entente relative aux honoraires d'intermédiation » (par. 62). Il était d'avis que le risque était assumé par Sattva, puisque le prix de l'action pouvait certes augmenter, mais il pouvait aussi diminuer, de sorte que Sattva aurait alors reçu un portefeuille d'actions d'une valeur inférieure au montant des honoraires (1,5 million \$US) qui avait été convenu.

[26] Le juge Armstrong était d'avis que l'interprétation de l'arbitre, laquelle donnait effet à la définition du cours et à la stipulation relative au « plafond », était préférable à celle de Creston, qui faisait fi de la définition du cours.

[27] En réponse à l'argument de Creston selon lequel l'arbitre n'avait pas examiné l'art. 3.1 de

which contains the “maximum amount” proviso, Armstrong J. noted that the arbitrator explicitly addressed the “maximum amount” proviso at para. 23 of his decision.

D. British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329

[28] The CA Appeal Court allowed Creston’s appeal, ordering that the payment of US\$1.5 million that had been made by Creston to Sattva on account of the arbitrator’s award constituted payment in full of the finder’s fee. The court reviewed the arbitrator’s decision on a standard of correctness.

[29] The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US\$1.5 million if it received its fee in cash, but shares valued at approximately \$8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

[30] The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an \$8 million finder’s fee in light of the fact that the “maximum amount” proviso in the Agreement limits the finder’s fee to US\$1.5 million. The court was of the view that the proviso limiting the fee to US\$1.5 million “when paid” should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

IV. Issues

[31] The following issues arise in this appeal:

l’entente, qui contient la stipulation relative au « plafond », le juge Armstrong a souligné que l’arbitre avait fait expressément référence à cette stipulation au par. 23 de la sentence arbitrale.

D. Cour d’appel de la Colombie-Britannique — décision sur l’appel, 2012 BCCA 329

[28] La Cour d’appel a accueilli l’appel de Creston et a statué que la somme de 1,5 million \$US versée par Creston en faveur de Sattva en exécution de la sentence arbitrale constituait le paiement intégral des honoraires d’intermédiation. La cour a contrôlé la sentence arbitrale suivant la norme de la décision correcte.

[29] La formation de la CA saisie de l’appel s’estimait liée, de même que la Cour suprême, par deux conclusions tirées par la formation de la CA saisie de la demande d’autorisation, à savoir : 1^o il serait incongru que l’entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million \$US alors que, si elle opte pour le versement sous forme d’actions, elle recevra un portefeuille valant environ 8 millions \$ et 2^o l’arbitre n’a pas tenu compte de cette anomalie et a fait fi de l’art. 3.1 de l’entente.

[30] Selon la Cour d’appel, conclure que Sattva avait droit à des honoraires d’intermédiation de 8 millions \$ menait à un résultat absurde, étant donné la stipulation de l’entente relative au « plafond », qui limite le montant de tels honoraires à 1,5 million \$US. La cour était d’avis qu’il faudrait donner l’effet prépondérant à cette stipulation qui limite à 1,5 million \$US les honoraires [TRADUCTION] « à la date de leur versement » (par. 47). Elle était d’avis que donner effet à la définition du cours ne saurait avoir été l’intention des parties, et ce n’était pas non plus une décision sensée sur le plan commercial.

IV. Questions en litige

[31] Les questions suivantes sont soulevées dans le présent pourvoi :

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| <p>(a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the AA properly before this Court?</p> <p>(b) Did the CA Leave Court err in granting leave under s. 31(2) of the AA?</p> <p>(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the AA?</p> <p>(d) Did the arbitrator reasonably construe the Agreement as a whole?</p> <p>(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?</p> | <p>a) La Cour a-t-elle été saisie à bon droit de la question de savoir si la Cour d’appel a commis une erreur en autorisant l’appel en vertu du par. 31(2) de l’AA?</p> <p>b) La Cour d’appel a-t-elle commis une erreur en autorisant l’appel en vertu du par. 31(2) de l’AA?</p> <p>c) Si l’autorisation a été accordée à bon droit, quelle norme de contrôle convient-il d’appliquer aux sentences arbitrales commerciales rendues sous le régime de l’AA?</p> <p>d) L’arbitre a-t-il donné une interprétation raisonnable de l’entente dans son ensemble?</p> <p>e) La Cour d’appel a-t-elle commis une erreur en s’estimant liée par les remarques formulées par la formation de la CA saisie de la demande d’autorisation au sujet du bien-fondé de l’appel?</p> |
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V. Analysis

A. *The Leave Issue Is Properly Before This Court*

[32] Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator’s decision. In Sattva’s view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the AA. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

[33] First, Creston argues that this issue was not advanced in Sattva’s application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is “at large”. Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

V. Analyse

A. *Notre Cour est saisie à bon droit de la question de l’autorisation*

[32] Sattva prétend notamment que la Cour d’appel a commis une erreur en accordant l’autorisation d’interjeter appel de la sentence arbitrale. Selon elle, la Cour d’appel n’a cerné aucune question de droit, alors que l’autorisation est subordonnée à l’existence d’une telle question, aux termes du par. 31(2) de l’AA. Creston soutient que la Cour n’est pas saisie à bon droit de cette question et avance deux arguments à l’appui de sa position.

[33] Premièrement, Creston fait valoir que cette question n’était pas soulevée dans la demande d’autorisation d’appel que Sattva a présentée à la Cour. Cet argument ne saurait tenir. À moins que la Cour n’impose des restrictions dans l’ordonnance accordant l’autorisation, cette ordonnance est de « portée générale ». Par conséquent, l’appelant peut soulever en appel une question qui n’était pas énoncée dans la demande d’autorisation. La Cour peut toutefois exercer son pouvoir discrétionnaire et refuser de trancher une question qui n’a pas été abordée par les tribunaux d’instance inférieure, s’il en résulte un préjudice pour l’intimé, ou si, pour toute autre raison, elle juge opportun de ne pas la trancher.

[34] Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue — whether the proposed appeal was on a question of law — was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

[35] Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the AA to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

[34] En l'espèce, l'ordonnance accordant l'autorisation d'interjeter appel des deux décisions de la Cour d'appel, sur la demande d'autorisation d'appel et sur l'appel, ne comportait aucune restriction (2013 CanLII 11315). La question — à savoir si l'appel proposé soulevait une question de droit — a été expressément débattue devant les formations de la CS et de la CA saisies de la demande d'autorisation, qui l'ont tranchée. Rien n'empêche Sattva de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour.

[35] Deuxièmement, Creston soutient que la Cour n'a pas été saisie à bon droit de la question de savoir si la formation de la CA saisie de la demande d'autorisation a cerné une question de droit parce que Sattva n'a pas contesté la décision rendue à ce sujet devant tous les tribunaux d'instance inférieure. Plus précisément, aux dires de Creston, Sattva n'aurait pas fait valoir devant la formation de la CS saisie de l'appel que l'appel soulevait une question mixte de fait et de droit et aurait reconnu devant la Cour d'appel que l'appel soulevait une question de droit. Un tel argument ne tient pas. Devant la formation de la CS saisie de l'appel, il n'était pas possible pour Sattva de débattre à nouveau de la question de savoir si l'autorisation aurait dû être accordée. La formation de la CS saisie de l'appel était liée par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir que l'autorisation était opportune et qu'une question de droit avait été cernée. Ainsi, Sattva ne pouvait guère plaider devant la formation de la CS saisie de l'appel un point sur lequel la formation de la CA saisie de la demande d'autorisation s'était déjà prononcée. Rien dans l'AA n'habilite Sattva à interjeter appel de la décision sur la demande d'autorisation d'appel rendue par une formation de la Cour d'appel à une autre formation de la même cour. Ce n'est pas parce que Sattva n'a pas plaidé à nouveau le point devant la formation de la CS saisie de l'appel ou devant la formation de la CA saisie de l'appel qu'elle ne peut le soulever devant notre Cour, tout particulièrement étant donné que Sattva a obtenu de notre Cour l'autorisation d'appeler de la décision rendue par la formation de la CA saisie de la demande d'autorisation.

[36] While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been argued in the lower leave courts.

[37] Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

B. *The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA*

(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the AA

[38] Appeals from commercial arbitration decisions are narrowly circumscribed under the AA. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the AA, reproduced in its entirety in Appendix III, sets out the requirements for leave:

- (2) In an application for leave under subsection (1)(b), the court may grant leave if it determines that
- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
 - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
 - (c) the point of law is of general or public importance.

[36] Ainsi, la Cour peut certes refuser l'autorisation si la question que l'on cherche à soulever devant elle n'a pas été plaidée devant les tribunaux d'instance inférieure, mais ce n'est pas le cas en l'espèce. En l'occurrence, les arguments sur le fondement de la demande d'autorisation d'appel de la sentence arbitrale présentée par Creston — à savoir si elle soulevait une question de droit ou une question mixte de fait et de droit — avaient été plaidés devant les formations saisies des demandes d'autorisation.

[37] Par conséquent, la Cour est saisie à bon droit de la question de savoir si la formation de la CA qui a accueilli la demande d'autorisation a conclu à tort que l'appel soulevait une question de droit.

B. *La Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'AA*

(1) Facteurs qui entrent en ligne de compte dans l'analyse de la demande d'autorisation d'appel présentée au titre de l'AA

[38] L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'AA. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit dans le cas où les parties consentent à l'appel ou, en l'absence de consentement, dans les cas où l'autorisation d'appel est accordée. Le paragraphe 31(2) de l'AA, reproduit intégralement à l'annexe III, énonce les critères d'autorisation :

[TRADUCTION]

- (2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :
- (a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,
 - (b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,
 - (c) la question de droit est d'importance publique.

[39] The B.C. courts have found that the words “may grant leave” in s. 31(2) of the AA give the courts judicial discretion to deny leave even where the statutory requirements have been met (*British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (“*BCIT*”), at paras. 25-26). Appellate review of an arbitrator’s award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

[40] Although Creston’s application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court’s decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts’ leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

[41] In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether

[39] De l’avis des tribunaux de la C.-B., l’expression [TRADUCTION] « peut accorder l’autorisation » qui figure au par. 31(2) de l’AA confère au tribunal un pouvoir discrétionnaire qui l’habilite à refuser l’autorisation même lorsque les critères légaux sont respectés (*British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (« *BCIT* »), par. 25-26). L’appel d’une sentence arbitrale n’est donc entendu que si les critères du par. 31(2) sont remplis et que le tribunal saisi de la demande d’autorisation ne refuse pas néanmoins l’autorisation en vertu de son pouvoir discrétionnaire résiduel.

[40] Bien que Creston ait présenté une demande d’autorisation à la Cour suprême sur le fondement des al. 31(2)(a), (b) et (c), il semble que les arguments invoqués devant elle et au cours des autres instances portaient sur l’al. 31(2)(a). La décision de la Cour suprême sur la demande d’autorisation reprend un long passage tiré de l’affaire *BCIT* axé sur les éléments de l’al. 31(2)(a). La Cour suprême y souligne que les deux parties reconnaissent qu’il est satisfait au premier élément de l’al. 31(2)(a), c’est-à-dire que la question est importante pour les parties. Dans sa décision sur la demande d’autorisation d’appel, la Cour d’appel a dit craindre que refuser l’autorisation ne donne lieu à une erreur judiciaire — un critère prévu seulement à l’al. 31(2)(a). Enfin, ni les décisions sur les demandes d’autorisation des tribunaux d’instance inférieure ni les arguments soulevés devant notre Cour ne traitent des autres critères, à savoir que la question de droit revêt de l’importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie (al. 31(2)(b)) ou est d’importance publique (al. 31(2)(c)). Par conséquent, l’analyse qui suit porte principalement sur l’al. 31(2)(a).

(2) L’issue est importante pour les parties

[41] L’autorisation d’interjeter appel d’une sentence arbitrale commerciale est subordonnée au respect d’un critère minimal : l’appel doit porter sur une question de droit. Toutefois, avant d’aborder ce sujet, il convient d’examiner sommairement un autre élément requis par l’al. 31(2)(a) et sur lequel

the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be “sufficiently important”, in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(a) *When Is Contractual Interpretation a Question of Law?*

[42] Under s. 31 of the AA, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

[43] Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 20, per Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be

s’entendent les parties, à savoir que l’importance de l’issue de l’arbitrage pour les parties doit justifier l’intervention du tribunal. Selon l’explication donnée par la juge Saunders de ce critère dans *BCIT*, il faut que l’issue de l’arbitrage soit [TRADUCTION] « suffisamment importante » aux yeux des parties, pour le principe ou les sommes d’argent en jeu, pour justifier le coût et la longueur d’une instance (par. 27). Les parties en l’espèce ont convenu que l’issue de l’arbitrage revêt de l’importance pour chacune. Étant donné la somme relativement considérable en litige et compte tenu du fait que les parties s’entendent pour dire que l’issue est importante pour elles, je conviens que l’importance de l’issue de l’arbitrage pour les parties justifie l’intervention du tribunal. Cette condition prévue à l’al. 31(2)(a) est remplie.

(3) La question soulevée n’est pas une question de droit

a) *Dans quelles circonstances l’interprétation contractuelle est-elle une question de droit?*

[42] Aux termes de l’art. 31 de l’AA, la demande d’autorisation d’appel doit porter sur une question de droit. Pour déterminer la norme de contrôle applicable ou, comme c’est le cas en l’espèce, pour déterminer si les critères d’autorisation sont respectés, le tribunal siégeant en révision est régulièrement appelé à décider si une question tranchée en première instance est une question de droit, une question de fait ou une question mixte de fait et de droit.

[43] Autrefois, la détermination des droits et obligations juridiques des parties à un contrat écrit ressortissait à une question de droit (*King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 20, la juge Steel; K. Lewison, *The Interpretation of Contracts* (5^e éd. 2011 et suppl. 2013), p. 173-176; G. R. Hall, *Canadian Contractual Interpretation Law* (2^e éd. 2012), p. 125-126). Cette règle a pris naissance en Angleterre, à une époque où les procès civils devant jury étaient fréquents et l’analphabétisme courant. Dans de telles circonstances, l’interprétation des documents écrits devait être assimilée à une question de droit parce que le juge était le seul dont on

assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

[44] This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); and *Rear-don Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, at paras. 11-12; and *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78, at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 44; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A., in dissent, but not on this point); and *King*, at paras. 20-23.

[46] The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract

pouvait être certain qu'il savait lire et écrire et, par conséquent, qu'il était en mesure de prendre connaissance du contrat (Hall, p. 126; Lewison, p. 173-174).

[44] Cette justification historique ne s'applique plus. Néanmoins, pour les tribunaux du Royaume-Uni, l'interprétation d'un contrat écrit ressortit toujours à une question de droit (*Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, par. 58 et 82-83; Lewison, p. 173-177), et ce, même s'ils tiennent compte des circonstances — un concept que nous aborderons — dans l'interprétation du contrat écrit (*Prenn c. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Rear-don Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] Au Canada, l'approche historique n'a pas perdu tous ses adeptes. Voir par exemple *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII), par. 10; *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, par. 26; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, par. 11-12; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII), par. 34. Or, des tribunaux canadiens ont délaissé l'approche historique au profit d'une nouvelle démarche qui conçoit l'interprétation des contrats écrits soit comme une question de droit soit comme une question mixte de fait et de droit. Voir par exemple *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, par. 11; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, par. 13; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 44; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, par. 22-23 (les juges majoritaires, sous la plume du juge Blair) et par. 133-135 (la juge Gillese, dissidente, mais pas sur ce point); *King*, par. 20-23.

[46] La tendance à délaissé l'approche historique au Canada semble s'expliquer par deux changements. Le premier est l'adoption d'une méthode d'interprétation contractuelle qui oblige le tribunal à tenir compte des circonstances — que l'on appelle

— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

[47] Regarding the first development, 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.). 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:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

souvent le fondement factuel — dans l’interprétation d’un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2^e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l’interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d’interprétation. La question prédominante consiste à discerner « l’intention des parties et la portée de l’entente » (*Jesuit Fathers of Upper Canada c. Cie d’assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s’harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l’examen des circonstances, on reconnaît qu’il peut être difficile de déterminer l’intention contractuelle à partir des seuls mots, car les mots en soi n’ont pas un sens immuable ou absolu :

[TRADUCTION] Aucun contrat n’est conclu dans l’abstrait : les contrats s’inscrivent toujours dans un contexte. [. . .] Lorsqu’un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d’autre part une connaissance de l’origine de l’opération, de l’historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l’objet de l’entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

v. *Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law “are questions about what the correct legal test is” (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as “applying a legal standard to a set of facts” (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

[50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. 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.

[51] The purpose of the distinction between questions of law and those of mixed fact and law further

Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

[TRADUCTION] Le sens d’un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n’équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu’il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l’approche historique de l’interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu’il s’agit d’interprétation contractuelle, le but de l’exercice consiste à déterminer l’intention objective des parties — un but axé sur les faits — par l’application des principes juridiques d’interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l’arrêt *Housen* comme supposant « l’application d’une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l’application directe de cette définition, qui avait été établie à l’égard d’une action intentée pour négligence, à des questions d’interprétation contractuelle et laissent entendre que cette dernière est d’abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l’opinion contraire, à mon avis, il faut rompre avec l’approche historique. L’interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s’agit d’en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la

supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or “precedential value”) as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

[52] Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

question de droit et la question mixte de fait et de droit. En distinguant ces deux catégories, on visait principalement à restreindre l’intervention de la juridiction d’appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Ainsi, le rôle des cours d’appel, qui consiste à assurer la cohérence du droit, et non à offrir aux parties une nouvelle tribune leur permettant de poursuivre leur litige privé, est préservé. C’est pourquoi la Cour dans l’arrêt *Southam* reconnaît le degré de généralité (ou « la valeur comme précédents ») comme la principale différence entre la question de droit et la question mixte de fait et de droit. Plus la règle est stricte, moins l’intervention de la cour d’appel sera utile :

Si une cour décidait que le fait d’avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l’affaire prend le caractère d’une question d’application pure, et s’approche donc d’une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu’il n’est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n’est pas susceptible de présenter beaucoup d’intérêt pour les juges et les avocats dans l’avenir. [par. 37]

[52] De même, la Cour dans l’arrêt *Housen* conclut que la retenue à l’égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l’autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l’endroit des décideurs de première instance en matière d’interprétation contractuelle. Les obligations juridiques issues d’un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d’application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l’interprétation contractuelle est une question mixte de fait et de droit.

[53] Nonetheless, 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 (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation 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” (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the AA, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of “mixed law and fact”. Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” . . . [para. 36]

[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L’interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d’un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d’autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l’obligation que soient constatés par écrit certains types de contrat, etc.

[54] Le tribunal doit cependant faire preuve de prudence avant d’isoler une question de droit dans un litige portant sur l’interprétation contractuelle. Compte tenu de l’obligation, prévue au par. 31(2) de l’AA, que la demande d’autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu’ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d’appels, et les tribunaux doivent examiner soigneusement le motif d’appel proposé pour déterminer s’il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu’il s’agit d’isoler une question de droit s’applique dans le cas présent :

Les cours d’appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu’il a conclu à la négligence, puisqu’il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n’est pas facilement isolable, il s’agit alors d’une « question mixte de fait et de droit » . . . [par. 36]

[55] Certes, cette mise en garde a été formulée dans le contexte d’une action pour négligence, mais elle s’applique également à mon avis à l’interprétation contractuelle. Comme je le mentionne précédemment, le but de l’interprétation contractuelle — déterminer l’intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport

contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the AA from an arbitrator's interpretation of a contract.

(b) *The Role and Nature of the “Surrounding Circumstances”*

[56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*,

étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'AA.

b) *Le rôle et la nature des « circonstances »*

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man” (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and *Hall*, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (*Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party’s ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts

appartenait ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d’exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances », pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (*Investors Compensation Scheme*, p. 114). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

c) *Tenir compte des circonstances n’est pas contraire à la règle d’exclusion de la preuve extrinsèque*

[59] Quelques mots sur l’examen des circonstances et la règle d’exclusion de la preuve extrinsèque s’imposent. Cette règle empêche l’admission d’éléments de preuve autres que les termes du contrat écrit qui auraient pour effet de modifier ou de contredire un contrat qui a été entièrement consigné par écrit, ou d’y ajouter de nouvelles clauses ou d’en supprimer (*King*, par. 35; *Hall*, p. 53). À cette fin, la règle interdit notamment les éléments de preuve concernant les intentions subjectives des parties (*Hall*, p. 64-65; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129, par. 54-59, le juge Iacobucci). La règle vise, premièrement, à donner un caractère définitif et certain aux obligations contractuelles et, deuxièmement, à empêcher qu’une partie puisse utiliser des éléments de preuve fabriqués ou douteux pour attaquer un contrat écrit (*Fraternité unie des charpentiers et menuisiers d’Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341-342, le juge Sopinka).

[60] La règle d’exclusion de la preuve extrinsèque n’interdit pas au tribunal de tenir compte des circonstances entourant le contrat. Cette preuve est compatible avec les objectifs relatifs au caractère définitif et certain puisqu’elle sert d’outil d’interprétation qui vient éclairer le sens des mots du contrat choisis par les parties, et non le changer ou s’y substituer. Les circonstances sont des faits connus

that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) *Application to the Present Case*

[62] In this case, the CA Leave Court granted leave on the following issue: “Whether the Arbitrator erred in law in failing to construe the whole of the Finder’s Fee Agreement . . .” (A.R., vol. I, at p. 62).

[63] As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the AA, I do not think this question was properly extricated in this case.

[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). 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.

[65] However, it appears that the arbitrator did consider the “maximum amount” proviso. Indeed,

ou qui auraient raisonnablement dû l’être des deux parties à la date de signature du contrat ou avant celle-ci; par conséquent, le risque que des éléments d’une fiabilité douteuse soient invoqués ne se pose pas.

[61] Selon une certaine jurisprudence et des auteurs, la règle d’exclusion de la preuve extrinsèque serait un anachronisme ou, à tout le moins, d’application restreinte vu la myriade d’exceptions dont elle est assortie (voir par exemple *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), par. 19-20; Hall, p. 53-64). Dans le cadre du présent pourvoi, il suffit de dire que la règle d’exclusion de la preuve extrinsèque ne s’oppose pas à la présentation d’une preuve des circonstances entourant le contrat pour l’interprétation de ce dernier.

d) *Application au présent pourvoi*

[62] En l’espèce, la Cour d’appel a accordé l’autorisation d’appel relativement à la question suivante : [TRADUCTION] « L’arbitre a-t-il commis une erreur de droit en n’interprétant pas l’entente relative aux honoraires d’intermédiation dans son ensemble . . . ? » (d.a., vol. I, p. 62)

[63] Comme nous le verrons, l’obligation d’interpréter le contrat dans son ensemble est une question de droit susceptible, si on pouvait l’isoler, de satisfaire au critère minimal exigé à l’art. 31 de l’AA. À mon avis, cette question n’a pas été isolée comme il se doit en l’espèce.

[64] Je reconnais qu’il est un principe fondamental de l’interprétation contractuelle selon lequel le contrat doit être interprété dans son ensemble (McCamus, p. 761-762; Hall, p. 15). Si l’arbitre n’a pas tenu compte de la stipulation relative au « plafond », comme le prétend Creston, il n’a alors pas interprété l’entente dans son ensemble, car il en a négligé une clause précise et pertinente. Voilà une question de droit qui pourrait être isolée de la conclusion mixte de fait et de droit.

[65] Or, il semble que l’arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US\$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the “maximum amount” proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the “incongruity” in the fact that the value of the fee would vary “hugely” depending on whether it was taken in cash or shares (para. 25).

[66] With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

[67] The conclusion that Creston’s application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the

En effet, selon la formation de la CA saisie de la demande d’autorisation, l’arbitre a examiné la stipulation, puisqu’elle signale qu’il a envisagé le plafond de 1,5 million \$US, un nombre auquel il ne peut être arrivé que s’il a consulté la politique de la Bourse à laquelle renvoie la stipulation relative au « plafond » à l’art. 3.1 de l’entente. À la lumière de ses motifs, j’estime que la formation de la CA saisie de la demande d’autorisation, au lieu de se demander si l’arbitre a négligé la stipulation relative au plafond — ce que Creston prétend devant la Cour —, a axé sa décision sur l’interprétation qu’a donnée l’arbitre de l’art. 3.1 de l’entente, qui contient cette stipulation (par. 25-26). Par exemple, la formation de la CA saisie de la demande d’autorisation s’est dite préoccupée que l’arbitre n’ait pas abordé l’[TRADUCTION] « absurdité » de la variation « considérable » dans la valeur des honoraires selon qu’ils étaient versés en argent ou en actions (par. 25).

[66] Avec tout le respect que je lui dois, j’estime que la formation de la CA saisie de la demande d’autorisation a assimilé à tort l’interprétation de l’art. 3.1 de l’entente à une question de droit. Comme l’explique le juge Armstrong dans la décision de la CS sur l’appel, pour interpréter l’art. 3.1 et tenir compte de la stipulation, il fallait examiner les circonstances pertinentes, y compris le fait que les parties étaient des parties avisées, la fluctuation du cours de l’action et la nature du risque qu’une partie assume quand elle opte pour le versement de ses honoraires en actions plutôt qu’en argent. Un tel exercice soulève une question mixte de fait et de droit. Comme aucune question de droit ne peut être isolée de la question mixte de fait et de droit qui porte sur l’interprétation de l’art. 3.1 et de la stipulation, la Cour d’appel a commis une erreur en accueillant la demande d’autorisation d’appel.

[67] Conclure que la demande d’autorisation d’appel présentée par Creston ne soulevait aucune question de droit suffirait à trancher le présent pourvoi. Toutefois, puisque la Cour a rarement l’occasion de se pencher sur l’appel d’une sentence arbitrale, il est à mon avis utile d’expliquer que même si la formation de la CA saisie de la demande d’autorisation avait conclu à bon droit que l’interprétation de l’art. 3.1 de l’entente constituait une question de

application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the AA.

(4) May Prevent a Miscarriage of Justice

(a) *Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA*

[68] Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal “may prevent a miscarriage of justice” in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the AA. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

[69] In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: “. . . if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?” (*BCIT*, at para. 28). See also *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, which discusses the test of whether “some substantial wrong or miscarriage of justice has occurred” in the context of a civil jury trial (para. 43).

[70] Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the AA, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

droit, elle devait néanmoins rejeter la demande, car il n’était pas satisfait aux autres volets de l’analyse des demandes d’autorisation que requiert l’al. 31(2)(a) de l’AA, qui concernent l’erreur judiciaire et le pouvoir discrétionnaire résiduel.

(4) Le règlement de la question de droit peut permettre d’éviter une erreur judiciaire

a) *L’erreur judiciaire pour l’application de l’al. 31(2)(a) de l’AA*

[68] Une fois qu’il a cerné une question de droit, le tribunal doit être convaincu que le fait de statuer sur cette dernière [TRADUCTION] « peut permettre d’éviter une erreur judiciaire » avant d’accorder l’autorisation d’appel en vertu de l’al. 31(2)(a) de l’AA. La première étape de l’analyse consiste donc à définir l’erreur judiciaire pour l’application de cette disposition.

[69] Dans *BCIT*, la juge Saunders traite du critère concernant l’erreur judiciaire prévu à l’al. 31(2)(a). Elle confirme la définition énoncée dans l’affaire *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), selon laquelle l’erreur de droit doit toucher une question importante de sorte qu’une conclusion différente aurait abouti à un résultat différent : [TRADUCTION] « . . . si le point de droit avait été tranché différemment, l’arbitre aurait rendu une décision différente. Autrement dit, l’erreur de droit invoquée a-t-elle eu un effet déterminant sur la décision; touche-t-elle au cœur de la décision? » (*BCIT*, par. 28). Voir également l’arrêt *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712, où la Cour analyse le critère qui sert à déterminer s’il y a « préjudice grave ou [. . .] erreur judiciaire » dans le contexte des procès civils avec jury (par. 43).

[70] Compte tenu des arrêts *BCIT* et *Quan*, je suis d’avis que, pour que l’erreur de droit reprochée soit une erreur judiciaire au sens où il faut l’entendre pour l’application de l’al. 31(2)(a) de l’AA, elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat.

[71] According to this standard, a determination of a point of law “may prevent a miscarriage of justice” only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of “may prevent a miscarriage of justice” because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

[72] At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

[73] *BCIT* sets the threshold for this preliminary assessment of the appeal as “more than an arguable point” (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the “more than an arguable point” standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

[74] In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). “Arguable merit” is a well-known phrase whose meaning has been expressed in a variety of ways: “a reasonable prospect of success” (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); “some hope of success” and “sufficient merit” (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and “credible

[71] Suivant cette norme, le règlement d’un point de droit « peut permettre d’éviter une erreur judiciaire » seulement lorsqu’il existe une certaine possibilité que l’appel soit accueilli. Un appel qui est voué à l’échec ne saurait « permettre d’éviter une erreur judiciaire » puisque les possibilités que l’issue d’un tel appel joue sur le résultat final du litige sont nulles.

[72] Ce n’est pas à l’étape de l’autorisation qu’il convient d’examiner exhaustivement le fond du litige et de se prononcer définitivement sur l’absence ou l’existence d’une erreur de droit. Cependant, il faut procéder à un examen préliminaire de la question de droit pour déterminer si l’appel a une chance d’être accueilli et, par conséquent, de modifier le résultat du litige.

[73] Selon l’arrêt *BCIT*, le demandeur doit établir [TRADUCTION] « plus qu’un argument défendable » (par. 30) lors de cet examen préliminaire de l’appel. Pourtant, une fois un argument défendable soulevé, que faudrait-il démontrer de plus pour qu’il soit satisfait à cette norme? Vraisemblablement, le juge saisi de la demande d’autorisation devrait alors examiner les arguments se rapportant à la question de droit soulevée en appel de plus près que ce qui serait indiqué à cette étape pour trouver *plus* qu’un argument défendable. À mon humble avis, exiger un examen plus approfondi du point de droit brouille les rôles respectifs de la formation saisie de la demande d’autorisation et de celle saisie de l’appel.

[74] Selon moi, ce qu’il faut démontrer, pour l’application du par. 31(2), c’est que la question de droit invoquée a un fondement défendable. Ce critère s’applique souvent à l’étape de l’autorisation, pour établir sommairement le bien-fondé de l’appel (voir par exemple *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, par. 5; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII), par. 7). Il est bien connu et a été exprimé de diverses façons : [TRADUCTION] « une possibilité raisonnable d’être accueilli » (*a reasonable prospect of success*) (*Quick Auto Lease*, par. 5; *Enns c. Hansey*, 2013 MBCA 23 (CanLII), par. 2); une « certaine chance de succès » (*some hope of success*) et un « fondement suffisant » (*sufficient merit*) (*R. c. Hubley*, 2009 PECA

argument” (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

[75] Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the AA, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator’s expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator’s decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). Of course, the leave court’s assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

21, 289 Nfld. & P.E.I.R. 174, par. 11); un « argument plausible » (*credible argument*) (*R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270, par. 8). À mon avis, les diverses appellations qui désignent le fondement défendable présentent un élément commun : l’argument soulevé par le demandeur ne peut être rejeté à l’issue d’un examen préliminaire de la question de droit. Pour déterminer s’il faut annuler la sentence arbitrale, un examen approfondi est nécessaire, et c’est au tribunal saisi de l’appel qu’il incombe, une fois l’autorisation accordée.

[75] L’examen visant à décider si la question soulevée dans la demande d’autorisation d’appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l’analyse du bien-fondé de l’appel. Il faut donc procéder à un examen préliminaire ayant pour objet la norme applicable. Comme nous le verrons, la norme de la décision raisonnable s’appliquera presque toujours aux arbitrages commerciaux régis par l’AA, sauf dans les rares circonstances où l’application de la norme de la décision correcte s’imposera, notamment lorsqu’il s’agit d’une question constitutionnelle ou d’une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d’expertise du décideur administratif. Par conséquent, dans le cadre de l’examen préalable à l’autorisation le tribunal s’interrogera ordinairement quant à savoir si la prétention — selon laquelle la sentence arbitrale sur la question en litige était déraisonnable — a un fondement défendable, compte tenu du fait que le décideur n’est pas tenu de faire référence à tous les arguments, dispositions ou précédents ni de tirer une conclusion précise sur chaque élément constitutif du raisonnement pour que sa décision soit raisonnable (*Newfoundland and Labrador Nurses’ Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 16). Certes, le tribunal saisi de la demande d’autorisation ne procède qu’à un examen préliminaire ayant pour objet la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l’appel. Ainsi, il ne faudrait pas considérer qu’il s’agit d’une invitation à se perdre en analyses ou en arguments poussés à propos de la norme de contrôle à l’étape de la demande d’autorisation.

[76] In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the AA at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

Where, then, if anywhere, does consideration of the merits of the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (a) through (c). Just as an appeal woefully lacking in merit should not attract leave under (b) (of importance to a class of people including the applicant) or (c) (of general or public importance), so too it should not attract leave under (a). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

[77] I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal “may prevent a miscarriage of justice”. It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave “may prevent a miscarriage of justice”.

[78] However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary

[76] Dans *BCIT*, la juge Saunders s’interroge sur l’étape à laquelle il convient d’examiner le bien-fondé de l’appel dans le cadre de l’analyse requise par l’al. 31(2)(a) de l’AA. Contrairement à ce que prétendait une partie, soit que l’évaluation du bien-fondé se rapporte au critère de l’erreur judiciaire, la juge détermine que cet examen se rattache plutôt à l’exercice du pouvoir discrétionnaire. Ses motifs révèlent que sa décision découle de sa volonté d’adopter une approche uniforme à l’égard des al. 31(2)(a), (b) et (c) :

[TRADUCTION] À quel moment, le cas échéant, faut-il alors examiner le bien-fondé de l’appel? M. Roberts, qui représente l’Association étudiante, prétend qu’il convient de procéder à cet examen lorsqu’on se demande si une erreur judiciaire risque d’être commise, c’est-à-dire, à la deuxième étape. Je ne suis pas d’accord. À mon avis, l’appréciation du bien-fondé ou de l’absence de fondement apparent de l’appel s’inscrit dans l’exercice du pouvoir discrétionnaire résiduel et s’applique également aux trois alinéas, de (a) à (c). Tout comme un appel manifestement dénué de fondement ne devrait pas être autorisé en vertu de l’al. (b) (revêt de l’importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie) ou de l’al. (c) (est d’importance publique), un tel appel ne devrait pas non plus être autorisé en vertu de l’al. (a). Dans un but d’uniformité à l’égard de l’article entier, l’appréciation du bien-fondé devrait être intégrée à l’exercice du pouvoir discrétionnaire résiduel. [par. 29]

[77] Je reconnais la validité du raisonnement axé sur l’uniformité. Cependant, à mon humble avis, cette volonté d’adopter une démarche semblable au regard des al. 31(2)(a), (b) et (c) ne saurait l’emporter sur le libellé de la disposition. Contrairement aux al. 31(2)(b) et (c), l’al. 31(2)(a) exige que le tribunal détermine si le fait d’autoriser l’appel « peut permettre d’éviter une erreur judiciaire ». J’estime qu’un examen préliminaire de la question de droit s’inscrit implicitement dans l’examen qui vise à déterminer si l’autorisation « peut permettre d’éviter une erreur judiciaire ».

[78] Cependant, lorsqu’il s’agit d’une demande d’autorisation d’appel présentée en vertu des al. 31(2)(b) ou (c) — puisque ces dispositions ne prévoient pas le risque d’erreur judiciaire comme

examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

[79] In sum, in order to establish that “the intervention of the court and the determination of the point of law may prevent a miscarriage of justice” for the purposes of s. 31(2)(a) of the AA, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

(b) *Application to the Present Case*

[80] The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the “maximum amount” proviso. Accepting that this is a question of law for these purposes only, a determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded \$4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder’s fee paid in \$0.15 shares. If Creston’s argument is correct and the \$0.15 share price is foreclosed by the “maximum amount” proviso, damages would be reduced to US\$1.5 million, a significant reduction from the arbitrator’s award of damages.

[81] As s. 31(2)(a) of the AA is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator’s conclusion results in Sattva receiving shares valued at considerably more than the US\$1.5 million maximum dictated by the “maximum amount” proviso is

critère —, je souscris aux commentaires formulés par la juge Saunders dans *BCIT* selon lesquels l’examen préliminaire du bien-fondé de la question de droit devrait intervenir à l’étape de l’exercice du pouvoir discrétionnaire résiduel dans l’analyse, puisque l’examen du bien-fondé de l’appel proposé demeure pertinent dans la décision d’accorder ou non l’autorisation d’appel en vertu de l’art. 31.

[79] Bref, afin d’établir que l’intervention du tribunal est justifiée [TRADUCTION] « et que le règlement de la question de droit peut permettre d’éviter une erreur judiciaire » pour l’application de l’al. 31(2)(a) de l’AA, le demandeur doit prouver que le point de droit en appel aura une incidence sur le résultat final et qu’il est défendable.

b) *Application au présent pourvoi*

[80] La formation de la CA saisie de la demande d’autorisation a conclu à la possibilité d’une erreur de droit par l’arbitre qui n’aurait pas interprété l’entente dans son ensemble et, plus particulièrement, aurait fait fi de la stipulation relative au « plafond ». Admettons cette prétention comme question de droit uniquement pour les besoins de la cause. Le règlement de la question est déterminant parce qu’il pourrait avoir pour effet de modifier la sentence de l’arbitre, lequel a accordé 4,14 millions \$ en dommages-intérêts au motif qu’il évaluait à 85 p. 100 la probabilité que la Bourse approuve des honoraires d’intermédiation payés en actions, à raison de 0,15 \$ l’unité. Si l’argument invoqué par Creston est correct et que le cours de l’action ne peut s’établir à 0,15 \$ en raison de la stipulation relative au « plafond », les dommages-intérêts seraient réduits à 1,5 million \$US, une amputation considérable de la somme initiale accordée.

[81] Comme l’al. 31(2)(a) de l’AA est la disposition pertinente en l’espèce, il doit être procédé à un examen préliminaire de la question de droit pour déterminer le risque qu’une erreur judiciaire découle du rejet de la demande d’autorisation d’appel présentée par Creston. Cette dernière soutient que le fait que Sattva reçoive un portefeuille d’actions dont la valeur est très supérieure au plafond de 1,5 million \$US en exécution de la sentence arbitrale

evidence of the arbitrator's failure to consider that proviso.

[82] However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:

- (a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange – section 3.1. It is common ground that the quantum of this fee is US\$1,500,000.
- (b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.
- (c) The Market Price, as defined in the Agreement, was \$0.15. [Emphasis added.]

[83] Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US\$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US\$1.5 million and awarded Sattva US\$1.5 million in shares priced at \$0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

[84] Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

prouve que l'arbitre n'a pas tenu compte de la stipulation relative au « plafond ».

[82] Or, l'arbitre renvoie effectivement à l'art. 3.1, la stipulation relative au « plafond », à deux reprises dans sa décision, soit aux par. 18 et 23(a). Par exemple, il affirme ce qui suit au par. 23 :

[TRADUCTION]

Bref, à partir du 27 mars 2007, il était clair et incontestable qu'aux termes de l'entente :

- (a) Sattva avait le droit de recevoir des honoraires équivalant au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX – article 3.1. Les parties conviennent que le montant des honoraires s'établit à 1 500 000 \$US.
- (b) La commission était payable en actions, en fonction du cours, tel qu'il est défini dans l'entente, à moins que Sattva n'opte pour le versement des honoraires en argent ou en argent et en actions.
- (c) Le cours de l'action, tel qu'il est défini dans l'entente, s'établissait à 0,15 \$. [Je souligne.]

[83] Ainsi, même si l'arbitre n'indique pas expressément avoir examiné le jeu de la stipulation relative au « plafond » et de la définition du cours, cet examen ressort implicitement de sa sentence. La seule clause de l'entente qui prévoit le montant des honoraires, soit 1,5 million \$US, est la stipulation relative au « plafond », qui renvoie au point 3.3 de la politique 5.1 de la Bourse. Reconnaisant que le montant des honoraires s'élève à 1,5 million \$US, l'arbitre a accordé à Sattva pareille somme, payable en actions, à raison de 0,15 \$ l'unité. Contrairement à l'argument avancé par Creston, selon qui l'arbitre aurait négligé la stipulation dans son interprétation de l'entente, il ressort de l'examen préliminaire de la question que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

[84] Par conséquent, même si la Cour d'appel avait cerné à juste titre une question de droit, elle aurait dû rejeter la demande d'autorisation. Il n'était pas satisfait au critère qui exige que le caractère déraisonnable de la sentence arbitrale ait un fondement défendable, ni à celui de l'erreur judiciaire.

(5) Residual Discretion to Deny Leave

- (a)
- Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application*

[85] The B.C. courts have found that the words “may grant leave” in s. 31(2) of the AA confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

1. “the apparent merits of the appeal”;
2. “the degree of significance of the issue to the parties, to third parties and to the community at large”;
3. “the circumstances surrounding the dispute and adjudication including the urgency of a final answer”;
4. “other temporal considerations including the opportunity for either party to address the result through other avenues”;
5. “the conduct of the parties”;
6. “the stage of the process at which the appealed decision was made”;
7. “respect for the forum of arbitration, chosen by the parties as their means of resolving disputes”; and
8. “recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement”.

(5) Le pouvoir discrétionnaire résiduel qui habilité à refuser l’autorisation

- a)
- Éléments à examiner dans l’exercice du pouvoir discrétionnaire résiduel à l’égard d’une demande d’autorisation présentée en vertu de l’al. 31(2)(a)*

[85] Les tribunaux de la C.-B. ont conclu que les termes [TRADUCTION] « peut accorder l’autorisation » figurant au par. 31(2) de l’AA confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l’autorisation même quand les critères prévus par la disposition sont respectés (*BCIT*, par. 9 et 26). Dans *BCIT*, la juge Saunders énumère des facteurs à considérer dans l’exercice de ce pouvoir discrétionnaire (par. 31) :

1. [TRADUCTION] « le bien-fondé apparent de l’appel »;
2. « l’importance de la question pour les parties, les tiers et la société en général »;
3. « les circonstances qui sont à l’origine du différend et de l’arbitrage, y compris le besoin urgent d’obtenir un règlement définitif »;
4. « d’autres considérations temporelles, y compris la possibilité pour l’une ou l’autre des parties de remédier autrement aux conséquences »;
5. « la conduite des parties »;
6. « l’étape à laquelle la décision qui a été portée en appel avait été prise »;
7. « le respect du choix des parties d’avoir recours à l’arbitrage pour résoudre leurs différends »;
8. « la reconnaissance du fait que l’arbitrage constitue souvent un moyen expéditif et définitif de régler les différends, spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d’arbitrage ».

[86] I agree with Justice Saunders that it is not appropriate to create what she refers to as an “immutable checklist” of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

[87] In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties’ conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52). This would include the urgent need for a final answer.

[88] With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court’s residual discretion.

[89] As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the “importance of the result of the arbitration to the parties” criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the AA sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and

[86] Je conviens avec la juge Saunders pour dire qu’il n’est pas opportun de dresser ce qu’elle appelle une [TRADUCTION] « liste immuable » de facteurs à considérer dans l’exercice du pouvoir discrétionnaire prévu au par. 31(2) (*BCIT*, par. 32). Cependant, je ne peux convenir que tous les facteurs qui figurent sur la liste qu’elle a dressée sont applicables à cette étape de l’analyse.

[87] Dans l’exercice du pouvoir discrétionnaire que lui confère l’al. 31(2)(a) et qui l’habilite à rejeter la demande d’autorisation, le tribunal devrait examiner les motifs traditionnels justifiant le refus d’une réparation discrétionnaire : la conduite des parties, l’existence d’autres recours et tout retard indu (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 364-367). L’exercice du pouvoir discrétionnaire qui permet de refuser une réparation fait intervenir des considérations relatives à la prépondérance des inconvénients (*Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 52). Parmi celles-ci se trouve le besoin urgent d’obtenir un règlement définitif.

[88] Quant aux autres facteurs mentionnés dans la liste et dont je traite successivement ci-après, j’estime qu’ils ont déjà été examinés dans le cadre de l’analyse fondée sur l’al. 31(2)(a) ou qu’il conviendrait mieux de les examiner à un autre volet du critère énoncé au par. 31(2). Une fois examinés, ces facteurs ne devraient pas être réexaminés par le tribunal au moment de l’exercice de son pouvoir discrétionnaire résiduel.

[89] Je le rappelle, dans l’analyse fondée sur l’al. 31(2)(a), il faut procéder à l’examen préliminaire du bien-fondé de la question de droit soulevée dans la demande d’autorisation pour déterminer s’il y a risque d’erreur judiciaire. La question de l’importance pour les parties se règle à l’al. 31(2)(a) : [TRADUCTION] « l’importance de l’issue de l’arbitrage pour les parties ». L’importance de la question pour les tiers et pour la société en général ne doit pas être examinée à l’al. 31(2)(a), car l’AA prévoit ces motifs à des dispositions distinctes, soit les al. 31(2)(b) et (c). En outre, le respect du choix des parties d’avoir recours à l’arbitrage sous-tend la loi elle-même, ce dont témoigne le seuil élevé auquel l’autorisation

can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

[90] As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (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. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns should not be considered anew.

[91] In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s. 31(2)(a) of the AA would include:

- conduct of the parties;
- existence of alternative remedies;
- undue delay; and
- the urgent need for a final answer.

[92] These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should

est subordonnée aux termes de l'al. 31(2)(a). La reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends et spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage s'inscrit dans le besoin urgent d'obtenir un règlement définitif.

[90] Quant à l'étape du processus à laquelle la décision dont on veut faire appel a été rendue, ce n'est pas un facteur pertinent pour l'exercice par le tribunal du pouvoir discrétionnaire résiduel conféré par l'al. 31(2)(a) qui lui permet de refuser l'autorisation. Ce facteur a été défini en réponse à des préoccupations selon lesquelles l'autorisation d'appeler d'une décision interlocutoire risque d'être prématurée et d'entraîner des retards indus ainsi qu'une fragmentation inutile du processus judiciaire (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. 3-67 à 3-76). Or, ces préoccupations auront été dissipées par la formation saisie de la demande d'autorisation lorsqu'elle se sera penchée sur le risque d'erreur judiciaire, et, plus précisément, sur la possibilité que la question interlocutoire ait une incidence sur le résultat final. Ainsi, les préoccupations mentionnées précédemment ne devraient donc pas être réexaminées.

[91] En résumé, une liste non exhaustive des facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) de l'AA comprendrait :

- la conduite des parties;
- l'existence d'autres recours;
- un retard indu;
- le besoin urgent d'obtenir un règlement définitif.

[92] Ces facteurs pourraient, le cas échéant, justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères prévus à

exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) *Application to the Present Case*

[93] The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [AA] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

[94] For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

[95] However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. v. Bellusci*, 2012 SCC 44, [2012]

l'al. 31(2)(a). Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire. Après avoir conclu à l'existence d'une erreur de droit et, au moins en ce qui concerne l'al. 31(2)(a), d'un risque d'erreur judiciaire, le tribunal doit sopeser ces facteurs avec soin avant de décider s'il va rejeter ou non pour des motifs discrétionnaires une demande par ailleurs admissible.

b) *Application au présent pourvoi*

[93] Le juge de la CS saisi de la demande d'autorisation a rejeté cette dernière au motif qu'elle ne soulevait aucune question de droit. Il a indiqué que, même s'il avait conclu à l'existence d'une telle question, il aurait refusé l'autorisation en vertu de son pouvoir discrétionnaire résiduel, et ce, pour deux raisons : premièrement, à cause de la conduite de Creston qui a présenté inexactement les faits relatifs aux honoraires d'intermédiation à la Bourse et à Sattva; deuxièmement, [TRADUCTION] « par égard pour le principe selon lequel l'[AA] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41). La formation de la CA saisie de la demande d'autorisation a écarté la décision de la CS pour ces deux raisons discrétionnaires.

[94] Pour les motifs énoncés précédemment, l'objectif qui vise à favoriser et à préserver l'intégrité du système d'arbitrage ne devrait pas constituer une considération distincte dans l'analyse que requiert l'al. 31(2)(a) préalable à l'exercice du pouvoir discrétionnaire. Bien que le régime instauré par le par. 31(2) reconnaît cet objectif, l'exercice du pouvoir discrétionnaire doit se rapporter aux faits et aux circonstances de l'affaire. Cet objectif général ne fait pas partie des considérations susceptibles de justifier le refus discrétionnaire de l'autorisation.

[95] Toutefois, la conduite des parties est un facteur que le tribunal peut prendre en considération dans l'exercice du pouvoir discrétionnaire résiduel que lui confère l'al. 31(2)(a). La cour d'appel doit faire preuve de déférence lorsqu'elle contrôle la décision discrétionnaire de refuser l'autorisation d'interjeter appel. Elle doit se garder d'intervenir seulement parce qu'elle aurait exercé son pouvoir

2 S.C.R. 509, at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117).

[96] Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at para. 27).

[97] The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the AA that would limit a leave judge's exercise of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

[98] In *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011, at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to

discrétionnaire différemment (*R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, par. 18 et 30). La cour d'appel ne saurait intervenir à l'égard de l'exercice du pouvoir discrétionnaire par le juge de l'instance inférieure que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117).

[96] En l'espèce, la formation de la CS saisie de la demande d'autorisation a fondé sur un facteur reconnu sa décision de refuser la réparation discrétionnaire : l'inconduite de Creston. La formation de la CA saisie de la demande d'autorisation a infirmé cette décision au motif que [TRADUCTION] « ces faits [la conduite de Creston] n'intéressent pas directement la question de droit » soulevée en appel (par. 27).

[97] La formation de la CA saisie de la demande d'autorisation n'a pas expliqué pourquoi l'inconduite doit se rapporter directement à une question de droit pour que l'autorisation soit refusée. Rien dans le par. 31(2) de l'AA ne limite l'exercice du pouvoir discrétionnaire du juge saisi de la demande d'autorisation de la façon avancée par la Cour d'appel. Mon interprétation de la jurisprudence ne cadre pas avec le point de vue selon lequel l'inconduite d'une partie doit se rapporter directement à la question devant être tranchée par la cour.

[98] Dans l'arrêt *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011, p. 1037-1038, l'inconduite d'une partie ne se rapportait pas directement à la question en cause devant la Cour, mais cette dernière a néanmoins refusé d'accorder la réparation. Le litige tirait son origine d'un désaccord sur la question de savoir si l'acheteur de lots sur un lotissement, Homex, avait assumé les obligations du vendeur prévues à la convention de lotissement, c'est-à-dire de satisfaire à « toutes les exigences, financières ou autres » relativement à l'installation des services d'utilité publique sur un lotissement (p. 1015-1016). La Cour décide qu'Homex n'a pas bénéficié de l'équité procédurale lorsque la municipalité avait adopté un règlement se rapportant au litige (p. 1032). Néanmoins, la demande visant à obtenir l'annulation discrétionnaire du règlement a été rejetée notamment

avoid the burden associated with the subdivision of the lands” that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

[99] Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding “the nature of the obligation it had undertaken to Sattva by representing that the finder’s fee was payable in cash” (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva’s finder’s fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

[100] In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court’s denial of leave to appeal in deference to that court’s exercise of judicial discretion.

[101] Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is, how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be

parce que « [t]out au long de ces procédures, Homex a cherché à éviter les obligations qui se rattachent au lotissement des terrains » qu’elle détenait (p. 1037), même si Homex savait, de l’avis de la Cour, qu’elle devait assumer cette obligation (p. 1017-1019). Cette conduite se rapportait, non pas à la question de savoir si le règlement avait été adopté d’une manière équitable sur le plan de la procédure, mais au désaccord à l’origine du litige. Par conséquent, je crois que l’arrêt *Homex* étaye la proposition selon laquelle une conduite répréhensible se rapportant au différend à l’origine du litige peut justifier le refus de la réparation discrétionnaire sollicitée, en l’occurrence l’autorisation d’interjeter appel.

[99] En l’espèce, l’arbitre a tiré la conclusion de fait suivante : Creston a induit la Bourse et Sattva en erreur en ce qui concerne [TRADUCTION] « la nature de l’obligation qu’elle avait contractée envers Sattva en affirmant que les honoraires d’intermédiation étaient payables en argent » (par. 56(k)). Bien que cette conduite ne soit pas liée à la question de droit énoncée par la formation de la CA saisie de la demande d’autorisation, elle est liée à l’arbitrage visant à déterminer le cours de l’action applicable aux fins du versement des honoraires d’intermédiation de Sattva. La Cour suprême pouvait à bon droit fonder sur une telle conduite sa décision de refuser l’autorisation, en vertu de son pouvoir discrétionnaire.

[100] Par conséquent, à mon humble avis, même si la formation de la CA saisie de la demande d’autorisation avait défini une question de droit et qu’il avait été satisfait au critère du risque d’erreur judiciaire, elle aurait dû confirmer la décision de la formation de la CS saisie de la demande d’autorisation de rejeter cette demande, par égard pour l’exercice du pouvoir discrétionnaire de cette cour.

[101] S’il est vrai que la formation de la CA saisie de la demande d’autorisation a commis une erreur en autorisant l’appel, ces interminables procédures ne s’en trouvent pas moins à l’heure actuelle devant nous. Puisque, par ailleurs, c’est la question de fond de l’appel — soit celle de savoir combien l’entente exige que Creston paie à Sattva — qui intéresse réellement les parties, et que les tribunaux d’instance

unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. *Standard of Review Under the AA*

[102] I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

[103] At the outset, it is important to note that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the AA.

[104] Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the AA forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the

inférieure ont considérablement divergé d'opinion quant à l'interprétation qu'il faut donner à l'entente, il serait bien peu satisfaisant que le véritable litige à l'origine de cette instance ne soit pas réglé. Je vais donc examiner les trois autres questions soulevées en appel comme si l'autorisation d'interjeter appel avait été accordée à bon droit.

C. *Norme de contrôle applicable aux affaires régies par l'AA*

[102] Abordons les décisions des tribunaux siégeant en appel. Tout d'abord, il est nécessaire de déterminer la norme applicable au contrôle de la sentence arbitrale en fonction de la question à l'égard de laquelle la formation de la CA saisie de la demande d'autorisation a accordé cette dernière : l'arbitre a-t-il interprété la disposition sur les honoraires d'intermédiation à la lumière de l'entente dans son ensemble? Plus particulièrement, l'a-t-il interprétée en tenant compte de la stipulation relative au « plafond »?

[103] D'entrée de jeu, il convient de souligner que l'*Administrative Tribunals Act*, S.B.C. 2004, ch. 45, laquelle prévoit les normes de contrôle applicables aux décisions rendues par de nombreux tribunaux administratifs de la Colombie-Britannique (art. 58 et 59), ne s'applique pas aux arbitrages régis par l'AA.

[104] L'examen en appel des sentences arbitrales commerciales s'inscrit dans un régime, strictement défini et adapté aux objectifs de l'arbitrage commercial, qui diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif. Par exemple, la plupart du temps, les parties décident d'un commun accord de soumettre leur différend à l'arbitrage. Il ne s'agit pas d'un processus imposé par la loi. De plus, contrairement à la procédure devant un tribunal administratif, dans le cas d'un arbitrage les parties à la convention choisissent le nombre d'arbitres et l'identité de chacun. Ces différences révèlent que le cadre relatif au contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Par exemple, l'AA interdit

Dunsmuir judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

[105] Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

[106] *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

le contrôle des conclusions de fait tirées par l'arbitre. En matière d'arbitrage commercial, une telle disposition est absolue. Suivant le cadre établi dans *Dunsmuir*, l'existence d'une disposition d'inattaquabilité (aussi appelée clause privative) n'empêche pas le tribunal judiciaire de procéder au contrôle d'une décision administrative, elle signale simplement que la déférence est de mise (*Dunsmuir*, par. 31).

[105] Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Dans les deux cas, le tribunal examine la décision rendue par un décideur administratif. En outre, l'expertise constitue un facteur tant en matière de contrôle judiciaire qu'en matière d'arbitrage commercial : quand les parties choisissent leur propre décideur, on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable. Pour ces raisons, j'estime que certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences rendues en matière d'arbitrage commercial.

[106] La jurisprudence depuis l'arrêt *Dunsmuir* vient confirmer qu'il est souvent possible de déterminer la norme de contrôle applicable suivant la nature de la question en litige (voir par exemple *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 44). En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou 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 (*Alberta Teachers' Association*, par. 30). La question dont nous sommes saisis, à savoir si l'arbitre a interprété l'entente dans son ensemble, n'appartient pas à l'une ou l'autre de ces catégories. Compte tenu des éléments pertinents de l'analyse établie dans l'arrêt *Dunsmuir*, la norme de la décision raisonnable s'applique en l'espèce.

D. *The Arbitrator Reasonably Construed the Agreement as a Whole*

[107] For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at \$0.15 per share, the arbitrator reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

[108] The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

[109] The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. \$0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

[110] In *Newfoundland and Labrador Nurses' Union*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

"Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in

D. *L'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble*

[107] Essentiellement pour les mêmes motifs que ceux exprimés par le juge Armstrong aux par. 57-75 de la décision de la CS sur l'appel, je suis d'avis que l'arbitre, en déterminant que Sattva était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 \$ l'action, a donné une interprétation raisonnable de l'entente considérée dans son ensemble. Le juge Armstrong a contrôlé la décision de l'arbitre selon la norme de la décision correcte, mais ses motifs démontrent amplement le caractère raisonnable de cette décision. L'analyse qui suit est largement fondée sur son raisonnement.

[108] La question que devait trancher l'arbitre portait sur la date qui doit être retenue pour évaluer le cours de l'action aux fins du versement des honoraires d'intermédiation : la date établie selon la définition du cours qui figure dans l'entente ou la date du versement des honoraires d'intermédiation.

[109] L'arbitre a conclu que la valeur calculée selon la définition du cours l'emportait, soit 0,15 \$ l'action. Selon lui, tel constat découlait des termes de l'entente et était [TRADUCTION] « clair et incontestable » (par. 23). Apparemment, comme il estimait que ce point était clair, il ne l'a pas motivé abondamment.

[110] Dans l'arrêt *Newfoundland and Labrador Nurses' Union*, la juge Abella cite le professeur David Dyzenhaus pour expliquer que les tribunaux siégeant en révision peuvent compléter les motifs du décideur de première ligne dans le cadre de l'analyse du caractère raisonnable :

[TRADUCTION] Le « caractère raisonnable » s'entend ici du fait que les motifs étaient, effectivement ou en principe, la conclusion. Autrement dit, même si les motifs qui ont en fait été donnés ne semblent pas tout à fait convenables pour étayer la décision, la cour de justice doit d'abord chercher à les compléter avant de tenter de les contrecarrer. Car s'il est vrai que parmi les motifs pour lesquels il y a lieu de faire preuve de retenue on compte le fait que c'est le tribunal, et non la cour de justice, qui a été désigné comme décideur de

some respects defective. [Emphasis added by Abella J.; para. 12.]

(Quotation from D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

Accordingly, Justice Armstrong’s explanation of the interaction between the Market Price definition and the “maximum amount” proviso can be considered a supplement to the arbitrator’s reasons.

[111] The two provisions at issue here are the Market Price definition and the “maximum amount” proviso:

2. DEFINITIONS

“**Market Price**” for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company’s stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

3. FINDER’S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder’s fee (the “Finder’s Fee”) based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder’s fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder’s Fee Limitations. [Emphasis added.]

première ligne, la connaissance directe qu’a le tribunal du différend, son expertise, etc., il est aussi vrai qu’on doit présumer du bien-fondé de sa décision même si ses motifs sont lacunaires à certains égards. [Soulignement ajouté par la juge Abella; par. 12.]

(Citation de D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304)

Par conséquent, on peut supposer que l’explication donnée par le juge Armstrong du jeu de la définition du cours et de la stipulation relative au « plafond » complète les motifs de l’arbitre.

[111] Les deux clauses en cause sont la définition du cours et la stipulation relative au « plafond » :

[TRADUCTION]

2. DÉFINITIONS

« **cours** », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c’est-à-dire qu’il s’entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l’acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s’entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l’acquisition.

Et :

3. HONORAIRES D’INTERMÉDIATION

3.1 . . . la société convient qu’à la conclusion d’une acquisition qui lui a été présentée par l’intermédiaire, elle verse à l’intermédiaire des honoraires (des « honoraires d’intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX. Ces honoraires d’intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l’intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n’excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d’intermédiation. [Je souligne.]

[112] Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be \$0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US\$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

[113] While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US\$) is transferred into another (shares):

The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the \$1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of \$1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particular date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the \$1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains \$1.5 million US, payable in the number of Canadian dollars (or shares) equal to the

[112] L'article 3.1 de l'entente permet à Sattva de recevoir ses honoraires d'intermédiation en actions en fonction du « cours ». Aux termes de l'art. 2 de l'entente, le cours des titres des sociétés cotées à la Bourse de croissance TSX est égal au « cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». En l'espèce, compte tenu de la définition du cours, l'action vaudrait 0,15 \$. Le passage « dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation » tiré de l'art. 3.1 de l'entente constitue la stipulation relative au « plafond ». Cette stipulation limite le montant des honoraires d'intermédiation. Le plafond correspond dans le cas qui nous occupe à 1,5 million \$US (voir le point 3.3 de la politique 5.1 de la Bourse à l'annexe II).

[113] La stipulation relative au « plafond » limite le montant des honoraires d'intermédiation, mais elle ne change rien à la définition du cours. Comme l'explique le juge Armstrong, la définition du cours fixe la date à laquelle un moyen de paiement (dollars américains) est converti en un autre (actions) :

[TRADUCTION] Le moyen de paiement des honoraires d'intermédiation est clairement établi par l'entente conclue en ce sens. La valeur marchande de ces actions au moment où les parties ont conclu cette entente était inconnue. L'intimée établit une analogie entre le paiement en actions des honoraires d'intermédiation de 1,5 million \$US et une entente hypothétique en vertu de laquelle la somme de 1,5 million \$US serait convertie en dollars canadiens. Dans les deux cas, les honoraires seraient payés en devises différentes. Le taux de change d'une à l'autre serait fixé à une date précise, tout comme l'est le cours de l'action dans l'entente relative aux honoraires. Ce taux de change permettrait de calculer la somme à verser en dollars canadiens en règlement des honoraires de 1,5 million \$US, tout comme le cours permet de déterminer le nombre d'actions cédées en règlement des honoraires. Le dollar canadien est une forme de paiement, au même titre que l'action. Il importe peu que la valeur du dollar canadien augmente ou diminue après la date fixée pour établir le taux de change. Le

amount of the fee based on the value of that currency on the date that the value is determined.

(SC Appeal Court decision, at para. 71)

[114] Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

[115] However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

[116] The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

[117] As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient

montant des honoraires payé est toujours égal à 1,5 million \$US. Il est converti en un certain nombre de dollars canadiens (ou d'actions) équivalant au montant des honoraires en fonction de la valeur de la devise à la date à laquelle cette valeur est déterminée.

(Décision de la CS sur l'appel, par. 71)

[114] Comme l'explique le juge Armstrong, accepter la position de Creston revient à ne pas tenir compte de la définition du cours et à fixer le cours de l'action en fonction de l'évaluation faite en prévision d'un placement privé.

[115] Cependant, rien dans l'entente n'indique, expressément ou implicitement, qu'il faille réévaluer avant la date du versement des honoraires d'intermédiation la conformité à la stipulation relative au « plafond ». L'entente ne précise pas non plus — ni expressément, ni implicitement — la base sur laquelle il faudrait procéder à une telle réévaluation — en l'occurrence un placement privé. Accepter l'interprétation de Creston reviendrait à faire fi du libellé de l'entente selon lequel les « honoraires d'intermédiation sont versés en actions de la société en fonction du cours ».

[116] La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond ». Comme l'explique le juge Armstrong, l'interprétation par l'arbitre de l'entente atteint cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne peut être considérée comme déraisonnable.

[117] Comme l'explique le juge Armstrong, fixer le cours de l'action en avance engendre un risque qui rend le paiement en actions qualitativement différent du paiement en argent. Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action

of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

[118] By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US\$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

(SC Appeal Court decision, at para. 70)

[119] For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et Creston et Sattva, des parties avisées, en auraient eu connaissance.

[118] En acceptant un paiement en actions, Sattva acceptait de se soumettre à la volatilité du marché. Si l'action de Creston avait chuté, Sattva aurait tout de même été liée par la valeur déterminée en application de la définition du cours, de sorte qu'elle aurait reçu des actions d'une valeur marchande inférieure au plafond de 1,5 million \$US. Il ne serait guère logique d'accepter le risque d'une baisse du cours de l'action sans avoir la possibilité de bénéficier d'une hausse. Pour reprendre les propos du juge Armstrong :

[TRADUCTION] Il serait contraire aux principes commerciaux reconnus de protéger l'appelante de la hausse du cours de l'action dont bénéficiait l'intimée à la date de versement des honoraires, alors qu'une telle augmentation était prévisible et aurait dû être soulevée par l'appelante, tout comme il serait contraire aux principes commerciaux reconnus, et aux termes de l'entente relative aux honoraires, d'augmenter le nombre d'actions cédées à l'intimée dans le cas où leur valeur aurait baissé par rapport au cours en vigueur à la date du versement des honoraires. Les deux parties ont reconnu, quand elles ont conclu l'entente relative aux honoraires, la possibilité de fluctuation de la valeur de l'action après la définition du cours.

(Décision de la CS sur l'appel, par. 70)

[119] Pour ces raisons, on ne peut prétendre que l'arbitre n'a pas tenu compte de la stipulation de l'entente relative au « plafond ». Le raisonnement de l'arbitre, que le juge Armstrong explique, satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité (*Dunsmuir*, par. 47).

E. Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts

[120] The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

[121] The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US\$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately \$8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.

This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at \$0.15, it would receive a fee having a value at the time the fee became payable of over \$8 million. If the fee were taken in cash, the amount payable would be \$1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.

The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

E. La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel

[120] La Cour d'appel a conclu qu'elle-même et la formation de la CS saisie de l'appel étaient liées par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation en ce qui a trait non seulement à la décision d'autoriser l'appel, mais aussi au bien-fondé de l'appel. Autrement dit, elle a conclu que la formation de la CS saisie de l'appel avait commis une erreur de droit en faisant fi des conclusions de la formation de la CA saisie de la demande d'autorisation quant au bien-fondé de l'appel.

[121] La formation de la CA saisie de l'appel a mis en relief deux conclusions précises quant au bien-fondé de l'appel qui, à son avis, la liaient elle, et aussi la formation de la CS saisie de l'appel : 1^o il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million \$US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions \$ et 2^o l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente :

[TRADUCTION] Le juge [de la CS saisi de l'appel] a conclu que l'arbitre avait expressément tenu compte du plafond des honoraires payables conformément au paragraphe 3.1 de l'entente et que sa sentence était correcte.

Cette conclusion est contraire aux remarques formulées par la juge Newbury dans l'appel antérieur selon lesquelles, si ses honoraires étaient versés en actions, à raison de 0,15 \$ l'unité, Sattva obtiendrait des honoraires d'une valeur, à la date du versement des honoraires, de plus de 8 millions \$. Si elle optait pour le versement en argent, elle recevrait un montant de 1,5 million \$US. La juge Newbury a statué expressément que l'arbitre n'avait pas soulevé cette anomalie et qu'il n'avait pas tenu compte du sens du paragraphe 3.1 de l'entente.

Le juge [de la CS saisi de l'appel] était tenu d'accepter ces conclusions. De même, à défaut d'une décision d'une formation de cinq juges en l'espèce, nous devons aussi accepter ces conclusions. [par. 42-44]

[122] With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), at para. 32).

[123] Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

[124] The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

[122] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la CA saisie de la demande d'autorisation la liaient elle, de même que la formation de la CS saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 88). Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli (*Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, par. 27, autorisation d'appel refusée, [2013] 3 R.C.S. viii). Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause, comme c'est le cas en l'espèce. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs (*Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), par. 32).

[123] Creston concède ce point, mais prétend que la conclusion tirée par la formation de la CA saisie de l'appel selon laquelle elle était liée par les conclusions de celle saisie de la demande d'autorisation était sans conséquence parce que la première est arrivée à la même conclusion que la seconde sur le bien-fondé, à l'issue d'un raisonnement distinct et indépendant.

[124] Le fait que la formation de la CA saisie de l'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur. Dès lors que la formation de la CA saisie de l'appel a accordé un caractère obligatoire aux motifs concernant le bien-fondé de l'appel énoncés par celle saisie de la demande d'autorisation, elle ne pouvait guère arriver à une autre décision. Comme le souligne l'avocat de Sattva, considérer comme impérative la décision relative à la demande d'autorisation rendrait l'appel futile.

VI. Conclusion

[125] The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

APPENDIX I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

(a) "Market Price" definition:

2. DEFINITIONS

"**Market Price**" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

3. FINDER'S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee

VI. Conclusion

[125] La formation de la CA saisie de la demande d'autorisation a commis une erreur en accordant l'autorisation d'interjeter appel en l'espèce. Quoi qu'il en soit, la sentence arbitrale était raisonnable. L'appel interjeté à l'encontre des décisions de la Cour d'appel de la Colombie-Britannique datées du 14 mai 2010 et du 7 août 2012 est accueilli avec dépens devant toutes les cours. La sentence arbitrale est rétablie.

ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

a) Définition du « cours » :

[TRADUCTION]

2. DÉFINITIONS

« **cours** », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

b) Disposition relative aux honoraires d'intermédiation (laquelle contient la stipulation relative au « plafond ») :

[TRADUCTION]

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques

is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

APPENDIX II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

3.3 Finder's Fee Limitations

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

Benefit	Finder's Fee
On the first \$300,000	Up to 10%
From \$300,000 to \$1,000,000	Up to 7.5%
From \$1,000,000 and over	Up to 5%

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

APPENDIX III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the Arbitration Act)

Appeal to the court

31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation.

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

3.3 Plafond des honoraires d'intermédiation

Les honoraires d'intermédiation sont assujettis à un plafond si l'avantage que retire l'émetteur prend la forme d'un achat ou d'une vente d'actifs ou d'une convention de coentreprise, ou si son avantage n'est pas lié à un financement précis. La contrepartie devrait être exprimée à la fois en valeur monétaire et en pourcentage de la valeur de l'avantage reçu. Sauf dans des circonstances exceptionnelles, les honoraires d'intermédiation ne doivent pas dépasser les pourcentages suivants :

Avantage	Honoraires d'intermédiation
300 000 \$ et moins	Jusqu'à 10 %
Entre 300 000 \$ et 1 000 000 \$	Jusqu'à 7,5 %
1 000 000 \$ et plus	Jusqu'à 5 %

De façon générale, les honoraires ou la commission, exprimés en pourcentage de la valeur monétaire de l'avantage, devraient être inversement proportionnels à cette valeur.

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'Arbitration Act)

[TRADUCTION]

Appel devant le tribunal

31 (1) Une partie à l'arbitrage peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

- | | |
|---|---|
| <p>(a) all of the parties to the arbitration consent, or</p> <p>(b) the court grants leave to appeal.</p> <p>(2) In an application for leave under subsection (1)(b), the court may grant leave if it determines that</p> <p>(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,</p> <p>(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or</p> <p>(c) the point of law is of general or public importance.</p> <p>(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.</p> <p>(4) On an appeal to the court, the court may</p> <p>(a) confirm, amend or set aside the award, or</p> <p>(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.</p> | <p>(a) toutes les parties à l'arbitrage y consentent,</p> <p>(b) le tribunal accorde l'autorisation.</p> <p>(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :</p> <p>(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,</p> <p>(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,</p> <p>(c) la question de droit est d'importance publique.</p> <p>(3) Si le tribunal accorde l'autorisation en vertu du présent article, il peut assortir des conditions qu'il estime équitables l'ordonnance accordant l'autorisation.</p> <p>(4) En appel, le tribunal peut, selon le cas :</p> <p>(a) confirmer, modifier ou annuler la sentence,</p> <p>(b) renvoyer la sentence à l'arbitre avec l'opinion du tribunal sur la question de droit qui a fait l'objet de l'appel.</p> |
|---|---|

Appeal allowed with costs throughout.

Pourvoi accueilli avec dépens devant toutes les cours.

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Procureurs de l'appelante : McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Miller Thomson, Vancouver.

Procureurs de l'intimée : Miller Thomson, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Solicitors for the intervener the BCICAC Foundation: Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenante BCICAC Foundation : Fasken Martineau DuMoulin, Vancouver.

18

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)
UNITED STATES OF AMERICA et al.,)
)
Plaintiffs,)
)
v.	Case No. 20-cv-3010 (APM))
)
GOOGLE LLC,)
)
Defendant.)
<hr/>)

<hr/>)
STATE OF COLORADO et al.,)
)
Plaintiffs,)
)
v.	Case No. 20-cv-3715 (APM))
)
GOOGLE LLC,)
)
Defendant.)
<hr/>)

MEMORANDUM OPINION

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INTRODUCTION

The general search engine has revolutionized how we live. Information that once took hours or days to acquire can now be found in an instant on the internet with the help of a general search engine. General search engines use powerful algorithms to create what seems like magic. Enter a search query, and the general search engine will retrieve, rank, and display the websites that provide the exact information the user seeks at that very moment. And it all happens in the blink of an eye.

General search engines make money by selling digital advertisements. Type the words “running shoes” into a general search engine, and sellers of running shoes will compete with one another in a split-second auction to place an advertisement on the results page, which if clicked takes the user directly to the seller’s website. This is a highly effective way of reaching consumers. It is also an incredibly lucrative business. In 2021, advertisers spent more than \$150 billion to reach users of general search engines.

For more than 15 years, one general search engine has stood above the rest: Google. The brand is synonymous with search. Once a scrappy start-up founded by two Stanford University students in a rented garage, Google is now one of the world’s most valuable companies. Its parent company, Alphabet Inc., today has a market capitalization (the value of its outstanding shares of stock) of more than \$2 trillion. Much of that value is due to Google’s extremely profitable advertising business.

Google’s dominance has gone unchallenged for well over a decade. In 2009, 80% of all search queries in the United States already went through Google. That number has only grown. By 2020, it was nearly 90%, and even higher on mobile devices at almost 95%. The second-place search engine, Microsoft’s Bing, sees roughly 6% of all search queries—84% fewer than Google.

Google has not achieved market dominance by happenstance. It has hired thousands of highly skilled engineers, innovated consistently, and made shrewd business decisions. The result is the industry's highest quality search engine, which has earned Google the trust of hundreds of millions of daily users.

But Google also has a major, largely unseen advantage over its rivals: default distribution. Most users access a general search engine through a browser (like Apple's Safari) or a search widget that comes preloaded on a mobile device. Those search access points are preset with a "default" search engine. The default is extremely valuable real estate. Because many users simply stick to searching with the default, Google receives billions of queries every day through those access points. Google derives extraordinary volumes of user data from such searches. It then uses that information to improve search quality. Google so values such data that, absent a user-initiated change, it stores 18 months-worth of a user's search history and activity.

The distribution agreements benefit Google in another important way. More users mean more advertisers, and more advertisers mean more revenues. As queries on Google have grown, so too has the amount it earns in advertising dollars. In 2014, Google booked nearly \$47 billion in advertising revenue. By 2021, that number had increased more than three-fold to over \$146 billion. Bing, by comparison, generated only a fraction of that amount—less than \$12 billion in 2022.

For years, Google has secured default placements through distribution contracts. It has entered into such agreements with browser developers, mobile device manufacturers, and wireless carriers. These partners agree to install Google as the search engine that is delivered to the user right out of the box at key search access points.

Google pays huge sums to secure these preloaded defaults. Usually, the amount is calculated as a percentage of the advertising revenue that Google generates from queries run through the default search access points. This is known as “revenue share.” In 2021, those payments totaled more than \$26 billion. That is nearly four times more than all of Google’s other search-specific costs combined. In exchange for revenue share, Google not only receives default placement at the key search access points, but its partners also agree not to preload any other general search engine on the device. Thus, most devices in the United States come preloaded exclusively with Google. These distribution deals have forced Google’s rivals to find other ways to reach users.

Google’s dominance eventually attracted the attention of antitrust enforcers—the U.S. Department of Justice and nearly every state’s Attorney General. They homed in on Google’s distribution agreements and in late 2020 filed two separate lawsuits alleging that the agreements and certain other conduct violate Section 2 of the Sherman Act. According to their complaints, Google has unlawfully used the distribution agreements to thwart competition and maintain its monopoly in the market for general search services and in various online advertising markets.

The proceedings that followed have been remarkable. Discovery began in December 2020 and concluded in March 2023. Millions of pages exchanged hands, Google produced petabytes of data, and the parties deposed dozens of witnesses, including high-ranking executives at some of the world’s largest technology companies. The court held a nine-week bench trial starting in September 2023. It heard from dozens of live witnesses, including multiple experts, and admitted over 3,500 exhibits. After receiving extensive post-trial submissions, the court held closing arguments over two days in early May 2024. The lawyering has been first rate throughout.

After having carefully considered and weighed the witness testimony and evidence, the court reaches the following conclusion: Google is a monopolist, and it has acted as one to maintain its monopoly. It has violated Section 2 of the Sherman Act.

Specifically, the court holds that (1) there are relevant product markets for general search services and general search text ads; (2) Google has monopoly power in those markets; (3) Google's distribution agreements are exclusive and have anticompetitive effects; and (4) Google has not offered valid procompetitive justifications for those agreements. Importantly, the court also finds that Google has exercised its monopoly power by charging supracompetitive prices for general search text ads. That conduct has allowed Google to earn monopoly profits.

Other determinations favor Google. The court holds that (1) there is a product market for search advertising but that Google lacks monopoly power in that market; (2) there is no product market for general search advertising; and (3) Google is not liable for its actions involving its advertising platform, SA360. The court also declines to sanction Google under Federal Rule of Civil Procedure 37(e) for its failure to preserve its employees' chat messages.

This decision is organized as follows. The court begins with a brief procedural history. It then sets forth findings of fact. They are followed by the court's conclusions of law regarding the challenged distribution agreements. The court first addresses market definition and monopoly power, then the exclusionary nature of the conduct (including the contracts' exclusivity), and finally the agreements' anticompetitive effects and Google's procompetitive justifications for them. A discussion of the SA360-related conduct follows. The opinion ends with brief sections on anticompetitive intent, as well as Plaintiffs' request for sanctions. The court has included as an Appendix a list of the names and titles of all witnesses whose testimony is cited in the decision.

PROCEDURAL HISTORY

On October 20, 2020, the U.S. Department of Justice, joined by 11 States (“U.S. Plaintiffs”), commenced *United States v. Google*, 20-cv-3010 (APM). *See* Compl., ECF No. 1. Pursuant to authority conferred by 15 U.S.C. § 4, U.S. Plaintiffs alleged that Google had violated Section 2 of the Sherman Act by unlawfully maintaining its monopoly in three product markets by entering into exclusive agreements to secure default distribution on nearly all desktop and mobile devices in the United States. *See generally* Am. Compl., ECF No. 94. The alleged markets are general search services, search advertising, and general search text advertising. *Id.* ¶¶ 88–107. U.S. Plaintiffs advanced three Section 2 claims, each corresponding to an alleged market. *Id.* ¶¶ 173–193. They sought a finding of liability, an injunction against the challenged conduct, and structural relief necessary to cure any resulting anticompetitive effects. *Id.* ¶ 194.

On December 17, 2020, 38 States (“Plaintiff States”) joined together to bring *State of Colorado v. Google*, 20-cv-3715 (APM) [hereinafter *Colorado v. Google* Docket]. They filed suit pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, in their sovereign or quasi-sovereign capacities as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states. The *Colorado* complaint adopted the allegations in the U.S. Plaintiffs’ complaint but supplemented it in three ways. Compl., *Colorado v. Google* Docket, ECF No. 3 [hereinafter *Colorado* Compl.]. First, Plaintiff States alleged a third advertiser-side market for general search advertising but not one, as U.S. Plaintiffs had, for search advertising. *Id.* ¶¶ 56 n.3, 82–89. Second, they asserted exclusionary conduct by Google that targeted specialized vertical providers, or SVPs. *Id.* ¶¶ 168–189. Third, Plaintiff States claimed that Google had engaged in further exclusionary conduct by using its proprietary advertising platform, SA360, to harm competition

in all proposed markets. *Id.* ¶¶ 144–167. Plaintiff States similarly sought declaratory and injunctive relief. *Id.* ¶ 233.

On January 7, 2021, upon Plaintiff States’ motion, the court consolidated the two cases for pretrial purposes, including discovery. Order, *Colorado v. Google* Docket, ECF No. 67. The court subsequently consolidated the cases for trial as well. *See* Status Conf. Tr., ECF No. 609, at 10–14. The parties also jointly asked to bifurcate the liability and remedies phases, and the court agreed to do so. *See* Order, ECF No. 264.

Discovery closed on February 23, 2023. Soon after, U.S. Plaintiffs moved for sanctions under Rule 37(e) for Google’s failure to preserve relevant chat messages among its employees. Pls.’ Mot. for Sanctions, ECF No. 512. The court deferred ruling on the motion pending the presentation of evidence relevant to that issue at trial. Order, ECF No. 610, at 2.

Google also moved for summary judgment in both cases. *See* ECF Nos. 451, 452. The court granted in part and denied in part Google’s motions. It entered judgment for Google as to U.S. Plaintiffs’ claims related to Android Compatibility Commitments and Anti-Fragmentation Agreements, Google’s voice-activated assistant and other “Internet-of-Things” devices, and the Android Open-Source Project. *See United States v. Google LLC*, 687 F. Supp. 3d 48, 78–84, 85–87 (D.D.C. 2023). It also entered judgment in favor of Google on Plaintiff States’ theory that Google’s targeting of SVPs caused anticompetitive effects in the proposed markets. *Id.* at 78–83. The court permitted the remaining claims to proceed to trial.

Trial commenced on September 12, 2023. Both sides presented exhaustive evidence in support of their various claims and defenses. Dozens of witnesses, including numerous Google employees, third-party witnesses, and several experts, testified live and were subject to lengthy

cross-examination. The parties entered thousands of exhibits and designated certain deposition testimony into the trial record. Trial concluded just over nine weeks later on November 16, 2023.

Following trial, each group of Plaintiffs and Google filed separate post-trial briefs, as well as affirmative and responsive proposed findings of fact and conclusions of law. Those submissions ran into the thousands of pages. Finally, the court held two days of closing arguments on May 2 and 3, 2024.

FINDINGS OF FACT

I. PARTIES AND RELEVANT NONPARTIES

A. Parties

1. Plaintiff United States of America, along with Plaintiffs Arkansas, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, South Carolina, Texas, and Wisconsin—**U.S. Plaintiffs**—filed the lawsuit captioned *United States v. Google*, 20-cv-3010 (APM). *See* Am. Compl. at 2–3.

2. Separately, Plaintiffs Colorado, Nebraska, Arizona, Iowa, New York, North Carolina, Tennessee, Utah, Alaska, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wyoming—**Plaintiff States**—filed the lawsuit captioned *State of Colorado v. Google*, 20-cv-3715 (APM). *See Colorado* Compl.

3. Alphabet Inc. is the California-based parent company of a collection of businesses, the largest of which is Defendant Google LLC (**Google**). UPX8085 at 851.¹ Google was founded

¹ This opinion uses the last three digits of Bates numbers on an exhibit to cite the specific pages that support a finding of fact.

in 1998 by two students from Stanford University, Larry Page and Sergey Brin, who left school to create Google, which is a general search engine (GSE). Trial Tr. at 7292:21–7293:1 (Raghavan) [hereinafter Tr.]. A GSE is software that produces links to websites and other relevant information in response to a user query. *See infra* Part II. What started in a rented garage is today one of the world’s largest companies. The Chief Executive Officer (CEO) of Alphabet and Google is Sundar Pichai. Tr. at 7638:2-12 (Pichai).

4. Although Google began as a GSE, today its core services include a suite of applications widely used on mobile and desktop devices, including Gmail, Google Drive, Google Maps, Google Photos, Google Play, and YouTube. *Id.* at 7717:2-12 (Pichai); UPX8085 at 852.

5. In 2008, Google developed **Android**, an open-source operating system for mobile devices. *See* Tr. at 7652:1–7653:11 (Pichai). An open-source system allows third-party developers to create new smart devices and technologies by customizing the Android system to the device or technology. *See id.* at 7653:2-3 (Pichai) (“[Y]ou can just take the open source project and do whatever you want with it without ever talking to Google”); *id.* at 9414:25–9415:3 (Rosenberg) (“Being open source, [Android is] customizable. It [i]s something that someone could take with its underlying capabilities and then build on top of and add capabilities to.”). Today, hundreds of millions of mobile devices in the United States run on the Android operating system. UPX639 at 266.

6. Also in 2008, Google launched **Chrome**, a web browser. Tr. at 7646:5-7 (Pichai). A web browser is software that allows users to access websites on the internet, among other things. *See* M. Baker Dep. Tr. at 23:1–27:8. Chrome was designed to increase the speed and seamlessness of web navigation by users. Tr. at 7649:11–7650:2 (Pichai). “Chromium is the underlying engine

which powers Chrome,” and it is fully open source, like Android. *Id.* at 7648:21–7649:5 (Pichai). Google is the default search engine on Chrome. *Id.* at 7650:5-9 (Pichai).

7. Google also acquired an online advertising platform, DoubleClick, in 2008, which it developed into what today is known as **SA360**. *Id.* at 1235:5-12 (Dischler); PSX1109. SA360 is a search engine marketing tool, which allows advertisers to purchase digital advertisements across multiple platforms. *Tr.* at 1234:2–1235:4 (Dischler); *see also infra* Section V.G.

8. In 2022, Google reported Search+ revenues over \$162 billion. UPX8085 at 879, 899 (including “other Google owned and operated properties like Gmail, Google Maps, and Google Play”). Between 2014 and 2021, Google’s Search+ revenues more than tripled, with gross margins ranging from 76–82% annually. *See* UPX7002.A. The vast majority of Alphabet’s revenues (nearly 80%) come from digital advertisements, and historically the largest component has been ads displayed on Google’s search engine results page. *See* UPX8085 at 878–89; UPX342 at 824 (attributing approximately 66% of the “company’s revenue and \$ growth for 10+ years” to search advertising).

B. Key Third Parties

9. **Apple Inc.** is a California-based company that “designs, manufactures[,] and markets smartphones, personal computers, tablets, wearables[,] and accessories, and sells a variety of related services.” UPX8105 at 172, 175. Those products include the iPhone, iPad, and Mac personal computers (PCs). *Id.* at 175. Each of these devices runs on an Apple-developed, proprietary operating system: iOS for iPhones, iPadOS for iPads, and macOS for Mac computers. *Id.* Unlike Android, Apple’s operating systems are not open source. *See* *Tr.* at 9841:25–9842:5 (Murphy). Apple’s products all come preloaded with its proprietary web browser, Safari. *Id.* at

632:9-10 (Rangel). In 2022, Apple's market capitalization was at least \$2.8 trillion. UPX8105 at 173.

10. **Microsoft Corporation** is a Washington-based company whose products include an operating system called Windows, a web browser called Edge, and various devices, including PCs and tablets. UPX8094 at 517, 521, 530–31. In 1998, Microsoft licensed a third-party GSE, MSN Search, for use on its devices. Tr. at 3545:11-21 (Nadella). In 2005, Microsoft created its own GSE, which was then known as Live Search. *Id.* at 3547:3-24 (Nadella). In 2009, Microsoft launched **Bing**, a GSE. *Id.* at 3548:4-5 (Nadella). Microsoft has invested nearly \$100 billion into search over the past two decades. *Id.* at 3510:3-7, 18-21 (Nadella). Bing's search and news advertising revenue totaled \$11.6 billion in 2022. *See* UPX8094 at 612. The CEO of Microsoft is Satya Nadella. Tr. at 3487:2-6 (Nadella). Microsoft's revenues in 2022 were over \$198 billion, with a market capitalization of \$2.5 trillion. UPX8094 at 559, 517.

11. **Mozilla Corporation** is a California-based company that developed an open-source web browser called Firefox for both desktop and mobile devices. JX31 at 612, 633. Today, Mozilla's share in the desktop browser market is about 10% and negligible in the mobile market. M. Baker Dep. Tr. at 127:24–128:8, 134:9-20. In 2018, Mozilla generated \$435 million in revenues. *Id.* at 285:12-16 (discussing UPX979 at 414).

12. **DuckDuckGo (DDG)** is Pennsylvania-based web services company founded in 2008. Tr. at 1937:4-7 (Weinberg). It offers a product that is an integrated browser and GSE. *Id.* at 1962:6-12, 1963:3-16 (Weinberg). Gabriel Weinberg is the founder and CEO of DDG. *Id.* at 1937:2-3 (Weinberg). DDG does not produce its own search results or search advertisements. It syndicates both from Microsoft. *Id.* at 3510:8-11, 3520:13-22 (Nadella). DDG attempts to

differentiate itself from other GSEs through a focus on user privacy. *E.g., id.* at 1937:14-20, 2150:13-18 (Weinberg).

13. **Yahoo** is a California-based provider of general search services and was an early market leader in general search. UPX1053 at 121; Ramalingam Dep. Tr. at 23:2-12. In 1998, the year that Google was founded, Yahoo already had hundreds of millions of users. UPX1053 at 121. By 2009, however, Yahoo had stopped crawling the web and producing its own search results. Instead, it reached a data-sharing and syndication agreement with Microsoft, which provided that the two companies would combine their search engine user data (primarily to compete with Google) and, going forward, Yahoo's search results would be delivered by Bing. *See* DX271; Tr. at 3520:13–3522:9 (Nadella). Yahoo also has popular subject-specific, or “vertical,” products, such as Yahoo Sports and Yahoo Finance. Ramalingam Dep. Tr. at 24:14–25:11.

14. **Neeva** was a California-based company incorporated in 2017 that introduced a new GSE in 2019. Tr. at 3670:1-5, 3670:24–3671:1 (Ramaswamy). Neeva was founded by Dr. Sridhar Ramaswamy, a veteran Google Search executive. *Id.* at 3667:3–3669:14 (Ramaswamy). One of Neeva's distinguishing features was that it was a subscription-based service that did not serve advertisements. *Id.* at 3675:22–3679:16 (Ramaswamy). Although Neeva initially licensed Bing's search infrastructure to respond to all queries, by 2022 Neeva responded to about 60% of queries using its own systems, relying on Bing for the remainder. *Id.* at 3739:14-16, 3776:14-21 (Ramaswamy). In May 2023, Neeva shut down and was acquired by Snowflake Inc., an enterprise data company. *Id.* at 3675:1-6 (Ramaswamy). It no longer exists as a GSE. *Id.* at 3675:5-19 (Ramaswamy).

15. **Branch** is a California-based software company that was founded by Stanford graduate students in 2013. *Id.* at 2892:7-24 (Austin). Branch created a search engine for

applications using “deep linking” technology, which allows users to search across pages of mobile applications on a particular device and navigate to relevant application results. *Id.* at 2893:18–2894:18, 2897:3-15 (Austin). This “app search engine” required “work[ing] individually with every app company [to] get them to send [] the actual pages inside of the app,” which entailed “build[ing] the one-on-one relationship with the app [and] hav[ing] them develop, write custom code.” *Id.* at 2898:2-9 (Austin). Unlike a GSE, Branch’s product does not index the web and (in its presently deployed version) does not deliver web results. *Id.* at 2957:3-15, 2956:16-24 (Austin); *see also infra* Section VI.B.2.d.

16. **Samsung Electronics Co. Ltd.** is a Korea-based original equipment manufacturer (OEM) of smartphones and other mobile devices that run on the Android platform. *See* UPX639 at 266; Baxter Dep. Tr. at 34:14. Samsung devices “represent the primary competitor to the iPhone in key monetizing regions, such as the US[.]” UPX639 at 266. Samsung develops mobile applications that it preloads onto its devices, including a browser known as S Browser and an app store called the Galaxy Store. Baxter Dep. Tr. at 83:10-24, 91:4-7. Samsung also invests in novel products through its innovation arm, Samsung Next. Tr. at 4485:3-12, 4485:22–4486:14 (Chang).

17. **Motorola Mobility LLC** is an Illinois-based OEM of smartphones that run on the Android platform. JX39 at 794. Motorola and Samsung together manufacture the majority of Android devices in the United States. Tr. at 775:2-5 (Kolotouros). Google acquired Motorola but later sold it to Lenovo Group Ltd. Christensen Dep. Tr. at 15:12-14, 142:12-18.

18. **AT&T Mobility LLC** is a Georgia-based mobile carrier that provides wireless services that connect mobile devices to cellular networks. JX91 at 742. AT&T also sells devices directly to consumers. Ezell Dep. Tr. at 28:4-12. Roughly 30% of the smartphones that it distributes are Android devices. *Id.* at 29:8-25. The other 70% are Apple devices. *Id.*

19. **T-Mobile US, Inc.** is a Washington-based mobile carrier that provides cellular services and sells mobile devices directly to consumers. JX95 at 687–88; Tr. at 9313:24-25 (McCallister). Approximately half of the phones sold by T-Mobile run on Android, and the other half are Apple devices. Giard Dep. Tr. at 23:16–24:7.

20. Cellco Partnership, doing business as **Verizon Wireless**, is a New Jersey-based mobile carrier that provides cellular services and sells mobile devices directly to consumers. JX93 at 487–88; Tr. at 9313:24-25 (McCallister). It distributes roughly twice as many Apple devices (70%) as Android devices (30%). Tr. at 1102:21-23 (Higgins).

II. GENERAL SEARCH ENGINES

A. Overview

21. Google, Bing, Yahoo, DDG, Ecosia, and Brave are GSEs. *See, e.g., id.* at 2168:1-4 (Giannandrea); *id.* at 1031:2-10 (Higgins); *id.* at 1942:11-17 (Weinberg); *id.* at 8201:23-24 (Reid). There is “relatively limited [user] overlap between the general search engines.” *Id.* at 8728:23-24 (Israel).

22. Bing is Google’s largest general search competitor today. *Id.* at 8094:8-10 (Raghavan). It is the only rival that crawls the web and generates its own search results. The next two largest search engines, Yahoo and DDG, syndicate their search results from Bing. *See id.* at 3520:13-25 (Nadella).

23. By 2009, 80% of all general search queries, whether entered on a desktop computer or mobile device, flowed through Google. *Id.* at 4762:4-12 (Whinston) (discussing UPXD102 at 48); *e.g.,* UPX472; *see also* Tr. at 203:21–204:5 (Varian) (Google began measuring its search share against other GSEs monthly in 2009). That percentage had increased from 80% to 89.2% by 2020. Tr. at 4761:14–4762:8 (Whinston) (discussing UPXD102 at 47).

24. Google's share of search queries on mobile devices was even higher at 94.9% in 2020. *Id.* at 4762:19–4763:2 (Whinston) (discussing UPXD102 at 49); *see also* UPX476 at 668 (Google's internal share calculation of 98% of mobile GSE queries in 2019). The percentage on desktop devices was 84%. *See* UPX476 at 668.

25. Google's second-place rival, Bing, receives roughly 6% of all search queries. *Tr.* at 4761:12-14 (Whinston) (discussing UPXD102 at 47). Bing (5.5%), Yahoo (2.2%), DDG (2.1%), and other rivals (0.9%) together see less than 11% of all queries. *Id.* Their numbers are even lower on mobile devices. *Id.* at 4762:19–4763:2 (Whinston) (discussing UPXD102 at 49) (Bing (1.3%), Yahoo (2.1%), DDG (1.5%), and others (0.2%)). Bing's market share has never risen above 12%. *See id.* at 4762:4-12 (Whinston) (discussing UPXD102 at 48).

26. Bing sees more desktop queries than mobile queries because it has greater distribution on Windows desktop devices, where it is the default GSE on the preloaded Edge browser. *See id.* at 3096:14-18 (Tinter).

B. How a GSE Works (Greatly Simplified)

27. “A general search engine is a tool that you use to search the worldwide web using queries.” *Id.* at 2167:3-4 (Giannandrea). A GSE attempts to answer all queries by “provid[ing] search results that are relevant to those queries.” *Id.* at 8093:10-12 (Raghavan); *id.* at 182:6-8 (Varian). “The primary source of information for Search is the web.” UPX194 at 552.

28. The first step in developing a search engine is to crawl the web. *Id.* at 552; *Tr.* at 1774:20-22 (Lehman); *id.* at 2206:14-15 (Giannandrea) (“[S]tep one [of] building a general search engine would be to take a copy of as much of the web as you can.”). GSEs crawl the web using a “crawling bot,” which “starts with a list of websites[.]” *Tr.* at 2206:17-20 (Giannandrea). The bot “crawls the HTML on those websites and then it looks at the links inside of those web pages and

then recursively crawls them.” *Id.* And, because websites “are constantly changing and the web is constantly growing,” GSEs “constantly recrawl the web to index new content.” UPX194 at 552–53.

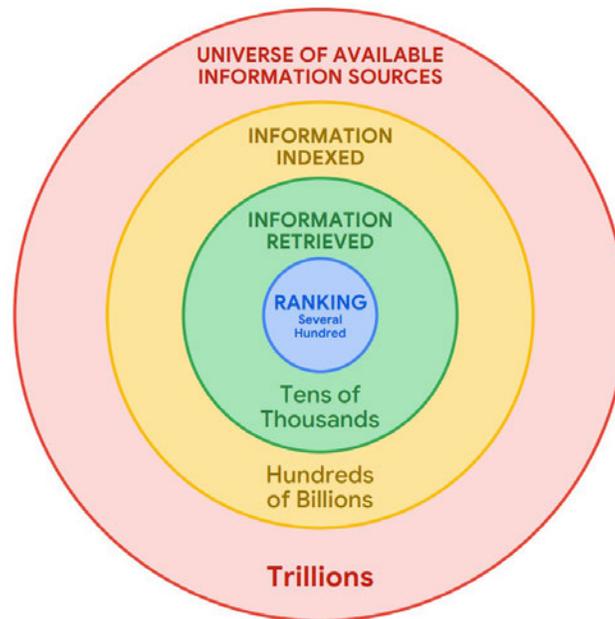
29. The results of the web crawling are organized into an index. An index is “a database essentially of the whole web that’s publicly available that can be returned if [a] user asks for it.” Tr. at 2656:17-18 (Parakhin). The development of an index is “a crucial piece of the puzzle,” because if a site is not in the index, it will not be presented to users in response to a query. *Id.* at 6303:20-25 (Nayak); *id.* at 2210:21 (Giannandrea) (“What you include in the index matters a lot[.]”). Thus, the more sites in an index, the better. *Id.* at 2212:4 (Giannandrea). Today, only Google and Bing create fulsome web search indexes that generate accessible results. DDG indexes portions of the web to create its own search “modules.” *Id.* at 1939:2–1941:16 (Weinberg). And Apple maintains an index of about ■ billion websites, although it does not presently plan to use that index to offer a results page. *Id.* at 2212:9-14 (Giannandrea); FOF ¶ 302.

30. An index is only useful if the GSE understands what the user is seeking with a query. GSEs “aim to identify spelling errors, annotate the query with synonyms, mark multi-word concepts, generate terms related to the query, and more.” UPX213 at 715. Google does this in many ways: through its spelling and synonyms functions, using “query-based salient terms” (QBST) that are likely to show up in a responsive document, and semantic tools, such as query clustering and segmentation. *Id.* at 715–16; *see also* UPX870 at .016–.017.

31. The GSE then must retrieve and rank websites responsive to the query. Common queries can yield a nearly infinite number of potentially responsive sites, so the GSE must include a retrieval system that narrows the volume of responsive links to tens of thousands, as opposed to millions. Tr. at 6331:7-15 (Nayak). The GSE then must rank these several thousand results. It

first must decide which results are worth scoring at a more granular level, and then score those hundreds of sites to determine which top 10 or so should be surfaced to the user. *Id.* at 6331:13–6332:11 (Nayak); *infra* Section II.G.

32. The above-described culling and sorting process by which a GSE produces search results is illustrated below:



DXD17 at 2.

C. Types of Queries

33. A GSE can supply information from a broad variety of sources, covering nearly any topic. *Tr.* at 8708:16-20 (Israel) (agreeing that GSEs “can handle virtually any type of query”). Thus, it is “the first place that you can turn to,” and “a place that you go to for the vast majority of your information needs.” *Id.* at 3670:6-18 (Ramaswamy); *see also id.* at 6511:11-23 (Whinston) (same); *id.* at 7027:23-25 (J. Baker) (“[A] general search user can get satisfactory responses to multiple queries from multiple sources, all without switching sites.”); *id.* at 10471:17-25 (Oard)

("[M]ental process is costly[] and . . . people may just not know about where things are."); *cf. id.* at 8717:17-18 (Israel) ("If I don't know the best source, I may have to try various ones.").

34. Google classifies its queries by subject matter, and it has developed more than two dozen "level-one" classifications. *Id.* at 7029:2-16 (J. Baker) (discussing PSDX11 at 17). Users tend to use a GSE for a short period of time to search for a particular topic and then allow time to pass before using a GSE to search for a different topic. Put differently, users do not typically search multiple different subject matters during an unbroken time period. *Id.* at 8419:9-15 (Israel) (discussing DXD29 at 25) (78% of users searched within only one vertical in a short period). Yet, if viewed over a longer period, users frequently turn to GSEs to search for a broad variety of topics. *See id.* at 7029:17–7031:11 (J. Baker) (discussing PSXD11 at 19) (showing based on Google sessions data from 2019 and 2021 that nearly 65% of "sessions," defined in the study as a 24-hour period, involved users searching in more than one classified segment).

35. Many users begin their online information gathering journeys on GSEs. An analysis by U.S. Plaintiffs' expert Dr. Michael Whinston found that 77% of search sessions on Windows desktop devices began on GSEs. *Id.* at 4614:12-24 (Whinston). That 77% figure is arguably lower on mobile devices, on which users are more likely to start searches directly within an application instead of a GSE. *See id.* at 5875:19–5876:9 (Whinston).

36. There are two general types of queries on GSEs: noncommercial and commercial.

37. A noncommercial query is one in which the user seeks to retrieve information that the GSE does not attempt to monetize by delivering a search advertisement. 80% of Google's queries are noncommercial in nature. *Id.* at 8396:16–8398:17 (Israel); UPX10 at 053 n.6.

38. Commercial queries, as the name implies, are queries that the GSE perceives are an expression of commercial intent by the user and constitute the remaining 20% of Google's queries.

Tr. at 8396:16–8398:17 (Israel); UPX10 at 053 n.6. Typically, such a query seeks information on a product or a service. GSEs often serve advertisements on a search engine results page in response to a commercial query. *See infra* Section V.A.1. Like Google, only about 20–30% of Bing’s queries are commercial and show ads. Tr. at 3645:13–3646:2 (Nadella).

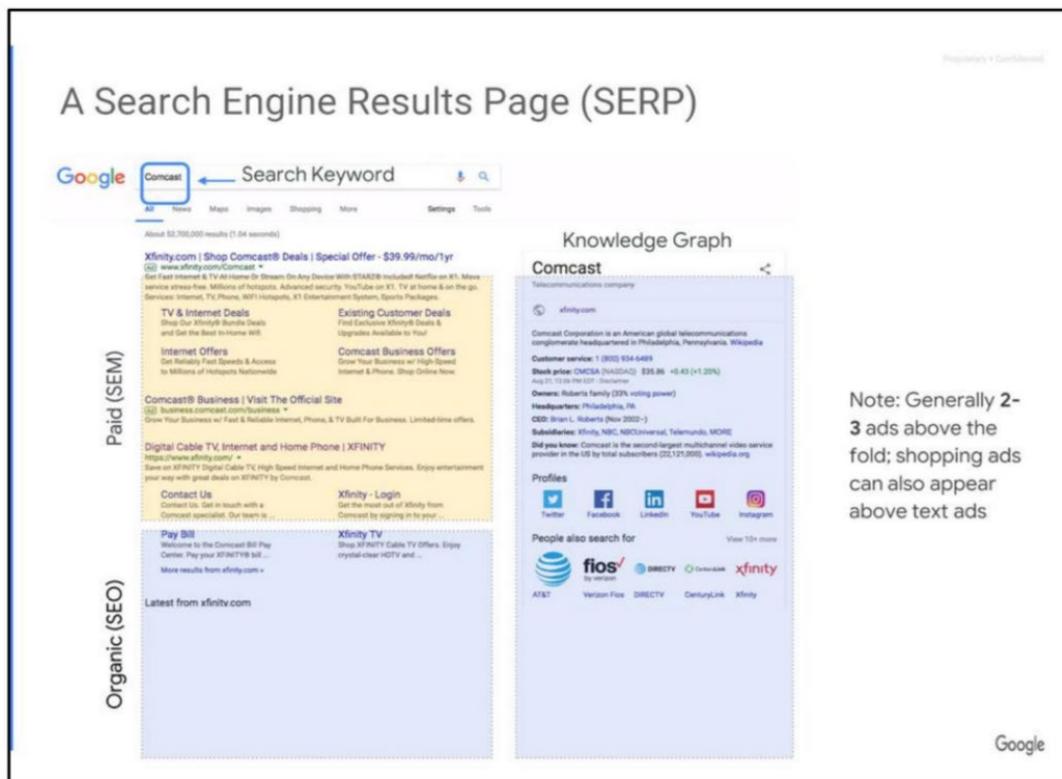
39. Navigational queries, which can be either commercial or non-commercial, are a type of query that reflects a user’s intent to navigate directly to a particular website. *Id.* at 185:11–19 (Varian). GSEs may or may not serve ads on a navigational query. An example of a navigational query is “Amazon,” which may express the user’s intent to go to Amazon.com. *See id.* at 8721:12–13 (Israel) (“[O]ne use of a general search engine[] is as this vehicle to take me to other sites.”). Users often enter navigational queries. In fact, at a given time, Google’s top five queries by query volume are navigational queries, UPX342 at 859, and nearly 12% of all Google queries are navigational queries, Tr. at 8748:22–8749:1 (Israel) (calculation reflected in Whinston Expert Report at 64); *id.* at 8748:25–8749:1 (Israel) (the volume of navigational queries is “significant”). Navigational queries are unique to GSEs, because only a GSE’s results page supplies a user with organic links used to navigate to another website. *See id.* at 4616:23–25 (Whinston) (specialized vertical providers are “not sending you off to other sites” because “they don’t have a broad index of the web”); *see infra* Section IV.A.

40. The number of general search queries has grown dramatically over the last decade, especially on mobile devices. *See* Tr. at 8442:17–8443:2 (Israel) (discussing DXD29 at 45) (“[O]utput is more than double over this 10-year time period.”); *id.* at 7248:4–10 (J. Baker) (discussing PSXD12).

D. Search Engine Results Page

41. GSEs produce information responsive to a query on a search engine results page, or SERP. The SERP “provid[es] links to websites drawn from a broad index of the web as well as provid[es] additional information[.]” *Id.* at 4610:21-22 (Whinston); *id.* at 7026:20-22 (J. Baker).

42. Most SERPs contain some mixture of advertisements, organic links, and vertical offerings. A sample SERP is illustrated below.



UPX1 at 533.

43. Organic links, or “blue links,” are unpaid search results that allow a user to navigate directly to a website. *Tr.* at 2221:15-19 (Giannandrea); *id.* at 6509:25–6510:1 (Nayak). A GSE determines which links to present by sorting through indexed webpages and presenting relevant results. *See* UPX8104 at 165; *see also supra* Section II.B; *infra* Sections II.G & II.H.

44. Paid advertisements are typically generated in response to a commercial query and usually appear at the top of a SERP. *See* UPX1 at 533. Multiple types of advertisements can appear on a SERP, but the two primary ones are general search text ads (which resemble organic results but are labeled “sponsored” on Google) and shopping ads (which typically consist of a product photograph, vendor identity, and price information). *See infra* Section V.A.1.

45. A vertical offering is a category of specialized information that is accessible to users without leaving the SERP. *Tr.* at 2336:14-16 (Giannandrea); *id.* at 6509:7-21 (Nayak). Examples of verticals include information about flights, hotels, and restaurants. Such information is usually acquired from third parties and is referred to as “structured data.” *Id.* at 8224:18–8225:6 (Reid). Structured data can come from several sources: specialized vertical providers (like online travel sites), users, merchants, or GSE employees in the field. *Id.* Much of “th[is] information is not even on the web.” *Id.* at 8224:24-25 (Reid). Another example of structured data is a “knowledge graph,” which is a database containing useful information about people, places, and things, as well as the connections among them. *See* Moxley 30(b)(1) Dep. *Tr.* at 17:17-20; UPX1 at 533.

46. GSEs enter into data-sharing agreements with partners (usually specialized vertical providers) to obtain structured data for use in verticals. *Tr.* at 9148:2-5 (Holden) (“[W]e started to gather what we would call structured data, where you need to enter into relationships with partners to gather this data that’s not generally available on the web. It can’t be crawled.”). These agreements can take various forms. The GSE might offer traffic to the provider in exchange for information (i.e., data-for-traffic agreements), pay the provider revenue share, or simply compensate the provider for the information. *Id.* at 6181:7-18 (Barrett-Bowen).

47. As of 2020, Microsoft has partnered with more than 100 providers to obtain structured data, and those partners include information sources like Fandango, Glassdoor, IMDb,

Pinterest, Spotify, and more. DX1305 at .004, 018–028; *accord* Tr. at 6212:23–6215:10 (Barrett-Bowen) (agreeing that Microsoft partners with over 70 providers of travel and local information, including the biggest players in the space).

48. In some limited instances, providers have expressed discomfort with new or continued partnerships with Bing due to its smaller scale. Tr. at 6187:20-24 (Barrett-Bowen). For example, [REDACTED], an online travel company, refused to share its information with Bing given its limited distribution. *Id.* at 6188:5-10 (Barrett-Bowen). Bing, however, has data agreements with other travel providers, including major airlines and platforms like Booking.com, Expedia, and TripAdvisor. *Id.* at 6212:25–6213:11, 6214:1-2 (Barrett-Bowen); *see id.* at 2678:5-9 (Parakhin); DX1305 at .018–028. On another occasion, [REDACTED], a provider of [REDACTED] information, asked for a financial commitment from Bing, as the amount of traffic provided through the existing Bing-[REDACTED] data-for-traffic agreement was insufficient. *See generally* Tr. at 6198–6204 (Barrett-Bowen). Bing did not agree to [REDACTED] terms, in part due to Bing’s budgetary constraints, and that partnership ceased. *Id.* at 6204:13-17 (Barrett-Bowen).

49. As a third example, Bing displays [REDACTED] information from a single partner— [REDACTED]. The “sole reason” for this is Bing’s small scale. *Id.* at 6190:4-12 (Barrett-Bowen). Since the [REDACTED] industry “is just not a big category” for Bing, it makes sense for Bing to partner with a single provider to obtain as much data as possible, rather than “fragment[] it amongst other partnerships[.]” *Id.* at 6190:14-23 (Barrett-Bowen).

E. The Expense of Developing and Maintaining a GSE

50. Constructing a GSE is an extremely capital- and human-resource intensive endeavor. *See id.* at 4765:17-20 (Whinston); *id.* at 3700:14-16 (Ramaswamy) (describing the

building of a search index as a “Herculean problem”). Developing just the technical infrastructure alone requires billions of dollars. *Id.* at 1651:12-25 (Roszak).

51. A competitive analysis performed by Google illustrates the point. In late 2020, Google estimated how much it would cost Apple to create and maintain a GSE that could compete with Google. Google “estimate[d] that the total capital expenditures required [for Apple] to reproduce [Google’s technical] infrastructure dedicated to search would be in the rough order of \$20[billion].” UPX2 at 392–93; Tr. at 1644:8-20 (Roszak). Google further estimated that, if Apple needed only half of Google’s infrastructure to produce a competitive GSE, it would have to spend \$10 billion to get it off the ground, plus \$4 billion annually in technical infrastructure. UPX2 at 393. On top of that, if Apple could sustain a business with only one third of Google’s engineering and product management costs, it still would cost Apple \$7 billion annually. Seven billion dollars was equal to more than 40% of Apple’s total research and development expenditure in 2019. *Id.*

52. The cost of maintaining a fully-integrated GSE once built runs into the billions of dollars. In 2020, Google spent \$8.4 billion to operate its search engine (excluding revenue share payments). This expense is attributable to a variety of inputs. By way of example, the “petabytes” of user data that Google maintains are “expensive to store[.]” Tr. at 7824:2-3 (Fox); *id.* at 6337:20-21 (Nayak) (“[T]he cost of processing the data goes up if we’re talking about large amounts of data.”). Certain highly effective ranking mechanisms, such as artificial intelligence-driven models, are computationally more expensive than others because they are costly to train and require significant engineering capabilities. *See id.* at 1931:17-20 (Lehman); *id.* at 6447:11-16, 6452:1-8, 6452:15-19 (Nayak); *id.* at 8278:15-18, 8281:13-24 (Reid).

53. Adding features to the SERP also dramatically increases costs. UPX266 at 985 (explaining that “[f]eatures are even more incrementally expensive,” such as including web search and video search on a single SERP, which costs about five times more per query than web search alone). There are many other contributing costs.

54. Apple itself has estimated that it would cost \$6 billion annually (on top of what it already spends developing search capabilities) to run a GSE. Tr. at 2295:9-16 (Giannandrea); UPX460 at 177.

55. But building and maintaining a GSE is only half of the cost equation. Monetizing a GSE is also an expensive proposition. In 2020, Google spent \$11.1 billion to operate its search ads business. By comparison, it spent \$8.4 billion on search (excluding revenue share payments). Tr. at 4764:12-20 (Whinston) (discussing UPXD102 at 52). In 2020, Bing earned only \$7.7 billion *total* in search ads revenue. *Id.* at 4765:4-6 (Whinston) (discussing UPXD102 at 52).

56. As result of the extraordinary resources required to build, operate, and monetize a GSE, venture capitalists and other investors have stayed away from funding new search ventures. *Id.* at 2261:11-19, 2268:6-7 (Giannandrea) (stating that “a startup could not raise enough money . . . to build a very good, large-scale search engine” because “to build a competitive project is very expensive”); UPX240 at 507 (internal Apple document written by Giannandrea stating that “the reason a better search engine has not appeared is that it’s not a [venture capital] fundable proposition even though it’s a lucrative business”); Tr. at 3510:24–3512:7 (Nadella) (describing Silicon Valley’s view of venture funding of search as the “biggest no fly zone”).

57. New investment has not poured in despite the promise of high profit margins in general search. *See* UPX635 at 352 (Apple executive noting that “there aren’t so many businesses

on the planet that have such high marginal profit[] on incremental revenues”); FOF ¶ 8 (describing Google’s revenues).

F. GSE Distribution

58. Search providers have multiple channels to make accessible, or distribute, their GSE to users on mobile and desktop devices. They include but are not limited to: (1) the search bar integrated into browsers; (2) search widgets on Android device home screens; (3) search applications; (4) preset bookmarks within the default browser; (5) downloading an alternate browser; and (6) direct web search (i.e., navigating to www.google.com or www.bing.com). These channels of distribution are known as search access points.

1. Default Distribution

59. The most efficient channel of GSE distribution is, by far, placement as the preloaded, out-of-the-box default GSE. That access point varies by device. On Apple products, it is the integrated search bar in the Safari browser (and to some extent, Apple’s voice assistant, Siri, and on-device search, Spotlight). Tr. at 632:9-10 (Rangel); *infra* Section VI.A.1.a. On Android devices, it is the search widget (prominently displayed at the center of the device’s home screen) and the search toolbar in the Chrome browser. *See infra* Section VI.B.1. The Chrome browser typically appears on the home screen of Android devices either in the “hotseat”—that is, the row of applications at the bottom of the home screen—or in a folder on the home screen along with other Google applications. Tr. at 797:7-17 (Kolotouros); *see infra* Section VI.B.1. And, on Windows desktop computers, the default access point is the integrated search bar in the Edge browser. Tr. at 3096:14-18 (Tinter). Google is the default GSE on all of these access points except on Edge, where the default GSE is Bing. *Id.* at 540:4-12, 632:6-8 (Rangel).

60. Other browsers, which are not preloaded on devices but can be downloaded, also use an integrated search bar. *Id.* at 1963:3-12 (Weinberg) (DDG); M. Baker Dep. Tr. at 189:3-12 (Firefox). Google is the current default search engine on Firefox. From 2014 through 2017 it was Yahoo. *See infra* Section VI.A.2.a. On Firefox, a drop-down menu allows users to select a non-default search provider for the next search without changing the default search engine. M. Baker Dep. Tr. at 92:11-25. This is called the “this time, search with” feature. *Id.* Those options include SVPs, like Amazon. *Id.* (listing Bing, Amazon, or DDG as options).

61. Default settings can be changed by the user. On all major browsers, users can navigate to the browser’s settings and change the default to their preferred GSE. *See, e.g.,* M. Baker Dep. Tr. at 61:1-4 (Firefox); Tr. at 2630:3–2631:15 (Cue) (discussing DXD6) (Safari); *id.* at 7650:10-17 (Pichai) (Chrome). No browser allows a user to change the default GSE to a specialized vertical provider, such as Amazon, or to a social media platform. *Id.* at 7426:21–7427:4 (Raghavan).

62. Notwithstanding the option to switch, the default remains the primary search access point. Roughly 50% of all general search queries in the United States flow through a search access point covered by one of the challenged contracts. *See id.* at 5755:6-11 (Whinston) (discussing UPXD104 at 34–36). Of that 50%, 28% of those queries are entered into search access points covered by the Google-Apple Internet Services Agreement, 19.4% through Google’s agreements with Android OEMs and carriers, and 2.3% through search access points on third-party browsers, such as Mozilla’s Firefox. *See id.*

63. Another 20% of all general search queries in the United States flow through user-downloaded Chrome, which defaults to Google. *Id.* at 5762:22–5763:13 (Whinston) (discussing UPXD104 at 37).

64. Thus, only 30% of queries in the United States run through a search access point that does not default to Google. *See id.* at 5762:22–5763:13 (Whinston) (discussing UPXD104 at 37). (To be clear, those 30% of searches are not all run on GSEs other than Google. A large percentage of those searches still are entered into Google, but through channels other than the default search access points, such as user-downloaded Google Search app or a search on www.google.com.)

65. That users overwhelmingly use Google through preloaded search access points is explained in part by default bias, or the “power of defaults.” The field of behavioral economics teaches that a consumer’s choice can be heavily influenced by how it is presented. *Id.* at 526:7-21 (Rangel) (describing the concept of “choice architecture”). The consensus in the field is that “defaults have a powerful impact on consumer decisions.” *Id.* at 526:22-25 (Rangel).

66. According to U.S. Plaintiffs’ expert, Dr. Antonio Rangel, whose testimony the court credits, “the vast majority of individual searches, or queries, are carried out [by] habit,” because search is a high frequency activity done on a familiar device that provides an instant response. *Id.* at 543:2-9 (Rangel) (“Habits develop very strongly in those situations of high repetition and immediate feedback.”); *see also id.* at 543:14-19 (Rangel) (“When a consumer encounters their devices for the first time and they start searching, they start searching with the default search engine, which for many of them is the case. . . . If that search engine that is the default generates adequate experiences, the consumer will get habitized to that.”). A 2020 Google study confirmed this. A group of iOS users were asked what app they would choose to open a link in an email: Chrome, the Google Search app, or Safari? Regardless of the option the user selected, their leading rationale for doing so was “Habit/Regular Usage.” UPX757 at 628.

67. Individuals often are not aware that they are acting out of habit. Tr. at 542:4-12 (Rangel). Consequently, when users are habituated to a particular option, they are unlikely to deviate from it. As Google’s behavioral economics team wrote in 2021: “Inertia is the path of the least resistance. People tend to stick with the status quo, as it takes more effort to make changes.” UPX103 at 214; *see also* UPX171 at 190 (2015 Google study based on 26 user interviews; almost half of the users (12) did not notice a surreptitious change from Google to Bing on their iPhone; “People expressed interest (but not huge urgency) to switch back to Google”); Tr. at 7677:5–7682:19 (Pichai) (discussing UPX172, a 2005 letter from Google to Microsoft stating that “most end users do not change defaults”).

68. Many users do not know that there is a default search engine, what it is, or that it can be changed. Tr. at 548:24–549:3 (Rangel); *id.* at 9942:7-10 (Murphy); *see* UPX123 at 469, 485 (2007 Google study showing that the default homepage on a browser is “[c]onfigurable by user but very few know/care to change it” and that “[u]sers do not always make an active, deliberate choice of a” search engine); PSX216 at 126 (2016 Google-internal email identifying “one fundamental issue [a]s that users on Edge don’t even realize they aren’t using Google”); UPX66 at 73 (2018 Google study showing substantial user confusion regarding which browser and GSE was in use); UPX2051 at 520 (2020 Google study showing that over half of iPhone users in the United States were “unsure” which GSE powered Safari and concluding that users are “often unaware they’re using Google”).

69. Even users who “are not in this habitual mode and [] try to change the default will get frustrated and stop the process” if there is “choice friction.” Tr. at 547:5-16 (Rangel). “Choice friction” refers to the concept that subtle challenges or barriers make it increasingly more difficult

to implement a change. *Id.* at 554:5-16 (Rangel). “[T]he more choice friction it takes to change the defaults, the stickier the defaults are.” *Id.* at 554:20-21 (Rangel).

70. The amount of choice friction varies and depends on many factors. For instance, default effects are weaker when the product is of poor quality or is unknown to users. Consumers “start thinking about switching more if the experience is unsatisfactory” or if they have, “over years, developed a very strong preference for a [rival] brand[.]” *Id.* at 548:15-20 (Rangel). By contrast, default effects are stronger when the user is satisfied with the product. *Id.* at 650:22–651:9 (Rangel).

71. The type of device matters as well. Default effects are stronger on mobile devices, as opposed to desktop computers, in part because of the smaller interface. *Id.* at 625:21-23 (Rangel); *id.* at 6311:1-8 (Nayak) (“I think the most salient difference between mobile and desktop is in the user experience. . . . The mobile device has very limited real estate. . . . Whereas, the desktop device, of course, has a lot of real estate to provide your search experience. . . . It’s just a very different experience.”); *id.* at 9764:6-12 (Murphy) (“[M]obile screens are smaller, hard to change the default, as compared to a PC where the screen is bigger[.]”); *id.* at 3498:14-19 (Nadella) (“[C]hanging defaults today is . . . toughest on mobile platforms because . . . they’re locked up on the browser that is allowed, they’re locked up with app store access. So there are many, many sort of friction points on mobile operating systems.”). Also, switching certain default settings on an Android device is arguably harder than on an iPhone. *See* UPX171 at 186 (iPhone user study participants were “able to switch back with relatively little effort” to Google from Bing); Tr. at 559:23–561:16 (Rangel) (discussing UPXD101 at 25–35) (replacing the Google Search Widget with Bing’s rival widget is a 10-step process).

72. Google understands that switching on mobile is more challenging than on desktop. To illustrate, in 2016 and 2020, Google estimated that if it lost the Safari default placement, it would claw back more search volume on desktop than on mobile. *See* UPX142 at 886 (2016) (Google would recover only 30% on iOS but 70% on MacOS); UPX148 at 826 (2020) (same, projecting 60–80% query loss on iOS); *see also* UPX84 at 728 (2016) (“User behavior is more heavily influenced by default settings on mobile and tablet[.]”); UPX139 at 119 (2020) (“People are much less likely to change [the] default search engine on mobile.”).

73. Google appreciates that increased choice friction discourages users from changing the default. *See* UPX103 at 214 (2021 Google document from Google’s Behavioral Economics Team stating that a “[s]eemingly small friction points in user experiences can have a dramatically disproportionate effect on whether people drop or stick”); UPX848 at 612 (“[Y]ou want to think about each step, as small as it might be, and see if there is a way to eliminate it, delay it, simplify it, default it.”); UPX172 at 731 (“[O]f the tiny fraction of end users who try to change the default, many will become frustrated and simply leave the default as originally set[.]”).

74. A GSE’s placement as the default thus drives search volume through that access point. Tr. at 3689:21-24 (Ramaswamy) (testifying that “the convenience of easy accessibility and tapping into . . . engrained default behaviors are the deciding factors when it comes to whether a search engine gets lots of usage”); *id.* at 7674:6–7675:21 (Pichai) (“[B]ecause you’re taking existing users, and by giving them more convenient access points, you’re making them search more. . . . Done correctly, and if you’re putting a product out in front of users which users like and want to use, yes, defaults can make a difference.”). In 2017, over 60% of all queries entered on Google flowed through defaults. UPX83 at 967; *see id.* (60% of iOS queries were through the

Safari default, and 80% of Android queries were through defaults secured by the distribution deals). Far fewer users search directly on Google’s website.

75. Google recognizes that securing the default placement is extremely valuable for monetizing search queries. In 2017, Google estimated that its default placements drove over half (then 54%) of its overall search revenue, a percentage that had grown since 2014. UPX83 at 968. For devices manufactured by Samsung—the largest Android OEM—80% of search revenue earned on those devices in 2016 flowed through default placements secured by the MADAs (Chrome and the Google Search Widget). *See* UPX639 at 266; UPX660 at 369. In 2019, about 50% of all search revenue on Android devices flowed through the Google Search Widget. UPX0316 at 906. In 2020, Google’s internal modeling projected that it would lose between 60–80% of its iOS query volume should it be replaced as the default GSE on Apple devices, UPX148 at 826, which would translate into net revenue losses between \$28.2 and \$32.7 billion (and over double that in gross revenue losses), UPX1050 at 887. And in a 2015 presentation, Google expressed confidence in its standing among Apple users, but warned that its position “is still very vulnerable if defaults were to change.” UPX171 at 186.

76. Neeva exemplifies the importance of search distribution through a readily accessible channel. Neeva secured the capital and human resources needed to build a search engine. Tr. at 3671:4–3672:13 (Ramaswamy). Although it initially syndicated search results from Bing, it eventually crawled the web, built an index, and developed a ranking model, which relied heavily on artificial intelligence technology, to generate its own search results for about 60% of its queries. *Id.* at 3775:9–3776:21, 3739:14-16 (Ramaswamy). But Neeva was unable “to be even a default provider on things like the major browsers or operating systems,” which “was what made [its founders] conclude that it was hard to have Neeva consumer search as a viable business.” *Id.*

at 3701:1-7 (Ramaswamy). The reason “why Neeva failed . . . was simply because [it] could not get enough users to be in that state where they regularly used Neeva.” *Id.* at 3712:10-12 (Ramaswamy); *id.* at 3677:2-3, 3700:25–3701:7 (Ramaswamy) (testifying that more users on Neeva would result in greater revenues through subscription fees); *id.* at 3724:18-21 (Ramaswamy) (“[I]f a well-funded and exceptionally talented team like Neeva could not even be a provider on most of the browsers, I don’t see that as the market working.”).

2. *Other Search Access Points*

77. There are access points other than the default that can be used to distribute a GSE, but those channels are far less effective at reaching users. That is due in part to users’ lack of awareness of these options and the “choice friction” required to reach these alternatives. FOF ¶¶ 65–73.

78. Users can download search applications on Apple devices from the App Store or on Android devices from the Google Play Store. *Tr.* at 1538:1-4 (Roszak); *id.* at 617:15-22 (Rangel). But to reach such applications, a user would have to (1) know the application exists and (2) download it. Those points of choice friction reduce the effectiveness of a search app as a channel of distribution. To illustrate the point: Google receives only about 10% of its searches on Apple devices through the Google Search App (GSA). *Id.* at 9758:16–9760:1 (Murphy) (discussing DXD37 at 52); *id.* at 2494:22-24 (Cue) (“[M]ost people are sitting on a browser, they don’t really want to go search on an app or a different app from that standpoint.”). (Google does not suffer from this problem on Android devices. GSA is preloaded on all Android devices sold in the United States.) *See id.* at 791:25–792:2 (Kolotouros); *see also infra* Section VI.B.1.

79. Google recognizes that the user-downloaded GSA is an ineffective way to reach users. A 2018 internal study revealed that over 35% of iOS users did not know they could

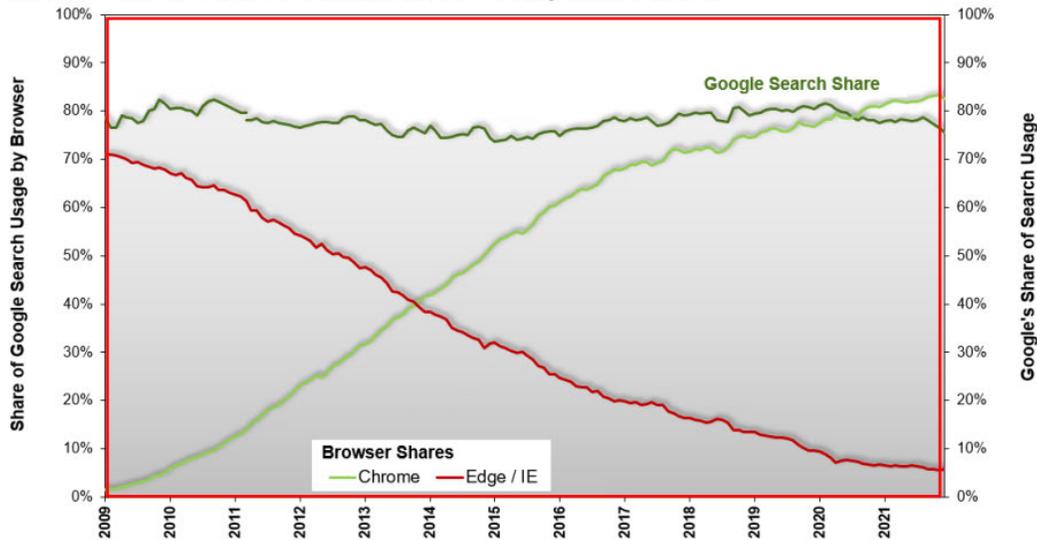
download GSA, and most of those who were aware of GSA did not want to install it. *See* UPX139 at 149. Over half of Safari users had not installed GSA, and of those that *had* installed it, over 80% still preferred using Safari. *Id.* at 150.

80. Another non-default search access point is the bookmarks page on a browser. *See* Tr. at 10195:21–10196:3 (Murphy) (discussing DXD37 at 47). The Safari “Favorites” page, for instance, contains preloaded icons to access Google, Bing, and Yahoo. *Id.* A user also can add a new search engine on that page. But few consumers use this channel, as it first requires finding the Favorites page in a new Safari tab, which requires an “extra click[.]” *Id.* at 10101:19–10102:21 (Murphy). Google itself receives only 10% of its searches on Safari through the bookmark. *Id.* at 9758:16–9760:1 (Murphy) (discussing DXD37 at 52).

81. Users also can reach GSEs by downloading an alternative browser from an applications store or the web. For example, a user can download Chrome, Edge, or DDG onto an Apple device. This, too, is not an easily accessible search point, as it involves similar choice friction as acquiring a search application. Google receives only 7.6% of all queries on Apple devices through user-downloaded Chrome. *Id.*

82. To be sure, downloads of an alternative browser occur with greater frequency on Windows desktop computers. On such devices, Edge is the default browser and Bing is the default search engine. *Id.* at 3096:14-20 (Tinter). Yet, Google’s search share on Windows devices is 80%, with most of the queries flowing through the Chrome default, which means Chrome was downloaded onto the device. *See id.* at 9737:9-21 (Murphy) (discussing DXD37 at 36, 38). Google’s dominance on Windows cannot, however, be attributed simply to the popularity of Chrome. Google had an 80% search share on Windows when Chrome first launched, and that share has remained steady ever since (see below).

Search and Browser Shares on Windows Computers (U.S.)



DXD37 at 38.

83. Google’s dominance on Windows does not, however, undermine the power of defaults. Google’s strong product quality and brand recognition likely weakened the effectiveness of defaults on Windows devices before the introduction of Chrome. FOF ¶ 70 (switching the default is more common when the default has inferior product quality and branding). The popularity of Chrome over time only fortified that dominance. *See* Tr. at 9739:10-17 (Murphy) (discussing DXD37 at 38).

84. The power of defaults *is* evident, however, from the share of Bing users on Edge. Bing’s search share on Edge is approximately 80%; Google’s share is only 20%. *Id.* at 5744:24–5745:20 (Whinston) (discussing UPXD104 at 29). Even if one assumes that some portion of those Bing searches are performed by Microsoft-brand loyalists, Bing’s uniquely high search share on Edge cannot be explained by that alone. The default on Edge drives queries to Bing.

85. Finally, users can navigate directly to the GSE on the web to conduct searches—for example, by entering google.com or bing.com in a browser search bar. *Id.* at 1633:1-8 (Roszak). This is known as an “organic” search. But few users search in this way. On Apple

devices, Google receives less than 5% of its query volume through organic searches. *Id.* at 9758:16–9760:1 (Murphy) (discussing DXD37 at 52). On Android devices, that number is only 10%. Sept. 19, 2023 (Sealed Session) Tr. at 23:25–27:2 (Yoo).

G. The Importance of Scale

86. Early on, Google understood that the information gleaned from user queries and click activity were a strong proxy for users’ intent and that such information could be used to deliver superior results. *See* UPX251 at 870 (“[M]ost of the knowledge that powers Google, that makes it magical, ORIGINATES in the minds of Google users.”); *id.* at 871 (“As people interact with the search results page, their actions teach us about the world.”); UPX203 at 906 (“If a document gets a positive reaction, we figure it is good. If the reaction is negative, it is probably bad. Grossly simplified, this is the source of Google’s magic.”).

87. Greater query volume means more user data, or “scale.” As the most widely used GSE in the United States, Google receives nine times more queries each day than all of its rivals *combined* across all devices. The disparity is even more pronounced on mobile. There, Google receives *nineteen* times more queries than all of its other rivals put together. *See* Tr. at 4761:6-24, 4762:19–4763:2 (Whinston) (discussing UPXD102 at 47, 49).

88. There are different types of user data. Click data, for example, includes the search results on which a user clicks; whether the user returns to the SERP and how quickly; how long a user hovers over SERP results; and the user’s scrolling patterns on the SERP. *See* UPX4 at .004. From such data, a GSE learns not only about the user’s interests but also the relevance of the search results and quality of the webpages that the user visits. Tr. at 1767:215–1771:22 (Lehman) (discussing UPX4 at .004).

89. Another type of user information is query data. GSEs accumulate query data to, among other things, learn what information users are looking for. Google's scale means that it not only sees more queries than its rivals, but also more unique queries, known as "long-tail queries." To illustrate the point, Dr. Whinston analyzed 3.7 million unique query phrases on Google and Bing, showing that 93% of unique phrases were only seen by Google versus 4.8% seen only by Bing. On mobile, where Google has more scale, the disparity was even higher. *See id.* at 5785:12–5788:1 (Whinston) (98.4% of unique phrases seen only by Google, 1% by Bing; 99.8% of tail queries on Google not seen at all by Bing) (discussing UPXD104 at 44).

90. Google has used its scale advantage to improve the quality of its search product. At every stage of the search process, user data is a critical input that directly improves quality.

91. *Crawling.* GSEs must determine the order in which they crawl the web. User data helps GSEs determine which sites to crawl, because it allows general search providers to understand the relative popularity of various sites. *Id.* at 2207:7-9 (Giannandrea). User data also helps GSEs determine the frequency with which to crawl websites. *Id.* at 10274:16–10275:1 (Oard). "Freshness," or the recency, of information is an important factor in search quality. GSEs "need to know how to recrawl [sites] to make sure that [they] do at all times have a reasonably fresh copy of the web that you are looking at." *Id.* at 6310:2-5 (Nayak); *see* UPX870 at .013 ("If we build too infrequently, our users could miss out on important news or get stale results[.]"). Popular sites, like the *New York Times*, are worth crawling more often than less visited sites. *Tr.* at 2207:3-6 (Giannandrea).

92. *Indexing.* While click data is "not particularly important for indexing," query data is: GSEs need to ensure that their index covers queries that are frequently entered. *Id.* at 2211:13-17 (Giannandrea). *But see id.* at 10274:16-21 (Oard) (opining that click data helps Google "decide

whether to keep those pages . . . [or] future pages in the index or not”). User data also helps determine where a webpage resides within the larger index. *Id.* at 10274:22–10275:1 (Oard). Google divides its index into tiers. *Id.* Each page is assigned to a tier based on how fresh it needs to be, and the fresher tiers are rebuilt more frequently. *Id.*

93. *Retrieval and Ranking.* Because humans are imperfect, so too are their queries. Google relies on user data to decipher what a user means when a query is typed imprecisely. For example, user data allows Google to identify misspellings and reformulate queries using synonyms to produce better results. *Id.* at 8088:15-24 (Gomes) (spelling, synonyms, and autocomplete use query data to improve); *id.* at 2273:3-15 (Giannandrea) (“reformulation,” which is when a user misspells a query and then re-enters it with another spelling, is important to improve spell check); UPX224 at 914 (Google built its spelling technology by “look[ing] at all the ways in which people mis-spell words in queries and text all over the web, and us[ing] that to predict what you actually mean”).

94. Google scores potentially relevant results to determine the order in which they are placed, or ranked, on the SERP. Scoring is done using a number of signals and ranking systems, which are technologies that attempt to discern the user’s intent and thus identify the most relevant results for a particular query. *See* UPX204 at 243; Tr. at 1764:1-25 (Lehman). Many of these signals, discussed below, rely on user data.

95. Query-based Salient Terms, or QBST, is a Google signal that helps respond to queries by identifying words and pairs of words that “should appear prominently on web pages that are relevant to that query.” Tr. at 1807:25–1808:10 (Lehman) (e.g., “1600 Pennsylvania Avenue” and “White House”). QBST is a “memorization system[]” that helps the GSE

“understand facts about the world[.]” *Id.* at 1838:11-25 (Lehman). It is trained on about 13 months of user data. *Id.* at 1808:14-20 (Lehman); UPX1007 at 371.

96. Navboost is another signal that pairs queries and documents through memorizing user click data. Tr. at 1838:11-25 (Lehman). It allows Google to remember which documents users clicked after entering a query and to identify when a single document is clicked in response to multiple queries. *See* UPX196 at 175; Tr. at 1806:2-15 (Lehman) (describing functions of Glue, a “relative” signal to Navboost); *id.* at 2215:3-4 (Giannandrea) (NavBoost “was considered very important”). Prior to 2017, Google trained Navboost on 18 months of user data. Tr. at 6405:15-25 (Nayak). Since then, it has trained Navboost on 13 months of user data. *Id.* Thirteen months of user data acquired by Google is equivalent to over 17 *years* of data on Bing. *See id.* at 5793:14-23 (Whinston); *id.* at 10350:8–10351:8 (Oard) (same) (discussing UPXD105 at 50).

97. More recent ranking signals developed by Google rely less on user data. Those include RankBrain, DeepRank, RankEmbed, RankBERT, and MUM. *See* UPX255 at .010; UPX2034. Known as “generalization” systems, these signals “may not be so good at memorizing facts, but they’re really good at understanding language.” Tr. at 1846:18-22 (Lehman). Such systems are “designed to fill holes in [click] data”; they allow Google to generalize from situations where it has data to situations it does not. *Id.* at 1896:2-19 (Lehman).

98. Although these newer systems are less dependent on user data, they were designed with user data and continue to be trained on it, albeit using less volume. *See id.* at 1845:12-21 (Lehman) (discussing UPX255 at .010–.011) (older signals use up to 1 trillion examples, whereas newer algorithms require only 1 billion); UPX226 at 483 (“Learning from this user feedback is perhaps the central way that web ranking has improved for 15 years.”) (discussing BERT and

RankBrain); *see also* Tr. at 2652:11-14 (Parakhin) (“The more data of this nature we have, the more we can train algorithms to be better in predicting what is good and what is bad.”).

99. MUM is a large language model (LLM), or “a computational system that tries to, in some way, capture patterns in language.” Tr. at 1912:22-23 (Lehman). Whereas RankBERT “exhibited fairly weak performance” on newer scoring metrics, MUM “achieved essentially human-level performance.” *Id.* at 1915:10-20 (Lehman). MUM is trained on a subset of the web corpus, as well as some click training data, to allow it to “understand the structure of language and acquire some kind of reasoning abilities.” *Id.* at 1919:8-14 (Lehman); *id.* at 6358:8-20 (Nayak).

100. Google has also developed three newer LLMs: LaMDA, PaLM, and PaLM2. LaMDA was released in 2021 and is focused on conversation; PaLM and PaLM2 expanded on LaMDA and have more capabilities. *Id.* at 6363:22–6364:3 (Nayak). These systems were not built with user data. *Id.* at 6364:13-22 (Nayak).

101. Google has also developed a Search Generative Experience, which leverages artificial intelligence (AI) in search. *Id.* at 6364:4-12 (Nayak). This experimental product “add[s] generative AI into the search results to enhance them[.]” *Id.* at 8217:3-5 (Reid); *see infra* Section II.H.

102. The more recent LLM signals did not replace Navboost and QBST in ranking. Tr. at 1931:21-24 (Lehman); UPX190 at 740 (“Navboost remains one of the most power ranking components historically[.]”). Nor did they render the generalization systems obsolete. *See* Tr. at 6366:21–6367:10 (Nayak); *see also* FOF ¶¶ 114–115. LLMs are used as “additional signals that get balanced both against each other as well as against other signals[.]” Tr. at 6367:5-7 (Nayak).

103. Traditional systems like Navboost can also beat out LLMs (and even generalization systems) in certain aspects of SERP production, like freshness. UPX214 at 696; UPX256 at 185.

104. To be sure, there are diminishing returns to user data, but that inflection point is far from established. And, in any event, user data does not become worthless even after the point of diminishing returns. *See* Tr. at 10078:7-9 (Murphy) (“[T]here’s pretty much always diminishing returns, but that doesn’t mean they’re not valuable even after some diminishing returns have set in.”); *id.* at 6337:8-18 (Nayak) (“[T]he value you get from every additional piece of data starts falling,” but the overall value “continues to increase a little bit.”).

105. Google continues to maintain significant volumes of data—despite the expense of storing it—because its value outweighs that cost. *See id.* at 6337:17-25 (Nayak) (“[A]s you get more data, it’s more expensive to process.”); *id.* at 10349:24–10350:7 (Oard) (“[T]he cost of keeping and using this data goes up with the amount of data that we keep. The value goes up as well. And at some point, if the value were to decline to the point where it wasn’t worth the cost, people would stop doing it[.] . . . [T]here’s a sweet spot where you would stop doing it, and Google hasn’t stopped doing it yet.”); *id.* at 10079:9-10 (Murphy) (“I would presume if they maintain it and it’s costly to maintain it, there’s a reason they maintain it.”).

106. For GSEs with little scale, even a small amount of data can result in meaningful improvements. *Id.* at 10347:7-10 (Oard) (“And when you have very little, then not only do you get better, but you keep getting better at a faster and faster rate up to some point where the rate at which you’re getting better starts to slow down.”); *id.* at 2047:21–2048:3 (Weinberg) (“[W]e lack the scale to do as much experimentation as we want[.]”).

H. Artificial Intelligence

107. “Artificial intelligence is the science and engineering of getting machines, typically computer programs, to exhibit intelligent behavior.” *Id.* at 6339:18-20 (Nayak). One application of AI enables computers to understand and solve problems without human intervention.

108. For instance, AI researchers have sought to program “computers to directly understand a document or a passage just based on the words.” *Id.* at 1909:5-6 (Lehman). These sorts of programs are known as LLMs or machine-learning models. *See id.* at 2667:25–2668:4 (Parakhin) (“A large language model is the closest that humanity came to producing actual artificial intelligence. It is a system that can look at written text or images, and reason over it and provide answers in a human readable flowing sort of language.”).

109. Beginning in 2015, Google increasingly began to incorporate AI technologies into its search processes. *Id.* at 6341:18–6342:11 (Nayak). Around that time, Google published “a family of deep neuralnets that are called transformers that . . . take an input and spit out an output[.]” *Id.* at 7403:9-17 (Raghavan). This technology, which is incorporated into signals like MUM, allowed Google to rely on less user data and still improve its ranking of search results. FOF ¶¶ 97–101.

110. For instance, AI technology has accelerated search quality with respect to spelling corrections or semantically related concepts, without relying on user data. *Tr.* at 3697:7-17 (Ramaswamy). Neeva leveraged machine learning to develop its spell-correction technology, as opposed to relying entirely on user data. *Id.* at 3781:23–3783:20 (Ramaswamy). And if a user were to query “vacuum cleaner for a small apartment with pets,” Google’s transformer technology helps discern “whether the user wants an apartment, a vacuum cleaner[,], or a pet[.]” *Id.* at 7405:5-11 (Raghavan); *see also* UPX197 at 211 (discussing impact of machine learning on relevance).

111. AI technologies have the potential to transform search. *Tr.* at 3696:11–3697:21 (Ramaswamy) (“AI enables search engines to do things that are not really conceivable in a return-a-set-of-links model, which is what commercial search engines generally do today.”). Recently, Google and Bing have incorporated generative AI technology into their SERPs by providing “AI-

powered answer[s],” which do not rely on user data to produce. *Id.* (generative AI can supplement user data by offering different SERP functionality beyond organic links, such as an “AI-powered answer”). Such answers also can come in the form of AI chatbots, such as Bing’s BingChat (now Copilot) and Google’s Bard (now Gemini). *Id.* at 8272:9-24 (Reid). The input could be an image or words, and the output may be similarly varied. *Id.* at 7404:8-11 (Raghavan). Neeva also relied on AI-generated search results to differentiate itself from other GSEs and used AI to develop a search product with less user data. *See id.* at 3696:11–3697:21 (Ramaswamy).

112. The integration of generative AI is perhaps the clearest example of competition advancing search quality. Google accelerated and launched its public piloting of Bard one day before Microsoft announced BingChat, the integration of ChatGPT’s generative AI technology into Bing to deliver answers to queries. *Id.* at 8272:4-7 (Reid); *id.* at 2670:10–2671:9 (Parakhin). (describing BingChat).

113. AI also has applications in search advertising. “Natural language understanding is a subfield of artificial intelligence” that seeks to “understand what it is a user is trying to get done, going back to the intent.” *Id.* at 7376:1-3 (Raghavan). Google applies natural language understanding to its search advertising to better discern user intent and deliver an optimally responsive advertisement. *Id.* at 7376:3-21 (Raghavan).

114. Despite these recent advances, AI has not supplanted the traditional ingredients that define general search. *See* UPX197 at 211 (“There is a lot more to web ranking for which [machine learning] seems much less appropriate.”). And it is not likely to do so anytime soon. *Tr.* at 7531:23–7532:8 (Raghavan) (“I view this as a journey, not as something that happened overnight. And I think what we in the industry have to figure out is how to use the AI . . . tools to do a better and better job of defining the user’s intent and giving just the perfect answer. And what I’ve seen

so far is one more step. I think there's a few more steps to go, and I expect that in time, for instance, you will see these language models be able to service queries not only from typewritten prompts, but voice queries, image, camera, as well. And that's a journey that we're still early on."); *id.* at 7530:7-8 (Raghavan) ("It's not the case . . . that everything we do in ten years will be through" LLMs.); *id.* at 7530:9-18 (Raghavan) (Google has no plans to stop crawling and indexing the web in the foreseeable future nor will it stop presenting users with organic links on the SERP); *id.* at 7665:23-25 (Pichai) ("Now with artificial intelligence, I think we are again in the early stages of completely rethinking what's possible for our users.").

115. Importantly, generative AI has not (or at least, not yet) eliminated or materially reduced the need for user data to deliver quality search results. *Id.* at 3697:17-21 (Ramaswamy) ("[T]he middle problem of figuring out what are the most relevant pages for a given query in a given context still benefits enormously from query click information. And it's absolutely not the case that AI models eliminate that need or supplant that need."); *id.* at 1931:21-24 (Lehman) (MUM "definitely" did not replace traditional data-based signals, like Navboost and QBST). When asked to predict how search engines will work in five or 10 years, Google's former Distinguished Software Engineer, Eric Lehman, testified that while it may be diminished in the future, "there will still be a role for user data[.]" *Id.* at 1924:18–1925:22 (Lehman). This is in part because "deep learning systems are much harder to understand." *Id.* at 6366:21-22 (Nayak). It thus remains vital for Google to "have an infrastructure that [it] understand[s]," i.e., traditional ranking signals. *Id.* at 6366:21–6367:10 (Nayak) ("[T]here is no sense in which we have turned over our ranking to these systems. We still exercise a modicum of control over what is happening and an understandability there.").

I. User Data and Privacy

116. Google recognizes that users increasingly care about the privacy of their online activity. *See generally* UPX1069. *See* Tr. at 7471:5-25 (Raghavan); *id.* at 8994:22–8995:1 (Fitzpatrick) (“[E]xpectations around privacy from our users from, frankly, society across the tech industry, have evolved pretty significantly.”); *id.* at 8995:13-16 (Fitzpatrick) (noting that “focus on privacy as a topic has really elevated and increased” recently). So do browser developers, *see id.* at 2484:6-11 (Cue) (Apple); M. Baker Dep. Tr. at 117:8–118:7 (Mozilla), and other GSEs, Tr. at 3677:19–3679:16 (Ramaswamy) (Neeva); UPX720 at 249–53 (DDG).

117. Google has a Privacy, Safety, and Security team that focuses, among other things, “on both building proactive privacy protections into [Google] products, as well as building technical privacy protections into [the] systems and infrastructure,” and “keeping users safe in [Google] products.” Tr. at 8989:19-24 (Fitzpatrick). Google surveys users about its privacy offerings. *See, e.g.*, DX183 (2020 study assessing user trust related to privacy).

118. When Google makes decisions about privacy-focused features, rivals’ privacy offerings are “something [Google] keep[s] an eye on” as one of “many” data points.” Tr. at 8998:1-4 (Fitzpatrick). Google several times has considered undertaking privacy initiatives after looking to rivals. *See, e.g.*, UPX811 at 420 (comparing Google to DDG and recommending Google adopt certain features); UPX794 at 146 (same).

119. But Google also considers the business case for making privacy-focused changes. UPX501 at 520 (2019 email from Raghavan stating that merely because “people care increasingly about privacy” and “DDG is making a lot [of] noise about it,” it did not mean that Google needed “a product change”); *see* Tr. at 7411:17-21 (Raghavan) (“And the team that came forward with the proposal said we need to do exactly what [DDG’s] doing. And my pushback was maybe we do,

maybe we don't, but I'd like to see the data on the impact on users, and on our ability to build a good search and search ad system.”).

120. Google believes that there is a trade-off between search quality and user privacy. *See* Tr. at 8998:1-7 (Fitzpatrick) (“But when we’re designing, whether it’s a product overall, a new feature, or a privacy control or capability, end of the day the question is: How do we do what’s right for our users?”); *id.* at 7475:1-2 (Raghavan) (agreeing that an incognito mode feature could be accomplished “[a]s a technical matter,” but “[t]hat doesn’t make a good product design”); UPX500 at 518 (“DDG might also not be the best model for Google users’ privacy needs[.]”); UPX501 at 520 (“I want to see evidence that there’s a real impact on Google users, attributable to” privacy.).

121. The degree of privacy a GSE offers reflects a series of individual design decisions. Whether to track a user’s sessions data is one such decision. According to Google, tracking user sessions is “measurably beneficial to the user experience, including things like [i]n-session use of context to improve results.” Tr. at 9035:22–9036:1 (Fitzpatrick). Such data also helps to tailor the advertisements that Google delivers to a user. *See id.* at 7457:23–7458:9 (Raghavan); *id.* at 9069:15-23 (Fitzpatrick). DDG, on the other hand, anonymizes user click data and does not track user sessions. *Id.* at 2050:24–2051:7 (Weinberg). It therefore cannot discern whether multiple searches are the same user performing different actions. *Id.* at 2051:3-7 (Weinberg); *id.* at 1944:14-18 (Weinberg) (“[I]f 100 people search for cat pictures today, we don’t really know whether it’s like one person or 100 different people.”).

122. How a GSE uses IP addresses is another design decision. Google logs IP addresses and uses them to customize search results. *See, e.g., id.* at 1772:22–1773:15 (Lehman) (“[K]nowing a person’s . . . location can sometimes help understand what it is they’re looking

for.”); *id.* at 1778:16-18 (“[I]n general, showing people search results that are appropriate to their location for a certain query is important[.]”). DDG, in contrast, does not log IP addresses. Instead, it “use[s] the location that [it] get[s] via the IP address, and then [it] throw[s] it away after the search is done.” *Id.* at 2085:25–2086:1 (Weinberg).

123. Google also logs IP addresses to enhance security. *Id.* at 7413:25–7414:10 (Raghavan) (Google logs IP addresses to detect and combat botnets and fraudulent clicks). DDG “had developed [its] own click fraud systems” that do not require logging of IP addresses. *Id.* at 2069:10-11 (Weinberg); DX621 at 100.

124. Another question of privacy design is whether to invite users to “sign in.” Google does so because it believes such functionality improves search results and overall search engine quality. *See* Tr. at 3737:5-8 (Ramaswamy) (personalization improves search quality). DDG does not have an option for users to “sign in” to its platform. *Id.* at 1944:14-15 (Weinberg) (“[E]very time you search on DuckDuckGo, it’s like it’s your first time[.]”).

125. How much user data a GSE retains also is a measure of privacy. Google chose to retain 18 months, even though some survey data suggested users preferred a shorter retention period. UPX996 at 978 (49% of users surveyed would prefer that Google stored one month or less data, and 74% wanted Google to store their data for under one year). The decision to retain 18 months of a user’s data versus fewer months was largely arbitrary. Tr. at 9013:9-18 (Fitzpatrick) (While Google “felt like it was important to have a default that was greater than that one-year boundary to allow for . . . annual seasonality [of information] to still be preserved,” the decision to default to 18 months (as opposed to 13 months) was because 13 “felt like a really weird number” and 18 months “just felt a little . . . better.”).

III. GOOGLE SEARCH

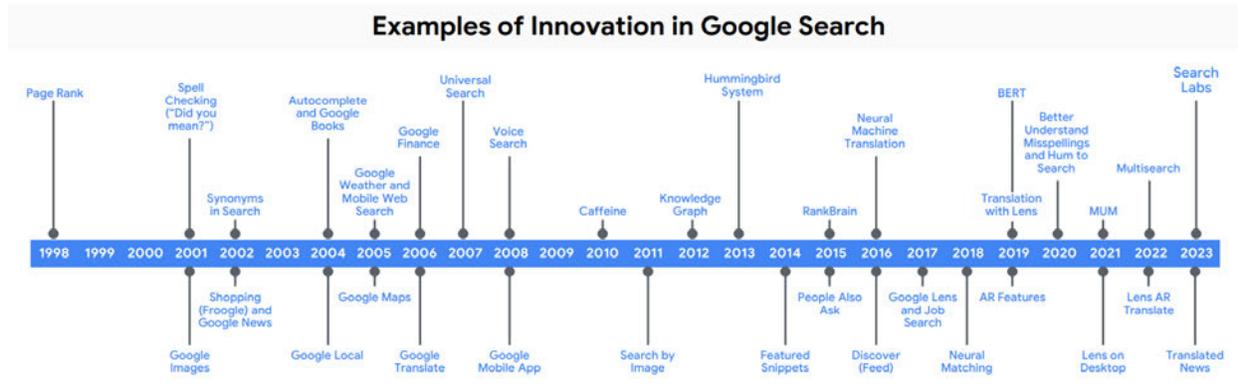
A. Product Development

126. Google is widely recognized as the best GSE available in the United States. *See, e.g., id.* at 2586:1-2 (Cue) (Apple) (“Google still has the best search engine by far[.]”); DX547 at .002 (Mozilla) (“Google is the clear winner when it comes to product experience and what users want.”) (internal quotation marks omitted); Christensen Dep. Tr. at 146:19-23 (Motorola) (“We have a positive opinion about Google Search, as do most consumers I think. It’s – it’s fast. It’s reliable. It performs well for consumers’ intended purchase in our opinion.”); Giard Dep. Tr. at 33:2-3 (T-Mobile) (Google “provides customers with the best overall device experience[.]”); DX385 at 239 (AT&T) (“Google generates more query volume and monetizes search at higher rates than Bing and Yahoo[.]”); *accord* Tr. at 9429:3 (Rosenberg) (Google) (“[W]e think Search is best in class.”).

127. Although Google significantly outperforms all rivals on mobile devices, Bing’s search quality on desktop measures up to Google’s. *See* Tr. at 6048:12-15 (Whinston) (Bing’s quality “is very close on desktop” to Google); UPX238 at 667 (“Bing is comparable on desktop . . . and leads in several desktop verticals[.]”); UPX260 at 681 (Bing is comparable to Google for desktop result relevance and outperforms Google on desktop for overall preference).

128. Google’s superior product quality rests in part on its numerous innovations over the years, as depicted below. *See* Tr. at 9899:21–9900:6 (Murphy) (discussing DXD37 at 140).

Google Has Made Continual Investments That Expand the Use of Search



DXD37 at 140.

129. “In analyzing potential changes to its Search product, Google considers the needs of users. Google recognizes that it exists in a competitive landscape and if it does not satisfy users’ information needs, users will access information from other search providers (general or otherwise). Google does not, however, consider whether users will go to other specific search providers (general or otherwise) if it introduces a change to its Search product.” UPX6019 at 365–66.

B. Branding

130. The fact that “Google is used extremely highly across the world . . . contribute[s] to brand formation.” Tr. at 672:20-21 (Rangel); *id.* at 7780:23-24 (Pichai) (“Our brand gets validated by being present as a default in iPhones.”). Google also built brand loyalty and recognition by offering a high quality product. *Id.* at 5921:22–5922:5 (Whinston); *id.* at 8397:21-22 (Israel) (“Google is building a brand reputation by how well it provides searches.”).

131. Google has long recognized that “the affinity of the Google brand was something that was valued by users[.]” *Id.* at 361:17-18 (Barton); *see* UPX93 at 904 (“Several factors are believed to affect the choice [of a GSE], including . . . brand strength[.]”) (2007); UPX171 at 186

(“Our brand is in good standing among iPhone users” based on “[k]ey satisfaction and brand affinity metrics[.]”) (2015).

132. Perhaps the best example of Google’s brand is that the public uses the term “Google” interchangeably with internet search. “[T]o search is to Google. Google is a verb.” Tr. at 623:20-21 (Rangel); *see also id.* at 672:14-23 (Rangel) (same); *id.* at 4769:10-16 (Whinston). Moreover, a search for “google.com” is one of the most frequently entered search queries on Bing. *Id.* at 2745:21-25 (Parakhin).

133. Google’s strong brand also benefits its partners. *See id.* at 7780:21-23 (Pichai) (“Apple benefits and sells more iPhones by having their brand associated with the quality . . . [of] Google Search.”).

C. Internal Quality Studies

134. In 2020, Google assessed the impact of degrading aspects of its search quality for about three months, specifically its large ranking components (e.g., Navboost, Synonyms). *See UPX1082* at 294. The experiment tested a quality decline of 1 IS point, a measure of search quality equivalent to the loss of two times the information contained on all of Wikipedia. *See id.*; Tr. at 6323:12-17 (Nayak) (“If we took Wikipedia out of our index, completely out of our index, then that would lead to an IS loss of roughly about a half point.”); *id.* at 4771:4–4773:9 (Whinston) (describing this experiment). This quality-reduction experiment correlated with only a 0.66–0.99% decline in global search revenue. *UPX1082* at 294. In short, this study demonstrates that a significant quality depreciation by Google would not result in a significant loss of revenues. *See id.* *But see id.* at 6329:22-25 (Nayak) (“[I]f you made much larger IS changes, the relationship might not stay linear. It might become nonlinear. There might be inflection points where if you make search much worse, for example, you might actually lose a lot more traffic[.]”).

135. Google has at times tracked its competitors' market shares or standing by identifying other GSEs and comparing Google to those rivals. *See* UPX399 at 965–66 (2014 document referring to Google, Bing, and Yahoo); UPX475 at 744 (2018 email chain and attachment calculating market share against other GSEs); UPX268 at 182 (2020 slide deck comparing Google, Bing, DDG, Qwant, and Ecosia).

136. When Google evaluates its own quality, it does so by conducting side-by-side experiments with other search engines. *See* Tr. at 6466:4-18 (Nayak) (discussing UPX2033) (describing side-by-side Google-Bing analysis with respect to queries relating to COVID-19). These studies involve IS4 rating systems that use human raters to compare results. *Id.* at 8099:4-25 (Gomes). In the past, Google has compared its latency and search results quality (using IS differences) to Bing's. *See id.*; *id.* at 6457:13-21 (Nayak) (discussing UPX2022, a 2017 document comparing Google and Bing's relative latency); *id.* at 7771:12-25 (Pichai). Google engages in an ongoing evaluation of Bing as part of its work. *Id.* at 8099:23-25 (Gomes).

137. Latency measures the speed with which a GSE returns search results and is an important quality metric. *Id.* at 1345:15-17 (Dischler). In 2017, Google analyzed its latency relative to Bing and determined that, for certain popular queries on Google, 25% of the time, the SERP took more than three seconds to load. UPX2026 at 122. Bing was “dramatically faster[.]” *Id.* at 123. Its first result arrived sooner 98% of the time. *Id.* This translated to about 300 milliseconds faster than Google. UPX2022 at 590. In response, Google launched Project Folly, “an attempt at instituting a set of projects and policies and processes to decrease latency.” Tr. at 6458:12-19 (Nayak). The project was a success. *Id.*

138. Google has also evaluated its privacy protections and IS metrics compared to those of DDG. *Id.* at 8099:17-19 (Gomes) (Google “use[s] IS4 and human raters to compare against competitors like” DDG).

139. Google does not compare latency or IS scores with social media platforms like TikTok “because they’re very different experiences.” *Id.* at 6467:8-14 (Nayak); *id.* at 8100:4-8 (Gomes) (IS ratings comparison with Facebook is “not something that [Google] could do easily”). The same is true with respect to specialized vertical providers like Amazon. *See id.* at 8100:1-3 (Gomes).

140. That said, Google has assessed the competitive threat posed by specialized vertical providers and social media platforms. For instance, in 2021, Google sought to understand whether younger users relied on social media instead of Google for search; the study concluded that youth have different behaviors that drive their desired search experience, one of which is increased importance on receiving recommendations from individuals. *Id.* at 8206:24–8208:11, 8249:23–8250:25 (Reid). Among “Generation Z” participants (defined as participants between the ages of 18–24 who use TikTok daily), 63% reported that they use TikTok as a search engine. DX241 at .032. And a 2015 Google User Experience Research study concluded that Google users frequently used specialized vertical providers’ mobile applications. *See* DX62A at .027–.028.

IV. OTHER PLATFORMS

A. Special Vertical Providers

141. Specialized vertical providers, or SVPs, are platforms that respond to queries centered on a particular subject matter. *Tr.* at 8626:5-12 (Israel). Examples of SVPs include Amazon, Expedia, and Yelp. *See id.* at 1031:14-18 (Higgins); *id.* at 2169:3-8 (Giannandrea).

142. Most SVPs do not respond to noncommercial queries, although there are exceptions, e.g., Wikipedia. *Id.* at 8396:23–8397:3 (Israel).

143. SVPs are not GSEs. *E.g., id.* at 8098:4-6 (Gomes).

144. Once a user is on an SVP’s site, the SVP facilitates navigation “only to sites in their segment where [the user] can make a transaction,” with some exceptions. *Id.* at 7032:18-23 (J. Baker). This is known as a “walled garden” model, where the platform has proprietary, structured data that is not available on the open web. *Id.* at 8100:11-14 (Gomes). Thus, an SVP like “Amazon is not a competitor for nav[igational] queries.” *Id.* at 8749:3 (Israel); *see also id.* at 1492:18-22 (Dischler) (“Google offers the full web, to the extent that Google has access to it. Amazon offers the products that are available at Amazon. It’s possible that some products available at Amazon are not available via Google’s access on the web, and Amazon may have their own unique inventory.”).

145. Home Depot, for instance, maintains a product catalog of goods that it sells both online and in stores. *Id.* at 5115:4-11 (Booth); *see also id.* at 8395:14-24 (Israel) (discussing DXD29 at 17) (Home Depot is an SVP in the shopping vertical). Users of Home Depot’s digital platforms can use them to purchase those goods but not navigate to a product-maker’s website to make a direct purchase there instead. *See id.* at 5115:12-14, 5128:22–5129:4 (Booth); van der Kooi Dep. Tr. at 79:11-12 (“It is a search on what is available in the catalog.”).

146. Fact witnesses with industry experience agree that SVPs are different from GSEs. *See, e.g.,* Tr. at 1031:20–1032:2 (Higgins) (stating GSEs involve “anything that’s available on the web,” while SVPs are “specifically focused on a domain”); *id.* at 2168:5–2169:11 (Giannandrea) (does not consider SVPs to be GSEs); *id.* at 3670:12-13 (Ramaswamy) (GSEs are “best defined in contrast to a specialized search engine”); *id.* at 5230:21-23 (Dijk) (Booking.com is not a GSE).

147. Fact witnesses with industry experience also agree that an SVP could not substitute for a GSE as a default search engine. *Id.* at 2171:10-13 (Giannandrea) (agreeing that “users, when they put something in the URL bar of Safari, they have an expectation that it’s going to go to a general search engine”); *id.* at 1032:7-20 (Higgins) (stating that he would not recommend that an SVP be set as a default search engine on a Verizon device, because “consumers would like to have some search capability on their devices, and the preference would be for a general as opposed to a specific vertical”); *id.* at 7425:25–7426:14 (Raghavan); M. Baker Dep. Tr. at 217:3-15, 218:8-9 (“The user experience trying to use general search with only Amazon would not be good.”).

148. Plaintiff States’ expert, Dr. Jonathan Baker, provided an example. If a user enters a query for “UFOs” on Google, they will be presented with nearly 2 billion search results. But that same query on Amazon yields only around 10,000 results, all of which are products for purchase. And if a user searches on Expedia or HomeAdvisor for “UFOs,” they will receive no results. Tr. at 7031:21–7032:6 (J. Baker) (discussing PSXD11 at 21).

149. Google’s own employees recognize that SVPs are not GSEs. *See id.* at 8098:4-6 (Gomes); UPX911 at 875 (“Amazon is not considered a search site.”); Tr. at 183:13-18 (Varian) (agreeing that “Amazon, Apple, and Facebook don’t provide general-purpose search engines”); *id.* at 484:20–485:4 (Varian) (Amazon’s search results are narrower than Google’s “[b]ecause they use different algorithms, different datasets, different history, different understanding of users”).

150. Nevertheless, both Google and other GSEs compete against SVPs for certain commercial queries in vertical offerings, such as travel and shopping. *See* Tr. at 3646:3-11 (Nadella); *id.* at 5883:16-22 (Whinston); *id.* at 8202:1-6 (Reid) (listing Amazon, DoorDash, OpenTable, Yelp, and TripAdvisor as competitors for shopping and food queries); *id.* at 7310:5–7312:4 (Raghavan); *see* UPX8085 at 854 (“We face formidable competition in every aspect of our

business, including, among others, from . . . vertical search engines and e-commerce providers for queries related to travel, jobs, and health, which users may navigate directly to rather than go through Google[.]”). Google’s internal documents reflect differentiated analysis for “traditional Search engines such as Bing, Yandex, DuckDuckGo and alike” versus “[v]ertical search and apps analysis (including Amazon, Booking, etc.)[.]” UPX483 at 295.

151. Google views competition from SVPs as “intense for commercial clicks.” UPX343 at 845. A 2020 Bank of America study reported that 58% of users search Amazon first when they seek to make an online purchase, as opposed to only 25% who go first to Google, demonstrating Google’s secondary status as a starting point for users with high commercial intent. Tr. at 8425:15–8426:8 (Israel) (discussing DXD29 at 28). Google thus perceives Amazon as posing a risk of siphoning queries away from Google. DX126 at .019.

152. Microsoft recognizes that “if Bing or Google were not doing vertical searches well, or at least not having organic results that people could click to get to vertical search engines,” users might bypass GSEs and instead search directly on Amazon from the outset. Tr. at 3649:23–3650:6 (Nadella). *But cf. id.* at 1942:18-21 (Weinberg) (DDG does not consider Amazon or other SVPs to be competitors that users are likely to switch to or from).

153. Even for overlapping queries, GSEs and SVPs can serve as complementary search platforms. As Dr. Baker opined, “it wouldn’t be surprising if, for example, a search user entered a query for red shoes on a general search firm, saw a link to a shopping SVP, and then clicked on it and entered a search for red shoes there. That would be a natural thing to expect.” *Id.* at 7035:9-13 (J. Baker); *accord id.* at 7435:5-7 (Raghavan) (“Prime members who in any way intend to shop at Amazon might come to Google and do a lot of research before they do it.”).

154. For that reason, studies conducted by Google’s expert Dr. Mark Israel regarding query overlap do not show that SVPs like Amazon and Yelp belong in the same product market as Google. *See id.* at 8406:5–8407:4 (Israel) (discussing DXD29 at 20) (analysis showing that a query sample of Google’s top 25 non-navigational shopping queries attracts more queries weekly on Amazon (3.7 million) than Bing (0.4 million)); *id.* at 8411:3-13 (discussing DXD29 at 21) (finding that Yelp’s local query volume is higher than Google’s and much higher than Bing’s); *see also id.* at 8401:4–8404:15 (Israel) (discussing DXD29 at 18) (analyzing the percentage of searches on GSEs as compared to SVPs for particular verticals).

155. SVPs are often reliant upon GSEs for traffic. *See id.* at 3534:7-23 (Nadella); *id.* at 2645:13-18 (Parakhin); *id.* at 7032:7-15, 7033:13-21 (J. Baker). For instance, Dr. Baker’s analysis demonstrated that 33–88% of SVPs’ online traffic (depending on the vertical) flows through GSEs, either via organic links or advertisements. *Id.* at 7033:18-21 (J. Baker) (discussing PSXD11 at 25). Although this analysis omits traffic through mobile applications, the conclusion is bolstered by Google’s own analysis showing that “Amazon” was Google’s fourth highest query by volume in 2018. *See* UPX342 at 859.

156. For this reason, SVPs are top advertisers on GSEs. *Tr.* at 9209:1-10 (Holden) (travel SVPs like Booking.com and Expedia are some of Google’s largest advertisers); *id.* at 4615:11-16 (Whinston) (“[I]f you go and you look which are the biggest advertisers on Google, which are the biggest advertisers on Bing, the answer is specialized search engines. And what it’s reflecting is that there’s a bunch of traffic they think they can’t get directly, you know, otherwise they wouldn’t be spending the money to try to get referrals.”); *id.* at 5116:3-8 (Booth) (Home Depot is a “large” purchaser of ads on Google, spending “hundreds of millions of dollars”); *see also infra* Section V.A.1.

157. Empirical research—performed by Google—demonstrates that use of SVPs is complementary, rather than cannibalistic. In other words, there is no evidence that increased use of SVPs correlates with a diminished use of Google or other GSEs. *See* UPX344 at 058; UPX436 at 005. For instance, Google’s 2019 Project Charlotte study showed that users who were members of SVP loyalty clubs (e.g., Amazon Prime) or who otherwise engaged with SVPs were *more* likely to enter queries on Google. Tr. at 7430:2–7435:20 (Raghavan). Similarly, a 2018 Google analysis concluded that Android users who were active on the Amazon application yielded \$2.31 per user in incremental search revenue for Google. UPX335 at 694. More recently, a 2020 Google study found a positive correlation between Amazon application use and query volume on Google, ultimately determining that a user’s adoption of any of six major SVP applications—Amazon, eBay, Walmart, Pinterest, Spotify, or Twitter—was related to increased revenues and queries on Google mobile, with no significant change on desktop behavior. Tr. at 8733:1–8738:19 (Israel); PSX562 at 966, 977.

158. SVPs do not view themselves as competing with general search, although they may compete with GSEs’ vertical offerings. *See, e.g.*, Tr. at 6580:1-15 (Hurst) (Expedia competes with Google’s travel verticals, but not its search product, because users “can’t generally search for most of the things [one] search[es] Google for on Expedia . . . Expedia[’s] product literally does not work for what I assume is the overwhelming majority of Google general search.”).

B. Social Media Platforms

159. Users go to social media platforms primarily to interact with others and view photos and videos. *Id.* at 5392:19-24 (Jerath); *cf. id.* at 6943:19-21 (Amaldoss) (“I can say people go to social media for entertainment and Twitter for entertainment. They’re not going there to collect

information.”). People tend to engage with social media properties for longer sessions than with GSEs. *See id.* at 1408:3-20 (Dischler).

160. Examples of social media platforms are Facebook, Instagram, Twitter, Snapchat, LinkedIn, Pinterest, and TikTok. *Id.* at 3928:2-14 (Lowcock); *id.* at 4840:23-25 (Lim).

161. Industry participants do not consider social media sites to be GSEs. *See, e.g., id.* at 5243:6-8 (Dijk) (TikTok); *id.* at 183:13-18 (Varian) (Facebook).

162. On TikTok, users do not have to enter a query to view content. *Id.* at 7419:16-18 (Raghavan). Instead, they “scroll through a video feed that’s based on an algorithm of their engagement with past videos[.]” *Id.* at 7419:23–7420:1 (Raghavan). TikTok does have a search functionality, but if users enter a query on TikTok, the results page only displays content already on TikTok and does not contain links or information from the open web. *Id.* at 7420:22–7421:7, 7421:22-25 (Raghavan). As compared to Google, the user experience on TikTok is “quite different, that’s clear.” *Id.* at 7424:17-18 (Raghavan).

163. Google’s internal studies suggest that younger users may be increasingly using social media for search-related needs. *Id.* at 8202:24–8203:5 (Reid); DX241 at .010 (“63% of daily TikTok users aged 18 to 24 stated that they use TikTok as a search engine in the last week.”). The majority of Google users are not in that narrow age range. Tr. at 8261:15–8362:20 (Reid).

164. Still, Google views social media sites like Facebook, Instagram, and TikTok as competitive threats. *See id.* at 7386:23–7387:13 (Raghavan); *see also id.* at 1412:23-25 (Dischler) (Instagram’s ad revenue growth is “seen as a competitive threat” by Google); UPX8085 at 854 (“We face formidable competition in every aspect of our business, including, among others, from . . . social networks, which users may rely on for product or service referrals, rather than seeking information through traditional search engines[.]”). For example, Google’s Senior Vice President

of Knowledge and Information Products, Dr. Prabhakar Raghavan, explained that TikTok is growing more rapidly than Google, in part due to “an extremely compelling product, especially for a younger demographic.” Tr. at 7393:2-15 (Raghavan); *see also id.* at 7401:9-11 (Raghavan) (describing “TikTok’s rise” as “mercurial,” and stating that he “expect[s] it to grow again at the expense of some of the others”).

165. The evidence does not show, however, that increased use of social media corresponds to a decrease in use of Google. In fact, a 2009 Google study showed that users who increase their use of Facebook tend to use Google more often, not less. UPX902 at 020.

V. THE DIGITAL ADVERTISING INDUSTRY

166. The digital advertising industry has grown rapidly in the last decade and a half. *See* Tr. at 1393:8-18 (Dischler) (describing “hundreds” of digital advertisers, such as “Meta, with their Facebook and Instagram properties; Amazon; Microsoft; Apple; Snap; various display networks. Netflix has now created an ad platform which is growing very quickly”); *id.* at 1394:2-12 (Dischler) (discussing DX3243); *id.* at 8553:4–8554:14 (Israel) (discussing DXD29 at 120) (digital advertising revenue has grown from about \$20 billion in 2008 to over \$200 billion in 2021, more than a ten-fold increase).

A. Search Advertisements

167. Search advertisements are a form of digital advertising. Search advertisements are paid, or “sponsored,” postings published in response to a user’s query on a search platform. *Id.* at 1173:15-16 (Dischler). Search advertisements appear on GSEs and SVPs, as well as occasionally on social media platforms.

168. A “signal” within the context of search advertising is an indicator of a consumer’s intent to purchase a good or service. *Id.* at 404:25–405:16 (Varian).

169. Search ads are the product of a uniquely strong signal because they are delivered in response to a user's query. *See* UPX910 at 753 (“The vast majority of our profits come from search ads, because the signal from a query is s[]o strong.”). “The big idea is that when you search for a product or service, chances are you're interested in purchasing that product or service.” UPX428 at .010.

170. This signal is all the more powerful because it represents the user's declared intent in real time, that is, at the moment the intent is manifest. *See* UPX910 at 753 (a query for “tennis racquet” is a “strong indicator of interest in buying a tennis racquet,” and “[m]uch stronger than what you searched [] three days ago,” “[o]r what article you read yesterday”); UPX26 at 764 (“Search ads are an effective form of advertising since queries are a strong signal of user interest and intent and the ads appear immediately after the query is entered.”); Daniels Dep. Tr. at 31:4-8 (search consumers express “clear intent”).

171. As a result, advertisers view paid search as particularly efficient at driving conversions. *See, e.g.,* Tr. at 4854:23–4855:1 (Lim); UPX441 at 802 (JPMorgan Chase email: “Search can drive acquisition based on some of the strongest intent signals made available[.]”); Daniels Dep. Tr. at 31:13-19 (search customers express “the clearest preference” in the digital marketing ecosystem); Alberts Dep. Tr. at 45:18–46:16 (“[P]aid search can be an incredibl[y] powerful way to get in front of the consumer who is . . . actively looking to make a purchase or looking to sign up or enroll.”); *see also infra* Section V.D (describing differences in intent among users on various ad channels). A conversion typically is a sale or, for some goods or services, a new account or enrollment. Tr. at 4842:7-8 (Lim); *id.* at 5121:1-5 (Booth).

I. Search Ads on GSEs

172. GSEs earn revenue through the sale of search ads. *Id.* at 361:21–363:16 (Barton); *id.* at 1138:2-5 (Dischler) (the majority of Google’s revenue is ad revenue). When a user clicks on a GSE search ad, they are taken to an advertiser’s website or platform and encouraged to complete a sale or some other indicia of conversion. *Id.* at 1398:11-12 (Dischler).

173. There is a direct relationship between a GSE’s scale and its monetization of search advertising. *Id.* at 2646:18-22 (Parakhin). More users on a GSE means more queries, which in turn means more ad auctions and more ad revenue. *See, e.g., id.* at 5142:3-13 (Booth); *id.* at 6595:12-25 (Vallez); Stein Dep Tr. at 185:14-22.

174. Google does not serve ads in response to all queries. FOF ¶¶ 37–38. It does so only in response to queries that convey a “commercial intent,” which Google assesses by determining whether an advertiser is willing to pay for an ad in response to the query. Tr. at 1170:11-13, 1171:23–1172:1 (Dischler).

175. There are two primary types of search ads sold on GSEs: (1) general search text ads and (2) shopping ads, or product listing ads (PLAs). *Id.* at 1177:2-4 (Dischler). The figure below illustrates how those ad types can appear on a SERP. Other types of ads that appear on SERPs include local ads, hotel ads, and other travel ads. *Id.* at 1346:14-23 (Dischler).

The screenshot displays a search results page for 'men's shoes'. It is divided into three main sections identified by red lines and labels on the right:

- Product Listing Ads:** A grid of five shoe listings with images, brand names (Skechers, Leather Fall & Spring, Cole Haan, Cole Haan, Crown Vintage), prices, and star ratings.
- Text Ads:** Two text-based advertisements. The first is from Zappos, titled 'Mens Shoes At Zappos - Best Selling Shoe Styles'. The second is from Cole Haan, titled 'COLE HAAN® Official Site - Shop the New Collection'.
- Organic Results:** A search result from Nordstrom titled 'Men's Shoes', featuring a shoe image and a brief description of their offerings.

DXD3 at 2.

176. As shown, text ads resemble the organic links on a SERP. When a user types in a query, text ads generally appear at the top of the SERP with a designation indicating that they are paid advertisements. On Google, that designation is the word “Sponsored.” *See id.* Occasionally, a text ad will include an image. *See Tr. at 408:7-9 (Varian).*

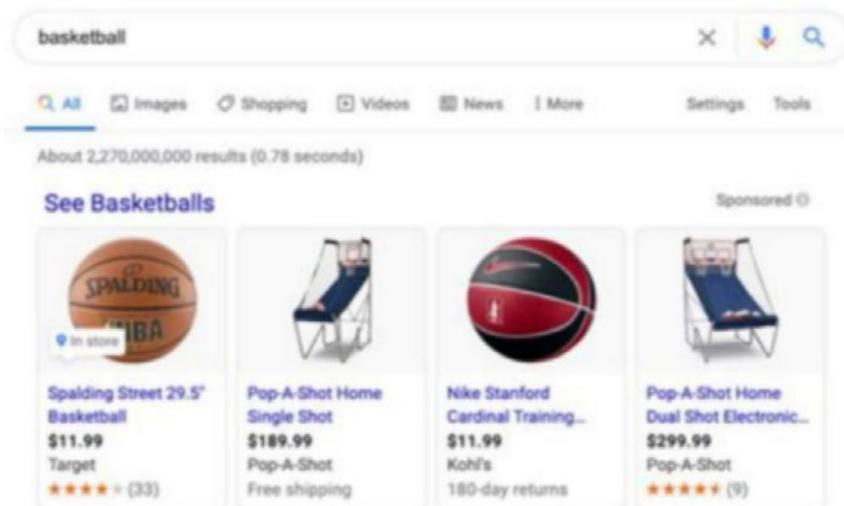
The screenshot shows a Google search for 'best bank' in Washington, DC. The search results are dominated by sponsored advertisements:

- Chase Bank:** A sponsored ad for a '\$200 CHASE Checking Offer - CHASE Total Checking® Account'.
- Citi:** A sponsored ad for an 'Unlock Up to \$2,000 Cash Bonus - Open a Citibank® Account'.
- Capital One:** A sponsored ad for 'Capital One Bank Accounts - No Fees or Minimums'.
- CIT:** A sponsored ad for 'CIT Bank Platinum Savings - New - CIT Bank Platinum Savings'.

UPXD13. As depicted in the two prior images, the number of text ads served can vary based on the query. Google's policy, however, is to serve no more than four text ads on a SERP. *See* Jain Dep. Tr. at 262:16–263:11 (discussing UPX746).

177. PLAs, also known as “[s]hopping ads[,] are designed for retail advertisers,” that is, sellers of tangible goods. Tr. at 1353:3 (Dischler); *id.* at 3998:7-9 (Juda). “The reason why is because when users are shopping, they often want to see pictures and prices and other relevant information about products.” *Id.* at 1353:4-6 (Dischler).

178. Google developed PLAs both to meet this consumer need and to compete with Amazon's retail offerings. *Id.* at 1354:3-15 (Dischler). A depiction of shopping ads on a SERP appears below.



UPX32 at 145.

179. Text ads differ from PLAs in several ways. Text ads can be used to advertise almost any product or service. So, virtually any seller can advertise using a text ad. *See* Tr. at 408:10-13 (Varian); *id.* at 3810:25–3811:5 (Lowcock); *id.* at 3995:11–3996:9 (Juda). PLAs, however, are used to market only tangible goods. *Id.* at 3811:22-24 (Lowcock).

180. A significant portion of Google’s search advertisers can purchase a text ad, but not a PLA. *Id.* at 1180:7-24, 1183:13-19 (Dischler); *id.* at 4251:2-9 (Juda) (“[P]roduct listing ads only appear on searches that are more retailer product oriented.”); *id.* (“[S]ince text ads offer a more free-flowing way for advertisers to target searches, they will sort of run the whole gamut of the kinds of searches that they may show against.”). For example, a financial institution like JPMorgan Chase purchases text ads but not PLAs. *Id.* at 4848:1-11 (Lim). Moreover, many of Google’s top advertisers by ad spend are online travel companies that do not purchase PLAs. *See* PSX867.002.

181. Text ads are thus the predominant form of advertising on Google, whether measured by revenue or number of advertisers. *Tr.* at 1180:25–1181:13, 1476:25–1477:5 (Dischler). In 2020, text ads made up about 80% of Google’s search ads by revenue. *Id.*; *id.* at 1282:9-11 (Dischler). In terms of ad types, 52.8% of ad dollars spent on Google come from advertisers who purchase only text ads; 46.9% is generated from advertisers who purchase both text ads and PLAs; and a mere 0.1% is originated by PLA-exclusive advertisers. *Id.* at 4649:5-15 (Whinston) (discussing UPXD102 at 37); *accord* PSX867.003 (54.7% of revenue comes from advertisers who purchase only text ads versus 45.1% from advertisers who buy both text ads and PLAs). When measured by number of advertisers, 92.5% of Google’s advertisers purchase only text ads, 5.5 % purchase PLAs and text ads, and 2% purchase only PLAs. PSX867.003; *accord* *Tr.* at 1476:25–1477:5 (Dischler).

182. Advertisers have significant control over the “copy” of a text advertisement. *Tr.* at 423:15-20 (Varian); *id.* at 3810:13-23 (Lowcock); *id.* at 1184:16–1185:1, 1185:13-15 (Dischler) (“Q. Would you agree that a text ad gives an advertiser more control when their ad appears on a search engine results page? A. It does.”). For example, advertisers can tailor the text of the advertisement to include a heading and description or add “extensions” such as additional site links

or contact information. *See* UPX12 at .005; Tr. at 1180:3-6 (Dischler). These are sometimes known as “formats.” Tr. at 4791:1-4 (Whinston); *see id.* at 5128:4-18 (Booth) (discussing PSXD2, Home Depot’s use of an extension to promote a Labor Day sale).

Anatomy of an Ad

Ad Content

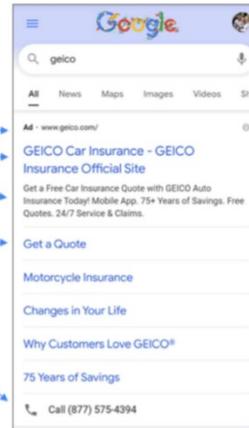
Text

1. Display URL
2. 1-3 Headlines
3. 1-2 description lines

Ad Extensions

4. Sitelinks
5. Call Extension

Other Extensions include:
Location, App, Price,
Promotion, Structured Snippet



UPX12 at .005.

183. By contrast, advertisers have less input into the final copy of a PLA. Tr. at 1185:2-15 (Dischler); *id.* at 5133:9-10 (Booth) (“There are fewer controls or ability to be able to custom tailor a product listing ad or a shopping ad.”). Google generates PLAs using machine learning, based on inventory information provided by the advertiser. *Id.* at 1185:4-6, 1353:7-11 (Dischler) (“The retail advertisers will provide us with a product feed that has structured information which is analogous to an ad creative[.]”).

184. Advertisers also have more control over text ads because they are purchased through keywords. A query that includes an advertiser’s selected keywords might trigger an advertisement from that source. *Id.* at 1185:16-19 (Dischler). Advertisers do not select keywords when buying PLAs. *Id.* at 1185:20-22 (Dischler). “Shopping campaigns rely on the feeds for letting the engines know when it is relevant to serve [the] product.” UPX926 at 698. “Since Shopping campaigns are not keyword-based, the information included in [the] product titles and

descriptions will be the main source of what the engines will be crawling before serving ads.” *Id.* at 699. *But cf. id.* at 701 (advertisers can use negative keywords to target PLAs); *infra* Section V.F.3.b (discussing negative keywords).

185. Both text ads and PLAs are sold using an auction, although those auctions are different. *Tr.* at 1197:9-13 (Dischler); *id.* at 3812:9-12 (Lowcock); *see infra* Section V.F (describing text ads auctions). In 2017, Google considered and rejected a combined auction for text ads and PLAs. *See* UPX1013 at .003 (deciding against integration in part because “user intent and advertiser value is different across the units, and as a result advertisers are not bidding on the same thing on Shopping and Text ads”). At present, changes to pricing of text ads auctions does not impact the pricing of PLA auctions. *Tr.* at 1203:21-24 (Dischler).

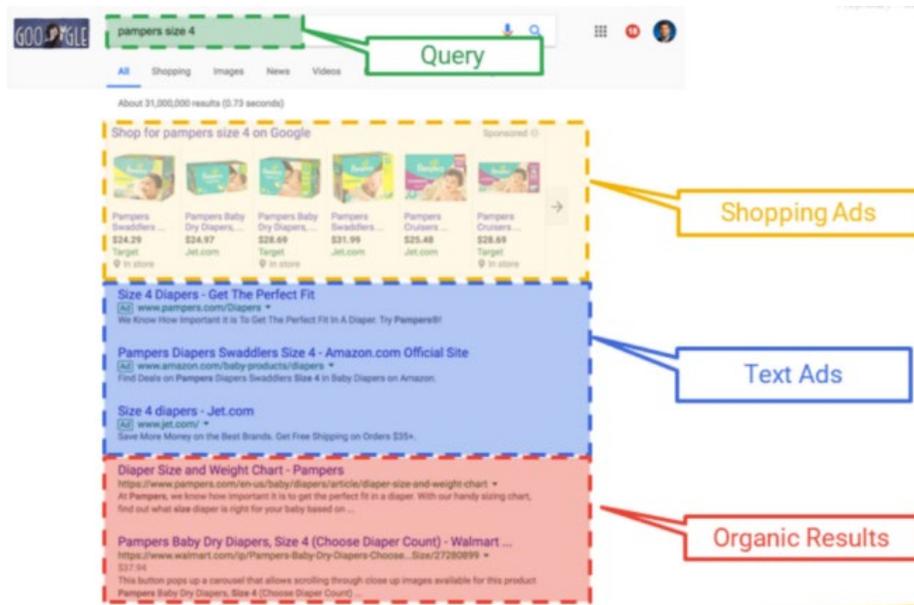
186. Both text ads and PLAs are sold on a cost-per-click (CPC) basis. “[T]he advertisers only pay[] if the user clicks on a link within their ad.” *Id.* at 1195:14-16, 1177:5-20 (Dischler); UPX1 at 538–39. PLAs cost less than text ads. *See* UPX1013 at .003 (“While PLAs are a great user experience and provide a great deal of advertiser value, the CPCs tend to be lower than text ads.”); *Tr.* at 4650:2-20 (Whinston) (discussing UPXD102 at 39) (concluding that “text ads are more expensive than PLAs” and while “PLA prices have been flat or, if anything, a little decreasing, [] text ad prices have been going up”); *cf. id.* at 4782:23–4783:2 (Whinston) (discussing UPXD102 at 65) (opining that the CPC of text ads has doubled between 2013 and 2021).

187. Google views text ads and PLAs as different products. *Tr.* at 423:12-14 (Varian); *id.* at 1188:10-16, 1188:25–1189:1 (Dischler) (“[F]rom the perspective of Google, shopping ads and text ads are different products.”); PSX191 at 722 (“Shopping and Text Ads are different products with different goals.”); *id.* at 723 (“Today these two formats are siloed in their own world

and don't compete[.]"); UPX1084 at 477 (slides summarizing differences between text and shopping ads); UPX440 at 590 (“[W]e believe that both supplement each other and provide useful information to the user.”). Accordingly, Google has separate teams for text ads and PLAs, and those teams have different goals. Tr. at 1188:25–1189:3 (Dischler); *id.* at 1498:9-16 (Dischler) (Google plans to continue selling text ads and PLAs as separate products).

188. Retail advertisers, however, often have the same goal when using both types of ads, which is to drive sales. *Id.* at 1183:22-25, 1190:4-8 (Dischler). Accordingly, retail advertisers “often will relatively allocate their budgets on text ads or shopping ads in order to achieve that objective at the lowest possible cost and highest effectiveness.” *Id.* at 1355:5-9 (Dischler); *infra* Section V.E.

189. Because tangible goods can be advertised using either a text ad or PLA, both ad types sometimes will appear on the same SERP. Certain retail advertisers attempt to purchase both to maximize their visibility on a given SERP. For example, if a user searches for a particular branded product (e.g., see below entering the query “pampers”), the brand can attempt to “own the SERP” by purchasing the top placements for both text ads and PLAs. *See* Tr. at 5137:14-17 (Booth) (“[T]he SERP has got limited real estate, and so the more that we can take up that real estate, the higher consideration we would have for somebody to select one of our ads.”).



UPX12 at .003.

190. Google recognizes that some advertisers use text ads and PLAs together to maximize their SERP “real estate.” *See* Tr. at 1354:18–1355:5 (Dischler); UPX464 at 155 (PLAs “[c]omplement[] text ads to increase an advertiser’s ‘shelf space’ on SERPs[.]”).

191. An advertiser may also purchase its rivals’ branded keywords to “conquest” by diverting rivals’ potential customers towards its platform. *See* Tr. at 3864:19–3865:25 (Lowcock). Conquesting thus is most effective through text advertising, which uses keywords. *See id.* at 4846:23–4847:8 (Lim) (“branded keywords” are those that contain a firm’s “owned and operated terms”); *id.* at 5131:22-25 (Booth) (text ads are better suited to branded keywords, as a query for “Home Depot” is too general to assign to a single product).

192. Google’s market share in the text ads market measured by ad spending is 88%. *See id.* at 4777:21–4779:6 (Whinston) (discussing UPXD102 at 62). Of those text ad dollars, 45% comes from text ads that are displayed in response to a query entered into a default search access point covered by Google’s distribution agreements. *Id.* at 5772:20–5773:2 (Whinston) (discussing UPXD104 at 39).

2. *SVP Search Ads*

193. SVPs also display search ads, which are almost exclusively PLAs. SVP PLAs also use a feed-based system to select ads. *See* Alberts Dep. Tr. at 39:22-40:13 (describing Amazon and Target as serving PLAs “powered by product feeds”).

194. In order to place a search advertisement on an SVP, “the client needs to have their product or services available for purchase on the[] online retailer websites.” Tr. at 3854:13-15 (Lowcock); *see, e.g.*, James Dep. Tr. at 105:20-23 (“[A]n Amazon-sponsored product ad would require the . . . advertiser . . . to be selling that product on Amazon.”). A user that clicks on a search ad delivered on an SVP thus will remain on the platform, unlike a click of a GSE search ad that takes the user to the advertiser’s website. *See* Tr. at 485:11-13 (Varian); *id.* at 1398:4-10 (Dischler) (“One particular feature of Amazon’s product ads is that since they’re also the platform on which products are sold, it means that they can close the loop, which means that anytime a conversion happens, when a purchase event happens, it happens on Amazon.”). SVPs like Amazon take a “cut” of the final sale, which drives their profits. *See* DX501 at .015–.017.

195. As a consequence, a firm that does not sell on an SVP also will not advertise on it. For example, because Home Depot does not sell goods on Amazon, it does not purchase search ads on Amazon. Tr. at 5124:10-23 (Booth).

196. As of 2023, Google estimates that Amazon’s revenues are larger than Google’s in retail advertising. *Id.* at 1403:20-21 (Dischler) (discussing DX231 at .003).

B. Display Ads

197. A display advertisement is an image or video that appears on a website. *Id.* at 4848:17-22, 4857:3-5 (Lim). One type of display ad is a banner ad, which is depicted below at

the top and side of the image. *Id.* at 1195:19-25 (Dischler); UPX274 at 841. If a user clicks on a display ad, they will be directed to the advertiser’s website. *See* UPX8089 at 398.



UPX274 at 841.

198. Display ads only run on a website if the site is supported by software that enables the ad’s placement. For Google Ads that software is the Google Display Network. UPX8056 at .002. Many websites do not have display advertising on them. *Tr.* at 1193:13-18 (Dischler). Display ads do not appear on a SERP. *Id.* at 1193:19-21 (Dischler).

199. Display ads are priced based on the impressions that the advertisement receives. “An impression is the delivery of an ad,” which indicates “a high probability that the user has seen the ad.” *Id.* at 3821:13, 19-20 (Lowcock). The advertiser pays for a display ad whenever it shows up on a user’s screen. *Id.* at 1177:15-17 (Dischler); UPX1 at 538 (“An impression is counted each time your ad is shown.”). The metric used to price display ads is known as cost-per-mille (or CPM), which is a fixed price per thousand impressions. UPX26 at 770; *Tr.* at 1194:16–1195:13 (Dischler). Display ads sold through Google are priced through auctions that are distinct from those used for text ads or PLAs. *See Tr.* at 4006:23-25 (Juda). Display auctions are first-price auctions, where the top bidder wins the ad placement and pays its bid price. UPX6032 at 655–56.

200. Display ads are well-suited for creating brand awareness. UPX26 at 764 (“Display ads . . . aim to build brand recognition[.]”). For instance, if an individual “see[s] a display ad for

a new fuel-efficient Toyota, [they] might think, ‘Gee, maybe it’s time to buy a new car.’” Tr. at 454:13-20 (Varian) (quoting UPX411 at 638).

201. Because a display ad is not served to a user in response to a query, advertisers rely on various other signals, both from the ad publisher and the user, in determining where to place a display ad. Advertisers can elect to place display ads to appear on content-relevant websites (e.g., an ad for a mixer next to an article on baking) or on specific websites. UPX26 at 769. As for user signals, *see id.* at 764, advertisers look to place display ads on content-relevant or industry-related websites that the user has visited or whose ads on which the user has clicked, UPX428 at .011; Tr. at 1418:4-8 (Dischler) (“The users’[] interest can be signaled in any number of ways, whether it’s visiting a website, whether it’s subscribing to a TikTok channel of a golf influencer or in any number of ways.”).

202. A particularly valuable form of display advertising is “retargeted” display ads. An advertiser uses a consumer’s activity on the advertiser’s website to tailor a later-appearing display ad on another website. To illustrate, “[a] retargeted ad would occur, for example, when you bought a product and there was a complimentary product that was associated with that. So, you could buy a product like ski boots and it would suggest ski equipment or ski mittens.” Tr. at 455:6-9 (Varian). A retargeted display ad can be delivered only *after* the consumer has visited the advertiser’s website. *Id.* at 455:25–456:5 (Varian).

203. The placement of a retargeted display ad is most valuable within the first hour after the user visits the advertiser’s website. UPX26 at 764–65. The value of a retargeted ad diminishes as the time increases from the user’s visit to the website, because the user is less likely to possess the intent that they had when visiting the site. Tr. at 456:6-17 (Varian). Take, for instance, a user who visits Best Buy’s website and looks at flat-screen TVs but does not make a purchase. A

retargeted display ad featuring a brand of flat-screen TV will be less effective as time goes on from when the user visited the Best Buy website.

204. Privacy initiatives can also limit the effectiveness of such targeting techniques. Retargeting data is collected using “cookies” or data about an individual’s prior web activity: “The way this works is that an advertiser or agency presents an ad and a list of [] cookies to an ad server network and the network displays the ad to the cookies on the list, if and when these cookies show up on particular website.” UPX413 at 735. Cookies can be limited by third parties. For instance, after Apple made privacy changes to a new version of iOS, Meta’s ability to serve retargeting ads was made “much harder or potentially even not possible in some circumstances.” Levy Dep. Tr. at 172:18-24.

205. Retargeted display ads cannot replace search ads. *See* Tr. at 5220:11-22 (Booth).

C. Social Media Ads

206. Social media advertisements are essentially display ads that are integrated into a social media feed. *See id.* at 5392:3–5393:9 (Jerath); *id.* at 3839:23–3840:2 (Lowcock); van der Kooi Dep. Tr. at 260:21–261:2.

207. One of the largest providers of social media ads is Meta, which owns Facebook and Instagram. The bulk of Facebook’s social media ads are not considered search ads, although “a very small percentage” do qualify. Tr. at 8772:13-16 (Israel); *id.* at 458:4-5 (Varian). Facebook has roughly twice as many advertisers as Google. *Id.* at 1407:4-11 (Dischler). Other social media channels include TikTok, LinkedIn, Snapchat, and Pinterest. *Id.* at 4840:23-25, 4860:6-13 (Lim).

208. Social media users spend a significant amount of time engaging with the platform, which can provide a greater opportunity for advertisers to engage with potential customers. *Id.* at 1407:23–1408:20 (Dischler). Advertisers use social ads “[m]ainly [for] awareness, engagement,

and, in some instances, acquisition” where possible. *Id.* at 4841:9-10, 4860:15-22 (Lim). Social media ads have “a distinctly different role . . . than paid search” ads. *Id.* at 4841:11-12 (Lim); *see also infra* Section V.D.

209. Because social media ads are not displayed in response to a query, social media platforms rely on various other signals of a user’s intent to determine which ads to display. Tr. at 1369:18–1370:1 (Dischler) (noting that Facebook’s ads do not use keywords). Those include accounts or channels the user follows, the length of engagement, user clicks on products shown on the feed, etc. *Id.* at 1418:4-7 (Dischler).

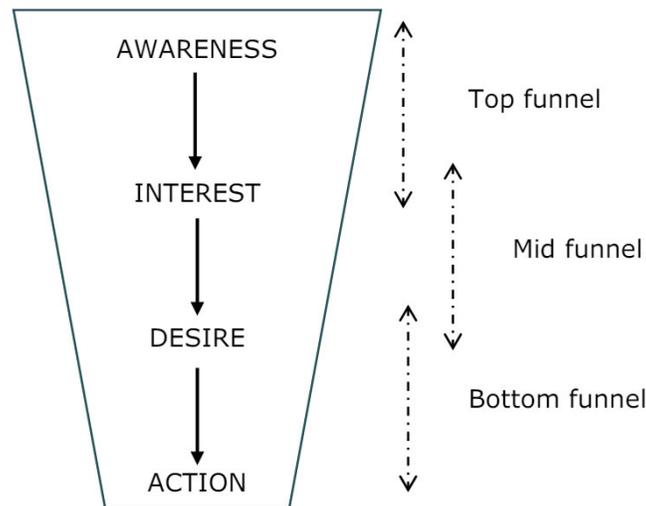
210. Social media is a growing destination for advertisers. Meta has been wildly successful in selling social ads on Facebook and Instagram. Between 2018 and 2021, for example, Meta’s ad revenue grew by about 150%. *See* UPX1019 at 530. And while TikTok’s growth as an ad platform is in its infancy, evidence suggests that it may be particularly well-suited for targeting younger demographics. DX241 at .010 (“Nearly 50% of Gen Z say they use TikTok, IG for shopping, compared to just 15% of older users.”).

211. Google responded to the dramatic growth in social media ad spend with a new advertising product called “Discovery Ads,” or Demand Gen ads. Discovery ads are placed within a user’s feed on YouTube or Gmail. Tr. at 1196:15–1197:5 (Dischler); UPX33 at 117. Discovery ads were partially modeled after social media ads on Instagram and Facebook to compete with Meta’s offerings. Tr. at 1197:3-8 (Dischler); UPX29 at 541 (“Google has no *direct* competitor to Facebook’s ad offering[.]”). Discovery ads are not sold on SERPs. Tr. at 1196:22-24 (Dischler).

D. The Marketing Funnel

212. Advertisers use the different ad channels described—search, display, and social media—to accomplish different marketing goals, sometimes within the same campaign. Those objectives often are correlated to the ad channel’s unique features.

213. “The purpose of advertising is to capture consumers’ attention and drive them through to a point of conversion, and conversion is to purchase a product or service.” *Id.* at 3815:6-9 (Lowcock). Marketing professionals in industry and academia have used a “funnel,” pictured below, as a visual depiction of the consumer journey from awareness to purchase.



UPXD103 at 7; Tr. at 3815:11-13 (Lowcock) (summarizing the funnel as “[d]riving awareness, capturing intent, driving consideration, and driving a decision to purchase”).

214. The upper funnel focuses on generating consumer inspiration and awareness of the product. Tr. at 5121:16-25 (Booth) (e.g., “getting people thinking about performing a [home-improvement] project”); *id.* at 3816:10-11 (Lowcock). In the middle is the consideration phase, where the consumer evaluates a class of products or a particular product. *Id.* at 5122:9-10 (Booth); *id.* at 3817:24–3818:2 (Lowcock) (“The middle part of the funnel is to try and drive some sort of

. . . behavior so to learn more about the product or service.”). The lower funnel seeks to persuade a user to carry out a transaction (e.g., a sale or other metric of conversion). *Id.* at 5121:21-25 (Booth); *id.* at 3818:3-8 (Lowcock).

215. Another way to think about the funnel is in terms of “push” and “pull” ads. “[P]ush ads are essentially an advertiser putting a message out there when a consumer isn’t necessarily even looking for something. Pull ads tend to [function when] somebody goes to Google or goes to Bing, is actively looking for something, [advertisers] have the opportunity to be able to respond to that query.” *Id.* at 5123:3-11 (Booth) (“So push [] is we’re sending our message out. Pull means we’re bringing people in who are already in market.”); *id.* at 6588:13-20 (Vallez) (“We generally think about search as pull,” and “[p]ush ads are generally more what we call upper funnel. They’re more video, display, that type of media, social media.”).

216. “The customer journey is complex. Consumers don’t consume media in a silo, so they experience media across all channels.” *Id.* at 3815:2-5 (Lowcock).

217. Marketers view different ad channels in terms of their relative strength at achieving objectives along the funnel. Generally, display ads are superior at establishing product awareness, whereas search ads are more effective at driving conversions. “One way to think about the difference between search and display/brand advertising is to say that search ads help *satisfy* demand, while brand advertising helps to *create* demand.” UPX411 at 638 (2008 internal Google email written by Hal Varian) (internal quotation marks omitted) (emphasis added); UPX459 at 871 (same); UPX439 at 112 (same); *accord* Tr. at 1174:20-23 (Dischler) (“If you want to get very broad, to reach a diffuse audience like someone used for TV, the search results page is a less optimal channel because it is [] more focused.”).

218. Display ads therefore are considered more effective upper-funnel tools and search ads more effective lower-funnel tools. Tr. at 3816:1-11, 3816:25–3817:1, 3819:12-17 (Lowcock) (“Display advertising is primarily intended to drive or create demand and drive awareness,” while “[s]earch advertising is there to capture intent after you have driven awareness.”); *id.* at 6586:24-25 (Vallez) (“[S]earch is more often than not the last step, one of the last steps in that journey.”). Search ads can be effective for upper-funnel goals, *see, e.g.*, James Dep. Tr. at 269:22–270:7, but that is not how advertisers largely conceive of them, *see* Tr. at 6881:20–6882:24 (Amaldoss) (discussing PSXD10 at 17) (summarizing based on a subset of record documents and testimony, 64% of advertisers view display ads to be higher up in the funnel than search ads, and 0% consider display to be below search). Google acknowledges that “[w]hen running Display ads, [advertisers] might not reach those who are actively searching for what” is offered. UPX8056 at .002; *see also* UPX8089 at 398 (“While the Search Network can reach people while they search for specific goods or services, the Display Network can help you capture someone’s attention earlier in the buying cycle.”).

219. Social media ads can be used at multiple stages of the funnel, Tr. at 4861:3-4 (Lim); Ramalingam Dep. Tr. at 151:7-11, but the marketing industry views them primarily as “push ads” to drive brand and product awareness, Tr. at 6588:23–6859:2 (Vallez) (describing social media ads as “push,” not “pull” ads, “because the consumer is not intentionally trying to pull information, . . . they’re usually getting a feed that’s being presented to them, different options, [] which may or may not be relevant to the context which they’re in”); *id.* at 4861:24–4864:1 (Lim) (JPMorgan Chase spends three times as much in paid search as in social, all of which is used for lower-funnel goals, whereas its social media spend is targeted to various stages of the funnel); *id.* at 6513:1-5 (Hurst) (Expedia spends on social media for the purpose of “buying an audience”); Dacey Dep.

Tr. at 291:18-22 (“The intent of the user is very different and it’s a more passive user on paid social; whereas, in search, the intent is significantly higher and we can monetize it in a completely different amount.”); Tr. at 5123:24–5124:1 (Booth) (identifying social media ads as push ads “in some cases”).

220. For some industries, however, like clothing and cosmetics, social media ads can be effective for lower-funnel purposes. DX703 at 704 (Revlon advertising strategy placing social media in the awareness and consideration phases, alongside search in the latter); Tr. at 4892:16-18 (Lim) (“[I]f you’re a direct consumer, fashion brand, you may consider paid social lower in the funnel than a bank.”).

221. Advertisers often use different ad channels as complements as part of a “full-funnel strategy.” Tr. at 5122:1-20 (Booth) (“What we try to do or what most advertisers try to do is try to nurture that consumer journey by showing them a bunch of options, presenting that in display or social, and then ultimately leading them down that transaction path.”); *id.* at 4894:15-17 (Lim) (“[M]ore often than not, it’s a combination of everything that you’re doing that’s driving that outcome.”). Google itself touts the importance of a “full-funnel” strategy. UPX8051 at .005 (2022 Google record concluding that “full-funnel marketing has never looked better or been more critical to business success”).

222. The marketing funnel is neither “dead” nor has it become “obsolete” because of the emergence of digital marketing and new ad technologies. *See* Tr. at 5649:2-13 (Jerath) (discussing DXD14 at 37). Industry witnesses consistently testified that they continue to use the funnel to shape marketing strategies, even on digital platforms. *See id.* at 3815:11-15, 3816:12-20 (Lowcock) (IPG); *id.* at 4857–4892 (Lim) (JPMorgan Chase); *id.* at 5121:1-10 (Booth) (Home Depot); *id.* at 5238:9–5239:3 (Dijk) (Booking.com); *id.* at 6512:1–6513:24 (Hurst) (Expedia); *id.*

at 6585:25–6589:2 (Vallez) (Skai); Alberts Dep. Tr. at 45:18–47:8 (Dentsu); Dacey Dep. Tr. at 98:3-22 (TripAdvisor); Daniels Dep. Tr. at 19:14-23 (Thumbtack); James Dep. Tr. at 23:13–24:3 (Amazon); Levy Dep. Tr. at 104:11-18 (Meta); Lien Dep. Tr. at 186:5-15 (Marin); Ramalingam Dep. Tr. at 148:5–151:18 (Yahoo); Soo Dep. Tr. at 285:3–287:11 (OpenTable); Stoppelman Dep. Tr. at 83:4–84:19 (Yelp); Utter Dep. Tr. at 284:11–285:218 (Microsoft).

223. Even Google has recently and repeatedly recognized the continued vitality of the marketing funnel. *See* UPX427 at 030 (2019); DX241 at .010 (2021); UPX8051 at .002 (2022) (Google essay touting “full-funnel” strategies using Google Ads); *cf.* Tr. at 1413:10–1414:22 (Dischler) (contending that the funnel is “obsolete” but agreeing that advertisers use it “informally”); *id.* at 7791:7-16 (Pichai) (describing the funnel).

224. Large advertisers typically organize themselves along ad channels, with different teams and distinct budgets based on ad channel. *See, e.g.,* Tr. at 4839:12-16 (Lim) (JPMorgan Chase has three departments: paid social, search, and programmatic); *id.* at 6590:23–6591:1 (Vallez) (advertisers generally have multiple teams managing different ad channels); James Dep. Tr. at 187:6-9, 190:9-13 (Amazon has different teams and leadership for paid search, social marketing, display, and video); PSX970 at 668 (advertising agency Tinuiti has different teams for paid search and paid social).

E. Shifting Spend

225. An advertiser will “determine the objectives of their advertising campaign on a campaign basis and they set an overall budget for their entire advertising spend.” Tr. at 3805:2-4 (Lowcock). From there, the advertiser will determine how to allocate their budget to different channels to meet campaign goals. *Id.* at 3805:5-10 (Lowcock); *see, e.g.,* UPX926 at 683–84 (“Campaign segmentation should be done at a granular level where you can control the investment

amount allocated towards a campaign. Orienting these campaigns with the customer journey is critical so that you can align all assets housed within the campaign to a common and consistent goal.”); Tr. at 4857:12-18 (Lim) (“Paid search budgets are for paid search only. Where we have investment mobility would be if you think about just digital or just a programmatic investment for a campaign, we could optimize to or from various different websites within that campaign. But it is not transferable between a programmatic buy across web pages and paid search. They are distinct and different and separate.”).

226. One common campaign driver is seasonality: Certain times of year are associated with product popularity and purchases. *E.g.*, DX187 at .069 (“Escape rooms are very seasonal. You’re going to see a spike in the summer months, and around the holidays, Christmas. So, a bit of a mixture of seasonality and available impression.”).

227. Another driver is return on investment (ROI), or return on ad spend (ROAS), which are metrics advertisers use to evaluate the effectiveness of their ad spend. Advertisers will shift spend to more effective ad channels to maximize their overall ROI. *See, e.g.*, Tr. at 5340:23–5341:5 (Dijk) (ROI is the “key” metric for decision-making); James Dep. Tr. at 35:19-23 (Amazon bases some of its bidding strategies in part on ROI); Tr. at 5141:14-17 (Booth) (“So we would continue to lean our investment into what is producing the greatest return on advertising spend or ROAS, and that’s a consistent practice that our teams are always doing.”); DX187 at .066 (ROI is “the top factor affecting short term [] and long term [] spend”).

228. But it is challenging for advertisers to calculate ROI and ROAS. *See* UPX441 at 803 (privacy measures have made it “more challenging for [JPMorgan Chase’s] teams to have real-time access to performance data at a granular level”); Tr. at 3981:14-17 (Lowcock) (“[B]ecause ROI requires confidential client information, . . . the client might not share that data

with us, nor would it then be provided to third parties to optimize ROI.”); UPX519 at .001 (“There is no good sense, both within Google and outside, for what the true ROI of advertising channels are (and consequently how they compare).”) (2017); UPX506 at .012 (“Overwhelming majority of adv[ertisers are] nowhere closer to measuring ROI,” only a “[s]elect few players with the resources can build models” to do so, “but analysis have shown they are all over the place.”) (2017).

229. Google believes that advertisers’ ability to calculate ROI has improved significantly in the last six years, in part due to the development of AI and new ad channels, such as social media. Tr. at 1385:3-12 (Dischler). Also, now available to advertisers is automated bidding software, which attempts to discern and compare the ROI of different ad types to further the advertiser’s business objectives. *See id.* at 1357:7–1358:19 (Dischler). These automated tools shift ad spend between social media ads and search ads on GSEs and SVPs. *Id.* at 1406:4-8 (Dischler). Google has an automated bidding product, Performance Max, that some of its advertisers use (although not many of its largest). *Id.* at 1371:4-11, 1372:5-24 (Dischler).

230. Though advertisers do try to estimate and maximize ROI and ROAS across channels, they do not substitute away significantly from search ads to other channels, like display or social. These channels are less effective at achieving the same marketing goals as search ads. Advertiser witnesses uniformly testified that purchasing search ads on Google is essential to digital ads campaigns because search ads are uniquely able to capture high-intent consumers. *See, e.g., id.* at 3826:14-15 (Lowcock) (“I would go so far as search would be mandatory in any advertising campaign.”); *id.* at 4849:6-7 (Lim) (“We think of search as an always-on acquisition driver for the firm.”); *id.* at 6506:24–6507:1 (Hurst) (“[T]here isn’t a great substitute for the volume of high-intent customers you can find on Google.”); *id.* at 5236:24–5237:1 (Dijk) (“Google is kind of the

exclusive, dominant . . . pool of high-intent, new customers for us to find.”); *id.* at 6585:25–6587:3 (Vallez) (agreeing that no paid media channel better captures user intent than paid search because search reflects “the moment right when they’re about to make a decision”); DX412 at 665 (Kohl’s presentation showing search spend as unchanging while other ad types, including display, social, and video, fluctuate); Tr. at 5450:6-10 (Jerath) (discussing UPXD103 at 23) (Booking.com record explaining that “Search and Display Ads are not seen as substitutable to one another . . . because they target users in very different situations/environments,” and the “resulting performance is very different”). There is no evidence that advertisers have significantly shifted spend away from search ads at any point.

231. Advertisers rely heavily on search ads for traffic and revenue. When advertisers have experimented by turning off search ads for a portion of queries or products, they have lost revenue. *See* Tr. at 422:22-24 (Varian). In 2020, for example, Home Depot—one of Google’s largest advertisers—studied the effects of cutting off paid search on its revenue. When it turned off paid search in █% of United States markets, its revenue dropped █%. PSX676 at 240. Home Depot concluded that for every \$1 it invested into paid search, it earned over \$█ in revenue. *Id.*; *accord* Tr. at 5284:6-8 (Dijk) (Booking.com cannot stop purchasing text ads from Google and sustain its business.).

232. When it comes to general search text ads, advertisers have a fixed budget that largely mirrors the relative market shares of Google and Bing. Tr. at 4869:7-23 (Lim) (90% of JPMorgan Chase’s search text ad spend is on Google, 10% is on Bing); *id.* at 5141:23-24 (Booth) (“It’s industry standard, probably 90 percent versus 8 to 10 percent on Bing.”); *id.* at 6501:11-14 (Hurst) (Expedia’s spend allocation is 10 to 1, Google to Bing); UPX441 at 803 (Google is a

“[c]ore partner in search due to overwhelming market share”). Advertisers buy nearly all of their text ads from these two GSEs. Tr. at 4874:10-12 (Lim).

233. Advertisers consistently testified that shifting significant ad spending from Google to Bing would be ineffective (and unwise) because of Bing’s lack of scale. *Id.* at 4869:7–4870:11 (Lim) (“Bing doesn’t have an equivalent volume so we would be unable to move budgets between those two partners.”); *id.* at 4875:19–4876:4 (Lim) (stating “there’s [nowhere] else to go” once it maximizes spend on Bing); *id.* at 5143:5-24 (Booth) (Home Depot’s 90/10 spend split has remained constant); *id.* at 6533:16-20 (Hurst) (“I don’t think there is a way to shift enough spend to Bing to make up for that gap. I’m actually very confident there is not a way to spend that much money in Bing and find all the travelers you had in Google by using one instead of the other.”); *id.* at 5282:7-12 (Dijk) (“Q. Are text ads that Booking.com purchases on Bing generally less expensive than on Google? A. Very difficult to say. It depends very much on the keywords and the searches. But as I told to you, it doesn’t really matter. I would gladly spend far more with Bing, but I’m constrained because the demand is clearly not there.”); *accord* UPX519 at .017 (Google study reflecting that “Bing was mentioned as having good ROI but too low volume for them to seriously invest”).

234. For advertisers that purchase both text ads and PLAs, the shifting of spend between those two formats is more common. *See* Tr. at 5181:22–5182:6 (Booth) (Home Depot reshuffles its text ad/PLA spend allocation daily). But only retail advertisers can shift spend from text ads to PLAs. *Id.* at 1493:11–1494:3 (Dischler); *id.* at 7580:9-17 (Raghavan) (stating that the determining factor in whether an advertiser could shift spend from text ads to PLAs is whether their products “have visual appeal”).

235. Some of Google’s largest advertisers cannot make that shift. Dr. Raghavan agreed that among Google’s top 20 queries in the United States in 2018, only three pertained to a physical product for which advertisers could shift spend from text ads to PLAs. *See id.* at 7578:8–7580:17 (Raghavan) (discussing UPX342 at 859).

236. Even for retail advertisers, PLAs are not perfect substitutes for text ads. *See id.* at 5218:23–5219:5 (Booth) (Home Depot would be unable to use PLAs to advertise a storewide sale). *But see id.* at 1356:25–1357:3 (Dischler) (“I believe that they’re equivalent. In the view of the advertisers, they’re equivalent and substitutable.”); *id.* at 1476:20-24 (Dischler) (“[T]he advertiser has a singular business objective which is to sell products, and they could use shopping ads or text ads in order to achieve that business objective for the retail advertisers that are eligible to use shopping ads.”).

237. That said, some retail advertisers are increasingly embracing PLAs and spending more of their search ads budget on that channel. *Id.* at 5182:7-21 (Booth) (Home Depot’s spend is greater on PLAs than text ads); *id.* at 1356:22-24 (Dischler) (“You know, as advertisers become more comfortable, they’ve been shifting more budgets to shopping ads versus text ads.”).

F. Text Ads Auctions (Also Greatly Simplified)²

238. Advertisers do not purchase ads on Google in the same way they do in traditional media, like newspapers (e.g., the cost of a half-page ad) or television (e.g., the cost of a 30-second ad during the Super Bowl). Instead, on Google, advertisers compete with one another through an auction to make an ad purchase. *Id.* at 463:14-16 (Varian). These auctions occur in a split second,

² At trial, Plaintiffs repeatedly confronted Google’s ad executives with company records containing their own statements, as well as the statements of their colleagues, regarding Google’s text ads auctions. In many instances, the witness professed to lack an understanding of the record or sought to contextualize it in highly technical ways. In making these Findings of Fact, the court gives greater weight to the contemporaneous statements contained in the company’s internal records, than later trial testimony in which Google employees declined to ratify those statements.

between the time a user enters a query and when the SERP is displayed. Google designs the auction and controls underlying inputs that can affect the ultimate price generated by the auction. *Id.* at 1197:25–1198:4, 1205:12–18 (Dischler); UPX509 at 869 (“We also directly affect pricing through tunings of our auction mechanisms[.]”). Google runs billions of search ads auctions each day. Tr. at 1198:24–1199:5 (Dischler).

239. The auction determines the ads displayed and the order in which they appear on the SERP. *Id.* at 1198:5–17 (Dischler). An advertiser whose text ad appears on a SERP only pays Google if a user clicks on the ad. FOF ¶ 186. A text ad is priced on “cost per click” (CPC) basis. *Id.* The price of a text ad “is determined based on the results of the auction, and the maximum cost per click is specified by the advertiser.” Tr. at 1352:13–17 (Dischler). Google sets a “reserve price” for text ads, or a minimum price below which it will not sell the ad. *Id.* at 463:20–25 (Varian); *id.* at 1204:15–1205:3 (Dischler).

240. Google’s text ads auction is a classic second-price auction, with modifications. A second-price auction is one where multiple bidders enter the auction, and the winner, instead of paying the price of their highest bid, pays one cent above the first runner-up. *Id.* at 1200:2–21 (Dischler). This makes the “second price,” or the runner-up’s bid, very important. *Id.* at 1200:22–25 (Dischler). Google runs a second-price auction because it views it as more advertiser-friendly. *Id.* at 4263:12–16 (Juda). It is also more efficient for Google, because when the final price is determined by something other than the top bid, advertisers will not “be constantly trying to move their bids up or down to see if they can get the same outcome for less money,” which is burdensome for both advertisers and Google’s advertising system (which is responsible for “consuming all these changing bids at all times and processing them”). *Id.* at 4264:1–14 (Juda).

241. An auction winner is not determined solely based its bid. The auction also relies on certain qualitative metrics, including the quality of the ad and the advertiser’s website. At a high level, the auction captures both the bid and the qualitative factors in the following formula:

$$\mathbf{LTV = bid \times pCTR - \beta}$$

UPX8 at 054.

242. In this formula, “bid” represents the advertiser’s chosen bid; “pCTR,” or predicted click-through rate, is a proxy for the ad quality; and “beta” refers to blindness, which tries to approximate future engagement with ads. *Id.*; UPX37 at 200, 202–03; UPX442 at 868. The pCTR is a score between 0 and 1: “[I]f a predicted click-through rate of 0.20 was used in a running shoes query, that would imply that the system thinks there’s a one-out-of-five chance that a user is going to click on the ad, or a 20 percent chance.” Tr. at 4281:1-4 (Juda). The formula’s result is an “LTV” score, which refers to the “long-term” value of the ad. UPX889 at 772–73. The higher the LTV score, the more likely the ad will win an auction. *Id.* at 772.

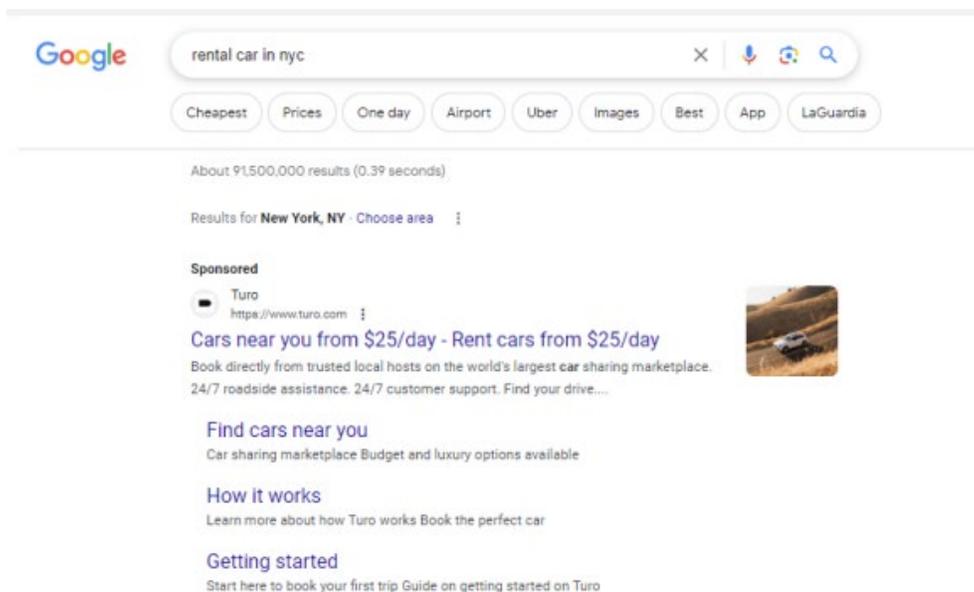
1. Pricing Knobs

243. Google can affect the final price paid for an ad through so-called “pricing knobs” or “pricing mechanisms.” *Id.* at 779, 783. Google has used three primary pricing knobs to influence prices: (1) squashing, (2) format pricing, and (3) randomized generalized second-price auction. Google has referred to these levers as “intentional pricing.” UPX509 at 869.

244. **Squashing** premiered in a launch that Google code-named “Butternut Squash.” *See generally* UPX442. Squashing artificially raises the pCTR of the runner-up, thereby inflating its overall LTV score. UPX889 at 784. This increases the likelihood that the runner-up takes the top spot (even if its bid is not the highest). *See id.* at 784–86; Tr. at 1221:17–1222:10 (Dischler) (squashing tries “to prevent runaway winners and to create a chance for smaller advertisers to

participate in the auction”). But squashing also “[e]ffectively simulates auction pressure” by making the runner-up more competitive, thereby creating upward pricing pressure on the top-rated bidder. That top bidder must pay more to win the auction so as to offset the runner-up’s artificially increased LTV score. UPX889 at 784; Tr. at 1386:6-9, 1383:19-21 (Dischler); *id.* at 4281:17–4283:2 (Juda). As a result, on average, the winner of an auction subject to squashing pays more than they would have absent squashing. *See* Tr. at 1222:3-10 (Dischler); *id.* at 8857:2-13 (Israel).

245. **Format pricing** is Google’s practice of charging advertisers for “formats,” or additional text and links that appear on general search text ads. *Id.* at 4254:3-8 (Juda) (discussing DXD11 at 5, 8). A formatted text ad is illustrated below.



DXD11 at 5 (links entitled “Find cars near you,” “How it works,” and “Getting started”). Formats allow an advertiser to create a customized and complex ad copy that provides the consumer with more information than an ordinary text ad. When first implemented, formats came at no extra cost to advertisers. *See* UPX430 at 580. But in 2017, Google adjusted the auction to impose price increases for formatted ads, after it determined that “strongly increased format prices” resulted in long-term revenue gains. UPX729 at 979; FOF ¶ 250 (discussing the Gamma Yellow experiment).

246. In 2019, Google developed a randomized generalized second-price auction, or **rGSP**, another ad launch that affected pricing. Tr. at 1222:11-17 (Dischler). Put simply, rGSP occasionally randomly switches the LTV scores of the two top auction entrants, thereby allowing the runner-up to win the auction despite its originally lower LTV score. *Id.* at 1222:18–1223:7 (Dischler); UPX1045 at 422; UPX512 at .009–.010. Much like squashing, rGSP artificially enhances the runner-up’s score, creating more competitive auctions and driving up final prices. UPX45 at 840 (“Ads pay a higher price to win with certainty, which increases revenue.”); Tr. at 4177:20-25 (Juda) (one way that advertisers can avoid being swapped is to increase their bid to counteract the other LTV score impacts). rGSP replaced format pricing because it was even more effective at driving revenue. *See* UPX512 at .002. Advertisers cannot opt out of rGSP. Tr. at 4302:9–4305:5 (Juda).

2. *Increasing Text Ads Prices*

247. Many of Google’s ad innovations seek to deliver additional value to advertisers and users. *See* UPX430 at 577; UPX45 at 838–39. “[A]nother important objective is the revenue that the platform (Google) makes.” UPX45 at 839.

248. Google strategically has used pricing knobs to raise text ads prices. Google’s “intentional pricing launches,” or “intentional exploration,” arose from the concern that it was not capturing in its pricing the full value of the ad to the advertiser. In other words, Google believed that it could increase ad prices because its pricing was below what advertisers would be willing to pay for an ad.

249. That intention is perhaps best captured in a January 2018 strategy document titled “How should AQ think about Pricing,” which drew on lessons from past pricing experiments and outlined possible future pricing strategies. UPX509 at 869. The record observed, “[w]e know

there is still significant upside left in the different auction pricing knobs . . . but we've only dared capture[] a small fraction.” *Id.* It then asked: “Should we stop working on pricing exploration despite our belief we’re leaving money on the table?” *Id.*; *see also* UPX737 at 462 (“[T]he value created . . . was left underpriced,” meaning “that the cost of incremental clicks did not rise along with volume following the original click cost curve.”); UPX430 at 578 (“[T]here is a lot of opportunity to increase prices for search ads.”).

250. Google had learned from earlier ad experiments that small but substantial price increases would generate sustained long-term profits. For example, a study conducted in 2017 termed “Gamma Yellow” sought to evaluate the long-term effects of increased format prices. *See* UPX729 at 979. The experiment exposed 15% of advertisers to “strongly increased format prices” for six weeks. *Id.* Google found that “50% of the initial revenue gains stuck” and “found no evidence of notable format opt-out behaviour.” *Id.*

251. In 2017, Google began testing a launch called Momiji. *See generally* UPX36. Momiji sought to determine how much Google could raise prices through format pricing. *See* UPX456 at 274–75; UPX36 at 063, 065–67. Google admitted that it had “no way to say what formats should cost,” but it knew that format pricing was the “best knob to engender large price increases.” UPX507 at .026. Because it had “no principle to say what the cost should be,” Google decided to “follow [its] long term revenue focus.” UPX506 at .005 (“So, we follow our long term revenue focus. We put a reasonable price to Top-1 extra clicks and see if advertisers are willing to pay it (if it sticks in an AE). Try to bring the Top-1 headroom down closer to the other position headroom.”); *see also* UPX456 at 274 (“We are making this tuning in order to better share in the value that AdWords and formats create, and to raise text ad prices on Google.com.”). Acknowledging that it “shouldn’t launch” if it thought it would “see large scale format opt out,”

UPX506 at .008, Google nevertheless pushed significant format price increases because its experiments had revealed that advertisers would not drop out in significant numbers, Tr. at 1274:21–1275:3 (Dischler) (Momiji led to an increase in search ads revenue); *see also* UPX36 at 064, 069 (describing Momiji format pricing increases: “We’ve launched things at 15% and heard nothing” and “[w]e don’t see mass opt-out of anything”).

252. Similar studies showed that Google could raise prices using squashing without losing advertisers. In a 2017 study code-named “Kabocha,” Google determined that squashing was “long term revenue positive[.]” UPX745 at 085. The study showed that the “stickage factor” after price increases “was also [] roughly 50%,” meaning Google “expected 50% of gains to stick post advertiser response to the changes introduced[.]” UPX737 at 462.

253. Still, as reflected in the January 2018 strategy document, Google understood that “at any given point in time[,] there is some price or ROI ceiling above which” advertisers may abandon advertising on Google. UPX509 at 869–70. To ensure profits while remaining under the “ceiling,” Google outlined four paths, two of which involved no “pricing exploration” (thereby leaving “money on the table”) and two of which would continue “price exploration.” *Id.* at 871–72. Google appears to have selected “Path 3,” which it termed “Control the walk.” *Id.* at 872. This is the “scenario under which [Google] believe[d] the ceilings are *still high* and [it] want[ed] to maximize [long-term] revenue.” *Id.* (emphasis added). “This sharing of value implies getting closer to these ceilings without passing them, which we need to do in a controlled pricing environment.” *Id.* In other words, Google believed that it could raise prices using pricing knobs without losing advertisers—since “ceilings are still high”—thereby growing its revenues. Google proposed that price changes could be made through “[i]ncidental launches throughout the year,”

and “[p]rice adjustments to the new state of the world would be done once or twice a year through dedicated pricing exploration using existing . . . and [h]olistic . . . tools.” *Id.*

254. Later launches and studies show that is precisely what Google did. UPX745 at 085 (AION six-month advertiser experiment, from early 2018, demonstrating that Google “can confidently increase format prices” because “there is still large headroom in format pricing”); UPX 737 at 462 (stating that AION’s “[s]pend response trends to the 15% change have stabilized at roughly half the initial gains, confirming our belief that there is still room for price tuning”); *id.* at 461–64, 476 (Potiron study, from June 2018, showing that “[f]ine grained squashing” showed the same 50% “stickage” in the long term). Increasing prices through format pricing plainly was a success. When it was replaced by rGSP, format pricing had risen to make up about 20% of Google’s text ads revenue, measured per thousand queries (also known as revenue per mille, or RPM). *See* UPX512 at .002 (format pricing comprised about 20% of Google’s RPM).

255. The launch of rGSP in 2019 was equally successful. Google’s pre-launch experiments indicated that rGSP would increase CPCs for top slot ads on non-navigational queries by 5.91% on PCs and tablets and 4.85% on mobile phones with a long-term “stickage factor” of 40–50%. UPX457 at 258–60. Experiments showed that a 5.74% revenue gain persisted two months after launch. UPX45 at 838; *see also, e.g.*, UPX745 at 085–86 (new launch known as “Stateful Pricing” demonstrated “over \$6 billion in *short term* incremental annual revenue in headroom”).

256. In February 2020, Google reported that the rGSP “tuning point,” or increased bid, was about 3.7. UPX466 at 939. This meant that in order for the top bidder to keep its position, it would need to bid 370% more than the runner-up to account for the swapped LTV score. *Id.*; Tr. at 4178:8-14 (Juda); *see id.* at 4177:20-25 (Juda) (one way an advertiser may avoid swapping is by

increasing its bid). If that bidder was successful, it would ultimately pay significantly more than it otherwise would have for the same ad placement.

257. Google's records make clear that growing its revenue was a principal goal in launching these price tunings. *See, e.g.*, UPX51 at 228 ("Main goal: Long-term Revenue"); UPX442 at 868 (Google will use its launch "to recover lost revenue from launches which create value for our users and advertisers, but reduce revenue for Google") (squashing); *id.* (Google "wants to continue launching such advertiser value creating launches, but needs a mechanism to help Google share in the value that [the] launches create"); UPX507 at .004 ("Prices could be higher, and we think we would keep the money," because "[r]evenue gain from higher prices > revenue loss from response" by advertisers) (format pricing); *id.* at .010 (describing philosophy as to "[g]et the highest RPM point possible"); *id.* at .027 (ranking format pricing, squashing, and reserves by "effectiveness," measured as increased RPM); UPX430 at 577 (Google adjusts "the parameters of the auction function in order to improve Long Term Revenue. . . . This work has resulted in products which add several billions of dollars in incremental revenue annually."); UPX45 at 837 (rGSP solves the "difficult problem" and "major priority" of "increasing revenue in auctions with low competition[.]").

258. In fact, Google used ad launches to meet revenue goals or make up for perceived deficits in its ad revenue growth. *See, e.g.*, UPX745 at 085 (projecting "+4% RPM from standalone pricing launches" and expecting additional billions in "incremental annual revenue" from format pricing and squashing); UPX456 at 298 (predicting at +1.3% revenue increase). As Dr. Adam Juda, Google's Vice President of Project Management, testified, a positive 20% increase in revenue "was an annual objective that we would try to get to over the course of an entire year." Tr. at 4140:1-20 (Juda); *see id.* at 7549:6-9 (Raghavan) (discussing UPX342 at 824) (same).

259. And Google met that objective year after year. As the below chart shows, Google has enjoyed unusually consistent revenue growth from 2010 to 2018 that hovered at or above the 20% expectation.



UPX342 at 824.

260. If Google grew concerned about meeting its revenue targets, it called for a “Code Yellow effort,” where its “top priority” would be to “deliver [] revenue launches” through intentional pricing. UPX738 at 406; *see* UPX733 at 203–04 (describing the Sugarshack format pricing launch, which was used to meet Google’s revenue targets in response to a Code Yellow); UPX514 at 386 (describing ad launches implemented to meet Code Yellow revenue goals).

261. Google’s pricing decisions also reflected an understanding that increasing its revenue in the ways discussed might occasionally come at a cost (or no improvement) to advertisers. *See* UPX734 at 509 (“cleverer . . . auction pricing” comes “at a cost to advertisers”); UPX507 at .015 (“Sales struggles to explain these [price increases] in terms of user/advertiser value[.]”); UPX889 at 780 (auction pricing mechanisms are “[n]ot designed to increase clicks”); UPX36 at 065 (“[C]urrent system has issues. We’re acknowledging the current CPM space is giving them different prices at the same value.”).

262. For instance, Google claimed that the *primary* motivation for implementing squashing was to help smaller advertisers, but that is not borne out by the record. Tr. at 1386:10-19 (Dischler) (“The primary reason that we implemented squashing was to prevent certain winner-takes-all dynamics in the auction. What we were finding is that there were a few large advertisers that were kind of winning every auction in a particular category, and we weren’t sure actually whether that was a good user experience. It was becoming much harder for the runnerup to break through and show up in the top position.”). In fact, after squashing, Google displayed the same ads on about 95% of queries measured by impressions and clicks, generating 88% of its revenue from queries returning the same ads in the top placement. UPX442 at 872. In other words, the overwhelming majority of revenues resulted from the same placements before and after squashing. Moreover, Google measured success not based on improved ranking for smaller advertisers, but by whether a “squashed” auction produced positive revenues for Google. In one record, Google described squashing as “desirable” when CPCs increased, and “undesirable” when they did not due to “reranking.” UPX737 at 464. Because squashing produced desirable results 60% of the time, Google believed that “coarse squashing provide[d] overall positive metrics” but was “suboptimal due to these mixed effects.” *Id.* Google proposed to further refine squashing to optimize revenues. *Id.* at 464–65.

263. When it made pricing changes, Google took care to avoid blowback from advertisers. For instance, records show that Google had concerns about the impact of transparency on their efforts to increase prices. *See* UPX507 at .015 (“Worry that if we tell advertisers they will be impacted, they will attempt to game us and convince us to abandon the experiment. . . . But, if we don’t tell them, they will react more naturally (how they’d react if they believed they couldn’t

influence our decision at all.”); UPX519 at .003 (“A sudden step function might create adverse reaction.”).

264. Google therefore endeavored to raise prices incrementally, so that advertisers would view price increases as within the ordinary price fluctuations, or “noise,” generated by the auctions. *See, e.g.*, UPX507 at .023 (describing a 10% CPC increase as “safe” because it is “within usual WoW noise”); UPX519 at .003 (acknowledging that advertisers would notice a 15% price increase, but “this change is to [be] put in perspective with CPC noise,” that is, “50% of advertisers seeing 10%+ WoW CPC changes”); *id.* (comment stating that 15% is “probably an acceptable level of change (from a perception point of view) because these are magnitudes of fluctuations they are used to see[ing]”).

265. With respect to format pricing, one Google document states: “A progressive ramp up leaves time to internalize prices and adjust bids appropriately[.]” UPX519 at .003; UPX509 at 870 (stating that “[i]ncremental launches and monitoring should help us manage” the risk that price increases would lead advertisers to “lower[] their bids or modify[] other settings . . . to get back to a given ROI, leading to less revenue for Google than the initial impact hinted to”). Similarly, in 2020, Google raised prices on navigational queries using multiple knobs and recognized that it was “[o]bviously a very large change that we don’t intend to roll out at once,” instead planning a “[s]low 18 months rollout” to “[l]eave[] time for advertiser[s] to respond rationally[.]” UPX503 at 034; *id.* at 038 (“A slow roll ensures we don’t shock the system, gives time for advertisers to respond and us to monitor changes and stop early if needed.”); *see also, e.g.*, UPX505 at 312 (prior to implementing squashing, concluding that “[a]dvertisers should perceive AdWords as a consistent system, and not be subject to constant large impacts due to Google changes,” in part to

“improve[] advertiser stickiness”); UPX506 at .018 (Momiji slide deck: “Unlikely that advertisers will notice by themselves and respond. However, a bad press cycle could put us in jeopardy.”).

266. Google’s incremental pricing approach was successful. In 2018 and 2019, Google conducted ROI Perception Interviews, which raised no red flags about advertisers’ attitudes as to ad spending on Google. *See generally* DX187; DX119. While advertisers could tell that prices were increasing, they did not understand those changes to be Google’s fault. Google’s studies revealed that advertisers facing CPC changes “dominantly attribute[d] these shifts to themselves, competition[,] and seasonality (85%)—not Google.” UPX1054 at 061; *see also* UPX737 at 464 (“They often attribute these changes to things in the world or what they’ve done, not just things happening on the backend[.]”).

267. When it made these pricing changes, Google did not consider its rivals’ text ads pricing. *See* UPX509 at 959 (Dr. Raghavan querying why “all of the discussion on advertisers’ reactions to [Google’s] pricing changes seem to presume that this is a 2-person game between the advertiser and [G]oogle,” even though it is “really 3 players—the advertisers, [Google], and [its] competitors”); *id.* (noting that “the discussion seems insensitive to where else the advertiser could obtain traffic of similar quality and price”).

3. *Limiting Advertiser Control*

268. Google also depreciated the quality of its text ads product in two primary ways: by reducing the information available to advertisers in Search Query Reports and by loosening keyword matches to create more crowded and higher price-generating auctions.

a. Search Query Reports

269. Google began offering Search Query Reports (SQRs) in 2007 to help advertisers determine whether to add new affirmative or negative keywords to their lists. UPX526 at 538;

Tr. at 1481:16-20 (Dischler) (“They use it in order to measure their advertiser effectiveness, or they could use it in order to improve the range of keywords that they use in order to be able to target users that are looking for their products or services.”). Google was aware that SQRs were “widely used by advertisers of all segments.” UPX526 at 539, 556.

270. Prior to 2020, SQRs included all queries that resulted in an ad click, even if there was only a single click (i.e., the “one-click threshold”). *See generally id.* Ostensibly out of privacy concerns, Google removed the one-click threshold. *Id.* at 543. It did so notwithstanding “substantial” projected data loss for advertisers and knowing that specific major advertisers, like Expedia and Booking.com, had stated they would be harmed. *Id.* at 545, 549.

271. Google’s own records show that the privacy rationale was suspect. *See id.* at 525 (email from Dr. Juda questioning whether the proposed trimming of the SQR report “could or should be turned into a [privacy-focused thing] without a lot of thought”); *id.* at 531 (“While a query can contain sensitive information, I have the ability to type anybody’s SSN into my search box. Therefore, queries are not PII, even if I am the only person ever to search for your SSN.”); *id.* (opining that “even when we do share keywords which are identical to the query and contain sensitive information, I would argue our documentation is accurate”); *id.* at 541 (unnamed commentor stating “queries aren’t PII”). Some advertisers, as well as U.S. Plaintiffs’ expert Dr. Kinshuk Jerath, also view Google’s privacy-related justifications with skepticism. Tr. at 3850:5-7 (Lowcock) (“[I]t would be reasonable to continue to share that sort of information with us without breaching privacy regulations.”); *id.* at 5473:13-25 (Jerath) (“[T]his is not a valid reason because the search query reports were never using user level data.”). Still, Google decided in the fall of 2020 that all queries must receive 50 cookie impressions daily to appear on an SQR. *See* UPX532 at 566 (“This decision is rooted in Google’s treating search query data as personal

data for this use-case, even though Google has reasonable arguments such data [(i.e., queries)] may not be personal data in many instances.”).

272. The less fulsome SQRs negatively impacted advertisers, who already have limited insight into how Google’s auctions work. *See, e.g.*, UPX519 at .016 (advertisers “would like to see . . . more transparency in the definition of quality”); Tr. at 3850:16-18 (Lowcock) (“[W]e know what price we paid. We have no true visibility in the way that the price is determined and how the auction is conducted.”); Alberts Dep Tr. at 213:21–214:6 (“[I]t does limit some of the visibility in some of the terms that are triggering keywords that we would not like to match to.”); Tr. at 5174:16-20 (Booth) (same); *see also id.* at 5468:6-21 (Jerath) (additional examples). For instance, JPMorgan Chase estimated that prior to the change, about 5% of the keywords were not visible on SQRs, but afterwards the number rose to 20%. Tr. at 4866:13–4868:10 (Lim) (“It just gave my team less information to work with.”).

273. Google did not inform advertisers how the threshold had changed. UPX532 at 568 (internal informational Q&A for press inquiries advised not to reveal the threshold for making the SQR “in keeping with our privacy and security policies”); Tr. at 5222:2-19 (Booth); Alberts Dep. Tr. at 166:17-25. And because advertisers no longer received a report of every query that involved an ad click, advertisers purchased ads on certain queries generating fewer than 50 cookied impressions. *See* Tr. at 5469:18–5471:12 (Jerath) (“They were buying certain queries but they were not being told . . . which queries they’re buying,” as if you purchased “a product in a supermarket but they don’t tell you what you actually bought.”); *id.* at 5471:10-12 (Jerath) (“This is data that you’re actually buying. This is indeed where your spend is going. You should be entitled to know that at least this is where I spent my money.”).

274. Advertisers not only identify the keywords that may trigger participation in an auction, they also can identify so-called “negative keywords,” which are keywords that an advertiser selects so as to avoid entry into an auction. Alberts Dep. Tr. at 214:10-21; Tr. at 400:3-7 (Varian) (“[I]t’s the advertiser that provides the keywords. Google is seeing if those keywords match the query, and then it’s determining that. So it’s really the advertisers’ choice of keywords that are determining whether it serves an ad.”). Without the single-click information, Google thus not only constrained advertisers’ ability to withdraw keywords but also to identify negative keywords to remove themselves from undesirable ad auctions. *See* Tr. at 5472:11-24 (Jerath).

b. Keyword Matching

275. Google also reduced advertisers’ ability to remove themselves from certain ad auctions by expanding its “keyword matching” functionality. “[T]he typical way that advertisers interact with search advertising is using keywords, which is literally the advertiser [] guessing what the users might be querying, which is very complex. And so doing that for millions of products is sort of an undue burden on advertisers so [Google] came up with an automated system where [it] do[es] more of the matching.” *Id.* at 1353:21–1354:2 (Dischler).

276. One way Google does this is through “semantic matching,” which tries to “understand[] the meaning of [key]words and replac[e] those with analogous words so that things that mean the same thing in a particular language are treated the same way.” *Id.* at 1363:12-16 (Dischler). The chart below depicts how semantic matching works for the keyword “kids clothing.”

New matches for keyword*: +kids +clothing

kids → children	kids clothing → kidswear	clothing → apparel / outfit
clothing for young child	nikolai kidswear	creative apparel for kids
children's clothing in singapore	tj maxx kidswear	kids outfits
kids clothing canada	kids winter wear for girls	kids apparel in citywalk
best children's clothing brands	sean jean kids wear	
childrens beach clothes	kids wear online	
newborn children's clothing	kidswear outlet	

Note: Table is a sample of matches, not exhaustive.

* Includes both S&R, SNE, and SemPhrase & SemBMM matches (all are new).

DX18 at 721. Another example is correcting misspellings. *See* Tr. at 1365:15-22 (Dischler); *see also id.* at 3848:17-20 (Lowcock) (describing “products like keyword matching and broad match modifier, which means the algorithm of a machine that the search engine is running can look for synonyms or understand what might be associated”).

277. Google has changed its keyword matching over time, beginning in 2012. *Id.* at 4283:13–4284:15 (Juda). The narrowest category, “expanded match,” initially included only the keyword itself or grammatical variations (e.g., plurals) but today includes misspellings. UPX8055 at .001–.002; Tr. at 5477:15–5478:1 (Jerath) (discussing UPXD103 at 40). When Google began including misspellings as part of “expanded match,” about 25% of advertisers (by ad revenue) opted out of the new feature, including many of Google’s largest advertisers, like Amazon. UPX518 at 573. Nevertheless, Google removed the opt-out option in 2014, UPX8049 at .003; Tr. at 1478:12-14 (Dischler); *id.* at 4298:6-16 (Juda), despite recognizing that this move would “[r]emove[] control from advertisers,” UPX518 at 572. Thereafter, Google continued to expand the keyword match types. *See* UPX31 at 471. There are presently three types: broad match, phrase match, and exact match. UPX8023 at .001.

Internal: [ads/ads/ads](#)

The evolution of keyword match types

We've expanded the close variants definition to include semantic variations. With these expansions, you can be more confident that you are maximizing reach on highly relevant, incremental queries, without additional campaign management.

2012	2017	2018	2019
Phrase Match & Exact Match	Exact Match	Exact Match	BMM & Phrase Match
Inclusion of syntactic variants of keywords (plurals, misspellings, abbreviations, acronyms, etc.)	Inclusion of same meaning queries (allowing for word reordering / function word addition or removal).	Inclusion of synonyms, implied words and queries with the same meaning .	Inclusion of synonyms, implied words and variants with the same meaning . (Queries must contain the same concept as the keywords)

UPX31 at 471.

278. Because broader matching enters more advertisers into an auction, it leads to thicker auctions (i.e., more auction participants), which creates upward pricing pressure. Tr. at 1477:18-24 (Dischler); *id.* at 4298:22–4299:1 (Juda). As advertisers cannot opt out of matching, the only way to ensure that a certain query does not trigger an ad is to provide a negative keyword. *Id.* at 4297:23–4298:3 (Juda). But identifying negative keywords is a far more cumbersome way for advertisers to avoid undesirable auctions, a challenge made even more difficult with less information from SQR reports. *See id.* at 5472:11-24 (Jerath).

G. SA360

279. A search engine management tool, or SEM tool, enables advertisers to manage advertising campaigns across different online platforms, including GSEs, SVPs, and social media platforms. *Id.* at 1232:13–1233:18 (Dischler). “Native tools” refer to proprietary software products that allow advertisers to make ad purchases directly on the owner’s platform. Google’s native tool is Google Ads, and Microsoft’s is Microsoft Ads. (Since both Yahoo and DDG use Microsoft’s search results, they also rely upon Microsoft Ads as their underlying ad technology.) *Id.* at 1229:16-19, 1232:19–1233:6 (Dischler).

280. SEM tools are helpful because they take the application programming interface from native tools and apply them in ways that facilitate management of multi-platform advertising campaigns all in one place. *Id.* at 1234:11-24 (Dischler).

281. Google owns an SEM tool called Search Ads 360, or SA360. *Id.* at 1234:2-4 (Dischler). It was initially developed by a company called DoubleClick, which Google acquired in 2007. *Id.* at 1235:5-12 (Dischler); *id.* at 3668:23-24 (Ramaswamy). Google advertised the SEM tool as “a neutral third party, helping [advertisers] achieve the highest return on investment, regardless of the online channel.” PSX1109 at 093. Google continues to maintain that the “aim of the product” is “to be a neutral third party.” *Tr.* at 1236:21-23 (Dischler).

282. Other SEM tool companies include Skai, Marin, and Adobe. *Id.* at 1423:9-10 (Dischler). About one third (31%) of all search ads revenue on Google and Bing flows through SEM tools. *See id.* at 7095:1-24 (J. Baker) (discussing PSXD11 at 73). SA360 is the market leader, with 76% of all SEM tool ad dollars spent on SA360. *Id.*

283. Auction-time bidding (ATB) is a feature available in both the Google Ads and Microsoft Ads native tools. *Id.* at 1230:4-6, 1240:4-7 (Dischler). ATB affords advertisers the ability to adjust bidding strategies in real time during ad auctions. The alternative to ATB—*intraday bidding*—allows bidding strategies to be updated a few times a day. Because ATB permits advertisers to adjust their bids in real time, it is more efficient than *intraday bidding* at allocating ad dollars to achieve their highest return. *Id.* at 1230:7–1231:9 (Dischler) (“It’s beneficial to advertisers, because it’s better than the other alternatives.”).

284. ATB has been available on the Google Ads native tool since about 2016. *Id.* at 1231:10-14 (Dischler). It has a high adoption rate, meaning that it is popular among advertisers, in part because it yields an improved ROI. *Id.* at 1231:15-17 (Dischler).

285. By September 2019, ATB was fully integrated into the Google Ads interface on SA360. *Id.* at 4308:9-11 (R. Krueger); PSX386 at 607. It was immensely popular, with an 80% adoption rate and a 15–30% increase in ROI. PSX386 at 607. Google viewed the implementation of ATB into Google Ads on SA360 as a “high-complexity” feature that took between two to three years to accomplish. Tr. at 1425:18-24 (Dischler). When ATB was introduced in SA360 for Google Ads, Microsoft had ATB available only on its native tool. *Id.* at 1240:4-7 (Dischler).

286. In the summer of 2019, Microsoft asked Google to integrate ATB and other features into the Microsoft Ads interface on SA360. *See id.* at 4309:5–4334:13, 4341:6–4345:2 (R. Krueger). Google slow-rolled the request. It instead prioritized continued work on Project Amalgam, which was an effort to overhaul SA360 to introduce it as “a completely new product,” including “immediate support for most new Google Ads features and improved support for other channels and search engines, like Microsoft Advertising[.]” DX282 at .001; Tr. at 4468:4-15 (R. Krueger); *see id.* at 4745:4–4746:5-11 (Varia) (discussing DX132 at .005). It also completed the years-long Project Myx, which integrated ATB for Google Ads into SA360. Tr. at 4691:9-15, 4728:7–4729:7 (Varia). Microsoft grew increasingly frustrated by Google’s inaction, and it eventually requested a CEO-to-CEO level resolution of the matter. PSX360 at 750. Notwithstanding these efforts, at the time of trial, ATB still was not integrated into the Microsoft Ads interface on SA360. Tr. at 5158:9-24 (Booth).

287. Unlike SA360, other SEM tools offer ATB for Microsoft Ads on their platform. *See id.* at 6643:7-12 (Vallez) (Skai); Heath Dep. Tr. at 47:3–48:8 (Adobe), 83:7–84:16 (Marin).

288. With ATB unavailable for Microsoft Ads on SA360, some advertisers have used other SEM tools or Microsoft’s native tool to avail themselves of that feature for their Bing ad

spend. This includes one of SA360's largest advertisers, Home Depot. *See* PSX441 at 903–04; PSX1203 at 992; Tr. at 5161:22–5162:14 (Booth).

VI. THE RELEVANT CONTRACTS

289. Google has entered into search distribution contracts with two major browser developers (Apple and Mozilla); all major OEMs of Android devices (Samsung, Motorola, and Sony); and the major wireless carriers (AT&T, Verizon, and T-Mobile) in the United States. In 2021, Google paid out a total of \$26.3 billion in revenue share under these contracts, an expense listed in its financial statements as “traffic acquisition costs,” or TAC. UPX7002.A; Tr. at 7577:2,7577:20-24 (Raghavan) (discussing DXD21 at 2). TAC was Google's greatest expense in 2021, almost four times more than all other search-related costs combined. *See* Tr. at 7577:2,7577:20-24 (Raghavan) (discussing DXD21 at 2); UPX7002.A.

A. Browser Agreements

1. *The Google-Apple Internet Services Agreement*

290. The Internet Services Agreement (ISA) is an agreement between Google and Apple, wherein Google pays Apple a share of its search ads revenue in exchange for Apple preloading Google as the exclusive, out-of-the-box default GSE on its mobile and desktop browser, Safari. *See generally* JX33 (2016 ISA). Apple is a crucial partner to Google, in part due to “Apple's sizeable and valuable user base, for which Apple controls distribution.” UPX6024 at 437; Tr. at 9742:1–9743:13 (Murphy) (discussing DXD37 at 40) (over half of all search volume in the United States flows through Apple devices).

a. Current ISA Terms

291. The parties entered into the current ISA in 2016, JX33, and in 2021 extended it for a period of five years until 2026, JX97 at 357. Apple can unilaterally extend the agreement by two

years until 2028. JX97 at 357. After that point, the agreement can be further extended until 2031 if the parties mutually agree to do so. *See* Tr. at 2501:17-25 (Cue). Neither party has the right to unilaterally terminate the ISA prior to its current termination date. JX33 at 800 (“The parties expressly amend the existing ISA Agreement to remove the right of either party to terminate at will[.]”).

292. The ISA also requires both parties to cooperate to defend the agreement, including in response to regulatory actions. *Id.* at 801.

293. Two provisions of the ISA are at the heart of the parties’ dispute: (1) the default and revenue share provisions and (2) restrictions on Apple’s product development.

i. Default and Revenue Share

294. The ISA requires Apple to set Google as the default search engine on Safari for all its devices. *Id.* at 793. Under the ISA, a “Default” search engine is one that “will automatically be used for responding to Search Queries initiated from the Web Browser software, unless the End User selects a different third-party search service.” *Id.*

295. “Search Query” under the ISA is defined as any user input seeking information that is entered on Apple’s voice assistant, Siri; its on-device search, Spotlight; or Safari. *Id.* Between Siri, Spotlight, and Safari, Apple gets about 10 billion user queries per week. Roughly 80% of those queries are entered into Safari; Siri and Spotlight thus make up a minority of queries. Tr. at 2246:11–2247:9 (Giannandrea).

296. Across all Apple devices, 65% of searches are entered into Safari’s default access point, which is the integrated search bar. This means that across all Apple devices, only 35% of all queries flows through non-default search access points. UPX1050 at 894. The numbers are similar for mobile searches: 61.8% of query volume flows through search access points governed

by the ISA, and 38.2% of queries are run through non-default search access points. *See* Tr. at 9758:9–9759:22 (Murphy) (discussing DXD37 at 52). *But cf.* UPX138 at 119 (2018 Google estimate of 80% on iOS). Only 5.1% of all searches on iPhones are conducted on a GSE other than Google. *See* Tr. at 9758:9–9759:22 (Murphy) (discussing DXD37 at 52). So, Google receives almost 95% of all general search queries on iPhones.

297. Queries entered through the Safari default (both mobile and desktop) account for 28% of all queries in the United States. *Id.* at 5763:14-22 (Whinston) (discussing UPXD104 at 36).

298. In return for these default placements, Google pays Apple █% of its ad revenue on Safari and Chrome, including queries initiated through Safari’s default bookmarks. JX33 at 793, 797–98; JX24 at 822. Google pays revenue share on Chrome queries, notwithstanding the fact that Apple does not preload Chrome onto its devices. *See* JX33 at 796–98.

299. In 2022, Google’s revenue share payment to Apple was an estimated \$20 billion (worldwide queries). Tr. at 2492:22–2493:6 (Cue). This is nearly double the payment made in 2020, which was then equivalent to 17.5% of Apple’s operating profit. *Id.* at 2492:2-8 (Cue); *id.* at 5727:20–5728:4 (Whinston) (discussing UPXD104 at 19). Google’s 2022 payment under the ISA is more than all of its other revenue share payments combined and is approximately double that combined value. *Id.* at 5727:5-20 (Whinston) (discussing UPXD104 at 19).

ii. Apple’s Product Development

300. Google has long recognized that, if Apple were to develop and deploy its own search engine as the default GSE in Safari, it would come at great cost to Google. *See generally* UPX2. *See* Tr. at 7693:12–7697:12 (Pichai); *id.* at 8094:11–8096:4 (Gomes). For example,

Google projected that without the ISA, it would lose around 65% of its revenue, even assuming that it could retain some users without the Safari default. *See* UPX1050 at 886.

301. Apple has taken steps to grow its capacity in search. In 2018, it hired the former head of Google Search, John Giannandrea, as its Chief of Machine Learning and AI Strategy. Tr. at 2164:18–2165:10 (Giannandrea). Under his leadership, Apple has made a significant commitment to developing certain foundational elements of a GSE, including crawling and indexing the web and creating a knowledge graph. *Id.* at 2244:19–2246:9, 2247:14-16 (Giannandrea); UPX659 at 213. It also has integrated machine learning into its development efforts. UPX1123 at 511. Apple has invested [REDACTED] of dollars and committed [REDACTED] employees to search development. Tr. at 2227:18–2229:1 (Giannandrea).

302. Notwithstanding these investments, Apple has decided not to enter general search at this time. *Id.* at 2247:17-21 (Giannandrea). Apple would forego significant revenues under the ISA if it were to do so. UPX273 at 974 (2016 email from Cue to Apple CEO Tim Cook stating that Apple would have to “jeopardize revenue” if it stopped partnering with Google); UPX460 at 176–77 (internal Apple assessment from 2018, which concluded that, even assuming that Apple would retain 80% of queries should it launch a GSE, it would lose over \$12 billion in revenue during the first five years following a potential separation from Google). It would also have to undertake the risk of consumer backlash, *see* DX374 at .001 (Giannandrea email stating, “there is considerable risk that [Apple] could end up with an unprofitable search engine that [is] also not better for users”), and forgo investment in other areas of product development, Tr. at 2541:13-17 (Cue) (“And so if we took all of our resources and started spending them on search, sure, we could have competed with Google . . . [b]ut that meant we wouldn’t have done other things.”).

303. Though it has not launched a full-blown GSE, Apple has introduced and integrated search functionality into its devices. Its Suggestions feature is one example. Apple can determine that a query entered into one of its access points does not qualify as a “Search Query,” as defined by the ISA, if that “determination is based exclusively on its intent to provide a superior user experience.” JX33 at 793. In practice, this means that Apple can effectively divert certain queries away from Google through a “suggestion.” *See* Tr. at 2217:10-16 (Giannandrea). For instance, when a user enters a navigational query into Siri, Spotlight, or Safari, Apple provides a suggested website to the user, which is intended to allow the user to directly navigate to a third-party site and skip the Google SERP entirely. *See id.* at 2217:3–2218:14 (Giannandrea) (discussing UPXD7). Apple also uses its own proprietary search index to identify potentially responsive websites. As depicted below, a user beginning to type “running sneakers” into Safari may be shown a “suggestion” to nike.com, which if tapped will take the user directly to Nike’s website. *Id.* at 2217:17–2218:8 (Giannandrea) (discussing UPXD7). Apple collects user data to deliver “suggestions.” *Id.* at 2219:18-21 (Giannandrea). Apple views its Suggestions functionality as providing “a much better user experience.” *Id.* at 2235:6-7 (Giannandrea).



UPXD7.

304. Google perceived Suggestions as a threat to its search volume. It believed that Apple’s “increasing use of their own variety of suggestions to the user [wa]s pushing the user away from completing the search on” Google. UPX309 at 823. This meant that Google could not earn advertising revenue on those queries, which could decrease its overall search revenue on Apple devices. *See* UPX2010 at 527 (Google analysis estimating a query loss of 10–15% of Safari traffic and a revenue loss of 4–10% of iOS Safari revenue based on Apple Suggestions).

305. In direct response, Google negotiated a new term in the 2016 ISA, which required that Apple’s implementation of the Safari default must “remain substantially similar” to prior implementations. JX33 at 793 (“**Substantially Similar**” clause); UPX309 at 823 (Suggestions was “why [Google] added into the [ISA] that [Apple] could not expand farther than what they were doing in” 2016 as Google “did not wish for them to bleed off traffic[.]”).

306. Apple has broader authority with respect to Siri. It may “determine which user inputs constitute Search Queries that will be provided to Google on any basis,” not just superior user experience. JX33 at 794.

307. At present, Apple does not view the ISA as a limitation on its ability to respond to user queries on Suggestions or Siri. *See* Tr. at 2534:24–2535:5 (Cue) (“Q. Was one of Apple’s goals in 2015 to increase the number of users search queries Apple could answer on its own? A. . . . We still have that. We’re trying to answer more questions on Siri today. So it’s still a goal today.”); *id.* at 2345:11-23 (Giannandrea) (“Q. [D]id anything in Google’s agreement with Apple, with regard to the Safari browser, did that limit in any way Apple’s ability to make these Safari suggestions or Siri suggestions? A. No. . . . I didn’t believe there was any limit to what we could do with respect to these suggestions.”).

308. Another search feature on Apple devices is Spotlight. Spotlight can be accessed on the iPhone by a single downward swipe, which produces a search bar. Spotlight is “intended to be sort of a universal search that looks at your own device, but can look up information further afield,” including on Safari. *Id.* at 2204:23–2205:3 (Giannandrea). It is not a GSE, but Spotlight offers links to websites as if entered directly on Safari. *Id.* at 2205:16-21 (Giannandrea). The ISA provides that “Apple shall not be limited in its ability to alter, modify and innovate in Spotlight,” but also requires that Apple’s “initial implementation of the Spotlight Services for Search Queries within Spotlight shall be generally equivalent to the current implementation of search within Spotlight,” though “in future versions of Spotlight, Apple may offer better integrations of the Spotlight Services.” JX33 at 794.

309. The ISA also addresses Apple’s ability to serve ads. If Apple ever wishes to serve ads on Siri or Spotlight queries or results, it may only do so if it intends “to provide a superior user

experience or align with its general advertising principles.” *Id.* at 796. If that threshold requirement is met, Apple is further obligated by the ISA to “offer Google the opportunity to supply such ads or paid listings” before doing so itself. *Id.* This provision has been described as the “**Right of First Refusal.**”

310. Apple does not presently advertise on Spotlight, nor does it have any plan to do so. Tr. at 2497:11-25 (Cue) (stating that Apple has “no intentions or plans to put ads on Siri or Spotlight,” and “today, we have no intentions to put ads on Siri or Spotlight”).

311. Apple also does not “preload any third-party application on [their] devices” and does not intend do so under “any scenario[.]” *Id.* at 2456:2-10 (Cue). Apple previously tried to preload third-party applications on desktop devices, and determined that “it wasn’t the best experience[.]” *Id.* at 2456:13:15 (Cue).

b. History of the ISA

312. The ISA did not start out with Google as the exclusive default GSE. The first-ever ISA was signed in 2002. *See* JX1 (2002 ISA). It granted Apple the right to license Google Search, allowing its users to access the Google SERP directly from the “search box” in Apple’s web browser. *Id.* at 678. The contract was not exclusive as to either party: Apple could preload rival search engines, and Google could license its search product to other third parties. *Id.* at 679. The five-year agreement allowed for either party to terminate the agreement on certain grounds, and it permitted Apple to unilaterally terminate the agreement for any reason after its first year. *Id.* at 680. The 2002 ISA did not include any payment of revenue share. Cue 30(b)(6) Dep. Tr. at 26:4-7.

313. Around 2005, Google initiated the idea of an exchange of revenue share for default exclusivity after it grew concerned that Yahoo might replace Google. *See* UPX855 at 239–40; UPX992 at 016. Apple did not ask for revenue share. *See* Cue 30(b)(6) Dep. Tr. at 26:8–27:2.

314. The parties subsequently amended the 2002 ISA, providing that Google would pay Apple a one-time sum of \$10 million, plus 50% of its annual advertising revenue. JX2 at 818. As consideration, Apple agreed to preinstall Google as the default GSE on Safari, such that it would “automatically be used for web search unless the user selects another search provider.” *Id.* at 819. The 2005 amendment was set to terminate after three years, with Apple retaining the right to unilaterally terminate the agreement any time during the last year. *Id.* at 820.

315. In 2007, Apple launched the iPhone. The parties amended the ISA to include the Safari default placement on mobile devices and other platforms. JX4 at 647 (expanding the definition of “software” to include web browser software for iPhones, iPods, Safari for Windows, etc.).

316. The 2007 amendment included two notable amendments. First, it required that “Apple shall not pre-populate the search box with search terms that are not initiated by the end user,” but that “queries utilizing auto complete features . . . shall be considered input by the End User.” *Id.*; *see* Tr. at 5001:16–5004:15 (Braddi) (describing Apple top hits, Apple Suggestions, and Google suggestions).

317. Second, the 2007 amendment secured Google’s default status in the Safari search bar not only on the iPhone but also on various other Apple products, including iPods and Safari for Windows. JX4 at 647–49. The 2007 amendment also made clear that Google would not pay revenue share to Apple if it decided to create a homepage on Safari that included a search service other than Google. *Id.* This term apparently grew out of a worry that Apple might install Yahoo

as a default GSE on a Safari for Windows homepage. UPX672 at 475–76. Apple apparently never implemented such a homepage on any version of Safari, so Google remained the only default GSE on Apple devices.

318. The ISA amendments in 2008 and 2009 were largely without substantive change. *See, e.g.*, JX5 (2008 amendment); JX6 (2009 amendment).

319. In 2009, Apple sought greater flexibility to grant its users access to other GSEs. Apple sought “[t]he option but not the obligation to set Google as the default search provider” and still receive revenue share. UPX605 at 269. Specifically, Apple proposed that it would receive slightly less revenue share for non-default queries (40%) and the full amount (50%) for queries on search access points preset with Google as the default. *See* UPX675 at 249–50 (Apple redline of ISA). Google rejected those terms in large part because Apple “could decide to work with an alternate provider for the desktop/Safari search solution,” i.e., use Google as the default for some, but not all, locations or product lines/versions. UPX605 at 270; UPX675 at 250. Apple’s requests did not make it into the updated amendments. *See* JX9 (2009 amendment changing the revenue share percentages slightly, with no substantive changes); JX12 (2010 amendment extending the 2002 ISA, as amended, until 2014); Tr. at 4998:3-22 (Braddi) (Apple’s requests “got dropped out”). The agreement remained exclusive.

320. In 2012, Apple again sought the flexibility to distribute other GSEs to its users. It sent Google a term sheet requesting that Apple would have “[n]o obligation to use Google search services or to make Google the default” while maintaining its then-revenue share of 50% for all Google searches on Apple devices. UPX570 at 724. Google stood firm that “[i]f they wanted to receive revenue share,” Apple had to maintain Google as the exclusive Safari default. Tr. at 5001:8-11 (Braddi). The resulting amendment, entitled the 2014 Joint Cooperation Agreement,

maintained Google as the exclusive default search engine. *See* JX24 at 822 (“Google shall remain the default search engine” in the United States.). The 2014 amendment also provided for the creation of “default bookmarks,” which required Apple to include a bookmark for Google Search “prominently displayed on the Safari default bookmarks page” and obligated Google to pay revenue share “for all traffic initiated via the Google search bookmark.” *Id.* Apple, however, was not precluded from offering default bookmarks that linked to rival GSEs, and it reached agreements with Bing and Yahoo for bookmark placement. *See, e.g.*, DX962 at .003–.004 (Apple-Microsoft promotional agreement providing that Apple will make Bing readily discoverable, including by preloading it as a default bookmark on Safari). Two years later, Apple and Google entered into the ISA currently in effect.

c. Microsoft-Apple Negotiations

321. Apple and Microsoft occasionally have had discussions regarding installing Bing as the default GSE on Safari. Microsoft has not been successful. *See generally* Tr. at 2508:3–2531:13 (Cue); *id.* at 3500:9–3504:17 (Nadella).

322. In 2015, prior to the signing of the 2016 ISA, Microsoft hoped that Bing might replace Google as the default GSE on Safari. *Id.* at 2508:7-9 (Cue). As part of its pitch, Microsoft claimed that “increased competition between Microsoft and Google enabled by a search partnership [with Apple] is in Apple’s long-term economic interests[.]” UPX614 at 112. Microsoft made clear that it was “willing to provide Apple with the majority of profits in a search partnership along with greater levels of flexibility and control over the product experience including user experience and branding,” with one example being improved private searching “consistent with the broader Apple value proposition around respecting user privacy[.]” *Id.*

323. Microsoft understood that it “would have to pay and even subsidize the transfer” for the period of transition and was willing to do so for the long term. Tr. at 3502:21–3503:8 (Nadella). Microsoft offered Apple a revenue share rate of 90%, or a little under \$20 billion over five years. UPX614 at 113–14. It did so recognizing that “there was going to be a period of turbulence of shift,” both as a result of the change and assuming that Google would respond by encouraging users to abandon Safari for its browser, Chrome. Tr. at 3503:22–24, 3504:4–12 (Nadella). When that offer was not accepted, Microsoft proposed sharing 100% of its Bing revenue with Apple to secure the default or even selling Bing to Apple. *Id.* at 2511:14–14, 2530:14–21 (Cue).

324. Microsoft “thought they had great [search] quality and they said that with [Apple’s] search volume, they could be even better,” but Apple disagreed. *Id.* at 2510:8–11 (Cue). Moreover, Apple was concerned that despite the high revenue share percentage, Bing would not be able to bring in sufficient revenues because it was “horrible at monetizing advertising.” *Id.* at 2510:25–2511:11, 2511:24–2512:16 (Cue) (“If you have an inferior search engine, customers wouldn’t use it, and so, therefore, I don’t know how you could monetize it well.”).

325. Apple evaluated the potential financial impact of replacing Google with Bing. *See generally* UPX273. The analysis assumed that Microsoft would initially pay Apple 100% of Bing’s revenue share, while Google would continue paying Apple █% revenue share if retained as the default. *Id.* at 975–76. The analysis showed that if Apple extended the ISA, it would gain about \$40 billion from Google in the next five years, and then \$70 billion in the following five years. *Id.* at 974. This was double the \$20 billion Microsoft offered Apple for the first five years. *Id.* (“Clearly, Microsoft can’t commit to these numbers or even anything close to them.”).

326. In response to this analysis, Apple's Senior Vice President of Services, Eddy Cue, internally proposed that the only way Apple could make the switch was if Microsoft were to guarantee minimum annual revenues of \$4 billion the first year and a stepped increases of \$1 billion per year over the next four years, for a total of \$30 billion in guarantees. *Id.* Still, even that approach would produce revenues well short (by \$10 billion) of Apple's expected earnings if it retained Google as the default. *Id.* (“[T]his doesn't match Google (\$30B v. \$40B) and provides no protection for the following 5 years[.]”). Cue concluded that a Microsoft-Apple deal would only make sense if Apple “view[ed] Google as somebody [they] don't want to be in business with and therefore are willing to jeopardize revenue to get out. Otherwise it [was a] no brainer to stay with Google as it is as close to a sure thing as can be.” *Id.*; Tr. at 2528:13-16 (Cue) (“And so Google's a sure thing. They have the best search engine, they know how to advertise, and they're monetizing really well.”).

327. Apple proposed to Microsoft that it guarantee revenues (the record is not clear whether the proposal mirrored what Cue suggested above), but Microsoft balked, which Cue expected. Tr. at 2522:3-19, 2518:18-24 (Cue). Regardless, Apple would not have accepted the deal, even if Microsoft had agreed to a guarantee. According to Cue, there was “no price that Microsoft could ever offer [Apple]” to make the switch, because of Bing's inferior quality and the associated business risk of making a change. *Id.* at 2519:10-11 (Cue); *id.* at 2530:17-19 (Cue) (“I don't believe there's a price in the world that Microsoft could offer us. They offered to give us Bing for free. They could give us the whole company.”).

328. Google has also analyzed what Microsoft would need to offer Apple in order to win the Safari default. It called this study “Alice in Wonderland,” with Alice referring to Microsoft. *See id.* at 1678:16-20 (Roszak). The analysis concluded that in order for Microsoft to match

Google's financial contribution, it would have to pay Apple 122% of Bing's revenue share just to equal Google's then-33.75% revenue share. *Id.* at 1683:10-13 (Roszak); UPX674 at 914. Google thus determined that "it will not be possible for Alice to match our payments profitably[.]" UPX674 at 914. Accordingly, during ISA negotiations, Google understood that Bing was not a viable option, which minimized Apple's leverage. *See* Tr. at 7772:12–7773:10 (Pichai).

329. Although Apple has never seriously considered Bing as an option, Microsoft perceives that Apple has used Bing "to bid up the price" in its negotiations with Google and extract a higher revenue share from Google. *Id.* at 3505:6 (Nadella). Microsoft CEO Satya Nadella testified that if, hypothetically, Bing exited the market, there would be a real concern as to whether Google would even pay Apple for default status, given the lack of any other option at all. *Id.* at 3505:12-17 (Nadella).

d. DDG-Apple Negotiations

330. DDG, because of its brand emphasis on privacy, on multiple occasions has attempted to convince Apple to switch to DDG as the default GSE on Safari's "private browsing mode," a feature in Safari that provides some additional privacy protections beyond the baseline. *Id.* at 1953:3-11, 1973:16-19 (Weinberg).

331. In 2014, Apple for the first time offered DDG as an alternative default search option on Apple devices. This meant that users could change the default on Apple devices to DDG, if they chose to do so. *Id.* at 1972:22–1973:2 (Weinberg). That same year, DDG made its first pitch to serve as the default in Safari private browsing mode. *Id.* at 1973:3-5 (Weinberg). It continued to propose this idea over the following two years and received its first response from Apple in 2016. *Id.* at 1973:6-7 (Weinberg). DDG periodically met with Apple representatives through

2019, but ultimately Apple declined to make the switch. *See generally id.* at 1974–2046 (Weinberg).

332. Upper-level Apple executives never genuinely considered using DDG as the default in Safari’s private browsing mode. *Id.* at 2352:21-23, 2361:7-11 (Giannandrea); *id.* at 2506:25–2507:7 (Cue). This is in part because DDG operates as “a veneer on top of other search engines,” as it syndicates its results from Bing. *Id.* at 2352:25–2353:8, 2353:22-25 (Giannandrea); *id.* at 2505:10-14 (Cue); *see* DX375; DX377 at .001 (describing DDG for private browsing as “probably a bad idea”). Apple’s senior leadership also views DDG’s search quality as inferior to Google’s. *Tr.* at 2353:9-11 (Giannandrea); *id.* at 2506:12-16 (Cue) (“[I]t is not a great search engine. . . . [I]t’s not good enough.”).

e. Apple’s Recent Evaluation of GSEs

333. In 2021, Apple’s “Aethon” study demonstrated that, as measured by relevance of results, Google is superior to Bing on all search access points (except desktop queries on Safari). UPX260 at 681. “Google has a much larger lead on Mobile than Desktop[.]” *Id.* Google’s relevance advantage was particularly strong for long-tail queries. As to users’ overall preferences, Bing outperformed Google on its desktop user interface (for both Safari and Spotlight), but Google tied with Bing as to overall Safari queries and beat out Bing as to Spotlight on mobile. *Id.*

2. Mozilla-Google RSA

334. Google also has a revenue sharing agreement with the browser developer Mozilla, whereby it pays Mozilla ■% revenue share in exchange for the default search placement on the Firefox browser. JX65 at 100, 107. The search access points on Firefox include “the search box” in the browser, “the navigation or location bar,” any “search box displayed on a Firefox Startpage,” among others. *Id.* at 102–03. If Mozilla implements the “this time, search with” feature on its

mobile application, the revenue share paid under the Google-Mozilla agreement drops from █% to █%. *See id.* at 100, 107.

335. Google's 2021 revenue share payment to Mozilla was over \$400 million, or about 80% of Mozilla's operating budget. M. Baker Dep. Tr. at 41:18-24; Tr. at 538:7-15 (Rangel) (discussing UPXD101 at 10). Mozilla has repeatedly made clear that without these payments, it would not be able to function as it does today. *E.g.*, DX547 at .002.

336. Under the terms of the current Mozilla RSA, either party may terminate the agreement only upon a breach. *See JX31* at 628–29.

a. Mozilla-Yahoo Partnership

337. From 2014 through 2017, the default GSE on Firefox was Yahoo, not Google. Tr. at 630:12-17 (Rangel). The Mozilla-Yahoo agreement required Yahoo to pay a minimum annual payment of \$375 million, or 70% revenue share, whichever was higher. DX1012 at .007; M. Baker Dep. Tr. at 220:19–221:10.

338. When Mozilla switched the Firefox default GSE from Google to Yahoo, the query volume for each search provider changed. Google's share of queries on Firefox abruptly dropped from between 80–90% to between 60–70%, a 20-point decline. *See Tr.* at 630:12–631:9 (Rangel) (discussing UPXD101 at 55). Yahoo's share, in turn, increased from around 10% to 30% of the Firefox queries. *Id.* Between 2014 and 2017, Google gained back some amount of query share, but never more than 70%. *Id.* When Mozilla reverted the default back to Google in 2017, Google regained its former query share at Yahoo's expense. *Id.*

339. To meet the minimum payment guarantee, Yahoo increased the number of ads it placed on the SERP, degrading the user experience and ultimately resulting in Mozilla changing the default back to Google. M. Baker Dep. Tr. at 236:24–237:9, 239:2-11; *see* UPX898 at 752

(“The Yahoo team has been under continual pressure to increase monetization of the SERP, and has been making gradual changes over the last few months, leading to the cumulative experience you see today.”); M. Baker Dep. Tr. at 77:18–78:2; Tr. at 6043:14-25 (Whinston).

b. Mozilla’s Experiments

340. Mozilla has run experiments to assess a potential switch of the default GSE from Google to a rival. It tends to run these experiments when its agreements come up for renewal. *See* M. Baker. Dep. Tr. at 269:20–270:21.

341. In a 2016 experiment, Mozilla switched the default GSE on both new and existing users from Google to Bing. By the twelfth day, Bing had kept only 42% of the search volume. DX679 at .006. After some additional time, those numbers dropped to 20–35%, depending on certain variables. *Id.* Mozilla’s takeaway was that switching the Firefox default to Bing would result in missing revenue targets. *Id.*

342. The same year, Mozilla conducted an experiment switching the default GSE to Yahoo. DX729. Yahoo only retained 16.5% of the total search volume. *Id.*

343. In 2017, Mozilla conducted a similar test, with Bing replacing Google. DX679 at .006. After 14 days, Bing retained 52.3% of search volume. *Id.*

344. From 2021 to 2022, Mozilla once again switched the default GSE to Bing for 0.5% of desktop Firefox users. *See* DX548 at .002. As a result, search volume decreased by 7% and ad clicks went down 13%. *Id.* at .003. Mozilla found: (1) “35.5% of clients who had their default search engine switched to Bing changed their default to another search engine (26% changed to Google, 9% changed to a search engine other than Bing or Google and the remaining kept Bing);” (2) the “64.5% of clients who did not switch away from Bing contributed a much lower percentage

to total search volume and ad clicks than clients who switched back to Google;” and (3) “65% of users who did not retain Bing as their default engine made the change within the first day[.]” *Id.*

345. There is no evidence in the record of Mozilla running any experiments where it switched the default from Google to a non-GSE.

3. *Other Browser Agreements*

346. Google has comparable agreements with smaller browsers, like Samsung’s S Browser, which have been renewed through amendments. *See, e.g.*, UPX5131 (Google-Opera 2012 Contract); UPX5146 (Google-Opera 2021 Amendment); UPX5210 (Google-UCWeb 2017 Agreement); JX71 (Google-Samsung RSA).

347. DDG made its private browsing mode default proposal to other browser developers, including Samsung, Mozilla, and Opera, but none of them moved forward with DDG. Tr. at 2048:9-24 (Weinberg). DDG’s impression was that the common concern shared by these browsers was their contracts with Google. *Id.* at 2049:21-24 (Weinberg).

B. Android Agreements

1. *Mobile Application Distribution Agreements*

348. Google has entered into Mobile Application Distribution Agreements, or MADAs, with all Android OEMs, including Motorola and Samsung, among others. *See, e.g.*, UPX5206 (Sony); JX49 (Motorola); JX37 (Samsung). The MADA is a device-by-device license that allows OEMs to use Google’s proprietary mobile applications developed for the Android ecosystem. Tr. at 775:9-14, 781:10-11 (Kolotouros). This suite of applications is referred to as Google Mobile Services (GMS). *Id.* at 775:9-17 (Kolotouros). OEMs pay no fee for the GMS license, but Google requires OEMs to preload certain applications in prominent placements. *See id.* at 9415:16-18 (Rosenberg).

349. The MADAs may be terminated only by a breach by either party. *E.g.*, JX49 at 877–78 (Google-Samsung MADA).

350. As of 2019, about 2.3 billion Android devices were subject to the MADA. UPX129 at 904. Google employees were not aware of any non-MADA Android device sold in the United States. *See* Sept. 19, 2023 (Sealed Session) Tr. at 9:23–10:4, 12:8-10 (Yoo); Tr. at 780:23-25, 791:25–792:2 (Kolotouros). Moreover, there are no Android OEMs that have revenue share agreements but are *not* MADA signatories. Tr. at 777:1-15 (Kolotouros); *see also id.* at 778:5-6 (Kolotouros) (“I would say to the extent the RSA generally does not happen unless an OEM has entered into a MADA, that is correct.”).

351. Google views the MADA as securing “baseline distribution of [its] apps on Android[.]” UPX129 at 904. Under the MADA, partner OEMs must preload all 11 GMS applications onto a new device, including the Google Search Widget, Chrome, YouTube, Gmail, Google Maps, and Google Drive, among others. *Id.* at 904–05. Six of these applications, including the Google Search application and Chrome (which both default to Google), cannot be deleted by the user. *Id.* Without a MADA, an OEM cannot distribute any one of these GMS applications. Tr. at 779:10–780:16 (Kolotouros).

352. One of the GMS applications is the Google Play Store, the leading Android app store. *See* UPX129 at 905. Without a MADA, an OEM cannot distribute the Play Store. Tr. at 780:23-25 (Kolotouros). The Play Store contains a set of application programming interfaces (APIs), which support the functionality of all Android applications—both those developed by Google and by third parties. *Id.* at 784:7–786:5 (Kolotouros). A user cannot effectively utilize GMS applications without having the Google Play Store installed, because the GMS apps’ APIs

rely on the Play Store’s infrastructure. UPX125 at 067; *see* Tr. at 3517:18-19 (Nadella) (“And without [the] Google Play [Store], an Android phone is a brick.”).

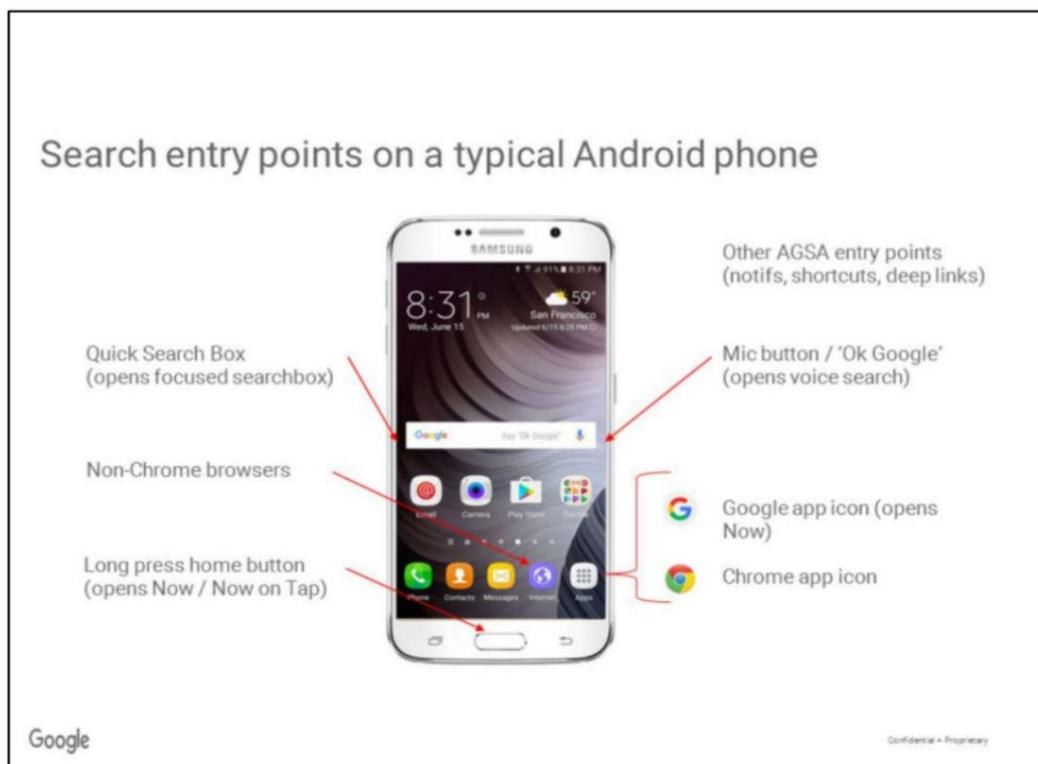
353. The Play Store is not just technically required, but it also contributes significantly to the user experience. Carriers view the Play Store as essential. *See* Tr. at 1025:11-12 (Higgins) (“A device would need to have an app store on it in order to be successful[.]”); Giard Dep. Tr. at 111:18–112:7 (stating the Play Store is “[v]ery important” and “a primary function of allowing customers to access the apps that they want to have [o]n their device”; it “would be extremely difficult for a device to be successful without it”); Ezell Dep. Tr. at 61:1-3 (“[H]aving on the home screen the icon for the Play Store makes sense. It’s a core functionality of the device.”).

354. Samsung, which preloads its own proprietary app store onto its devices, does not see its “Galaxy Store” as replacing the Play Store. *See* Baxter Dep. Tr. at 91:20-23 (“I can probably count on the number – on one hand the numbers of times that I went into the Galaxy app store. So it was not a real relevant solution.”); *see also* UPX1011 at 290 (Google “believe[s] that the cannibalization of Play store revenue due to Galaxy store is none to minimal,” given that most of the popular applications present on the Play Store are absent from the Galaxy Store).

355. Even Microsoft signed a MADA (thereby preloading the rival Google Search Widget and Chrome) for its Duo mobile devices because it “needed the license from Google[.]” Tr. at 3117:2-3, 3125:19 (Tinter).

356. Part of the GMS suite of applications is the Google Search Widget (or Quick Search Box). Signatories of the MADA agree to preload and place the Widget on the default home screen of the device. *Id.* at 793:21-23 (Kolotouros). Signatories also receive Chrome, and generally speaking, they agree to place Chrome in the Google applications folder, which appears on the default home screen. UPX141 at 244. The MADA requires the Google applications folder to be

on the default home screen, but it does not require its placement on the dock, sometimes known as the “hotseat,” as depicted below. Tr. at 793:15–797:20 (Kolotouros) (discussing default placements).



UPX76 at 184.

357. Although OEMs must preload the Google Search Widget, users can delete it. As of 2016, there were about 200,000 logged widget deletions daily but over 2.5 million daily Android activations. *Id.* at 188.

358. Nothing in the MADA expressly requires an OEM to preload only the GMS applications. *See* Christensen Dep. Tr. at 49:25–50:4. OEMs are, for instance, free to preload a second (or third) browser or search widget.

359. In practice, however, OEMs recognize that preloading more than one of the same search access points, especially in similar prominent positions, is a suboptimal design that would

degrade the user experience. This overloading of apps is known as “bloatware.” *See* Tr. at 2456:20–2457:8 (Cue). Even Microsoft avoided adding a Bing search widget on its Duo devices to avoid degrading the user experience. *See, e.g., id.* at 3126:7-10 (Tinter) (“I do remember us having some conversations that from a user-interface standpoint, it would be really confusing if there were two boxes there, and it wouldn’t be a good product for the user.”).

360. As another example, Samsung already preloads a second browser—its proprietary S browser—on all Samsung devices. Rival browser and GSE providers, like Microsoft, understand that Samsung is extremely unlikely to preload a third browser on Samsung devices. *See* UPX301 at 646 (2019 Microsoft email: “Therefore to take Edge [Samsung] would either need to ship 3 browsers on the device (Samsung browser, Edge, and Chrome) or drop the Samsung Browser. 3 browsers is DOA,” or “dead on arrival”); UPX133 at 811 (internal Microsoft analysis: “On browser, [Samsung is] not willing to ship three browsers on the device. This is due to overall concerns about the number of applications pre-loaded on the device and concern about operator push back.”).

361. Google recognizes this reality, too. *See* UPX141 at 819 (describing device configuration with two preinstalled browsers and two default widgets as “[a]llowed but not likely”); Tr. at 1528:6-11 (Yoo) (“[F]rom the angle of like a user experience for these devices, what we understood and what we were trying to convey here was that OEMs want to sell devices, they want to be competitive. And we thought that having two widgets was a little too much, so that OEMs are not likely to put two widgets on a device.”). Google employees were unable to identify any Android device that is preloaded with two search widgets. Tr. at 1528:17-20 (Yoo); *id.* at 2877:2–2877:7 (Kartasheva); *id.* at 803:9-16 (Kolotouros).

2. *Revenue Share Agreements*

362. A revenue share agreement, or RSA, is a separate agreement from the MADA. Each RSA generally follows a tiered structure, in which a carrier's or OEM's payment is tied to the degree of device exclusivity. The RSAs are device-by-device, meaning that partners can opt into different tiers based on the device model sold. The RSAs do not prohibit the preinstallation of social networks like Facebook and Instagram. *Id.* at 8689:7-9 (Israel).

363. Although no OEM or carrier is required to enter into an RSA, all do so. It would be irrational for a profit-maximizing firm to sign a MADA but then forgo at least some revenue share under the RSA.

a. Carrier RSAs

364. Google has signed RSAs with each major wireless carrier: Verizon, AT&T, and T-Mobile. Google's agreement with Verizon has three tiers, whereas its contracts with AT&T and T-Mobile only have two and one, respectively. *See* JX93 at 515 (2021 Google-Verizon RSA, outlining three tiers); JX91 at 765 (2021 Google-AT&T RSA, outlining two tiers); JX95 at 695–98 (2021 Google-T-Mobile RSA, describing one tier). All three carrier RSAs may only be terminated should either party breach the contract. *See* JX93 at 508; JX91 at 758–59; JX95 at 704.

365. Google has long viewed RSAs with carriers as essential to securing query traffic on Android devices to the exclusion of rivals. In fact, Google viewed exclusivity on Android devices as “very strategic to Google.” UPX134 at 865. In a 2011 email, Google executive Chris Barton wrote about then-existing exclusive distribution deals with T-Mobile, Verizon, and Sprint, “I think this approach is really important otherwise Bing or Yahoo can come and steal away our Android search distribution at any time, thus removing the value of entering into contracts with them. Our philosophy is that we are paying revenue share *in return for* exclusivity.” *Id.* at 869.

Another Google employee wrote as part of the same conversation, “The exclusive across all the [A]ndroid search entry points is very strategic to mobile search. [T]he nightmare scenario is for [Microsoft] (or others) to come and scoop us by simply paying more. [W]e know they have shown an appetite to do this in the past and will likely do so again to gain traction.” *Id.* at 866. Barton finally added, “We need to incentivize carriers to ship Google using the same approach we at Google have used for many years: ‘We will pay for revenue share in return for exclusive default placement.’ This contract is an exchange. . . . Without the exclusivity we are not ‘getting’ anything. Without an exclusive search deal, a large carrier can and will ship alternatives to Google[.] . . . Android is by far the greatest opportunity for Search monetization in mobile over the next years and is very strategic to Google. You can bet that Microsoft and Yahoo will enter into contracts for search on Android through carrier deals if we do not.” *Id.* at 865.

i. Verizon

366. Verizon’s RSA has three tiers: Core, Qualifying, and Preferred. Google pays Verizon █% revenue share on devices where the “core” search access points have been preinstalled and defaulted to Google. *See JX93* at 515–16 (describing the “Core Devices”). Those include Chrome, the Samsung Browser (on Samsung devices only), and the Google Assistant application. *Id.* at 516. Verizon also receives █% revenue share for old devices that comply with the prior RSA terms (i.e., that are grandfathered in). *See id.* at 515 (describing the “Qualifying Devices”). In exchange for more placements, Google pays more revenue share. The RSA requires Google to pay Verizon █% revenue share on Preferred Tier devices (a three-fold increase from Verizon’s Core Tier), provided that those devices have several other default Google placements. *Id.* at 515, 517. Those include, but are not limited to, the Google Search Widget, Chrome, and the default homepage on the browser. *See id.* at 517.

367. Verizon’s “Core Devices” tier was developed through negotiations. Verizon has entered into RSAs with Google for over a decade. “From 2009–2014, Google paid Verizon 40% revenue share,” and from 2014–2020, Google decreased the revenue share, paying Verizon 20%. UPX947 at 105.

368. The Qualifying Tier devices earn carriers a ■% revenue share but are only applicable to devices sold during the prior agreement terms and whose configuration conforms to the requirements of the previous agreement. JX93 at 515. Verizon previously earned a 20% revenue share on these Qualifying Tier devices but now only earns ■%. Tr. at 1049:25–1050:4 (Higgins).

369. On June 13, 2017, Verizon purchased Yahoo. *Id.* at 1043:15-18 (Higgins). One of Verizon’s goals was to preload certain Yahoo features, including search, onto its devices. *See id.* at 1056:11-15 (Higgins). Verizon raised this with Google in its negotiations for the 2021 Google-Verizon RSA. *See* UPX1026 at 080–81.

370. In November 2018, during RSA negotiations, Verizon shared a redline of the draft RSA with Google, striking out the exclusivity provision, which previously read: “Company will not include on the device any alternative search service that is similar to Google Search.” *Id.* at 080. In that same redline, Verizon sought to limit the search access points governed by the RSA to expand its “flexibility for additional search capabilities on devices.” Tr. at 1056:5-10 (Higgins); *see* UPX1026 at 081.

371. During those negotiations, Verizon hoped to increase the revenue share it was paid under the RSA. *See* UPX947 at 105 (a “top Verizon Ask[] to Google” was for “Google to increase revenue share to Verizon from 20% to 23%” under the RSA).

372. Despite these asks, Google insisted on the tiered revenue share system in effect at the time. UPX306 at 976–77. It “advised [that] all go-forward agreements with carriers include exclusivity provisions and exceptions cannot be made.” UPX642 at 198. Despite Verizon “arguing vigorously . . . to keep [the] contract non-exclusive,” *id.*, Google was insistent that Verizon could not preload any other GSE, such as Yahoo Search, and still receive the then-20% revenue share, Tr. at 1075:16-21 (Higgins). In order for Verizon to preload Yahoo onto its devices, it had to accept the much-lower █% revenue share on those models in the Core Tier, which does not require exclusivity. *See* JX93 at 515.

373. Verizon viewed the █% revenue share as “punitive.” UPX495 at 003. It conducted a “full revenue impact” assessment if it were to either not renew the RSA or renew but accept the Core Tier to allow it to “commingl[e] search” with Yahoo. *Id.* at 003–04. That analysis demonstrated that Verizon’s acceptance of the Core Tier revenue share payment would result in a \$1.4 billion loss in revenue to the company. UPX304 at 606; Tr. at 1068:3-5 (Higgins). This was both due to the decreased revenue share from Google, as well as Yahoo’s revenue projections, which indicated “smaller [revenue] relative to the agreement that [Verizon] had with Google.” Tr. at 1090:2-5 (Higgins).

374. As a result, Verizon determined that “the lower revenue from Yahoo [was] not worth it.” UPX306 at 976. Instead, it determined that it would preload Yahoo properties that “do not have general search capabilities outside of the app,” which would not run afoul of the Preferred Tier requirements. UPX642 at 198. Those properties included vertical offerings such as news, finance, and sports. Tr. at 1093:3-7 (Higgins). Google and Verizon in fact did agree to a carveout in the RSA that would allow for these vertical properties to be preloaded onto Verizon’s Android devices, without demoting them from the Preferred to Core Tier. *Id.* at 1095:1-7 (Higgins). Those

vertical properties, however, could not serve as a search access point or otherwise direct users to a non-Google GSE. *Id.* at 1095:13-15 (Higgins).

375. Ultimately, these negotiations regarding Yahoo verticals became moot because Verizon sold Yahoo shortly before the 2021 RSA was executed. *See id.* at 1056:16-18 (Higgins).

ii. AT&T

376. AT&T's RSA is very similar to Verizon's, although it does not have a tier for Core Devices. AT&T may instead choose to enroll its devices in the Preferred Tier, maintain them as Qualifying Devices, or forego any revenue share. *See JX91* at 765.

377. The RSA requires Google to pay AT&T █% revenue share on Preferred Tier devices provided that all search access points default to Google and those devices preload the Google Search Widget on the default home screen. *Id.* at 751, 765–68.

iii. T-Mobile

378. T-Mobile's RSA is structured differently than the others. T-Mobile is compensated for the default placements on Qualifying Devices and Preferred Devices through a \$█ bounty per device. *JX95* at 692, 696. If T-Mobile does not configure a device on an exclusive basis, it is entitled to no bounty at all. *See id.* at 696. In the RSA negotiations, the initial term sheet included a tier-based system, where T-Mobile would earn more revenue share in exchange for exclusivity ("Optimized Tier") and less in exchange for a minimum level of device configuration without exclusivity ("Core Tier"). *Giard Dep. Tr.* at 328:23–330:25. Google ultimately dropped the Core Tier from the RSA, even though T-Mobile "still wanted to be able to configure devices and receive revenue share from Google for the devices that were nonexclusive," because "Google preferred not to do that." *Id.* at 330:7-11.

379. It is not economically rational for any profit-maximizing carrier to opt for the lower-revenue share option. Consequently, all three major carriers under their current RSAs have enrolled all Android devices sold at the highest revenue tier. Tr. at 1050:18-22 (Higgins) (Verizon, all at Preferred Tier); Ezell Dep. Tr. at 193:5-9 (AT&T, all at Preferred Tier); Giard Dep. Tr. at 39:3-16 (T-Mobile, all distributed devices qualified for bounty).

b. RSAs with OEMs

380. Google also has RSAs with the two primary Android OEMs, Samsung and Motorola. These RSAs cover the relatively small number of Android devices sold directly by OEMs.

381. Under its current RSA, Samsung receives ██████% revenue share for devices complying with prior terms. JX71 at 404, 417. Additional incremental revenue share requires Samsung to configure certain search access points to Google. “Core Devices” per the Samsung RSA must have Google set as the default GSE on the S Browser and must not allow users to change the S Browser default from the browser search bar itself (as opposed to the device settings). *See id.* at 401, 426–28. In exchange, Google pays Samsung ██████% revenue share on certain search access points for Core Devices. *Id.* at 416.

382. The Samsung RSA also provides for “Enhanced Devices,” which requires additional placements beyond the MADA, such as placing Chrome as the default browser (over S Browser) in the hotseat, or dock. *See id.* at 402–03, 422–24. The revenue share paid to Samsung is the same for Enhanced Devices and Core Devices (█████%), but that percentage applies to a broader set of search access points. *Id.* at 402, 416, 422–24.

383. Nearly all Samsung devices sold in the United States are Enhanced Devices. Tr. at 921:5-7 (Kolotouros).

384. Motorola’s RSA with Google is structured differently. All devices sold must meet the minimum requirements of the Foundation Tier (preinstallation of Chrome with Google as the default GSE in the device’s dock or hotseat). JX62 at 184, 197. Motorola then earns at least \$ [REDACTED] monthly in return. *Id.* The Premier Tier requires exclusive preinstallation of Google as the default on all search access points on the device, in return for additional monthly payments. *Id.* at 186–87, 198, 201. Google estimates that the number of Motorola devices sold by the OEM that are subject to this RSA “is north of 95 percent[.]” Tr. at 911:11-19 (Kolotouros).

c. Definitions of Alternative Search Services

385. All current Android RSAs contain a definition of “alternative search services” that limits the partner’s ability to preinstall or promote a different GSE. The 2021 Google-T-Mobile and 2020 Google-Motorola RSAs define “Alternative Search Service” as “any search service that is substantially similar to Google Search (as determined by Google in its reasonable discretion).” JX95 at 689 (T-Mobile); JX62 at 177 (Motorola). The 2021 Google-T-Mobile agreement prohibits T-Mobile, on Preferred Devices, from installing any Alternative Search Service or means of navigating to one; marketing any other Alternative Search Service; suggesting an Alternative Search Service to end users; or adjusting settings that would interfere with Google’s default search position. JX95 at 696–97. The 2020 Google-Motorola RSA contains similar restrictions. JX62 at 185, 187.

386. The 2009 Google-Verizon RSA defined “General Web Search” as “search functionality that produces search results by searching a large proportion of indexable websites, and where such search results may also include, unless excluded herein, other non-website results. Examples of General Web Search include Google, Yahoo, and Bing search services.” JX16 at 678.

387. That contract did not limit partners' ability to preload "vertical and customizable search functionality such as restaurant search, local business search, application search, and video search" onto covered devices and states that those functions are "not General Web Search" within the meaning of the contract. *Id.*

388. The 2021 Google-Verizon RSA defines "Alternative Search Service" as "(a) any web or (b) any on-device search service that in response to queries incorporates multiple vertical search functionalities, and that, in each case of (a) and (b), offers functionality that is substantially similar to Google Search (as determined by Google in its reasonable discretion)[.]" JX93 at 489. This definition expressly carves out "search within a single mobile application that is limited to content within a particular, single or multiple vertical . . . that provides search results that [are] not substantially similar to Google Search (in its reasonable discretion)[.]" *Id.* The 2021 Google-Verizon RSA restricts the installation or promotion of Alternative Search Services, with a limited carve-out for Yahoo verticals, which was never implemented. FOF ¶¶ 371–375.

389. The 2021 Google-AT&T RSA defines "Alternative Search Service" as "any application, product, or service, other than Google Search, which, in response to queries, delivers search results consisting of (a) internet content or (b) content from multiple applications on a Device that [is] owned by entities that are not Affiliates of one another, in each case of (a) and (b), in a manner that is substantially similar to Google Search (as determined by mutual agreement of the Parties in accordance with section 7.2)." JX91 at 743. The AT&T agreement carves out similar functionality to the Verizon agreement, including any vertical content "that provides search results without searching the internet, other mobile applications, or web pages," providing Spotify and Waze as examples. *Id.* The AT&T agreement prohibits AT&T from preloading or otherwise

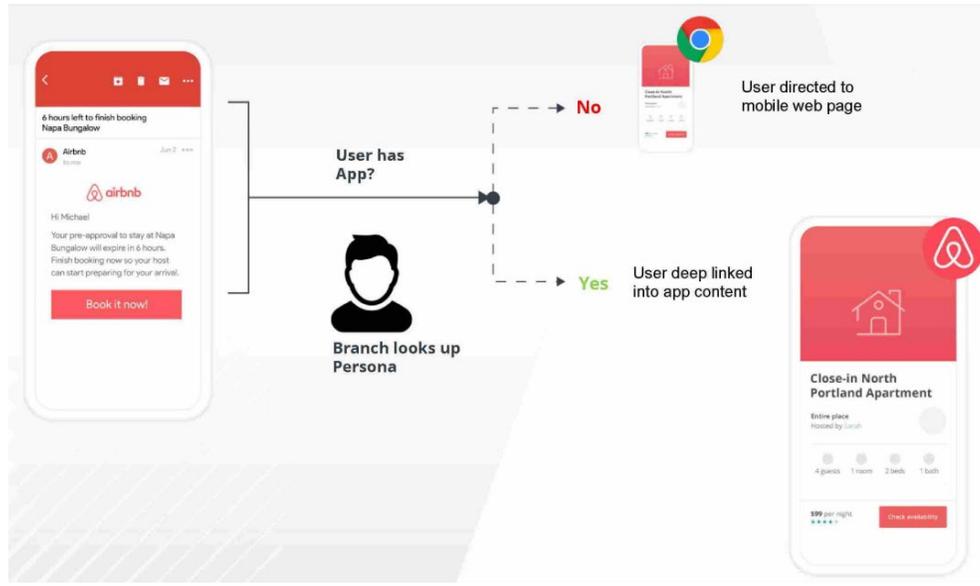
promoting on Preferred Devices any Alternative Search Services, with limited exceptions. *Id.* at 752, 753–54.

390. The 2017 Google-Samsung RSA used to define “Alternative Search Service” as “any web search service that is substantially similar to Google Search.” JX41 at 967. That definition was changed in 2020, however, to include “any web or on-device search service (including on-device search that incorporates multiple vertical search functionalities) that offers functionality that is similar to Google Search.” JX71 at 394. This change resulted from Samsung’s preinstallation of an on-device search technology from Branch, discussed *infra* Section VI.B.2.d. The 2020 Google-Samsung RSA limits Samsung’s ability to install or promote Alternative Search Services on Enhanced Qualified Devices, with limited exceptions. JX71 at 403, 405.

d. Branch

391. In 2019, Samsung sought to integrate Branch’s deep-linking technology onto its devices. Tr. at 2907:11-20, 2908:1-4 (Austin). That technology primarily enables on-device search of mobile applications, but it also has the capacity to serve limited web search results if a user does not have a relevant mobile application on their device. This web search functionality was known as “Discovery.” *Id.* at 2894:9–2895:6, 2900:4-12, 2909:16–2910:14 (Austin).

392. Branch also developed a “Deepview” functionality where, based on partnerships with SVPs, it would allow users who did not have a particular app downloaded to access the SVP’s website information directly from the Discovery interface, without reverting to the web. *Id.* at 2916:1-18, 2917:3-13 (Austin).



DX612 at .011.

393. Branch understood the Google-Samsung RSA to be a roadblock to its distribution, as linking to websites could conflict with the agreement. *See* Tr. at 2908:18–2909:2 (Austin). Although Samsung eventually did preinstall Discovery on certain devices, its functionality was diminished. *See id.* at 2910:21-22, 2921:2-8 (Austin) (“Samsung implemented a number of severe product restrictions based on this concept of linking to the web.”). Branch was limited to a predetermined list of applications so that Samsung could ensure those applications did not link to the web. *Id.* at 2910:23–2911:9 (Austin). These restrictions affected Branch’s ability to monetize Discovery because monetization was driven by user access. *Id.* at 2912:22–2913:20 (Austin).

394. Following this episode, the newly negotiated 2020 Google-Samsung RSA included an amended definition of “Alternative Search Service” as “any web or on-device search service (including on-device search that incorporates multiple vertical search functionalities) that offers functionality that is similar to Google Search.” JX71 at 394.

395. AT&T also considered installing Branch’s technology. Ultimately, it decided not to partner with Branch after Google refused to clarify whether such a partnership would run afoul

of the RSA. After initially meeting with Branch, AT&T was interested in distributing it, but sought reassurance from Google that if it did so, it would not violate the RSA. Ezell Dep. Tr. at 237:6-19, 239:15-23. AT&T felt that it was not “black and white or cut and dry,” and that “there might be some risks associated with” partnering with Branch, because it could be “considered a competing or alternative search,” which would require AT&T to “forego[] the Internet search revenue from Google and instead just earn[] this on-device search revenue from Branch.” *Id.* at 240:1-5, 242:25–243:9.

396. Ultimately, AT&T was unable to get a clear response from Google, *see* UPX982 at 686–87 (Google referring AT&T back to the “alternative search services” term without a concrete answer), and thus AT&T declined to preload Branch because it was not worth the risk, Ezell Dep. Tr. at 340:20–341:4 (“[T]he way it was reported back to me was that Google indicated they felt that it was inconsistent with the RSA.”); *id.* at 247:1–249:9 (“It didn’t appear that the economic upside from Branch was significant enough to . . . potentially put at risk a device not being eligible for our Google Search revenue.”).

3. *Mobile Services Information Agreements*

397. In 2021, every wireless carrier entered into a Mobile Services Incentive Agreement (MSIA) with Google, also known as a “go-to-market” agreement, wherein Google pays carriers incentives as consideration for meeting various requirements that are unrelated to search. *See* JX92; JX96; JX94; Tr. at 9460:24–9461:23 (Rosenberg).

398. The MSIAs are separate and apart from the MADAs and RSAs. Tr. at 9376:21–9377:8 (McCallister). They require partners to collaborate with Google as to how the incentive is spent, which goes towards the goal of supporting the sale of Android devices and the Android ecosystem. *Id.* at 9460:24–9461:23 (Rosenberg); *id.* at 9378:23–9379:1 (McCallister).

CONCLUSIONS OF LAW

I. LEGAL FRAMEWORK

“Section 2 of the Sherman Act makes it unlawful for a firm to ‘monopolize.’” *United States v. Microsoft*, 253 F.3d 34, 50 (D.C. Cir. 2001) (citing 15 U.S.C. § 2). The offense of monopolization requires proof of two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

The D.C. Circuit’s decision in *Microsoft* explains how to evaluate claims of monopolization. The first element—“monopoly power in the relevant market”—consists of two inquiries: (1) market definition, both product and geographic, and (2) power within the relevant market. *Microsoft*, 253 F.3d at 51. The plaintiff bears the burden of proof on both. *Id.* The second element—“willful acquisition or maintenance” of monopoly power—involves a burden-shifting inquiry. The plaintiff bears the initial burden of establishing a prima facie case of anticompetitive effects resulting from the challenged conduct. *Id.* at 58. If the plaintiff makes out its prima facie case, the burden shifts to the defendant to “proffer a ‘procompetitive justification’ for its conduct,” that is, “a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal[.]” *Id.* at 59. Finally, “[i]f the monopolist asserts a procompetitive justification . . . then the burden shifts back to the plaintiff to rebut that claim.” *Id.* “[I]f the monopolist’s procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.” *Id.*

The court structures its conclusions of law consistent with *Microsoft's* analytical framework. After first summarizing the principles governing market definition, *infra* Section II.A, the court in Section II.B addresses whether general search services is a relevant product market, and finding that it is, then evaluates in Section II.C whether Google has monopoly power in that market. In Part III, the court considers the three proposed advertiser-side markets. The court finds that Plaintiffs have established two relevant markets—search advertising and general search text advertising—but that Google possesses monopoly power only in the narrower market for general search text advertising. All parties agree that the relevant geographic market is the United States.

The court then determines whether Google has engaged in exclusionary conduct in the relevant product markets. Plaintiffs' primary theory centers on Google's distribution agreements with browser developers, OEMs, and carriers. The court first addresses in Part IV whether the distribution agreements are exclusive under *Microsoft*. Finding that they are, the court then analyzes in Parts V and VI whether the contracts have anticompetitive effects and procompetitive justifications in each market. For reasons that will become evident, the court does not reach the balancing of anticompetitive effects and procompetitive justifications. Ultimately, the court concludes that Google's exclusive distribution agreements have contributed to Google's maintenance of its monopoly power in two relevant markets: general search services and general search text advertising.

In Part VII, the court evaluates Plaintiff States' additional theory of exclusionary conduct: that Google caused anticompetitive effects in the proposed markets by purposely advantaging its own advertising platform over Microsoft's on its search engine management tool, SA360. The court finds that Google's SA360-related conduct does not give rise to antitrust liability for two

reasons: (1) as a matter of law, Google has no duty to deal with Microsoft and (2) Plaintiff States did not produce evidence of anticompetitive effects.

Finally, in Sections VIII.A and VIII.B, respectively, the court discusses the intent evidence in this case and Plaintiffs' request for sanctions under Rule 37.

II. MONOPOLY POWER: GENERAL SEARCH SERVICES

The Supreme Court has defined “monopoly power” to mean “the power to control prices or exclude competition.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). “More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level.” *Microsoft*, 253 F.3d at 51. Direct evidence of such pricing power is “rarely available[.]” *Id.* So, “courts more typically examine market structure in search of circumstantial evidence of monopoly power.” *Id.* Applying this “structural approach,” a court may infer monopoly power “from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.” *Id.* Entry barriers are factors “that prevent new rivals from timely responding to an increase in price above the competitive level.” *Id.*

Plaintiffs maintain that Google has monopoly power in the product market for general search services in the United States. According to Plaintiffs, Google has a dominant and durable share in that market, and that share is protected by high barriers to entry.

Google counters that there is no such thing as a product market for general search services. What exists instead, Google insists, is a broader market for query responses, in which there is vigorous competition. Google’s Post-Trial Br., ECF No. 908 [hereinafter GTB], at 8–15. That market includes a host of other firms that fall outside of Plaintiffs’ proposed market, including (1) SVPs like Amazon, Booking.com, and Yelp, (2) social media companies like Meta (which owns Facebook and Instagram) and TikTok, and (3) prominent stand-alone websites, like

Wikipedia. *Id.* These firms answer queries and therefore compete with Google. Secondly, even if there is a product market for general search services, Google argues that it lacks monopoly power in it. The emergence of other search competitors, Google says, proves that barriers to entry are not as high as Plaintiffs claim.

A. Principles of Market Definition

The court starts with market definition.³ “[T]he relevant market is defined as the area of effective competition. Typically this is the ‘arena within which significant substitution in consumption or production occurs.’” *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018) (quoting AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 5.02 (4th ed. 2017)) (internal quotation marks omitted). A relevant market must include all products that are “reasonably interchangeable by consumers for the same purposes,” *Microsoft*, 253 F.3d. at 52 (internal quotation marks omitted), “even though the products themselves are not entirely the same,” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 25 (D.D.C. 2015). Courts should combine different products or services in a single market when “that combination reflects commercial realities.” *Grinnell*, 384 U.S. at 572.

Whether goods are reasonable substitutes depends on two factors: functional interchangeability and cross-elasticity of demand. *Sysco*, 113 F. Supp. 3d at 25–26. Functionally interchangeable products are those that consumers view as substitutes for each other. *See id.* The products comprising the relevant market need not be entirely the same. So long as “consumers can substitute the use of one for the other, then the products in question will be deemed ‘functionally interchangeable.’” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004); *see also du Pont*, 351 U.S. at 393 (“Determination of the competitive market for commodities

³ While this legal standard is identified as part of the court’s discussion of the general search services market, it also applies to the advertiser-side markets discussed in Part III.

depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.”).

Cross-elasticity of demand turns on consumers’ sensitivity to an increase in price. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986); *du Pont*, 351 U.S. at 400 (“An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other.”). That is, “[i]f an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market.” *Sysco* 113 F. Supp. 3d at 25. “The higher these cross-elasticities, the more likely it is that similar products . . . are to be counted in the relevant market.” *Rothery Storage*, 792 F.2d at 218.

Courts generally consider two categories of evidence when defining the relevant product market: the “practical indicia” identified by the Supreme Court in *Brown Shoe Company v. United States*, 370 U.S. 294 (1962), and quantitative evidence from expert economists. The *Brown Shoe* “practical indicia” include: (1) industry or public recognition, (2) the product’s peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors. *Id.* at 325. According to the D.C. Circuit, “[t]hese indicia seem to be evidentiary proxies for direct proof of substitutability.” *Rothery Storage*, 792 F.2d at 218. And while “[t]he *Brown Shoe* practical indicia may indeed be ‘old school’” antitrust law, they bind the court. *Sysco*, 113 F. Supp. 3d at 27 n.2.⁴

Quantitative evidence of market definition typically comes in the form of an expert economist conducting a “hypothetical monopolist test.” *Id.* at 33 (internal quotation marks

⁴ Although some jurists have questioned the continued reliance on *Brown Shoe* to define markets, *see FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1058–59 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), Google has not urged the court to abandon consideration of them, *see* GTB at 6–23; Google’s Proposed Conclusions of Law, ECF No. 909 [hereinafter GCL], at 1–13; Google’s Resp. Proposed Conclusions of Law, ECF No. 911 [hereinafter GRCL], at 3–7.

omitted). “This test asks whether a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products. If so, the products may comprise the relevant product market.” *Id.* None of Plaintiffs’ economics experts performed a quantitative hypothetical monopolist test. That is entirely understandable for the proposed general search services market because search is a zero-priced good to the end user. The absence of a price is a feature of the user-side market. *See Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 978 (9th Cir. 2023) (observing that “there may be markets where companies offer a product to one side of the market for free but profit in other ways, such as by collecting consumer data or generating ad revenue”).

Pricing, however, is central to the advertiser-side markets. Yet none of Plaintiffs’ experts performed a hypothetical monopolist test. The court found this surprising, but its absence is not fatal. There is no legal requirement that a plaintiff supply quantitative proof to define a relevant market. *See McWane, Inc. v. FTC*, 783 F.3d 814, 829–30 (11th Cir. 2015). Authorities cited by Google do not establish otherwise. *See* GTB at 21. For instance, Google accurately quotes an Eleventh Circuit decision, stating that “the broader economic significance of a submarket must be supported by demonstrable empirical evidence.” *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) (quoting *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 998 (11th Cir. 1993)) (internal quotation marks omitted). But the Circuit’s later decision in *McWane* made clear that this is not a hard-and-fast rule. There, the expert’s opinion “did not involve an econometric analysis, such as a cross-elasticity of demand study.” 783 F.3d at 829. Still, the expert’s reliance on qualitative economic evidence was sufficient to define the market, because “there appears to be no support in the caselaw for [the] claim that such a technical analysis is always required.” *Id.*

Plaintiffs did offer proof of what they say are “real-world” hypothetical monopolist inquiries conducted by Google, as the company routinely measured the effects of price increases on advertiser demand. The court will discuss what Google calls “intentional pricing” as part of the proposed advertiser-side markets, *infra* Section VI.B.

B. General Search Services is a Relevant Product Market.

The evidence at trial established that general search services is a relevant product market and alternative sources for query information, like SVPs and social media sites, are not adequate substitutes. The *Brown Shoe* practical indicia highlight the unique features of a GSE that make it distinct from other platforms. Of course, not every *Brown Shoe* factor is applicable because general search is a free product, so the court does not consider factors related to pricing. The court first addresses the relevant *Brown Shoe* factors and then responds to Google’s counterarguments.

I. Peculiar Characteristics and Uses

“The ‘product’s peculiar characteristics’ refers to the general truth that substitutes in the market often have a strong physical and functional relationship.” *Rothery Storage*, 79 F.2d at 218 n.4.

No user could confuse a GSE with an SVP or a social media site. Unlike those other products, GSEs are a gateway to the World Wide Web. FOF ¶ 27. The web itself is often (but not always) the source of the answer to a query. (GSEs also secure query responses from structured data, such as knowledge graphs, current travel information, sports score feeds, etc.). FOF ¶¶ 41–45. Search on a GSE therefore is not constrained by subject matter, inventory, or query type. FOF ¶ 33. Google’s own query classification system reflects this reality. It tracks queries in more than two dozen different subject matter areas. FOF ¶ 34. Moreover, 80% of Google’s queries are noncommercial in nature. FOF ¶ 37. Also, navigational queries—that is, queries entered for the

purpose of getting to another site on the web (e.g., “amazon,” “home depot,” “baltimore sun”)—are exclusive to GSEs. FOF ¶ 39. Nearly 12% of Google’s queries are navigational queries, and according to a 2018 Google weekly query report, its top five queries by query volume were all navigational queries. *Id.*

By contrast, SVPs are “walled gardens,” meaning their query responses are derived from structured data available only on that particular platform. FOF ¶ 144. Such data cannot typically be crawled by a GSE. FOF ¶¶ 45, 144. Because a user’s search is confined to the SVP’s structured data, users cannot use an SVP to navigate beyond the platform. FOF ¶ 144. For instance, Home Depot maintains a vast product catalog of goods that it sells both online and in stores. FOF ¶ 145. Users of Home Depot’s digital platforms can purchase those products from Home Depot but cannot navigate to a product-maker’s website to make a direct purchase. *Id.* In addition, as the name implies, SVPs are typically “specialized” to a particular subject matter (e.g., Amazon for shopping, Expedia for travel, Yelp for local businesses). FOF ¶¶ 141, 146. Although some SVPs do answer noncommercial queries, most notably Wikipedia, the vast majority do not. FOF ¶ 142. Thus, a user who wishes to acquire different categories of information could not do so from a single SVP and instead would have to take trips to multiple sites. FOF ¶¶ 33, 147. Even then, there are some types of queries—like long-tail queries—for which there may not be an SVP to deliver an answer. FOF ¶ 148.

The product delivered to consumers on a GSE differs significantly from what is produced by an SVP. When a user enters a query into Google or Bing, the result is a search engine results page, or SERP, which contains organic links that enable the user to navigate to other websites. FOF ¶¶ 41, 43. For commercial queries, the Google SERP will include advertisements, which similarly link to other webpages. FOF ¶ 172. And, in some cases, the SERP will contain vertical

offerings, which are built on structured data typically sourced from a third-party on topics such as shopping, flights, and hotels. FOF ¶¶ 42, 45.

On the other hand, SVPs respond to queries with a results page that reflects the data possessed or controlled by the SVP. Although some SVPs contain links that direct a user to a site external to the SVP's platform (such as an online travel aggregator like Kayak), most do not. FOF ¶ 144. Similarly, any advertisements that appear on an SVP's results page link to products or services within its own platform. FOF ¶ 194. Purchases are typically completed within the SVP itself. *Id.* As a result of these distinct features, the business models of GSEs and SVPs are fundamentally different. A GSE seeks to attract users on the promise that it will accurately and efficiently answer any query and monetize the commercial ones through advertising. An SVP must attract a user to its site for a commercial purpose to complete a transaction.

Social media sites differ from GSEs in many of the same ways as SVPs. They too are “walled gardens,” primarily driven by user-generated content such as self-uploaded videos on TikTok or photos on Instagram. FOF ¶ 162. Searches on social media only yield results from profiles on the platform and do not display web links to external sites (although social media users can navigate to external web content, such as through a link posted by a user or through an advertisement). *Id.* There was little evidence presented on the efficacy of social media search. The court thus has no reason to believe that search functionality on social media sites is comparable to that offered by GSEs or even SVPs.

Plaintiffs have sought to distinguish GSEs from other platforms as a “one-stop shop” for all manner of queries, and Google challenges that characterization. U.S. Plaintiffs' expert, Dr. Michael Whinston, opined that his analysis of Windows query data demonstrated that 77% of users begin their search journeys on GSEs. FOF ¶ 35. Plaintiff States' expert, Dr. Jonathan Baker,

conducted an analysis of user search behavior, which showed that nearly 65% of user sessions involved searching in more than one vertical. FOF ¶ 34. Dr. Baker claimed that this analysis proved that general search offers “one-stop shop” convenience. *Id.* Google’s expert, Dr. Mark Israel, took a contrary position. He opined that “one-stop shopping” is at odds with how people actually search. Google’s sessions data showed that during a “visit” to Google—defined as any series of user activity separated by five minutes of inactivity—the median number of queries is one and that the median length of a visit is 20 seconds. That data, he said, is inconsistent with the notion of “one-stop shopping.” Tr. at 8418:1–8419:3 (Israel) (discussing DXD29 at 25).

The court does not find the “one-stop shop” analogy to be apt, but that is no obstacle to recognizing a general search services market. The notion of the “one-stop shop” was useful in a case like *Sysco*, where the ability of a purchaser to obtain all of its requirements in one place was more efficient and less costly than having to place orders with multiple specialty providers. *See* 113 F. Supp. 3d at 16 (“Customers value the breadth of product offerings and the opportunity to aggregate a substantial portion of their purchases with one distributor, allowing them to save costs.”). That is not exactly how search works. Users do not necessarily do all their querying at once. Users seek information on different subjects over time. By that thinking, Dr. Israel is right that search is not a “one-stop shop.”

But that framing is too narrow. Users always can, and do, return to a GSE to fulfill a broad array of informational needs. And they can do so at little or no cost. A user can search for a tennis racket on Google, then purchase the racket on Walmart.com, and then return to Google to find out the dates for the next U.S. Open with little to no friction (and certainly no actual expense). This may not be “one-stop shopping” in a traditional sense, but the GSE is performing a unique function: It is both a reservoir of information and a conduit to other sources on the web. And it

serves that purpose over and over again. No SVP or social media platform can meet user needs in the same way. They therefore are not functionally interchangeable with GSEs.

2. *Industry or Public Recognition*

Industry or public recognition “matters because [courts] assume that economic actors usually have accurate perceptions of economic realities.” *Rothery Storage*, 792 F.2d at 218 n.4. Plaintiffs have presented significant evidence that market participants consider GSEs to be a distinct product with no adequate substitutes.

First, browser developers recognize that GSEs are a distinct product. Browsers contain a default search access point, and only GSEs occupy that position. To install an SVP or a social media site as the default would restrict that key access point to a particular vertical or subset of verticals, creating a poor user experience. FOF ¶¶ 146–147, 149. To that end, browsers allow users to switch the search default only to a GSE and not to an SVP or a social media platform. The available alternative defaults in Chrome, Edge, Firefox, and Safari all are GSEs. FOF ¶ 61. Mozilla recognizes that certain SVPs are frequented by its users, and so it has created a unique feature in the desktop version of Firefox that allows users to perform individual searches with SVPs like Amazon or Wikipedia, using the Firefox toolbar. FOF ¶ 60. But even Firefox does not allow a user to change the default search engine to an SVP. FOF ¶ 61.

Second, Android OEMs and mobile carriers also consider GSEs to be a distinct product. By signing the MADA, every Android OEM has installed a GSE—Google—as its default search access point (whether in the Google Search Widget or Chrome). FOF ¶¶ 59, 350, 363. No Android phone comes with an SVP or a social media platform installed at the default search access point. Not surprisingly then, Google’s various RSAs with OEMs and carriers define the term “Alternative Search Service” to include platforms similar to Google. FOF ¶¶ 385–390. Certain RSAs explicitly

exclude SVPs from the definition. *Id.* Thus, the RSAs prohibit partners from preloading Bing, Yahoo, and DDG but permit preloading of Amazon or Instagram.

Third, advertisers consider GSEs to be differentiated from SVPs and social media platforms. The court will have more to say about this in connection with the advertiser-side markets, *see infra* Section III.A.1, but for present purposes it suffices to observe that advertisers do not generally view SVPs and social media to be reasonable substitutes for GSEs.

Fourth, Google itself recognizes general search services as a distinct product and separate market. As already noted, Google is the default GSE on Chrome. (Microsoft does the same with Edge, installing Bing as the preset default.) When Google has evaluated its quality against other platforms, it has done so primarily against other GSEs. FOF ¶¶ 136–138. For instance, Google has assessed its SERP quality and latency alongside Bing and has compared its privacy offerings to DDG. *Id.* While Google has conducted some evaluations of SVP and social media users, *see* Google’s Resp. Proposed Findings of Fact, ECF No. 912, ¶¶ 13, 15 [hereinafter GRFOF], its employees have testified that it would be difficult or unhelpful to do side-by-side comparisons with SVPs or social media, because of their differentiated product experiences, FOF ¶ 139.

In addition, internal Google documents show that Google, as early as 2009, tracked its “market share” relative only to other GSEs. *See United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011) (“When determining the relevant product market, courts often pay close attention to the defendants’ ordinary course of business documents.”) (citation omitted). Google has since suspended that practice. The record does not reveal precisely why.

Finally, evidence suggests that the public also views GSEs as a distinct product. Dr. Israel testified that there is “relatively limited [user] overlap between the general search engines.” Tr. at

8728:23-24 (Israel). This suggests that users see Google and other GSEs as substitutes, such that using Google obviates a need to use another GSE.

3. *Unique Production Facilities*

“If a product requires unique production facilities, and the producer raises the price above the competitive level, the ability of other producers to shift resources to make the product would be limited, and the market definition should be likewise limited.” *Rothery Storage*, 792 F.2d at 218 n.4. For a zero-cost product like a GSE, this factor is of limited application unless slightly modified to use quality as the relevant variable, instead of price.

Imagine if Google’s search quality substantially degraded, whether purposely or through neglect. Would SVPs or social media platforms be able to shift resources to put out a product that resembles a GSE and thereby capture a significant number of dissatisfied Google users? The answer obviously is no. Absent extraordinary cost and expense, neither Amazon nor Meta could become a source for noncommercial or navigational queries. *See infra* Section II.C.3.a. Wikipedia likewise could not become a source for commercial or navigational ones. And even if an SVP or social media firm were willing to make the required intense resource commitments, adapting its platform to perform general search functions would take a long time to materialize. *Cf. Microsoft*, 253 F.3d at 53–54 (stating that substitute products are those that can “constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function”).

* * *

Accordingly, the relevant *Brown Shoe* factors warrant recognition of a general search services market.

4. *Google's Proposed Query Product Market*

Google urges that the relevant user-side product is query responses, not general search services. *See* GTB at 8. That contention rests largely on the opinions of its expert, Dr. Israel. He observes that whenever a person seeks information online, they make a choice about where to search, whether on a GSE, an SVP, a website, or a social media platform. *See, e.g.*, Tr. at 8398:1-17, 8437:1-23 (Israel). These various sources, although differentiated from GSEs, compete with GSEs for queries and thus act as competitive constraints. GTB at 9. Plaintiffs' user-side market for GSEs, Dr. Israel says, artificially cuts out these market actors, many of whom are Google's primary competitors for users. *Id.* at 10–12. Those include shopping and local SVPs, like Amazon and Yelp, which fiercely compete with Google to attract users. Tr. at 8394:25–8395:9 (Israel).

In one sense, Dr. Israel is not wrong. Google does perceive and respond to competitive pressure from other platforms, particularly SVPs. FOF ¶ 140. After all, Google developed verticals like shopping, flights, and hotels in part to provide users with topic-specific results much like SVPs. *See* GTB at 13; FOF ¶ 45. Still, the court is unpersuaded by Dr. Israel's query-by-query approach to define the relevant market for several reasons.

First, “the relevant market must include all products ‘reasonably interchangeable by consumers for the same purposes.’” *Microsoft*, 253 F.3d at 52 (quoting *du Pont*, 351 U.S. at 395) (emphasis added); *see also id.* (affirming the district court's exclusion of “information appliances” from the relevant market “because information appliances fall far short of performing *all of the functions of a PC*”) (emphasis added). No one disputes that an SVP can serve the same purpose as a GSE for an individual query on a particular subject matter. A user can, for example, use either Google or OpenTable to find a nearby Japanese restaurant, or turn to Google or Amazon to shop for a blender. But no SVP can fulfill a user's varied needs in the same manner as a GSE. Few

SVPs can provide answers to noncommercial queries or take a user to a desired location on the web through a navigational query. And no SVP can answer long-tail queries like a GSE. Thus, an SVP may be reasonably interchangeable with a GSE for a discrete purpose but for not the “same purposes.”

Second, “the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.” *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997). That is the lesson learned from the D.C. Circuit’s decision in *Whole Foods* and the district court’s decision in *Staples*. In *Whole Foods*, the fact that consumers “cross-shopped” between premium and organic supermarkets and ordinary supermarkets did not require the latter’s inclusion in the relevant market. 548 F.3d at 1040 (Brown, J.). Likewise, in *Staples*, the court held that office supply superstores constituted a relevant product market even though consumers also purchased such products through other retail outlets. 970 F. Supp. at 1079. A similar analysis applies here. The fact that GSEs may compete for travel queries against Booking.com, shopping queries against Amazon, and local queries against Yelp does not mean that firms that specialize in certain verticals belong in the same product market as GSEs. The fact that users “cross-query” does not require all online query sources be lumped together in the same market.

To challenge this conclusion, Google points to a 2020 Bank of America study, which asked participants where they begin online shopping searches: 58% responded Amazon, only 25% chose Google. FOF ¶ 151. “But the fact that [two firms] ‘are direct competitors in some submarkets . . . is not the end of the inquiry[.]’” *Whole Foods*, 548 F.3d at 1040 (Brown, J.) (quoting *United States v. Conn. Nat. Bank*, 418 U.S. 656, 664 n.3 (1974)). The Bank of America study merely demonstrates that Google and Amazon compete for shopping queries, which comprise a minority

of Google’s overall queries by type. FOF ¶ 151; FOF ¶ 38 (80% of queries on Google are non-commercial in nature); *see also* 548 F.3d at 1048 (Tatel, J., concurring) (“That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether [they] should be treated as operating in the same market as conventional grocery stores.”). That Google and Amazon have some overlapping users does not, without more, mean they belong in the same product market.

Third, there is nothing improper about aggregating varied query types into a single relevant market. According to Dr. Israel, the “clustering” of different verticals into a single market is appropriate only when the competitive conditions are similar, that is, when information providers are competing to resolve similar user questions, such as those related to travel. *See* Tr. at 8400:6-23 (Israel); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014) (“If the [competitive] conditions are similar for a range of services, then the antitrust analysis should be similar for each of them.”). He acknowledges that there may be submarkets for travel or shopping or local queries, but he rejects an overarching market that collects those submarkets under the umbrella of general search. *See* Tr. at 8399:7–8400:23 (Israel).

But Dr. Israel’s “cluster” market principle does not apply here, because a GSE is better thought of as a “bundle” of offerings. *Cf. Whole Foods*, 548 F.3d at 1039 (Brown, J.) (recognizing a “cluster” market based on “a core group of particularly dedicated, distinct customers, paying distinct prices”). “Unlike cluster markets, which aggregate a number of individual relevant markets, a bundle market is the collection of products or services that comprise the relevant market where customers value suppliers offering a package of goods and benefit from the ‘one-stop shopping’ experience.” Kevin Hahm & Loren K. Smith, *Clarifying Bundle Markets and*

Distinguishing Them from Cluster Markets, 20 ANTITRUST SOURCE 1, 3 (2021). As already discussed, GSEs are not a “one-stop shop” in the same sense as, say, an office-supply superstore (*Staples*) or a broadline distributor (*Sysco*). But they are a distinct product because only a GSE can answer *any* query—including, importantly, noncommercial and navigational queries. See *Grinnell*, 384 U.S. at 572–74 (stating that there is “no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities” and the market concerns “a single basic service” that is “unique,” notwithstanding the existence of more specialized competitors). No SVP can match the breadth and comprehensiveness of a GSE. Thus, even if viewed as a “bundle” of search offerings, GSEs comprise a relevant product market.

Finally, the record shows that GSEs and SVPs are complementary goods, undermining Google’s contention that users view the two as true substitutes. *Sysco*, 113 F. Supp. 3d at 31 (observing that it “would be improper to group complementary goods into the same relevant market just because they occasionally substitute for one another”) (quoting AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW ¶ 565b (4th ed. 2017)). Dr. Baker demonstrated that SVPs receive between 33% to 88% of their traffic, depending on the subject matter area, through a click on a GSE’s SERP, whether through an organic link or an advertisement. FOF ¶ 155. Not surprisingly then, SVPs are Google’s top advertisers. FOF ¶ 156. This data shows that users are not uniformly bypassing Google and going directly to SVPs, thus confirming that SVPs do not cannibalize searches on Google.

As evidence that SVPs pose a competitive constraint, Dr. Israel analyzed queries on Google, Amazon, and Bing, and found that for Google’s top non-navigational shopping queries, Amazon had a significant query volume (3.7 million, as compared to Google’s 5.1 million). FOF ¶ 154. But Dr. Israel’s query volume analysis only reveals that users enter a large number of

queries on both Google and Amazon. Unlike most goods, queries are free, so users face no cost constraint when using more than one site. Thus, the fact that large numbers of consumers use both Google and Amazon tells the court little about whether Amazon is “reasonably interchangeable” with Google. (The same is true for Dr. Israel’s analysis of queries on Yelp and the Auto, Flights, and Shopping verticals.)

Google’s own studies confirm that GSEs and SVPs are complementary goods, not substitutes. Google’s 2019 analysis, entitled “Project Charlotte,” showed that users who engaged with SVPs were *more likely* to enter queries on Google. FOF ¶ 157. The same is true on mobile applications: A 2020 Google study found a positive correlation between users’ activity on SVP applications and query volume on Google, such that a user’s adoption of Amazon, eBay, Walmart, Pinterest, Spotify, or Twitter was associated with increased revenues and queries on Google mobile. *Id.* Therefore, although SVPs can and do compete with GSEs for certain types of queries, the evidence does not show that such competition has led to less frequent use of GSEs. Consumers use GSEs and SVPs in a complementary manner to meet their online needs. *See Microsoft*, 253 F.3d at 52 (products that function “only as a supplement to” the proposed product market are not within the market).

With respect to social media platforms, there is little evidence that they actually compete with GSEs for search queries. Google presented an internal study suggesting that 63% of daily TikTok users aged 18–24 reported using the platform to perform searches within the last week, FOF ¶¶ 140, 163–164 (citing DX241), but that percentage alone tells the court little about actual substitution between GSEs and TikTok. Importantly, the study offers no detail on the types of searches performed or the quality of the results. There also is some evidence—albeit dated—that Facebook use correlates to *more* searching on Google. FOF ¶ 165. Thus, although it may be that

there is some growth in search on social media platforms, it is not enough to comprise the “significant substitution” necessary to be grouped into the same product market.

* * *

The court therefore rejects Google’s proposed query-response market and instead agrees with Plaintiffs that there is a relevant market for general search services.⁵

C. Google Has Monopoly Power in the General Search Services Market.

The court turns now to address whether Google possesses monopoly power within the market for general search services. “While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge.” *Microsoft*, 253 F.3d at 51 (citations omitted). “Monopoly power is the power to control prices or exclude competition.” *du Pont*, 351 U.S. at 391. “More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level.” *Microsoft*, 253 F.3d at 51. Importantly, a firm need not actually have earned monopoly profits or excluded competition to possess monopoly power. “[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition is actually excluded but that *power exists* to raise prices or exclude competition when it is desired to do so.” *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811

⁵ Dr. Whinston suggested that the so-called “*Cellophane* fallacy” explains substitution away from Google to other platforms, like SVPs. See U.S. Pls.’ Proposed Conclusions of Law, ECF No. 838 [hereinafter UPCL], at 6–7. The *Cellophane* fallacy refers to “the existence of substitution between products resulting from monopoly power rather than reasonable substitutability.” *Id.* A commercial environment evincing a “high cross-elasticity of demand may, in some cases, be the product of monopoly power rather than a belief on the part of consumers that the products are good substitutes for one another.” *United States v. Eastman Kodak Co.*, 63 F.3d 95, 105 (2d Cir. 1995). In other words, the dearth of true substitutes in a heavily monopolized market may lead users to substitute to “highly-differentiated,” out-of-market products. *Id.* In those circumstances, “[t]he existence of significant substitution in the event of further price increases or even at the current price does not tell us whether the defendant already exercises significant market power.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 471 (1992) (quoting AREEDA & KAPLOW, ANTITRUST ANALYSIS ¶ 340b (4th ed. 1988)) (emphasis omitted). The court thinks that the *Cellophane* fallacy has little application here. Amazon is not a “poor substitute” whose use should be understood as evidence of Google’s monopoly power. UPCL at 6. All evidence points to consumers viewing Google and Amazon as complementary goods that compete in certain submarkets but not as “reasonably interchangeable by consumers for the same purposes[.]” *du Pont*, 351 U.S. at 395. The *Cellophane* fallacy is thus not applicable.

(1946) (emphasis added). “It is not necessary that the power thus obtained should be exercised. Its existence is sufficient.” *Id.* (internal quotation marks omitted).

The possession of monopoly power may be proven through direct or indirect evidence. Direct evidence of monopoly power is rare. “Where evidence indicates that a firm has in fact profitably” raised prices substantially above the competitive level, “the existence of monopoly power is clear.” *Microsoft*, 253 F.3d at 51. More often, courts “examine market structure in search of circumstantial evidence of monopoly power.” *Id.*; *see id.* at 57 (observing that “direct evidence [is not required] to show monopoly power in any market”). Under this indirect, structural approach, “monopoly power may be inferred from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.” *Id.* at 51.

A barrier to entry is “[a]ny market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm . . . regardless of who is responsible for the existence of that condition.” *S. Pac. Commc’ns Co. v. AT&T*, 740 F.2d 980, 1001 (D.C. Cir. 1984). “Common entry barriers include: patents or other legal licenses, control of essential or superior resources, entrenched buyer preferences, high capital entry costs[,] and economies of scale.” *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997); *see also United States v. Syufy Enters.*, 903 F.2d 659, 667 (9th Cir. 1990) (observing that a “network of exclusive contracts or distribution arrangements designed to lock out potential competitors” is a barrier to entry). A plaintiff must not only show that such barriers to entry exist, but that those barriers are “significant[.]” *Microsoft*, 253 F.3d at 82.

Certain market behaviors are not inconsistent with a defendant’s possession of monopoly power. Evidence that a dominant firm invests in research and development is not antithetical to

monopoly power. “[B]ecause innovation can increase an already dominant market share and further delay the emergence of competition, even monopolists have reason to invest in R&D.” *Id.* at 57. The same is true of decreasing price: “[A] price lower than the short-term profit-maximizing price is not inconsistent with possession or improper use of monopoly power.” *Id.* (citation omitted). Finally, “[t]he defendant’s innocence or blameworthiness . . . has absolutely nothing to do with whether a condition constitutes a barrier to entry” evincing monopoly power. *AT&T*, 740 F.2d at 1001.

Plaintiffs attempt to prove that Google has monopoly power in the market for general search services through both direct and indirect evidence. Although they offer little direct evidence, the indirect evidence supporting the structural approach—a dominant market share fortified by barriers to entry—easily establishes Google’s monopoly power in search.

1. Direct Evidence

Plaintiffs’ direct evidence is limited. They note that Google’s immense revenues and large profit margins, FOF ¶¶ 8, 57, 259, allow it to capture significant surplus from the challenged contracts, *see* U.S. Pls.’ Proposed Findings of Fact, ECF No. 839 [hereinafter UPFOF], at 27–28; Tr. at 4775:21-24 (Whinston) (“[T]he size of profits and . . . when firms have a really, really big advantage, that is very likely to coincide with market power.”); *id.* at 415:8-10 (Varian) (agreeing that in some cases, “large profit is one indicator of monopoly”).

In addition, Plaintiffs point to Google’s admission that it does not “consider whether users will go to other specific search providers (general or otherwise) if it introduces a change to its Search product.” UPX6019 at 365–66. Google’s indifference is unsurprising. In 2020, Google conducted a quality degradation study, which showed that it would not lose search revenue if were to significantly reduce the quality of its search product. FOF ¶ 134. Just as the power to raise

price “when it is desired to do so” is proof of monopoly power, *Am. Tobacco*, 328 U.S. at 811, so too is the ability to degrade product quality without concern of losing consumers, *see* Andrew Chin, *Antitrust Analysis in Software Product Markets: A First Principles Approach*, 18 HARV. J.L. & TECH. 1, 22 n.134 (2004) (“A seller with market power may find it profitable to reduce product quality in the eyes of a captive group of consumers if the seller can thereby reduce production costs or, more generally, if the seller’s interests are adverse in some way to the consumers’ preferences.”). The fact that Google makes product changes without concern that its users might go elsewhere is something only a firm with monopoly power could do. *See Microsoft*, 253 F.3d at 58 (observing that Microsoft’s setting “the price of Windows without considering rivals’ prices” is “something a firm without a monopoly would have been unable to do”).

Other direct evidence presented was less persuasive. Plaintiffs submitted evidence that Google’s Senior Vice President of Knowledge and Information Products, Dr. Prabhakar Raghavan, cautioned his team against responding hastily to DDG’s privacy initiatives absent a business case for doing so. FOF ¶¶ 138, 118–119. According to Plaintiffs, Google’s ability to offer fewer privacy protections—without concern as to a rival’s superior privacy offerings—is evidence of monopoly power. *See* U.S. Plaintiffs’ Post-Trial Br., ECF No. 838 [hereinafter UPTB], at 53–55.

But using privacy to demonstrate monopoly power is questionable for a host of reasons. For one, Plaintiffs have not established any framework for evaluating whether Google’s privacy offerings are suboptimal. Sure, there was evidence that users generally care about privacy. FOF ¶ 116. But Plaintiffs submitted little proof that identified the privacy features users value and, importantly, whether Google declined to adopt such features without any concern that its users would go elsewhere.

Nor is it proof of monopoly power that Google considers the business case for making privacy adjustments. There is some tradeoff between privacy and search quality. FOF ¶¶ 121–125. For example, less information about a user’s search history might produce inferior results when the user returns to find more information about a previously searched topic. *See id.*; Tr. at 9905:1-10 (Murphy) (“Privacy is good, but it comes at a tradeoff from quality.”). Also, Google’s employees convincingly testified that Google refrained from particular privacy measures adopted by rivals to prioritize an improved user experience. FOF ¶ 120. That Google offers fewer privacy protections than DDG without losing users is thus not necessarily indicative of monopoly power. It may just be that users are willing to sacrifice enhanced privacy offerings for improved search functionality.

2. *Indirect Evidence – Market Share*

Assessing monopoly power through indirect evidence begins with determining market share. Although there is no minimum percentage, the Supreme Court has recognized that two-thirds of a domestic market can constitute a “predominant share.” *Grinnell*, 384 U.S. at 571 (citing *Am. Tobacco*, 328 U.S. at 797). Duration also matters. “Monopoly power must be shown to be persistent in order to warrant judicial intervention[.]” AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 801d (5th ed. 2022) [hereinafter AREEDA].

Plaintiffs easily have demonstrated that Google possesses a dominant market share. Measured by query volume, Google enjoys an 89.2% share of the market for general search services, which increases to 94.9% on mobile devices. FOF ¶¶ 23–24. This overwhelms Bing’s share of 5.5% on all queries and 1.3% on mobile, as well as Yahoo’s and DDG’s shares, which are under 3% regardless of device type. FOF ¶ 25. Google does not contest these figures. Closing Arg. Tr. at 68:17–69:6.

Nor is this market dominance of recent vintage. Google has enjoyed an over-80% share since at least 2009. FOF ¶¶ 23–24. That is a durable dominant share by any measure.

3. *Indirect Evidence – Barriers to Entry*

Barriers to entry are essential to establishing monopoly power because the current market share may not reflect the “possibility of competition from new entrants[.]” *Microsoft*, 253 F.3d at 54. “[I]f barriers to entry are high, then market power can be sustainable over a long period of time.” Tr. at 4763:21-22 (Whinston). Plaintiffs identify several such barriers to the general search services market: (1) high capital costs, (2) Google’s control of key distribution channels, (3) brand recognition, and (4) scale. The court finds that these barriers exist and that, both individually and collectively, they are significant barriers that protect Google’s market dominance in general search.

a. High Capital Costs

“[T]he need for large capital outlays and lengthy construction programs in order to enter the market” is a barrier to entry. *AT&T*, 740 F.2d at 1002; *see Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) (barriers to entry include “high capital costs, or technological obstacles, that prevent new competition from entering a market in response to a monopolist’s supracompetitive prices”); *Syufy Enters.*, 903 F.2d at 667 (structural barriers include “onerous front-end investments that might deter competition from all but the hardiest and most financially secure investors”).

Building and maintaining a competitive GSE require an extraordinary upfront capital investment, to the tune of billions of dollars. FOF ¶¶ 50–55. Apple’s Chief of Machine Learning and AI Strategy, John Giannandrea, testified that “a startup could not raise enough money . . . to build a very good, large-scale search engine” because “to build a competitive project is very

expensive,” amounting to a “multi-billion dollar investment.” Tr. at 2261:11-19, 2268:6-7 (Giannandrea); DX374 at 301; *see also* UPX266 at 986 (“[A] world class search engine is at least a \$2–4B/year R&D investment[.]”). Neeva founder, Dr. Sridhar Ramaswamy, testified to the same effect. Tr. at 3672:7 (Ramaswamy) (stating that Neeva required “two substantial [venture capital] funding rounds”). Google’s internal estimates also are consistent with this testimony. FOF ¶ 51 (assessing that it would cost Apple billions to compete in the search market). And those capital expenditures are required *before* the additional, multi-billion-dollar investment needed to build and maintain an ad platform or other means of monetization. FOF ¶ 55.

High capital costs thus constitute a substantial barrier to entry. *See Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 381 (6th Cir. 1981) (concluding that the relevant market was “characterized by high barriers to entry because of capital requirements” of about \$1 billion, rendering it “unlikely that a new vertically integrated [] company would enter the market to take [the defendant’s] place as a competitor and supplier for independent dealers”).

b. Google’s Control of Key Distribution Channels

The D.C. Circuit has described a dominant firm’s “control of interconnection with its local distribution facilities” as perhaps the “most critical[.]” barrier to entry, which should be considered by looking at the “realities of control[.]” *AT&T*, 740 F.2d at 1002. Plaintiffs point to two sources of Google’s control: the challenged contracts and its ownership of Chrome.

Without descending into the contested issues of exclusivity and anticompetitive effects at this juncture, *see infra* Section IV.C & Part V, it suffices to say that Google controls the most efficient and effective channels of distribution for GSEs. It is the exclusive preloaded GSE on all Apple and Android mobile devices, all Apple desktop devices, and most third-party browsers (Edge and DDG are the exceptions). FOF ¶ 59. Rivals cannot presently access these channels of

distribution without convincing Google's partners to break existing agreements, all of which are binding for a term of years. FOF ¶¶ 291, 349, 364; *see infra* Section V.A.1.b; *Syufy Enters.*, 903 F.2d at 667 (a “network of exclusive contracts or distribution arrangements designed to lock out potential competitors” is a barrier to entry). Even if a new entrant were positioned from a quality standpoint to bid for the default when an agreement expires, such a firm could compete only if it were prepared to pay partners upwards of billions of dollars in revenue share and make them whole for any revenue shortfalls resulting from the change. *Infra* Section IV.A. No *current* search engine in the market can compete on those terms. It is even harder to envision a new entrant doing so.

It is also a “realit[y] of control” that Google is the sole default on Chrome. *AT&T*, 740 F.2d at 1002. Queries on user-downloaded Chrome make up 20% of searches conducted in the United States. FOF ¶ 63. Though the Chrome default is not alleged to be exclusionary conduct, it is a market reality that significantly narrows the available channels of distribution and thus disincentivizes the emergence of new competition. Google's near-complete control of the most efficient search distribution channels is a major barrier to entry.

c. Brand Recognition

“[T]he need to overcome brand preference established by the defendant's having been first in the market or having made extensive ‘image’ advertising expenditures[] also constitute[s] barriers to entry.” *AT&T*, 740 F.2d at 1002; *U.S. Anchor Mfg.*, 7 F.3d at 998 (“[I]t is settled that customer brand loyalty may constitute an impediment to competition and thus an aid in the exercise of market power.”); *cf. Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) (“[E]stablishing credibility naturally seems to be a significant barrier to entry, particularly for an enterprise that depends heavily upon reputation, such as certification of medical specialists.”). As U.S. Plaintiffs' expert in behavioral

economics, Dr. Antonio Rangel, opined: “If you have a brand that is so dominant and consumers are not familiar with the others, it’s already at ceiling.” Tr. at 649:19-21 (Rangel).

Record evidence firmly establishes that Google’s brand is widely recognized and valued. FOF ¶¶ 130–131. After all, “Google” is used as a verb. Even on Bing, “google.com” is the number one search. FOF ¶ 132. The “entrenched buyer preferences” enjoyed by Google are a major deterrent to market entry. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1126 (10th Cir. 2014).

Google’s brand recognition also provides its distribution partners with a powerful incentive to retain Google as the default GSE. FOF ¶ 133. Google considers its brand as a benefit to its contracting partners, incentivizing them to choose Google. *See* Tr. at 7780:21-23 (Pichai) (“Apple benefits and sells more iPhones by having their brand associated with the quality . . . [of] Google Search.”). The Google brand also benefits from the “seal of approval” it receives from its partners. *See id.* at 7780:23-24 (Pichai) (“Our brand gets validated by being present as a default in iPhones.”); *id.* at 2619:24–2620:4 (Cue) (“It’s a great product for our customers, and we wanted our customers to know that they’re getting the Google search engine. I think one of the benefits, for example, that Google gets from Apple is that we are telling the world that Google is the best search engine, because that’s what they would expect Apple to pick.”). This mutuality of branding interests makes market entry that much harder.

To be sure, Google’s brand recognition is due in no small part to its product quality. FOF ¶ 130. But as previously stated, “[t]he defendant’s innocence or blameworthiness . . . has absolutely nothing to do with whether a condition constitutes a barrier to entry” evincing monopoly power. *AT&T*, 740 F.2d at 1001.

d. Scale

Finally, Plaintiffs identify scale as a barrier to entry. A lengthy discussion on the relationship between scale and search engine quality is unnecessary at this stage. *See infra* Section V.A.2. It is enough to say for now that scale is an important factor in search quality. As Google admits, “the volume and availability of user interaction data is one factor that can affect search quality[.]” Google’s Proposed Findings of Fact, ECF No. 835, ¶ 256 [hereinafter GFOF]. Google has a lot of scale, and new entrants struggle to obtain it. FOF ¶¶ 87, 89. As Dr. Ramaswamy testified, acquiring users and getting them into the “habit” of using a new product is “tricky.” Tr. at 3699:22 (Ramaswamy). Securing users to generate scale, in order to then exploit the benefits of scale, is a significant barrier to entry. *See Microsoft*, 253 F.3d at 55–56 (identifying as an entry barrier that “most developers prefer to write for operating systems that already have a substantial consumer base,” such that developers would not similarly support rival operating systems without scale); *see also FTC v. Surescripts, LLC*, 665 F. Supp. 3d 14, 45 (D.D.C. 2023) (same).

4. *Google’s Counterarguments*

Google counters that the barriers to entry are not as high as Plaintiffs suggest. It points to (1) evidence of new entrants;⁶ (2) the emergence of nascent technology like artificial intelligence; and (3) its own emergence in a market that, prior to its entry, was dominated by other firms, most notably Yahoo. Google also cites the growth of search output (measured by number of queries) as inconsistent with its monopoly power. None of these contentions demonstrate low barriers to entry.

⁶ Google also presented expert testimony that SVPs are market entrants that demonstrate low barriers to entry. *See, e.g.*, Tr. at 8438:12-14 (Israel). But that argument has no force because the relevant market does not include SVPs or social media platforms.

First, Google identifies Neeva and DDG as two market entrants during the alleged monopoly maintenance period. Neeva, it argues, “was able to build and develop a search engine in a relatively short period of time that [Dr. Ramaswamy] believed rivaled Bing and Google with a much smaller venture capital funding.” Closing Arg. Tr. at 59:25–60:3. Also, “DuckDuckGo exists and . . . they believe they compete in the market.” *Id.* at 60:4-5; *see* GRFOF ¶ 25 (DDG CEO “Gabriel Weinberg testified that he built, and continues to operate, DuckDuckGo at a fraction of Plaintiffs’ estimated cost.”).

These market entries are not inconsistent with high barriers to entry and Google’s possession of monopoly power. “The fact that entry has occurred does not necessarily preclude the existence of ‘significant’ entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the [monopolist], they are unlikely to represent a challenge to the [monopolist’s] market power. Barriers may still be ‘significant’ if the market is unable to correct itself despite the entry of small rivals.” *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995) (citations omitted); *McWane*, 783 F.3d at 832 (“Although the limited entry and expansion of a competitor sometimes may cut against such a finding, the evidence of McWane’s overwhelming market share (90%), the large capital outlays required to enter the domestic fittings market, and McWane’s undeniable continued power over domestic fittings prices amount to sufficient evidence” to support the conclusion that McWane had monopoly power.).

The tales of DDG and Neeva illustrate *Rebel Oil*’s point. Both entered the market notwithstanding Google’s dominance, but neither has “taken significant business” from Google and they therefore have not posed any meaningful threat to its “market power.” DDG, though in operation since 2008, has barely reached a 2% market share. FOF ¶ 25; *Surescripts*, 665 F. Supp.

3d at 46–47 (“[T]he ability of one competitor to capture [a relatively minor percentage] of the market does not undermine [the dominant firm’s] durable monopoly power protected and perpetuated by barriers to entry.”). As for Neeva, it entered and exited within four years. FOF ¶ 14. Google argues that Neeva’s failure was caused by its subscription-based model, *see* GRFOF ¶ 25, but that is not the full story. The lack of access to efficient channels of distribution diminished Neeva’s ability to grow its user base and significantly contributed to its demise. FOF ¶ 76; *see Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publ’ns*, 63 F.3d 1540, 1555–56 (10th Cir. 1995) (significant entry barriers existed notwithstanding three attempted entries, given that two of them were “largely unsuccessful”). These firms’ experiences confirm that high barriers prevent entry of new competitors.

Second, the advent of artificial intelligence (AI) has not sufficiently eroded barriers to entry—at least not yet. New technologies may lower, or even demolish, barriers to entry, but such innovation is meaningful only if it can change the market dynamic in the “foreseeable future.” *Microsoft*, 253 F.3d at 55 (“[W]ere middleware to succeed, it would erode the applications barrier to entry. . . . [But] middleware will not expose a sufficient number of APIs to erode the applications barrier to entry in the foreseeable future.”). Currently, AI cannot replace the fundamental building blocks of search, including web crawling, indexing, and ranking. FOF ¶¶ 114–115. Neeva’s experience is again illustrative. Despite building a search engine enhanced by AI technology, FOF ¶¶ 110–111, Neeva could not ride it to market success. AI may someday fundamentally alter search, but not anytime soon. FOF ¶¶ 114–115.

Third, Google’s early success in dethroning Yahoo as the dominant market player says nothing about the barriers to entry *as they exist today*. For that same reason, Microsoft’s impression in 2009 that barriers to entry were low in search carries little weight here. *See* GTB at

33 (citing DX430 at 2). The internet of today is a far different animal. Hundreds of millions of dollars is just the opening ante to enter the search market in part because of the internet's dramatic growth; billions are needed to acquire meaningful market share. *See infra* Section IV.A. The next great search engine (if there is to be one) will not be built in a rented garage like Google. *See Microsoft*, 253 F.3d at 56 (stating that this case is not about Microsoft's "initial acquisition of monopoly power," but about its "efforts to maintain this position through means other than competition on the merits").

Finally, Google argues that regardless of its market share and any barriers to entry, its lack of monopoly power is confirmed by the dramatic growth in search output and its numerous innovations that have increased search quality. *Cf. Qualcomm*, 501 F.3d at 307 ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output."). Dr. Israel opined: "A firm has monopoly power if it can act like a monopol[ist], which means reduce market-wide output. So to establish market power directly, you would need to show that the firm has reduced output relative to some but-for world[.]" Tr. at 8439:8-11 (Israel). But restricted output is simply a form of direct proof. Its absence is not fatal, as indirect evidence suffices to establish monopoly power. *See Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 435–36 (3d Cir. 2016) (treating as direct evidence the absence of "markedly restricted output" but then evaluating indirect evidence of monopoly power).

Also, reduced output is an ill-fitting indicia of monopoly power in a market like search. Google's marginal cost of responding to one additional query is near zero. In such a market, a dominant firm has no incentive to restrict output to earn monopoly profits. *See H. ØVERBY & JAN ARLID AUDESTAD, INTRODUCTION TO DIGITAL ECONOMICS* § 6.2 (2d ed. 2021) (For a digital good like search, "because the marginal cost is zero and [] there is no limit to the number of units that

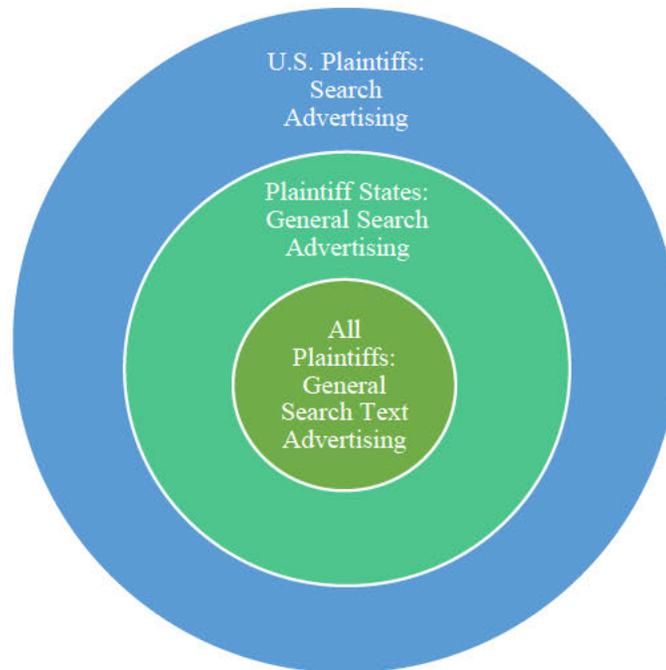
can be produced without increasing the fixed costs[,] . . . the cost per unit produced will be zero independently of the production volume.”); *cf. Pac. Eng’g & Prod. Co. of Nev. v. Kerr-McGee Corp.*, 551 F.2d 790, 796 (10th Cir. 1977) (recognizing that in the face of “decreasing marginal costs,” a firm “would be tempted to lower price and expand output to reach a lower point on its marginal cost curve”). So, the fact that search output has grown is not inconsistent with monopoly power in search.

* * *

For these reasons, the court concludes that Google has monopoly power in the general search services market.

III. MONOPOLY POWER: ADVERTISING MARKETS

The court now moves from search to advertising. Plaintiffs collectively assert that Google has monopoly power in three overlapping advertising markets. These markets and their relationships are illustrated below. U.S. Plaintiffs allege the broadest proposed market, search advertising, which includes all advertisements served in response to a query, regardless of the digital platform. Within the search ads market, Plaintiff States define a general search advertising market that includes only ads served on GSEs. Finally, both sets of Plaintiffs propose a general search text advertising market, limited to text ads appearing on a GSE’s SERP. Google counters that Plaintiffs’ proposed markets do not comport with business realities. There is, according to Google, one omnibus market for digital advertising, and the markets as alleged exclude various digital ad types that are effective substitutes for Google’s text and shopping ads.



The court considers each of Plaintiffs' proposed markets under the *Brown Shoe* factors, and, to the extent that it recognizes a market, determines whether Google has monopoly power within it. The court addresses the broadest market first (search advertising), followed by the narrowest (general search text advertising), and then concludes with the one in between (general search advertising). It finds as follows. First, although there is a relevant product market for search advertising, Google does not monopolize it. Second, general search text advertising is a relevant product market in which Google has monopoly power. Finally, a relevant product market for general search advertising does not exist.

A. Search Advertising Is a Relevant Market, But Google Does Not Have Monopoly Power in It.

1. Search Advertising Is a Relevant Product Market.

The search advertising market is the broadest proposed advertiser-side market. It includes all advertisements served in response to a query—whether entered on a GSE, an SVP, or a social media platform. Excluded from this market are display ads, retargeted display ads, and non-search

social media ads (i.e., those that are integrated into a social media feed). What sets search ads apart, U.S. Plaintiffs assert, is the unique level of real-time, expressed intent discernable from a user's query. If a user types in "portable bluetooth speaker," the ad platform will recognize the query as one reflecting the user's interest in buying a portable Bluetooth-enabled speaker and will deliver advertisements from retailers that sell such products. Non-search ads, by contrast, are not delivered in response to a query and therefore are far less effective and precise at determining a user's intent at the time the ad is delivered. For this reason, U.S. Plaintiffs contend, online advertisers will not significantly substitute away from search to non-search advertisements in response to a small but significant price increase.

Google, on the other hand, argues that it competes within a broader market for digital advertising. It claims that all forms of digital advertising "provide advertisers the ability to connect with potential customers," and that other ad types identify and respond to user intent as effectively as search ads. GTB at 15–16. It points to advertisers' regular movement of spend among various ad types as evidence that, within the broader market of digital advertising, ad dollars are fungible and will be spent on the channel with the strongest return on investment, or ROI. *Id.* Technical differences among search ads and other ad types, Google says, do not overcome this market reality.

As before, the court addresses the parties' arguments within the framework of the relevant *Brown Shoe* practical indicia, this time including pricing considerations. Those factors again are: "[1] industry or public recognition of the submarket as a separate economic entity, [2] the product's peculiar characteristics and uses, [3] unique production facilities, [4] distinct customers, [5] distinct prices, [6] sensitivity to price changes, and [7] specialized vendors." *Brown Shoe*, 370 U.S. at 325. Nearly all of these criteria warrant recognizing a search ads product market.

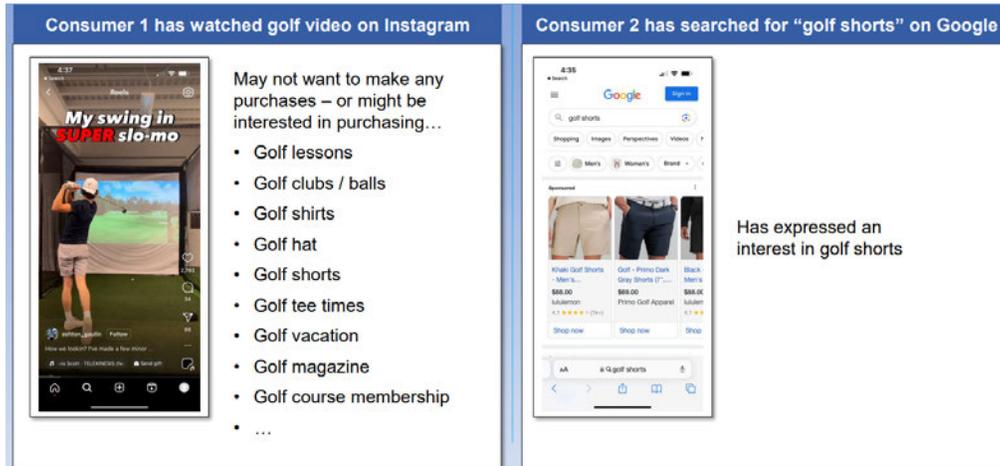
Peculiar Characteristics and Uses. Search ads are generated in response to a user query. U.S. Plaintiffs assert that such queries are a well-defined and contemporaneous expression of a user's intent that is unmatched at driving conversions. That is the defining feature of the proffered market. Google disputes the notion that search ads uniquely capture and convert user intent. That construct is outdated, it says. Social media and display ads can be extremely effective in discerning a user's unexpressed, or latent, intent and driving conversions. Thus, according to Google, what U.S. Plaintiffs say is unique about search ads is readily achievable through other ad channels. The court thinks U.S. Plaintiffs have the better of this argument.

Search ads are a direct expression of a user's specific motivation or interest at the time it is entered. FOF ¶¶ 167, 169–170. For example, a search ads platform understands the query “Taylor Swift Eras Tour tickets” to mean “I'd like to purchase tickets to see Taylor Swift in concert right now” (or at least “I'm thinking about doing so right now”). That provides ticketing vendors a unique opportunity to connect with a Swiftie who is seeking tickets for a show.

On the other hand, social media, display, and retargeted ads rely on indirect signals to decipher a user's latent intent and thus are less valuable to advertisers. Such signals include present and past interactions with a webpage, accounts the user follows, videos or photographs the user views, and how the user engages with a post. FOF ¶¶ 201–202, 208–209; *e.g.*, Tr. at 1418:4-8 (Dischler) (“The users’[] interest can be signaled in any number of ways, whether it’s visiting a website, whether it’s subscribing to a TikTok channel of a golf influencer[.]”). Consider a TikTok user who regularly watches videos of the Eras Tour. That user is not necessarily conveying an immediate desire to purchase concert tickets, and a ticket vendor who targets that user with a social media ad is less likely to achieve a conversion than if the user had searched for tour tickets on a GSE. Search ads are thus unique in their capacity to connect the consumer and vendor at the very

moment the consumer is looking to make a purchase. FOF ¶¶ 170–171; *cf. United States v. Bazaarvoice, Inc.*, No. 13-cv-00133 (WHO), 2014 WL 203966, at *24 (N.D. Cal. Jan. 8, 2014) (distinguishing social commerce products from “rating and reviews” online platforms, because social commerce products do not “provide[] potential consumers with product-specific feedback from other consumers at the point of purchase” and “are often focused on brand advertising rather than driving the sale of individual products”).

The much-discussed golf-shorts example from trial, illustrated below, makes the same point.



PSXD10 at 25. The Instagram viewer of a golf-swing video (on the left) might not be in a buying frame of mind—they could just be interested in improving their golf swing. But even if the user were looking to make a purchase, or the video piqued their desire to do so, such interest could be directed to all manner of golf items—shoes, clubs, shirts, tee times, lessons, etc. Tr. at 6890:17–6891:23 (Amaldoss) (discussing PSXD10 at 25). By contrast, the user who enters “golf shorts” into Google is highly likely expressing an interest in buying golf shorts. *Id.* at 6891:24–6892:12 (Amaldoss) (discussing PSXD10 at 25). Delivering a search ad in response to directly expressed

intent on Google or Amazon is more likely to result in the sale of golf shorts than a social media ad on Instagram.

Retargeted ads differ from search ads for a similar reason. A retargeted display ad can be served only *after* the user has visited the advertiser's platform. FOF ¶¶ 202–203. For instance, a consumer interested in buying a portable Bluetooth speaker will see a retargeted display ad for, say, a Sonos-brand portable speaker, only if they have previously visited the Sonos website. But a search ad for such a product is presented immediately, regardless of whether the user has previously visited the advertiser's website. The time lag between the user's originally expressed intent and delivery of the retargeted ad makes such ads less effective. FOF ¶ 203 (describing how retargeting signals rapidly grow stale, even after just one hour).

Another unique characteristic of search ads is that they are not limited by privacy features. A user enters a query and gets a result without intermediation from privacy filters. On the other hand, display and retargeted display ads require individualized user information from cookie tracking and audience profiling, which can be disabled or impeded by platforms or the user. FOF ¶ 204.

At bottom, search ads and non-search ads are *not* “roughly equivalent”: Search ads better approximate user intent than other ad types, and they do so with immediacy. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997) (“Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively.”) (internal quotation marks and citation omitted).

Industry or Public Recognition. Advertisers recognize search ads as a distinct product market. *See Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (considering

as relevant that “[t]he advertising industry and its customers . . . markedly differentiate between advertising in newspapers and in other mass media”). Advertisers have separate teams for search ads and other types of advertising, like display and social media. FOF ¶ 224. They also have separate budgets for those ad channels. *Id.*

Advertisers uniformly testified that they view search ads as unique because they respond to expressed user intent in real time. FOF ¶¶ 169–171, 218. Or, to put it in marketing terms, paid search is a “bottom funnel” ad channel or a “push” ad. FOF ¶¶ 213, 215, 218. Recall, the “marketing funnel” is a construct used in the advertising industry to generally depict a consumer’s journey from ignorance about a product (at the top of the funnel) to its purchase (at the bottom of the funnel). FOF ¶¶ 213–224. Advertisers attempt to correlate ad types with each stage of that journey based on the advertiser’s goal: promoting product awareness (upper funnel), addressing a consumer’s consideration of a purchase (mid-funnel), or driving sales (lower funnel). *Id.* Advertisers use the funnel as a framework when determining how to allocate their spending. FOF ¶¶ 221–222. They typically consider search as an ad channel better suited for “lower funnel” objectives than social media or display advertising. FOF ¶¶ 218–220.

Google asserts that the “industry and public recognition” factor weighs against a market for search advertising for two reasons. *First*, it vigorously contests the relevance of the marketing funnel. Google protests that the funnel is a dated tool with limited application in today’s digital ad market, especially given the explosion of social media advertising. GTB at 18–20; GRCL ¶ 7. It points to industry records that show greater fluidity among different stages of the funnel, and marketers conceiving of non-search ads as bottom-funnel media. GTB at 19–20. Google’s point is that advertisers shift spend to the ad type that they believe will return the greatest ROI, which

makes search and non-search digital advertisements reasonably interchangeable and renders the marketing funnel obsolete. *Id.* at 20–23.

It is true that digital advertising has disrupted the traditional marketing funnel construct of a linear consumer journey from product awareness to purchase. But advertisers and even Google still use it, and they continue to view search advertising as unique because of its efficacy in reaching lower-funnel consumers. *See Rothery Storage*, 792 F.2d at 218 n.4 (“The ‘industry or public recognition of the submarket as a separate economic’ unit matters because we assume that economic actors usually have accurate perceptions of economic realities.”); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (“[T]he determination of the relevant market in the end is a matter of business reality—of how the market is perceived by those who strive for profit in it.”) (cleaned up). Every industry witness testified that the marketing funnel remains a framework through which they make ad spending decisions. FOF ¶ 222. A recent Google online marketing essay does the same. It contains a depiction of the funnel and touts a “full-funnel” marketing strategy. FOF ¶¶ 221, 223 (citing UPX8051 at .005) (extolling two brands that “meet[] customers where they are. And that means addressing them at every stage of the sales funnel to raise brand awareness, answer questions prepurchase, and nurture people through final decision-making”).

Although Google presented marketing strategy documents from various industries that showed some advertisers placing display and social alongside search as bottom-funnel channels, no advertiser viewed search ads as upper funnel. FOF ¶ 218 (based on documents and testimony, 64% of advertisers view display to be higher than search in the funnel, and 0% consider it to be below search). To be sure, there are some products for which social media ads are particularly effective at driving conversions (e.g., cosmetics and apparel), but there are large categories of

products and services for which social media advertising is far less compelling (e.g., financial services). FOF ¶¶ 219–220.

To further underscore the distinction between search and social media ads, consider a new ad product recently introduced by Google: Demand Gen (or Discovery Ads). It is a feed-based ad platform for YouTube and Gmail, developed to better compete for advertising dollars going to Meta properties and TikTok, among others. Before its launch, Google recognized that it did not have an advertising channel that competed effectively for that highly lucrative ad spend. FOF ¶ 211; UPX29 at 541 (“Google has no *direct* competitor to Facebook’s ad offering[.]”). And, when describing the audience targeted for Discovery Ads, Google did so with terminology by now familiar to the reader. UPX33 at 145 (describing the social ads buyer as seeking to “create intent” and “find new customers,” as compared to the search ads buyer, who aims to “capture a person’s declared intent”) (2020). Thus, while Google as a *firm* may fiercely compete with Meta’s feed-based ads offerings, Google *search* ads do not.

Second, Google claims that U.S. Plaintiffs’ proposed market fails to account for the public’s consideration of different ad channels. Google argues that the market should be defined based on the degree of audience overlap. *See* GTB at 17–18 (citing Tr. at 4634:24–4635:11 (Whinston) (“The overlap between the audiences is really important for the amount of substitution there will be between ad products.”)). In other words, ads that target the same audiences should be treated as part of the same ad market. Google contends that “Plaintiffs’ ads markets exclude forms of digital advertising that feature a high degree of audience overlap while including those with less overlap.” *Id.* at 18. For instance, Google users typically do not also use Bing, FOF ¶ 21, but they *do* frequently use Amazon, FOF ¶ 157; *see, e.g.*, GTB at 17–18, GFOF ¶¶ 1018–1024. So, Google argues, U.S. Plaintiffs are mistaken when they consider search ads on Bing in the same

market as Google search ads but not ads shown on Amazon or other platforms where there is user overlap.

This argument misses the point. SVP search ads offerings *are* included in the search ads market. They target their users who express real-time intent with a query. Nor is there anything inconsistent about treating search ads and ads on other platforms, like social media, as distinct products even though they have overlapping audiences. Marketers use them as complements to fulfill their ultimate objective: to drive sales. FOF ¶¶ 221, 225.

Sensitivity to Price Changes. U.S. Plaintiffs argue that advertisers do not substitute away from search ads, even in the face of price hikes. Google says otherwise. It contends that advertisers care more about ROI or return on ad spend (ROAS) than any particular advertising channel, and that they move ad spend across different channels to maximize their ROI. For example, Google points out that advertisers increasingly are using tools like its own Performance Max, which helps advertisers optimize their ad spend to yield the best ROI. GFOF ¶¶ 1009–1013; FOF ¶ 229.

But Google's focus on ROI misses the forest for the trees. Products are reasonably interchangeable only if "significant" substitution occurs in response to a price increase. *See Ohio v. Am. Express Co.*, 585 U.S. 529, 543–44 (2018). To be sure, advertisers did testify to shifting spend to maximize ROI. But none said that they have "significantly" shifted ad spend away from search ads. In fact, the opposite is true. Advertisers uniformly said that they would not substitute search ads for another ad type absent some campaign-level reason to do so. FOF ¶¶ 230–231; *see Staples*, 970 F. Supp. at 1074 (courts look to "whether and to what extent purchasers are willing to substitute one for the other"). To the extent that ad dollars are increasingly being spent on other channels, that change reflects the ballooning of the digital advertising market as a whole.

FOF ¶ 166. There is no evidence that the massive growth of social media ads, for example, has come at the expense of search ads.

The record also shows that to the extent advertisers shift spending, they do so as part of a “full-funnel strategy.” Campaign goals may require a different blend of complementary advertising types to further a firm’s objectives. FOF ¶ 221. For instance, companies may shift ad spend to more upper-funnel strategies when introducing new products to create awareness but move ad spend to lower-funnel strategies if trying to increase seasonal sales of well-known products. FOF ¶¶ 226–227. The fact that advertisers may move money between search and social ads to achieve varying goals does not make them substitutes. *See Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 782–83 (N.D. Cal. 2022) (concluding that social ads are a distinct market from other online ads due to industry recognition, in part because, in contrast to search ads, “social advertisements help a company find customers who are not already looking for the company’s products”); *FTC v. IQVIA Holdings Inc.*, No. 23-cv-06188 (ER), 2024 WL 81232, at *17 (S.D.N.Y. Jan. 8, 2024) (“An agency running an advertising campaign will not have an unlimited budget, so it must make decisions about how to allocate the advertising funds it has. But the fact that [search] competes with these channels for advertising dollars in a broader market does not necessarily mean those channels are reasonably interchangeable substitutes that must be included in the relevant product market.”).

The Nike-Meta episode does not help Google, either. In 2020, Nike boycotted advertising on Facebook, cutting all of its social spending on the platform for several months. According to Dr. Israel, Nike reallocated that spend to search and display ads and, when the boycott ended, Nike reverted the money to its social budget. Tr. at 8517:1–8518:13 (Israel) (discussing DXD29 at 83, 86–87). Per Google, this demonstrates reasonable interchangeability. But Dr. Whinston’s

analysis—which aligns better with Nike’s internal studies—shows otherwise. He convincingly demonstrated that most of the money previously invested into Meta ads was simply reallocated to other social media and display ads. *Id.* at 10489:10–10495:9 (Whinston) (discussing UPXD106 at 13–14, 16). In fact, Nike’s search ads spend barely increased during the boycott. *Id.*; *see also* UPX2076 at 152 (as a percentage of Nike’s overall ad spend, search grew from 48% to 51% and then returned to 50% post-pause, a minor change).

Google further contends that U.S. Plaintiffs’ search ads market fails because U.S. Plaintiffs have presented no econometric modeling on pricing (e.g., a SSNIP test). GTB at 21–23; GCL ¶ 22; *see Sysco*, 113 F. Supp. 3d at 33–34 (describing a SSNIP test).⁷ But as previously discussed, *supra* Section II.A, such modeling is not required to define a market.

Unique Production Facilities. U.S. Plaintiffs contend that “the uniqueness of production facilities present in the general search services market appl[ies] in the Search Ads market.” UPFOF ¶ 440. That is not quite right. U.S. Plaintiffs’ search advertising market includes search ads on SVPs, so the two proposed markets do not fully overlap. Still, search ads production, regardless of the platform, is characterized by certain common components. A platform must “(1) match Search Ads to consumers’ real-time queries, (2) pull those ads into the relevant auction, (3) determine which ads in the auction will be shown, (4) determine where on the [results page] the shown ads will be positioned, and (5) calculate the price for each ad shown, should it be clicked on.” *Id.* ¶ 441. Display and social ads are produced differently. FOF ¶¶ 198–199, 204, 206.

⁷ U.S. Plaintiffs contend that that the pricing evidence relevant to the general search text ads market should be considered as persuasive in the search advertising market as well, because text ads make up 65% of the search ads market. *See* UPFOF ¶ 589 (citing Tr. at 4797:2-14 (Whinston)). As the court can define a search advertising market without reliance on such evidence, it discusses the relevance of text ads-specific evidence to the search ads market during the monopoly power inquiry. *See infra* Section III.A.2.

Distinct Customers. This factor does not support a search ads market, as advertisers who purchase search ads also purchase other ad types, including social media and display ads.

Distinct Prices. Search ads and display ads use different pricing models. Search ads are sold using a cost-per-click metric, such that advertisers pay only if a user clicks on a search ad. FOF ¶ 186. Display ads, on the other hand, generally use a cost-per-mille metric (i.e., cost per 1,000 impressions, or views). FOF ¶ 199. This means that advertisers are charged each time a display ad is posted, irrespective of whether a user clicks on the ad.

These different pricing approaches are consistent with the channels' different purposes. Search ads can be priced per click, as an ad click is in some sense indicative of the ad's effectiveness in satisfying a user's expressed intent. The effectiveness of display ads is more difficult to measure, as users click on them with less frequency. FOF ¶¶ 228, 230. The record contains almost no evidence as to pricing of social media ads.

Google argues that distinct pricing alone is "insufficient to confine a market to search ads, particularly in light of the evidence that different types of ads are priced similarly when adjusted for the outcomes advertisers seek to achieve." GCL ¶ 30. True. But neither U.S. Plaintiffs nor the court have rested solely on distinct pricing in defining a market for search advertising.

Google's Authorities. Google cites *Berlyn v. The Gazette Newspapers*, an unpublished Fourth Circuit case, to argue that all digital ads belong in the same relevant market. GTB at 17. There, the plaintiffs attempted to establish a market consisting of "legal and commercial advertising services provided by weekly community newspapers" and a single weekly section in the *Washington Post* dedicated to local news. 73 F. App'x 576, 582 (4th Cir. 2003). The court rejected that market based on the minimal evidence presented: (1) a single advertising flier touting the efficacy of print ads in local publications relative to radio and TV ads and (2) a *Washington*

Post marketing strategy paper discussing radio ads. *See id.* at 583. The court explained that this evidence, “if anything, . . . tends to show that all of these media outlets are within the same product market, to the extent that they are competing for the same limited pool of advertisers’ dollars.” *Id.* *Beryln* is of limited utility here. There can be no genuine comparison between the paucity of record evidence in *Beryln* versus the mountain of evidence presented in this case. Moreover, this court considered the evidence here in light of the *Brown Shoe* factors, which is something the *Beryln* court did not need to do on a limited evidentiary record.

Google’s other authorities are likewise inapposite. Google cites *Hicks v. PGA Tour, Inc.* for the proposition that “many courts have rejected antitrust claims reliant on proposed advertising markets limited to a single form of advertising.” GTB at 15–16 (quoting 897 F.3d 1109, 1123 (9th Cir. 2018)). But “*Hicks* does not apply where,” as here, “a plaintiff has alleged that two types of advertising have fundamentally different purposes.” *Klein*, 580 F. Supp. 3d at 784. Google also cites to decades-old cases decided at the motion-to-dismiss stage, which rejected Sherman Act claims for failure to adequately allege digital ads markets. *See Kinderstart.com LLC v. Google, Inc.*, No. 06-cv-2057 (JFRS), 2007 WL 831806, at *6 (N.D. Cal. Mar. 16, 2007); *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 858 (E.D. Va. 1999); GCL ¶¶ 19, 26. These cases are inapposite for numerous reasons, including that they predate the digital advertising boom and were decided on the pleadings. *See* GFOF ¶¶ 990–991 (“Digital Advertising is dynamic and growing. . . . Indeed, digital advertising has undergone dramatic change even in just the last few years.”). More recent decisions, however, with the benefit of a factual record, have refused to lump together various forms of digital advertising merely because advertisers spend in different channels. *See, e.g., IQVIA*, 2024 WL 81232, at *17.

* * *

In sum, the *Brown Shoe* factors counsel in favor of finding a relevant market for search advertising. Neither Google’s counterarguments nor its legal authorities persuade the court otherwise.

All that said, U.S. Plaintiffs’ search ads market is underinclusive in an important way: It excludes certain search advertisements that appear on Amazon known as “product page” ads. Such ads share the defining characteristic of search ads, which is that they are delivered in response to a user query. To illustrate, when an Amazon user queries “coffee,” its results page contains ads like PLAs presented on Google. Such ads are included in U.S. Plaintiffs’ market. When a user then selects a product—through a PLA or an unpaid result—they are taken to a “product page” that also contains advertisements (see below). These “product page” ads look a lot like PLAs, and they respond to the user’s twice-expressed intent (the query and the product selection). *See* Tr. at 8459:8-24 (Israel) (discussing DXD29 at 108). Yet, they are not included in U.S. Plaintiffs’ search ads market. *Id.*



DXD29 at 108 (blue boxes depict ads).

These “product page” ads likely generate substantial revenue for Amazon, whose ad business is growing rapidly. *See* DX231 at .003 (Google record from January 2021 estimating that Amazon’s “US ads business is nearly the size of Google’s US retail ads business today, and is growing at over twice Google’s rate.”). Dr. Israel testified that these product-page ads make up one third of Amazon’s ads overall. Tr. at 8459:16-17 (Israel). Dr. Whinston put Amazon’s search ads revenue at \$7.6 billion in 2020, excluding product-page ads revenue. *See* Fig. 78, Whinston Expert Report, ECF No. 418-1, at 185. Although the record does not reveal precisely how much revenue Amazon generates from product-page ads, U.S. Plaintiffs’ search ads market likely excludes a substantial dollar amount from its market share denominator. This under-inclusivity is not fatal to defining a relevant market for search ads, but it will impact Google’s market share, as described *infra* Section III.A.2.b.

2. *Google Does Not Have Monopoly Power in the Search Ads Market.*

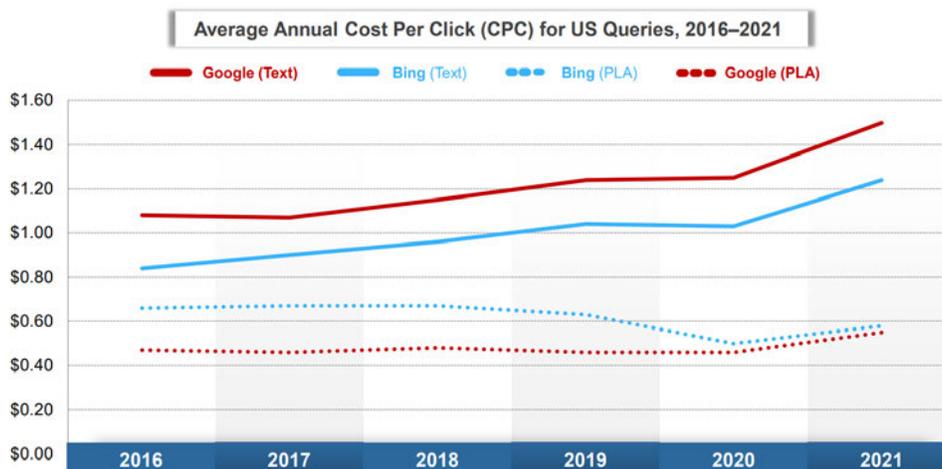
Although the court concludes that there is a relevant market for search ads, the court finds that U.S. Plaintiffs have not proven that Google possesses sufficient power in that market to make out a Section 2 violation. Recall, there are two types of evidence of monopoly power: (1) direct evidence indicating that a firm can substantially raise prices above the competitive level, and (2) indirect (or structural) evidence permitting the court to infer monopoly power “from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.” *Microsoft*, 253 F.3d at 51 (citation omitted). U.S. Plaintiffs have not met their burden with either.

a. Direct Evidence

As direct evidence, U.S. Plaintiffs have offered proof that Google has profitably raised prices on its general search text ads, a subset of its search ads offerings that is distinct from PLAs.

See infra Section III.B.2. U.S. Plaintiffs urge the court to extrapolate this text ads-specific evidence to infer that Google has monopoly pricing power in the broader search ads market. *See* UPFOF ¶ 589 (“Text Ads constitute approximately 64% of the Search Ads market; Google’s pricing power in the Text Ads market therefore confers on Google the ability to control price in a significant portion of the Search Ads market, even without regard to any of Google’s other Search Ads products.”). *But cf.* FOF ¶ 185 (changes to the text ads auction do not directly impact the PLA auction).

The court declines to make such a simplistic extrapolation to sustain a finding of monopoly power. *Cf. ThermoLife Int’l LLC v. Neogenis Labs Inc.*, No. 18-cv-02980 (DWL), 2021 WL 1400818, at *8–10 (D. Ariz. Apr. 14, 2021) (finding that the court could not “infer” power in a broader market based on power in a narrower one because the plaintiff had not alleged the relative size of the submarket in relation to broader market). Text ads comprise 64% of the search ads market defined by U.S. Plaintiffs. Tr. at 4797:7-10 (Whinston). That is a large number, even if overstated by some degree due to U.S. Plaintiffs’ exclusion of Amazon’s product-page ads from the calculation. But Dr. Whinston’s analysis of PLA pricing from 2016 to 2021 demonstrates that while Google has raised text ads prices, PLA prices, which comprise approximately 40% of the search ads market, have been stagnant, only showing nominal growth beginning in 2020. *See id.* at 4650:2-20 (Whinston) (discussing UPXD102 at 39) (“[W]hat you can see here is PLA prices have been flat or, if anything, a little decreasing, and text ad prices have been going up.”). That prices have remained flat in nearly 40% of the market is inconsistent with the notion that Google has monopoly pricing power in the search ads market as a whole.



UPXD102 at 39.

These different pricing trends can be explained by competition (or the lack thereof). Google’s ability to profitably raise text ads prices is surely due in part to the lack of any meaningful competition in that submarket—Microsoft is its only true competitor. *See infra* Section III.B.2. The competitive conditions for PLAs are very different. Amazon, as discussed, is a major competitor. Dr. Whinston put Amazon’s search ads market share at 19%, a likely underestimate given the exclusion of product-page ads. Fig. 78, Whinston Expert Report, ECF No. 418-1, at 185; Tr. at 8459:16-20 (Israel). Also, many other retailers compete in the PLA space (e.g., Home Depot, Walmart, Target), and though their share is small now, it is likely to grow. *See* Tr. at 8438:12-20, 8550:2-10 (Israel). These competitive market conditions likely explain why Google’s PLA prices remained largely unchanged from 2016 to 2021.

Google’s lack of pricing power as to PLAs cautions against inferring that Google’s pricing power in search text advertising extends to the broader search ads market.

b. Indirect Evidence

Nor is the court convinced that indirect evidence establishes monopoly power in the market for search ads.

“[A] market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.” *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981). Dr. Whinston calculated Google’s share of the proposed market as 74%, although that is an overestimate given the omission of Amazon’s product-page ads. *See* Tr. at 4779:7-15 (Whinston) (discussing UPXD102 at 63). Although Google’s market share is some evidence of monopoly power, it is not necessarily “strong evidence.” That said, Google’s share of the search advertising market has been durable, *id.* (65% market share or more since 2012), despite the market’s enormous growth, *id.* at 8874:25–8875:13 (Israel). These markers, taken together, tilt somewhat in favor of a finding of monopoly power.

But “because of the possibility of competition from new entrants, looking to current market share alone can be misleading.” *Microsoft*, 253 F.3d at 54 (internal quotation marks and citations omitted); *see also* *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) (“We cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry.”); *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (“A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant’s inability to control prices or exclude competitors.”) (citation omitted).

U.S. Plaintiffs have not shown that barriers to entry protect Google’s leading share in the search ads market. *Microsoft*, 253 F.3d at 51. Concededly, the capital cost of developing an ad platform is high. *See* UPFOF ¶¶ 581–583. But well-resourced market entrants, and demonstrated growth by those entrants, belie a reality of unconstrained dominance. There is, of course, Amazon’s entry and explosive growth in the market. FOF ¶ 196 (Google estimates that Amazon

has surpassed its revenue in retail advertising and is growing at a faster rate). Other SVPs are more recent market entrants and are looking to grow their search ads business. *See* Tr. at 8438:12-20 (Israel) (“[W]hat the lesson of commercial verticals has told us is that where there’s money to be made, SVPs pop up and they compete for advertising.”). These are not small firms likely to compete only at the margins. They include mega-retailers looking to aggressively expand their search ads business. Walmart and Target are two examples. *Id.* at 8549:9–8550:17 (Israel) (describing Walmart’s emergence as a search advertiser); Alberts Dep. Tr. at 40:5-10 (same as to Target). Online travel sites are another. Tr. at 5244:12-17 (Dijk) (describing Booking.com’s emerging search ads offerings). It is not surprising then that Google’s share of the search ads market has steadily eroded since 2017. *Id.* at 4779:7-15 (Whinston) (discussing UPXD102 at 63) (declining from near 80% in 2017 to 74% in 2020). U.S. Plaintiffs thus have not shown that the barriers to entering the search advertising market are comparable to those that protect Google’s monopoly in general search.

Meta’s experience in search ads does not counsel a different outcome. U.S. Plaintiffs argue that if a massive digital media company like Meta could not enter search ads successfully, no new entrant can be expected to survive. UPFOF ¶ 584 (describing Facebook’s “multiple unsuccessful attempts to enter the Search Ads market”). But U.S. Plaintiffs acknowledge that the reason for this failure had nothing to do with barriers to entry and instead was due to the difficulty of serving search ads on social media platforms. *See id.* ¶ 585 (“Google recognizes that, due to the nature of Facebook’s product, the social network is ill-suited to offer Search Ads.”) (citing Tr. at 1491:21–1492:2 (Dischler) (“The search feature is just not very important on Facebook for searching for products or services or other commercial things.”)). That social media is a poor fit for search ads

does not mean that the market is protected by high entry barriers. It just means that the strength of social media advertising lies elsewhere.

In the end, courts “cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry.” *Tops Markets*, 142 F.3d at 98–99. Here, the court finds that, notwithstanding Google’s leading market share, the recent history of new entrants, the strength of those entrants, and their growth show that barriers to entry are not so high as to compel the conclusion that Google has monopoly power in the market for search advertising. *Cf. id.* (finding no monopoly power by a retail supermarket in a local area where barriers to entry were low, despite 72% market share). U.S. Plaintiffs therefore have not proven a Section 2 violation in the search ads market.

B. Google Has Monopoly Power in the General Search Text Ads Market.

1. General Search Text Ads Is a Relevant Product Market.

The court moves next to general search text advertising. As before, the court applies the *Brown Shoe* factors to determine the relevant product market and then addresses Google’s counterarguments. Each of the relevant *Brown Shoe* criteria warrants recognizing general search text advertising as a relevant product market.

Peculiar Characteristics and Uses. General search text advertisements, or “text ads,” are displayed on a SERP in response to a user’s query. FOF ¶¶ 175–176. Like search ads, they are distinguishable from social media and display ads for the reasons already stated, *supra* Section III.A.1. Text ads have various unique features that also differentiate them from other types of search ads, most notably shopping ads, or PLAs.

First, text ads have the appearance of organic search results and provide web links to the advertiser’s site. FOF ¶ 176. They can include an image but are largely text-based. *Id.* PLAs, on

the other hand, are visually driven and appear at the top of the SERP in what is referred to as a “carousel.” They are not integrated into the SERP results. FOF ¶¶ 177–178.

Second, advertisers write the “copy” for text ads but do not do so for PLAs. FOF ¶ 182. Advertisers value this control because it allows them to highlight discounts, seasonal offerings, new products, or other promotions. *Id.* PLAs offer little content other than a product image, its pricing, and its source. FOF ¶¶ 178, 183. For instance, Home Depot may purchase a PLA to sell a trash can that is currently on sale in response to the query “trash can.” But a PLA cannot promote its storewide Labor Day sale, during which all trash cans are 50% off. That information can be conveyed only with a text ad. FOF ¶¶ 179, 182.

Third, and perhaps most importantly, text ads are available to a far broader range of advertisers than PLAs. PLAs can feature only tangible goods because they can be depicted visually, whereas text ads may be used to sell all manner of goods and services. FOF ¶ 179. This distinction is crucial. Over 92% of Google’s advertisers *only* purchase text ads, while a mere 5.5% of Google’s advertisers purchase both. FOF ¶ 181 (only 2% of Google’s advertisers purchase PLAs but not text ads); *see also id.* (“In terms of revenue, 52.8% of ad dollars spent on Google came from advertisers who purchase *only* text ads.”). Notably, some of Google’s largest advertisers are travel sites, FOF ¶ 180, who have no use for PLAs. The breadth of advertiser access and usage is a key distinction between text ads and PLAs.

Industry or Public Recognition. Both Google and its advertisers recognize text ads as a distinct product submarket. Google has repeatedly acknowledged that text ads and shopping ads are different products. FOF ¶ 187. It even has different teams for text ads and PLAs. *Id.*

Advertisers also recognize each ad type as a distinct product. Non-retail advertisers emphasized that they simply cannot use PLAs, and thus they view text advertising as its own channel. FOF ¶¶ 179–180.

Retail advertisers who purchase PLAs view them as a complementary product. Text ads can be used in conjunction with PLAs to “own the SERP,” that is, take up as much real estate on the search results page as possible. FOF ¶¶ 189–190. For instance, Amazon’s Director of Software Development, Mike James, testified that, from the *advertiser’s* perspective, “there are . . . distinct advantages in one ad format over another,” and “there are edges where those ad units have their own specific incremental benefits.” James Dep. Tr. at 234:23-24, 235:3-4. Amazon uses a particular bidding strategy for branded keywords on text ads, which cannot be achieved through PLAs alone. *See id.* at 95:3-8. To be sure, text ads and PLAs arguably serve a similar function from a user’s perspective, *id.* at 142:4-5, 234:9-19 (stating that “there is an intersection of the purposes that they serve,” which is that they “can fulfill the same customer’s need”), but marketers view them as distinct products.

Google counters that “what matters for market definition is that many advertisers can and do buy other search ads as substitutes.” GRFOF ¶ 19f. At trial, Google employees highlighted that certain advertisers shift spend between text ads and PLAs. FOF ¶ 234. This, Google contends, is evidence that these ad types are substitutes. But, as discussed, only retail advertisers can shift spend between text ads and PLAs—only a small minority of all Google advertisers (7.5%) purchase both ad types. And for reasons already discussed, the reallocation of some spending between text ads and PLAs does not on its own reflect significant substitution: Advertisers may reallocate dollars among ad channels for a variety of campaign- or product-specific reasons.

See supra Section III.A.1. Thus, the mere fact that advertisers move some spending between text ads and PLAs does not, without more, make them substitutes.

Unique Production Facilities. Text ads are generated and sold through different means than PLAs. The appearance and content of text ads is controlled by the advertiser, who has substantial design input. FOF ¶¶ 182, 184. In contrast, Google designs PLAs; the advertiser merely supplies the inventory. FOF ¶ 183. While both text ads and PLAs are sold through auctions, the auctions are separate. FOF ¶ 185. And Google has rejected proposals to integrate the auctions because “user intent and advertiser value is different across the units, and as a result advertisers are not bidding on the same thing on Shopping and Text ads.” UPX1013 at .003; FOF ¶ 185. Finally, while PLAs appear on SVPs and other platforms, text ads are unique to GSE SERPs. *Cf.* FOF ¶ 193 (SVP search ads are almost exclusively PLAs).

Distinct Customers. As already discussed, text ads are open to nearly all advertisers, whereas PLAs can feature only tangible goods.

Google counters that “[t]he observation that some advertisers purchase only text ads (and not product listing ads), or do not advertise with certain major SVPs, does not show that general search text advertising is a relevant market because not all potential substitutes need to be equally compelling to all customers.” GCL ¶ 34; *see also* GRCL ¶ 9. But that argument largely misses the point. Over 92.0% of Google’s advertisers purchase only text ads. For that large cohort PLAs apparently will not do. A product that serves less than 10% of advertisers cannot be a substitute for one that serves all of them.

Distinct Prices. Text ads and PLAs are both priced on a cost-per-click, or CPC, basis. The prices of text ads, however, are higher than those of PLAs. FOF ¶ 186. Dr. Whinston’s analysis

revealed that while PLA prices remained stagnant or decreased from 2016 to 2020, text ads prices steadily climbed over that same period. *Id.*

Sensitivity to Price Changes. Over the years, Google has tested whether it can profitably raise its text ads prices by 5% or more without losing substantial advertisers, and the results have been largely consistent—it can. FOF ¶¶ 238–267; *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.1 (3d Cir. 2016) (“The SSNIP is typically about 5%.”); *Sysco*, 113 F. Supp. 3d at 33–34 (same). The court will delve further into the details of Google’s numerous ad experiments and feature launches, *infra* Section VI.B, but at present it is sufficient to say that the evidence firmly establishes modest advertiser sensitivity to small but significant text ads price increases. This reality is particularly acute for sellers of services or non-tangible goods, who cannot buy PLAs.

* * *

Accordingly, applying the *Brown Shoe* factors, Plaintiffs have proven that general search text ads is a relevant product market.

2. *Google Has Monopoly Power in the General Search Text Ads Market.*

Plaintiffs offer both direct and indirect evidence of Google’s monopoly power in the market for general search text advertising. The court starts with the indirect evidence.

Indirect Evidence. Google possesses a large and durable share in the text ads market, which is protected by significant entry barriers. In 2020, its market share in the text ads market was 88%, having grown steadily from 80% in 2016. FOF ¶ 192. Advertisers confirmed Google’s market dominance. They testified that their text ads spending allocation mirrors Google’s and Bing’s relative query volumes (i.e., 90% of spend on Google vs. 10% on Bing). FOF ¶ 232. They also emphasized that under no circumstances would they spend more than 10% of their text ads dollars on Bing, and that no other platforms were viable substitutes. FOF ¶ 233. As one advertising

executive put it, once that 10% of ad spend on Bing is exhausted, “there’s [nowhere] else to go.” Tr. at 4875:19–4876:4 (Lim).

Barriers to entry are high. Because only GSEs can display text ads, new entrants face the same major obstacles as would the developer of a new GSE. *Supra* Section II.C.3. Those barriers are compounded by the additional costs and resources required to build an ad platform to deliver text ads. FOF ¶ 55 (Google spends \$11.1 billion annually on search ads and \$8.4 billion on search). Significant entry barriers thus insulate from erosion Google’s longstanding, dominant market share in the text ads market. Google has monopoly power in this market.

Direct Evidence. It is not necessary here to discuss the specific evidence Plaintiffs have offered to prove that Google priced text ads at supracompetitive levels (or Google’s responses to that evidence). It is sufficient at this point to observe what is undisputed, which is that Google does not consider competitors’ pricing when it sets text ads prices. FOF ¶ 267. That is “something a firm without a monopoly would have been unable to do.” *Microsoft*, 253 F.3d at 57–58 (making that observation as to Microsoft’s pricing of Windows); *see also Am. Tobacco Co.*, 328 U.S. at 811 (“[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition is actually excluded but that *power exists* to raise prices or exclude competition when it is desired to do so.”) (emphasis added).

Google responds that *Microsoft*’s observation does not apply here, because Google does not set ad prices, the auctions do. GTB at 31 n.1; GFOF ¶ 1144. But that contention overlooks that Google controls key inputs to the auctions that influence the ultimate price that advertisers pay. FOF ¶¶ 243–246. That Google makes changes to its text ads auctions without considering its rivals’ prices is something that only a firm with monopoly power is able to do. And, as will be

discussed, Google in fact has profitably raised prices substantially above the competitive level. That makes “the existence of monopoly power [] clear.” *Microsoft*, 253 F.3d at 51.

* * *

The court thus concludes that Google has monopolized the market for general search text advertising.

C. The Evidence Does Not Support a Market for General Search Advertising.

Finally, the court addresses Plaintiff States’ market for general search advertising. General search advertising is alleged to be a submarket of search advertising that “includes all ads that appear on a GSE results page in response to a user query, which overwhelmingly consists of text ads and product listing ads” but also encompasses local ads and travel ads. Pl. States’ Post-Trial Brief, ECF No. 900 [hereinafter PSTB], at 8. While the court has found that the record establishes both a broader market (search advertising) and a narrower submarket (general search text ads), the *Brown Shoe* factors do not warrant recognition of a general search ads market.

Peculiar Characteristics and Uses. Plaintiff States’ core argument is that all the differences between GSEs and SVPs already described, *supra* Section II.B, support a market solely comprised of search ads that appear on GSE SERPs. Specifically, they claim that “[g]eneral search advertising is a relevant market because all ads on a GSE’s results page reach users who are considering the broad range of choices and destinations provided by a GSE.” PSTB at 8. Because of a GSE’s breadth compared to an SVP, Plaintiff States contend that “GSE users are more likely to be in a research or consideration mindset, whereas SVP users are more likely to be in a purchase mindset.” *Id.* at 9. Users can purchase a product directly on an SVP’s platform, whereas they cannot do so with Google. FOF ¶¶ 144–145, 194. This makes GSEs “attractive to advertisers

seeking to reach users in the mindset of actively researching a topic without having determined a specific purchase destination.” PSTB at 10.

That all makes intuitive sense, and there is some record evidence to support it. *See, e.g.*, Tr. at 5138:11-14 (Booth) (Home Depot believes that once a user is on their website, it has “a higher likelihood to actually get them to convert”); *id.* at 3860:20-24 (Lowcock) (“So if a user goes to a retailer’s website, they’ve got a high probability and intent to buy. And if they type something into search, typically they type in the brand and product that they’re specifically looking for. So they know what they’re going to do.”); *id.* at 6873:7-10 (Amaldoss) (discussing PSX970) (SVPs “are the places [] people can actually buy the product from . . . because these consumers have a very high purchase probability, and they want to close the sale.”).

But the fact that users of GSEs may sometimes be higher up in the marketing funnel does not mean that general search ads have a particular use that is distinct from search ads on SVPs. It just means that advertisers can purchase general search ads to satisfy broader objectives and on a wider range of topics. *Id.* at 5391:10-23 (Jerath) (stating “search ads are most suited and effective for bottom funnel goals and to some extent for mid-funnel goals”). That is a difference of degree, not kind.

Industry or Public Recognition. There is little industry recognition of a separate general search ads market. Advertisers testified that text ads are distinct because of their breadth and effectiveness, *supra* Section III.B.1, but that says nothing about whether they recognize a wider general search advertising market that also includes PLAs and other SERP advertising. Plaintiff States contend that “large, well-known companies like Amazon, Booking.com, and Expedia rely heavily on general search ads to acquire new customers.” PSTB at 15. But Booking.com and Expedia only buy text ads, not PLAs. And Amazon’s actual testimony suggests

that Amazon views text ads and PLAs not as a single product, but as different ones because it uses bid strategies unique to each ad type. *Supra* Section III.B.1.

Plaintiff States further argue that SVPs must purchase ads on GSEs using branded keywords (e.g., “Yelp” or “Expedia”) to preempt rivals from doing so and siphoning off users who are potentially interested in their brand, a practice known as “conquesting.” *See* PSTB 11–12; Pl. States’ Proposed Findings of Fact, ECF No. 902, ¶¶ 36–38 [hereinafter PSFOF]. Because only GSEs accept queries that allow users to navigate directly to external websites, Plaintiff States say, advertisers cannot substitute away from general search ads to SVP ads if they seek to prevent conquesting. PSTB at 12. This all may be true, but it does not support a separate general search ads market. Only text ads, not PLAs, are purchased by keywords and appear similar to organic links on the SERP. FOF ¶ 184. The conquesting concern thus is a feature of the text ads market, not a broader market for general search advertising. FOF ¶ 191.

Finally, Plaintiff States contend that when purchased together, text ads and PLAs allow advertisers to “own the SERP” by taking up treasured real estate on a SERP. PSFOF ¶¶ 10–11. In this way, advertisers consider general search ads as a separate product.

Although Plaintiff States do not put it precisely this way, their argument resembles one for recognition of a “cluster market” that is defined by “a central group of customers for whom ‘only [a particular package of goods and services] will do.’” *Whole Foods*, 548 F.3d at 1038 (Brown, J.) (quoting *Grinnell*, 384 U.S. at 574). There is some evidence to support this theory. Some advertisers do in fact purchase both text ads and PLAs to “own the SERP.” FOF ¶ 189. And Plaintiff States point to evidence that Google has touted “owning the SERP” as a marketing strategy. FOF ¶ 190.

But the court was told little else about such customers. For instance, the record does not disclose how many advertisers have adopted that strategy and how much they spend and contribute to Google’s revenues. Nor has the court been told whether such advertisers view “owning the SERP” as essential to their marketing strategy, including on Bing, such that no other combination of ad products will do. *See Whole Foods*, 548 F.3d at 1039 (Brown, J.) (recognizing that a core group of customers can define a market because they “need a complete ‘cluster of products,’” the “particular circumstances dictate that the product ‘is the only realistic choice,’ or “they find the product ‘uniquely attractive’”) (citation omitted). Indeed, it is also equally plausible that such advertisers simply view text ads and PLAs as complementary products, rather than as a “clustered” general search ads product. In sum, there is very little evidence of industry recognition of general search ads as a distinct product market.

With respect to public recognition, Plaintiff States point to evidence that GSEs and SVPs—as platforms—are complements (not substitutes) as proof that general search ads and SVP search ads are also not substitutes. PSFOF ¶¶ 15–21. But this argument misses the mark. Users of GSEs and SVPs may view them as complements to gather information, but that does not mean they feel the same way about the *advertisements* that appear on those platforms. The record does not reflect any public recognition of general search ads as a separate market.

Unique Production Facilities. Although GSEs and SVPs have different means of production for answering a query, there is substantial overlap as to how the platforms serve advertisements. PLAs on both platforms are generated from the ad inventory either available on the platform (SVPs) or through a structured data feed (GSEs). This process does not involve affirmative keywords. FOF ¶¶ 183–184. Admittedly, there is an important difference between the breadth of general search ads on GSEs versus search ads on SVPs. The latter are limited to

advertising products available for purchase on the website, whereas the former are not so restricted. Still, that distinction alone is not enough to conclude that general search ads are uniquely produced in a way that sets them apart from similar ads on SVPs.

Distinct Customers. Not all firms who advertise on GSEs purchase search ads on SVPs. For example, the decision to sell a product on Amazon means agreeing to share a portion of any purchase completed on Amazon. FOF ¶ 194. Home Depot, for example, does not sell products on Amazon for that reason. FOF ¶ 195. Other firms do not buy ads on SVPs because no SVP corresponds to its product or service. Financial services companies are a good example. This means that a subset of Google's customers are not SVP search ads buyers, creating a class of customers who purchase only general search ads. But that class is so broad that this factor only marginally supports the proposed market.

Distinct Prices. Plaintiff States argue that SVP search ads and general search ads are priced differently, because when a purchase is made following an SVP search ad, it is done on the SVP, which takes a "cut" of the purchase price. In contrast, general search ads lead consumers directly to the advertiser's platform, where the advertiser keeps 100% of the purchase price. PSFOF ¶¶ 56–57. This factual distinction is accurate, but the record does not reveal how this difference impacts the pricing of ads on each platform. It is not established, for instance, how retailers think about pricing for search ads on Google versus search ads on Amazon because of this difference.

Instead of advertiser testimony, Plaintiff States point to three pieces of evidence in support of distinct prices, but none are persuasive. First, a slide deck by the ad platform Kenshoo (now Skai) notes that advertisers report the cost-per-click on Amazon to be about five times that on Google. *See* PSFOF ¶ 60 (citing PSX6 at 037). But that proof is of limited probative value because it compares only PLA ads pricing across platforms, not general search ads pricing (including text

ads). PSX6 at 037. Second, Plaintiff States note that Dr. Israel testified that when he adjusted various ad prices to fit within a cost-per-mille metric, general search text ads were significantly more expensive than Amazon ads. *See* PSFOF ¶ 60 (citing Tr. at 8461:23–8462:13 (Israel) (discussing DXD29 at 62)). But this time, the comparison excludes PLAs, which are in the proposed general search ads market along with text ads. Finally, Plaintiff States identify analysis from the clothing retailer North Face (unsupported by designated or trial testimony) showing that North Face calculated its ROI on Google to be a fraction of its ROI on Amazon but nevertheless continued to spend on Google. This, according to Plaintiff States, is evidence that search ads on GSEs and SVPs are not substitutable. PSFOF ¶¶ 64–65. But the weight of this evidence is limited by the particular features of North Face’s product, primarily cold-weather apparel. As stated in the same record, its business is “highly dependent on weather,” and GSEs can supply “triggers” that better identify when a user may be in a cold-weather location. PSX976 at 423–24. The court will not generalize a peculiar use case into a product market.

Sensitivity to Price Changes. Plaintiff States presented no evidence that advertisers lack reasonable substitutes for general search ads (as a market) in the face of rising prices. They point to testimony from Joshua Lowcock, Global Chief Media Officer at IPG, for the proposition that major advertising agencies would not recommend that their clients switch away from general search ads should prices increase. *See* PSTB at 17; PSFOF ¶ 9 (citing Tr. at 3825:12-24 (Lowcock)). But that testimony was limited to general search *text* ads and did not encompass PLAs. The same is true of other advertiser testimony the States cite: None of those advertisers purchase PLAs. *See* PSFOF ¶ 99 (citing testimonies from Booking.com, Expedia, TripAdvisor, Angi, and Yelp). Ultimately, this factor does not support a separate market for general search ads.

* * *

The *Brown Shoe* factors counsel against recognizing a market for general search advertising. Plaintiff States' Section 2 claim as to this alleged market fails.

IV. EXCLUSIVE DEALING

Before moving forward, it is worthwhile to pause and summarize where we are. The court has found that Plaintiffs have proven that Google has monopoly power in two relevant product markets: general search services and general search text advertising. On the other hand, although the court recognized a separate market for search ads, it found that Google did not have monopoly power in that market. It also rejected a separate general search ads market. As to the latter two markets, the court's Section 2 inquiry proceeds no further.

Because "having a monopoly does not by itself violate § 2," *Microsoft*, 253 F.3d at 58, the next step in the analysis is to determine whether Google has engaged in exclusionary conduct with respect to general search services and general search text advertising. Plaintiffs must prove a second element, which is "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 50 (internal quotation marks omitted). The bulk of Plaintiffs' case focuses on the search distribution contracts—the browser agreements (primarily with Apple and Mozilla) and the Android agreements (the MADAs and RSAs)—which Google allegedly uses to maintain its monopoly in the relevant markets.

According to Plaintiffs, the challenged contracts are unlawful exclusive agreements. They effectively block Google's rivals from the most effective channels of search distribution, namely, the out-of-the-box default search settings. Google is the exclusive default search engine on the Safari and Firefox browsers. Likewise, on all Android devices, the Google Search Widget appears on the home screen and, on all except Samsung devices, Chrome is preloaded as the exclusive

browser. Plaintiffs say that these distribution contracts effectively “lock up” half of the market for search and, by extension, nearly half of the market for general search text ads. These exclusive deals protect Google’s dominant position and shield it from meaningful competition. Plaintiffs also specify certain contractual provisions that they claim thwart competition. The ISA, for example, contains provisions arguably restricting Apple’s ability to divert queries away from Google and serve search ads, and the RSAs prohibit partners from preloading “alternative search services” on Android devices.

Before turning to the merits of Plaintiffs’ arguments, the court considers two threshold matters. First, Google contends that it is not subject to Section 2 liability because its positions as the default GSE are the product of “competition for the contract” and thus are not exclusionary. Second, Plaintiffs maintain that the court should eschew *Microsoft*’s exclusive dealing framework in favor of a broader “general Section 2 standard.” UPCL at 14. The court rejects both arguments.

A. “Competition for the Contract” Is No Defense.

Google disputes that the distribution agreements are exclusionary. Recall, the Supreme Court has drawn a line between exclusionary conduct versus “growth or development as a consequence of a superior product, business acumen, or historical accident.” *Grinnell*, 384 U.S. at 571. The former violates the Sherman Act; the latter does not. Google says that it has secured default distribution, not through exclusionary conduct, but by developing a “superior product” through constant innovation. Google claims that it “has repeatedly outcompeted its rivals . . . on the basis of its superior quality and monetization,” and that any “scale benefits achieved from winning customers’ business based on competition on the merits [do not] turn[] an otherwise lawful agreement into an unlawful one.” GTB at 50, 56. Google points out that its partners chose to design their products to have a default GSE, and Google simply has bested its rivals to secure

those default positions. Google also emphasizes its superior “business acumen.” *See id.* at 50–60. For instance, unlike Microsoft, Google anticipated that there would be increasing demand for search on mobile, and it invested accordingly. *Id.* at 68. Thus, Google says, it has won (and continues to win) the defaults through competition as opposed to exclusionary conduct. *See Paddock Publ’ns, Inc. v. Chi. Trib. Co.*, 103 F.3d 42, 47 (7th Cir. 1996) (“[C]ompetition for the contract makes it possible to have the benefits of exclusivity and rivalry simultaneously.”); *see also Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1074 (5th Cir. 1984) (“The record contains no evidence to undermine the thesis that U-Haul’s power was acquired by virtue of its superior product and marketing ability, and the Sherman Act does not punish monopolists whose position has been ‘thrust upon’ them.”) (citation omitted); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (“The successful competitor, having been urged to compete, must not be turned upon when he wins.”).⁸

In a sense, Google is not wrong. It has long been the best search engine, particularly on mobile devices. FOF ¶¶ 126–127. Nor has Google sat still; it has continued to innovate in search. FOF ¶ 128. Google’s partners value its quality, and they continue to select Google as the default because its search engine provides the best bet for monetizing queries. FOF ¶¶ 126, 133. Apple and Mozilla occasionally assess Google’s search quality relative to its rivals and find Google’s to be superior. FOF ¶¶ 324, 332–333, 340–344. And Google’s rivals have tried to oust it as the

⁸ This court determined at summary judgment that the so-called “‘competition for the contract’ defense [could not] be resolved on summary judgment at the *prima facie* stage and [wa]s better left for the procompetitive prong of the *Microsoft* analysis.” *United States v. Google*, 687 F. Supp. 3d 48, 73 (D.D.C. 2023). Upon further reflection at Google’s urging, *see* Closing Arg. Tr. at 243:4-10, the court thinks the defense is better considered here, when determining whether the distribution agreements qualify as exclusionary conduct, *see Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 526 (5th Cir. 1999) (analyzing impact of “qualitative merits of [defendant’s] product,” including the argument that it “enhanced rather than subverted competition on the merits” at the exclusionary conduct stage); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (citing AREEDA and defining exclusionary conduct as “conduct, other than competition on the merits or restraints reasonably ‘necessary’ to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power”).

default GSE. Microsoft, most notably, has pitched Apple on making Bing the default multiple times, and DDG made a bid to be the default for private browsing mode searches on Safari. FOF ¶¶ 321, 330. These firms have not succeeded in part due to their inferior quality. FOF ¶¶ 324, 327, 332. It is also true that Google foresaw that the future of search was on mobile. Microsoft acknowledges that it was slow to recognize the importance of developing a search product for mobile, and it has been trying to catch up—unsuccessfully—ever since. *See infra* Section V.A.3.a.

But these largely undisputed facts are not inconsistent with possessing and exercising monopoly power. Nor do they tell the full story. There is no genuine “competition for the contract.” Google has no true competitor. Consider that Google’s monopoly in general search has been remarkably durable. Its market share in 2009 was nearly 80%, and it has *increased* since then to nearly 90% by 2020. FOF ¶ 23. Bing, during that same period, has never held a market share above 11%, and today it stands at less than 6%—meaning that Google’s biggest rival trails in market share by a whopping 84%. FOF ¶ 25. Yahoo, long ago considered Google’s closest competitor, today holds less than 2.5% of the market. *Id.* Thus, over the last decade, Google’s grip on the market has only grown *stronger*.

That is not the only evidence of market stasis. Only once in the last 22 years has a rival dislodged Google as the default GSE, and in that case, Mozilla switched back from Yahoo to Google three years later. FOF ¶¶ 337–339. Moreover, there have been only two new market entrants of note in the last 15 years—DDG and Neeva. One of them is no longer in business (Neeva), and the other has achieved a market share of 2.1% (as of 2020) after more than a decade in business. If there is genuine competition in the market for general search, it has not manifested in familiar ways, such as fluid market shares, lost business, or new entrants.

The market reality is that Google is the only real choice as the default GSE. Apple's Senior Vice President of Services, Eddy Cue, put it succinctly when, in a moment of (perhaps inadvertent) candor, he said: "[T]here's *no price* that Microsoft could ever offer [Apple] to" preload Bing. Tr. at 2519:10-11 (Cue) (emphasis added). "No price." Mozilla stated something similar in a letter to the Department of Justice prior to the filing of this lawsuit. It wrote that switching the Firefox default to a rival search engine "would be a losing proposition" because no competitor could monetize search as effectively as Google. DX547.002. A "losing proposition." If "no price" could entice a partner to switch, or if doing so is viewed as a "losing proposition," Google does not face true market competition in search.

Google understands there is no genuine competition for the defaults because it knows that its partners cannot afford to go elsewhere. Time and again, Google's partners have concluded that it is financially infeasible to switch default GSEs or seek greater flexibility in search offerings because it would mean sacrificing the hundreds of millions, if not billions, of dollars that Google pays them as revenue share. FOF ¶¶ 319, 320, 370–375, 378 (identifying instances in which Apple, Verizon, AT&T, and T-Mobile have all sought and failed to obtain greater flexibility under the relevant contracts). These are Fortune 500 companies, and they have nowhere else to turn other than Google.

That was the key takeaway from the testimony of Neeva's founder and former Google Senior Vice President of Ads and Commerce, Dr. Ramaswamy. The court found him to be a particularly compelling witness. He put it best. When the court asked why Google pays billions in revenue share when it already has the best search engine, he answered that the payments "provide an incredibly strong incentive for the ecosystem to not do anything"; they "effectively make the ecosystem exceptionally resist[ant] to change"; and their "net effect . . . [is to] basically

freeze the ecosystem in place[.]” Tr. at 3796:8–3798:22 (Ramaswamy). No one would ever describe a competitive marketplace in those terms. When the distribution agreements have created an ecosystem that has a “strong incentive” to do “nothing,” is “resist[ant] to change,” and is “basically [frozen] in place,” there is no genuine “competition for the contract” in search. It is illusory.

As was true of Microsoft and Windows, Google “may have gained its initial dominance in the [general search services] market competitively—though superior foresight or quality. But this case is not about [Google’s] initial acquisition of monopoly power. It is about [Google’s] efforts to maintain this position through means other than competition on the merits.” *Microsoft*, 253 F.3d at 56; see *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979) (“Even if the origin of the monopoly power was innocent, . . . the *Grinnell* rule recognizes that maintaining or extending market control by the exercise of that power is sufficient to complete a violation of § 2.”). Google has succeeded in doing just that. Like Microsoft before it, Google has thwarted true competition by foreclosing its rivals from the most effective channels of search distribution. See *infra* Section V.A.2. The result is that consumer use of rival GSEs has been kept below the critical levels necessary to pose a threat to Google’s monopoly. See *Microsoft*, 253 F.3d at 71. The exclusive distribution agreements thus have significantly contributed to Google’s ability to maintain its highly durable monopoly. *Id.* at 78–79.

Google asserts that this case is unlike *Microsoft* because there, Microsoft radically changed its conduct in response to Netscape’s threat and, in so doing, flipped the companies’ market shares. Here, by contrast, Google says its conduct has been relatively constant, both before and after its acquisition of dominant market status. See Closing Arg. Tr. at 244:13–245:22. But “many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller

rivals. A classic illustration is an insistence that those who wish to secure a firm's services cease dealing with its competitors. Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even honestly industrial." *Berkey Photo*, 603 F.2d at 274–75 (internal quotation marks and citations omitted). It is Google's status as a monopolist that makes its distribution contracts exclusionary, even if the same conduct did not have that effect when Google first began employing it.

B. The *Microsoft* Exclusive Dealing Framework Is Applicable.

Before turning to a more detailed discussion of the market effects, the court addresses the proper analytical framework within which to view the challenged distribution agreements. From the outset, Plaintiffs have framed this case as one about exclusive dealing. *See, e.g.*, Am. Compl. ¶¶ 78–79 (Android agreements), 118–119 (Apple), 156 (browser agreements). Unexpectedly, for the first time post-trial, Plaintiffs contend that the court should eschew considering the agreements through the lens of exclusivity, which they now deem “too narrow,” but instead should “opt[] for the general Section 2 standard, even when harm resulted from agreements blocking access to distribution.” UPCL at 13–16.

The court declines to ratify what Google rightly calls a “dramatic post-trial shift[.]” GRCL at 1. *Microsoft* compels application of the exclusive dealing framework. *See* 253 F.3d at 69–70. That framework requires the court to consider, at the threshold, the degree to which the agreements foreclose the relevant markets. *Id.* But because foreclosure is only a “useful screening function,” the court also must identify real-world anticompetitive effects that arise from such agreements. *Id.* at 69; *McWane*, 783 F.3d at 835 (describing foreclosure as a “proxy for

anticompetitive harm”). Perhaps that is what Plaintiffs mean by the “general Section 2 standard.” UPCL at 14. In any event, the court’s analysis follows *Microsoft*.

C. The Challenged Agreements Are Exclusive.

“Generally, a prerequisite to any exclusive dealing claim is an agreement to deal exclusively.” *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) (internal quotation marks and citations omitted). Exclusivity need be neither express nor complete to render an agreement “exclusive” for Section 2 purposes: *De facto* and partial exclusivity may suffice depending on the circumstances. *Id.* at 270, 283.

To illustrate, in *Microsoft*, the D.C. Circuit upheld the trial court’s determination that “although not literally exclusive, the deals were exclusive *in practice* because they required developers to make Microsoft’s [Java Virtual Machine] the default in the software they developed.” 253 F.3d at 75–76 (emphasis added); *see also LePage’s Inc. v. 3M*, 324 F.3d 141, 157 (3d Cir. 2003) (Section 2 liability encompasses “arrangements which, albeit not expressly exclusive, effectively foreclosed the business of competitors.”) (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). The court also found that Microsoft’s distribution agreements with Internet Access Providers (IAPs) were exclusive, even though browser distribution could be achieved by other “more costly and less effective” means. 253 F.3d at 70. *Microsoft* thus provides the template for evaluating Google’s distribution agreements.

I. Browser Agreements

Google’s browser agreements are exclusive insofar as they establish Google as the out-of-the-box default search engine. The Apple ISA requires that Google be preloaded as the exclusive default search engine on all Safari search access points in exchange for ■% revenue share. FOF ¶ 298. The resulting query volume is substantial. About 65% of queries on all Apple devices

(mobile and desktop), and 61.8% on iOS devices (mobile), flow through the Safari default, demonstrating that default placement is a “primary channel[] for distribution of” search. FOF ¶¶ 296–297 (queries entered on Safari (both mobile and desktop) account for 28% of all queries in the United States); *Microsoft*, 253 F.3d at 61.

The Mozilla RSA has a similar effect. Google is the default GSE on all Firefox search access points, including the navigation bar and the homepage, among others. FOF ¶ 334. Google’s default placements on Firefox generate 80% of Mozilla’s overall operating revenue, demonstrating that the vast majority of query volume on Firefox goes through defaults. FOF ¶ 335. Google also has comparable agreements with smaller browsers, like Samsung’s S Browser. FOF ¶ 346; *see also* UPFOF ¶¶ 310–318.

Google mounts several arguments as to why these agreements are not exclusive as a matter of law.

First, it asserts that the browser agreements permit the browser to “promote search rivals on the same browser, and Apple and Mozilla have for many years entered into such promotional deals.” GTB at 37. For instance, Apple’s agreement with Microsoft provides that Apple will provide a readily discoverable means of switching the default and will install Bing as a default bookmark. FOF ¶ 320. Relatedly, Google’s agreement with Mozilla permits the “this time, search with” feature on Firefox, which allows users to select a different search product from its “Awesome Bar” for a given query. FOF ¶ 60.

The fact that Google’s browser partners can contract with its rivals for distribution through less efficient channels does not, however, immunize the challenged agreements from being deemed exclusive. That is the clear lesson of *Microsoft*. There, for example, Microsoft’s contracts with the leading IAP, America Online (“AOL”), provided that AOL would not “provide software

using any non-Microsoft browser except at the customer's request, and even then AOL [would] not supply more than 15% of its subscribers with a browser other than I[n]ternet E[xplorer].” 253 F.3d at 68. The trial court had described this agreement “for all practical purposes” as guaranteeing that Internet Explorer would be AOL’s “browser of choice,” even though “Microsoft [] permitted AOL to offer Navigator through a few subsidiary channels.” *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 53 (D.D.C. 2000). The trial court held that the agreement was exclusive, and the D.C. Circuit agreed. The Circuit explained that IAPs were one of the two major channels of distribution, and by reaching agreements with 14 of the top 15 IAPs, Microsoft had “kept usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly.” *Microsoft*, 253 F.3d at 67. Similarly here, the mere fact that the browser agreements do not prevent Apple and Mozilla from entering into limited distribution deals with rivals does not render the agreements non-exclusive.

Google’s additional counterargument that the ISA is not exclusive because Apple may not want more flexibility under the ISA is without merit. GRFOF ¶ 68. A firm that agrees to distribute only a monopolist’s product may itself benefit from such an agreement, but that does not render it non-exclusive. *See id.* at 69 (observing that “exclusivity provisions in contracts may serve many useful purposes”). Google also overlooks that Apple has previously tried to negotiate around exclusivity in the ISA to no avail. FOF ¶¶ 319–320. The question of exclusivity turns on “the opportunities for other traders to enter into or remain in [the] market.” *Microsoft*, 253 F.3d at 69 (quoting *Tampa Elec.*, 365 U.S. at 327). So, even if Apple does not want more flexibility, that is a market reality that heightens the anticompetitive effects of the ISA for “other traders” who might seek to enter the market.

Second, Google points out that the ISA does not prevent Apple from preloading a third-party's search application or a third-party browser on its devices. GTB at 38. But market realities matter more than what is theoretically possible. *See Tampa Elec.*, 365 U.S. at 327–28. Apple has made clear it will not design its products to include third-party applications. FOF ¶ 311. Google knows this well. *See* Tr. at 7667:20–7668:18 (Pichai) (testifying that it is common knowledge in the industry that Apple does not preload third-party applications onto its devices). So, even though the ISA contains no express exclusivity provision, its terms in combination with Apple's established business practices means that Google will be the only GSE preloaded on an Apple device. That makes it exclusive. *See LePage's*, 324 F.3d at 157–58 (concluding that agreement was exclusive despite no “express exclusivity requirement,” because the arrangement “effectively foreclosed the business of competitors”).

The same is true as to Google's contention that the ISA permits Apple to preload its own search widget on mobile devices. *See* GRFOF ¶ 67. There is no record evidence that Apple has developed such a product or intends to do so.

Third, Google argues that “users' search behavior [is] not consistent with Plaintiffs' assertion that the agreements were exclusive or *de facto* exclusive,” and that ultimately, user choice is determined by quality, not defaults. GTB at 38. It points out that nearly 40% of queries on Apple's mobile devices flow through non-default search access points, such as default bookmarks or organic search. *Id.*; FOF ¶ 296. “This fact, alone,” Google says, “confirms that the Safari agreement is not exclusive.” GTB at 38. It also highlights the example of Firefox's default change from Google to Yahoo. In 2014, when that change happened, users switched back to Google despite the Yahoo default because users preferred Google. *Id.* And Google cites its own success on Windows PCs, where Google is not the preloaded search default. *Id.* at 38–39. This actual user

behavior, Google says, “flatly contradicts Plaintiffs’ assertion that browser default agreements are the equivalent of an exclusive distribution agreement.” *Id.* at 39.

But the fact that some consumers access search on non-default access points is not dispositive on exclusivity. On Apple devices, 65% of queries still go through the default. FOF ¶ 296. That is a “substantial amount of distribution[.]” *Microsoft*, 87 F. Supp. 2d at 42. Moreover, Google’s brand recognition and Yahoo’s poor quality were major factors that dampened the default effect on Firefox (and yet there was still a noticeable default effect when Firefox switched from Google to Yahoo). FOF ¶¶ 370–375; *infra* Section V.A.2.a. And Google’s success on Windows again illustrates that defaults are less effective when the alternative has strong brand recognition and product quality. FOF ¶ 70. Even then, the default effect on users who stick with the Edge browser on Windows devices is real, as Bing receives 80% of such queries. FOF ¶¶ 82–84 (Google’s share on Windows devices overall is 80%, but its share on Edge where it is not the default is only 20%).

To be deemed exclusive, a contract need not foreclose all other avenues of distribution to which consumers might have access. It is enough that the contract “clos[es] to rivals a substantial percentage of the available opportunities for [] distribution.” *Microsoft*, 253 F.3d at 70. As will be seen when the court discusses market foreclosure, *infra* Section V.A.1.b, the distribution agreements do just that.

Fourth, Google notes that the ISA does not operate to prohibit *users* from accessing rival GSEs. To be sure, there are other ways for users to access a GSE other than Google on Apple devices and on Firefox. As noted, Bing and Yahoo are preloaded as default bookmarks on Safari’s homepage. Also, users can download another search engine, download a browser other than Safari from the App Store, or navigate directly to a rival GSE’s website for an “organic” search. *See* GTB

at 39–40. Similarly, on the desktop version of Firefox, the user can use the Awesome Bar to conduct individual queries on search engines other than Google. And on both Safari and Firefox, the user can change the default GSE. But mere user access to these less efficient channels of distribution does not render the browser agreements non-exclusive.

Microsoft again illustrates the point. There, the D.C. Circuit affirmed that Microsoft’s agreements with OEMs were exclusive even though they “did not ultimately deprive Netscape of the ability to have access to every PC user worldwide to offer an opportunity to install Navigator,” as “Navigator c[ould] be downloaded from the Internet,” was “available through myriad retail channels,” and could be “mailed directly to an unlimited number of households.” 87 F. Supp. 2d at 53; *see* 253 F.3d at 64 (rejecting the argument that Microsoft’s licensing agreements with OEMs were not exclusive “because Netscape is not completely blocked from distributing its product,” as “although Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones”). The court also found Microsoft’s agreement with AOL to be exclusive, even though it allowed users to request a browser other than Internet Explorer. *See* 253 F.3d at 68–71.

The record here resembles that in *Microsoft*. Users are free to navigate to Google’s rivals through non-default search access points, but they rarely do. In 2020 only 5.1% of all search queries on iOS devices went to a rival GSE through a non-default access point. FOF ¶ 296. That figure aggregates queries run through *all* non-default search access points, including organic searches, bookmarks, and downloaded search applications. Most non-default queries still go through Google. “The mere existence of other avenues of distribution is insufficient without an assessment of their overall significance to the market.” *United States v. Dentsply*, 399 F.3d 181, 196 (3d Cir. 2005). Thus, the fact that a small fraction of Apple and Firefox users search on non-default access points with a rival GSE does not render the browser agreements non-exclusive.

2. *Android Agreements*

Plaintiffs likewise contend that the RSAs and MADAs are exclusive. Google disputes that characterization.

a. MADAs

At summary judgment, the court concluded that “although, by its terms, the MADA is not an exclusive contract, there is a dispute of fact as to whether market realities make it one.” *Google*, 687 F. Supp. 3d at 76. With the benefit of a full trial, the court can now conclude that the MADA is exclusive in practice.

Its exclusivity arises from two contractual requirements and two market realities. The two contractual requirements are that all MADA signatories must: (1) feature the Google Search Widget in the center of the home screen and (2) place Chrome on the home screen with Google as the default GSE. FOF ¶¶ 351, 356. The two market realities are that: (1) the Google Play Store is a must-have on all Android devices, FOF ¶¶ 352–354, and (2) the industry-wide practice is to avoid excessive preloading of applications, or “bloatware,” FOF ¶¶ 359–361. This combination of factors has resulted in all Android OEMs and carriers entering into MADAs, with all Android devices featuring the Google Search Widget and Chrome on the home screen to the exclusion of rivals as a practical matter. No Android device carries a second search widget and, other than Samsung, no device comes with a second preinstalled browser (and even the S Browser defaults to Google because of the RSA). *Id.* These prized placements are extremely effective at driving searches to Google. To illustrate, Samsung, the largest Android OEM, derives 80% of its on-device search revenue through searches performed via the Google Search Widget and Chrome default. FOF ¶ 74.

Google offers two primary arguments for why the MADAs are not exclusive.

First, Google contends that the MADA’s device-by-device optionality allows an OEM to choose either to preload Google’s products on some or all of their devices. GTB at 73. That is true, but the argument overlooks the market reality that the Google Play Store is viewed by OEMs as essential to the Android customer experience. FOF ¶¶ 352–354. As Microsoft CEO Satya Nadella put it, without the Play Store, the “phone is a brick.” FOF ¶ 352. Even Samsung, which has developed and preloads the Galaxy Store, deems the Play Store essential. FOF ¶ 354. Not surprisingly then, every Android device sold in the United States is subject to the MADA. FOF ¶ 350. That rival app stores might be developed in the future, *see* GRFOF ¶¶ 239–240, is not relevant to the court’s assessment of the market realities today. The MADA secures for Google the two most effective search access points—the search widget and the Chrome browser—on all Android devices, device-by-device optionality notwithstanding.⁹

Second, Google points out that the MADA does not expressly prohibit OEMs from preloading other search access points on the home screen, like a second search widget or a different browser that defaults to a rival GSE. Google illustrates the point by hypothesizing numerous MADA-compliant configurations that incorporate search access points defaulting to Bing. GTB at 74–76. But market realities make such configurations unrealistic. The industry is concerned with app “bloat,” that is, excessive preinstallation of out-of-the-box applications. Too many preloaded apps degrade the user experience. FOF ¶ 359. So, while the MADA formally allows preloading of rivals’ widgets or browsers, the industry practice of avoiding app “bloat” means that Android devices rarely come preloaded with non-Google applications.

⁹ Google notes that the unbundling of GMS in the European Union has not been effective because OEMs still continue to license the Google Search Widget and Chrome. *See* GTB at 81–82. That may be true, but this court’s task is not to peer into the future when determining the present effects of the MADA. *See* Section V.A.

Google recognizes this. It understands that OEMs are unlikely to place two search widgets on a device because to do so would create a negative customer experience. FOF ¶ 361. Even Microsoft did not add a second Bing search widget to its mobile devices due to concerns over poor user experience. FOF ¶ 359. The same is true of browsers other than Chrome. OEMs tend not to preload a second browser. Samsung is an exception. It preloads its S Browser (in addition to Chrome), but as noted even the S-browser defaults to Google per the Samsung-Google RSA. FOF ¶ 360. Because Samsung is unlikely to include a *third* out-of-the-box browser, no GSE can hope to secure that channel of distribution on Samsung devices other than Google.

Google's additional contention that "users who wish to use a rival search service can download its app, widget, or browser, or change the default in the preloaded" browser(s) fares no better. GTB at 76. Under *Microsoft*, the mere availability of less efficient and less prominent channels of distribution does not make the MADA non-exclusive. *See* 253 F.3d at 61.

b. RSAs

The RSAs between Google and Android device distributors formalize the practical exclusivity of the MADAs. That has been their purpose from the outset. FOF ¶ 365 (2011 Google email stating that "Our philosophy is that we are paying revenue share *in return for* exclusivity," "we are not 'getting' anything" without exclusivity, and recognizing that "Microsoft and Yahoo will enter into contracts on Android through carrier deals if we do not"). All of the RSAs contain an "alternative search services" clause. That clause prohibits Google's Android partners from preloading rival search engines. It also greatly restricts a partner's ability to promote other GSEs. In return, the Android partner receives revenue share. The structure of revenue share payments varies among the RSAs, but the basic barter is revenue share in exchange for default exclusivity.

It is, of course, true that no distributor of Android devices is *required* to enter into an RSA with Google. They can opt to distribute MADA-compliant devices without earning revenue share. Also, Google’s agreements with Verizon and Samsung permit those partners to retain the option to preinstall another GSE, albeit at a lower revenue share percentage. FOF ¶¶ 366, 381. As Google argues, RSA “[p]artners are not prevented from preloading rivals on any devices (and any amount of devices) of their choosing—the only result of doing so is that the partner will not receive the highest revenue share on those devices.” GTB at 77.

This optionality does not make the RSAs any less exclusive. “[A]ntitrust policy should not differentiate between the manufacturer of widgets that explicitly imposes exclusive dealing on its dealers and the manufacturer that gives such dealers a discount or rebate for dealing exclusively in the manufacturer’s widgets,” because both “have the ‘practical effect’ of inducing exclusive dealing.” AREEDA ¶ 1807b (quoting *Tampa Elec.*, 365 U.S. at 326). While financial incentives to deal exclusively may not thwart competition in the short-term, “[s]uch a scheme is problematic [] when the defendant is a dominant firm in a position to force manufacturers to make an all-or-nothing choice.” *Id.*

That is effectively how the RSAs operate. No rational market actor would sell a MADA-compliant device without ensuring that it earned search revenue through the RSA. FOF ¶ 363. The forgone revenue is simply too great. For instance, Verizon considered switching away from the Google default but would have had to risk a \$1.4 billion loss to do so. FOF ¶¶ 372–374. The decision to stick with Google was the only rational choice. FOF ¶ 379. Not surprisingly then, Google has identified no Android device presently sold in the United States that is subject to a MADA but not an RSA. *Id.*

True, some of the RSAs do not present a literal “all-or-nothing choice,” as a partner can on a device-by-device basis earn *some* revenue share on a non-exclusive deal, but that distinction is not dispositive. *But see* FOF ¶ 378 (describing the T-Mobile RSA, which requires exclusive default placements as a precondition to *any* payment at all). In *United Shoe Machinery*, an early Clayton Act case, the Supreme Court confronted a similar factual scenario. There, the challenged contractual provision was a “discriminatory royalty clause providing lower royalty for lessees who agree not to use certain machinery . . . other than those leased from the lessor.” *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457 (1922). The Court held that this clause was exclusionary because “[w]hile the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use.” *Id.* Here too, the Verizon and Samsung RSAs technically provide a non- or less-exclusive option that still allows carriers to earn some revenue share, but “the practical effect” of the tiered system is to induce carriers to select the highest-value tier. And that is precisely how the market has played out. Nearly all RSA-covered devices are presently enrolled at the highest-revenue tier, thus locking in Google as only preloaded GSE. FOF ¶ 379.

The RSAs therefore are properly treated as exclusive agreements.

V. EFFECTS IN THE MARKET FOR GENERAL SEARCH SERVICES

A. The Exclusive Agreements Cause Anticompetitive Effects in the General Search Services Market.

Merely categorizing Google’s distribution agreements as “exclusive” does not answer the question of whether those deals violate Section 2. That is because exclusive agreements are not condemned per se by the antitrust laws, even if they involve a dominant firm. *Microsoft*, 253 F.3d at 69 (“[E]xclusivity provisions in contracts may serve many useful purposes.”); *In re EpiPen Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 983 (10th Cir. 2022) (“Courts repeatedly

explain that exclusive dealing agreements are often entered into for entirely procompetitive reasons and pose very little threat to competition even when utilized by a monopolist.”). They can, however, “run afoul of the antitrust laws when used by a dominant firm to maintain its monopoly.” *McWane*, 783 F.3d at 832; *see also ZF Meritor*, 696 F.3d at 270 (“The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition.”).

“[T]o be condemned as exclusionary, a monopolist’s act must have an ‘anticompetitive effect.’ That is, the monopolist must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.” *Microsoft*, 253 F.3d at 58. A plaintiff bears the burden to show “that the monopolist’s conduct *indeed* has the requisite anticompetitive effect.” *Id.* at 58–59 (emphasis added). “Even though monopolistic conduct requires proof of actual or threatened consumer harm, the proof need not invariably be elaborate.” AREEDA ¶ 651e2.

Anticompetitive effects analysis involves establishing a “causal link.” *Microsoft*, 253 F.3d at 78. The exclusionary conduct must cause the anticompetitive harm. As here, when a regulator is seeking only injunctive relief, the standard is somewhat relaxed. *See id.* at 79. Courts may “infer ‘causation’ from the fact that a defendant has engaged in anticompetitive conduct that ‘reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.’” *Id.* (quoting 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (1996) [hereinafter AREEDA (1996)]); *id.* (holding that the plaintiff in an “equitable enforcement action” need not “present direct proof that a defendant’s continued monopoly power is precisely attributable to anticompetitive conduct”); *accord Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 485 (7th Cir. 2020) (same, citing *Microsoft*); *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 460 (9th Cir.

2021) (same). Such an inference is appropriate “when exclusionary conduct is aimed at producers . . . of established substitutes.” *Microsoft*, 253 F.3d at 79.

Importantly, causation does not require but-for proof. The plaintiff is not required to show that but for the defendant’s exclusionary conduct the anticompetitive effects would not have followed. Such a standard would create substantial proof problems, as “neither plaintiffs nor the court can confidently reconstruct . . . a world absent the defendant’s exclusionary conduct.” *Id.* “To some degree, ‘the defendant is made to suffer the uncertain consequences of its own undesirable conduct.’” *Id.* (quoting *AREEDA* (1996) ¶ 651c, at 78).

The key question then is this: Do Google’s exclusive distribution contracts reasonably appear capable of significantly contributing to maintaining Google’s monopoly power in the general search services market? The answer is “yes.” Google’s distribution agreements are exclusionary contracts that violate Section 2 because they ensure that half of all GSE users in the United States will receive Google as the preloaded default on all Apple and Android devices, as well as cause additional anticompetitive harm. The agreements “clearly have a significant effect in preserving [Google’s] monopoly.” *Id.* at 71.

The agreements have three primary anticompetitive effects: (1) market foreclosure, (2) preventing rivals from achieving scale, and (3) diminishing the incentives of rivals to invest and innovate in general search. Plaintiffs also contend that Google’s incentives to invest are diminished, but the evidence of that effect is weaker than the others.

1. The Exclusive Agreements Foreclose a Substantial Share of the Market.

An exclusive agreement violates the Sherman Act only when its “probable effect is to ‘foreclose competition in a substantial share of the line of commerce affected.’” *Id.* at 69 (quoting *Tampa Elec.*, 365 U.S. at 328). “The share of the market foreclosed is important because, for the

contract to have an adverse effect upon competition, ‘the opportunities for other traders to enter into or remain in that market must be significantly limited.’” *Id.* (quoting *Tampa Elec.*, 365 U.S. at 328). “Substantial foreclosure allows the dominant firm to prevent potential rivals from ever reaching ‘the critical level necessary’ to pose a real threat to the defendant’s business.” *ZF Meritor*, 696 F.3d at 286 (quoting *Dentsply*, 399 F.3d at 191). Plaintiffs thus must “prove the degree of foreclosure” in the relevant markets because of the exclusive deals. *Microsoft*, 253 F.3d at 69.

a. Foreclosure Calculation

U.S. Plaintiffs’ expert, Dr. Whinston found that 50% of all queries in the United States are run through the default search access points covered by the challenged distribution agreements. FOF ¶ 62 (28% through the ISA, 19.4% through the MADAs and RSAs, and the remaining 2.3% through third-party browser agreements). This figure does not include the 20% of all queries in the United States that flow through Google on user-downloaded Chrome. FOF ¶ 63.

Google does not dispute Dr. Whinston’s 50% computation. Instead, it challenges his very understanding of market foreclosure. First, Google contends that the proper measure of foreclosure is not market coverage but the percentage of queries available to rivals in a “but-for world” in which the challenged contracts do not exist. In such a world, the foreclosure number would be far lower because users in large numbers still would use Google. Second, Google argues that, even if foreclosure is properly analyzed based on default coverage, Dr. Whinston fails to account for rivals’ ability to “compete even for those users who access search through” defaults. GTB at 41. The foreclosure number is thus zero, according to Google. Finally, assuming that query coverage is the correct measure, Google argues that the court should disaggregate the

browser agreements, MADAs, and the RSAs when considering foreclosure figures, which when considered separately are not substantial and therefore not anticompetitive.

i. But-For World

Although Dr. Whinston testified that market foreclosure is “ideally” examined against a but-for world, Tr. at 6085:9-19 (Whinston), the law does not require it.

[T]o demand that bare inference be supported by evidence as to what would have happened but for the adoption of the practice that was in fact adopted or to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.

Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 309–10 (1949). A plaintiff thus “is entitled to view the situation as it exists.” *Mytinger & Casselberry, Inc. v. FTC*, 301 F.2d 534, 538 (D.C. Cir. 1962). “To require that § 2 liability turn on a plaintiff’s ability or inability to reconstruct the hypothetical marketplace absent a defendant’s anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.” *Microsoft*, 253 F.3d at 79; *see also ZF Meritor*, 696 F.3d at 286 (basing foreclosure on the percentage “of the market remaining open,” that is, not presently covered by mandatory purchase requirement agreements); *LePage’s*, 324 F.3d at 159 (describing market foreclosure based only on real-world effects of discount practices).

Google relies on the D.C. Circuit’s decision in *Rambus Inc. v. FTC* to support the need for a but-for world showing. *See* 522 F.3d 456 (D.C. Cir. 2008). In that case, the FTC concluded that Rambus had secured its monopoly by making misrepresentations to a standards-setting body about its patent interests, in violation of Section 2. *Id.* at 461. The body developed standards that incorporated Rambus’s intellectual property. *Id.* at 460. The D.C. Circuit reversed the agency’s determination. The court explained that if the standards-setting body, “in the world that would have existed but for Rambus’s deception, would have standardized the very same technologies,

Rambus’s alleged deception cannot be said to have had an effect on competition in violation of the antitrust laws.” *Id.* at 466–67. Put differently, the FTC’s claim failed because it had not shown that the standards-setting body would have adopted the standard in question but for Rambus’s deception. *Id.*

Rambus does not establish a categorical rule that the anticompetitive effects of an exclusive agreement must be measured against a but-for world. That case involved deception to a standards-setting organization, a form of exclusionary conduct particularly susceptible to a finding of materiality. *See id.* at 466 (“[A]n antitrust plaintiff must establish that the standard-setting organization would not have adopted the standard in question but for the misrepresentation or omission.”) (quoting 2 HOVENKAMP ET AL., IP & ANTITRUST § 35.5 (Supp. 2008)). Indeed, the FTC itself had left open the possibility that the standards-setting organization “would have standardized Rambus’s technologies *even if Rambus had disclosed* its intellectual property.” *Id.* at 466. In such circumstances, the D.C. Circuit deemed it appropriate to demand proof that Rambus’s deception in fact resulted in competitive harm. *See id.* at 466–67. Nowhere, however, did the court suggest that such a strict standard of proof was required to demonstrate anticompetitive effects for other forms of exclusionary conduct, particularly exclusive dealing arrangements. Such a holding would be contrary to *Microsoft*, and the court in *Rambus* nowhere questioned that precedent. *Rambus* therefore does not require Plaintiffs to prove substantial foreclosure against a but-for world.

Consequently, the court does not rely on Dr. Whinston’s but-for world “Super Duck” analysis or determine foreclosure against a hypothetical world in which users are offered a GSE “choice screen” out of the box. *See* GTB at 44 (arguing that “Plaintiffs did not attempt to calculate the degree of alleged foreclosure if all browser developers offered a choice screen instead of setting

Google as the default”). Proving substantial foreclosure does not require such thought experiments.

ii. Zero Foreclosure

Next, Google says that there is no foreclosure at all because the distribution agreements still permit rivals to compete for queries. According to Google, “because rivals can compete even for those users who access search through the browser default, there is no foreclosure” arising from the browser agreements. GTB at 41. Similarly, as to the Android agreements, Google contends that “[r]ival search engines can compete for incremental promotion on MADA devices, and the device-by-device nature of the RSAs allows rivals to compete for preinstallation on any of the OEM’s or carrier’s devices.” GTB at 80.¹⁰

As support, Google relies on *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, in which the Third Circuit observed that, when analyzing foreclosure, the court’s concern should “not [be] about which products a consumer chooses to purchase, but about which products are reasonably available to that consumer. For example, if customers are free to switch to a different product in the marketplace but choose not to do so, competition has not been thwarted—even if a competitor remains unable to increase its market share.” 821 F.3d 394, 403 (3d Cir. 2016) (citation omitted); *see also Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 997 (9th Cir. 2010) (“If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose

¹⁰ To the extent that Google argues that there is no foreclosure because rivals can compete to win the default, *see* GTB at 42 (“[R]ivals can compete for 100% of all queries . . . first by competing to be the default[.]”), that contention misconstrues the foreclosure analysis. “The central question is whether *after* the Exclusive Agreements were signed [Google’s] competitors were able to meaningfully compete or whether they were foreclosed from the market.” *In re Lorazepam Antitrust Litig.*, 467 F. Supp. 2d 74, 82 (D.D.C. 2006) (emphasis added).

from competition *any* part of the relevant market.”) (citation omitted). Because users are “free to switch to a different product,” Google contends, the foreclosure number is zero. GTB at 41.

But neither *Eisai* nor *Allied Orthopedic* stand for the broad proposition that there is no market foreclosure when a dominant firm leaves *some* alternative ways for customers to access rivals. *Microsoft* rejected that very proposition. For instance, it treated as exclusive Microsoft’s agreement with AOL, even though it permitted AOL to distribute Netscape if customers requested it. 253 F.3d at 68. It did the same as to the OEM agreements, which left open internet downloads and mailings as a means for users to reach Netscape. *Id.* at 64, 70; *see Microsoft*, 87 F. Supp. 2d at 53. The court in *Microsoft* did not say that these contracts caused zero market foreclosure merely because Internet Explorer had other, less-efficient means of reaching users.

The same holds true here. The court already has found that preloaded default placements are the most efficient channel for reaching search consumers, and Google has secured all the major ones (except the default on the Edge browser preloaded on Windows devices). FOF ¶ 61. Sure, users can access Google’s rivals by switching the default search access point or by downloading a rival search app or browser. But the market reality is that users rarely do so. The fact that exclusive agreements allow users to reach rivals through other means does not make the foreclosure number zero.

iii. Aggregation

Finally, Google argues that the court should consider the impact of each type of agreement (e.g., ISA, MADA, RSA) separately when assessing the magnitude of foreclosure. GTB at 80–82. That is not how foreclosure is measured under *Microsoft*.

The court largely addressed this argument at summary judgment when it explained that the *Microsoft* court “aggregate[d] foreclosure in the exclusive dealing context,” considering smaller

channels of distribution alongside larger ones in arriving at its conclusion that the market had been substantially foreclosed. *Google*, 687 F. Supp. 3d at 68 (citing 253 F.3d at 72) (“Although the ISVs [(Independent Software Vendors)] are a relatively small channel for browser distribution, they take on greater significance because, as discussed above, Microsoft had largely foreclosed the two primary channels to its rivals. In that light, one can tell from the record that by affecting the applications used by ‘millions’ of consumers, Microsoft’s exclusive deals with the ISVs had a substantial effect in further foreclosing rival browsers from the market.”); *see also FTC v. Motion Picture Advert. Serv. Co.*, 334 U.S. 392, 395 (1953) (aggregating foreclosure caused by three contested agreements and concluding that “respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States”).

Aggregating the foreclosure effects of the browser and Android agreements is an appropriate way to understand the overall effect of Google’s exclusive dealing in the relevant markets. Google’s authority, which largely deals with aggregating challenged and lawful conduct, GTB at 82, is inapposite.¹¹

* * *

The court thus finds that as to the general search services market Plaintiffs have proven that Google’s exclusive distribution agreements foreclose 50% of the general search services market by query volume.

¹¹ The parties also disagree as to whether the court can permissibly aggregate the challenged conduct (i.e., the distribution agreements) together with unchallenged conduct (e.g., the placement of Google as the default GSE on user-downloaded Chrome). *See* GTB at 82; U.S. Pls.’ Resp. Proposed Conclusions of Law, ECF No. 899 [hereinafter UPRCL], at 14. Because the court finds that the foreclosure figures—which do not include unchallenged conduct—are sufficient to establish significant foreclosure, *infra* Section V.A.1.b, the court need not resolve this dispute.

b. Significant Foreclosure

To be considered anticompetitive, the market foreclosure must be “significant.” *Microsoft*, 253 F.3d at 70–71. The 50% figure meets that threshold. *See id.* (stating that “a monopolist’s use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose *less than* roughly 40% or 50% share usually required to establish a § 1 violation”) (emphasis added); AREEDA ¶ 1821c (“Percentages higher than 50 percent are routinely condemned when the practice is complete exclusion by a contract of fairly long duration[.]”).

Courts also look to certain qualitative conditions when assessing a foreclosure percentage’s significance. *See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004) (“But while low [foreclosure] numbers make dismissal easy, high numbers do not automatically condemn, but only encourage closer scrutiny[.]”); AREEDA ¶ 1821c (stating that “even relatively high percentages are not necessarily illegal, for there is no ‘per se’ rule condemning any specific [foreclosure] percentage”) (collecting cases). Such qualitative conditions include the duration of the exclusive agreements, their ease of terminability, the height of barriers to entry, the availability of alternative methods of distribution, and the willingness of consumers to comparison shop. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000); *Omega Env’t, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163–64 (9th Cir. 1997); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 (8th Cir. 1987). These factors can be thought of as a test of the durability of market foreclosure at a given time. *See* AREEDA ¶ 1821 (noting that courts analyze “the existence of other factors that give significance to a given foreclosure percentage”). Each favors a finding of significant market foreclosure in this case.

Duration of Contracts. “[S]hort-term” exclusive agreements “present little threat to competition.” *ZF Meritor*, 696 F.3d at 286; *see also In re EpiPen*, 44 F.4th at 988 (“It is axiomatic

that short, easily terminable exclusive agreements are of little antitrust concern; a competitor can simply wait for the contracts to expire or make alluring offers to initiate termination.”). Here, the challenged contracts vary in term, but all are above the one year that courts have presumed reasonable under related antitrust provisions. *See, e.g., Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (“Exclusive-dealing contracts terminable in less than a year are presumptively lawful under section 3.”).

The 2016 ISA, renegotiated in 2021, consists of a base five-year term with extension options for an additional five years. Apple can unilaterally exercise a two-year extension, and then the parties can mutually agree to an additional three-year extension. FOF ¶ 291. That duration amplifies the significance of the ISA’s market foreclosure. *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1301–02 (9th Cir. 1982) (finding a violation of Section 1 based on exclusive dealing where 10-year contracts foreclosed 24% of the market); *ZF Meritor*, 696 F.3d at 286–87 (condemning exclusive contracts, five and seven years in duration, which locked up 85% of the market).

The Mozilla RSA and the Android agreements are shorter, varying in terms of either two or three years, with opportunities for renewal. *See* JX31 at 628–29 (Mozilla RSA); UPFOF ¶¶ 250, 255 (summarizing terms of MADAs and RSAs). Such durations, depending on the circumstances, can raise antitrust concerns. *See Motion Picture Adver. Serv. Co.*, 344 U.S. at 393–96 (in a Section 5 case under the FTC Act, upholding contracts of one year or less, but condemning contract terms ranging from two to five years). In this case, the Android agreements do raise such concerns because they foreclose 19.4% of the market and, as discussed below, they are not easily terminable. FOF ¶ 62; *see ZF Meritor*, 696 F.3d at 287 (stating that “[t]he significance of any particular contract duration is a function of both the number of such contracts and market share covered by

the exclusive-dealing contracts”) (citation omitted); *cf. In re EpiPen*, 44 F.4th at 988–91, 1006 (holding that two- and three-year exclusive agreements were not anticompetitive where they could be terminated at will and without cause on 90-day written notice or less). As for the Mozilla RSA, although it forecloses a far smaller percentage of the search market, its effect is amplified by the significant foreclosure of larger channels. *See Microsoft*, 253 F.3d at 72.

The absence of meaningful rebidding further aggravates the foreclosure effects. “Even an exclusive-dealing contract covering a dominant share of a relevant market need have no adverse consequences if the contract is let out for frequent rebidding.” *In re EpiPen*, 44 F.4th at 988 (quoting AREEDA ¶ 1802g2). Google’s partners track rival GSEs’ quality and occasionally have engaged with them, FOF ¶¶ 333, 340–344, but the record reflects no meaningful competitive rebidding of the agreements. The more common story is Google’s partners renewing the agreements without genuine consideration of an alternative. *See supra* Section IV.A.

Ease of Terminability. An exclusive contract that is easily terminable can “negate substantially [its] potential to foreclose competition.” *Omega Env’t*, 127 F.3d at 1163; *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (stating that “opportunities for competition remain” where the contract’s term was three years but it “[could] be cancelled without cause upon six-months’ notice”). Google’s partners cannot easily exit the agreements. Neither Apple nor Mozilla have a unilateral right to terminate without cause, FOF ¶¶ 291, 336, and the RSAs and MADAs can be terminated only upon breach, FOF ¶¶ 349, 364. There is an added disincentive with the MADA, where termination would result in loss of the GMS license, including the essential Play Store. *See, e.g.*, JX49 at 878 (“[O]n expiration or termination of this Agreement . . . all rights and licenses granted hereunder will immediately cease” and the signatory must “immediately cease

reproducing, offering, or distributing” the GMS apps). The lack of flexibility for partners to exit the distribution agreements reinforces their foreclosure effect.

Barriers to Entry. As already discussed, *supra* Section II.C.3, there are significant barriers to entry to the market for general search services. This means that new entrants are unlikely to emerge to meaningfully reduce the share of the market foreclosed by the distribution agreements.

Willingness to Comparison Shop. There is no evidence on this record that consumers are apt to comparison shop among GSEs, likely in part due to the friction associated with switching the default or accessing a different search access point. FOF ¶¶ 69–74; Tr. at 8728:23-24 (Israel) (There is “relatively limited [user] overlap between the general search engines.”).

* * *

These factors all demonstrate that Google’s distribution agreements foreclose a substantial portion of the general search services market and impair rivals’ opportunities to compete. This is not a market where “a competitor can simply wait for contracts to expire or make alluring offers to initiate termination.” *In re EpiPen*, 44 F.4th at 988.

2. *The Exclusive Agreements Have Deprived Rivals of Scale.*

Google’s exclusive agreements have a second important anticompetitive effect: They deny rivals access to user queries, or scale, needed to effectively compete. Scale is the essential raw material for building, improving, and sustaining a GSE. FOF ¶¶ 86–106. For more than a decade, the challenged distribution agreements have given Google access to scale that its rivals cannot match. FOF ¶¶ 87–89. Google has used that scale to improve its search product and ad monetization. FOF ¶¶ 90–94, 103–105. Meanwhile, without access to scale, other GSEs have remained at a persistent competitive disadvantage, and new entrants cannot hope to achieve a scale that would allow them to compete with Google. FOF ¶¶ 76, 87–89, 106. Naturally then, GSE

distributors prefer Google because of its search quality and because it would be economically irrational to sacrifice the high revenue share. They thus routinely renew the distribution deals with their exclusive terms. In this feedback loop, the revenue share payments “effectively make the ecosystem exceptionally resistan[t] to change” and “basically freeze the ecosystem in place[.]” Tr. at 3797:24–3798:21 (Ramaswamy); *see id.* at 3513:1-3 (Nadella) (“[T]his vicious cycle that [Microsoft is] trapped in can [] become even more vicious because the defaults get reinforced.”). That is the antithesis of a competitive market. *See Berkey Photo*, 603 F.2d at 274–75 (While “[a] firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies,” a “classic illustration” of anticompetitive conduct “is an insistence that those who wish to secure a firm’s services cease dealing with its competitors.”).

Google acknowledges that a “search engine in the default position receives additional search volume beyond what it would otherwise receive.” GRFOF ¶ 85. It also concedes that “user interaction data has some utility for search quality[.]” *Id.* ¶ 139. But it otherwise disputes that the default access points have afforded it a volume of query data that prevents others from competing for search users. It contends that Plaintiffs have failed to establish a link between the agreements, the denial of sufficient scale to rivals, and anticompetitive effects in the market in two ways. First, it maintains that the agreements’ default effects are not so strong as to deny rivals’ meaningful scale to compete. Second, Google asserts that the role of scale in GSE product quality and monetization is overstated, such that others can compete with less scale if only they were as innovative as Google. The record does not support either position.

a. The Power of Defaults

Numbers help explain the power of the search default settings. Half of all GSE queries in the United States are initiated through the default search access points covered by the distribution

agreements. *See supra* Section V.A.1. An additional 20% of all searches nationwide are derived from user-downloaded Chrome, a market reality that compounds the effect of the default search agreements. FOF ¶ 63. That means only 30% of all GSE queries in the United States come through a search access point that is not preloaded with Google. Additionally, default placements drive significant traffic to Google. Over 65% of searches on all Apple devices go through the Safari default. FOF ¶ 296. On Android, 80% of all queries flow through a search access point that defaults to Google. FOF ¶ 74.

All of this makes the defaults extremely valuable. In 2021, Google spent \$26.3 billion in traffic acquisition costs—the revenue share paid to its partners—which is four times more than the company’s other search-related costs combined, including research and development. FOF ¶ 289. The true value of the defaults is undoubtedly far greater. Tr. at 9786:6-8 (Murphy) (stating “there’s a lot of headroom” between Google’s revenues and the price of the distribution agreements).

Google, of course, recognizes that losing defaults would dramatically impact its bottom line. For instance, Google has projected that losing the Safari default would result in a significant drop in queries and billions of dollars in lost revenues. FOF ¶¶ 72, 75. The same would occur if Google were to lose the Android defaults. Over 50% of all search revenue on Android devices flows through the Google Search Widget alone. FOF ¶ 74; *see also* FOF ¶ 75 (the Widget and Chrome make up 80% of search revenue on Samsung devices). The defaults are more than just “incremental promotion.” GRFOF ¶ 96. They supply Google with unequalled query volume that is effectively unavailable to rivals.

Against this backdrop, Google disputes the power of the default to drive query volume. It once again points out that users do not seem to have trouble switching to Google when a rival occupies the default. For instance, when Mozilla changed the Firefox default from Google to

Yahoo in 2014, most users “switched back” to Google by changing the default, navigating directly to google.com or searching through Chrome. GTB at 38. Google also points to its status on Windows devices. *Id.* at 39. There, Google is the dominant GSE, even though Windows devices come preinstalled with Microsoft’s Edge browser, which defaults to Bing. FOF ¶¶ 82–84. But these examples confirm that the default effect is weaker when the alternative is a dominant firm with high brand recognition backed by a quality product. FOF ¶ 70; *supra* Section II.C.3.c. Otherwise, as Dr. Rangel convincingly explained, the combination of user habit, Google’s brand, and choice friction creates a powerful default effect that drives most consumers to use the default search access points occupied by Google. FOF ¶¶ 65–74.

Google’s discounting of the default also cannot be squared with Bing’s success on the Edge browser on Windows desktops, where Bing is the default GSE. Of the users that remain on Edge, 80% of their searches are conducted using Bing. FOF ¶¶ 83–84. Even if some of that rate is attributable to users who prefer Microsoft products, and therefore consciously do not switch, the default effect no doubt materially contributes to the uniquely high percentage of Bing users on Edge. That added search volume has allowed Microsoft to improve its search quality on desktop devices, to the extent that it is now nearly on par with Google. FOF ¶ 127.

Finally, Google’s position on defaults is at odds with many internal records that recognize, from a behavioral standpoint, the power of the default. FOF ¶¶ 66–68, 72–73, 75. It also is contrary to Google’s well-documented early recognition of defaults as critical to driving query volume. FOF ¶¶ 67, 73.

b. The Impact of Scale

Having established that Google gets substantially more queries than its rivals as a result of the defaults, the question becomes how, if at all, that advantage impacts competition. The answer to that question turns on the relationship between scale and a GSE's quality.

The sheer magnitude of Google's query volume, or scale, compared to rivals is startling: Users enter nine times more queries on Google than on all rivals combined. On mobile devices, that multiplier balloons to 19 times. FOF ¶ 87. NavBoost, one of Google's core ranking models, runs on 13 months of Google click-and-query data. FOF ¶¶ 96, 102–103. That is the equivalent of over 17.5 *years* of Bing data. FOF ¶ 96; *see also* FOF ¶¶ 90–94. This wealth of data gives Google greater insight into search behavior in part because it simply sees more queries than other GSEs. *See, e.g.*, FOF ¶ 89 (98.4% of unique phrases seen only by Google, 1% by Bing & 99.8% of tail queries on Google not seen at all by Bing).

Armed with its scale advantage, Google continues to use that data to improve search quality. Google deploys user data to, among other things, crawl additional websites, expand the index, re-rank the SERP, and improve the “freshness” of results (i.e., bring them up to date). FOF ¶¶ 90–94, 103. Click-and-query data also is used to build and train models that algorithmically improve results' relevance and ranking, as well as to run large-format experiments to develop new features. FOF ¶¶ 90–94, 98, 103, 106. Scale also improves search ads monetization. This is intuitive: Understanding which advertisements users click on (or scroll past) enables Google to evaluate ad quality and serve more relevant ads in the future. FOF ¶¶ 105–106. The more precisely targeted an ad, the greater likelihood that it will be clicked, which translates into higher revenues that Google uses to make larger revenue share payments.

The market for GSEs is thus characterized by a type of network effect. *Cf. Microsoft*, 253 F.3d at 49 (discussing network effects in phone services). (1) More user data allows a GSE to improve search quality, (2) better search quality attracts more users and improves monetization, (3) more users and better monetization attract more advertisers, (4) more advertisers mean higher ad revenue, and (5) more ad revenue enables a GSE to expend more resources on traffic acquisition costs (i.e., revenue-share payments) and investments, which enable the continued acquisition of scale. *See* Tr. at 3492:8-25 (Nadella) (describing “network effects” in the market for search); ØVERBY & AUDESTAD, *supra*, § 9.3 (Data network effects are those “in which data collected about users or user behavior is used to improve digital services. Google Search is an example of data network effects since each search query contributes to refining the Google Search algorithm.”). The network effects are captured in the illustration below, taken from a Microsoft document.



UPX270 at .001; *see* Tr. at 2646:15-19 (Parakhin) (“Relative traffic, if I have more traffic than my competitors, that participates in multiple feedback loops driving quality and driving index completeness, which in effect is driving quality. . . [I]t is very impactful for revenue.”).

Google contends that these effects are dramatically overstated. It argues that newer ranking models rely on less data, with some driven entirely by AI, such that today's GSEs depend less on user data to improve quality and compete. GFOF ¶¶ 305–332. But the evidence shows otherwise. True, developments in search technology, including greater reliance on large-language models, or LLMs, for ranking, has reduced the need for user data. FOF ¶¶ 97, 99–101. Google, however, continues to rely on large volumes of user data at every step of the search journey, and no witness, even from Google, testified that LLMs had sufficiently advanced to supplant user data. FOF ¶¶ 101, 105, 114–115. There is a reason that Google still retains 18-months of a user's data: It is still highly valuable to Google.

Google also maintains that the quantity of user data is less important than how it is used, and if its rivals had Google's business foresight and drive to innovate, they too could win default distribution. GTB at 50. But that position blinks reality. Apple's flirtation with Microsoft best illustrates this point. Microsoft has invested \$100 billion in search in the last two decades and its quality now matches Google's on desktop search. FOF ¶¶ 10, 127. Yet, Microsoft's failure to anticipate the emergence of mobile search caused it to fall behind, and with Google guaranteed default placement on all mobile devices, Microsoft has never achieved the mobile distribution that it needs to improve on that platform. FOF ¶¶ 24–25. This perpetual scale and quality deficit means that Microsoft has no genuine hope of displacing Google as the default GSE on Safari. FOF ¶¶ 321–329. As Apple's Eddy Cue testified, there was "no price that Microsoft could ever offer [Apple]" to prompt a switch to Bing, because it lacks Google's quality. FOF ¶¶ 323, 326.

Google’s massive scale advantage thus is a key reason why Google is effectively the only genuine choice as a default GSE.¹²

That barrier is reinforced by the size of Google’s revenue share payments. Consider the following thought experiment. What would it take for a new market entrant to convince Mozilla—a small distribution channel—to walk away from Google as the default? The following would have to happen. First, the new entrant would have to surmount the entry barriers to create a GSE of comparable quality to Google. Second, it would have to build an ads platform that could monetize search on par with Google. Third, it would have to promise to offset any revenue shortfall that might arise either from reduced query volume (because some users would elect to stay with Google) or from inferior ad monetization (because fewer users could mean fewer advertisers and less profitable ad auctions, notwithstanding the quality of its delivery of ads). A new entrant would need billions of dollars to meet these three conditions. And notably, it would have to accomplish this trifecta either by acquiring enough user data through non-default distribution channels (which is improbable) or by developing a technology that would make the need for user data far less important (which is unlikely to happen anytime soon, FOF ¶¶ 102–104, 114–115). The truth is, no new entrant could hope to compete with Google for the default on Firefox or any other browser. Google’s query and quality advantage and high revenue share payments are strong incentives simply to stay put.

The end result here is not dissimilar from the *Microsoft* court’s conclusion as to the browser market. Just as the agreements in that case “help[ed] keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly,”

¹² To be clear, the court is by no means suggesting that query volume *alone* would make a rival GSE more competitive. It still must develop a quality product that satisfies users’ needs.

Google's distribution agreements have constrained the query volumes of its rivals, thereby inoculating Google against any genuine competitive threat. *Microsoft*, 253 F.3d at 71; *Dentsply*, 399 F.3d at 191 (condemning the defendant's exclusionary conduct, which "helps keep sales of competing teeth below the critical level necessary for any rival to pose a real threat to Dentsply's market share").

When "a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary . . . conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general." *LePage's*, 324 F.3d at 159. No current rival or nascent competitor can hope to compete against Google in the wider marketplace without access to meaningful scale, especially on mobile. The exclusive distribution agreements have substantially contributed to these anticompetitive market conditions.

c. Diminishing Returns of Scale

Finally, Google uses a data experiment to challenge the proposition that Microsoft lacks sufficient scale to compete. It contends that Microsoft has reached the point of diminishing returns on scale, and that factors other than scale explain the quality differences between the two GSEs. *See* GRFOF ¶ 139; GFOF ¶¶ 256 (collecting testimony); GTB at 67–69.

For these propositions, Google relies upon a data reduction experiment (DRE) performed by its computer science expert, Dr. Edward Fox. *See* GFOF ¶¶ 344–406.¹³ The DRE retrained various Google ranking signals (including NavBoost, QBST, Term Weighting, RankBrain, DeepRank, and RankEmbedBert) on an estimate of Bing's quantity of user data. *Id.* ¶¶ 352–353, 357–370. It then applied those adjusted models to a sample of Google mobile queries to yield

¹³ Dr. Fox's experiment and testimony are subject to a *Daubert* motion, ECF No. 443. Because the court has considered that evidence, but ultimately gives it little weight, the court denies the *Daubert* motion.

search results. *Id.* ¶¶ 354–356, 371–376. Those results were scored by human raters. *Id.* ¶¶ 377–379. Dr. Fox concluded that only 2.9% of the quality gap between Google and Bing was attributable to their respective volumes of user interaction data. Tr. at 7848:18-24 (Fox) (discussing DXD26 at 10); *see* GFOF ¶¶ 382–386, 349.

The court found Dr. Fox’s experiment to be an interesting exercise but ultimately is unpersuaded by it. If Dr. Fox is right that Google could operate a search engine of equal quality using the amount of data possessed by Bing, one would expect Google to have used the experiment beyond just litigation. If the DRE’s conclusions are correct, Google would not need to collect and store the incredible volumes of user data it retains to maintain its quality advantage over Bing. Less need for user data would translate into reduced costs and, possibly, greater privacy protections. FOF ¶¶ 105, 120–125. Yet, Google made no effort to run further experiments to verify Dr. Fox’s study, and further, key Google employees were completely unaware of it. *See* Tr. at 1827:5-19 (Lehman); *id.* at 7534:21–7535:18 (Raghavan). If Dr. Fox’s results are as powerful as Google suggests, it is odd that Google has done nothing more than present them in this lawsuit.

In any event, Dr. Fox’s study in one sense only reinforces the importance of user interaction data. Microsoft has had a search engine since 2005. FOF ¶ 10. In 2009, it struck a deal with Yahoo to, among other things, aggregate the amount of user data available to Bing. FOF ¶ 13. If Dr. Fox is right that Bing’s scale has passed the point of diminishing returns, it has taken decades and a substantial acquisition of Yahoo’s data to get there. Still, Bing remains well behind Google in absolute scale. That leaves little hope that a smaller firm like DDG or a nascent one can compete with Google. In fact, for Neeva, the inability to attract and retain users, and thus build scale, was a key reason for its demise. FOF ¶ 76.

Finally, Dr. Fox's study does not account for the years of product development made possible by Google's scale. Even if Google's modern data-based signals yield identical results when trained on a fraction of their scale, Google's ability to design and engineer those signals relied on volumes of user data that Bing (nor anyone else) has never had. FOF ¶¶ 98, 105; Tr. at 10318:9-24 (Oard) (“[T]hat’s the way Google does it is based in part on Google seeing what works and trying out new ideas, and user-side data is just all over that process. And so that if you have access to more and better user-side data, then you have opportunities to do things here you might not otherwise have. And that’s simply not measured in the experiment, right. That experiment of this general design couldn’t possibly measure that effect. I mean, you’d have to replay 20 years of search engine development.”).

In the end, Google's dismissal of the importance of scale is inconsistent with market realities. Google often warns that competition is “only a click away.” However, “[t]he paltry penetration in the market by competitors over the years has been a refutation of [that] theory by tangible and measurable results in the real world.” *Dentsply*, 399 F.3d at 194; Tr. at 3796:19-23 (Ramaswamy) (defaults are “enormously powerful,” notwithstanding “pious prose around ‘competition being a click away’”).

3. *The Exclusive Agreements Have Reduced Incentives to Invest and Innovate.*

The distribution agreements have caused a third key anticompetitive effect: They have reduced the incentive to invest and innovate in search. *See 1-800 Contacts, Inc. v. FTC*, 1 F.4th 102, 118 (2d Cir. 2021) (stating that anticompetitive effects can “include evidence of [slowed down] innovation”) (internal quotation marks omitted); *McWane*, 783 F.3d at 827 (observing that “slow innovation” can be a consequence of exclusive dealing arrangements) (internal quotation marks and citation omitted).

For more than a decade, the market for general search services has presented the opportunity to earn outsized profits. Google certainly has reaped the rewards. FOF ¶ 8 (Google Search’s 2022 booked revenue was over \$162 billion). Yet the general search services market has remained static for at least the last 15 years, with investments largely coming from established players. Only Google and Microsoft have made the sizeable capital investments needed to build a self-sustaining GSE. FOF ¶¶ 10, 55. Smaller competitors do even not compete as fully integrated search engines. Yahoo, once the market leader, no longer crawls the web and instead relies on Microsoft for web results. FOF ¶ 13. DDG operates in the same way. FOF ¶ 12.

Nor has venture capital money rushed in. As Apple’s John Giannandrea wrote in 2018: “[T]he reason a better search engine has not appeared is that it’s not a VC fundable proposition even though it’s a lucrative business.” UPX240 at 507; *see also* Tr. at 3510:24–3512:7 (Nadella) (describing Silicon Valley venture funding in search as a “no fly zone”). As a result, DDG and Neeva are the only two notable market entrants in the last 15 years. Each attempted to innovate—DDG on privacy and Neeva through a subscription-based model—but found only limited success (DDG) or left the market altogether (Neeva). FOF ¶¶ 14, 25, 76.

The foreclosure of efficient channels of distribution has contributed significantly to the lack of new investment. Neeva is a case in point. It could not gain a foothold in the market in part because it was relegated to less efficient means of distribution, such as app downloads. Tr. at 3689:15–3694:21 (Ramaswamy). Neeva was unable to gain a position as an alternative default GSE on any mobile device. FOF ¶ 76. Ultimately, Neeva’s inability to retain and attract users—and thus acquire scale—was a primary reason for its withdrawal from the market. *Id.* The loss of nascent competitors is a clear anticompetitive effect. *See* AREEDA ¶ 1802d5 (observing that exclusive dealing arrangements that deny smaller firms access to retailers may “impair their ability

to expand, thus becoming more effective competitors with the dominant firm. Indeed, the smaller [firms] may decline and even be forced to exit from the market”).

Plaintiffs offer other examples of how the distribution agreements disincentivize investment and innovation in general search: (1) Google’s main rival, Microsoft, has limited its investment due to its limited distribution on mobile; (2) Apple, a fierce potential competitor, remains on the sidelines due to the large revenue share payments it receives from Google; (3) nascent competitors, like Branch, are unable to obtain distribution; and (4) knowing that stagnation will engender no consequences, Google lacks incentives to innovate. The court addresses each in turn.

a. Microsoft

Everyone agrees that Google’s distribution agreements did not cause Microsoft’s *past* underinvestment in search. Microsoft “missed” the mobile revolution and was unable to improve its browser, Internet Explorer, until it used Google’s rendering engine, Chromium. *See generally* Tr. at 3585–3590 (Nadella). Some of Microsoft’s quality issues also were attributable to its poor index. *See* DX429 at .021 (Bing is 25 times worse than Google regarding not-in-index issues). By 2007, Microsoft understood that it was three to five years behind in search and increased investment was needed. DX424 at .005. Ultimately, Microsoft committed significant capital to search. FOF ¶ 10; *see* Tr. at 3510:3-7 (Nadella) (“As per capita to our revenue . . . we’ve invested a lot, more so than Google has invested, in search. . . . [W]e’re the only player other than Google that has continued to invest in search.”). That investment (combined with secured distribution on Windows devices) has allowed Bing to achieve quality parity with Google on Windows desktop devices. FOF ¶ 127.

Today, Microsoft could invest more money in search but chooses not to without assurances of additional distribution on mobile. *See* Tr. at 3510:13-15 (Nadella) (“Can we invest more? Of course, any day, you know, everybody wants to invest more. And in order to invest more, please give me some mobile share and I’ll invest more.”). That withholding of additional investment is in part attributable to Google’s exclusive search distribution agreements. As Microsoft’s former CEO of Advertising and Web Services, Mikhail Parakhin, testified, “fundamentally it boils down to what kind of a long-term revenue we can achieve. . . . If you don’t have [the] ability to effectively distribute [through defaults], it’s almost meaningless to invest in the area.” *Id.* at 2643:1-23 (Parakhin).

Google responds that Microsoft’s current investment strategy is not evidence of an anticompetitive effect because market actors must take financial risks to compete and Microsoft’s unwillingness to take such risks is not an antitrust problem. *See* GTB at 4, 68 (“Microsoft should not be heard to complain that Google has been too successful or that Microsoft simply cannot invest to improve its search quality *until* Apple replaces Google with Bing as the Safari default.”).

What Google says has intuitive appeal, but it does not reflect market realities. Microsoft stood no realistic chance of beating Google for the Apple default, and there is no evidence of any serious negotiations for Android placements. No profit-driven firm in Microsoft’s position would invest the substantial sums required to enhance its search product when there is little to no genuine opportunity for a default distribution deal. *See* AREEDA ¶ 725a (“To say that a business firm acts ‘rationally’ means that it seeks to maximize its profits or its value. Such a firm does not invest its resources unless it anticipates that the investment will be more profitable than available alternative investments.”). Google’s distribution agreements thus appear reasonably capable of having significantly contributed to disincentivizing Microsoft from enlarging its investment in search.

Plaintiff States advance a different theory of anticompetitive harm involving Microsoft. They contend that Bing's limited distribution restricts Microsoft's ability to enter into data-for-traffic agreements with SVPs to secure structured data for use in Bing's vertical offerings. *See* PSTB at 32–33. Plaintiff States argue that Bing's reduced scale means that it must either forego this data or pay for the data itself. *Id.* Google, on the other hand, can simply offer those partners traffic, due to its extraordinary scale. *Id.*

But the record does not support this theory. As of 2020, Microsoft had entered into *hundreds* of partnerships to obtain structured data. FOF ¶ 47. Bing has had some partnership challenges but none that could be fairly characterized as an anticompetitive effect. In one instance, Bing understood that a travel SVP refused to partner with it explicitly due to Bing's lack of query volume. FOF ¶ 48. But Bing partners with much larger SVPs in the same vertical, like Expedia and Booking.com. *Id.* On another occasion, Bing's partnership with █████ broke down when █████ sought a financial commitment (rather than traffic). *Id.* But it was not that █████ was unwilling to work with Bing; it was Bing who made a business judgment to forgo the partnership given self-imposed budget limitations and its strong relationship with another █████ *Id.* These isolated instances do not demonstrate that Google's contracts have substantially hampered Microsoft's ability to obtain structured data to improve Bing.

b. Apple

Plaintiffs contend that the billions of dollars that Apple receives in revenue share are, in effect, a payoff to keep Apple on the sidelines of search. Plaintiffs also maintain that the ISA limits Apple's ability to expand search through its Suggestions feature and prevents Apple from running ads on its Spotlight product. *See* UPTB at 33–34, 55. The evidence relating to Apple cannot be cast in such absolute terms and calls for more nuance.

Entering Search. Apple has the financial, technological, and human resources to develop or acquire a competing GSE. In 2018, Apple hired the former head of Google Search, John Giannandrea. Tr. at 2164:18–2165:12 (Giannandrea). Since then, Apple has been “investing quite a lot in” search by “building all of the technology [it] would need to build a general-purpose search engine.” *Id.* at 2245:2-6 (Giannandrea); *id.* at 2247:14-16 (Giannandrea); FOF ¶ 301 (describing dollars and manpower dedicated to search at Apple). Both Apple and Google understand that Apple could develop its own GSE to replace Google as the default in Safari. FOF ¶¶ 300–301. Apple has decided not to do so thus far. FOF ¶ 302.

The ISA revenue share is an important factor in Apple’s calculus. In return for exclusive and non-exclusive default placements (i.e., user-downloaded Chrome and Safari default bookmarks), Google pays Apple █% of its net ad revenue, which amounted to \$20 billion in 2022. FOF ¶¶ 298–299. This is almost double the payment Google made in 2020, which was at that time 17.5% of Apple’s operating profit. *Id.* Google pays Apple more in revenue share than it pays all other partners combined. FOF ¶ 299. If Apple were at all inclined to enter the market for general search, it would have to be prepared to lose these large revenue share payments. FOF ¶¶ 302–326.

But the loss of revenue share is not the only reason Apple has not entered the market. There are other costs and risks. Although Apple has built an infrastructure to deliver some search results to its users, it would have to commit billions more to build and maintain a fully functioning GSE. FOF ¶ 302. It also would need to develop an ad platform to monetize searches. Critically, Apple would have to be willing to put its brand reputation—and possibly device sales—at stake if it were to produce an inferior or unpopular product. *See id.* The required investment also would divert capital from other possibly profitable ventures. *Id.* Even if all went well, Apple’s own projections

estimate that it would lose over \$12 billion in revenue during the first five years following a potential separation from Google. *Id.*

Still, the ultimate question is whether the ISA reasonably appears capable of significantly contributing to keeping Apple on the sidelines of search, thus allowing Google to maintain its monopoly. *See Microsoft*, 253 F.3d at 79. The revenue share payments unquestionably have that effect. The prospect of losing tens of billions in guaranteed revenue from Google—which presently come at little to no cost to Apple—disincentivizes Apple from launching its own search engine when it otherwise has built the capacity to do so. The payments need not be Apple’s sole reason for staying out of search to constitute an anticompetitive effect. Plaintiffs are not required to prove that Google’s “continued monopoly power is precisely attributable to” the ISA. *Id.*¹⁴

“*Substantially Similar*” Clause. Plaintiffs’ other theories of anticompetitive harm do not fare as well. According to Plaintiffs, Google insisted on modifying the terms of the ISA to constrain Apple from intercepting increasing volumes of commercial queries through its Suggestions feature. UPTB at 33–34. When a user types a query in the Safari search bar, sometimes Safari will “suggest” a relevant link to the user that, if clicked, allows the user to avoid Google entirely. FOF ¶ 303. By 2016, Google viewed Apple’s increased use of Suggestions as a threat, because more diversions could translate to fewer revenue-generating search queries. FOF ¶ 304. So, when the parties renegotiated the ISA in 2016, Google insisted on inserting a term in which Apple promised that its use of Google Search as the default in Safari “will remain

¹⁴ In its discussion of Apple, Google references the principle that a firm’s “make or buy” decision typically does not offend antitrust law. GRCL ¶ 40 (citing *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 709–10 (7th Cir. 1984) (holding that a firm’s decision to vertically integrate—the decision to “make or buy” a good or service—typically does not offend antitrust law)); *see also* Tr. at 8698:25–8699:9 (Israel). But that principle has no application here because the question is not whether *Apple’s* decision to remain out of search is exclusionary, but whether the exclusivity of ISA has an anticompetitive effect by influencing that decision.

substantially similar to its use” in 2016. FOF ¶ 305. This has been termed the “substantially similar” clause.

Google denies that the clause’s purpose is to limit Apple’s ability to innovate its products. *See* GRFOF ¶¶ 171–172. Rather, it was meant to ensure that Apple would not divert queries to an SVP, like Amazon, thus leaving Google with a greater proportion of less profitable, noncommercial queries. *See* GFOF ¶ 1270.

Regardless of its purpose, Plaintiffs have not shown that the “substantially similar” clause has led to any actual competitive harm or threat of such harm. Both Apple witnesses, Cue and Giannandrea, testified that Apple does not view the “substantially similar” clause as limiting Apple at all on Suggestions, and that Apple has not been restrained by it. FOF ¶¶ 305, 307. Nor have Plaintiffs produced any evidence that would suggest that, since 2016, Apple has purposely reduced or limited the number of “suggestions” it offers users. Plaintiffs thus have not shown that the “substantially similar” clause “indeed” had an anticompetitive effect in the relevant market. *Microsoft*, 253 F.3d at 58–59.

Advertising on Spotlight. Plaintiffs’ related theory that the ISA restricts Apple’s ability to monetize its on-device search, Spotlight, is also not supported by the record. Spotlight is primarily an on-device search feature on Apple devices, though it has the capacity to run searches through Safari. FOF ¶ 308. Under the ISA, Apple must grant Google the opportunity to deliver search advertisements for on-device searches on Spotlight before it does so itself. FOF ¶ 309. This “right of first refusal” in theory prevents Apple from siphoning off advertising dollars from Google. According to Plaintiffs, this provision depresses competition by restricting Apple from expanding its search ads offerings. UPTB at 34.

But the evidence that the “right of first refusal” has an anticompetitive effect—in any market—is thin. Apple presently does not place ads on Spotlight. Nor has it expressed any intention to do so. Tr. at 2497:11-25 (Cue) (stating that Apple had “no intentions or plans to put ads on Siri or Spotlight,” and “today, we have no intentions to put ads on Siri or Spotlight”). If Apple seeks to monetize Spotlight in the future, and Google insists on enforcing the clause, then that would be an anticompetitive effect. But there is no evidence in the record that the “right of first refusal” clause is one today. Plaintiffs thus have not shown the “requisite anticompetitive effect.” *Microsoft*, 253 F.3d at 58–59.

c. Branch

Plaintiffs also contend that the distribution agreements prevent the emergence of innovative search-adjacent technologies. The example they cite is Branch. UPTB at 34–35. Branch is not a GSE. It develops a product that, as presently deployed, uses “deep linking” technology to search content within on-device applications, like Yelp. FOF ¶ 15. Plaintiffs do not contend that greater adoption of Branch’s technology would either facilitate competition among GSEs or lower entry barriers to the general search market. Instead, Plaintiffs’ theory is that Branch’s tool, as originally designed, uses the web to provide limited results, UPTB at 35, and thus could one day serve as a competitor to Google as a provider of web information retrieval, U.S. Pls.’ Resp. Proposed Findings of Fact, ECF No. 907, ¶¶ 2452–2453 [hereinafter UPRFOF].

According to Plaintiffs, the RSAs’ restriction on preinstalling an “alternative search service” caused potential distribution partners to balk at integrating Branch with full functionality. UPTB at 34–35. For instance, in 2019, Samsung, which was a primary investor in Branch, worked to integrate Branch into its devices but grew concerned about whether doing so would affect its relationship with Google. FOF ¶¶ 391–393. Samsung ultimately did preinstall Branch but only at

a reduced functionality (fewer searchable apps and no direct linking to mobile websites). *Id.* In 2020, the amended Google-Samsung RSA contained a modified clause that more squarely limited Samsung’s ability to preload on-device search. FOF ¶ 394. In addition, when another potential partner, AT&T, requested that Google clarify whether Branch could be preloaded on an RSA-compliant device, Google responded simply by citing the “alternative search services” term. FOF ¶¶ 395–396. AT&T decided not to partner with Branch given the uncertainty and the financial risk of losing revenue share if Google viewed integrating Branch as a breach of the RSA. *Id.*

Google has a different take on the evidence concerning Branch. It claims that the RSAs do not preclude the preloading of Branch, which is available on some RSA-compliant devices. GTB at 93. It also maintains that it never told any partner that integrating Branch would violate the RSA, and that partners declined to preload Branch for reasons other than the RSAs, including quality and data privacy issues. GRFOF ¶¶ 277–280.

Because Plaintiffs claim is that Google’s conduct blocked a nascent competitor, the question is not whether the technology “would actually have developed into [a] viable platform substitute[.]” but whether such technology has “showed potential” to do so. *Microsoft*, 253 F.3d at 79; *see also id.* (explaining that “nascent threats are merely *potential* substitutes”). In *Microsoft*, for instance, middleware technologies Java and Navigator were deemed nascent threats to Windows because such products, although not then substitutes, had the potential to “take over some or all of Window’s valuable platform functions[.]” *Id.* at 53.

The record does not support the conclusion that Branch’s technology has shown potential to become a viable platform substitute for Google. Branch’s founder and former CEO, Alex Austin, testified that Branch’s technology does not “conflict with or overlap with web search[.]” Tr. at 2961:3-4 (Austin). Branch also externally described its “search use case [a]s totally different

and distinct from Google search, and there is zero impact on Google search traffic after implementing Branch.” PSX65 at 531; *see also id.* at 532 (outlining significant differences between general web search and Branch). Although Austin stated that Branch “had hopes that over time, as people found they could do more in apps, that eventually some of that web search traffic would actually start to migrate over to this new app search engine and just create more competition in web search overall,” he admittedly “didn’t have any data, like an experiment data that suggested the impact.” Tr. at 2960:13-22 (Austin).

Thus, while there is some evidence that Branch aspired to compete with Google in general search, the nascent-threat evidence here is far weaker than in *Microsoft*. The trial court there “made ample findings that both Navigator and Java showed potential” as nascent threats. 253 F.3d at 879. This court cannot do the same about Branch.

That said, the record evidence does show that the RSAs’ “alternative search services” term had some chilling effect on distribution partners’ consideration of Branch. Samsung ultimately preloaded a scaled-back version of Branch, and AT&T declined the opportunity to partner with Branch because of the possibility of putting revenue share at risk. FOF ¶¶ 395–396. That chilling effect just did not occur in the general search services market.

d. Google

Finally, Plaintiffs argue that the absence of genuine competition for general search queries has reduced Google’s incentives to innovate its search product, thereby harming consumers. They note that Google spends seven times more on securing defaults than on R&D, FOF ¶ 289, and point to some evidence that its search expenses have declined over the years, *see* UPX249 at 556; UPX260 at 681 (Apple noting that “in recent years, Google has . . . under invest[ed] on desktop”). Plaintiffs also identify instances where Google has reacted to rare competitive pressure by rapidly

investing in product improvements or launches. For example, Plaintiffs point to Google’s “Go Big in Europe” campaign, launched in response to the advent of a search engine choice screen on Android devices required by European Union regulators. UPFOF ¶¶ 1088–1090. Plaintiffs also cite to some isolated examples of degraded search engine quality, such as a period of stagnation and decline in Google’s index size, declining latency, and anecdotal evidence from complaining employees. *Id.* ¶¶ 1083–1086.

The court is not persuaded. Google has not sat still despite its dominant market share. Search has changed dramatically over the last 15 years, largely because of Google. FOF ¶ 128. Its SERP, for example, is different today than it was even five years ago. *Id.* Moreover, the evidence that Google has left innovative technologies on the shelf, or that its investments in R&D and human capital have fallen behind others in the industry, is sparse. “Go Big in Europe” is a one-time, discrete episode that is far from robust evidence that Google remains inert absent competition. In truth, Google’s penchant for innovation is consistent with the behavior of a monopolist. *Microsoft*, 253 F.3d at 57 (“[M]onopolists have reason to invest in R&D,” as “innovation can increase an already dominant market share and further delay the emergence of competition[.]”).

There is one notable exception, however. That is Google’s launch of its generative AI chatbot Bard (now Gemini) in direct response to Microsoft’s announcement of BingChat (now Copilot), which integrates Bing and ChatGPT’s AI technology. FOF ¶¶ 111–112. This is a clear example of Google responding to competition.

In any event, based on the record as a whole, the court cannot find that the distribution agreements have had an anticompetitive effect by deterring Google from innovating in search.

* * *

Plaintiffs have made the required showing of anticompetitive effects in the general search services market, satisfying their prima facie case. The burden now shifts to Google to proffer a “procompetitive justification” for the exclusive distribution agreements. *Microsoft*, 253 F.3d at 59.

B. The Exclusive Agreements Do Not Result in Procompetitive Benefits.

“[I]f a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a ‘procompetitive justification’ for its conduct.” *Id.* The defendant must “present the District Court with evidence demonstrating that the exclusivity provisions have some such procompetitive justification.” *Id.* at 72. “If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.” *Id.* at 59.

Google advances three categories of procompetitive benefits. It submits that the challenged agreements (1) enhance the user experience, quality, and output in the market for general search services, (2) incentivize competition in related markets that redounds to the benefit of the search market, and (3) produce consumer benefits within the related markets. The court concludes that the record does not sufficiently support any of these procompetitive justifications.

1. Benefits in the Market for General Search Services

First, Google argues that its browser agreements “allow[] the browser’s search functionality to work effectively out of the box,” which “ensure[s] convenience for Safari and Firefox users[.]” GTB at 51, 53. As support for this proposition, Google notes the longstanding industry practice of preloading a browser with a default GSE. *Id.* at 51. Indeed, all browsers in

the United States are so designed. FOF ¶ 59. This practice, Google contends, is evidence that the browser agreements benefit consumers. *See In re EpiPen*, 44 F.4th at 989.

But the procompetitive benefit must justify “the specific means here in question, namely exclusive dealing contracts[.]” *Microsoft*, 253 F.3d at 71; *see id.* at 76 (defendant did not carry its burden when its purported benefit failed to justify the particular contractual clause that made the agreement exclusive). Assuming Google has established the value of a default placement to competition and consumers, it has not shown that *exclusive* defaults across nearly all key search access points have such utility.

What’s more, a non-exclusive default would still provide all the convenience and efficiency benefits that Google touts. *See* UPRFOF ¶ 2143 (“Plaintiffs are not challenging the concept of a search default or that distributors may recommend a search engine, set a search default, or preinstall search access points. Plaintiffs are challenging Google’s exclusionary contracts that require counterparties to set Google as the exclusive search default.”). For example, Google asserts that “Apple’s commitment to providing the best out-of-the-box experience to consumers includes designing the products to be simple to use and work right out of the box” and that “product designs with additional decisional steps for consumers to take can cause users to abandon use of the product.” GFOF ¶¶ 1223, 776. But Google does not explain why Apple would lack those same incentives absent exclusivity. Indeed, the original Google-Apple ISA preloaded Google as the default but did not require exclusivity. FOF ¶ 312; *see* AREEDA ¶ 1822d (stating courts may “consider alternatives to the challenged practice that are less threatening to competition than the challenged practice itself”). The absence of exclusivity did not stunt Apple’s product development during that time. Additionally, Apple in the past has sought greater flexibility with defaults, which

Google rejected. FOF ¶¶ 319–320. Presumably, Apple would not have made that request if it felt that it would harm the consumer experience.

Second, Google contends that “the contest to be the default presents search engines the opportunity to” win incremental promotion, thereby incentivizing firms “to make quality improvements to compete for the default position[.]” GTB at 53. That may be true in a competitive market. But as the court already has concluded, there is no genuine competition among GSEs for defaults, *supra* Section IV.A, and there is no record evidence that competition for the default has motivated GSEs to make quality improvements. If anything, Google’s near dominance over the defaults for more than a decade has *reduced* the incentive to invest. *See supra* Section V.A.3.

Google notes that “Microsoft highlighted its improvements in search quality over the past years” during its negotiations with Apple. GFOF ¶ 1440. But that only illustrates the importance of real competition for defaults. Microsoft committed resources to search, and Bing’s quality followed, because it has access to an efficient channel of distribution: the Edge browser on Windows. FOF ¶ 59. Without such access, it would be where Yahoo or DDG is today, with no real prospect of competing for any default placement. Microsoft’s ability to leverage its advantage on Windows is what spurred Microsoft’s investment in search, not the unrealistic prospect of replacing Google as a search default on Apple or any other device.

Relatedly, Google argues that the revenue sharing provisions of the agreements introduce price competition for the default that would not exist otherwise, because GSEs are free products. GTB at 53–54. The evidence does not support that assertion. True, Microsoft perceives that Apple has used it as a stalking horse in its negotiations with Google, FOF ¶ 329, but there is no evidence that Google made its revenue share offer to Apple based on a concern that Apple might accept a better price from Microsoft. To the contrary, Google knew there was no prospect that Microsoft

could outbid it. Google’s “Alice in Wonderland” analysis projected that Microsoft would have to offer Apple over 100% revenue share to compete, FOF ¶ 328, and this study turned out to be wholly accurate. Microsoft *did* offer Apple 100% revenue share plus guarantees, but Apple’s executives testified that Bing was never a realistic option to replace Google. FOF ¶¶ 323–327. Even Google CEO Sundar Pichai testified that Google took “into account” that Apple had no other viable option “which was why [it] didn’t pay the share Apple wanted.” Tr. at 7772:12–7773:10 (Pichai).

Google further claims that “[t]his price competition can also reduce barriers to entry or expansion and facilitate entry from new rivals by allowing them to ‘buy’ their way into the market.” GTB at 54. That assertion does not square with market realities. There is no evidence that entrants have been able to “buy their way into” the market, let alone ante up for default placement. *Supra* Sections II.C.3 & IV.A. Google’s reliance on *In re Epipen* is unconvincing. There, “buyers instigated exclusivity to obtain lower prices” in the challenged contracts, and the exclusive deals “were a normal competitive tool in the epinephrine auto-injector market to stimulate price competition.” *In re Epipen*, 44 F.4th at 986, 989. Here, exclusive deals are a feature of the market only because *Google* has insisted on them, not its distribution partners. Moreover, it is a market reality that no firm other than Google has held a default on any Apple or Android device for a decade or more, so the distribution agreements have not served as a “normal competitive tool.” And when partners have asked for flexibility on the defaults, perhaps with an eye towards generating competition, Google has resisted. *E.g.*, FOF ¶¶ 319–320 (Apple); FOF ¶¶ 370–375 (Verizon); FOF ¶ 378 (T-Mobile); FOF ¶¶ 395–396 (AT&T). Those market realities make this case different from *Epipen*.

Third, Google contends that the challenged contracts have led to increased search output due to the efficiency of the default placements and its superior search quality. Google is right that search output has increased significantly, FOF ¶ 40, but it has presented no evidence that default exclusivity—as opposed to a host of other market forces—is a substantial cause of that result. *United States v. Apple, Inc.*, 791 F.3d 290, 334 (2d Cir. 2015) (the challenged conduct must be “necessary” to the justification for it to be procompetitive); *McWane*, 783 F.3d at 841 (same).

Even if the record supported a connection between the exclusive agreements and increased search output, increased output alone is insufficient to outweigh their anticompetitive effects. Output measured by global desktop device shipments grew rapidly during the years of Microsoft’s anticompetitive conduct. *See* Tr. at 10456:17–10458:18 (Whinston) (discussing UPXD104 at 39). The D.C. Circuit nevertheless found that Microsoft’s conduct violated Section 2. Increased output similarly does not inoculate Google against liability.

2. *Benefits in Other Markets that Redound to the Benefit of the Search Market*

Google also asserts that its revenue share payments facilitate better browsers, improved and lowered cost for smartphones, and increased competition between Apple and Android, all of which redound to the benefit of the general search market by increasing search output. *See Sullivan v. NFL*, 34 F.3d 1091, 1113 (1st Cir. 1994) (“[B]enefits to competition in the relevant market can include evidence of benefits flowing indirectly . . . that ultimately have a beneficial impact on competition in the relevant market itself.”); *Epic Games*, 67 F.4th at 990 (same).

First, Google contends that its browser agreements promote browser competition, because a better GSE improves the browser experience, and browser developers use the revenue share payments they receive to improve their products. Put simply, better browsers equal better search products. *See* GTB at 62; Tr. at 7646:21–23, 7653:21–7654:1 (Pichai) (“We realized just

improving the state of browsers would overall help users use the web more, will increase online activity and increase search usage, including Google's usage.”). Google supports its position with the testimony of its expert, Dr. Murphy. *See* Tr. at 9855:11-23 (Murphy). He opined, “[I]f I generate more of a complementary good[], right, I give you a better browser, you're going to do more search, right, that's how I can compete for more search, and just like lower prices expand output, these lower price[s] expand output too, and they're going to expand output not just of search but also out of these complementary products.” *Id.* at 9705:19-24 (Murphy). The court accepts that the user experience of a browser is enhanced when the default GSE is excellent, but the evidence shows no more.

The ISA does not require Apple to use revenue share payments to improve Safari, and Google has presented no evidence that Apple does so. Mozilla likely does use its payments from Google to upgrade Firefox (given that those payments make up 80% of its operating budget), but Firefox's contribution to the overall search market is so small that the additional output it produces, at most, marginal procompetitive benefits. FOF ¶ 11. Importantly, even if there is a link between more competitive browsers and search output, Google not shown how the *exclusivity* of its agreements has produced that benefit. Dr. Murphy did not, for example, opine that the exclusivity feature of the distribution agreements was a contributor to increased search output. Moreover, Dr. Murphy conceded that there are multiple reasons why output in search has continued to expand for reasons that have nothing to do with Google as the exclusive default GSE. Tr. at 9710:4-25, 9711:5–9712:22, 10186:6-13 (Murphy).

Second, Google claims that the Android agreements promote smartphone competition between Android and Apple devices (inter-brand competition) and among Android devices (intra-brand competition). “This smartphone competition leads to higher-quality, lower-priced devices,

thereby increasing usage of mobile devices and expanding search output.” GTB at 89. Again, Dr. Murphy asserted that Google’s revenue share payments fund the Android ecosystem, enabling competition with Apple, which results in more consumers searching on all devices.



DXD37 at 100; *see* Tr. at 9855:16-23 (Murphy) (“Since you’re going to pass some of that cost through, one of the ways you do that is through lower prices, but, also, higher quality. Higher quality is another way to get more users and, therefore, get more search and, therefore, more search revenue. So, this enhances search output, partly by directly encouraging search, because that’s where the payment is coming from, but, indirectly, also, by pushing the . . . platforms.”).

But this contention once again falls short. For one, the evidence is thin that Android device makers and carriers use Google’s revenue share in any of the ways Google suggest. *See* Giard Dep. Tr. at 277:25–278:3 (stating that while the revenue share payments could be said to have subsidized costs to consumers of all services provided by T-Mobile, it would have “helped in a very minor way”); Christensen Dep. Tr. at 30:9-14 (“Q. Does the fact that the Android operating system license is free help Motorola develop more competitive devices across different price points? A. I think there is not necessarily a direct relationship to that.”). Also, once more, Google has not shown how the agreements’ *exclusivity* is the reason for greater smartphone competition and thus increased search output. *See* Tr. at 9847:8–9848:1 (Murphy) (agreeing that expanded output “comes from many things . . . [l]ots of things are driving it[.] . . . I can’t tell you how much of that is due to that competition [in mobile search], but it’s clearly a part of the picture[.]”).

If anything, greater output resulting from increased competition between Android devices and iPhones benefits mainly Google. Search on those devices occurs primarily through the

defaults, so more searching on those devices means more ad revenue for Google, which only entrenches Google as the default GSE of choice. An out-of-market benefit that “preserve[s] [Google’s] power in the [search] market” is not a procompetitive justification for the exclusive distribution agreements. *Microsoft*, 253 F.3d at 71.

3. *Cross-Market Benefits*

Google also claims that its distribution agreements create procompetitive benefits within the related markets themselves, which independently justifies their exclusionary effect in the market for search. *See* GCL ¶ 116 (“Procompetitive benefits that accrue in highly complementary markets should be considered in addition to the aforementioned benefits in Plaintiffs’ alleged markets.”). Put differently, Google says that exclusionary conduct in one market can be excused if it sufficiently promotes competition in another. This is a concept known as cross-market balancing. The parties dispute whether the court can engage in such balancing in a Section 2 case.

The Ninth Circuit recently observed that “[t]he Supreme Court’s precedent on cross-market balancing is not clear.” *Epic Games*, 67 F.4th at 989; *see NCAA v. Alston*, 594 U.S. 69, 87 (2021) (declining to consider argument by *amici* that “review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury,” when the parties had agreed in the trial court that cross-market balancing was appropriate). The Court has refused to engage in cross-market balancing in cases of *per se* violations. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609–10 (1972) (“Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.”). But in two Sherman Act cases the Court did consider with little discussion whether procompetitive benefits in one market justified anticompetitive conduct in a related one. *See Image Tech. Servs.*, 504 U.S. at 482–84 (addressing argument in a

Section 2 case that exclusionary conduct in the parts and repairs market was justified by “interbrand competition” in the market for photocopiers); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104–08, 115–17 (1984) (considering in a Section 1 case a procompetitive rationale regarding the college football tickets market when assessing anticompetitive conduct in the market for college football television).

The court need not, however, resolve this legal question because the record evidence does not support Google’s contention that the exclusive agreements have resulted in procompetitive benefits in related markets.

Browser Market. The link between the exclusive agreements and competition in the browser market is weak. It rests on the presumption that browser developers invest Google’s revenue share payments in improving their browsers. But, as discussed, no evidence shows how Apple uses its revenue share payments, and to the extent Mozilla uses them to improve Firefox, its share of the browser market is so low that it does not move the competitive needle.

Device Market. As to the Android agreements, Google argues that its payments fund the Android ecosystem, which promotes consistency across devices, lowers device prices, and ultimately stimulates competition among Android devices and with iPhones. But here, too, the evidence is unconvincing. Google has produced little industry evidence from any OEM or carrier that views the Android agreements and their revenue share payments as enhancing competition among devices. Google’s best evidence is testimony from Brian Higgins, Chief Customer Experience Officer at Verizon. Higgins shared his view that the Android agreements align incentives between Google and Verizon to promote Android and foster competition with Apple’s operating systems. *See* Tr. at 1097:1-22 (Higgins). But one partner’s testimony is not enough to establish procompetitive benefits in the *market* as a whole. As Dr. Murphy conceded, the

decreasing cost of Android phones was “consistent” with the “MADA barter,” but he could not establish causality. *Id.* at 10186:6-13 (Murphy). The rest of the evidence supporting this purported cross-market benefit comes from Google employees, but that testimony is largely speculative, as they have no first-hand knowledge of how Android partners use the revenue share payments. *See* GFOF ¶¶ 1711, 1713.

Security Upgrades. Before moving on to the general search text ads market, the court needs to address one more contention. That is Google’s argument that the RSAs enhance security in the Android device market because the agreements condition payment on making security upgrades. GTB at 91–92. Google notes that Apple can do this directly, as it is vertically integrated. Tr. at 9856:5-13 (Murphy). By contrast, OEMs historically have failed to prioritize performing security upgrades. *See* GFOF ¶ 1717. Google also points to the testimony from an AT&T representative, who said that security upgrades can involve a significant amount of work, implying that absent the agreements, AT&T might not be as willing to cooperate on device security. *Id.* (citing Ezell Dep. Tr. at 150:2–151:1). That witness, however, heavily caveated his own testimony. *See* Ezell Dep. Tr. at 153:21-25, 154:6-18.

Even if the court were to accept that the RSAs provide some additional incentive to partners to perform security upgrades, Google has not established a connection between that benefit and the agreement’s exclusivity. In fact, its CEO Sundar Pichai admitted that incentivizing partners to perform timely security upgrades could be done through a structure other than the RSA. Tr. at 7718:24–7719:1 (Pichai); FOF ¶¶ 397–398 (describing Mobile Service Incentive Agreements).

* * *

Google has not met its burden to establish that valid procompetitive benefits explain the need for exclusive default distribution. Accordingly, Plaintiffs have established that Google is

liable under Section 2 of the Sherman Act for unlawfully maintaining its monopoly in the market for general search services through its exclusive distribution agreements with browser developers and Android OEMs and carriers.¹⁵

VI. EFFECTS IN THE MARKET FOR GENERAL SEARCH TEXT ADVERTISING

To prove a Section 2 violation in the general search text ads market, Plaintiffs again must show that the exclusive agreements “indeed [have] the requisite anticompetitive effect.” *Microsoft*, 253 F.3d at 58–59. Plaintiffs contend that Google’s conduct has caused three anticompetitive effects particular to the text ads market: (1) market foreclosure, (2) supracompetitive text ads pricing, and (3) product degradation through diminished transparency regarding text ads auctions. As before, Plaintiffs argue that the exclusive deals deprive rivals of scale, which freezes competition in the text ads market in the same manner as in general search.

A. The Exclusive Agreements Foreclose a Substantial Share of the Market.

As previously discussed, evaluating an alleged exclusive dealing agreement first requires an estimation of market foreclosure. *See supra* Section V.A.1. Recall, the D.C. Circuit has said that “a monopolist’s use of exclusive contracts . . . may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.” *Microsoft*, 253 F.3d at 70; *see also McWane*, 783 F.3d at 837 (“Traditionally a

¹⁵ Google argues that Plaintiffs have failed to identify a substantially less restrictive alternative for achieving its proffered procompetitive benefits. GTB at 69–70. This requirement, according to Google, stems from the Section 1 case *NCAA v. Alston*, which stated that courts must determine whether the plaintiff has shown that “any procompetitive benefits associated with the [challenged] restraints could be achieved by substantially less restrictive alternative means.” 594 U.S. at 101 (internal quotation marks omitted). Plaintiffs do not dispute that the burden lies with them but remind the court that the principle only applies to “proven competitive benefits.” UPRCL at 22 (citing *Alston*, 594 U.S. at 101). Because Google has failed to prove that the challenged contracts have procompetitive benefits at all, the court need not reach the issue of least restrictive means.

foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases.”).

Here, Dr. Whinston has calculated that Google’s distribution agreements foreclose 45% of the text ads market, measured by ad spend. FOF ¶ 192. As before, Google does not dispute the underlying methodology used to calculate this figure, but rather mounts various objections as to its sufficiency, each of which the court has already considered and rejected. *Supra* Section V.A.1. Google does not make additional arguments specific to the text ads foreclosure percentage. *See* GTB at 41–47.

The court thus accepts Dr. Whinston’s determination that the challenged agreements foreclose 45% of the general search text ads market. The court also concludes that the market foreclosure is significant in light of same factors that court considered in the general search market. *See supra* Section V.A.1.b.

B. The Exclusive Agreements Allow Google to Profitably Charge Supracompetitive Prices for Text Advertisements.

The trial evidence firmly established that Google’s monopoly power, maintained by the exclusive distribution agreements, has enabled Google to increase text ads prices without any meaningful competitive constraint. There is no dispute that the cost-per-click for a text ad has grown over time. UPFOF ¶¶ 629–637, 652–676; FOF ¶ 186. Google has used various “pricing knobs” to drive these increases, often between 5% and 15% at a time, without a significant shift in advertiser spending to GSE competitors. FOF ¶¶ 243–267. Ad experiments consistently showed Google achieving a “stickage” rate of 50% for its pricing knob adjustments, meaning half of post-launch revenue increases translated into long-term gains. FOF ¶¶ 252, 254–255. Google also tweaked the pricing knobs when needed to achieve periodic revenue targets. FOF ¶¶ 257–260.

Google did so successfully, as its ad revenues have grown consistently at a rate of 20% or more year over year. FOF ¶ 259.

What's more, there is no evidence that any rival constrains Google's pricing decisions. In fact, Google admits it makes auction adjustments without considering Bing's prices or those of any other rival. *See Epic Games*, 67 F.4th at 984 (recounting among the district court's anticompetitive effects findings that "Apple has for years charged a supracompetitive commission" on App Store transactions that it set "without regard" to anything "other than legal action") (Section 1 case). The only apparent constraint on Google's pricing decisions are potential advertiser outcry and bad publicity. FOF ¶¶ 263–265. Google, however, has managed to avoid those pitfalls by ramping up its pricing incrementally, which has allowed advertisers "to internalize prices and adjust bids appropriately[.]" UPX519 at .003. Many advertisers do not even realize that Google is responsible for the changes in price. FOF ¶ 266. Thus, through barely perceptible and rarely announced tweaks to its ad auctions, Google has increased text ads prices without fear of losing advertisers.

Unconstrained price increases have fueled Google's dramatic revenue growth and allowed it to maintain high and remarkably stable operating profits. FOF ¶ 289 (citing UPX7002.A); *cf. Microsoft*, 253 F.3d at 50 ("High profit margins might appear to be the benign and necessary recovery of legitimate investment returns . . . , but they might represent exploitation of customer lock-in and monopoly power when viewed through the lens of network economics. . . . The issue is particularly complex because, in network industries characterized by rapid innovation, both forces may be operating and can be difficult to isolate."); *McWane*, 783 F.3d at 838 (considering monopolist's profit margins when analyzing anticompetitive effects, specifically supracompetitive

pricing). Google in turn has used these monopoly profits to secure the next iteration of exclusive deals through higher revenue share payments. *Supra* Sections IV.A & V.A.2.b.

Google's counter to this pricing evidence is to focus not on the nominal price increases of text ads, but on their quality-adjusted prices. *See In re Qualcomm Antitrust Litig.*, 328 F.R.D. 280, 309 (N.D. Cal. 2018) ("The economic term 'quality-adjusted prices' captures both the nominal price and total quality of a particular product."). Even a monopolist can increase prices to reflect improvements in quality without running afoul of the antitrust laws. *See Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005) ("Competitive markets are characterized by both price and quality competition, and a firm's comparatively high price may simply reflect a superior product."); *In re HIV Antitrust Litig.*, No. 19-cv-02573 (EMC), 2023 WL 3089820, at *7 (N.D. Cal. Mar. 7, 2023) ("[O]ne product may have the same price as another product. However, if the first product is of better quality than the second, then [the] first product is actually cheaper than the second."). Google insists that as text ads prices have grown, so too has their effectiveness.

Google says that its quality-adjusted price in fact has *decreased* over time. GFOF ¶¶ 1131–1143. As proof, it points to the increase in click-through rate (i.e., how often an ad is clicked) as a proxy for ad quality, assuming that "higher-quality ads are more likely to be clicked on by users[.]" *Id.* ¶ 1133; Tr. at 8554:22–8555:20 (Israel) (comparing click-through rate in 2011 of only 10% to click-through rate of over 30% in 2021) (discussing DXD29 at 121); *see also* AREEDA ¶ 403b n.2 ("Better products and other innovations do benefit consumers even though motivated by a firm's desire for monopoly."). Plaintiffs dismiss this evidence as irrelevant because it does not speak directly to whether the click resulted in a conversion. *See* UPRFOF ¶ 2269 ("Absent an increase in conversion rates per click, increased CPCs reduce advertiser value."). But Plaintiffs

are too dismissive. It is not an unreasonable inference that more ad clicks might correspond to better results for advertisers.

That said, the evidence that Google's quality-adjusted ads prices have remained steady, let alone decreased, is weak. Google has long recognized the inherent difficulty in determining the value of an ad to its buyer. FOF ¶ 228 (advertisers struggle to quantify ROI). Its ad launch and experiments reflect as much. FOF ¶¶ 251, 253. Instead, what they show is the company, largely through trial and error, attempting to capture the "headroom" between an ad's purchase price and its value to the buyer. FOF ¶¶ 254–255; UPX507 at .026 (Google admitting that that it had "no way to say what formats should cost"). This evidence does not reflect a principled practice of quality-adjusted pricing, but rather shows Google creating higher-priced auctions with the primary purpose of driving long-term revenues. FOF ¶¶ 257–265.

Dr. Israel's charting of the increased click-through rate onto the upward trend of CPCs is only so informative. *See* Tr. at 8569:5–8570:8 (Israel) (discussing DXD29 at 129). While there is arguably some correlation between click-through rate and ad quality, the strength of the connection is far from certain. There are other obvious contributors to the increased click-through rate that are wholly unrelated to ad quality. Such factors include the dramatic expansion of the online marketplace, the shift towards more online purchasing, and the emergence of mobile search. The most the court can conclude from Dr. Israel's mapping of the click-through rate onto the text ads price index is that both have directionally trended upwards.

But even if Google's ads have increased in quality, that by itself would not establish the absence of anticompetitive pricing effects. "[O]nce monopoly has been achieved and assuming significant entry barriers, the monopolist can set a profit-maximizing price without excessive concern about the behavior of other firms in the market." *Cf.* AREEDA ¶ 727d (discussing pricing

power following price predation to drive out competitors).¹⁶ That is precisely how Google has approached its ad pricing. Consider the following hypothetical (in whole numbers). Say, an advertiser values an ad at \$10. That advertiser would be willing to pay up to \$9 for the ad. A second-price auction, however, could result in a final price that is lower, say \$5, because the runner-up has capped its price at that amount. Google has endeavored through the years to capture the “headroom” between the ad’s value (\$10) and its price. FOF ¶¶ 254–255. It has done that by using its tuning knobs to adjust the auction formula so that, in this hypothetical case, it would push the final ad price to upwards of \$9. Google simply could not take this approach in a competitive market. If it did so, a rival could adjust its auction to charge the advertiser less for the same ad, say, \$7. In the competitive market then, Google still could earn a profit from the sale of an ad, but it could not achieve the *monopoly* profits that it does presently in the absence of rivals.

This is an anti-competitive price effect, irrespective of Google’s ad quality.

C. The Exclusive Agreements Have Allowed Google to Degrade the Quality of its Text Advertisements.

Google’s text ads product has degraded in two ways: (1) advertisers receive less information in search query reports (SQRs) and (2) they no longer can opt out of keyword matching. FOF ¶¶ 269–278. Specifically, Google removed information from SQRs that provided advertisers with insight into low-volume queries, which diminished advertisers’ ability to tailor their ad strategy in light of such queries. FOF ¶¶ 272–274. Similarly, disallowing advertisers from opting out of keyword matching created thicker auctions at the expense of advertiser control. FOF ¶¶ 277–278. These are arguably small changes, but they reveal Google as a monopolist unconcerned about product changes that have decreased advertisers’ autonomy over the auctions

¹⁶ To be clear, the court cites this passage not to suggest that Google has engaged in predatory pricing, but for the legal principle only.

they enter and the ads they purchase. Google has suffered no consequences because it does not operate in a competitive text ads market.¹⁷

D. The Exclusive Agreements Have Capped Rivals' Advertising Revenue.

The exclusive distribution agreements allow Google to maintain its text ads monopoly in much the same way as in the general search services market. That is, Google's rivals must distribute their GSEs through less efficient, non-default access points, which results in fewer users and fewer ad dollars spent to target those users. *See supra* Section V.A.2. With less ad revenue, Google's rivals are limited in their ability to reinvest in quality improvements (both as to search and general search text ads) to attract more users and more ad dollars. *Supra* Sections V.A.2 & V.A.3. That cycle puts rivals in no position to compete with Google for the increased ad revenue that accompanies greater query volume. *See supra* Section IV.A.

Advertising witnesses consistently testified to this reality. They uniformly cap their text ads spending on Bing at no more than 10% to approximate its relative market share. FOF ¶ 233. So, even if Bing's ads were to offer better value than Google's, Bing could not effectively constrain Google's ad pricing. As one witness put it, once the spending maxes out on Bing, there is simply "[nowhere] else to go." Tr. at 4875:19–4876:4 (Lim). By locking in a huge comparative query volume advantage through its exclusive agreements, Google ensures that advertisers will continue

¹⁷ Plaintiffs also assert that Google has depreciated SQR quality by removing information that allows advertisers to better approximate the final physical placement of their text ad. *See* UPFOF ¶¶ 1185–1192. Google's SQRs used to include an "average position" component, which gave advertisers insight into their ad placement compared to other ads. *See* UPX8037. Google changed that metric to be more relative, telling advertisers only the percentage of their ads that appear on a prime location, phasing out average position metrics. *Id.* at .001; DX2021 at .001. Now, while advertisers understand how many of their ads reach the top spot, they do not have a similar understanding of the lower positions. But there was very little advertiser testimony that this change was harmful, and no evidence that it led to increased prices. *See* Tr. at 5177:11-15 (Booth) (while Home Depot "wouldn't have the same specificity" without the average position metric, the change "certainly wasn't catastrophic"). Amazon's concern about the switch away from the average position insight adds some weight to the analysis, *see* UPFOF ¶¶ 1191–1192, but one advertiser's desire for a particular product feature is not an anticompetitive effect in the market as a whole.

to spend 90% of their text ad dollars with Google, regardless of increases in price or decreases in quality. That is an anticompetitive effect in the marketplace.

* * *

Google has not argued that the contracts generate procompetitive benefits beyond those already addressed and rejected, *supra* Section V.B. The court thus concludes that Plaintiffs have proven that Google’s exclusive distribution agreements substantially contribute to maintaining its monopoly in the general search text advertising market, violating Section 2 of the Sherman Act.

VII. SA360

As noted at the start of this opinion, Plaintiff States alone claim that Google engaged in additional exclusionary conduct that centers on SA360, Google’s proprietary search engine management tool, or SEM tool. *See* PSTB at 20–31. An SEM tool allows advertisers to run online marketing campaigns across multiple platforms in one centralized place. FOF ¶¶ 279–281. When it acquired the platform, Google vowed that SA360 would be a “neutral third party.” FOF ¶ 281. But Google has not acted in that way. Instead, Plaintiff States say, Google has prioritized and advantaged its own ad platform, Google Ads, over Microsoft’s ad platform on SA360. PSTB at 21–22. Specifically, they assert that for years Google has intentionally slow-rolled the development and launch of various features for Microsoft Ads that Google has fully integrated into SA360 for Google Ads. *Id.* at 22–24. Most critically, Google ignored Microsoft’s repeated pleas to integrate auction time bidding (ATB), a feature that permits advertisers to change their bid strategies in real time during auctions. *Id.* at 24–26; FOF ¶ 286. ATB remained unavailable for Microsoft Ads on SA360 at the time of trial. FOF ¶ 286. According to Plaintiff States, this feature disparity has caused anticompetitive effects in the proposed markets. They maintain that Google’s conduct harmed both “advertisers by diminishing the efficiency of their ad spend on

SA360” and “rival GSEs that use Microsoft Ads to attract customers . . . by driving down demand for advertising on these search engines.” PSTB at 29–30.

A. The Sherman Act Imposes No Liability on Google for Its Refusal to Grant Feature Parity to Microsoft Ads on SA360.

Plaintiff States’ SA360 theory falters at the threshold because it conflicts with the settled principle that firms have “no duty to deal” with a rival. “As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.” *Pac. Bell Tel. Co. v. Linkline Comm’n, Inc.*, 555 U.S. 438, 448 (2009). “Even a monopolist generally has no duty to share (or continue to share) its intellectual or physical property with a rival.” *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013) (Gorsuch, J.). That is because “[c]ompelling” a dominant firm “to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest,” and “[e]nforced sharing” requires courts to “act as central planners,” “a role for which they are ill suited.” *Verizon Commc’ns Inc. v. Law Off. of Curtis V. Trinko LLP*, 540 U.S. 398, 407–08 (2004); see also *New York v. Meta Platforms*, 66 F.4th 288, 305 (D.C. Cir. 2023) (stating that a Section 2 claim that “suppose[s] that a dominant firm must lend its facilities to its potential competitors” “runs into problems” under *Trinko*). Therefore, “a firm with no antitrust duty to deal with its rivals at all is under no obligation to provide those rivals with a ‘sufficient’ level of service.” *Linkline*, 555 U.S. at 444.

Although the Supreme Court has placed a “high value” on the right of firms to refuse to deal with others, it has said that “the right is [not] unqualified.” *Trinko*, 540 U.S. at 408 (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). “Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.” *Id.* Such circumstances are “limited,” *Linkline*, 555 U.S. at 448, however, and the Court has

“been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm,” *Trinko*, 540 U.S. at 408.

The “leading case for § 2 liability based on a refusal to cooperate with a rival” is *Aspen Skiing*, a case “at or near the outer boundary of § 2 liability.” *Id.* at 408–09. To fit within the *Aspen Skiing* exception, a plaintiff must make at least two, if not three, showings. First, “before the defendant refused its competitors access[,] the defendant ‘voluntarily engaged in a course of dealing with its rivals.’” *Meta Platforms*, 66 F.4th at 305 (quoting *Trinko*, 540 U.S. at 409). Second, the defendant’s “unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.” *Trinko*, 540 U.S. at 409 (emphasis omitted); *see also Covad Commc’ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 675 (D.C. Cir. 2005) (stating that “in order to prevail upon [a refusal to deal] claim Covad will have to prove Bell Atlantic’s refusal to deal caused Bell Atlantic short-term economic loss”) (citation omitted); *Novell*, 731 F.3d at 1075 (same).

In *Novell*, then-Judge Gorsuch distilled a third requirement from the Court’s prior precedents: “a showing that the monopolist’s refusal to deal was part of a larger anticompetitive enterprise, such as . . . seeking to drive a rival from the market or discipline it for daring to compete on price.” 731 F.3d at 1075 (citing *Aspen*, 472 U.S. at 597); *see also FTC v. Facebook, Inc.*, 560 F. Supp. 3d 1, 23 (D.D.C. 2021) (“The larger anticompetitive enterprise that characterizes an *Aspen Skiing* violation, crucially, cannot simply be an intent to harm—or, the flip side of the same coin, to avoid helping—a rival or rivals.”) (internal quotation marks omitted). Because a monopolist may rationally withdraw from a prior course of dealing and suffer short-term losses “to pursue perfectly procompetitive ends—say, to pursue an innovative replacement product of its

own,” *Novell* also required “a showing that the monopolist’s refusal to deal was part of a larger anticompetitive enterprise.” 731 F.3d at 1075.

Plaintiff States seek to bypass the “no duty to deal” doctrine entirely. They assert that “*Trinko* has no application where there is a voluntary, ongoing course of dealing,” and that “[e]xclusionary conduct occurring within a voluntary, ongoing commercial relationship is entirely actionable under Section 2.” PSTB at 34. According to Plaintiff States, the “no duty to deal” principle has been applied only to circumstances not applicable here: when “(i) the business relationship was government mandated, (ii) there was no prior dealing at all, or (iii) any prior dealing had ended.” *Id.* at 33–34. Here, by contrast, Google has chosen to “engage with another marketplace participant” and even has an agreed-upon “escalation process” by which the two companies raised the SA360 dispute to the CEO level. *Id.* at 34; *see* PSFOF ¶ 233 (citing PSX671).

The court is unpersuaded that Google’s SA360 conduct falls outside the “no duty to deal” framework. The fact that Google and Microsoft continue to have an ongoing course of dealing as to SA360 does not put this case in a different posture than a case such as *Novell*, where a dominant firm (Microsoft) at first shared its intellectual property with rivals, only to later withdraw it to advantage its own products. *See* 731 F.3d at 1067–68. The concerns that animate the no-duty-to-deal principle are equally applicable here. Primarily, adjudicating Plaintiff States’ claim would require the court to act as a “central planner” that endeavors to identify the proper “terms of dealing.” *Trinko*, 540 U.S. at 408. Their claim requires grappling with a host of questions that the court is ill-equipped to handle, such as: (1) by when, from a technical standpoint, could Google have integrated ATB into Microsoft Ads?, FOF ¶ 285 (noting that it took Google between two to three years to integrate its ATB on SA360); (2) how much advertiser interest in ATB does there need to be for Google to act on Microsoft’s request?, *see* DX179 at .009–.010 (Google survey of

U.S. Microsoft Ads customers showed that ATB was not among the top 20 features requested for Microsoft Ads in SA360); PSX444 (ATB listed 15th among feature priorities for Microsoft Ads on SA360); and (3) was it improper for Google to commit resources to prioritizing other projects, namely, Projects Amalgam and Myx, FOF ¶ 286, over integrating ATB for Microsoft Ads? And those thorny questions foreshadow the challenges the court would face in administering a remedy. Any relief presumably would require Google to ensure feature parity on SA360 now and into the future. A favorable outcome for Plaintiff States thus would mire the court in Google's day-to-day operations. *See Trinko*, 540 U.S. at 415 (“An antitrust court is unlikely to be an effective day-to-day enforcer of [] detailed sharing obligations.”). The court has learned a lot about Google, but it is “ill suited” for that role. *Id.* at 408.

To allow a continued course of dealing between rivals to circumvent *Trinko*'s strict limits also would invite uncertainty as to when antitrust liability attaches to otherwise rational business conduct. *See Linkline*, 555 U.S. at 453 (stating that “antitrust rules ‘must be clear enough for lawyers to explain them to clients’”) (quoting *Town of Concord v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.)). This case well illustrates the point. What standard should Google have used to determine by when it must integrate ATB or other features for Microsoft Ads to avoid a Sherman Act violation? Caselaw does not provide an answer, and it is difficult to conceive of one that is not highly subjective. The “no duty to deal” framework is appropriately applied in such circumstances.

Applying *Trinko* then, Plaintiff States have failed to meet their burden of proof. They have not shown that Google deviated from a voluntarily “course of dealing with its rivals” akin to the one that established a duty to deal in *Aspen Skiing*. In that case, “the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and

had persisted for several years.” 472 U.S. at 603. That change amounted to a “decision by a monopolist to make an important change in the character of the market.” *Id.* at 604. No similar market change was proven here. True, Google did vow that SA360 would be a “neutral third party.” FOF ¶ 281. But a vague promise made in marketing materials provides a poor yardstick against which to measure antitrust liability.

In addition, the record does not establish that Google was “willing[] to forsake short-term profits to achieve an important anticompetitive end.” *Trinko*, 540 U.S. at 409; *Covad*, 398 F.3d at 675–76. Plaintiff States did not offer any testimony or evidence as to how much Google left on the table by delaying the launch of ATB for Microsoft Ads on SA360. The record does not indicate, for example, how much additional revenue Google would have earned in the first years of an integrated ATB in Microsoft Ads. Plaintiff States made no effort to even ballpark that sum, let alone quantify it.

Finally, Plaintiff States did not show that Google’s action was part of “a larger anticompetitive enterprise,” such as “seeking to drive [Microsoft] from the market.” *Novell*, 731 F.3d at 1075. Part of the explanation for Google’s unresponsiveness was that it prioritized progressing work on Project Amalgam, which was in effect a new product launch. FOF ¶ 286. It was not improper for Google to prioritize “an innovative replacement” of SA360 over immediately delivering feature parity to a rival. *See Novell*, 731 F.3d at 1075 (“Neither is it unimaginable that a monopolist might wish to withdraw from a prior course of dealing and suffer a short-term profit loss in order to pursue perfectly procompetitive ends—say, to pursue an innovative replacement product of its own.”). That business decision may have come at Microsoft’s expense, but it does not give rise to Section 2 liability. *See id.* at 1067–68, 1077

(finding no Section 2 liability against Microsoft after it withdrew from sharing its intellectual property with rivals, after initially agreeing to do so, to advantage its own products).

B. Plaintiff States Have Not Proven that Google’s SA360 Conduct Had Anticompetitive Effects.

Plaintiff States’ SA360 claim falls short for a second independent reason: They have not shown anticompetitive harm. Plaintiff States contend that “Google’s conduct harm[ed] advertisers by diminishing the efficiency of their ad spend on SA360.” PSTB at 29. It also “harm[ed] rivals . . . by driving down demand for advertising on these search engines.” *Id.* at 30. The evidence does not support either contention.

Plaintiff States produced no advertiser testimony that the lack of ATB on SA360 reduced ad spend efficacy on Bing. No question, the evidence showed that the use of ATB resulted in increased conversions. FOF ¶ 285. But there was no evidence presented of any advertiser who wished to use ATB on Microsoft Ads but was left stuck using the less-effective, intra-day bidding on SA360 as a result of Google’s delayed integration. To the contrary, the evidence showed that some advertisers found other ways to place ads on Bing using ATB. For instance, some advertisers moved ad spend from SA360 to Microsoft’s native tool, which caused Google to worry that they would move even more spend away from SA360. FOF ¶ 288. Also, at least one major advertiser (Home Depot) began using a rival SEM tool, Skai, to take advantage of ATB for its Bing ad spend *Id.* And even if there were advertisers who desired to use ATB but could not because it was too costly to switch away from SA360, Plaintiff States offered no examples and the overall impact on the market remains uncertain.

As to Google’s competitors, the evidence of harm is similarly thin. Plaintiff States point to Dr. Israel’s analysis of Bing’s share of total spend on SA360 during the relevant time period, showing that the decline of ad spending on Bing accelerated after Google introduced ATB for

Google Ads on SA360. PSFOF ¶ 268. The implication is that the lack of feature parity caused advertisers on SA360 to increasingly shift spend away from Bing to Google. But correlation does not equal causation, and Plaintiff States offered no evidence that any advertiser in fact shifted its ad spend away from Bing because of the absence of feature parity. *Cf.* FOF ¶ 233 (advertiser testimony that their relative text advertising spend on Google and Bing is constant).

Plaintiff States' best evidence comes from Frederick van der Kooi, the former Corporate Vice President of Advertising at Microsoft, who testified: "The degree to which SA360 does or does not code to our latest features and functionality can impact us to the tune of hundreds of millions of dollars in revenue." van der Kooi Dep. Tr. at 241:2-5. But the only evidence substantiating this statement is a series of email threads referencing an internal estimate of Microsoft's lost revenue because of the unavailability of ATB and other key features on SA360. PSFOF ¶¶ 269–271 (citing PSX745 at 327–28, PSX746, and PSX754 at 336). Those emails acknowledge the "analyses have been very rough," PSX745 at 327, and describe the loss estimate as "broad assumptions," *id.* at 326; *see also* PSX754 at 255 (describing the figure as "a low precision estimate"). Importantly, no witness testified about the methodology used to produce the loss estimate. The court will not make an anticompetitive effects finding on such a shaky evidentiary foundation.

* * *

Because Google had no duty to deal with Microsoft and, even if it did, Plaintiff States have not established anticompetitive harm, the court finds in favor of Google on the SA360 claim.

VIII. INTENT AND SANCTIONS

The final piece of business the court must address is Plaintiffs' contentions concerning Google's intent and their demand that the court sanction Google pursuant to Federal Rule of Civil

Procedure 37(e). UPTB at 75–76. Under Rule 37(e), “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court” may order sanctions upon a showing of prejudice or an intent to deny another party use of the information. Fed. R. Civ. P. 37(e). Plaintiffs urge the Court to sanction Google for two practices: (1) “its systemic destruction of documents” and (2) its “flagrant misuse of the attorney-client privilege,” both of which Plaintiffs also say are “strong indicators that Google knows its conduct is unlawful.” UPTB at 75.

When Plaintiffs speak of “systemic destruction of documents” they mean Google’s long-time practice (since 2008) of deleting chat messages among Google employees after 24 hours, unless the default setting is turned to “history on,” which preserves the chat. *Id.* at 76–78. This failure to retain chats continued even after Google received the document hold notice at the start of the investigative phase of this case. It was not until Plaintiffs moved for sanctions in February 2023, more than two years after filing suit, that Google changed its policy to automatically save all chats of employees under a legal hold. Plaintiffs maintain that, as a result of Google’s chat-deletion policy, “years’ worth of chats—likely full of relevant information—were destroyed” and thus never subject to regulatory scrutiny, “show[ing] that Google knew its practices were likely in violation of the antitrust laws and wanted to make proving that impossible.” *Id.* at 78. Plaintiffs demand sanctions under Rule 37(e) for Google’s failure to preserve chats after it received the litigation hold notice.

As for “flagrant misuse of the attorney-client privilege,” that refers to Google’s “Communicate with Care” initiative. Google trained its employees to add its in-house lawyers on “any written communication regarding Rev Share [RSA] and MADA.” *Id.* at 78 (quoting UPX320

at 605). It also instructed that, when “dealing with a sensitive issue” via email, to “ensure the email communication is privileged” employees could add a “lawyer in [the] ‘to’ field,” “mark ‘Attorney/Client Privileged,’” and “ask the lawyer a question.” Pls.’ Mot. to Sanction Google & Compel Disclosure of Docs. Unjustifiably Claimed by Google as Att’y-Client Privileged, ECF No. 317, Ex. 1, ECF No. 317-4, at 363.

Google employees assiduously followed that advice. UPTB at 78–79 (collecting examples). As a result, Google’s outside counsel in this case initially withheld tens of thousands records on the grounds of privilege, which ultimately were re-reviewed, deemed not privileged, and produced to Plaintiffs. *See* Jt. Status Report, ECF No. 361, at 20–23. This creation of faux privileged materials, Plaintiffs contend, “demonstrates that Google intended to harm competition through its contracting practices and its supposed procompetitive justifications were simply pretext.” UPTB at 79.

In addition to these two practices, Plaintiffs also point out that, for years, Google has directed its employees to avoid using certain antitrust buzzwords in their communications. UPFOF ¶¶ 1225–1226. For example, in March 2011, Google prepared a presentation titled, “Antitrust Basics for Search Team,” which directed employees to “[a]void references to ‘markets,’ or ‘market share’ or ‘dominance,’” “[a]void discussions of ‘scale’ and ‘network effects,’” and “[a]void metaphors involving wars or sports, winning or losing.” UPX1066 at 880. Eight years later, Google still was telling employees not to “define markets and estimate shares” and to “[a]ssume every document you generate . . . will be seen by regulators.” UPX2091 at 584.

A. The Court Need Not Make a Finding of Anticompetitive Intent.

Plaintiffs seek a finding of “anticompetitive intent,” but the court need not make one. UPTB at 75–76. A finding of anticompetitive intent is not an element of a Section 2 violation.

See Microsoft, 253 F.3d at 59 (stating that in determining whether conduct is deemed exclusionary “our focus is upon the effect of that conduct, not upon the intent behind it”). “Evidence of intent behind the conduct of a monopolist is relevant only to the extent it helps [a court] understand the likely effect of the monopolist’s conduct.” *Id.* (citation omitted). Given that the court already has concluded that Google’s exclusive dealing agreements have anticompetitive effects in two relevant markets, *supra* Parts V & VI, it is unnecessary to consider intent evidence to further “understand” that conduct.

Still, the court is taken aback by the lengths to which Google goes to avoid creating a paper trail for regulators and litigants. It is no wonder then that this case has lacked the kind of nakedly anticompetitive communications seen in *Microsoft* and other Section 2 cases. *See, e.g., Microsoft*, 253 F.3d at 73 (stating that Microsoft could “use Office as a club” to coerce Apple to adopt Internet Explorer); *McWane*, 783 F.3d at 840 (citing evidence that left “little doubt” that the defendant’s program was meant to prevent its rival from “any critical mass market”); *Dentsply*, 399 F.3d at 190 (referencing “clear expressions of a plan to maintain monopolistic power”). Google clearly took to heart the lessons from these cases. It trained its employees, rather effectively, not to create “bad” evidence. Ultimately, it does not matter. Section 2 liability does not rise or fall on whether there is “smoking gun” proof of anticompetitive intent. AREEDA ¶ 1506 (discussing the role of intent evidence in Sherman Act cases).

B. The Court Declines to Impose Sanctions.

On the request for sanctions, the court declines to impose them. Not because Google’s failure to preserve chat messages might not warrant them. But because the sanctions Plaintiffs request do not move the needle on the court’s assessment of Google’s liability. UPTB at 75–76 (requesting evidentiary sanctions such as “a presumption that deleted chats were unfavorable to

Google”; “a presumption that Google’s proffered justifications are pretextual”; and “a presumption that Google intended to maintain its monopoly”). An adverse evidentiary inference would not change the court’s finding that Google lacks monopoly power in the market for search ads or that there is no relevant market for general search ads. Nor would it change the court’s legal conclusion that Google had no duty to deal with Microsoft on its preferred terms as to SA360, nor its finding on the absence of anticompetitive effects, as Google is not likely to have possessed such evidence. *See* AREEDA ¶ 1506 (“[I]n the absence of . . . provable anticompetitive effects, an evil mental state will not serve to condemn it.”). The court therefore declines to sanction Google for its failure to preserve its employees’ chat messages.¹⁸

The court’s decision not to sanction Google should not be understood as condoning Google’s failure to preserve chat evidence. Any company that puts the onus on its employees to identify and preserve relevant evidence does so at its own peril. Google avoided sanctions in this case. It may not be so lucky in the next one.

CONCLUSION

For the foregoing reasons, the court concludes that Google has violated Section 2 of the Sherman Act by maintaining its monopoly in two product markets in the United States—general search services and general text advertising—through its exclusive distribution agreements. The court thus holds that Google is liable as to Counts I and III of the U.S. Plaintiffs’ Amended Complaint, Am. Compl. ¶¶ 173–179, 187–193. To the extent that Counts I and III of the Plaintiff States’ Complaint are co-extensive with the U.S. Plaintiffs’ Counts I and III, the court finds Google liable. *Colorado* Compl. ¶¶ 212–218, 226–232.

¹⁸ For this same reason, the court denies as moot Plaintiffs’ Motion to Take Judicial Notice of Certain Publicly Available Exhibits, ECF No. 843.

The court enters judgment for Google as to Count II of both the U.S. Plaintiffs' Amended Complaint and the Plaintiff States' Complaint, Am. Compl. ¶¶ 180–186; *Colorado* Compl. ¶¶ 219–225, as well as the remainder of Counts I and III of the Plaintiff States' Complaint.

Dated: August 5, 2024


Amit P. Mehta
United States District Court

APPENDIX

I. TRIAL WITNESSES

A. Fact Witnesses

Name	Title	Affiliation	Called By
Alex Austin	<i>former</i> Chief Executive Officer & Founder	Branch	Plaintiffs
Neil Barrett-Bowen	Director, Business Development	Microsoft	Plaintiff States, Google
Chris Barton	<i>former</i> Strategic Partner & Development Manager	Google	U.S. Plaintiffs
Ryan Booth	Senior Manager, Paid Search	Home Depot	Plaintiffs
Joan Braddi	Partner Advisor, Global Partnerships	Google	U.S. Plaintiffs, Google
Patrick Chang	<i>former</i> Director	Samsung NEXT	U.S. Plaintiffs
Eddy Cue	Senior Vice President, Services	Apple	U.S. Plaintiffs, Google
Arjan Dijk	Senior Vice President & Chief Marketing Officer	Booking.com	Plaintiff States
Jerry Dischler	Vice President & General Manager, Ads Team	Google	U.S. Plaintiffs, Google
Jennifer Fitzpatrick	Senior Vice President, Core System and Experiences	Google	Plaintiff States, Google
John Giannandrea	Chief of Machine Learning and AI Strategy	Apple	U.S. Plaintiffs, Google
Ben Gomes	<i>former</i> Senior Vice President, Search	Google	Plaintiffs, Google
Brian Higgins	<i>former</i> Senior Vice President, Device Marketing & Product	Verizon	U.S. Plaintiffs, Google
Richard Holden	Vice President, Product Management for Chrome	Google	Plaintiff States, Google
Jeffrey Hurst	<i>former</i> Chief Operating Officer	Expedia Group	Plaintiff States
Adam Juda	Vice President, Project Management	Google	U.S. Plaintiffs, Google

Anna Kartasheva	Senior Manager, Android Sales and Operations Strategy	Google	U.S. Plaintiffs
Jim Kolotouros	Vice President, Android Platform Partnerships	Google	U.S. Plaintiffs, Google
Ryan Krueger	Product Manager, Search Ads 360 Bidding & Planning Tools	Google	Plaintiff States
Eric Lehman	<i>former</i> Distinguished Software Engineer	Google	U.S. Plaintiffs
Tracy-Ann Lim	Managing Director, Chief Media Officer	JPMorgan Chase	U.S. Plaintiffs
Joshua Lowcock	Global Chief Media Officer	Universal McCann, Interpublic Group	Plaintiffs
Adrienne McCallister	Vice President, Global Partnerships	Google	U.S. Plaintiffs, Google
Satya Nadella	Chief Executive Officer	Microsoft	U.S. Plaintiffs, Google
Pandu Nayak	Vice President, Search	Google	Google
Mikhail Parakhin	<i>former</i> Chief Executive Officer of Advertising & Web Services	Microsoft	Plaintiffs
Sundar Pichai	Chief Executive Officer	Google & Alphabet	Google
Prabhakar Raghavan	Senior Vice President, Knowledge and Information Products	Google	U.S. Plaintiffs, Google
Sridhar Ramaswamy	Co-Founder & Chief Executive Officer	Neeva	Plaintiffs
Elizabeth Harmon Reid	Vice President, Search	Google	Google
Jamie Rosenberg	Part-Time Advisor	Google	Google
Mike Roszak	Vice President, Finance	Google	U.S. Plaintiffs
Jonathan Tinter	Corporate Vice President, Business Development	Microsoft	Plaintiffs, Google
Paul Vallez	Executive Vice President, Business Development & Partnerships	Skai	Plaintiff States, Google
Amit Varia	Director of Product Management	Google	Plaintiff States
Hal Varian	Chief Economist	Google	Plaintiffs

Gabriel Weinberg	Chief Executive Officer & Founder	DuckDuckGo	U.S. Plaintiffs
Jonathan Yoo	<i>former</i> Finance Manager, Android Partnerships	Google	U.S. Plaintiffs

B. Expert Witnesses

Name	Title	Affiliation	Called By
Wilfred Amaldoss	Thomas A Finch Jr. Endowment Professor of Business Administration & Professor of Marketing	Duke University Fuqua School of Business	Plaintiff States
Jonathan Baker	<i>former</i> Law Professor	American University Washington College of Law	Plaintiff States
Edward Fox	Professor of Computer Science	Virginia Polytechnic Institute & State University	Google
Mark Israel	President & Member of the Global Executive Committee	Compass Lexecon	Google
Kinshuk Jerath	Arthur F. Burns Professor of Free & Competitive Enterprise & Advisor in Digital Marketing	Columbia Business School, Media and Technology Program	U.S. Plaintiffs
Kevin Murphy	George J. Stigler Distinguished Service Professor Emeritus in Economics	University of Chicago Booth School of Business and the Law School	Google
Douglas Oard	Professor	University of Maryland College of Informational Studies & Institute for Advanced Computer Studies	U.S. Plaintiffs
Antonio Rangel	Bing Professor of Neuroscience, Behavioral Biology & Economics	California Institute of Technology	U.S. Plaintiffs
Michael Whinston	Sloan Fellows Professor of Management and Professor of Applied Economics	Massachusetts Institute of Technology	U.S. Plaintiffs

II. DESIGNATED DEPOSITION TESTIMONY

Name	Title	Affiliation	Called By
Brendan Alberts	Senior Vice President, Head of Search	Dentsu	Plaintiff States, Google
Timothy Baxter	<i>former</i> President, Chief Executive Officer	Samsung	U.S. Plaintiffs, Google
W. Mitchell Baker	Chief Executive Officer	Mozilla	Google
Eric Christensen	Executive Director, Software Product Management & Partner Manager	Motorola	Google
Matt Dacey	Vice President, Marketing and Global Markets	TripAdvisor	Plaintiff States
Alexander Daniels	Founder	Thumbtack	Plaintiff States
Jeffrey Ezell	Vice President, Business Development, Mobility Business Unit	AT&T	U.S. Plaintiffs, Google
Jeffrey Giard	Vice President, Strategic Partnerships & Business Development in Emerging Products Group	T-Mobile	Google
Shirley Health	<i>former</i> Senior Director of Microsoft Advertising API Ecosystem	Microsoft	Plaintiff States
Sundeep Jain	<i>former</i> Vice President, Product Management	Google	Plaintiffs
Mike James	Director, Software Development	Amazon	Plaintiffs, Google
Daniel Levy	<i>former</i> Vice President, Ads & Business Products	Meta	Google
Chris Lien	Chairman & Chief Executive Officer	Marin	Google
Emily Moxley	<i>former</i> Vice President, Search	Google	U.S. Plaintiffs
Ramesh Ramalingam	<i>former</i> Senior Director, Product Management	Yahoo	U.S. Plaintiffs
Debby Soo	Chief Executive Officer	OpenTable	Plaintiff States
Mark Stein	Executive Vice President & Chief Strategy Officer	IAN	Plaintiffs

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Jeremy Stoppelman	Chief Executive Officer	Yelp	Plaintiff States
Brian Utter	General Manager, Advertising	Microsoft	Plaintiff States
Frederick van der Kooi	<i>former</i> Corporate Vice President, Advertising	Microsoft	Plaintiffs

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United States of America and the Honourable Allan Rock, Minister of Justice for Canada *Appellants*

v.

Arye Dynar *Respondent*

INDEXED AS: UNITED STATES OF AMERICA v. DYNAR

File No.: 24997.

1997: January 28; 1997: June 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major J.J.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Extradition — Offences — Money laundering — Attempt — Conspiracy — Fugitive charged in U.S. with attempting to launder money and conspiracy to launder money — Whether fugitive's conduct would have amounted to offence under Canadian law if it had occurred in Canada — Whether conduct would have amounted to criminal attempt or criminal conspiracy under Canadian law — Criminal Code, R.S.C., 1985, c. C-46, ss. 24(1), 462.31(1), 465(1)(c) — Narcotic Control Act, R.S.C., 1985, c. N-1, s. 19.2(1).

Criminal law — Attempt — Conspiracy — Whether impossibility constitutes defence to charge of attempt or conspiracy under Canadian law — Criminal Code, R.S.C., 1985, c. C-46, ss. 24(1), 465(1)(c).

Extradition — Hearing — Right to a fair hearing — Disclosure — Applicable procedural safeguards at extradition hearing.

The U.S. government requested the extradition of D, a Canadian citizen who had been the subject of a failed "sting" operation by the FBI. D had placed a telephone call from Canada to a former associate who was living in Nevada and who had become a confidential informant working for an FBI agent. D had been the subject of investigations in the U.S. into the laundering of substantial amounts of money originating in Nevada. The FBI agent had the informant introduce to D a second confidential informant, who was instructed to ask if D would be willing to launder large sums obtained as a result of

États-Unis d'Amérique et l'honorable Allan Rock, ministre de la Justice du Canada *Appellants*

c.

Arye Dynar *Intimé*

RÉPERTORIÉ: ÉTATS-UNIS D'AMÉRIQUE c. DYNAR

N° du greffe: 24997.

1997: 28 janvier; 1997: 26 juin.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Extradition — Infractions — Recyclage de produits de la criminalité — Tentative — Complot — Fugitif accusé aux É.-U. de tentative de recycler des produits de la criminalité et de complot pour recycler des produits de la criminalité — La conduite du fugitif aurait-elle constitué une infraction en vertu du droit canadien si elle avait eu lieu au Canada? — La conduite aurait-elle constitué une tentative criminelle ou un complot criminel en vertu du droit canadien? — Code criminel, L.R.C. (1985), ch. C-46, art. 24(1), 462.31(1), 465(1)c) — Loi sur les stupéfiants, L.R.C. (1985), ch. N-1, art. 19.2(1).

Droit criminel — Tentative — Complot — L'impossibilité constitue-t-elle un moyen de défense opposable à une accusation de tentative ou de complot en vertu du droit canadien? — Code criminel, L.R.C. (1985), ch. C-46, art. 24(1), 465(1)c).

Extradition — Audience — Droit à un procès équitable — Divulgence — Garanties procédurales applicables à une audience d'extradition.

Le gouvernement des États-Unis a demandé l'extradition de D, un citoyen canadien qui a fait l'objet d'une opération d'infiltration menée sans succès par le FBI. D avait fait un appel téléphonique, du Canada, à un ancien associé qui vivait au Nevada et qui était devenu un informateur d'un agent du FBI. D avait été l'objet d'enquêtes aux États-Unis relativement au recyclage de grosses sommes d'argent provenant du Nevada. L'agent du FBI a demandé à l'informateur de présenter à D un autre informateur, qui devait demander à D s'il accepterait de recycler de grosses sommes provenant d'un trafic

illegal trafficking. When asked, D agreed with alacrity. Numerous conversations between the two men were recorded over the course of some months. It was eventually arranged that an associate of D would go to the U.S. to pick up some money to be laundered, but the FBI aborted the operation just prior to the transfer. D was charged in the U.S. with attempting to launder money and conspiracy to launder money. Following a hearing under the *Extradition Act*, he was committed for extradition. He complained to the Minister of Justice of the lack of disclosure of the Canadian involvement in the investigation, but the Minister refused D's request to reopen the extradition hearing, and ordered his surrender for prosecution in the U.S. The Court of Appeal allowed D's appeal from the committal decision and granted his application for judicial review of the Minister's decision to order his surrender. The major issue raised in this appeal is whether D's conduct would have amounted to an offence under Canadian law if it had occurred in Canada. The issue presented on D's cross-appeal is whether the Canadian authorities violated D's constitutionally guaranteed right to a fair hearing by failing to disclose details of official Canadian involvement in the U.S. investigation of him.

Held: The appeal should be allowed and the cross-appeal dismissed.

(1) *Issue on Appeal*

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: If D had successfully consummated in Canada a scheme like the one he embarked on in the U.S., he would not have been guilty of any completed offence known to the law of Canada, since the conversion of monies that are believed to be but are not in fact the proceeds of crime was not an offence in Canada at the relevant time. There were two statutory provisions under which Canadian authorities might have prosecuted money-laundering schemes like the one that D attempted to consummate, but both required that an accused, if he was to be convicted, should have known that the money he converted was the proceeds of crime. Since the money that the U.S. undercover agents asked D to launder was not in fact the proceeds of crime, D could not possibly have known that it was the proceeds of crime.

illicite. D a accepté la demande avec empressement. De nombreuses conversations entre les deux hommes ont été enregistrées au fil de quelques mois. Il a finalement été convenu qu'un associé de D irait chercher l'argent à recycler aux États-Unis, mais le FBI a interrompu l'opération juste avant la remise de l'argent. D a été accusé aux États-Unis de tentative de recyclage de produits de la criminalité et de complot en vue de recycler des produits de la criminalité. Après une audience tenue en vertu de la *Loi sur l'extradition*, il a été incarcéré en vue de son extradition. Il s'est plaint au ministre de la Justice du fait que la participation canadienne à l'enquête n'avait pas été divulguée, mais le ministre a refusé de reprendre l'audience d'extradition à la demande de D et a ordonné qu'il soit extradé en vue de son procès aux États-Unis. La Cour d'appel a accueilli l'appel de D contre la décision de l'incarcérer ainsi que sa demande de contrôle judiciaire de la décision du ministre d'ordonner son extradition. La principale question soulevée dans le présent pourvoi est de savoir si les agissements de D auraient constitué une infraction en vertu du droit canadien s'ils avaient eu lieu au Canada. Quant au pourvoi incident, la question est de savoir si les autorités canadiennes ont porté atteinte au droit de D à un procès équitable, lequel est garanti par la Constitution, en ne communiquant pas des renseignements concernant la participation officielle du Canada à l'enquête que les É.-U. menaient sur lui.

Arrêt: Le pourvoi est accueilli et le pourvoi incident est rejeté.

(1) *Le pourvoi principal*

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Gonthier, Cory et Iacobucci: Si D avait mis à exécution au Canada, un projet comme celui dans lequel il s'est engagé aux États-Unis, il n'aurait été coupable d'aucune infraction consommée connue en droit canadien puisque le recyclage de sommes d'argent que l'on croit être des produits de la criminalité, mais qui dans les faits n'en sont pas, n'était pas, à l'époque en cause dans le présent pourvoi, une infraction au Canada. Deux dispositions législatives permettaient aux autorités canadiennes de poursuivre les auteurs de projets de recyclage d'argent du type de celui que D a essayé de réaliser, mais, pour que l'accusé puisse être déclaré coupable, l'une et l'autre nécessitaient que celui-ci ait su que l'argent à convertir était le produit de la criminalité. Étant donné que l'argent que les agents d'infiltration américains ont demandé à D de recycler n'était pas réellement le produit de la criminalité, D ne pouvait savoir qu'il s'agissait du produit de la criminalité.

However, the steps D took toward the realization of his plan to launder money would have amounted to a criminal attempt under Canadian law if the conduct in question had taken place entirely within Canada. The crime of attempt under s. 24(1) of the *Criminal Code* consists of an intent to commit the completed offence together with some act more than merely preparatory taken in furtherance of the attempt. D's argument that Parliament did not intend by s. 24(1) to criminalize all attempts to do the impossible, but only those attempts that the common law has classified as "factually impossible", does not help him, because the conventional distinction between factual and legal impossibility is not tenable. The only relevant distinction for purposes of s. 24(1) is between imaginary crimes and attempts to do the factually impossible. Only attempts to commit imaginary crimes fall outside the scope of the provision. Because what D attempted to do falls squarely into the category of the factually impossible — he attempted to commit crimes known to law and was thwarted only by chance — it was a criminal attempt within the meaning of s. 24(1).

Even though D did not "know" that the money he attempted to convert was the proceeds of crime, he nevertheless had the requisite *mens rea* for a crime. Knowledge is not the *mens rea* of the money-laundering offences. Knowledge has two components — truth and belief — and of these, only belief is mental or subjective. Belief is the *mens rea* of the money-laundering offences. That the belief be true is one of the attendant circumstances that is required if the *actus reus* is to be completed. The absence of an attendant circumstance is irrelevant from the point of view of the law of attempt.

D's conduct could also justify his surrender on the conspiracy charge. The issue is not whether D's conduct can support a conviction for conspiracy, but only whether a *prima facie* case has been demonstrated that would justify his committal for trial if his conduct had taken place in Canada. For there to be a criminal conspiracy, there must be an intention to agree, the completion of an agreement, and a common design to do something unlawful. Conspiracy is a more "preliminary" crime than attempt, since the offence is considered to be complete before any acts are taken that go beyond mere preparation to put the common design into effect. Impossibility is not a defence to conspiracy. Conspira-

Cependant, les efforts déployés par D en vue de la réalisation de son projet de recyclage d'argent auraient cependant constitué une tentative et un complot criminels en droit canadien si tous les agissements en question avaient eu lieu au Canada. En vertu du par. 24(1) du *Code criminel*, le crime de tentative consiste en l'intention de commettre l'infraction, constituée dans tous ses éléments, jointe à l'accomplissement d'actes dépassant le stade des actes simplement préparatoires à l'infraction. L'argument de D selon lequel le législateur n'avait pas l'intention, par l'adoption du par. 24(1), d'incriminer toutes les tentatives d'infractions impossibles, mais seulement celles que la common law a rangées dans la catégorie des «impossibilités de fait» ne lui est d'aucun secours puisque la distinction conventionnelle entre l'impossibilité de fait et l'impossibilité de droit est indéfendable. La seule distinction utile pour l'application du par. 24(1) est celle qui différencie le crime imaginaire de la tentative d'infraction impossible en fait. Seule la tentative de crime imaginaire échappe à l'application de la disposition. Comme ce que D a tenté de faire relève carrément de l'impossibilité de fait — il a tenté de commettre des crimes connus en droit et n'a été déjoué que par le hasard — il s'agissait d'une tentative criminelle au sens du par. 24(1).

Même si D ne «savait» pas que l'argent qu'il a tenté de convertir était le produit de la criminalité, il avait néanmoins la *mens rea* nécessaire pour commettre un crime. La connaissance n'est pas la *mens rea* des infractions de recyclage des produits de la criminalité. La connaissance a deux composantes — la vérité et la croyance — et de ces deux éléments, seule la croyance est subjective ou psychologique. La croyance est la *mens rea* des infractions de recyclage des produits de la criminalité. La conformité avec la réalité de la croyance est l'une des circonstances concomitantes exigées pour que l'*actus reus* soit exécuté. L'absence d'une circonstance concomitante n'est pas pertinente du point de vue des règles de droit applicables à la tentative d'infraction.

La conduite de D pourrait également justifier son extradition relativement à l'accusation de complot portée contre lui. Il ne s'agit pas de déterminer si les agissements de D peuvent fonder une déclaration de culpabilité à l'égard de l'accusation de complot, mais seulement si une preuve *prima facie* a été produite pour justifier son incarcération en vue d'un procès si les agissements qu'on lui reproche avaient eu lieu au Canada. Pour qu'il y ait complot criminel, l'intention de conclure une entente, la conclusion d'une entente et l'existence d'un projet commun de faire quelque chose d'illégal sont essentiels. Le complot est un crime plus «préliminaire» que la tentative, car cette infraction est considé-

tors should not escape liability because, owing to matters entirely outside their control, they are mistaken with regard to an attendant circumstance that must exist for their plan to be successful. From a purely conceptual perspective, the distinction between factual and legal impossibility is as unsound in the law of conspiracy as it is in the law of attempt. Cases of so-called “legal” impossibility turn out to be cases of factual impossibility and the distinction collapses, except in cases of “imaginary crimes”. Furthermore, like attempt, conspiracy is a crime of intention. Since the offence of conspiracy only requires an intention to commit the substantive offence, and not the commission of the offence itself, it does not matter that, from an objective point of view, commission of the offence may be impossible.

Per Sopinka, McLachlin and Major JJ.: The intention to do an act coupled with some activity thought to be criminal is not sufficient to find the accused guilty of an attempt when that which was attempted was not an offence under the *Criminal Code*. There must be an underlying offence capable of being committed before the elements of the attempt offence can be considered. The substantive offence of money laundering as it stands cannot be committed without the actual proceeds of crime being present. The accused cannot “know” that what he is laundering is the proceeds of crime unless the proceeds are in fact the proceeds of crime. Since D did not have knowledge, the *mens rea* of the offence, he cannot be said to have attempted it. Moreover, it does not make sense to say that D attempted to launder the proceeds of crime, when he only attempted to launder what the FBI provided. There was no offence that could be committed; the laundering of legal proceeds is an imaginary crime.

The offence of conspiracy to launder money can be made out on these facts. The gravamen of the offence is the agreement to commit a crime, and it was open to the extradition judge to conclude that there was sufficient evidence of an agreement between D and his associate to commit the offence of money laundering. The conspiracy charge was based on the agreement to commit the general offence of money laundering, whereas the attempt charge was restricted to the attempted launder-

rée consommée avant l’accomplissement de tout acte qui dépasserait le stade des actes simplement préparatoires à la mise à exécution du projet commun. L’impossibilité ne peut pas être opposée à une accusation de complot. Les conspirateurs ne devraient pas être exonérés parce que, pour des raisons totalement indépendantes de leur volonté, ils se sont trompés quant à l’existence d’une circonstance dont dépend le succès de leur entreprise. Sur le plan purement conceptuel, la distinction entre l’impossibilité de fait et l’impossibilité de droit n’est pas mieux fondée parce qu’il s’agit d’un complot plutôt que d’une tentative. La soi-disant impossibilité «de droit» est en réalité un cas d’impossibilité de fait et cette distinction ne vaut plus sauf dans les cas de «crimes imaginaires». En outre, à l’instar de la tentative, le complot constitue un crime d’intention. Comme l’infraction de complot exige seulement l’intention de commettre l’infraction matérielle précise, et non la perpétration de l’infraction elle-même, il est indifférent, du point de vue objectif, que la perpétration de l’infraction puisse être impossible.

Les juges Sopinka, McLachlin et Major: L’intention jointe à des actes tenus pour criminels ne suffit pas pour conclure que l’accusé est coupable de tentative, alors que ce qu’il a tenté de faire ne constitue pas une infraction visée par le *Code criminel*. Il doit y avoir une infraction sous-jacente susceptible d’être commise, avant que l’on puisse examiner les éléments de l’infraction de tentative. L’infraction de recyclage des produits de la criminalité, dans sa formulation actuelle, ne peut pas être perpétrée sans l’existence de produits de la criminalité. L’accusé ne peut pas “savoir” que ce qu’il recycle est le produit de la criminalité à moins que ce produit ne soit effectivement le produit de la criminalité. Étant donné que D n’avait pas la connaissance, *mens rea* de l’infraction, on ne peut dire qu’il a tenté de la commettre. Qui plus est, il n’est pas logique de dire que D a tenté de recycler des produits de la criminalité, alors qu’il a seulement tenté de recycler ce que le FBI devait lui fournir. Aucune infraction ne pouvait être commise; le recyclage des produits d’une activité licite est un crime imaginaire.

Les faits de l’espèce permettent d’établir l’infraction de complot en vue de recycler des produits de la criminalité. Le fondement de l’infraction est l’entente en vue de commettre un crime et il était loisible au juge d’extradition de conclure qu’il y avait suffisamment d’éléments de preuve d’une entente entre D et son associé en vue de commettre l’infraction de recyclage des produits de la criminalité. L’accusation de complot était fondée sur l’entente de commettre l’infraction générale de recy-

ing of the money that was to have been provided by the authorities in the sting operation.

(2) *Issue on Cross-Appeal*

A new hearing is not warranted here. The role of the extradition judge is a modest one, limited to the determination of whether or not the evidence is sufficient to justify committing the fugitive for surrender. The extradition hearing is intended to be an expedited process, designed to keep expenses to a minimum and ensure prompt compliance with Canada's international obligations. Even though the hearing must be conducted in accordance with the principles of fundamental justice, this does not automatically entitle the fugitive to the highest possible level of disclosure. The principles of fundamental justice guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms* vary according to the context of the proceedings in which they are raised. Procedures at the extradition hearing are of necessity less complex and extensive than those in domestic preliminary inquiries or trials. Since D received adequate disclosure of the materials that were being relied upon to establish the *prima facie* case against him, no additional disclosure was required. No justiciable *Charter* issue arises since the evidence provided by the requesting state contains sufficient information to conclude that the evidence was gathered entirely in the U.S., by American officials, for an American trial.

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By Cory and Iacobucci JJ.

Not followed: *Director of Public Prosecutions v. Nock*, [1978] 2 All E.R. 654; **referred to:** *McVey (Re); McVey v. United States of America*, [1992] 3 S.C.R. 475; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Vogelle and Reid*, [1970] 3 C.C.C. 171; *R. v. Stevens* (1995), 96 C.C.C. (3d) 238; *Irwin v. The Queen*, [1968] S.C.R. 462, aff'g [1968] 2 C.C.C. 50; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; *R. v. Cline* (1956), 115 C.C.C. 18; *R. v. Ancio*, [1984] 1 S.C.R. 225; *R. v. Deutsch*, [1986] 2 S.C.R. 2; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Donnelly*, [1970] N.Z.L.R. 980; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. O'Brien*, [1954] S.C.R. 666; *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306; *Papalia v. The Queen*, [1979] 2 S.C.R. 256; *Guimond v. The Queen*,

clage des produits de la criminalité, alors que l'accusation de tentative se limitait à la tentative de recycler l'argent qui aurait été fourni par les autorités lors d'une opération d'infiltration.

(2) *Le pourvoi incident*

Une nouvelle audience n'est pas justifiée en l'espèce. Le rôle du juge d'extradition est modeste car limité à déterminer si la preuve est suffisante ou non pour justifier l'incarcération du fugitif en vue de son extradition. L'audience d'extradition doit être un processus accéléré, conçu pour maintenir les dépenses à leur niveau le plus bas et pour garantir l'exécution rapide des obligations internationales du Canada. L'audience doit respecter les principes de justice fondamentale, mais il ne s'ensuit pas que le fugitif a nécessairement droit à la communication la plus complète possible. Les principes de justice fondamentale garantis par l'art. 7 de la *Charte canadienne des droits et libertés* varient selon le contexte de la procédure dans le cadre de laquelle ils sont soulevés. Les règles régissant la procédure dans une audience d'extradition sont nécessairement moins complexes et moins détaillées que dans une enquête préliminaire ou un procès en droit interne. Puisque D a obtenu une communication complète des éléments invoqués à l'appui de la preuve *prima facie* présentée contre lui, aucune communication additionnelle n'était nécessaire. L'instance ne soulève aucune question ayant trait à la *Charte* susceptible d'être tranchée par les tribunaux puisque la preuve fournie par l'État requérant comportait suffisamment de renseignements pour mener à la conclusion que la preuve a été recueillie entièrement aux États-Unis, par des fonctionnaires américains, en vue d'un procès devant se dérouler aux États-Unis.

Jurisprudence

Citée par les juges Cory et Iacobucci

Arrêt non suivi: *Director of Public Prosecutions v. Nock*, [1978] 2 All E.R. 654; **arrêts mentionnés:** *McVey (Re); McVey c. États-Unis d'Amérique*, [1992] 3 R.C.S. 475; *R. c. Zundel*, [1992] 2 R.C.S. 731; *R. c. Vogelle and Reid*, [1970] 3 C.C.C. 171; *R. c. Stevens* (1995), 96 C.C.C. (3d) 238; *Irwin c. The Queen*, [1968] R.C.S. 462, conf. [1968] 2 C.C.C. 50; *Gravel c. Cité de St-Léonard*, [1978] 1 R.C.S. 660; *R. c. Cline* (1956), 115 C.C.C. 18; *R. c. Ancio*, [1984] 1 R.C.S. 225; *R. c. Deutsch*, [1986] 2 R.C.S. 2; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. Donnelly*, [1970] N.Z.L.R. 980; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *R. c. O'Brien*, [1954] R.C.S. 666; *Mulcahy c. The Queen* (1868), L.R. 3 H.L. 306; *Papalia c. La Reine*, [1979] 2 R.C.S. 256;

[1979] 1 S.C.R. 960; *Haughton v. Smith*, [1973] 3 All E.R. 1109; *R. v. Shivpuri*, [1986] 2 All E.R. 334; *R. v. Atkinson*, [1987] O.J. No. 1930 (QL); *R. v. Sew Hoy*, [1994] 1 N.Z.L.R. 257; *R. v. Chow Sik Wah*, [1964] 1 C.C.C. 313; *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403; *R. v. Whitchurch* (1890), 24 Q.B.D. 420; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States of America v. Lépine*, [1994] 1 S.C.R. 286; *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Philippines (Republic) v. Pacificador* (1993), 14 O.R. (3d) 321; *United States of America v. Whitley* (1994), 94 C.C.C. (3d) 99, aff'd [1996] 1 S.C.R. 467; *R. v. Terry*, [1996] 2 S.C.R. 207; *R. v. Harrer*, [1995] 3 S.C.R. 562.

By Major J.

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Extradition Act, R.S.C., 1985, c. E-23, ss. 3, 9(3) [ad. 1992, c. 13, s. 2], 13, 14, 15, 16, 18(1)(b), (2), 19(b).
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Citée par le juge Major

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (1995), 25 O.R. (3d) 559, 85 O.A.C. 9, 101 C.C.C. (3d) 271, allowing the respondent’s appeal from a decision of the Ontario Court (General Division), [1994] O.J. No. 3940 (QL), committing him for extradition and his application for judicial review of the Minister of Justice’s decision to order his surrender. Appeal allowed and cross-appeal dismissed.

Robert W. Hubbard and Croft Michaelson, for the appellants.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d’appel de l’Ontario (1995), 25 O.R. (3d) 559, 85 O.A.C. 9, 101 C.C.C. (3d) 271, qui a accueilli l’appel interjeté par l’intimé contre une décision de la Cour de l’Ontario (Division générale), [1994] O.J. No. 3940 (QL), ordonnant son incarcération en vue de son extradition, ainsi que sa demande de contrôle judiciaire de la décision du ministre de la Justice d’ordonner son extradition. Pourvoi accueilli et pourvoi incident rejeté.

Robert W. Hubbard et Croft Michaelson, pour les appelants.

Frank Addario, for the respondent.

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

CORY AND IACOBUCCI JJ. — The issue in this appeal is whether the respondent's conduct in the United States would constitute a crime if carried out in this country, thereby meeting the requirement of "double criminality" which is the precondition for the surrender of a Canadian fugitive for trial in a foreign jurisdiction. This issue requires the Court to consider the scope of the liability for attempted offences and conspiracy under Canadian criminal law, specifically, whether impossibility constitutes a defence to a charge of attempt or conspiracy in Canada.

The issue to be determined on the respondent's cross-appeal is whether, in order to receive a fair committal hearing, he was entitled to full disclosure of all materials gathered in the course of the investigation which are in the possession of the Requesting State or the Canadian authorities. Specifically, the Court is asked to decide if he was entitled to receive disclosure of information regarding the involvement of the Canadian authorities in the investigation with a view to establishing a violation of his rights under the *Canadian Charter of Rights and Freedoms*.

I. Facts

Arye Dynar, a Canadian citizen, was the subject of a failed "sting" operation attempted by the Federal Bureau of Investigation in the United States. Mr. Dynar was indicted together with Maurice Cohen, who is also a Canadian citizen, in the United States District Court of Nevada. The United States indictment charged both Mr. Dynar and Mr. Cohen with one count of attempting to launder money in violation of Title 18, *United States Code*, § 1956(a)(3), and one count of conspiracy to violate Title 18, *United States Code*, § 1956(a)(3), contrary to Title 18, *United States Code*, § 371. The Government of the United States

Frank Addario, pour l'intimé.

Version française du jugement du juge en chef Lamer et des juges La Forest, L'Heureux-Dubé, Gonthier, Cory et Iacobucci rendu par

LES JUGES CORY ET IACOBUCCI — La question soulevée par le présent pourvoi est de savoir si la conduite de l'intimé aux États-Unis constituerait un crime si elle avait eu lieu au Canada, de manière à satisfaire à l'exigence de la «double incrimination» qui est une condition préalable à l'extradition d'un fugitif canadien en vue de son procès à l'étranger. La Cour doit examiner l'étendue de la responsabilité en matière de tentative et de complot en droit pénal canadien et elle doit décider plus particulièrement si l'impossibilité constitue un moyen de défense contre une accusation de tentative ou de complot au Canada.

Le pourvoi incident de l'intimé soulève la question de savoir si, pour garantir le caractère équitable de l'audience tenue relativement à son incarcération, il fallait lui reconnaître le droit à la communication de tous les éléments recueillis pendant l'enquête et en la possession de l'État requérant ou des autorités canadiennes. Plus précisément, on demande à la Cour de décider s'il avait droit à la communication de l'information relative à la participation des autorités canadiennes à l'enquête afin d'établir qu'il y a eu violation de ses droits garantis par la *Charte canadienne des droits et libertés*.

I. Les faits

Le citoyen canadien Arye Dynar a été l'objet d'une opération d'infiltration menée sans succès par un agent du Federal Bureau of Investigation des États-Unis. M. Dynar a été mis en accusation avec Maurice Cohen, également citoyen canadien, devant la cour de district des États-Unis du Nevada. L'acte d'accusation américain comportait, à la fois contre M. Dynar et contre M. Cohen, un chef de tentative de recyclage des produits de la criminalité en contravention du par. 1956(a)(3) du titre 18 du *United States Code*, et un chef de complot en vue d'enfreindre le par. 1956(a)(3) du titre 18 du *United States Code* en contravention de

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requested their extradition by Diplomatic Note dated November 30, 1992. This appeal relates to the request for the extradition of Mr. Dynar.

l'art. 371 du titre 18 du *United States Code*. Le gouvernement des États-Unis a demandé leur extradition par note diplomatique en date du 30 novembre 1992. Le présent pourvoi se rapporte à la demande présentée pour l'extradition de M. Dynar.

4 The events that formed the basis of the indictment began with a telephone call placed on January 2, 1990, from Canada, by Mr. Dynar to a former associate, Lucky Simone, who was living in Nevada. The call was apparently made to seek investors for a business operation in the United States. Lucky Simone had, unbeknownst to Mr. Dynar, become a confidential informant working for FBI agent William Matthews. He informed Agent Matthews of Mr. Dynar's call, and Agent Matthews requested that Mr. Simone return the call. Mr. Simone gave his consent for Agent Matthews to record the conversation.

Les événements à l'origine de la mise en accusation ont débuté par l'appel téléphonique que M. Dynar a fait le 2 janvier 1990, du Canada, à Lucky Simone, un ancien associé qui vivait au Nevada. M. Dynar était apparemment à la recherche d'investisseurs pour une opération commerciale aux États-Unis. Lucky Simone était devenu, à l'insu de M. Dynar, informateur de l'agent William Matthews du FBI. Mis au courant de l'appel de M. Dynar, l'agent Matthews a demandé à M. Simone de rappeler M. Dynar. M. Simone a consenti à ce que l'agent Matthews enregistre la conversation.

5 Affidavit evidence filed by the Requesting State indicates that, during the 1980s, Mr. Dynar was the subject of investigations in the United States pertaining to the laundering of substantial amounts of money originating in the State of Nevada. Agent Matthews' involvement in the investigation of Mr. Dynar's activities began in 1988. When Mr. Dynar made contact with Lucky Simone in 1990, Agent Matthews deposed that he decided to determine whether or not Mr. Dynar was still involved in laundering money which was the proceeds of crime. He had Mr. Simone introduce a second confidential informant, known as "Anthony", to Mr. Dynar. Anthony was instructed to ask if Mr. Dynar would be willing to launder large sums obtained as a result of illegal trafficking. When asked, Mr. Dynar agreed with alacrity to launder money for Anthony.

Selon la preuve par affidavit présentée par l'État requérant, au cours des années 80, M. Dynar avait été l'objet d'enquêtes aux États-Unis relativement au recyclage de grosses sommes d'argent provenant du Nevada. La participation de l'agent Matthews à l'enquête sur les activités de M. Dynar a débuté en 1988. L'agent Matthews a témoigné que, lorsque M. Dynar a pris contact avec Lucky Simone en 1990, il a décidé de chercher à savoir si M. Dynar était toujours mêlé au recyclage des produits de la criminalité. Il a demandé à M. Simone de présenter à M. Dynar un autre informateur appelé «Anthony». Anthony devait demander à M. Dynar s'il accepterait de recycler de grosses sommes provenant d'un trafic illicite. M. Dynar a accepté avec empressement la demande d'Anthony.

6 A great many conversations between the two men were recorded over the course of some months. On all of these occasions, Anthony was in Las Vegas, Nevada and Mr. Dynar was in Canada. Eventually, Mr. Dynar and Anthony arranged an initial meeting. The meeting was purportedly to allow Anthony to give money to Mr. Dynar for laundering as a first step towards developing a relationship in which Mr. Dynar would regularly

Un très grand nombre de conversations entre les deux hommes ont été enregistrées au fil de quelques mois. À chaque fois, Anthony était à Las Vegas, au Nevada, et M. Dynar était au Canada. M. Dynar et Anthony ont finalement convenu d'une première rencontre. Elle devait permettre à Anthony de confier l'argent à recycler à M. Dynar, et amorcer une collaboration dans le cadre de laquelle M. Dynar devait recycler régulièrement de

launder money for him. During several of the conversations, it was made clear that the money to be laundered was “drug money”. Mr. Dynar insisted more than once that the amounts had to be large in order to make his efforts worthwhile. The conversations also disclosed that Mr. Dynar had an associate named “Moe”, who was subsequently identified as Maurice Cohen. Agent Matthews recorded all of the conversations in Las Vegas pursuant to the applicable law of the United States, which only requires the consent of one party for the lawful interception of the conversation. Special Agent Charles Pine of the Internal Revenue Service (IRS) was able to identify the voice of Maurice Cohen in the background of several of the conversations.

The initial plan of the American authorities was to set up the transfer of funds to Mr. Dynar in the United States. However, Mr. Dynar believed that he was the subject of a sealed indictment in the United States charging him with laundering very large sums of money and that if he travelled to that country, he would be arrested. It was accordingly agreed that Mr. Dynar’s associate, Maurice Cohen, would meet Anthony’s associate in Buffalo. Mr. Cohen was to take the money to Toronto where it would be laundered by Mr. Dynar. It would then be taken back to Buffalo by Mr. Cohen on the following day, after a commission for Mr. Dynar had been deducted.

In Buffalo, Mr. Cohen met with Special Agent Dennis McCarthy of the IRS, who was posing as Anthony’s associate. The conversations that took place between them in preparation for the transfer of funds were recorded by Agent McCarthy. They contain several statements to the effect that Mr. Cohen was working for Mr. Dynar, as well as some explanations of the logistics of the laundering scheme. In the end, however, the money was not transferred to Mr. Cohen. The FBI aborted the operation by pretending to arrest Agent McCarthy just prior to the transfer of the money. Mr. Cohen was allowed to return to Canada.

A committal hearing under s. 13 of the *Extradition Act*, R.S.C., 1985, c. E-23, was held before Keenan J. of the Ontario Court (General Division).

l’argent pour Anthony. Au cours de plusieurs de ces conversations, il a été clairement dit que l’argent à recycler provenait du trafic de stupéfiants. M. Dynar a insisté plus d’une fois pour que ce soit de grosses sommes afin que cela en vaille la peine. Les conversations ont aussi révélé que M. Dynar avait un associé appelé «Moe», qui a par la suite été identifié comme étant Maurice Cohen. L’agent Matthews a enregistré toutes les conversations à Las Vegas conformément aux règles de droit applicables aux États-Unis où le consentement d’un seul interlocuteur suffit pour que l’interception soit légale. L’agent spécial Charles Pine, de l’Internal Revenue Service (IRS), a pu reconnaître la voix de Maurice Cohen en fond sonore de plusieurs des conversations.

Les autorités américaines avaient d’abord prévu que la remise des fonds à M. Dynar se ferait aux États-Unis. Mais M. Dynar croyait qu’il était l’objet d’un acte d’accusation sous pli scellé aux États-Unis, eu égard au recyclage de très grosses sommes d’argent, et que, s’il se rendait dans ce pays, il serait arrêté. Il a donc été convenu que l’associé de M. Dynar, Maurice Cohen, rencontrerait l’associé d’Anthony à Buffalo. M. Cohen devait apporter l’argent à Toronto, où M. Dynar devait le recycler. L’argent devait ensuite être rapporté à Buffalo par M. Cohen le jour suivant, après déduction de la commission versée à M. Dynar.

À Buffalo, M. Cohen a rencontré l’agent spécial Dennis McCarthy de l’IRS, qui s’est fait passer pour l’associé d’Anthony. Les conversations qui ont eu lieu entre eux en préparation de la remise des fonds ont été enregistrées par l’agent McCarthy. Elles comportent plusieurs affirmations selon lesquelles M. Cohen travaillait pour M. Dynar, de même que des explications sur l’organisation matérielle du recyclage d’argent. Finalement, l’argent n’a pas été remis à M. Cohen. Le FBI a interrompu l’opération en faisant semblant d’arrêter l’agent McCarthy juste avant la remise des fonds. Monsieur Cohen a été autorisé à rentrer au Canada.

L’audience relative à l’incarcération, prévue à l’art. 13 de la *Loi sur l’extradition*, L.R.C. (1985), ch. E-23, a été tenue devant le juge Keenan de la

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In support of the request for extradition of Mr. Dynar and Mr. Cohen, the United States as the Requesting State relied upon affidavits from the investigating officers and transcripts of the recorded telephone conversations. This evidence formed the basis for the decision to commit Mr. Dynar for extradition.

Cour de l'Ontario (Division générale). Au soutien de la demande d'extradition de MM. Dynar et Cohen, les États-Unis, à titre d'État requérant, ont présenté les affidavits des enquêteurs et les transcriptions des enregistrements des conversations téléphoniques. La décision d'incarcérer M. Dynar en vue de son extradition est fondée sur cette preuve.

¹⁰ Keenan J. proceeded on the assumption that there was no involvement by Canadian authorities in the investigation and he was therefore highly critical of the conduct of the United States authorities in carrying out the investigation. It subsequently became clear that the Canadian authorities had indeed been consulted and informed regarding the various stages of the investigation. A memo from a U.S. federal government lawyer received by the Canadian Department of Justice in response to Keenan J.'s decision indicated that a formal cooperative arrangement was in place in which information was exchanged between United States and Canadian authorities regarding Mr. Dynar's activities.

Présumant qu'il n'y avait eu aucune participation des autorités canadiennes à l'enquête, le juge Keenan a réprouvé la conduite de l'enquête par les autorités américaines. Par la suite, il est devenu évident que les autorités canadiennes avaient bien été consultées et informées au sujet des diverses étapes de l'enquête. Une lettre envoyée par un avocat du gouvernement fédéral américain au ministre de la Justice du Canada en réaction à la décision du juge Keenan indique que des mesures de coopération avaient été prises officiellement et avaient permis l'échange d'informations entre les autorités américaines et les autorités canadiennes au sujet des agissements de M. Dynar.

¹¹ Mr. Dynar's counsel complained of the lack of disclosure of the Canadian involvement in the investigation to the Minister of Justice in written submissions that were made prior to the Minister's decision to surrender Mr. Dynar. Mr. Dynar's counsel also attempted on two occasions to obtain full disclosure from the Minister of materials showing the course of dealings between the Canadian and American authorities. This disclosure was refused on both occasions on the basis that the Department of Justice did not possess the requested information, and in any event, that such disclosure was not appropriate in the extradition context. In his submissions to the Minister, Mr. Dynar's counsel also invoked compassionate grounds related to some of Mr. Dynar's health problems, and argued that Mr. Dynar should be prosecuted in Canada. All of these submissions were rejected by the Minister, who refused Mr. Dynar's request to re-open the extradition hearing, and ordered his surrender for prosecution in the United States.

Dans des observations écrites adressées au ministre de la Justice avant qu'il ne décide d'extrader M. Dynar, l'avocat de M. Dynar s'est plaint du fait que la participation canadienne à l'enquête n'avait pas été divulguée. Il a aussi, à deux reprises, tenté d'obtenir du ministre la communication complète des documents rendant compte des rapports entre les autorités canadiennes et les autorités américaines. Dans les deux cas, la communication a été refusée pour le motif que le ministère de la Justice ne possédait pas l'information demandée et que, de toute façon, il n'y avait pas lieu de l'accorder dans le contexte de l'extradition. Dans les observations présentées au ministre, l'avocat de M. Dynar a aussi invoqué des motifs humanitaires liés à certains problèmes de santé de M. Dynar et il a soutenu que M. Dynar devrait être poursuivi au Canada. Toutes ces observations ont été écartées par le ministre, qui a refusé de reprendre l'audience d'extradition à la demande de M. Dynar et a ordonné qu'il soit extradé en vue de son procès aux États-Unis.

Mr. Dynar appealed to the Ontario Court of Appeal from Keenan J.'s committal decision, and sought judicial review of the Minister's decision to order his surrender. Galligan J.A., for a unanimous court, allowed the appeal and the application for judicial review on the basis that the activities of Mr. Dynar would not constitute a criminal offence in Canada, even though they did constitute an offence under the applicable United States law: (1995), 25 O.R. (3d) 559, 85 O.A.C. 9, 101 C.C.C. (3d) 271. Mr. Dynar was therefore discharged.

The Minister of Justice and the United States have appealed Mr. Dynar's discharge and Mr. Dynar has brought a cross-appeal.

II. Applicable Legislation

The relevant statutory provisions are not the United States provisions under which Mr. Dynar has been indicted, but the provisions of the Canadian *Criminal Code*, R.S.C., 1985, c. C-46, and the *Narcotic Control Act*, R.S.C., 1985, c. N-1. It is these enactments which will determine whether the conduct of Mr. Dynar in the United States would constitute offences in this country. See *McVey (Re)*; *McVey v. United States of America*, [1992] 3 S.C.R. 475.

The *Criminal Code* provision that establishes the substantive "money laundering" offence is:

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence or a designated drug offence; or

M. Dynar a formé un appel devant la Cour d'appel de l'Ontario contre la décision du juge Keenan de l'incarcérer, et il a demandé le contrôle judiciaire de la décision du ministre d'ordonner son extradition. Le juge Galligan, au nom de la cour unanime, a accueilli l'appel et la demande de contrôle judiciaire pour le motif que les agissements de M. Dynar ne constitueraient pas une infraction criminelle au Canada, même s'ils étaient incriminés en vertu du droit applicable aux États-Unis: (1995), 25 O.R. (3d) 559, 85 O.A.C. 9, 101 C.C.C. (3d) 271. M. Dynar a donc été libéré.

Le ministre de la Justice et les États-Unis ont interjeté appel de la libération de M. Dynar, et ce dernier a formé un pourvoi incident.

II. Législation applicable

Les dispositions applicables ne sont pas les dispositions américaines en vertu desquelles M. Dynar a été mis en accusation, mais les dispositions du *Code criminel*, L.R.C. (1985), ch. C-46, et de la *Loi sur les stupéfiants*, L.R.C. (1985), ch. N-1. Ce sont ces dispositions qui déterminent si les agissements de M. Dynar aux États-Unis constituaient des infractions au Canada; voir l'arrêt *McVey (Re)*; *McVey c. États-Unis d'Amérique*, [1992] 3 R.C.S. 475.

La disposition du *Code criminel* qui crée l'infraction matérielle précise de «recyclage des produits de la criminalité» est libellée de la façon suivante:

462.31 (1) Est coupable d'une infraction quiconque — de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l'intention de les cacher ou de les convertir sachant qu'ils ont été obtenus ou proviennent, en totalité ou en partie, directement ou indirectement:

a) soit de la perpétration, au Canada, d'une infraction de criminalité organisée ou d'une infraction désignée en matière de drogue;

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(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

b) soit d'un acte ou d'une omission survenu à l'extérieur du Canada qui, au Canada, aurait constitué une infraction de criminalité organisée ou une infraction désignée en matière de drogue.

16 A similar offence is contained in the *Narcotic Control Act*:

La *Loi sur les stupéfiants* prévoit une infraction semblable:

19.2 (1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

19.2 (1) Commet une infraction quiconque — de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l'intention de les cacher ou de les convertir sachant qu'ils ont été obtenus ou proviennent, en totalité ou en partie, directement ou indirectement:

(a) the commission in Canada of an offence under section 4, 5 or 6; or

a) soit de la perpétration, au Canada, d'une infraction prévue aux articles 4, 5 ou 6;

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 4, 5, or 6.

b) soit d'un acte ou d'une omission survenu à l'extérieur du Canada et qui, au Canada, aurait constitué une telle infraction.

17 The relevant provisions of the *Criminal Code* which provide criminal liability for attempt and conspiracy are:

Les dispositions du *Code criminel* relatives à la responsabilité pénale en matière de tentative et de complot sont les suivantes:

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

24. (1) Quiconque, ayant l'intention de commettre une infraction, fait ou omet de faire quelque chose pour arriver à son but est coupable d'une tentative de commettre l'infraction, qu'il fût possible ou non, dans les circonstances, de la commettre.

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

(2) Est une question de droit la question de savoir si un acte ou une omission par une personne qui a l'intention de commettre une infraction est ou n'est pas une simple préparation à la perpétration de l'infraction, et trop lointaine pour constituer une tentative de commettre l'infraction.

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

465. (1) Sauf disposition expressément contraire de la loi, les dispositions suivantes s'appliquent à l'égard des complots:

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable;

c) quiconque complotte avec quelqu'un de commettre un acte criminel que ne vise pas l'alinéa a) ou b) est coupable d'un acte criminel et passible de la même peine que celle dont serait passible, sur déclaration de culpabilité, un prévenu coupable de cette infraction;

Finally, the role of the extradition judge in a committal hearing is provided for under the *Extradition Act*, as amended by S.C. 1992, c. 13. In particular, the following provisions are relevant to this appeal:

9. . . .

(3) For the purposes of the *Constitution Act, 1982*, a judge who is a superior court judge or a county court judge has, with respect to the functions that that judge is required to perform in applying this Act, the same competence that that judge possesses by virtue of being a superior court judge or a county court judge.

13. The fugitive referred to in section 12 shall be brought before a judge, who shall, subject to this Part, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada.

18. (1) The judge shall issue a warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law,

(b) in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to this Part, justify the committal of the fugitive for trial, if the crime had been committed in Canada.

III. Judgments Below

A. *Ontario Court of Justice (General Division)*, [1994] O.J. No. 3940 (QL)

Keenan J. held that the wiretap evidence “if legally admissible, is sufficient evidence upon which a properly instructed jury could find that Dynar and Cohen had agreed to engage in a scheme to launder illicit funds and that Cohen’s meeting with McCarthy in Buffalo was an act in furtherance of that conspiracy” (para. 3). He was also of the view that the conduct of Dynar and Cohen could constitute the offence of attempt to launder proceeds of crime.

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Finalement, la *Loi sur l’extradition*, modifiée par L.C. 1992, ch. 13, détermine le rôle du juge d’extradition à l’audience relative à l’incarcération. Les dispositions suivantes sont particulièrement pertinentes dans le présent pourvoi:

9. . . .

(3) Dans le cadre de la *Loi constitutionnelle de 1982*, un juge de cour supérieure ou de cour de comté conserve les compétences qu’il a en cette qualité, dans l’exercice des fonctions qu’il est tenu d’accomplir en appliquant la présente loi.

13. Le fugitif doit comparaître devant un juge; l’audition se déroule, dans la mesure du possible et sous réserve des autres dispositions de la présente partie, comme s’il comparait devant un juge de paix pour un acte criminel commis au Canada.

18. (1) Le juge délivre un mandat de dépôt portant incarcération du fugitif dans la prison appropriée la plus rapprochée en attendant la remise de celui-ci à l’État étranger ou sa libération conformément à la loi:

b) dans le cas où le fugitif n’est qu’accusé d’un crime donnant lieu à l’extradition, lorsque les éléments de preuve produits justifieraient en droit canadien, sous réserve des autres dispositions de la présente partie, sa citation à procès si le crime avait été commis au Canada.

III. Juridictions inférieures

A. *La Cour de justice de l’Ontario (Division générale)*, [1994] O.J. No. 3940 (QL)

Le juge Keenan a décidé que la preuve recueillie par écoute électronique, [TRADUCTION] «si elle est admissible, suffit pour qu’un jury qui a reçu des directives appropriées conclu que Dynar et Cohen avaient convenu de participer à l’exécution d’un projet de recyclage de fonds obtenus illicitement et que la rencontre de Cohen avec McCarthy à Buffalo était un acte accompli en vue de la réalisation de ce complot» (par. 3). Il était aussi d’avis que les agissements de M. Dynar et de M. Cohen pouvaient constituer l’infraction de tentative de recyclage des produits de la criminalité.

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20 Keenan J. noted that the wiretap interceptions were made “without reasonable and probable grounds to believe that an offence had been committed” (para. 5). The interceptions were part of a “sting” operation and the money laundering scheme did not exist. He noted that, if the judicial authorization for the wiretap had been sought in Canada, it would have been refused. However, *Charter* relief was not available because the infringement was not the result of Canadian state action, and did not involve the cooperation of the Canadian authorities. He held that the mere fact that the evidence was used in Canadian extradition proceedings did not engage the *Charter*.

21 Keenan J. stated that the 1992 amendments to the *Extradition Act* were intended to overcome problems of delays and multiplicity of proceedings in extradition matters. Section 9(3) of the *Extradition Act* removes the necessity for a fugitive in an extradition proceeding to seek *Charter* relief by way of an application for *habeas corpus*. The extradition judge, as a superior court judge, is a “court of competent jurisdiction” for the purposes of s. 24 of the *Charter*. But the provision restricts the power of the extradition judge to grant any such relief to the functions the judge performs under the Act. As a result, Keenan J. was of the view that the availability of *Charter* relief in a committal proceeding is limited to infringements that directly affect the hearing and the procedures set out in the Act, and may also include questions of unreasonable delay. However since no *Charter* violation had been committed by a Canadian government actor, it was not necessary to explore the scope of available *Charter* relief under s. 9(3).

22 Keenan J. acknowledged that the role of the extradition judge under the *Extradition Act* is a modest one. It is limited to examining the evidence submitted to ensure that it complies with the Act,

Le juge Keenan a fait remarquer que l’interception des conversations au moyen de l’écoute électronique avait été faite [TRADUCTION] «sans motifs raisonnables et probables de croire qu’une infraction avait été commise» (par. 5). L’interception faisait partie d’une opération d’infiltration et il n’y avait pas de projet de recyclage d’argent. Il a noté que, si l’autorisation judiciaire de faire l’écoute électronique avait été demandée au Canada, elle n’aurait pas été obtenue. Par ailleurs, on ne pouvait exercer un recours fondé sur la *Charte*, parce que l’atteinte ne résultait pas de l’action de l’État canadien et que les autorités canadiennes n’y avaient pas collaboré. Il a conclu que le simple fait que la preuve ait été utilisée dans des procédures d’extradition canadiennes n’entraînait pas l’application de la *Charte*.

Le juge Keenan a affirmé que les modifications apportées en 1992 à la *Loi sur l’extradition* visaient à résoudre le problème des retards et de la multiplicité des procédures en matière d’extradition. Le paragraphe 9(3) de la *Loi sur l’extradition* supprime l’obligation faite au fugitif dans une instance d’extradition de présenter une demande d’*habeas corpus* pour obtenir une réparation fondée sur la *Charte*. Le juge d’extradition, à titre de juge d’une cour supérieure, est un «tribunal compétent» pour l’application de l’art. 24 de la *Charte*. Mais la disposition limite le pouvoir du juge d’extradition d’accorder cette réparation aux fonctions que le juge exerce en vertu de la Loi. Par conséquent, le juge Keenan était d’avis que la possibilité de demander une réparation fondée sur la *Charte* dans une procédure relative à l’incarcération est limitée aux atteintes qui affectent directement l’audience et les procédures établies par la Loi, et peut aussi inclure les retards abusifs. Cependant, étant donné qu’aucun représentant du gouvernement canadien n’avait enfreint la *Charte*, il n’était pas nécessaire d’examiner l’étendue des réparations fondées sur la *Charte* admises sous le régime du par. 9(3).

Le juge Keenan a reconnu que le rôle dévolu au juge d’extradition sous le régime de la *Loi sur l’extradition* est modeste. Il se limite à l’examen de la preuve produite pour s’assurer qu’elle est con-

and that it is sufficient to disclose conduct which would constitute an offence if it had been carried out in Canada. Although the evidence in the case at bar did meet this test, Keenan J. felt it necessary to comment on the method by which the evidence had been gathered by the Requesting State as part of his reporting function under s. 19(b) of the *Extradition Act*.

In his report to the Minister of Justice, Keenan J. was critical of the conduct of the American authorities. He characterized their actions in investigating Mr. Dynar as a cross-border “fishing expedition” that showed lack of respect for Canadian sovereignty. He condemned the FBI for failing to make use of mutual legal assistance treaties to request Canadian assistance in gathering evidence in Canada, and concluded that “[w]hether deliberately or inadvertently, the F.B.I. agents ignored the principles of international comity and treated Canada as a part of their own jurisdiction for gathering evidence” (para. 30). He expressed the opinion that Agent Matthews did not have reasonable grounds for believing that an offence was being or would be committed.

Nonetheless, Keenan J. thought that all requirements for Mr. Dynar’s extradition had been properly fulfilled and issued a warrant of committal for him.

B. *Minister of Justice*

The Minister of Justice wrote to counsel for Mr. Dynar, indicating that although the extent of the involvement of Canadian law enforcement officials in the investigation had not been disclosed prior to the committal hearing, he was not persuaded that the hearing should be re-opened. Although Keenan J. commented on the lack of Canadian involvement in his reasons for committal, “this did not form the basis for his decision that the Charter did not apply to the evidence gathering process of the American authorities in this case”.

forme aux exigences de la Loi et qu’elle suffit pour révéler une conduite qui constituerait une infraction si elle avait eu lieu au Canada. Bien que la preuve en l’espèce satisfaisait à ce critère, le juge Keenan a cru nécessaire de faire des commentaires, dans le cadre de son obligation de présenter un rapport en vertu de l’al. 19b) de la *Loi sur l’extradition*, sur la méthode utilisée par l’État requérant pour recueillir cette preuve.

Dans son rapport au ministre de la Justice, le juge Keenan s’est montré sévère à l’égard de la conduite des autorités américaines. Il a qualifié leur action dans l’enquête sur M. Dynar de «recherche à l’aveuglette» transfrontalière qui dénote un manque de respect pour la souveraineté du Canada. Il a condamné le FBI pour n’avoir pas invoqué les traités d’entraide judiciaire afin d’obtenir l’aide du Canada pour recueillir des éléments de preuve au Canada, et il a conclu que [TRADUCTION] «[d]élibérément ou accidentellement, les agents du FBI ont fait fi de la courtoisie entre nations et ont agi comme si le Canada relevait de leur compétence à des fins de recherche de la preuve» (par. 30). Il s’est dit d’avis que l’agent Matthews n’avait pas de motifs raisonnables de croire qu’une infraction était en train d’être commise ou le serait.

Néanmoins, le juge Keenan a conclu que toutes les conditions pour l’extradition de M. Dynar avaient été remplies et il a décerné un mandat de dépôt contre lui.

B. *Le ministre de la Justice*

Le ministre de la Justice a écrit à l’avocat de M. Dynar pour lui faire savoir que, bien que la participation des agents canadiens à l’enquête n’ait pas été divulguée préalablement à l’audience relative à l’incarcération, il n’était pas convaincu qu’il y avait lieu de rouvrir les débats. Bien que le juge Keenan ait fait des remarques, dans les motifs de la décision portant incarcération, sur l’absence de participation du Canada, [TRADUCTION] «cela ne constituait pas le fondement de sa conclusion voulant que la Charte ne s’applique pas au processus de recherche et de découverte de la preuve des autorités américaines en l’espèce».

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- 26 The Minister stressed the fact that the investigations were conducted in the United States, and that Mr. Dynar's conversations were intercepted there. As a result, he was of the view that s. 24(2) of the *Charter* could not be applied to exclude the evidence gathered in the United States. Although he recognized that his decision to surrender Mr. Dynar must comply with the *Charter*, and that extradition in certain circumstances may violate the principles of fundamental justice, he concluded that there was nothing about Mr. Dynar's case that would render his surrender unacceptable or oppressive.
- Le ministre a souligné que les enquêtes avaient été menées aux États-Unis et que c'est dans ce pays que les conversations de M. Dynar avaient été interceptées. Par conséquent, il était d'avis que le par. 24(2) de la *Charte* ne pouvait être appliqué de manière à écarter les éléments de preuve recueillis aux États-Unis. Bien qu'il ait convenu que sa décision d'extrader M. Dynar devait être conforme aux dispositions de la *Charte*, et que l'extradition dans certaines circonstances puisse violer les principes de justice fondamentale, il a conclu qu'aucun des éléments du dossier de M. Dynar ne rendait son extradition inacceptable ou abusive.
- 27 The Minister rejected Mr. Dynar's counsel's submissions that Mr. Dynar's age and health justified a refusal of surrender. Nothing indicated that Mr. Dynar was unfit for trial, and there was no evidence that extradition would aggravate his medical condition. Furthermore, if treatment was required it would be available in the United States.
- Le ministre a rejeté l'allégation de l'avocat de M. Dynar selon laquelle l'âge et la santé de M. Dynar justifiaient le rejet de la demande d'extradition. Rien n'indiquait que M. Dynar était incapable de subir son procès, et aucune preuve n'a été présentée quant à une aggravation possible de son état de santé s'il était extradé. De plus, si un traitement était requis, il serait disponible aux États-Unis.
- 28 The Minister signed the warrants of surrender for Mr. Dynar.
- C. *Ontario Court of Appeal* (1995), 25 O.R. (3d) 559
- Le ministre a signé les mandats d'extradition de M. Dynar.
- C. *La Cour d'appel de l'Ontario* (1995), 25 O.R. (3d) 559
- 29 Galligan J.A. set out the issue presented by this case. United States law allows conviction of persons caught in money-laundering "sting" operations, but Canadian law does not. In particular, the Canadian offence of money-laundering requires not only that the money must be the actual proceeds of crime, but also that the accused have knowledge of that fact. The American offence is complete if the person acts on a representation that the property is the proceeds of crime. The money does not have to be the proceeds of crime, and no actual knowledge is required.
- Le juge Galligan a énoncé la question soulevée en l'espèce. Le droit américain permet la condamnation des personnes impliquées dans le recyclage d'argent au terme d'une opération d'infiltration policière, mais le droit canadien ne le permet pas. Plus particulièrement, la constitution de l'infraction canadienne de recyclage des produits de la criminalité exige non seulement que l'argent recyclé soit effectivement le produit de la criminalité, mais aussi que l'accusé l'ait su. L'infraction américaine est consommée dès que la personne passe à l'action après avoir été informée que le bien est le produit de la criminalité. Il n'est pas nécessaire que l'argent soit effectivement le produit de la criminalité et la connaissance véritable des faits n'est pas nécessaire.
- 30 Galligan J.A. recognized that the test for establishing an extradition crime is conduct-based.
- Le juge Galligan a reconnu que le critère permettant d'établir s'il y a eu perpétration d'un crime

However since actual knowledge is required for the substantive offences of money laundering under the *Criminal Code* and the *Narcotic Control Act*, he was of the view that “it would be manifestly unjust to use the law relating to attempts and conspiracy to elevate conduct which does not amount to an extradition crime into conduct which does” (p. 567).

Galligan J.A. did not find it necessary to consider the theory of impossible attempts, characterizing the real issue as whether a different mental element can be the basis for the offence of attempt or conspiracy than is required for the substantive offence. In his view, knowledge and belief are discrete states of mind that are not the same for legal purposes. The intention for the offence of attempt must mirror the intention for the corresponding substantive offence. Since knowledge is essential for the substantive offence of money laundering, the offence of attempt to launder money is only made out if the accused intends to deal with money knowing that it is derived from crime.

Furthermore, Galligan J.A. indicated that the essence of a conspiracy under the *Criminal Code* is an agreement to commit an indictable offence. The agreement between Dynar and Cohen was an agreement to deal with money believed to be the proceeds of crime, which is not an offence in Canada. He could not justify the substitution of the mental element of belief for knowledge when the charge is conspiracy to launder money. In the absence of knowledge, the agreement between Dynar and Cohen was not a conspiracy to launder money either under the *Criminal Code* or the *Narcotic Control Act*.

In the result, Galligan J.A. was of the view that the conduct of Mr. Dynar did not constitute an

donnant lieu à l’extradition repose sur la conduite. Cependant, étant donné que le *Code criminel* et la *Loi sur les stupéfiants* font de la connaissance vérifiable des faits un élément de l’infraction de recyclage des produits de la criminalité, il était d’avis qu’ [TRADUCTION] «il serait manifestement injuste de se servir des règles du droit relatives aux tentatives et aux complots pour élever au rang de crime donnant lieu à l’extradition une conduite qui n’est pas de cette nature» (p. 567).

Le juge Galligan a conclu qu’il n’était pas nécessaire de prendre en considération la théorie des tentatives d’infractions impossibles, statuant que la vraie question était de savoir si l’élément moral de l’infraction de tentative ou de complot peut être différent de celui de l’infraction matérielle précise. Selon lui, la connaissance et la croyance sont des états d’esprit distincts en droit. L’intention de l’infraction de tentative doit être le reflet de l’intention de l’infraction matérielle précise correspondante. Étant donné que la connaissance est essentielle à la perpétration de l’infraction de recyclage des produits de la criminalité, la tentative de recyclage des produits de la criminalité ne peut être constituée que si l’accusé a l’intention d’utiliser de l’argent qu’il sait être d’origine criminelle.

En outre, le juge Galligan a indiqué que l’absence d’un complot au sens du *Code criminel* est l’entente en vue de commettre un acte criminel. L’accord conclu entre M. Dynar et M. Cohen était une entente en vue d’utiliser de l’argent qu’ils croyaient être le produit de la criminalité, ce qui ne constitue pas une infraction au Canada. Il ne pouvait pas justifier la substitution de l’élément moral, savoir le remplacement de la connaissance par la croyance, dans le cas d’une accusation de complot en vue de recycler des produits de la criminalité. Faute de connaissance, l’accord conclu entre M. Dynar et M. Cohen n’était pas un complot en vue de recycler des produits de la criminalité en vertu du *Code criminel* ni en vertu de la *Loi sur les stupéfiants*.

Par conséquent, le juge Galligan était d’avis que la conduite de M. Dynar ne constituait pas une

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offence in Canada, and therefore he was not extraditable. Furthermore, since Mr. Dynar should have been discharged under s. 18(2) of the *Extradition Act*, the Minister was not entitled to order his surrender. The appeal from the committal and the application for judicial review of the Minister's surrender decision were therefore allowed, both decisions were set aside and Mr. Dynar was discharged.

infraction au Canada et que ce dernier ne pouvait être extradé. De plus, comme M. Dynar aurait dû être libéré en application du par. 18(2) de la *Loi sur l'extradition*, le ministre n'avait pas le droit d'ordonner son extradition. L'appel formé contre l'incarcération et la demande de contrôle judiciaire de la décision d'extradition prise par le ministre ont donc été accueillis, les deux décisions ont été annulées et M. Dynar a été libéré.

³⁴ Finally, Galligan J.A. disagreed with Keenan J.'s opinion that the American authorities had entrapped Mr. Dynar. He was of the view that there was a basis for reasonable suspicion that an offence was being committed after Mr. Dynar made his first attempt to contact his Las Vegas associate. Furthermore, the American officer did not go beyond providing Mr. Dynar with an opportunity to commit the offence. No improper inducement was offered. Finally, Galligan J.A. found no basis in the evidence for criticizing the conduct of the American investigators. The additional evidence disclosed after the hearing also revealed appropriate respect for Canadian sovereignty and adequate consultation between American and Canadian law enforcement officials.

Finalement, le juge Galligan s'est dit en désaccord avec l'opinion du juge Keenan selon laquelle les autorités américaines avaient piégé M. Dynar. Il était d'avis qu'il y avait des motifs raisonnables de soupçonner qu'une infraction était en train d'être commise après que M. Dynar eut tenté pour la première fois de communiquer avec son associé de Las Vegas. En outre, l'agent américain s'est contenté de fournir à M. Dynar l'occasion de commettre l'infraction. Il n'y a eu aucune incitation induite. Finalement, le juge Galligan a conclu que la preuve ne comportait aucun élément permettant de critiquer la conduite des enquêteurs américains. Les autres éléments de preuve divulgués après l'audience ont révélé le respect voulu pour la souveraineté du Canada et une consultation adéquate des agents américains avec les agents canadiens chargés d'appliquer la loi.

IV. Issues

IV. Les questions en litige

³⁵ The major issue which arises on the appeal is whether Mr. Dynar's conduct would have amounted to an offence under Canadian law if it had occurred in Canada. This question in turn has two parts: whether an accused who attempts to do the "impossible" may be guilty of attempt and whether an accused who conspires with another to do the impossible may be guilty of conspiracy.

La principale question soulevée dans le présent pourvoi est de savoir si les agissements de M. Dynar auraient constitué une infraction en vertu du droit canadien s'ils avaient eu lieu au Canada. Cette question se divise en deux parties: l'accusé qui tente d'accomplir l'«impossible» peut-il être coupable de tentative et l'accusé qui complot avec un tiers en vue d'accomplir l'«impossible» peut-il être coupable de complot?

³⁶ On the cross-appeal the issue presented is whether the Canadian authorities violated Mr. Dynar's constitutionally guaranteed right to a fair hearing by failing to disclose to Mr. Dynar

Quant au pourvoi incident, la question est de savoir si les autorités canadiennes ont porté atteinte au droit de M. Dynar à un procès équitable, lequel est garanti par la Constitution, en ne

details of official Canadian involvement in the U.S. investigation of him.

V. Analysis

A. *The Criminality of Mr. Dynar's Conduct Under Canadian Law*

(1) Introduction

In our view, Mr. Dynar's conduct would have amounted to a criminal attempt and a criminal conspiracy under Canadian law.

An accused may not be extradited from Canada unless it appears that his conduct, if it had taken place in Canada, would have amounted to a crime under the laws of this country. See *Extradition Act*, s. 18(1)(b). Mr. Dynar resists extradition on the ground that he did nothing that the criminal law of Canada proscribes. The appellants answer that, if Mr. Dynar had done in Canada what he did (telephonically) in the United States, he would have been guilty of the crimes of attempt and conspiracy.

It is clear that, if Mr. Dynar had successfully consummated in Canada a scheme like the one that he embarked upon in the United States, he would not have been guilty of any completed offence known to the law of Canada. The conversion of monies that are believed to be the proceeds of crime but that are not in fact the proceeds of crime was, at the relevant time in the history of this proceeding, not an offence in Canada.

There were two statutory provisions (s. 462.31(1) of the *Criminal Code* and s. 19.2(1) of the *Narcotic Control Act*) under which Canadian authorities might have prosecuted money-laundering schemes like the one that Mr. Dynar attempted to consummate. However, both required that an accused, if he was to be convicted, should have known that the money he converted was the proceeds of crime:

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or

communiquant pas à M. Dynar des renseignements concernant la participation officielle du Canada à l'enquête que les É.-U. menaient sur lui.

V. Analyse

A. *Le caractère criminel des agissements de M. Dynar en droit canadien*

(1) Introduction

À notre avis, les agissements de M. Dynar auraient constitué une tentative et un complot criminels en droit canadien.

L'accusé ne peut être extradé du Canada, sauf s'il apparaît que ses agissements, s'ils avaient eu lieu au Canada, auraient constitué un crime en droit canadien; voir la *Loi sur l'extradition*, al. 18(1)(b). M. Dynar s'oppose à son extradition pour le motif qu'il n'a rien fait qui soit prohibé par le droit pénal canadien. Les appelants soutiennent que, si M. Dynar avait fait au Canada ce qu'il a fait (par téléphone) aux États-Unis, il serait coupable des crimes de tentative et de complot.

Il est clair que, si M. Dynar avait mis à exécution au Canada, un projet comme celui dans lequel il s'est engagé aux États-Unis, il n'aurait été coupable d'aucune infraction consommée connue en droit canadien. Le recyclage de sommes d'argent que l'on croit être des produits de la criminalité, mais qui dans les faits n'en sont pas, n'était pas, à l'époque en cause dans le présent pourvoi, une infraction au Canada.

Deux dispositions législatives (le par. 462.31(1) du *Code criminel* et le par. 19.2(1) de la *Loi sur les stupéfiants*) permettaient aux autorités canadiennes de poursuivre les auteurs de projets de recyclage d'argent du type de celui que M. Dynar a essayé de réaliser. Toutefois, pour que l'accusé puisse être déclaré coupable, l'une et l'autre nécessitaient que celui-ci ait su que l'argent à convertir était le produit de la criminalité:

462.31 (1) Est coupable d'une infraction quiconque — de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte,

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otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of [the commission of a designated offence].

19.2 (1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of [the commission of a designated offence]. [Emphasis added.]

41 Because it is not possible to know what is false, no one who converts money that is not in fact the proceeds of crime commits these offences. This is clear from the meaning of the word “know”. In the Western legal tradition, knowledge is defined as true belief: “The word ‘know’ refers exclusively to true knowledge; we are not said to ‘know’ something that is not so” (Glanville Williams, *Textbook of Criminal Law* (2nd ed. 1983), at p. 160).

42 Consistently with Professor Williams’ definition of “knowledge”, this Court has said previously that proof of knowledge requires proof of truth. For example, in *R. v. Zundel*, [1992] 2 S.C.R. 731, the Court had to consider the validity of a provision that criminalized the wilful publication of a statement that the publisher knows to be false. The Court interpreted this provision to require a showing by the Crown that the accused published a statement that was in fact false (at p. 747).

43 Other decisions are to a similar effect. In *R. v. Vogelle and Reid*, [1970] 3 C.C.C. 171, at p. 177, the Manitoba Court of Appeal declared that “[i]n order for an accused to be found guilty of the offence of receiving . . . goods [knowing them to have been stolen] it is essential the Crown prove

modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l’intention de les cacher ou de les convertir sachant qu’ils ont été obtenus ou proviennent, en totalité ou en partie, directement ou indirectement [de la perpétration d’une infraction désignée].

19.2 (1) Commet une infraction quiconque — de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l’intention de les cacher ou de les convertir sachant qu’ils ont été obtenus ou proviennent, en totalité ou en partie, directement ou indirectement [de la perpétration d’une infraction désignée]. [Nous soulignons.]

Parce que celui qui «sait» connaît forcément la vérité, nul ne commet ces infractions s’il convertit de l’argent qui n’est pas effectivement le produit de la criminalité. Cette conclusion ressort clairement du sens du mot «savoir». Dans la tradition juridique occidentale, la connaissance s’entend de la croyance conforme à la réalité: [TRADUCTION] «Le mot «savoir» renvoie exclusivement à la connaissance véritable; l’on ne peut affirmer «savoir» sans connaître la vérité» (Glanville Williams, *Textbook of Criminal Law* (2^e éd. 1983), à la p. 160).

En accord avec la définition donnée au mot «connaissance» par le professeur Williams, notre Cour a dit précédemment que pour prouver la connaissance, il faut établir la réalité de l’objet «connu». Par exemple, dans l’arrêt *R. c. Zundel*, [1992] 2 R.C.S. 731, la Cour a examiné la validité d’une disposition incriminant la publication intentionnelle d’une déclaration que l’éditeur savait fautive. La Cour a interprété cette disposition comme exigeant du ministère public la preuve que l’accusé avait publié une déclaration qui était bel et bien fautive (à la p. 747).

D’autres décisions vont dans le même sens. Dans l’arrêt *R. c. Vogelle and Reid*, [1970] 3 C.C.C. 171, à la p. 177, la Cour d’appel du Manitoba a déclaré que [TRADUCTION] «[p]our qu’un accusé soit déclaré coupable du recel [. . .] de biens [sachant que ce sont des biens volés], il est essen-

beyond reasonable doubt . . . [t]hat the goods are stolen goods”. Twenty-five years later, the same court held, in *R. v. Stevens* (1995), 96 C.C.C. (3d) 238, at p. 307, that the offence of “publishing a defamatory libel known to be false” will be established only upon a showing that the libel actually is false.

The one apparently discordant note was sounded in a decision called *R. v. Irwin*, [1968] 2 C.C.C. 50 (Alta. S.C.A.D.), in which it was held that an accused who sold drugs to an undercover police officer for the stated purpose of helping to procure the miscarriage of a woman was guilty of the offence of “suppl[y]ing . . . a . . . noxious thing . . . knowing that it is intended to be used or employed to procure the miscarriage of a female person”. The Appellate Division reached this conclusion even though the undercover police officer did not intend to procure a miscarriage. On appeal, this Court affirmed the decision of the Appellate Division, but on the ground that the words “knowing that it is intended to be used or employed to procure the miscarriage of a female person” referred to the intention of the one selling the noxious thing, not to the intention of the one purchasing it. Because the accused certainly knew his own intention, which was to sell noxious things for the purpose of assisting in the procurement of a miscarriage, the Court held that the knowledge requirement had been satisfied. See *Irwin v. The Queen*, [1968] S.C.R. 462, at p. 465. Thus, *Irwin* is ultimately consistent with the other cases on the meaning of the word “knowing”. The Court did not hold in *Irwin* that it is possible to know something that is not the case. It held rather that the accused did know what the statute required him to know, which was his own intention.

As further support for the view that knowledge implies truth, the respondent points to a bill (Bill C-17) that Parliament has introduced to amend the money-laundering provisions to replace the word “knowing” with the words “knowing or believing”. This might be taken to suggest that, in the judgment of Parliament, the present money-lau-

tiel que le ministère public prouve hors de tout doute raisonnable [. . .] [q]ue les biens sont des biens volés». Vingt-cinq ans plus tard, la même cour a statué, dans l’arrêt *R. c. Stevens* (1995), 96 C.C.C. (3d) 238, à la p. 307, que pour établir la perpétration de l’infraction de «publication d’un libelle diffamatoire que l’on sait être faux», il faut absolument prouver que, de fait, le libelle est faux.

La seule note apparemment discordante est l’arrêt *R. c. Irwin*, [1968] 2 C.C.C. 50 (C.S.D.A. Alb.), où la cour a statué qu’un accusé qui avait vendu de la drogue à un policier en civil, en vue d’aider à provoquer l’avortement d’une femme, était coupable de l’infraction de «fourni[r] [. . .] une [. . .] substance délétère [. . .] sachant qu’elle est destinée à être employée ou utilisée pour obtenir l’avortement d’une personne du sexe féminin». La Division d’appel a tiré cette conclusion même si le policier en civil n’avait pas l’intention d’obtenir un avortement. En appel, notre Cour a confirmé l’arrêt de la division d’appel, mais pour le motif que les mots «sachant qu’elle est destinée à être employée ou utilisée pour obtenir l’avortement d’une personne du sexe féminin» renvoyaient à l’intention de la personne qui vendait la substance délétère, non à celle de la personne qui l’achetait. Puisque l’accusé connaissait certainement sa propre intention, qui était de vendre une substance délétère en vue de fournir à quelqu’un les moyens d’obtenir un avortement, la Cour a conclu que l’exigence en matière de connaissance avait été respectée; voir *Irwin c. The Queen*, [1968] R.C.S. 462, à la p. 465. En définitive, l’arrêt *Irwin* est compatible avec les autres décisions portant sur le sens du mot «sachant». La Cour n’a pas conclu dans *Irwin* qu’il était possible de savoir sans connaître la vérité. Elle a plutôt conclu que l’accusé savait bel et bien ce que la loi exigeait qu’il sache, soit sa propre intention.

Toujours à l’appui du point de vue voulant que la connaissance suppose la vérité, l’intimé invoque un projet de loi fédéral (Projet de loi C-17) visant à modifier les dispositions relatives au recyclage des produits de la criminalité de manière à remplacer le mot «sachant» par les mots «sachant ou croyant». Les modifications envisagées pourraient

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dering provisions do not contemplate punishment of one who merely believes that he is converting the proceeds of crime. But in our view this argument is misconceived. 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.

⁴⁶ Parliament itself recognized as much, when, in the *Interpretation Act*, R.S.C., 1985, c. I-21, s. 45(3), it declared:

The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

Moreover, to consult “subsequent legislative history” as an aid to the interpretation of prior enactments would be to give the subsequent enactments retroactive effect; and, as this Court has often observed, statutes are not to be given retroactive effect except in the clearest of cases:

The situation is completely different with respect to a statute subsequent in time to the facts which gave rise to the action. The construction of prior legislation is then exclusively a matter for the courts. In refraining from giving the new enactment retroactive or declaratory effect, the legislator avoids expressing an opinion on the previous state of the law, leaving it to the courts.

(*Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667.)

⁴⁷ Because the money that the U.S. undercover agents asked Mr. Dynar to launder was not in fact the proceeds of crime, Mr. Dynar could not possibly have known that it was the proceeds of crime. Therefore, even if he had brought his plan to fruition, he would not have been guilty of any com-

donner à penser que, dans l’esprit du législateur, les dispositions actuelles relatives au recyclage d’argent ne visent pas à punir celui qui croit simplement qu’il convertit les produits de la criminalité. Mais d’après nous, cet argument repose sur une erreur de raisonnement. 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.

Le législateur lui-même l’a admis dans la *Loi d’interprétation*, L.R.C. (1985), ch. I-21, au par. 45(3):

L’abrogation ou la modification, en tout ou en partie, d’un texte ne constitue pas ni n’implique une déclaration sur l’état antérieur du droit.

De plus, la consultation de l’«évolution législative subséquente» comme aide à l’interprétation de lois antérieures reviendrait à accorder aux lois adoptées subséquemment un effet rétroactif, et, comme notre Cour l’a fait observer à maintes reprises, les lois ne doivent pas être appliquées rétroactivement sauf dans les cas les plus clairs:

La situation est toute autre lorsque l’on est en présence d’une loi subséquente aux faits qui ont donné lieu au litige. La décision sur le sens de la législation antérieure est alors du ressort exclusif des tribunaux. En s’abstenant de donner au texte nouveau l’effet rétroactif ou déclaratoire, le législateur évite de se prononcer sur l’état antérieur du droit et laisse aux tribunaux le soin de le faire.

(*Gravel c. Cité de St-Léonard*, [1978] 1 R.C.S. 660, à la p. 667).

Étant donné que l’argent que les agents d’infiltration américains ont demandé à M. Dynar de recycler n’était pas réellement le produit de la criminalité, M. Dynar ne pouvait savoir qu’il s’agissait du produit de la criminalité. Par conséquent, même s’il avait pu réaliser son projet, il n’aurait

pleted offence known to Canadian law. But this is not the end of the story.

We conclude that the steps that Mr. Dynar took towards the realization of his plan to launder money would have amounted to a criminal attempt and a criminal conspiracy under Canadian law if the conduct in question had taken place entirely within Canada. We reach our conclusion on the basis of the wording in the applicable provisions of the *Criminal Code* interpreted in the light of the underlying theory of impossible attempts and conspiracies.

(2) The Law of Attempt

The *Criminal Code* creates the crime of attempt to commit an offence:

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence. [Emphasis added.]

On its face, the statute is indifferent about whether or not the attempt might possibly have succeeded. Therefore it would seem, at first blush, not to matter that Mr. Dynar could not possibly have succeeded in laundering money known to be the proceeds of crime. So long as he attempted to do so, he is guilty of a crime.

In our view, s. 24(1) is clear: the crime of attempt consists of an intent to commit the completed offence together with some act more than merely preparatory taken in furtherance of the attempt. This proposition finds support in a long line of authority. See, e.g., *R. v. Cline* (1956), 115 C.C.C. 18 (Ont. C.A.), at p. 29; *R. v. Ancio*, [1984] 1 S.C.R. 225, at p. 247; *R. v. Deutsch*, [1986] 2 S.C.R. 2, at pp. 19-26; *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 19. In this case, sufficient evidence was produced to show that Mr. Dynar intended to commit the money-laundering offences, and that he took steps more than merely preparatory in order to realize his intention. That is

été coupable d'aucune infraction consommée connue en droit canadien. Mais ce n'est pas tout.

Nous concluons que les efforts déployés par M. Dynar en vue de la réalisation de son projet de recyclage d'argent auraient constitué une tentative et un complot criminels en droit canadien si tous les agissements en question avaient eu lieu au Canada. Nous arrivons à cette conclusion en nous fondant sur le libellé des dispositions applicables du *Code criminel*, que nous interprétons à la lumière de la théorie sous-jacente des tentatives d'infractions et des complots impossibles.

(2) Le droit applicable en matière de tentative

Le *Code criminel* incrimine la tentative d'infraction:

24. (1) Quiconque, ayant l'intention de commettre une infraction, fait ou omet de faire quelque chose pour arriver à son but est coupable d'une tentative de commettre l'infraction, qu'il fût possible ou non, dans les circonstances, de la commettre. [Nous soulignons.]

À première vue, le législateur ne s'intéresse pas au résultat. Par conséquent, il importe peu, de prime abord, qu'il soit impossible pour M. Dynar de recycler des sommes d'argent qu'il sait être les produits de la criminalité. Il suffit qu'il ait tenté de le faire pour être coupable d'un crime.

À notre avis, le par. 24(1) est clair: le crime de tentative consiste en l'intention de commettre l'infraction, constituée dans tous ses éléments, jointe à l'accomplissement d'actes dépassant le stade des actes simplement préparatoires à l'infraction. Cette proposition s'appuie sur de nombreuses décisions. Voir, p. ex., *R. c. Cline* (1956), 115 C.C.C. 18 (C.A. Ont.), à la p. 29; *R. c. Ancio*, [1984] 1 R.C.S. 225, à la p. 247; *R. c. Deutsch*, [1986] 2 R.C.S. 2, aux pp. 19 à 26; *R. c. Gladstone*, [1996] 2 R.C.S. 723, au par. 19. En l'espèce, suffisamment d'éléments de preuve ont été produits pour établir que M. Dynar avait l'intention de commettre l'infraction de recyclage des produits de la criminalité et qu'il a pris des moyens, qui ne sont pas simplement des actes préparatoires, pour concrétiser son intention. Cela suffit pour établir qu'il a tenté de

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enough to establish that he attempted to launder money contrary to s. 24(1) of the *Criminal Code*.

51 However, the respondent argues that Parliament did not intend by s. 24(1) to criminalize all attempts to do the impossible, but only those attempts that the common law has classified as “factually impossible”. An attempt to do the factually impossible, according to the respondent, is an attempt that runs up against some intervening obstacle and for that reason cannot be completed. The classic example involves a pickpocket who puts his hand into a man’s pocket intending to remove the wallet, only to find that there is no wallet to remove.

52 Traditionally, this sort of impossibility has been contrasted with “legal impossibility”. An attempt to do the legally impossible is, according to those who draw the distinction, an attempt that must fail because, even if it were completed, no crime would have been committed. See Eric Colvin, *Principles of Criminal Law* (2nd ed. 1991), at pp. 355-56.

53 According to the respondent, the *Criminal Code* criminalizes only attempts to do the factually impossible. An attempt to do the legally impossible, in the absence of an express legislative reference to that variety of impossibility, is not a crime.

54 As support for this interpretation, the respondent offers two arguments. The first is that Parliament based s. 24(1) on an English provision whose purpose was to overrule a decision of the House of Lords that had made factual impossibility a defence. See Barry Brown, “‘Th’ attempt, and not the deed, Confounds us’: Section 24 and Impossible Attempts” (1981), 19 *U.W.O. L. Rev.* 225, at pp. 228-29. On the strength of this argument, the New Zealand Court of Appeal accepted that New Zealand’s equivalent to s. 24(1) criminalizes attempts whose completion is factually impossible but not those whose completion is legally impossible. See *R. v. Donnelly*, [1970] N.Z.L.R. 980 (C.A.), at pp. 984 and 988.

recycler des produits de la criminalité en contravention du par. 24(1) du *Code criminel*.

Cependant, l’intimé soutient que le législateur n’avait pas l’intention, par l’adoption du par. 24(1), d’incriminer toutes les tentatives d’infractions impossibles, mais seulement celles que la common law a rangées dans la catégorie des «impossibilités de fait». Selon l’intimé, en cas d’impossibilité de fait, le projet criminel se heurte à un obstacle et pour cette raison, il échoue. Le voleur à la tire qui plonge la main dans la poche d’un passant avec l’intention d’en retirer le porte-monnaie et découvre que la poche est vide, en est l’exemple typique.

Traditionnellement, ce genre d’impossibilité a été opposée à l’«impossibilité de droit». Selon ceux qui font cette distinction, dans ce cas, le projet criminel ne peut réussir car même si son exécution est achevée, aucun crime n’a été commis; voir Eric Colvin, *Principles of Criminal Law* (2^e éd. 1991), aux pp. 355 et 356.

Selon l’intimé, le *Code criminel* ne réprime les tentatives d’infractions impossibles que dans les cas d’impossibilités de fait. La tentative d’infraction impossible en droit n’est pas un crime à moins que la loi ne renvoie expressément à ce type d’impossibilité.

Au soutien de cette interprétation, l’intimé avance deux arguments. Le premier veut que le législateur ait rédigé le par. 24(1) en s’inspirant d’une disposition anglaise qui visait à renverser un arrêt de la Chambre des lords qui avait consacré l’impossibilité de fait comme moyen de défense; voir Barry Brown, «‘Th’ attempt, and not the deed, Confounds us»: Section 24 and Impossible Attempts» (1981), 19 *U.W.O. L. Rev.* 225, aux pp. 228 et 229. S’appuyant sur cet argument, la Cour d’appel de la Nouvelle-Zélande a accepté l’idée que le pendant néo-zélandais du par. 24(1) criminalise la tentative d’infraction impossible en fait, mais non la tentative d’infraction impossible en droit; voir *R. c. Donnelly*, [1970] N.Z.L.R. 980 (C.A.), aux pp. 984 et 988.

The respondent's second argument is that Parliament, had it intended to criminalize attempts to do the legally impossible, would have used the words "whether or not it was factually or legally impossible" in s. 24(1). As examples of statutes that were intended to criminalize attempts to do the legally impossible, the respondent cites provisions of statutes from the United Kingdom and from the United States:

1. — (1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where —

- (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
- (b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

(*Criminal Attempts Act 1981* (U.K.), 1981, c. 47.)

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime pursuant to section 110.00, it is no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be.

(*N.Y. Penal Law* § 110.10 (Consol. 1984).)

A third argument, which the respondent does not advance, is that the words "under the circum-

Le second argument de l'intimé est que le législateur, s'il avait voulu incriminer la tentative d'infraction impossible en droit, aurait utilisé les mots «qu'il fût possible ou non en fait ou en droit» au par. 24(1). À titre d'exemples de lois qui visent à criminaliser la tentative d'infraction impossible en droit, l'intimé invoque des dispositions législatives du Royaume-Uni et des États-Unis:

[TRADUCTION]

1. — (1) Quiconque, ayant l'intention de commettre une infraction visée au présent article, accomplit un acte qui dépasse le stade de la simple préparation à la perpétration de l'infraction, est coupable d'une tentative de commettre l'infraction.

(2) Une personne peut être déclarée coupable de tentative de commettre une infraction visée par le présent article, même si les faits sont tels que la perpétration de l'infraction est impossible.

(3) Pour l'application du paragraphe (1), une personne est réputée avoir l'intention de commettre l'infraction lorsque les conditions suivantes sont réunies:

- a) sans l'application du présent paragraphe, son intention ne serait pas considérée comme équivalent à l'intention de commettre l'infraction;
- b) si les faits avaient été tels que la personne les croyait, son intention aurait été considérée comme équivalent à l'intention de commettre l'infraction.

(*Criminal Attempts Act 1981* (R.-U.), 1981, ch. 47.)

[TRADUCTION] Si la conduite d'une personne constitue par ailleurs une tentative de commettre un crime visé à l'article 110.00, cette personne ne peut opposer en défense que la perpétration du crime qu'elle est accusée d'avoir tenté de commettre était, en raison des circonstances, impossible en fait ou en droit, dans les cas où le crime aurait pu être commis si les circonstances avaient été telles qu'elle les croyait.

(*N.Y. Penal Law*, par. 110.10 (codification de 1984).)

Selon un troisième argument, que l'intimé n'a pas avancé, les mots «dans les circonstances» limi-

stances” restrict the scope of s. 24(1) to attempts to do the factually impossible. An attempt that is not possible “under the circumstances”, according to this argument, is by implication possible under some other set of circumstances. Otherwise, there would be no need to mention circumstances — the mere mention of impossibility would suffice. President North of the New Zealand Court of Appeal made this very argument in *Donnelly, supra*, at p. 988:

In my opinion the significant words in s. 72 (1) [New Zealand’s equivalent to s. 24(1) of the *Criminal Code*] are “in the circumstances”, which seem to me to imply that in other circumstances it might be possible to commit the offence. This I think points to the conclusion that s. 72 (1) went no further than to ensure that a person who had the necessary criminal intent and did an act for the purpose of accomplishing his object was guilty of an attempt even although it so happened that it was not possible to commit the full offence.

57 In addition there is another way of turning the same language to the respondent’s advantage. “Circumstances”, in ordinary parlance, are facts. Laws, by contrast, are not circumstances. Accordingly, applying the rule that *expressio unius est exclusio alterius*, the mention in s. 24(1) of attempts that are circumstantially or factually impossible may be taken to exclude attempts that are legally impossible. The question, as one Canadian writer has framed it, is whether “‘the circumstances’ referred to in [s. 24(1)] include the legal status of the actor’s conduct”: Brown, *supra*, at p. 229.

58 Still another argument in favour of the respondent’s position, though one that reflects judicial policy rather than the strict ascertainment of legislative intent, is that penal statutes, if ambiguous, should be construed narrowly, in favour of the rights of the accused. “[T]he overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons”: *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 38.

tent l’application du par. 24(1) aux tentatives d’infractions impossibles en fait. Selon ce raisonnement, l’infraction impossible à commettre «dans les circonstances», doit nécessairement l’être dans d’autres circonstances. Sinon, il n’y aurait aucune raison de mentionner les circonstances — la seule mention de l’impossibilité suffirait. C’est précisément ce que le président North de la Cour d’appel de la Nouvelle-Zélande a avancé dans l’arrêt *Donnelly*, précité, à la p. 988:

[TRADUCTION] À mon avis, les mots significatifs du par. 72 (1) [le pendant néo-zélandais du par. 24(1) du *Code criminel*] sont les termes «dans les circonstances», qui semblent indiquer que, dans d’autres circonstances, il serait possible de commettre l’infraction. Je crois qu’il est permis de conclure que le par. 72 (1) se borne à garantir que celui qui avait l’intention criminelle nécessaire et a effectivement agi pour réaliser son but est coupable de tentative, même si, dans les faits, il était impossible de consommer l’infraction.

Il y a encore une autre façon d’interpréter les mêmes mots à l’avantage de l’intimé. Dans le langage de tous les jours, les «circonstances» ce sont des faits. En revanche, les textes législatifs ne sont pas des circonstances. Par conséquent, en appliquant la règle *expressio unius est exclusio alterius*, on peut considérer que la mention, au par. 24(1), de la tentative d’infraction impossible en fait, qui résulte d’une impossibilité tenant aux circonstances ou aux faits, exclut la tentative d’infraction impossible en droit. Pour reprendre l’expression d’un auteur canadien, il s’agit de savoir si [TRADUCTION] ««dans les circonstances» auxquelles [le par. 24(1)] renvoie, il faut inclure la qualification juridique de la conduite de l’auteur»; Brown, *op. cit.*, à la p. 229.

Il existe un autre argument favorable à la position de l’intimé, encore qu’il s’agirait davantage de l’application d’un principe jurisprudentiel que de l’exégèse du texte de loi, selon lequel, en cas d’ambiguïté, la loi pénale doit être interprétée de manière restrictive, d’une façon favorable aux droits de l’accusé. «[L]e principe suprême qui régit l’interprétation des dispositions pénales est que l’ambiguïté devrait être tranchée de la façon qui favorise le plus l’accusé»; *R. c. McIntosh*, [1995] 1 R.C.S. 686, au par. 38.

Although some of these arguments have a certain force, what force they have is greatly attenuated when it is realized that the conventional distinction between factual and legal impossibility is not tenable. The only relevant distinction for purposes of s. 24(1) of the *Criminal Code* is between imaginary crimes and attempts to do the factually impossible. The criminal law of Canada recognizes no middle category called “legal impossibility”. Because Mr. Dynar attempted to do the impossible but did not attempt to commit an imaginary crime, he can only have attempted to do the “factually impossible”. For this reason, Mr. Dynar’s proposal that s. 24(1) criminalizes only attempts to do the factually impossible does not help him.

As we have already indicated, an attempt to do the factually impossible is considered to be one whose completion is thwarted by mere happenstance. In theory at least, an accused who attempts to do the factually impossible could succeed but for the intervention of some fortuity. A legally impossible attempt, by contrast, is considered to be one which, even if it were completed, still would not be a crime. One scholar has described impossible attempts in these terms:

Three main forms of impossibility have set the framework for contemporary debate. First, there is impossibility due to inadequate means (Type I). For example, A tries to kill B by shooting at him from too great a distance or by administering too small a dose of poison; C tries to break into a house without the equipment which would be necessary to force the windows or doors. . . .

The second form of impossibility arises where an actor is prevented from completing the offence because some element of its *actus reus* cannot be brought within the criminal design (Type II). For example, A tries to kill B by shooting him when he is asleep in bed, but in fact B has already died of natural causes; C tries to steal money from a safe which is empty. . . .

Bien que certains de ces arguments ne soient pas dénués de valeur, leur force est grandement atténuée lorsqu’on se rend compte que la distinction conventionnelle entre l’impossibilité de fait et l’impossibilité de droit est indéfendable. La seule distinction utile pour l’application du par. 24(1) du *Code criminel* est celle qui différencie le crime imaginaire de la tentative d’infraction impossible en fait. En droit pénal canadien, il n’y a pas de catégorie intermédiaire fondée sur l’«impossibilité de droit». Comme M. Dynar a tenté de commettre une infraction impossible, mais n’a pas tenté de perpétrer un crime imaginaire, il ne peut qu’avoir tenté de commettre une infraction «impossible en fait». Pour ce motif, l’argument de M. Dynar selon lequel le par. 24(1) n’incrimine que la tentative d’infraction impossible en fait ne lui est d’aucun secours.

Nous l’avons dit, il y a tentative d’infraction impossible en fait lorsque la non-consommation résulte d’un simple hasard. Théoriquement, du moins, l’accusé qui tente de commettre une infraction impossible en fait pourrait réussir si ce n’était la présence d’une circonstance fortuite. Au contraire, dans la tentative d’infraction impossible en droit, même si les actes d’exécution étaient achevés, il n’y aurait toujours pas de crime. Un auteur a défini la tentative d’infraction impossible en proposant des distinctions entre les cas d’impossibilité:

[TRADUCTION] Trois principaux types d’impossibilité forment le cadre général du débat contemporain. En premier lieu, signalons l’impossibilité résultant de l’inefficacité des moyens employés (type I). Par exemple, A essaie d’abattre B en tirant un coup de feu à une distance trop grande ou en lui administrant une dose trop faible de poison; C essaie de s’introduire par effraction dans une maison sans le matériel nécessaire pour forcer une fenêtre ou une porte . . .

Dans le deuxième type d’impossibilité, l’agent ne réussit pas à commettre l’infraction faute d’un élément de l’*actus reus* nécessaire à la réalisation du projet criminel (type II). Par exemple, A essaie de tuer B en le tirant pendant qu’il dort mais B est déjà décédé de causes naturelles; C essaie de subtiliser le contenu d’un coffre-fort mais celui-ci est vide . . .

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The third form of impossibility arises where the actor's design is completed but the offence is still not committed because some element of the *actus reus* is missing (Type III). For example, A may take possession of property believing it to have been stolen when it has not been; B may smuggle a substance for reward believing it to be a narcotic when it is sugar. . . .

(Colvin, *supra*, at pp. 355-56.)

⁶¹ According to Professor Colvin, factually impossible attempts are those that fall into either of the first two categories. Legally impossible attempts are those that fall into the third category.

⁶² Colvin's schema appears attractive. But in fact it draws distinctions that do not stand up on closer inspection. There is no legally relevant difference between the pickpocket who reaches into the empty pocket and the man who takes his own umbrella from a stand believing it to be some other person's umbrella. Both have the *mens rea* of a thief. The first intends to take a wallet that he believes is not his own. The second intends to take an umbrella that he believes is not his own. Each takes some steps in the direction of consummating his design. And each is thwarted by a defect in the attendant circumstances, by an objective reality over which he has no control: the first by the absence of a wallet, the second by the accident of owning the thing that he seeks to steal. It is true that the latter seems to consummate his design and still not to complete an offence; but the semblance is misleading. The truth is that the second man does not consummate his design, because his intention is not simply to take the particular umbrella that he takes, but to take an umbrella that is not his own. That this man's design is premised on a mistaken understanding of the facts does not make it any less his design. A mistaken belief cannot be eliminated from the description of a person's mental state simply because it is mistaken.

⁶³ If it were otherwise, the effect would be to eliminate from our criminal law the defence of mis-

Le troisième type d'impossibilité se présente lorsque l'agent parvient à exécuter son projet sans toutefois commettre l'infraction parce qu'un élément de l'*actus reus* fait défaut (type III). Par exemple, A prend possession d'un bien croyant qu'il s'agit d'un bien volé alors que ce n'est pas le cas; B introduit une substance en contrebande contre rémunération croyant qu'il s'agit d'un stupéfiant alors que c'est du sucre. . . .

(Colvin, *loc. cit.*, aux pp. 355 et 356.)

Selon le professeur Colvin, la tentative d'infraction impossible en fait appartient à l'une ou l'autre des deux premières catégories. La tentative d'infraction impossible en droit est classée dans la troisième catégorie.

La classification proposée par Colvin est attrayante. Mais, de fait, elle établit des distinctions qui ne résistent pas à une analyse plus méticuleuse. Sur le plan juridique, il n'existe aucune différence pertinente entre le voleur à la tire qui glisse la main dans une poche vide et l'homme qui s'empare de son parapluie en croyant qu'il s'agit du parapluie d'un autre. Les deux ont la *mens rea* du voleur. Le premier a l'intention de prendre un porte-monnaie qu'il croit ne pas être le sien. Le second a l'intention de prendre un parapluie qu'il croit ne pas être le sien. Chacun a accompli des actes dans le but de réaliser son projet. Et chacun est contrecarré par un concours de circonstances défavorables, par un fait objectif indépendant de sa volonté: le premier, par l'absence du porte-feuille, le second, par le fait qu'il possède la chose qu'il cherche à voler. Il est vrai que ce dernier semble réaliser son projet sans pour autant consommer l'infraction; mais les apparences sont trompeuses. En vérité, le deuxième homme ne parvient pas à réaliser son projet, parce que son intention n'est pas simplement de prendre le parapluie qu'il prend, mais de s'emparer d'un parapluie qui ne lui appartient pas. Que son projet soit fondé sur une méconnaissance de la situation ne change rien au fait qu'il s'agit bien de son projet. La croyance erronée ne peut pas être éliminée de la description de l'état d'esprit simplement parce qu'elle est erronée.

S'il en était autrement, la défense de croyance erronée disparaîtrait de notre droit pénal. Si les

taken belief. If mistaken beliefs did not form part of an actor's intent — if an actor's intent were merely to do what he in fact does — then a man who honestly but mistakenly believed that a woman had consented to have sexual relations with him and who on that basis actually had sexual relations with that woman, would have no defence to the crime of sexual assault. His intention, on this limited understanding of intention, would have been to sleep with the particular woman with whom he slept; and that particular woman, by hypothesis, is one who did not consent to sleep with him. Substituting the one description (“a woman who did not consent to sleep with him”) for the other (“the particular woman with whom he slept”), it would follow that his intention was to sleep with a woman who had not consented to sleep with him. But of course, and as we have already strenuously urged, intention is one thing and the truth is another. Intention has to do with how one sees the world and not necessarily with the reality of the world.

Accordingly, there is no difference between an act thwarted by a “physical impossibility” and one thwarted “following completion”. Both are thwarted by an attendant circumstance, by a fact: for example, by the fact of there being no wallet to steal or by the fact of there being no umbrella to steal. The distinction between them is a distinction without a difference. Professor Colvin himself agrees that “[t]he better view is that impossibility of execution is never a defence to inchoate liability in Canada” (p. 358).

There is, however, a relevant difference between a failed attempt to do something that is a crime and an imaginary crime. See Pierre Rainville, “La gradation de la culpabilité morale et des formes de risque de préjudice dans le cadre de la répression de la tentative” (1996), 37 *C. de D.* 909, at pp. 954-55. It is one thing to attempt to steal a wallet, believing such thievery to be a crime, and quite

croyances erronées ne faisaient pas partie intégrante de l'intention de l'auteur d'un acte — si l'intention de cet auteur était simplement de faire ce qu'il fait effectivement — alors, l'homme qui sincèrement, mais erronément, croit qu'une femme a consenti à des relations sexuelles et qui, se fondant sur cette croyance, a des relations sexuelles avec cette femme, n'aurait aucun moyen de défense contre l'accusation d'agression sexuelle. Suivant cette conception restrictive de l'intention, l'homme aurait eu l'intention de coucher avec la femme avec laquelle il a couché; et cette femme, par hypothèse, est une femme qui n'a pas consenti à coucher avec lui. Si l'on substitue la proposition («une femme qui n'a pas consenti à coucher avec lui») à l'autre («la femme avec laquelle il a couché»), il s'ensuit que son intention était de coucher avec une femme qui n'avait pas consenti à coucher avec lui. Mais, évidemment, comme nous l'avons déjà dit avec grande insistance, l'intention est une chose et la vérité en est une autre. L'intention se rapporte à l'image que chacun se fait du monde extérieur et elle ne correspond pas forcément à la réalité.

Par conséquent, il n'y a aucune différence entre l'acte infructueux en raison d'une «impossibilité matérielle» et l'acte infructueux «à l'issue de l'exécution». Les deux sont contrecarrés par un concours de circonstances, par un fait: par exemple, par le fait qu'il n'y a aucun porte-monnaie à voler ou par le fait qu'il n'y a aucun parapluie à voler. La distinction établie entre les deux est une distinction sans fondement. Le professeur Colvin lui-même convient qu'il [TRADUCTION] «[v]aut mieux considérer que l'impossibilité d'exécution n'est jamais un moyen de défense en matière de responsabilité secondaire au Canada» (p. 358.)

Il y a toutefois une différence pertinente entre le crime manqué et le crime imaginaire. Voir Pierre Rainville, «La gradation de la culpabilité morale et des formes de risque de préjudice dans le cadre de la répression de la tentative» (1996), 37 *C. de D.* 909, aux pp. 954 et 955. C'est une chose de tenter de voler un porte-monnaie, croyant qu'un tel vol est un crime, mais c'en est une autre de tenter d'in-

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another thing to bring sugar into Canada, believing the importation of sugar to be a crime. In the former case, the would-be thief has the *mens rea* associated with thievery. In the latter case, the would-be smuggler has no *mens rea* known to law. Because s. 24(1) clearly provides that it is an element of the offence of attempt to have “an intent to commit an offence”, the latter sort of attempt is not a crime.

66 Nor should it be. A major purpose of the law of attempt is to discourage the commission of subsequent offences. See Williams’ *Textbook of Criminal Law*, *supra*, at pp. 404-5. See also Brown, *supra*, at p. 232; Eugene Meehan, “Attempt — Some Rational Thoughts on its Rationale” (1976-77), 19 *Crim. L.Q.* 215, at p. 238; Don Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 594. But one who attempts to do something that is not a crime or even one who actually does something that is not a crime, believing that what he has done or has attempted to do is a crime, has not displayed any propensity to commit crimes in the future, unless perhaps he has betrayed a vague willingness to break the law. Probably all he has shown is that he might be inclined to do the same sort of thing in the future; and from a societal point of view, that is not a very worrisome prospect, because by hypothesis what he attempted to do is perfectly legal.

67 Therefore, we conclude that s. 24(1) draws no distinction between attempts to do the possible but by inadequate means, attempts to do the physically impossible, and attempts to do something that turns out to be impossible “following completion”. All are varieties of attempts to do the “factually impossible” and all are crimes. Only attempts to commit imaginary crimes fall outside the scope of the provision. Because what Mr. Dynar attempted to do falls squarely into the category of the factually impossible — he attempted to commit crimes known to law and was thwarted only by chance — it was a criminal attempt within the meaning of s. 24(1). The evidence suggests that Mr. Dynar is a criminal within the contemplation of the Canadian

troduire du sucre au Canada, croyant que l’importation de sucre est un crime. Dans le premier cas, le voleur potentiel possède la *mens rea* liée au vol. Dans le deuxième cas, le contrebandier potentiel n’a aucune *mens rea* connue en droit. Étant donné que le par. 24(1) prévoit clairement que «l’intention de commettre une infraction» est un élément constitutif de l’infraction de tentative, cette deuxième sorte de tentative n’est pas un crime.

Et c’est bien qu’il en soit ainsi. L’un des buts principaux des règles de droit applicables en matière de tentative est de décourager la perpétration subséquente d’infractions; voir l’ouvrage de Williams intitulé *Textbook of Criminal Law*, *op. cit.*, aux pp. 404 et 405; voir également Brown, *loc. cit.*, à la p. 232; Eugene Meehan, «Attempt — Some Rational Thoughts on its Rationale» (1976-77), 19 *Crim. L.Q.* 215, à la p. 238; Don Stuart, *Canadian Criminal Law* (3^e éd. 1995), à la p. 594. Mais celui qui tente d’accomplir un acte qui n’est pas un crime, ou, même, celui qui accomplit effectivement un acte qui n’est pas un crime, croyant que ce qu’il a fait ou tenté de faire est un crime, ne montre aucune propension à la perpétration de crimes, sauf que sa conduite trahit peut-être une vague volonté d’enfreindre la loi. La seule chose qu’il a peut-être réussi à montrer, c’est qu’il pourrait être enclin à refaire la même chose un jour. Et d’un point de vue social, il n’y a pas lieu de s’inquiéter, parce que, par hypothèse, ce qu’il a tenté de faire est parfaitement légal.

Par conséquent, nous concluons que le par. 24(1) n’établit aucune distinction entre la tentative d’infraction possible à l’aide de moyens inefficaces, la tentative d’infraction impossible matériellement et la tentative d’infraction impossible «à l’issue de l’exécution». Ce sont toutes des tentatives d’infractions «impossibles en fait» et toutes sont des crimes. Seule la tentative de crime imaginaire échappe à l’application de la disposition. Comme ce que M. Dynar a tenté de faire relève carrément de l’impossibilité de fait — il a tenté de commettre des crimes connus en droit et n’a été déjoué que par le hasard — il s’agissait d’une tentative criminelle au sens du par. 24(1). La preuve montre que M. Dynar est un criminel visé

law and so the double criminality rule should be no bar to his extradition to the United States.

Notwithstanding the difficulties associated with the conventional distinction between factual and legal impossibility, a certain reluctance to embrace our conclusion persists in some quarters. It seems to us that this is in part due to a misunderstanding of the elements of the money-laundering offences. Both s. 462.31(1) of the *Criminal Code* and s. 19.2(1) of the *Narcotic Control Act* require knowledge that the property being laundered is the proceeds of crime. It is tempting to think that knowledge is therefore the *mens rea* of these offences. But “*mens rea*” denotes a mental state. *Mens rea* is the subjective element of a crime. See Williams’ *Textbook of Criminal Law*, *supra*, at p. 71. Knowledge is not subjective, or, more accurately, it is not entirely subjective.

As we have already said, knowledge, for legal purposes, is true belief. Knowledge therefore has two components — truth and belief — and of these, only belief is mental or subjective. Truth is objective, or at least consists in the correspondence of a proposition or mental state to objective reality. Accordingly, truth, which is a state of affairs in the external world that does not vary with the intention of the accused, cannot be a part of *mens rea*. As one Canadian academic has said, [TRANSLATION] “[t]he truth of the accused’s belief is not part of the *mens rea* of s. 24(1) Cr.C.”. See Rainville, *supra*, at p. 963. Knowledge as such is not then the *mens rea* of the money-laundering offences. Belief is.

The truth of an actor’s belief that certain monies are the proceeds of crime is something different from the belief itself. That the belief be true is one of the attendant circumstances that is required if the *actus reus* is to be completed. In other words, the act of converting the proceeds of crime presup-

par le droit canadien et, dès lors, la règle de la double incrimination ne devrait pas faire obstacle à son extradition aux États-Unis.

Malgré les difficultés suscitées par la distinction classique établie entre l’impossibilité de fait et l’impossibilité de droit, certains hésitent encore à accepter notre conclusion. Il nous semble que cela est dû en partie à une méconnaissance des éléments constitutifs des infractions de recyclage des produits de la criminalité. Tant le par. 462.31(1) du *Code criminel* que le par. 19.2(1) de la *Loi sur les stupéfiants* exigent que l’auteur de l’infraction sache que l’argent à recycler est le produit de la criminalité. Il est tentant de penser que la connaissance est donc la *mens rea* de ces infractions. Mais la *mens rea* dénote un état d’esprit. C’est l’élément subjectif du crime; voir l’ouvrage de Williams ayant pour titre *Textbook of Criminal Law*, *op. cit.*, à la p. 71. La connaissance n’est pas subjective, ou, pour être plus exact, elle n’est pas entièrement subjective.

Nous l’avons déjà dit, la connaissance en droit s’entend de la croyance conforme à la réalité. Elle a donc deux composantes — la vérité et la croyance — et de ces deux éléments, seule la croyance est subjective ou psychologique. La vérité est objective, ou du moins elle réside dans un rapport de concordance entre un énoncé ou un état d’esprit et la réalité objective. Par conséquent, la vérité, qui est un état du monde extérieur ne variant pas en fonction de l’intention de l’accusé, ne peut pas faire partie intégrante de la *mens rea*. Comme l’a dit un auteur canadien: «[l]a véracité de la croyance de l’accusé ne fait pas partie de la *mens rea* de l’article 24 (1) C.cr.». Voir Rainville, *loc. cit.*, à la p. 963. La connaissance comme telle n’est donc pas la *mens rea* des infractions de recyclage des produits de la criminalité. C’est la croyance qui l’est.

La conformité avec la réalité de la croyance de l’auteur de l’infraction que certaines sommes d’argent sont les produits de la criminalité est distincte de la croyance elle-même. Cette conformité avec la réalité est l’une des circonstances concomitantes exigées pour que l’*actus reus* soit exécuté. En

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poses the existence of some money that is in truth the proceeds of crime.

d'autres termes, le recyclage des produits de la criminalité suppose l'existence d'une somme d'argent qui est effectivement le produit de la criminalité.

71 In this, the money-laundering offences are no different from other offences. Murder is the intentional killing of a person. Because a person cannot be killed who is not alive, and because a killing, if it is to be murder, must be intentional, it follows that a successful murderer must believe that his victim is alive. An insane man who kills another believing that the one he kills is a manikin does not have the *mens rea* needed for murder. Thus, the successful commission of the offence of murder presupposes both a belief that the victim is alive just before the deadly act occurs and the actual vitality of the victim at that moment. Both truth and belief are required. Therefore, knowledge is required. But this does not mean that the vitality of the victim is part of the *mens rea* of the offence of murder. Instead, it is an attendant circumstance that makes possible the completion of the *actus reus*, which is the killing of a person.

Sur ce plan, les infractions de recyclage des produits de la criminalité ne sont pas différentes des autres infractions. Le meurtre, c'est le fait de donner volontairement la mort à un être humain. Comme l'on ne peut donner la mort qu'à un être vivant, et parce que le meurtre est volontaire, il s'ensuit que le meurtrier, pour mener à bien son projet, doit croire que sa victime est vivante. Le déséquilibré qui tue une personne en croyant qu'il s'agit d'un mannequin ne possède pas la *mens rea* nécessaire à la perpétration d'un meurtre. Ainsi, la consommation du meurtre suppose à la fois la croyance que la victime est vivante juste avant le coup mortel et la vie de la victime à ce moment-là. La croyance et sa conformité avec la réalité sont exigées toutes les deux. Par conséquent, la connaissance est exigée. Mais cela ne veut pas dire pour autant que la vie de la victime fasse partie de la *mens rea* du meurtre. C'est plutôt une circonstance concomitante qui rend possible la réalisation de l'*actus reus*, c'est-à-dire le fait de donner la mort à un être humain.

72 In general, the successful commission of any offence presupposes a certain coincidence of circumstances. But these circumstances do not enter into the *mens rea* of the offence. As one author observes, it is important "to keep separate the intention of the accused and the circumstances as they really were" (Brown, *supra*, at p. 232).

En général, la consommation d'une infraction suppose un certain concours de circonstances. Mais ces circonstances ne font pas partie de la *mens rea* de l'infraction. Comme un auteur le fait observer, il est important [TRADUCTION] «de distinguer l'intention de l'accusé et les circonstances telles qu'elles se sont réellement présentées» (Brown, *loc. cit.*, à la p. 232).

73 The absence of an attendant circumstance is irrelevant from the point of view of the law of attempt. An accused is guilty of an attempt if he intends to commit a crime and takes legally sufficient steps towards its commission. Because an attempt is in its very nature an incomplete substantive offence, it will always be the case that the *actus reus* of the completed offence will be deficient, and sometimes this will be because an attendant circumstance is lacking. In *Ancio, supra*, at pp. 247-48, McIntyre J. said:

L'absence d'une circonstance concomitante n'est pas pertinente du point de vue des règles de droit applicables à la tentative d'infraction. Un accusé est coupable de tentative s'il a eu l'intention de commettre un crime et s'il a pris des mesures suffisantes en droit pour le perpétrer. Puisqu'une tentative est par sa nature même une infraction matérielle précise non consommée, l'*actus reus* de l'infraction sera toujours imparfait, et, parfois, il en sera ainsi parce que la circonstance concomitante est absente. Dans l'arrêt *Ancio*, précité, aux pp. 247 et 248, le juge McIntyre a dit:

As with any other crime, the Crown must prove a *mens rea*, that is, the intent to commit the offence in question and the *actus reus*, that is, some step towards the commission of the offence attempted going beyond mere acts of preparation. Of the two elements the more significant is the *mens rea*. . . .

Indeed, because the crime of attempt may be complete without the actual commission of any other offence and even without the performance of any act unlawful in itself, it is abundantly clear that the criminal element of the offence of attempt may lie solely in the intent.

So it should not be troubling that what Mr. Dynar did does not constitute the *actus reus* of the money-laundering offences. If his actions did constitute the *actus reus*, then he would be guilty of the completed offences described in s. 462.31 of the *Criminal Code* and s. 19.2 of the *Narcotic Control Act*. There would be no need even to consider the law of attempt. The law of attempt is engaged only when, as in this case, the *mens rea* of the completed offence is present entirely and the *actus reus* of it is present in an incomplete but more-than-merely-preparatory way.

The respondent argues that, even accepting that the truth of a belief is not a part of the *mens rea*, nevertheless he did not have the requisite *mens rea*. In particular, the respondent suggests that, in determining whether an accused has the requisite *mens rea* for attempt, a court should consider only those mental states that supply the accused's motivation to act.

This proposal is a way of overlooking an accused's mistaken beliefs. Thus, the respondent argues that he did not have the requisite *mens rea* because he desired only to make money by doing a service to Anthony, the undercover agent. It did not matter to Mr. Dynar whether the money was the proceeds of crime or not. He would have been just as happy to convert funds for the United States Government as for some drug kingpin.

Comme dans le cas de tout autre crime, le ministère public doit prouver la *mens rea*, c'est-à-dire l'intention de commettre l'infraction en question, et l'*actus reus*, c'est-à-dire une mesure quelconque en vue de commettre l'infraction, autre que les simples actes de préparation. Le plus important de ces deux éléments est la *mens rea*. . . .

En effet, comme le crime de tentative peut être complet sans la perpétration d'aucune autre infraction et même sans l'accomplissement d'un acte illégal en soi, il est très clair que l'élément criminel de l'infraction de tentative peut résider uniquement dans l'intention.

Par conséquent, il ne faudrait pas s'inquiéter de ce que les agissements de M. Dynar ne constituent pas l'*actus reus* des infractions de recyclage des produits de la criminalité. Si ses actes constituaient l'*actus reus*, il serait coupable des infractions prévues par l'art. 462.31 du *Code criminel* et l'art. 19.2 de la *Loi sur les stupéfiants*. Il ne serait même pas nécessaire de prendre en considération les règles de droit relatives à la tentative d'infraction. Ces règles s'appliquent seulement lorsque, comme en l'espèce, la *mens rea* de l'infraction consommée est présente et que l'exécution de l'*actus reus* n'est pas achevée mais dépasse le stade des simples actes préparatoires.

L'intimé allègue que, même en acceptant que la conformité avec la réalité de la croyance ne fasse pas partie intégrante de la *mens rea*, on ne peut affirmer qu'il avait la *mens rea* nécessaire. Plus particulièrement, l'intimé affirme que, pour déterminer si un accusé a la *mens rea* nécessaire à la tentative, le tribunal ne devrait prendre en considération que les états d'esprit qui ont poussé l'accusé à agir.

Cette affirmation est une façon de ne pas tenir compte des croyances erronées de l'accusé. Ainsi, l'intimé allègue qu'il n'avait pas la *mens rea* requise parce qu'il voulait seulement faire de l'argent en rendant service à Anthony, l'agent d'infiltration. Cela n'avait aucune importance pour M. Dynar que l'argent soit le produit de la criminalité ou non. Il aurait été tout aussi heureux de recycler des fonds pour le gouvernement américain que

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Mr. Dynar's only concern was that he should receive a commission for his services.

pour n'importe quel baron de la drogue. M. Dynar n'avait pas d'autres préoccupations que de recevoir une commission pour ses services.

77 The theoretical basis for this thinking appears in Professor George Fletcher's attempted defence of the distinction between factual impossibility and legal impossibility (in *Rethinking Criminal Law* (1978)). Fletcher, on whom the respondent relies, says that an accused's legally relevant intention comprises only those mental states that move the accused to act as he does (at p. 161):

Le fondement théorique de cette ligne de pensée apparaît dans l'argumentation présentée par le professeur George Fletcher au soutien de la distinction établie entre l'impossibilité de fait et l'impossibilité de droit (dans *Rethinking Criminal Law* (1978)). Fletcher, que l'intimé invoque, affirme que l'intention pertinente en droit comprend seulement les états d'esprit qui ont poussé l'accusé à agir comme il l'a fait (à la p. 161):

[M]istaken beliefs are relevant to what the actor is trying to do if they affect his incentive in acting. They affect his incentive if knowing of the mistake would give him a good reason for changing his course of conduct.

[TRADUCTION] [L]es croyances erronées sont pertinentes en ce qui concerne le but recherché par l'agent si elles l'ont incité à agir. On peut dire qu'elles l'incitent à agir dans les cas où, s'il avait su qu'il faisait erreur, il aurait changé ses plans.

Because most facts are, from the accused's point of view, of no consequence, what the accused thinks about most facts is legally irrelevant.

Étant donné que la plupart des faits, du point de vue de l'accusé, n'ont pas d'importance, ce que l'accusé pense au sujet de la plupart des faits n'a pas de pertinence en droit.

78 Thus, to take one of Fletcher's examples, it does not matter what day a criminal thought it was when he committed a crime, because whatever he might have thought the day was, he would still have acted as he did. In Fletcher's view, similar reasoning explains why it is not a crime to deal with "legitimate" property thinking that one is dealing with the proceeds of crime (at p. 162):

Par conséquent, pour reprendre l'un des exemples que Fletcher donne, il importe peu que le criminel ait su quel jour c'était lorsqu'il a commis son crime, car il aurait agi de la même façon. Selon Fletcher, un raisonnement similaire explique pourquoi ce n'est pas un crime de faire le commerce d'un bien «légitimement acquis» en pensant qu'on utilise les produits de la criminalité (à la p. 162):

[I]t seems fairly clear that the fact that the [goods were] stolen does not affect the actor's incentive in paying the price at which [they were] offered to him by the police. If he were told that the goods were not stolen, that would not have provided him with a reason for turning down the offer. If they were not stolen, so much the better. It follows, therefore, that it is inappropriate to describe his conduct as attempting to receive stolen [goods].

[TRADUCTION] [I]l semble assez clair que le fait que [les biens] ont été volés n'affecte pas la motivation du sujet de payer le prix auquel la police [les] lui a offert[s]. Le fait de savoir que les biens n'avaient pas été volés ne l'aurait pas incité à repousser l'offre. S'ils n'ont pas été volés, tant mieux. Il s'ensuit, par conséquent, qu'il est incorrect de qualifier sa conduite de tentative de recel de [biens] volé[s].

79 But this view confounds motivation and intention. If attention were paid only to the former, then the number of crimes would be greatly, if not very satisfactorily, reduced, because what moves many criminals to crime is some desire relatively more benign than the desire to commit a crime. We suspect that only the most hardened criminals commit

Mais ce point de vue confond mobile et intention. S'il fallait ne retenir que le premier, le nombre de crimes serait grandement réduit, même si ce n'est pas de façon très satisfaisante, parce que ce qui pousse de nombreux criminels à agir est un désir relativement plus anodin que le désir de commettre un crime. Nous croyons que seuls les crimi-

crimes just for the sake of breaking the law. To at least many malefactors, it must be a matter of indifference whether their actions constitute crimes. Probably most thieves would not turn up their noses at the opportunity to loot a house simply because it has been abandoned and so is the property of no one. The goal is the making of a quick dollar, not the flouting of the law. In this, we again agree completely with Glanville Williams, who said:

Normally, motivation is irrelevant for intention. Every receiver of stolen goods would prefer to have non-stolen goods at the same price, if given the choice; but if he knows or believes the goods are stolen, he intends to receive stolen goods. We have to say that a person intends his act in the circumstances that he knows or believes to exist. This being the rule for consummated crimes, no good reason can be suggested why it should differ for attempts.

(“The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*”, [1986] *Cambridge L.J.* 33, at p. 78.)

In this case, it is almost certainly true that Mr. Dynar would have been content to convert the United States Government’s money even if he had known that it had nothing to do with the sale of drugs. Presumably his only concern was to collect his percentage. The provenance of the money must have been, for him, largely irrelevant. But, from the point of view of the criminal law, what is important is not what moved Mr. Dynar, but what Mr. Dynar believed he was doing. “We have to say that a person intends his act in the circumstances that he knows or believes to exist.” And the evidence is clear that Mr. Dynar believed that he was embarked upon a scheme to convert “drug money” from New York City.

Looking to intent rather than motive accords with the purpose of the criminal law in general and of the law of attempt in particular. Society imposes criminal sanctions in order to punish and deter

nels les plus endurcis commettent des crimes seulement pour le plaisir d’enfreindre la loi. Pour de nombreux malfaiteurs au moins, il doit être indifférent que leurs agissements constituent des crimes ou non. Probablement que la plupart des voleurs ne laisseraient pas filer l’occasion de piller une maison, simplement parce qu’elle a été abandonnée et que, par conséquent, elle n’appartient plus à personne. Le but est de s’enrichir vite, non de passer outre à la loi. Sur cette question, nous sommes à nouveau tout à fait d’accord avec Glanville Williams, qui affirme ce qui suit:

[TRADUCTION] Normalement, le mobile n’a pas d’incidence sur l’intention. Si on lui en donnait le choix, n’importe quel receleur de biens volés préférerait, pour le même prix, des biens qui n’ont pas été volés; mais s’il sait ou croit que les biens ont été volés, il a l’intention de receler des biens volés. Nous devons affirmer qu’une personne agit intentionnellement eu égard aux circonstances qu’elle sait ou croit exister. Ceci étant la règle pour les crimes consommés, aucune bonne raison ne justifie qu’il en soit différemment pour les tentatives.

(«The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*», [1986] *Cambridge L.J.* 33, à la p. 78.)

En l’espèce, il est presque certain que M. Dynar aurait été satisfait de recycler l’argent du gouvernement des États-Unis même s’il avait su que cet argent n’était en rien lié au commerce de stupéfiants. On peut présumer qu’il n’avait pas d’autre préoccupation que de récolter sa commission. Pour lui, la provenance de l’argent devait être sans grande importance. Mais, du point de vue du droit pénal, ce qui est important, ce n’est pas ce qui a poussé M. Dynar à agir, mais ce que M. Dynar croyait qu’il faisait. [TRADUCTION] «Nous devons affirmer qu’une personne agit intentionnellement eu égard aux circonstances qu’elle sait ou croit exister.» Et il ressort clairement de la preuve que M. Dynar croyait participer à un projet de recyclage d’argent provenant du trafic de stupéfiants à New York.

Prendre en considération l’intention plutôt que le mobile concorde avec l’objectif du droit pénal en général et les règles de droit relatives à la tentative en particulier. La société impose des sanctions

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undesirable conduct. It does not matter to society, in its efforts to secure social peace and order, what an accused's motive was, but only what the accused intended to do. It is no consolation to one whose car has been stolen that the thief stole the car intending to sell it to purchase food for a food bank. Similarly, the purpose of the law of attempt is universally acknowledged to be the deterrence of subsequent attempts. A person who has intended to do something that the law forbids and who has actually taken steps towards the completion of an offence is apt to try the same sort of thing in the future; and there is no assurance that next time his attempt will fail.

pénales afin de punir et de réprimer toute conduite indésirable. Dans son effort pour maintenir la paix sociale, la société ne se préoccupe pas du mobile de l'accusé, mais seulement de ce qu'il avait l'intention de faire. Pour qui s'est fait voler son automobile, ce n'est pas une consolation que de savoir que le voleur voulait la vendre en vue d'acheter de la nourriture pour une banque d'alimentation. De façon similaire, il est universellement reconnu que l'objet des règles de droit relatives à la tentative est de faire obstacle à la commission d'autres tentatives. Celui qui a eu l'intention d'accomplir un acte illicite et qui a pris effectivement les moyens pour y parvenir risque d'essayer à nouveau un jour; et il n'y a aucune assurance que la prochaine fois sa tentative échouera.

82 Applying this rationale to impossible attempts, we conclude that such attempts are no less menacing than are other attempts. After all, the only difference between an attempt to do the possible and an attempt to do the impossible is chance. A person who enters a bedroom and stabs a corpse thinking that he is stabbing a living person has the same intention as a person who enters a bedroom and stabs someone who is alive. In the former instance, by some chance, the intended victim expired in his sleep perhaps only moments before the would-be assassin acted. It is difficult to see why this circumstance, of which the tardy killer has no knowledge and over which he has no control, should in any way mitigate his culpability. Next time, the intended victim might be alive. Similarly, even if Mr. Dynar could not actually have laundered the proceeds of crime this time around, there is hardly any guarantee that his next customer might not be someone other than an agent of the United States Government.

Appliquant ce raisonnement à la tentative d'infraction impossible, nous concluons que cette tentative n'est pas moins menaçante que les autres tentatives. Après tout, la seule différence entre la tentative d'infraction possible et la tentative d'infraction impossible est la chance. La personne qui s'introduit dans une chambre à coucher et poignarde un cadavre en pensant poignarder une personne vivante a la même intention que la personne qui entre dans une chambre à coucher et poignarde une personne vivante. Dans le premier cas, par une espèce de hasard, la victime avait expiré dans son sommeil peut-être juste quelques instants avant que l'assassin potentiel ne porte le coup mortel. Il est difficile de concevoir pourquoi ce fait, qui survient à l'insu du tueur en retard et échappe à sa volonté, devrait de quelque façon atténuer sa culpabilité. La prochaine fois, la personne visée pourrait être vivante. De façon similaire, même si, cette fois-ci, M. Dynar ne pouvait pas réellement recycler les produits de la criminalité, il n'est pas garanti que son prochain client sera un agent du gouvernement américain.

83 The import of all of this is that Mr. Dynar committed the crime of attempt; and for having done so he should be extradited to the United States. The facts disclose an intent to launder money and acts taken in furtherance of that design. Section 24(1) of the *Criminal Code* requires no more.

Il s'ensuit que M. Dynar a commis le crime de tentative et dès lors, il doit être extradé aux États-Unis. Les faits révèlent une intention de recycler des produits de la criminalité et des actes accomplis en vue de réaliser ce projet. Le paragraphe 24(1) du *Code criminel* n'exige rien de plus.

(3) Could Mr. Dynar's Conduct Justify His Surrender on the Conspiracy Charge?

Mr. Dynar's extradition has also been requested on a charge of conspiracy. The warrant of committal issued by Keenan J. listed the two charges against Mr. Dynar that are the subject of the American indictment, and indicated that the conduct underlying both charges would constitute crimes in Canada. As a result, Mr. Dynar was extraditable on both. The conduct which would establish a *prima facie* case for the conspiracy charge is somewhat different from that which would establish the *prima facie* case for the attempt charge. Thus it is necessary to determine whether Mr. Dynar's conduct in combination with Mr. Cohen's could also constitute the crime of conspiracy in this country. The applicability of the defence of "impossibility" under Canadian criminal law is as much an issue with respect to the conspiracy charge as it is with regard to the attempt charge.

The issue is not whether Mr. Dynar's conduct can support a conviction for conspiracy (or for that matter for attempt), but only whether a *prima facie* case has been demonstrated that would justify his committal for trial if his conduct had taken place in Canada. Section 465(1)(c) of the *Criminal Code* makes it an offence to conspire with another person to commit any indictable offence, other than murder or false prosecution, which are governed by paragraphs (a) and (b) of the same subsection. There is no doubt that laundering proceeds of crime is an indictable offence in Canada. The question that must be decided, however, is whether a conspiracy can exist even where all the elements of the full indictable offence are not present because the circumstances are not as the accused believed them to be.

(a) *What is a Criminal Conspiracy?*

In *R. v. O'Brien*, [1954] S.C.R. 666, at pp. 668-69, this Court adopted the definition of conspiracy

(3) La conduite de M. Dynar pourrait-elle justifier son extradition relativement à l'accusation de complot portée contre lui?

La demande d'extradition de M. Dynar se fonde aussi sur une accusation de complot. Le mandat de dépôt délivré par le juge Keenan expose les deux accusations portées contre M. Dynar dans l'acte d'accusation américain et il indique que les actes à l'origine de ces deux accusations constitueraient un crime au Canada. En conséquence, M. Dynar pouvait être extradé relativement à l'un et l'autre. La conduite susceptible d'établir *prima facie* la perpétration d'un complot est quelque peu différente de celle qui pourrait établir *prima facie* le bien-fondé de l'accusation de tentative. Il faut donc déterminer si la conduite de M. Dynar, combinée à celle de M. Cohen, peut également constituer une infraction de complot en droit canadien. La question de savoir si la défense d'«impossibilité» peut être invoquée en droit pénal canadien se pose tout autant en ce qui concerne l'accusation de complot que l'accusation de tentative.

Il ne s'agit pas de déterminer si les agissements de M. Dynar peuvent fonder une déclaration de culpabilité à l'égard de l'accusation de complot (ou même de tentative), mais seulement si une preuve *prima facie* a été produite pour justifier son incarcération en vue d'un procès si les agissements qu'on lui reproche avaient eu lieu au Canada. Selon l'al. 465(1)c) du *Code criminel*, constitue une infraction le fait de comploter avec quelqu'un en vue de commettre un acte criminel, autre que les infractions de meurtre ou de poursuite injustifiée visées aux al. 465(1)a) et b). Au Canada, le recyclage des produits de la criminalité constitue sans conteste un acte criminel. Il reste toutefois à décider si un complot peut exister même si tous les éléments constitutifs ne sont pas réunis parce que les circonstances ne sont pas telles que l'accusé les croyait.

a) *Qu'est-ce qu'un complot criminel?*

Dans l'arrêt *R. c. O'Brien*, [1954] R.C.S. 666, aux pp. 668 et 669, notre Cour a fait sienne la défi-

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from the English case of *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306, at p. 317:

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties . . . punishable if for a criminal object. . . .

There must be an intention to agree, the completion of an agreement, and a common design. Taschereau J., in *O'Brien, supra*, at p. 668, added that:

Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect*. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement. [Emphasis in original.]

⁸⁷ In *Papalia v. The Queen*, [1979] 2 S.C.R. 256, at p. 276, Dickson J. (as he then was) described the offence of conspiracy as “an inchoate or preliminary crime”. In setting out the necessary elements of the offence, he noted at pp. 276-77 that:

The word “conspire” derives from two Latin words, “con” and “spirare”, meaning “to breathe together”. To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence: *Paradis v. R.*, at p. 168. The *actus reus* is the fact of agreement: *D.P.P. v. Nock*, at p. 66. The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are

nition du complot énoncée dans l’arrêt anglais *Mulcahy c. The Queen* (1868), L.R. 3 H.L. 306, à la p. 317:

[TRADUCTION] Un complot ne réside pas seulement dans l’intention de deux ou plusieurs personnes, mais dans l’entente conclue entre deux ou plusieurs personnes en vue de commettre un acte illégal, ou d’accomplir un acte légal par des moyens illégaux. Tant qu’un tel projet reste au stade de l’intention, il ne peut faire l’objet de poursuites. Lorsque deux personnes conviennent de le mettre à exécution, le projet lui-même devient un acte distinct, et l’acte de chaque partie [. . .] devient punissable s’il vise un but criminel . . .

L’intention de conclure une entente, la conclusion d’une entente et l’existence d’un projet commun sont essentiels. Dans l’arrêt *O’Brien*, précité, le juge Taschereau a ajouté, à la p. 668:

[TRADUCTION] Il n’est pas nécessaire qu’un acte manifeste soit accompli pour mettre le complot à exécution et commettre le crime, mais j’ai la certitude qu’il doit exister *une intention de mettre le projet commun à exécution*. Un projet commun implique nécessairement une intention. Ce sont des synonymes. L’intention ne peut consister qu’en la volonté de réaliser l’objet de l’entente. [En italique dans l’original.]

Dans l’arrêt *Papalia c. La Reine*, [1979] 2 R.C.S. 256, à la p. 276, le juge Dickson (plus tard Juge en chef) a qualifié l’infraction de complot de «crime incomplet ou préliminaire». En énonçant les éléments essentiels de l’infraction, il a noté, aux pp. 276 et 277:

Le mot «conspirer» vient de deux mots latins «con» et «spirare» qui signifient «souffler ensemble». Conspirer, c’est s’entendre. L’essence du complot criminel est la preuve de l’entente. Dans une accusation de complot, l’entente en soi est la substance de l’infraction: *Paradis c. R.*, à la p. 168. L’*actus reus* est le fait de l’entente: *D.P.P. v. Nock*, à la p. 66. L’entente à laquelle parviennent les conspirateurs peut envisager plusieurs actes ou infractions. Le nombre de participants n’est pas limité. De nouvelles personnes peuvent se joindre au projet en cours alors que d’autres peuvent l’abandonner. Aussi longtemps qu’il existe un plan général ininterrompu, des changements peuvent intervenir quant aux méthodes, aux conspirateurs ou aux victimes, sans que le complot prenne fin. L’enquête importante ne porte pas sur les actes accomplis conformément à l’entente, mais plutôt

referable and to which all of the alleged offenders were privy. [Emphasis added.]

Conspiracy is in fact a more “preliminary” crime than attempt, since the offence is considered to be complete before any acts are taken that go beyond mere preparation to put the common design into effect. The Crown is simply required to prove a meeting of the minds with regard to a common design to do something unlawful, specifically the commission of an indictable offence. See s. 465(1)(c) of the *Criminal Code*.

A conspiracy must involve more than one person, even though all the conspirators may not either be identified, or be capable of being convicted. See for example *O’Brien, supra*; *Guimond v. The Queen*, [1979] 1 S.C.R. 960. Further, each of the conspirators must have a genuine intention to participate in the agreement. A person cannot be a conspirator if he or she merely pretends to agree. In *O’Brien*, Rand J. held at p. 670 that

a conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient.

Where one member of a so-called conspiracy is a police informant who never intends to carry out the common design, there can be no conspiracy involving that person. Nonetheless, a conspiracy can still exist between other parties to the same agreement. It is for this reason that the conspiracy in this case is alleged to involve Mr. Dynar and Mr. Cohen, and not the confidential informant “Anthony”.

There can be no doubt that a criminal conspiracy constitutes a serious offence that is properly extraditable. Indeed, it was so recognized in the 1976 treaty between Canada and the U.S. in force at the time of the sting operation. The crime has a long and malevolent history. Conspirators have plotted to overthrow monarchs from biblical times through the time of the Plantagenets and Tudors. Guy

sur la question de savoir s’il existe vraiment une entente commune dont les actes découlent et à laquelle participent tous les présumés responsables. [Nous soulignons.]

Le complot est en fait un crime plus «préliminaire» que la tentative, car cette infraction est considérée consommée avant l’accomplissement de tout acte qui dépasserait le stade des actes simplement préparatoires à la mise à exécution du projet commun. Le ministère public doit simplement prouver la rencontre des volontés concernant un projet commun en vue de l’accomplissement d’un acte illégal, plus précisément la perpétration d’un acte criminel. Voir l’al. 465(1)c) du *Code criminel*.

Un complot doit être le fait de plus d’une personne, même si tous les conspirateurs ne sont pas nécessairement connus ni susceptibles d’être déclarés coupables. Voir, par exemple, *O’Brien*, précité; *Guimond c. La Reine*, [1979] 1 R.C.S. 960. En outre, chaque conspirateur doit avoir l’intention réelle de participer à l’entente. Une personne ne peut être un conspirateur si elle ne fait que prétendre acquiescer à l’entente. Dans l’arrêt *O’Brien*, le juge Rand a décidé, à la p. 670, que

[TRADUCTION] pour qu’il y ait complot, il doit y avoir une intention réelle des deux parties au moment où elles s’entendent pour participer à l’acte projeté; de simples paroles emportant apparemment acquiescement à l’acte projeté, sans aucune intention de le commettre, ne suffisent pas.

Lorsque l’un des supposés conspirateurs est un informateur de police qui n’a jamais eu l’intention de mettre le projet commun à exécution, il ne saurait être partie au complot. Un complot peut toutefois exister entre d’autres parties à la même entente. C’est pour cette raison que l’allégation de complot vise en l’espèce M. Dynar et M. Cohen, et non l’informateur «Anthony».

Il est bien établi qu’un complot criminel constitue une infraction grave qui peut à juste titre entraîner l’extradition. Le traité de 1976 entre le Canada et les États-Unis, qui était en vigueur au moment où a été menée l’opération d’infiltration, le reconnaît. Ce crime a une longue et sinistre histoire. Des conspirateurs ont comploté en vue de renverser des monarques depuis les temps

Fawkes conspired with others to blow up the parliament buildings. Today conspirators plot to carry out terrorist acts, to commit murders or to import forbidden drugs. Society is properly concerned with conspiracies since two or more persons working together can achieve evil results that would be impossible for an individual working alone. For example, it usually takes two or more conspirators to manufacture and secrete explosives or to arrange for the purchase, importation and sale of heroin. The very fact that several persons in combination agree to do something has for many years been considered to constitute “a menace to society”: *O’Brien, supra*, at p. 669. In fact, the scale of injury that might be caused to the fabric of society can be far greater when two or more persons conspire to commit a crime than when an individual sets out alone to do an unlawful act.

bibliques jusqu’à l’époque des Plantagenêts et des Tudors. Guy Fawkes a comploté avec d’autres personnes pour faire exploser les édifices du Parlement. Aujourd’hui, les conspirateurs complotent en vue de commettre des actes de terrorisme ou des meurtres ou d’importer des drogues interdites. La société a raison de s’inquiéter car deux ou plusieurs personnes agissant de concert peuvent parvenir à des résultats nuisibles qu’une personne seule ne pourrait jamais obtenir. Il faut, par exemple, plusieurs personnes pour fabriquer et cacher des explosifs ou pour organiser l’achat, l’importation et la vente d’héroïne. Le fait même que plusieurs personnes s’entendent pour accomplir quelque chose est considéré depuis nombre d’années comme une «menace pour la société»: *O’Brien, précité*, à la p. 669. En fait, les préjudices susceptibles d’être causés au tissu social sont beaucoup plus importants lorsque deux ou plusieurs personnes complotent en vue de commettre un crime que lorsqu’une personne décide seule de perpétrer un acte illégal.

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As a result, it is obvious that the reason for punishing conspiracy before any steps are taken towards attaining the object of the agreement is to prevent the unlawful object from being attained, and therefore to prevent this serious harm from occurring. See Glanville Williams, *Criminal Law — The General Part* (2nd ed. 1961), at p. 710. It is also desirable to deter similar conduct in the future. Those who conspire to do something that turns out to be impossible betray by their actions a propensity and aptitude to commit criminal acts; and there is no reason to believe that schemers who are thwarted on one occasion will not be successful on the next. Thus, the rationale for punishing conspirators coincides with the rationale for punishing persons for attempted crimes. Not only is the offence itself seen to be harmful to society, but it is clearly in society’s best interests to make it possible for law enforcement officials to intervene before the harm occurs that would be occasioned by a successful conspiracy or, if the conspiracy is incapable of completion, by a subsequent and more successful conspiracy to commit a similar offence.

De toute évidence, la répression du complot intervient avant l’accomplissement d’un acte visant à réaliser l’objet illégal de l’entente, et par conséquent en vue d’y faire obstacle afin d’empêcher que ce grave préjudice ne soit causé. Voir Glanville Williams, *Criminal Law — The General Part* (2^e éd. 1961), à la p. 710. Il est également souhaitable de décourager toute conduite similaire pour l’avenir. Les personnes qui complotent en vue d’accomplir ce qui s’avère impossible démontrent leur propension et leur aptitude à commettre des actes criminels et rien ne permet de croire qu’après un premier échec, elles n’obtiendront pas les résultats escomptés la fois suivante. Les raisons invoquées pour justifier la punition des auteurs de tentatives de crimes peuvent également l’être pour justifier celle des conspirateurs. Non seulement l’infraction en soi est considérée néfaste pour la société, mais encore l’intérêt de la société commande que les personnes chargées de l’application de la loi puissent intervenir avant que le préjudice que causerait le complot ne se réalise ou, s’il est irréalisable, avant qu’un nouveau complot en vue de commettre une infraction semblable ne réussisse.

(b) *Is Impossibility a Defence to Conspiracy?*

By virtue of the “preliminary” nature of the offence of criminal conspiracy, the mere fact that money was not transferred to Mr. Cohen for laundering by Mr. Dynar would not preclude a finding that a conspiracy existed between them. Criminal liability will still ensue, as long as the agreement and the common intention can be proved. Does it make any difference to the potential liability of the conspirators that they could not have committed the substantive offence even if they had done everything that they set out to do? Put another way, should conspirators escape liability because, owing to matters entirely outside their control, they are mistaken with regard to an attendant circumstance that must exist for their plan to be successful? Such a result would defy logic and could not be justified.

Impossibility as a defence to a charge of criminal conspiracy has received comparatively little attention by courts or academic writers. *Director of Public Prosecutions v. Nock*, [1978] 2 All E.R. 654 (H.L.), is the leading English case which considered the applicability of the defence of impossibility in a charge of conspiracy. In that case, the conspiracy was found to consist of an agreement to produce cocaine on a particular occasion from a specific substance. The agreement was impossible to carry out because the substance chosen was incapable of producing cocaine. The impossibility of carrying out this agreement was the basis for the conclusion that the same distinction between factual and legal impossibility that we have criticized in the law of attempt ought to apply to the law of conspiracy. The respondent relies upon *Nock*, and urges the adoption of legal impossibility as a defence to criminal conspiracy in Canada. This submission cannot be accepted.

In England, *Nock* has been specifically overtaken by the *Criminal Attempts Act 1981*, s. 5, which now makes criminal liability for conspiracy

b) *L'impossibilité peut-elle être opposée à une accusation de complot?*

Étant donné la nature «préliminaire» de l'infraction de complot criminel, le simple fait que l'argent n'a pas été remis à M. Cohen pour être recyclé par M. Dynar ne fait pas obstacle à une conclusion de complot. Leur responsabilité pénale sera retenue dans la mesure où l'existence d'une entente et d'une intention commune peut être prouvée. Le fait qu'il était impossible pour les conspirateurs de commettre l'infraction matérielle précise même en prenant toutes les mesures prévues a-t-il une incidence quelconque sur leur responsabilité éventuelle? Autrement dit, les conspirateurs devraient-ils être exonérés parce que, pour des raisons totalement indépendantes de leur volonté, ils se sont trompés quant à l'existence d'une circonstance dont dépend le succès de leur entreprise? Pareil résultat défierait la logique et serait injustifiable.

Le recours à l'impossibilité comme moyen de défense à une accusation de complot a comparativement très peu retenu l'attention de la doctrine et de la jurisprudence. La décision *Director of Public Prosecutions c. Nock*, [1978] 2 All E.R. 654 (H.L.), est l'arrêt de principe en Angleterre sur la question de savoir si l'on peut opposer l'impossibilité à une accusation de complot. Dans cette affaire, le complot consistait en une entente en vue de produire de la cocaïne à une occasion donnée à partir d'une substance particulière. La mise à exécution de l'entente était impossible parce que la substance choisie ne pouvait pas produire de cocaïne. Le tribunal s'est fondé sur l'impossibilité de mettre l'entente à exécution pour conclure que la distinction entre l'impossibilité de fait et l'impossibilité de droit, que nous avons critiquée relativement à la tentative, devait s'appliquer au complot. L'intimé s'appuie sur l'arrêt *Nock*, et demande instamment à la Cour de reconnaître que l'impossibilité peut être invoquée à l'encontre d'une accusation de complot au Canada. Cet argument ne peut être retenu.

En Angleterre, l'arrêt *Nock* a été expressément écarté par la *Criminal Attempts Act 1981*, art. 5, qui permet maintenant que soient tenus pénalement

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possible where the accused are mistaken as to an attendant circumstance that is necessary to prove the full offence. Effectively, this precludes the defence of legal impossibility as understood in *Nock, supra*, but preserves the defence for “imaginary crimes”. As we have seen, the latter term encompasses situations where individuals do something they believe contravenes the law when it does not. Thus, for example, in England it is not a crime to conspire to purchase Scotch whisky, because the purchase of that whisky is not a crime known to English law.

ment responsables d’un complot les accusés qui se trompent quant à l’existence d’une circonstance nécessaire pour établir la consommation de l’infraction. Cette disposition interdit, de fait, d’invoquer en défense l’impossibilité de droit au sens de l’arrêt *Nock*, précité, mais elle préserve le moyen de défense pour le «crime imaginaire». Comme nous l’avons vu, cette dernière expression s’entend notamment des cas où l’agent accomplit des actes en croyant qu’il contrevient à la loi, alors qu’il n’en est rien. Par exemple, en Angleterre, le fait de comploter pour acheter du whisky écossais ne constitue pas un crime parce que l’achat de ce type de whisky ne constitue pas un crime connu en droit anglais.

⁹⁴ Section 465(1)(c) of the Canadian *Criminal Code* does not specifically state that criminal liability for conspiracy can ensue where the substantive offence is impossible to commit. However, even in the absence of such an explicit legislative direction, the analysis of the House of Lords in *Nock* should not be accepted. The case has been rightly subjected to both academic and judicial criticism, and to the extent that it is based on the same distinction between factual and legal impossibility that has been applied in the law of attempt, it too is conceptually untenable.

L’alinéa 465(1)c) du *Code criminel* du Canada ne prévoit pas expressément qu’une personne peut être tenue pénalement responsable d’un complot lorsque la perpétration de l’infraction matérielle précise est impossible. Néanmoins, même si la loi n’énonce pas un tel principe, l’analyse effectuée par la Chambre des lords dans l’arrêt *Nock* ne devrait pas être retenue. Cet arrêt a été critiqué à juste titre par la doctrine et la jurisprudence. Dans la mesure où il repose sur la distinction établie entre l’impossibilité de fait et l’impossibilité de droit, qui a été appliquée en matière de tentative, il est tout aussi indéfendable sur le plan conceptuel.

⁹⁵ In England, the acceptance of legal impossibility as a defence to conspiracy in *Nock* was predicated on the adoption by the House of Lords of the same position regarding the law of attempt: see *Haughton v. Smith*, [1973] 3 All E.R. 1109. The House of Lords has now expressly overruled the *Haughton* decision in *R. v. Shivpuri*, [1986] 2 All E.R. 334. They did so on the basis that quite apart from the provisions of the *Criminal Attempts Act 1981*, the distinction between factual and legal impossibility is untenable in the law of attempt. The application of the distinction in *Nock* must now be questioned as well, even in the absence of legislative amendment. Accordingly, the desirability of using the *Nock* principles in Canada has been appropriately doubted by Cadsby Prov. Ct. J. in *R. v. Atkinson*, [1987] O.J. No. 1930. The New Zealand Court of Appeal has also rejected *Nock*,

En Angleterre, la reconnaissance de la défense d’impossibilité de droit invoquée à l’encontre d’une accusation de complot s’appuyait, dans l’arrêt *Nock*, sur la décision de la Chambre des lords de souscrire au même raisonnement en ce qui concerne la tentative: voir *Haughton c. Smith*, [1973] 3 All E.R. 1109. La Chambre des lords a maintenant expressément renversé l’arrêt *Haughton* dans l’arrêt *R. c. Shivpuri*, [1986] 2 All E.R. 334, pour le motif qu’abstraction faite des dispositions de la *Criminal Attempts Act 1981*, la distinction entre l’impossibilité de fait et l’impossibilité de droit ne saurait tenir en ce qui a trait à la tentative. L’application de la distinction établie dans l’arrêt *Nock* doit maintenant être remise elle aussi en question, même en l’absence de modification législative. Ainsi, l’opportunité d’appliquer au Canada les principes énoncés dans l’arrêt *Nock* a été mise en

except perhaps in the case of “imaginary crimes”: *R. v. Sew Hoy*, [1994] 1 N.Z.L.R. 257.

A number of Canadian academic authorities have also been justly critical of the use of the distinction between factual and legal impossibility in the law of conspiracy, and in particular, have criticized the *Nock* case for this reason. Most writers take the position that if the distinction between factual and legal impossibility is rejected in the case of attempt, it should *a fortiori* be rejected for conspiracy. Thus, for example, Colvin in *Principles of Criminal Law, supra*, at p. 358, indicates, in a discussion that deals primarily with the law of attempt, that he prefers the view that “impossibility of execution is never a defence to inchoate liability in Canada”. Since this position is clear in the *Criminal Code* with regard to attempt, “there is no good reason to treat conspiracy and other forms of inchoate liability any differently”.

Professor Stuart in *Canadian Criminal Law, supra*, at pp. 644-45, convincingly contends that the same rationale for rejecting the distinction between factual and legal impossibility in the law of attempt should apply to the law of conspiracy. He puts his position in this way (at p. 644):

If conspiracy is considered, as it has been suggested that it should, as a preventive crime owing its existence to the fact that it is a step, even though a limited one, towards the commission of a full offence, it is difficult to see why the approach to impossibility should differ.

According to Professor Alan Mewett and Morris Manning in *Mewett & Manning on Criminal Law* (3rd ed. 1994), at p. 341, if it were not for the decision in *Nock*, the question as to whether impossibility should constitute a defence to the offence of

doute avec raison par le juge Cadsby de la Cour provinciale dans l’affaire *R. c. Atkinson*, [1987] O.J. No. 1930. La Cour d’appel de la Nouvelle-Zélande a aussi rejeté l’arrêt *Nock*, sauf peut-être dans le cas des «crimes imaginaires»: *R. c. Sew Hoy*, [1994] 1 N.Z.L.R. 257.

Un certain nombre d’auteurs canadiens ont aussi émis des critiques justifiées à l’endroit du recours à la distinction établie entre l’impossibilité de fait et l’impossibilité de droit en matière de complot; ils ont critiqué plus particulièrement l’arrêt *Nock* pour cette raison. La plupart des auteurs ont exprimé l’opinion que, s’il convient de rejeter la distinction entre l’impossibilité de fait et l’impossibilité de droit en ce qui a trait à la tentative, ce rejet s’impose à plus forte raison en ce qui a trait au complot. Par exemple, Colvin, dans *Principles of Criminal Law, op. cit.*, à la p. 358, indique, dans un exposé qui porte principalement sur les règles applicables à la tentative, qu’il est favorable à l’idée que [TRADUCTION] «l’impossibilité d’exécution ne constitue jamais un moyen de défense en matière de responsabilité secondaire au Canada». Ce principe étant clairement exprimé relativement à la tentative dans le *Code criminel*, [TRADUCTION] «aucun motif valable ne justifie qu’on traite différemment le complot et d’autres formes de responsabilité secondaire».

Dans *Canadian Criminal Law, op. cit.*, aux pp. 644 et 645, le professeur Stuart fait valoir de façon convaincante que le raisonnement suivi pour rejeter la distinction entre l’impossibilité de fait et l’impossibilité de droit en matière de tentative doit aussi s’appliquer en matière de complot. Voici l’explication qu’il donne (à la p. 644):

[TRADUCTION] Si le complot est considéré, tel qu’on l’a proposé, comme une infraction à vocation préventive parce qu’elle constitue une étape, bien que limitée, vers la perpétration d’une infraction parfaite, il est difficile d’imaginer pourquoi la question de l’impossibilité devrait être abordée différemment.

Selon les professeurs Alan Mewett et Morris Manning dans *Mewett & Manning on Criminal Law* (3^e éd. 1994), à la p. 341, si ce n’était l’arrêt *Nock*, la question de savoir si l’impossibilité peut être invoquée en défense à l’encontre d’une accu-

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conspiracy ought not to arise at all. In *Nock*, the House of Lords held that because the offence can never materialize, “[t]here was no *actus reus* because there was no act of agreeing to commit an offence”. Mewett and Manning criticize this reasoning as unsound because “[i]t is wrong to think that there is something that can, in the abstract, be called an *actus reus*”. It is the agreement that is the *actus*, and the intention to do the act that is unlawful (the *mens rea*) that turns the agreement into an *actus reus*, or a “guilty act”. These authors would restrict the availability of the defence of impossibility to situations of “true” legal impossibility (which we have referred to as imaginary crimes), where persons conspire to do something that is not a crime known to law regardless of whether the facts are as the accused believe them to be.

sation de complot ne se poserait même pas. Dans l’arrêt *Nock*, la Chambre des lords a statué que, comme l’infraction ne peut jamais se matérialiser, [TRADUCTION] «[i]l n’y a pas d’*actus reus* parce qu’il n’y a pas eu d’entente en vue de commettre une infraction». Mewett et Manning condamnent ce raisonnement, le jugeant mal fondé parce qu’il [TRADUCTION] «[e]st erroné de croire qu’il existe ce qu’on pourrait, dans l’abstrait, appeler l’*actus reus*». C’est l’entente qui constitue l’*actus*, et l’intention d’accomplir l’acte illégal (la *mens rea*) qui transforme l’entente en un *actus reus*, ou en un «acte coupable». Ces auteurs restreindraient le recours à la défense d’impossibilité aux cas d’impossibilité de droit «véritables» (que nous avons qualifiés de crimes imaginaires), lorsque des personnes complotent en vue de commettre des actes qui ne constituent pas un crime en droit, peu importe que les faits aient été tels que les accusés les croyaient.

⁹⁹ Canadian courts have only rarely considered this issue. In *R. v. Chow Sik Wah*, [1964] 1 C.C.C. 313, the Ontario Court of Appeal, in a case involving conspiracy to commit forgery, held at p. 315 that “[i]n a prosecution for conspiracy a conviction may not be registered if the operation for the commission of which the accused allegedly conspired would, if accomplished, not have made the accused guilty of the substantive offence”. The respondent obviously finds comfort in this case.

Les tribunaux canadiens se sont rarement prononcés sur la question. Dans l’arrêt *R. c. Chow Sik Wah*, [1964] 1 C.C.C. 313, la Cour d’appel de l’Ontario a statué, dans une affaire de complot en vue de commettre un faux, à la p. 315, que [TRADUCTION] «[d]ans une poursuite pour complot, une déclaration de culpabilité ne peut être prononcée si l’opération visée par le complot allégué n’aurait pu, si elle avait été réalisée, entraîner la culpabilité de l’accusé au titre de l’infraction matérielle précise». L’intimé considère manifestement cet arrêt comme favorable à sa cause.

¹⁰⁰ Although some of the language in *Chow Sik Wah* suggests a more general acceptance of the defence of legal impossibility in a case of conspiracy, the case was decided on a much narrower basis. There the substantive offence was defined as involving the making of a false document, knowing it to be false. The resolution of the case turned on the definition of “false document”. Kelly J.A. held that the photograph of the false document was not itself a false document. Therefore, the crime could not be committed regardless of the intention of the accused. There was no issue as to mistaken belief regarding particular circumstances. The accused simply intended to do something which

Bien que certains passages de l’arrêt *Chow Sik Wah* laissent croire à une reconnaissance plus générale de l’impossibilité de droit comme moyen de défense dans une affaire de complot, la décision a une portée beaucoup plus étroite. En l’occurrence, l’infraction matérielle précise a été définie comme le fait de créer un faux document en le sachant faux. L’affaire reposait sur la définition de l’expression «faux document». Le juge Kelly de la Cour d’appel a conclu que la photographie du faux document n’était pas en soi un faux document. En conséquence, le crime ne pouvait être commis, peu importe l’intention des accusés. La question de la croyance erronée à des circonstances particulières

was not prohibited by law. In addition, Kelly J.A. found that the Crown had not established that the photograph was intended to be used to induce anyone to believe that the reproduced document was genuine.

Chow Sik Wah should only be accepted as authority for the proposition that impossibility can be a defence to a charge of conspiracy where the conspirators intend to commit an “imaginary crime”. This approach to impossibility and conspiracy has also been taken in older cases dealing with economic conspiracies: see for example *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403, at p. 406, citing *R. v. Whitchurch* (1890), 24 Q.B.D. 420.

None of these authorities stands in the way of a conclusion that, from a purely conceptual perspective, the distinction between factual and legal impossibility is as unsound in the law of conspiracy as it is in the law of attempt. As we concluded in discussing impossible attempts, cases of so-called “legal” impossibility turn out to be cases of factual impossibility and the distinction collapses, except in cases of “imaginary crimes”. Conspiracy to commit such fanciful offences of course cannot give rise to criminal liability.

Furthermore, like attempt, conspiracy is a crime of intention. The factual element — or *actus reus* — of the offence is satisfied by the establishment of the agreement to commit the predicate offence. This factual element does not have to correspond with the factual elements of the substantive offence. The goal of the agreement, namely the commission of the substantive offence, is part of the mental element — or *mens rea* — of the offence of conspiracy.

The conspiracy alleged in the case at bar involves the commission of an offence that requires knowledge of a circumstance as one of its essential elements. When a substantive offence

n’a pas été soulevée. Les accusés avaient simplement l’intention d’accomplir un acte non interdit par la loi. De plus, le juge Kelly de la Cour d’appel a conclu que le ministère public n’avait pas établi que la photographie était destinée à être utilisée pour inciter quelqu’un à croire que le document reproduit était authentique.

L’arrêt *Chow Sik Wah* ne devrait être invoqué pour affirmer que l’impossibilité peut être invoquée en défense à l’encontre d’une accusation de complot que si les conspirateurs avaient l’intention de commettre un «crime imaginaire». Cette façon d’aborder la question de l’impossibilité et du complot a été retenue dans la jurisprudence moins récente portant sur les complots économiques: voir, par exemple, *Howard Smith Paper Mills Ltd. c. The Queen*, [1957] R.C.S. 403, à la p. 406, où l’on cite *R. c. Whitchurch* (1890), 24 Q.B.D. 420.

Aucune de ces sources n’interdit de conclure que, sur le plan purement conceptuel, la distinction entre l’impossibilité de fait et l’impossibilité de droit n’est pas mieux fondée parce qu’il s’agit d’un complot plutôt que d’une tentative. Comme nous l’avons vu en analysant la tentative d’infraction impossible, la soi-disant impossibilité «de droit» est en réalité un cas d’impossibilité de fait et cette distinction ne vaut plus, sauf dans les cas de «crimes imaginaires». Un complot en vue de perpétrer une infraction aussi fantaisiste ne peut bien sûr pas engager la responsabilité pénale.

En outre, à l’instar de la tentative, le complot constitue un crime d’intention. L’élément matériel — ou *actus reus* — de l’infraction est établi par la preuve qu’il y a eu entente en vue de commettre l’infraction sous-jacente. Cet élément matériel ne doit pas nécessairement correspondre aux éléments matériels de l’infraction matérielle précise. Le but de l’entente, c’est-à-dire la perpétration de l’infraction matérielle précise, fait partie de l’élément moral — ou *mens rea* — de l’infraction de complot.

Le complot allégué en l’espèce vise la perpétration d’une infraction dont l’un des éléments essentiels est la connaissance d’un fait. Lorsqu’une infraction matérielle précise exige la connaissance

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requires knowledge of a particular circumstance, the Crown is required to prove a subjective element, which is best described as belief that the particular circumstance exists. The Crown is also required to prove an objective element, namely the truth of the circumstance. It is the presence of the objective circumstance that translates the subjective belief into knowledge or “true belief”.

105 However, since the offence of conspiracy only requires an intention to commit the substantive offence, and not the commission of the offence itself, it does not matter that, from an objective point of view, commission of the offence may be impossible. It is the subjective point of view that is important, and from a subjective perspective, conspirators who intend to commit an indictable offence intend to do everything necessary to satisfy the conditions of the offence. The fact that they cannot do so because an objective circumstance is not as they believe it to be does not in any way affect this intention. The intention of the conspirators remains the same, regardless of the absence of the circumstance that would make the realization of that intention possible. It is only in retrospect that the impossibility of accomplishing the common design becomes apparent.

106 If the failure of a conspiracy as a result of some defect in the attendant circumstances were to be considered to constitute “legal” impossibility and as such a defence to a charge of conspiracy, the fact that the conspirators are not culpable becomes a matter of pure luck, divorced from their true intentions. This result is unacceptable. Rather it would be consistent with the law of conspiracy to hold that the absence of the attendant circumstance has no bearing on the intention of the parties, and therefore no bearing on their liability.

107 It has long been accepted that conspirators can be punished for their agreement (*actus reus*) and their intention to commit the offence (*mens rea*). This is true even though the police intervene to prevent the conspirators from committing the substantive offence which was the aim of the conspiracy. By the same token, it should make no difference to the culpability of the conspirators if the

d’un fait particulier, le ministère public est tenu de prouver un élément subjectif, qu’on pourrait le mieux décrire comme la croyance en ce fait particulier. Il doit en outre établir un élément objectif, soit la réalité de ce fait. C’est l’existence de l’élément objectif qui transforme la croyance subjective en connaissance ou en «croyance conforme à la réalité».

Toutefois, comme l’infraction de complot exige seulement l’intention de commettre l’infraction matérielle précise, et non la perpétration de l’infraction même, il est indifférent, du point de vue objectif, que la perpétration de l’infraction puisse être impossible. C’est le point de vue subjectif qui importe et, de ce point de vue, les conspirateurs qui ont l’intention de commettre un acte criminel ont l’intention de prendre toutes les mesures nécessaires pour constituer l’infraction. L’impossibilité d’y parvenir parce qu’un fait objectif n’est pas tel qu’ils le croient n’a aucune incidence sur cette intention. L’intention des conspirateurs demeure la même, sans égard à l’absence du fait qui rendrait possible la réalisation de leur intention. Ce n’est que rétrospectivement qu’on pourra constater l’impossibilité de mettre à exécution leur projet commun.

S’il fallait considérer que l’échec d’un complot imputable à un concours de circonstances défavorables constitue une impossibilité «de droit» et peut de ce fait être invoqué à l’encontre d’une accusation de complot, l’innocence des conspirateurs serait le fruit du hasard et n’aurait aucun lien avec leur véritable intention. Ce résultat est inacceptable. Assurément, il serait conforme aux règles de droit applicables en matière de complot de décider que l’absence d’une circonstance particulière n’a aucun effet sur l’intention des parties et, par tant, sur leur responsabilité.

Il est depuis longtemps admis que les conspirateurs sont punissables du fait de leur entente (*actus reus*) et de leur intention de commettre l’infraction (*mens rea*). Cela vaut même lorsque les policiers interviennent pour empêcher les conspirateurs de commettre l’infraction matérielle précise qu’ils complotaient de perpétrer. Il s’ensuit que la culpabilité des conspirateurs ne devrait pas être atténuée

police intervene in a way that makes the offence impossible to commit because, for example, the money to be laundered is not derived from crime. The conspirators could still be properly convicted on the basis that the agreement to do the unlawful object is considered dangerous to society and reprehensible in itself.

This approach does not substitute a different mental element for the offence of conspiracy from that required for the substantive offence of money laundering. In those offences that require knowledge, the mental element is belief. Therefore, the subjective state of mind of a money launderer is the belief that the money is derived from an illicit source. Similarly, the subjective state of mind of the person who conspires with others to launder money is also the belief that the money is derived from an illicit source. For the substantive offence to be committed, the objective circumstance — the existence of actual proceeds of crime — must also exist. But this is not the objective element of the offence of conspiracy. The essential element of conspiracy is the existence of the agreement to put the intention of the conspirators into effect.

It follows from all that has been said above that a conspiracy to commit a crime which cannot be carried out because an objective circumstance is not as the conspirators believed it to be is still capable of giving rise to criminal liability in Canada. Legal impossibility cannot be invoked as a defence to the charge.

(c) *Application of These Principles to this Case*

The only reason that the conspiracy alleged to exist between Mr. Dynar and Mr. Cohen was considered “impossible” was because one external circumstance — the existence of actual proceeds of crime — was absent. Yet, the absence of this circumstance is not a defence to a charge of conspiracy.

lorsque l’intervention des policiers rend la perpétration de l’infraction impossible, par exemple, parce que l’argent à recycler n’est pas d’origine criminelle. Les conspirateurs pourraient quand même être condamnés à bon droit parce que l’entente conclue en vue de réaliser l’objet illégal est jugée dangereuse pour la société et répréhensible en soi.

Ce raisonnement n’emporte pas, pour l’infraction de complot, la substitution d’un élément moral différent de celui qui est exigé pour l’infraction matérielle précise de recyclage des produits de la criminalité. S’agissant d’infractions exigeant la connaissance, l’élément moral est la croyance. En conséquence, l’état d’esprit subjectif requis de la personne qui recycle de l’argent est la croyance que l’argent provient d’une source illicite. De même, l’état d’esprit subjectif de la personne qui complotte avec d’autres en vue de recycler de l’argent consiste à croire que l’argent provient d’une source illicite. Pour que l’infraction matérielle précise soit commise, le fait objectif — l’existence de produits de la criminalité — doit aussi exister. Mais il ne s’agit pas là de l’élément objectif de l’infraction de complot. L’élément essentiel du complot est l’existence d’une entente conclue en vue de mettre à exécution l’intention des conspirateurs.

Il s’ensuit qu’il est encore possible, au Canada, d’être tenu pénalement responsable d’un complot en vue de commettre un crime impossible à consommer parce qu’un fait objectif n’est pas tel qu’on le croit. La défense d’impossibilité de droit ne peut être invoquée à l’encontre de cette accusation.

c) *Application de ces principes aux faits de l’espèce*

L’unique motif pour lequel le complot qu’auraient tramé M. Dynar et M. Cohen a été considéré «impossible» est l’absence d’une circonstance extérieure, savoir l’existence de produits de la criminalité. Pourtant, l’absence de cette circonstance ne constitue pas un moyen de défense relativement à une accusation de complot.

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111 There is evidence that Mr. Dynar was a member of a conspiracy that included Mr. Cohen. On several occasions in the wiretapped conversations between Anthony and Mr. Dynar, Maurice Cohen was implicated as the intimate associate of Mr. Dynar in his money laundering operations. In the recorded conversations that took place between Mr. Cohen and Agent McCarthy in Buffalo, Mr. Cohen clearly indicated that he was working for Mr. Dynar and demonstrated a basic knowledge of the exchanges that took place between Mr. Dynar and Anthony. The very fact that Mr. Cohen showed up in Buffalo as arranged between Mr. Dynar and Anthony supports an inference that he and Mr. Dynar were acting in concert.

112 At a minimum, the evidence clearly supports the existence of an agreement to launder what the conspirators believed were the proceeds of crime. Furthermore, there is evidence that the agreement extended beyond the scheme that was being discussed in the “sting” operation. Mr. Dynar spoke of his operations as well-established, with worldwide affiliates, and of his ability to launder large sums of illicit money very quickly. Mr. Cohen demonstrated an intimate knowledge of the logistics of money laundering in Canada, which he indicated was a function of his association with Mr. Dynar. Finally, the appearance of Mr. Cohen in Buffalo, as arranged between Anthony and Mr. Dynar, was an overt act that suggested that Mr. Dynar’s claims about his abilities, and about his association with Mr. Cohen, were not mere “puff” and exaggeration. It is reasonable to infer that Dynar’s claims, pursuant to the agreement between Dynar and Cohen, were intended to be translated into action.

113 An RCMP officer, qualified as an expert in organized crime, testified to the interpretation of various references made by Mr. Dynar to the origin of the money. In the expert’s opinion, Mr. Dynar was clearly under the impression that he would be laundering money derived from the

Des éléments de preuve tendent à établir que M. Dynar était partie à un complot auquel participait M. Cohen. À plusieurs reprises, dans les communications interceptées entre Anthony et M. Dynar, M. Cohen a été impliqué à titre de proche associé de M. Dynar dans ses activités de recyclage d’argent. Au cours des conversations enregistrées entre M. Cohen et l’agent McCarthy, à Buffalo, M. Cohen a clairement indiqué qu’il travaillait pour M. Dynar et il a démontré qu’il connaissait la teneur générale des propos échangés entre M. Dynar et Anthony. Le simple fait que M. Cohen se soit rendu à Buffalo conformément aux arrangements pris par M. Dynar et Anthony nous permet de déduire que lui et M. Dynar agissaient de concert.

La preuve appuie nettement, à tout le moins, l’existence d’une entente en vue de recycler ce que les conspirateurs croyaient être des produits de la criminalité. En outre, des éléments de preuve tendent à établir que l’entente ne se limitait pas au scénario discuté dans le cadre de l’opération d’infiltration policière. Aux dires de M. Dynar, ses activités étaient solidement établies, avec le concours d’acolytes répartis dans le monde entier, et il était en mesure de recycler très rapidement de fortes sommes de provenance illégale. M. Cohen a démontré qu’il connaissait très bien l’organisation matérielle du recyclage d’argent au Canada, en raison, selon lui, de son association avec M. Dynar. Enfin, en se présentant au rendez-vous de Buffalo, conformément aux arrangements pris entre Anthony et M. Dynar, M. Cohen a accompli un acte manifeste qui laisse entendre que les prétentions de M. Dynar concernant ses capacités et son association avec M. Cohen ne relevaient pas de la pure vantardise et de l’exagération. Il est raisonnable de conclure que les prétentions de M. Dynar, conformément à l’entente conclue entre lui et M. Cohen, devaient être extériorisées par des actes.

Un agent de la GRC, ayant qualité d’expert en matière de crime organisé, a témoigné sur l’interprétation à donner aux différentes allusions faites par M. Dynar au sujet de la provenance de l’argent. Selon cet expert, M. Dynar pensait sans l’ombre d’un doute que l’argent qu’il devait recy-

drug trade. The evidence discloses that Mr. Cohen was under the same impression. This is demonstrated by his desire to ensure that he was not detected by the Canadian border officials while transporting the funds into Canada. It can therefore be said that both alleged conspirators had the requisite intention to commit the substantive offence of laundering money.

It is clear that the evidence presented demonstrated a *prima facie* case for extradition purposes, since it would warrant committing Mr. Dynar and Mr. Cohen for trial for conspiracy in Canada if their conduct had taken place here. Keenan J. was therefore correct in holding that Mr. Dynar was extraditable on both the charge of attempt to launder money, and conspiracy to launder money.

B. Disclosure in the Extradition Hearing: The Cross-Appeal

Mr. Dynar cross-appeals from the decision of the Ontario Court of Appeal on the basis that he was not given a fair hearing. He argues that he did not receive adequate disclosure of the involvement of the Canadian investigating authorities in the gathering of the evidence that was the basis for the committal order. This lack of disclosure, he submits, justifies a new hearing at which full disclosure should be given, which in turn may provide him with the basis for arguing that a stay of proceedings is warranted.

Alternatively, it is submitted that he will argue at a new hearing that there was a violation of his right to be free from unreasonable search and seizure under s. 8 of the *Charter* because the wire-tap evidence was gathered without judicial authorization. He also contends that there was a violation of his s. 7 rights on the basis of entrapment because the “sting” operation was allegedly set up without reasonable grounds to believe that an offence was being committed. The respondent conceded in oral argument that the ultimate goal of

cler provenait du trafic de stupéfiants. La preuve révèle que M. Cohen le pensait aussi. Il l’a démontré par son désir de tout faire pour ne pas être repéré par les douaniers à la frontière canadienne lorsqu’il ferait entrer l’argent au Canada. On peut donc affirmer que les deux conspirateurs présumés avaient l’intention nécessaire pour commettre l’infraction matérielle précise de recyclage des produits de la criminalité.

À l’évidence, les éléments de preuve produits ont établi la preuve *prima facie* requise dans une procédure d’extradition, car ils justifieraient que M. Dynar et M. Cohen soient cités à procès pour complot au Canada si les actes en cause avaient été accomplis dans notre pays. Le juge Keenan a donc eu raison de décider que M. Dynar pouvait être extradé pour les deux infractions reprochées: la tentative de recyclage d’argent et le complot en vue de recycler l’argent.

B. La communication à l’audience d’extradition: le pourvoi incident

M. Dynar a formé un pourvoi incident contre l’arrêt de la Cour d’appel de l’Ontario pour le motif qu’il n’a pas eu droit à un procès équitable. Il soutient ne pas avoir été suffisamment informé de la participation des enquêteurs canadiens aux mesures prises pour recueillir les éléments de preuve qui ont justifié la délivrance du mandat de dépôt. Il fait valoir que cette absence de communication justifie la tenue d’une nouvelle audience au cours de laquelle tous les éléments devraient lui être communiqués, ce qui pourra lui fournir des moyens pour justifier une demande de sursis d’instance.

Subsidiairement, il affirme qu’il soutiendra lors de la nouvelle audience, que son droit d’être protégé contre les fouilles, les perquisitions et les saisies abusives, garanti par l’art. 8 de la *Charte*, n’a pas été respecté parce que l’interception des communications produites en preuve n’a pas été autorisée par un juge. Il prétend en outre qu’il y a eu atteinte aux droits que lui confère l’art. 7 parce qu’on lui a tendu un piège étant donné que l’opération d’infiltration policière aurait été menée en l’absence de motifs raisonnables de croire à la per-

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these endeavours is either the exclusion of the evidence of the sting operation from the extradition proceedings, or a stay of proceedings. However, the nature of the extradition hearing, and the evidence relied upon by the Requesting State in the committal hearing, demonstrate that a new hearing is not warranted.

(1) The Nature of the Extradition Hearing

117 The extradition process in Canada is governed by the *Extradition Act*, which translates into domestic law Canada's international obligations to surrender fugitives who have committed crimes in other jurisdictions: *McVey*, *supra*, at p. 508. The Act establishes a two-step process for determining whether a particular fugitive should be surrendered to a foreign jurisdiction for trial.

118 The first step, the committal hearing, is the judicial phase of the process in which the fugitive is brought before a judge who determines whether the evidence justifies surrender of the fugitive. If the Requesting State has made out its case, the fugitive is committed. If not, the fugitive is discharged. If the fugitive is committed for surrender, the warrant of committal, as well as any report from the judge presiding over the committal hearing, is forwarded to the Minister of Justice, who then makes the final decision whether the fugitive should be surrendered. This second phase of the process is political in nature and is not in issue in the cross-appeal. Rather, the cross-appeal puts in issue the level of procedural protection that the fugitive is entitled to receive during the judicial phase of the process — the committal hearing.

119 Under s. 13 of the *Extradition Act*, the committal proceeding is to be conducted "in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada". The purpose of the extradition hearing for a fugitive accused of a crime in another jurisdiction is outlined in s. 18(1)(b), which provides:

pétration d'une infraction. L'intimé a admis dans sa plaidoirie orale que ces efforts visaient en bout de ligne à obtenir soit l'exclusion de la preuve recueillie grâce à l'opération policière, soit un sur-sis d'instance. Toutefois, la nature de l'audience d'extradition et la preuve invoquée par l'État requérant à l'audience relative à l'incarcération font ressortir qu'une nouvelle audience n'est pas justifiée.

(1) La nature de l'audience d'extradition

La procédure d'extradition au Canada est régie par la *Loi sur l'extradition* qui transpose en règles de droit interne les obligations internationales du Canada qui s'est engagé à extraditer les fugitifs ayant commis des crimes à l'étranger: *McVey*, précité, à la p. 508. La loi établit une procédure en deux étapes pour déterminer si le fugitif doit être livré à un pays étranger pour y être jugé.

La première étape, l'audience relative à l'incarcération, constitue la phase judiciaire du processus au cours de laquelle le fugitif comparaît devant un juge pour que celui-ci détermine si la preuve justifie son extradition. Si l'État requérant établit le bien-fondé de sa demande, le fugitif est incarcéré. Dans le cas contraire, le fugitif est libéré. Si le fugitif est incarcéré en vue de son extradition, le mandat de dépôt, ainsi que tout rapport préparé par le juge qui a présidé l'audience relative à l'incarcération sont transmis au ministre de la Justice qui tranche alors de façon définitive la question de savoir si le fugitif doit être extradé. Cette deuxième phase du processus est de nature politique et n'est pas contestée dans le pourvoi incident. Le pourvoi incident porte plutôt sur l'étendue de la protection en matière de procédure à laquelle le fugitif a droit pendant la phase judiciaire du processus — l'audience relative à l'incarcération.

Aux termes de l'art. 13 de la *Loi sur l'extradition*, la procédure touchant l'incarcération «se déroule, dans la mesure du possible [...] comme [si le fugitif] comparait devant un juge de paix pour un acte criminel commis au Canada». Le but de l'audience d'extradition d'un fugitif accusé d'un crime commis à l'étranger est énoncé à l'al. 18(1)(b):

18. (1) The judge shall issue a warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law,

. . . .

(b) in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to this Part, justify the committal of the fugitive for trial, if the crime had been committed in Canada.

The extradition judge must determine whether the fugitive should be committed for surrender, which is to say whether a *prima facie* case has been demonstrated that would justify his committal for trial if his conduct had taken place in Canada.

The jurisdiction of the extradition judge is derived entirely from the statute and the relevant treaty. Pursuant to s. 3 of the Act, the statute must be interpreted as giving effect to the terms of the applicable treaty. La Forest J., writing for the majority in *McVey, supra*, at p. 519, stated that courts must find a statutory source for attributing a particular function to the extradition judge, and that “courts should not reach out to bring within their jurisdictional ambit matters that the Act has not assigned to them”. In particular, it was held in *Argentina v. Mellino*, [1987] 1 S.C.R. 536, at p. 553, that

absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that the evidence establishes a *prima facie* case that the extradition crime has been committed. [Emphasis added.]

As a result, the role of the extradition judge has been held to be a “modest one”, limited to the determination of whether or not the evidence is sufficient to justify committing the fugitive for surrender: see, for example, *United States of America v. Lépine*, [1994] 1 S.C.R. 286, at p. 296; *Mellino, supra*, at p. 553; *McVey, supra*, at p. 526.

One of the most important functions of the extradition hearing is the protection of the liberty

18. (1) Le juge délivre un mandat de dépôt portant incarcération du fugitif dans la prison appropriée la plus rapprochée en attendant la remise de celui-ci à l'État étranger ou sa libération conformément à la loi:

. . . .

b) dans le cas où le fugitif n'est qu'accusé d'un crime donnant lieu à l'extradition, lorsque les éléments de preuve produits justifieraient en droit canadien, sous réserve des autres dispositions de la présente partie, sa citation à procès si le crime avait été commis au Canada.

Le juge d'extradition doit déterminer s'il faut incarcérer le fugitif en vue de son extradition, c'est-à-dire qu'il décide si une preuve *prima facie* a été établie qui justifierait sa citation à procès si les actes qu'on lui reproche avaient été commis au Canada.

Les pouvoirs du juge d'extradition lui sont conférés exclusivement par la loi et le traité applicable. Aux termes de l'art. 3 de la loi, celle-ci doit recevoir une interprétation favorable à la mise en œuvre du traité applicable. Le juge La Forest a déclaré, au nom de la majorité, dans l'arrêt *McVey*, précité, à la p. 519, que les tribunaux doivent trouver un fondement législatif à chaque fonction particulière qu'ils attribuent à un juge d'extradition et que «les tribunaux ne devraient pas se déclarer compétents à l'égard de questions que la Loi ne leur a pas confiées». Il a notamment été décidé ce qui suit, dans l'affaire *Argentine c. Mellino*, [1987] 1 R.C.S. 536, à la p. 553:

. . . en l'absence d'une autorisation expresse découlant d'une loi ou d'un traité, l'unique but d'une audience d'extradition est de s'assurer que la preuve établit une apparence suffisante de la perpétration d'un crime donnant lieu à l'extradition. [Nous soulignons.]

En conséquence, le rôle du juge d'extradition a été jugé «modeste», limité à déterminer si la preuve est suffisante ou non pour justifier l'incarcération du fugitif en vue de son extradition: voir, par exemple, *États-Unis d'Amérique c. Lépine*, [1994] 1 R.C.S. 286, à la p. 296; *Mellino*, précité, à la p. 553; *McVey*, précité, à la p. 526.

L'une des fonctions les plus importantes de l'audience d'extradition consiste à protéger la liberté

of the individual. It ensures that an individual will not be surrendered for trial in a foreign jurisdiction unless, as previously mentioned, the Requesting State presents evidence that demonstrates on a *prima facie* basis that the individual has committed acts in the foreign jurisdiction that would constitute criminal conduct in Canada. See *McVey, supra*, at p. 519; *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228, at p. 245, *per* Laskin J. (as he then was); *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 515. The extradition judge may also have limited *Charter* jurisdiction under s. 9(3) of the amended *Extradition Act*, although it is not necessary to delineate the scope of that jurisdiction in this appeal.

individuelle. Elle garantit qu'une personne ne sera pas extradée pour subir son procès à l'étranger à moins que l'État requérant ne présente, tel qu'il a été expliqué précédemment, une preuve établissant une apparence suffisante de la commission à l'étranger par cette personne d'actes qui constitueraient un crime au Canada. Voir *McVey*, précité, à la p. 519; *Commonwealth de Puerto Rico c. Hernandez*, [1975] 1 R.C.S. 228, à la p. 245, le juge Laskin (plus tard Juge en chef); *Canada c. Schmidt*, [1987] 1 R.C.S. 500, à la p. 515. Le juge d'extradition peut également être investi de pouvoirs limités concernant la *Charte* sous le régime du par. 9(3) de la *Loi sur l'extradition*, modifiée, mais il n'est pas nécessaire de préciser la portée de cette compétence pour trancher le présent pourvoi.

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A judge hearing an application for extradition has an important role to fulfil. Yet it cannot be forgotten that the hearing is intended to be an expedited process, designed to keep expenses to a minimum and ensure prompt compliance with Canada's international obligations. As La Forest J. stated for the majority in *McVey, supra*, at p. 551, "extradition proceedings are not trials. They are intended to be expeditious procedures to determine whether a trial should be held". In fact, in some contexts, a requirement for more "trial-like" procedures at the extradition committal stage may "cripple the operation of the extradition proceedings": *McVey, supra*, at p. 528. See also *Schmidt, supra*, at p. 516.

Le juge saisi d'une demande d'extradition a un rôle important à jouer. Pourtant, il ne faut pas oublier que l'audience doit être un processus accéléré, conçu pour maintenir les dépenses à leur niveau le plus bas et pour garantir l'exécution rapide des obligations internationales du Canada. Comme le juge La Forest l'a affirmé, au nom de la majorité dans l'arrêt *McVey*, précité, à la p. 551, «les procédures d'extradition ne sont pas des procès». Elles sont conçues comme des procédures expéditives pour déterminer s'il doit y avoir un procès». En fait, dans certains contextes, l'obligation de recourir à une procédure qui tient d'avantage du procès à l'étape de l'incarcération en vue de l'extradition pourrait «nuire au fonctionnement des procédures en matière d'extradition»: *McVey*, précité, à la p. 528. Voir aussi *Schmidt*, précité, à la p. 516.

(2) The Application of the *Charter* to Extradition Proceedings

(2) L'application de la *Charte* aux procédures d'extradition

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There is no doubt that the *Charter* applies to extradition proceedings. Yet s. 32 of the *Charter* provides that it is applicable only to Canadian state actors. Pursuant to principles of international comity as well, the *Charter* generally cannot apply extraterritorially: see, for example, *Schmidt, supra*, at pp. 518 and 527; *United States v. Allard*, [1987] 1 S.C.R. 564, at p. 571; *Mellino, supra*, at p. 552.

Il est certain que la *Charte* s'applique aux procédures d'extradition. Néanmoins, l'art. 32 de la *Charte* précise qu'elle ne s'applique qu'aux représentants de l'État canadien. Du reste, en vertu des principes de la courtoisie internationale, la *Charte* ne saurait en règle générale recevoir d'application extraterritoriale: voir, par exemple, *Schmidt*, précité, aux pp. 518 et 527; *États-Unis c. Allard*, [1987] 1 R.C.S. 564, à la p. 571; *Mellino*, précité, à la p. 552.

The *Charter* does therefore guarantee the fairness of the committal hearing. The Minister's discretion in deciding to surrender the fugitive may also attract *Charter* scrutiny. In both instances, s. 7 of the *Charter*, which provides that an individual has a right not to be deprived of life, liberty or security of the person, except in accordance with the principles of fundamental justice, will be most frequently invoked. It is obvious that the liberty and security of the person of the fugitive are at stake in an extradition proceeding. The proceedings must therefore be conducted in accordance with the principles of fundamental justice: see A. W. La Forest, *La Forest's Extradition to and from Canada* (3rd ed. 1991), at p. 132; *Schmidt, supra*, at pp. 520-21.

Even where there is a sufficient involvement of Canadian authorities in the proceedings to justify applying the *Charter*, courts must proceed with caution. It has been observed that "judicial intervention must be limited to cases of real substance": *Schmidt, supra*, at p. 523. To do otherwise might all too easily place Canada in a position of violating its international obligations: see *La Forest's Extradition, supra*, at p. 25.

Mr. Dynar has not argued that the situation he will face in the United States is in any way oppressive or unacceptable. Indeed, before such an argument could succeed the fugitive would have to demonstrate that he will be subjected to egregious conduct that would "shock the conscience" or that would be "simply unacceptable": *Schmidt, supra*, at p. 522; *Allard, supra*, at p. 572. Rather the focus of Mr. Dynar's argument is on his entitlement under s. 7 of the *Charter* to procedural safeguards in the form of disclosure in connection with the extradition hearing.

(3) Applicable Procedural Safeguards at the Extradition Hearing

(a) *The Right to Disclosure of Materials in the Hands of the Requesting State*

Mr. Dynar's submission is that he was entitled to a high level of disclosure in the extradition pro-

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La *Charte* garantit donc le caractère équitable de l'audience relative à l'incarcération. Le pouvoir discrétionnaire du ministre d'extrader le fugitif peut également faire l'objet d'un examen fondé sur la *Charte*. Dans les deux cas, l'art. 7 de la *Charte*, selon lequel il ne peut être porté atteinte au droit à la vie, à la liberté et à la sécurité de la personne qu'en conformité avec les principes de justice fondamentale, sera le plus souvent invoqué. Il est évident que la liberté et la sécurité de la personne d'un fugitif sont en jeu dans une procédure d'extradition. Cette procédure doit donc se dérouler en conformité avec les principes de justice fondamentale: voir A. W. La Forest, *La Forest's Extradition to and from Canada* (3^e éd. 1991), à la p. 132; *Schmidt*, précité, aux pp. 520 et 521.

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Même lorsque les autorités canadiennes participent suffisamment à la procédure pour justifier l'application de la *Charte*, les tribunaux doivent faire preuve de prudence. On a fait remarquer que «l'intervention des tribunaux doit se limiter aux cas où cela s'impose»: *Schmidt*, précité, à la p. 523. Agir autrement pourrait trop facilement placer le Canada dans une situation où il manquerait à ses obligations internationales: voir *La Forest's Extradition, op. cit.*, à la p. 25.

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M. Dynar n'a pas prétendu que la situation dans laquelle il se retrouverait aux États-Unis serait oppressive ou inacceptable à quelque égard. En fait, pour invoquer un tel argument avec succès, le fugitif devrait démontrer qu'il subirait un traitement inusité qui «choque la conscience» ou qui est «simplement inacceptable»: *Schmidt*, précité, à la p. 522; *Allard*, précité, à la p. 572. M. Dynar a plutôt fait porter l'essentiel de ses arguments sur les garanties procédurales en matière de communication que lui accorde la *Charte* relativement à l'audience d'extradition.

(3) Garanties procédurales applicables à l'audience d'extradition

a) *Le droit à la communication des éléments en la possession de l'État requérant*

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Selon M. Dynar, il a droit à une communication très étendue dans le cadre de la procédure d'extra-

ceeding so that he could make full answer and defence in accordance with his s. 7 *Charter* rights. The essence of Mr. Dynar's argument is that an attenuated version of the rules set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, *R. v. O'Connor*, [1995] 4 S.C.R. 411, and *R. v. Chaplin*, [1995] 1 S.C.R. 727, should apply. Although the level of disclosure required in an extradition proceeding does not have to be definitively resolved in this case, some comments pertaining to this issue should be made.

dition afin de pouvoir présenter une défense pleine et entière en conformité avec les droits garantis par l'art. 7 de la *Charte*. Pour l'essentiel, M. Dynar soutient qu'une version assouplie des règles établies dans les arrêts *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, *R. c. O'Connor*, [1995] 4 R.C.S. 411, et *R. c. Chaplin*, [1995] 1 R.C.S. 727, doit s'appliquer. Bien qu'il ne soit pas nécessaire en l'espèce de trancher la question de l'étendue de la communication requise dans une procédure d'extradition, il y a lieu de formuler certaines remarques à ce sujet.

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Even though the extradition hearing must be conducted in accordance with the principles of fundamental justice, this does not automatically entitle the fugitive to the highest possible level of disclosure. The principles of fundamental justice guaranteed under s. 7 of the *Charter* vary according to the context of the proceedings in which they are raised. It is clear that there is no entitlement to the most favourable procedures imaginable: *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 361-62. For example, more attenuated levels of procedural safeguards have been held to be appropriate at immigration hearings than would apply in criminal trials. See *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711. The same approach is equally applicable to an extradition proceeding. While it was stated in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 658, that the committal hearing in the extradition process is "certainly judicial in its nature and warrants the application of the full panoply of procedural safeguards", it was held that the extent and nature of procedural protection guaranteed by s. 7 of the *Charter* in an extradition proceeding will depend on the context in which it is claimed (at pp. 656-57).

L'audience d'extradition doit respecter les principes de justice fondamentale, mais il ne s'ensuit pas que le fugitif a nécessairement droit à la communication la plus complète possible. Les principes de justice fondamentale garantis par l'art. 7 de la *Charte* varient selon le contexte de la procédure dans le cadre de laquelle ils sont soulevés. À l'évidence, il n'existe pas de droit à la procédure la plus favorable qu'on puisse imaginer: *R. c. Lyons*, [1987] 2 R.C.S. 309, aux pp. 361 et 362. Ainsi, on a jugé que des garanties procédurales moins strictes que celles applicables dans le cadre d'un procès criminel convenaient aux audiences en matière d'immigration. Voir *Chiarelli c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 711. Cette solution vaut également pour la procédure d'extradition. Certes, l'arrêt *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631, à la p. 658, précise que l'audience relative à l'incarcération dans la procédure d'extradition est «certainement judiciaire de par sa nature et justifie l'application de toute la gamme des garanties en matière de procédure», mais il dit aussi que l'étendue et la nature de la protection procédurale garantie par l'art. 7 de la *Charte* dans une procédure d'extradition dépendra du contexte dans lequel elle est réclamée (aux pp. 656 et 657).

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The context and purpose of the extradition hearing will shape the level of procedural protection that is available to a fugitive. In *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 844, the position was put by the majority in this way:

Le contexte et l'objet de l'audience d'extradition déterminent l'importance de la protection accordée au fugitif en matière de procédure. Dans l'arrêt *Kindler c. Canada (Ministre de la Justice)*, [1991] 2 R.C.S. 779, à la p. 844, la Cour à la majorité s'est exprimée comme suit:

While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.

See also *Mellino*, *supra*, at p. 551.

It follows that it is neither necessary nor appropriate to simply transplant into the extradition process all the disclosure requirements referred to in *Stinchcombe*, *supra*, *Chaplin*, *supra*, and *O'Connor*, *supra*. Those concepts apply to domestic criminal proceedings, where onerous duties are properly imposed on the Crown to disclose to the defence all relevant material in its possession or control. This is a function of an accused's right to full answer and defence in a Canadian trial. However, the extradition proceeding is governed by treaty and by statute. The role of the extradition judge is limited and the level of procedural safeguards required, including disclosure, must be considered within this framework.

Procedures at the extradition hearing are of necessity less complex and extensive than those in domestic preliminary inquiries or trials. Earlier decisions have wisely avoided imposing procedural requirements on the committal hearing that would render it very difficult for Canada to honour its international obligations. Thus, in *Mellino*, *supra*, at p. 548, reservations were expressed about procedures that would permit an extradition hearing to become the forum for lengthy examinations of the reasons for delay in either seeking or undertaking extradition proceedings. La Forest J., for the majority, held that this would be "wholly out of keeping with extradition proceedings".

Bien que le processus d'extradition constitue une partie importante de notre système de justice pénale, il serait erroné de le faire correspondre au processus d'instance criminelle. Il est différent du processus criminel par son objet et sa procédure et, ce qui est le plus important, par les facteurs qui le rendent équitable. Contrairement à la procédure criminelle, la procédure en matière d'extradition est fondée sur des concepts de réciprocité, de courtoisie et de respect des différences dans d'autres ressorts.

Voir aussi *Mellino*, précité, à la p. 551.

Il s'ensuit qu'il n'est pas nécessaire ni indiqué de transposer simplement dans le processus d'extradition toutes les exigences en matière de communication mentionnées dans les arrêts *Stinchcombe*, *Chaplin* et *O'Connor*, précités. Ces concepts s'appliquent aux procédures pénales internes, dans le cadre desquelles le ministère public est à juste titre tenu de s'acquitter de lourdes obligations quant à la communication à la défense de tous les documents pertinents qu'il a en sa possession ou sur lesquels il exerce son autorité. C'est le corollaire du droit de l'accusé à une défense pleine et entière dans un procès tenu au Canada. La procédure d'extradition, elle, est régie par les stipulations d'un traité et par la loi. Le rôle du juge d'extradition est limité et l'étendue des garanties procédurales à respecter, notamment en matière de communication, doit être établie en fonction de ce contexte.

Les règles régissant la procédure dans une audience d'extradition sont nécessairement moins complexes et moins détaillées que dans une enquête préliminaire ou un procès en droit interne. Les décisions antérieures ont judicieusement évité d'assujettir l'audience relative à l'incarcération à des exigences procédurales qui gêneraient l'exécution par le Canada de ses obligations internationales. Ainsi, des réserves ont été exprimées dans l'arrêt *Mellino*, précité, à la p. 548, relativement aux règles de procédure qui feraient de l'audience d'extradition le cadre d'un examen minutieux des motifs du retard à demander l'extradition ou à engager une procédure d'extradition. Le juge La Forest a déclaré, au nom de la majorité, que cette fonction «ne conv[enait] guère à des procédures d'extradition».

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- 132 The statutory powers of an extradition judge are limited. The hearing judge may receive sworn evidence offered to show the truth of the charge or conviction (s. 14), receive evidence to show that the particular crime is not an extradition crime (s. 15), and take into account sworn, duly authenticated depositions or statements taken in a foreign state (s. 16). The obligation on the Requesting State is simply to establish a *prima facie* case for the surrender of the fugitive and it is not required to go further than this. The committal hearing is neither intended nor designed to provide the discovery function of a domestic preliminary inquiry. See *Philippines (Republic) v. Pacificador* (1993), 14 O.R. (3d) 321 (C.A.), at pp. 328-39, leave to appeal refused, [1994] 1 S.C.R. x. Specifically, disclosure of the relationship between United States and Canadian authorities in an investigation is not a requirement imposed on the Requesting State under either the Act or the treaty.
- 133 It was emphasized in *Mellino, supra*, at p. 555, that one of the practical difficulties with attributing jurisdiction to an extradition judge to adjudicate on matters such as unreasonable delay caused by officials either in Canada or the Requesting State is the “limited information available to an extradition judge and his jurisdictional inability to obtain it”. Any requirement for disclosure that is read into the Act as a matter of fundamental justice under s. 7 of the *Charter* will therefore necessarily be constrained by the limited function of the extradition judge under the Act, and by the need to avoid imposing Canadian notions of procedural fairness on foreign authorities.
- 134 The Requesting State concedes that the fugitive is entitled to know the case against him. See *United States of America v. Whitley* (1994), 94 C.C.C. (3d) 99 (Ont. C.A.), aff’d [1996] 1 S.C.R. 467. In light of the purpose of the hearing, however, this would simply entitle him to disclosure of materials on which the Requesting State is relying to establish its *prima facie* case.
- Les pouvoirs conférés par la loi au juge d’extradition sont limités. Le juge qui préside l’audience peut recevoir sous serment les témoignages visant à établir la véracité de l’accusation ou l’existence de la condamnation (art. 14), recevoir les témoignages visant à établir que le crime en cause ne constitue pas un crime donnant lieu à l’extradition (art. 15) et tenir compte des dépositions ou déclarations faites sous serment dans un État étranger et dûment authentifiées (art. 16). L’État requérant doit simplement produire une preuve *prima facie* du bien-fondé de l’extradition du fugitif, rien de plus. L’audience relative à l’incarcération n’a pas pour objet d’assurer la communication prévue dans une enquête préliminaire en droit interne et elle n’a pas été conçue à cette fin. Voir *Philippines (Republic) c. Pacificador* (1993), 14 O.R. (3d) 321 (C.A.), aux pp. 328 à 339, autorisation de pourvoi refusée, [1994] 1 R.C.S. x. Plus précisément, ni la loi ni le traité n’obligent l’État requérant à révéler les rapports entre les États-Unis et les autorités canadiennes dans le cadre d’une enquête.
- On a souligné, à la p. 555 de l’arrêt *Mellino*, précité, que l’une des difficultés pratiques à laquelle se heurterait le juge d’extradition appelé à trancher des questions telles le caractère déraisonnable d’un retard imputable aux fonctionnaires du Canada ou de l’État requérant est «le peu d’informations dont dispose un juge d’extradition et son défaut de compétence pour obtenir de plus amples renseignements». Toute obligation de communication que l’on considérerait comme prévue par la loi au nom de la justice fondamentale reconnue à l’art. 7 de la *Charte* serait donc nécessairement restreinte en raison du rôle limité attribué au juge d’extradition par la loi et de la nécessité d’éviter d’imposer les notions canadiennes relatives à l’équité procédurale aux autorités étrangères.
- L’État requérant reconnaît au fugitif le droit d’être informé de la preuve qu’il devra réfuter. Voir *United States of America c. Whitley* (1994), 94 C.C.C. (3d) 99 (C.A. Ont.), conf. par [1996] 1 R.C.S. 467. Compte tenu de l’objet de l’audience, toutefois, le fugitif n’aurait droit qu’à la communication des éléments sur lesquels l’État requérant s’appuie pour établir sa preuve *prima facie*.

Mr. Dynar does not argue that he did not receive adequate disclosure of the materials that were being relied upon to establish the *prima facie* case against him. It follows that, in light of the limited nature of extradition hearing, no additional disclosure was required and there is no foundation to Mr. Dynar's claim that he was not treated fairly in the hearing before Keenan J.

(b) *No Justiciable Charter Issue Arises in this Case*

Quite simply, no justiciable *Charter* issue arises in light of the evidence adduced and the nature of an extradition hearing. Mr. Dynar took advantage of telephone facilities to carry out his activities in the United States. He also sent Mr. Cohen to Buffalo to pick up the money. It does not matter that he physically did not leave Canada at any point. The actions of Dynar and Cohen were sufficient to bring them within the jurisdiction of the United States. The affidavit evidence submitted by the Requesting State discloses that the evidence was gathered by American authorities, on American soil, for an American investigation. Any attempt to demonstrate involvement of Canadian authorities acting in conjunction with American authorities simply cannot alter this basic fact.

R. v. Terry, [1996] 2 S.C.R. 207, considered an informal cooperative arrangement between Canadian and U.S. law enforcement officials. Canada was seeking the return from the State of California of a Canadian accused of murder. The fugitive was apprehended by the police in California who, at the request of the Canadian authorities, questioned him. Although the conduct of the investigation was lawful in the United States, the police failed to advise the fugitive of his rights to counsel in the manner that would be required by the *Charter*. The fugitive argued that the statement he made to the California police should accordingly be excluded from his Canadian trial. McLachlin J., writing for the Court, held that in order to find a violation of the *Charter*, it would be necessary to hold that the California police were subject to the *Charter*. This would "run counter to the settled rule that a state is

M. Dynar ne prétend pas avoir obtenu une communication incomplète des éléments invoqués à l'appui de la preuve *prima facie* présentée contre lui. Par conséquent, compte tenu de la nature limitée de l'audience d'extradition, aucune communication additionnelle n'était nécessaire et la prétention de M. Dynar voulant qu'il n'ait pas été traité équitablement à l'audience présidée par le juge Keenan est sans fondement.

b) *Absence de question justiciable des tribunaux ayant trait à la Charte*

Compte tenu de la preuve produite et de la nature de l'audience d'extradition, l'instance ne soulève tout simplement aucune question ayant trait à la *Charte* susceptible d'être tranchée par les tribunaux. M. Dynar s'est servi du réseau téléphonique pour exercer ses activités aux États-Unis. Il a également envoyé M. Cohen à Buffalo pour prendre l'argent. Peu importe qu'il n'ait jamais quitté le Canada. Les agissements de M. Dynar et M. Cohen suffisaient pour les assujettir à la compétence des États-Unis. L'affidavit produit par l'État requérant révèle que la preuve a été recueillie par les autorités américaines, en territoire américain, aux fins d'une enquête américaine. Tenter d'établir la participation des autorités canadiennes qui auraient agi de concert avec les autorités américaines n'y changera rien.

L'arrêt *R. c. Terry*, [1996] 2 R.C.S. 207, portait sur une coopération officieuse entre les personnes chargées de l'application de la loi au Canada et aux États-Unis. Le Canada tentait d'obtenir le renvoi au Canada d'un Canadien accusé de meurtre qui se trouvait dans l'État de Californie. Le fugitif a été arrêté par les policiers de la Californie qui l'ont interrogé, à la demande des autorités canadiennes. L'enquête s'est déroulée en conformité avec le droit américain, mais les policiers n'ont pas informé le fugitif de son droit à l'assistance d'un avocat selon les exigences établies par la *Charte*. Le fugitif a fait valoir que la déclaration faite aux policiers de la Californie ne devait donc pas être admise en preuve dans le cadre de son procès au Canada. Le juge McLachlin, s'exprimant au nom de la Cour, a statué que pour conclure à l'existence d'une violation de la *Charte*, il fallait d'abord con-

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only competent to enforce its laws within its own territorial boundaries” (p. 215).

clure que les policiers de la Californie étaient assujettis à la *Charte*. Pareille conclusion «irait à l’encontre de la règle bien établie selon laquelle un État n’a de compétence pour faire appliquer ses lois qu’à l’intérieur de ses propres frontières territoriales» (p. 215).

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McLachlin J. went on to state at p. 216 that “[t]he practice of cooperation between police of different countries does not make the law of one country applicable in the other country”. She added at p. 217 that:

Le juge McLachlin a ajouté, à la p. 216, que «[l]a pratique de la coopération entre les policiers de différents pays ne rend pas les lois d’un pays applicables dans un autre». Elle a poursuivi son raisonnement, à la p. 217:

Still less can the *Charter* govern the conduct of foreign police cooperating with Canadian police on an informal basis. The personal decision of a foreign officer or agency to assist the Canadian police cannot dilute the exclusivity of the foreign state’s sovereignty within its territory, where its law alone governs the process of enforcement. The gathering of evidence by these foreign officers or agency is subject to the rules of that country and none other. Consequently, any cooperative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken. . . .

La *Charte* peut encore moins régir la conduite de policiers étrangers qui coopèrent officieusement avec la police canadienne. La décision personnelle d’un policier ou d’un organisme étranger d’aider la police canadienne ne peut diminuer l’exclusivité de la souveraineté d’un État étranger sur son territoire, où seules ses lois régissent le maintien de l’ordre. Les personnes qui recueillent des éléments de preuve dans un pays étranger sont tenues de respecter les règles de ce pays, et aucune autre règle. Par conséquent, toute enquête fondée sur la collaboration entre des autorités policières canadiennes et américaines sera régie par les lois du pays où l’activité en question se déroule . . .

Finally, she concluded at p. 220 that “[e]ven if one could somehow classify them as ‘agents’ of the Canadian police, so long as they operated in California they would be governed by California law”. The existence of a cooperative arrangement between jurisdictions, whether informal or formal, does not change these principles.

Enfin, elle a conclu, à la p. 220, que «[m]ême s’ils pouvaient de quelque façon être qualifiés de «mandataires» de la police canadienne, dans la mesure où ils agissaient en Californie, ils étaient assujettis aux lois de la Californie». L’existence d’une coopération, officielle ou officieuse, entre les deux ressorts ne modifie pas ces principes.

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If the foreign police are not governed by the *Charter*, then the evidence gathered by them cannot be excluded under s. 24(2) of the *Charter*. It is true that there are limited circumstances in which evidence might be excluded without resorting to s. 24(2). This exception might apply if the evidence is gathered by the foreign authorities in such an abusive manner that its admission would be *per se* unfair under s. 7 of the *Charter*. See *R. v. Harrer*, [1995] 3 S.C.R. 562, at pp. 571-72; *Terry*, *supra*, at pp. 218-19. But both *Harrer* and *Terry* involve evidence gathered by foreign authorities for use in a Canadian trial. This limited exception is of no assistance to Mr. Dynar, who is arguing

Si les policiers étrangers ne sont pas assujettis à la *Charte*, la preuve qu’ils recueillent ne peut être exclue en vertu du par. 24(2) de la *Charte*. Certes, dans certaines circonstances, la preuve pourrait être exclue sans que soit invoqué le par. 24(2). Ce serait le cas si la preuve avait été recueillie par les autorités étrangères de façon si abusive que son admission serait en soi inéquitable au sens de l’art. 7 de la *Charte*. Voir *R. c. Harrer*, [1995] 3 R.C.S. 562, aux pp. 571 et 572; *Terry*, précité, aux pp. 218 et 219. Mais les arrêts *Harrer* et *Terry* portent tous les deux sur la preuve recueillie par des autorités étrangères en vue d’un procès canadien. Cette exception n’est d’aucun secours à M. Dynar

for the exclusion of evidence in an extradition hearing.

Although a fugitive might be able to argue that the admission of some evidence at an extradition hearing was *per se* unfair under s. 7 of the *Charter*, Mr. Dynar could not have successfully made this argument. The wiretap evidence was gathered in Nevada, in conformity with the law of the United States, but in a manner that would be unacceptable in Canada. However, the fact that evidence was obtained in the foreign jurisdiction in a way that does not comply with our *Charter* is not enough on its own to render the proceeding so unfair that the evidence should be excluded: *Harrer, supra*, at p. 573. Considerations of this nature must always be balanced against the need to ensure that Canada's international obligations are honoured, to foster cooperation between investigative authorities in different jurisdictions, and to avoid indirectly forcing the foreign authorities to adopt procedural safeguards that resemble our own in order to successfully obtain the surrender of a fugitive.

Mr. Dynar contends that as a result of the Requesting State's non-disclosure, there is no evidentiary record on the basis of which he can even attempt to make a *Charter* argument. Yet the evidence presented by the Requesting State does disclose enough information to conclude that there is simply no "air of reality" to the contention that Mr. Dynar could establish a *Charter* violation by the Canadian officials in the gathering of the evidence. The evidence before Keenan J. included the affidavit of Agent Matthews. It clearly reveals that the FBI had been interested in the activities of Mr. Dynar for some time; that Matthews himself was aware of previous occasions on which Mr. Dynar had admitted to laundering large sums of money in the State of Nevada, and that he initiated the investigation on the basis of his suspicions regarding Mr. Dynar's telephone call to Lucky Simone. The affidavit provides a sufficient basis to conclude that the investigation, the evidence and the prosecution were essentially American. No

qui demande l'exclusion de la preuve dans le cadre d'une audience d'extradition.

Bien qu'un fugitif puisse faire valoir que l'admission d'une preuve quelconque dans le cadre d'une audience d'extradition est inéquitable en soi au sens de l'art. 7 de la *Charte*, M. Dynar n'aurait pu avoir gain de cause sur ce point. La preuve obtenue par écoute électronique a été recueillie au Nevada en conformité avec le droit américain, mais selon des modalités qui seraient inacceptables au Canada. Toutefois, le fait que la preuve a été obtenue dans un ressort étranger selon des modalités qui ne respectent pas la *Charte* canadienne ne suffit pas en soi pour rendre la procédure inéquitable à tel point que la preuve doive être exclue: *Harrer*, précité, à la p. 573. Des considérations de cette nature doivent toujours être soupesées en regard de la nécessité d'assurer le respect par le Canada de ses obligations internationales, afin de favoriser la coopération entre enquêteurs de ressorts différents et d'éviter de forcer indirectement les autorités étrangères à établir des garanties procédurales semblables aux nôtres pour obtenir l'extradition d'un fugitif.

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M. Dynar prétend qu'en raison du manquement par l'État requérant à l'obligation de communiquer, il n'y a pas d'éléments de preuve au dossier sur lesquels il pourrait se fonder, ne serait-ce que pour tenter d'invoquer la *Charte*. Or la preuve produite par l'État requérant révèle suffisamment de renseignements pour justifier que l'on conclue à l'absence de «vraisemblance» de la prétention selon laquelle M. Dynar pourrait établir que les fonctionnaires canadiens ont violé la *Charte* en recueillant la preuve. Parmi les éléments versés aux débats devant le juge Keenan figurait un affidavit de l'agent Matthews. Il révèle clairement que le FBI s'intéressait aux activités de M. Dynar depuis quelque temps, que l'agent Matthews lui-même savait que M. Dynar avait déjà admis à d'autres occasions avoir recyclé d'importantes sommes d'argent dans l'État du Nevada et qu'il avait amorcé l'enquête en raison des soupçons qu'avait éveillés chez lui l'appel téléphonique de M. Dynar à Lucky Simone. Cet affidavit fournit

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amount of cooperation by the Canadian authorities could change this.

suffisamment d'éléments pour étayer la conclusion que l'enquête, la preuve et la poursuite étaient essentiellement américaines. L'étendue de la coopération des autorités canadiennes n'y aurait pu rien changer.

142 The facts of the instant appeal illustrate the logical soundness of the *Terry* decision. The reason for exercising extreme caution in excluding foreign evidence from consideration in the extradition process on *Charter* grounds is that it is difficult to imagine how such evidence could be excluded without indirectly applying the *Charter* extraterritorially to the foreign jurisdiction. If this concern applies where the foreign evidence is being used in a Canadian trial (*Terry, supra*), it must *a fortiori* be a very significant if not a governing factor where the foreign evidence is to be used in a foreign trial.

Les faits à l'origine du présent pourvoi illustrent la justesse de l'arrêt *Terry*. S'il faut faire preuve d'une prudence extrême avant d'exclure une preuve étrangère pour des motifs fondés sur la *Charte* dans une procédure d'extradition, c'est parce qu'il est difficile d'imaginer comment on pourrait y parvenir sans assujettir indirectement le ressort étranger à la *Charte* en donnant à celle-ci une portée extraterritoriale. Si ce problème se pose lorsque la preuve étrangère est utilisée dans un procès qui se déroule au Canada (*Terry, précité*), il doit à plus forte raison constituer un facteur très important, sinon déterminant, lorsque la preuve doit être utilisée dans un procès tenu à l'étranger.

143 It is true that the fugitive is entitled to be committed only on the basis of evidence that is legally admissible according to the law of the province in which the committal hearing takes place: see *La Forest's Extradition, supra*, at p. 160. But it has been consistently and properly held that the *Charter* generally does not apply extraterritorially. As a result, Canadian courts cannot impose upon foreign evidence the standards of admissibility that have developed in the jurisprudence dealing with s. 24(2) of the *Charter*.

Certes, le fugitif a le droit de n'être incarcéré que sur la foi d'une preuve légalement admissible en vertu du droit de la province dans laquelle a lieu l'audience relative à l'incarcération: voir *La Forest's Extradition, op. cit.*, à la p. 160. Mais d'après une jurisprudence constante et juste, la *Charte* ne reçoit pas, en règle générale, d'application extraterritoriale. Par conséquent, les tribunaux canadiens ne peuvent soumettre la preuve étrangère aux normes d'admissibilité élaborées par la jurisprudence portant sur le par. 24(2) de la *Charte*.

144 Mr. Dynar was entitled to a fair hearing before the extradition judge, and in our opinion he received one. He was not entitled to disclosure from the Requesting State beyond the production of the evidence that it was relying upon to establish its *prima facie* case. In any event, the evidence provided by the Requesting State did contain sufficient information to conclude that the evidence was gathered entirely in the United States, by American officials, for an American trial. It follows that no justiciable *Charter* issue can arise in this case. In these circumstances, a new hearing is simply not justified.

M. Dynar avait droit à un procès équitable devant le juge d'extradition et, selon nous, il l'a obtenu. Il n'avait pas droit à la communication d'autres éléments que ceux que l'État requérant a produits pour établir la preuve *prima facie*. Quoi qu'il en soit, la preuve fournie par l'État requérant comportait suffisamment de renseignements pour mener à la conclusion que la preuve a été recueillie entièrement aux États-Unis, par des fonctionnaires américains, en vue d'un procès devant se dérouler aux États-Unis. L'instance ne saurait donc soulever aucune question justiciable des tribunaux ayant trait à la *Charte*. Dans les circonstances, une nouvelle audience n'est tout simplement pas justifiée.

(c) *Disclosure of Materials in the Hands of the Canadian Authorities*

Mr. Dynar argued that even if he was not entitled to additional disclosure from the American authorities, he was entitled to disclosure of the materials in the hands of the Canadian authorities. Since no justiciable *Charter* issue can arise from the potential involvement of the Canadian authorities in the gathering of evidence in this case, it is not necessary to consider the degree of disclosure that might be required in other circumstances.

Similarly, it is not necessary to resolve the scope of the jurisdiction of the extradition judge under s. 9(3) of the amended *Extradition Act* in a case where sufficient Canadian state involvement could be demonstrated. Perhaps it will suffice to observe that as a result of the enactment of the section, the extradition judge is a “court of competent jurisdiction” pursuant to s. 24 of the *Charter*, provided that the presiding judge normally fulfills that function. Any further analysis of this issue must await a case when it is dispositive of the appeal.

The facts presented in this case preclude any recourse to the *Charter* in the committal hearing and the cross-appeal must be dismissed.

VI. Conclusion

In the result, therefore, the appeal is allowed, the judgment of the Court of Appeal is set aside, and the cross-appeal is dismissed. The order of Keenan J. committing the fugitive for extradition and the Minister of Justice’s decision to surrender the fugitive are reinstated.

The reasons of Sopinka, McLachlin and Major JJ. were delivered by

MAJOR J. — I agree with Justices Cory and Iacobucci on the disposition of this appeal but disagree with their conclusion that an attempt to com-

c) *Divulgence des éléments en la possession des autorités canadiennes*

M. Dynar a soutenu que, même s’il n’avait pas droit à la communication de renseignements additionnels de la part des autorités américaines, il avait le droit d’obtenir celle des éléments qui sont en la possession des autorités canadiennes. Étant donné qu’aucune question justiciable des tribunaux ayant trait à la *Charte* ne peut être soulevée par la participation potentielle des autorités canadiennes à l’obtention de la preuve en l’espèce, il n’est pas nécessaire d’examiner l’étendue de la divulgation qui pourrait être exigée dans d’autres circonstances.

De même, il n’est pas nécessaire de trancher la question de l’étendue de la compétence conférée au juge d’extradition par le par. 9(3) de la *Loi sur l’extradition*, modifiée, dans un cas où une participation suffisante de l’État canadien pourrait être établie. Peut-être suffit-il de préciser qu’en conséquence de l’entrée en vigueur de cette disposition, le juge d’extradition est «un tribunal compétent» au sens de l’art. 24 de la *Charte*, à condition que le juge qui préside l’audience exerce normalement cette fonction. Avant de pousser l’analyse de cette question, il convient d’attendre que sa solution soit déterminante quant à l’issue d’un pourvoi.

Les faits exposés en l’espèce font obstacle à tout recours à la *Charte* à l’audience relative à l’incarcération et le pourvoi incident doit être rejeté.

VI. Conclusion

Par ces motifs, le pourvoi est donc accueilli, l’arrêt de la Cour d’appel infirmé et le pourvoi incident rejeté. L’ordonnance portant incarcération du fugitif en vue de son extradition prononcée par le juge Keenan et la décision du ministre de la Justice d’extrader le fugitif sont rétablies.

Version française des motifs des juges Sopinka, McLachlin et Major rendus par

LE JUGE MAJOR — Je suis d’accord avec les juges Cory et Iacobucci quant à la solution qu’ils proposent d’apporter au présent pourvoi, mais con-

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mit an offence under s. 24 of the *Criminal Code*, R.S.C., 1985, c. C-46, can be found on the present facts.

150 It should not be a criminal attempt to do acts which, if completed, would not amount to an offence in Canada. I, like the New Zealand Court of Appeal (*R. v. Donnelly*, [1970] N.Z.L.R. 980), the House of Lords (*Haughton v. Smith*, [1973] 3 All E.R. 1109), the New York Court of Appeals (*People v. Jaffe*, 78 N.E. 169 (1906)) and the Ontario Court of Appeal in the present case ((1995), 25 O.R. (3d) 559), cannot grasp the notion that the intention to do an act coupled with some activity thought to be criminal is sufficient to find the accused guilty of an attempt when that which was attempted was not an offence under the *Criminal Code*.

151 My colleagues have carefully described the different elements of mistake of fact and mistake of law and conclude there is no difference between the two when raised as a defence of impossibility to a criminal charge. To them the only defence of impossibility is when the crime is imaginary. The debate over the defence of mistake of fact as opposed to mistake of law has engaged judges, academics and legislators for at least 150 years. The issue in this appeal can be resolved without solving the controversy over the attempt to commit crimes inherently impossible to commit. This is because in this appeal the elements of the offence are missing.

152 The problem can best be illustrated by the following hypothetical facts. A purchases goods from B at a fraction of their acknowledged true value. A believes that he is getting such a bargain because the goods are stolen, and admits this to the police. After investigating, the police determine that the goods were not stolen, and that A simply got a good deal. Has the purchaser nonetheless committed an offence? My colleagues say yes, that A committed the offence of attempted possession of

trairement à mes collègues, j'estime que les faits de l'espèce ne permettent pas de conclure à la tentative d'infraction prévue à l'art. 24 du *Code criminel*, L.R.C. (1985), ch. C-46.

Ce ne devrait pas être criminel que de tenter d'accomplir des actes qui, s'ils étaient menés à terme, ne constitueraient pas une infraction au Canada. Personnellement, tout comme la Cour d'appel de Nouvelle-Zélande (*R. c. Donnelly*, [1970] N.Z.L.R. 980), la Chambre des lords (*Haughton c. Smith*, [1973] 3 All E.R. 1109), la Cour d'appel de New York (*People c. Jaffe*, 78 N.E. 169 (1906)) et la Cour d'appel de l'Ontario en l'espèce ((1995), 25 O.R. (3d) 559), je n'arrive pas à comprendre comment l'intention, jointe à des actes tenus pour criminels, suffit pour conclure que l'accusé est coupable de tentative, alors que ce qu'il a tenté de faire ne constitue pas une infraction visée par le *Code criminel*.

Mes collègues ont décrit soigneusement les différents éléments de l'erreur de fait et de l'erreur de droit et ils concluent qu'il n'existe aucune différence entre les deux lorsque l'erreur sert de fondement à la défense d'impossibilité opposée à une accusation criminelle. Selon eux, l'impossibilité ne peut être invoquée en défense qu'à l'encontre d'un crime imaginaire. Le débat sur la distinction entre la défense d'erreur de fait et la défense d'erreur de droit alimente la réflexion des juges, des universitaires et des législateurs depuis au moins 150 ans. La question en litige dans le présent pourvoi peut être tranchée sans que soit résolue la controverse sur la tentative des crimes qui, de par leur nature, sont impossibles à commettre. En effet, les éléments de l'infraction ne sont pas réunis en l'espèce.

L'hypothèse suivante illustre bien le problème. A achète des biens à B pour une fraction de leur juste prix. A croit qu'il peut les obtenir à si bon marché parce qu'ils ont été volés et il l'avoue à la police. Après enquête, la police découvre que les biens n'ont pas été volés et que A a simplement fait une bonne affaire. L'acheteur a-t-il néanmoins commis une infraction? Mes collègues disent que oui. Ils estiment que A a commis l'infraction de tentative de possession de biens volés. Je ne suis

stolen goods. I disagree. Section 24 requires, on its plain meaning as an element of the offence, that that which was intended to be done be an offence.

I. Attempt

In order for the extradition judge to commit the respondent Dynar for extradition to the United States the “double criminality” rule must be satisfied. This requires the judge to consider whether the conduct alleged, if it had occurred in Canada, would be a criminal offence. The appellant Crown submits that Dynar, on the facts of this appeal, could be convicted of attempting to launder money or of entering into a conspiracy to launder money under Canadian law. I doubt that the offence of attempt could be made out on the facts of this case as the sum of the activity and intention of Dynar did not amount to an attempt pursuant to s. 24.

An attempt is defined in s. 24(1) of the *Criminal Code*:

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

It is inescapable that there must be an underlying offence capable of being committed before we can consider the elements of the attempt offence. It is accepted by my colleagues that on the facts here what Dynar did would not amount to a criminal offence in Canada. This is because he did not “know” that the money sought to be laundered was the proceeds of crime, as it was not. The money was a prop of the police in the sting operation. In my view, since Dynar did not knowingly attempt to launder the proceeds of crime, it cannot be said he had the “intent to commit an offence” for purposes of s. 24(1).

pas d'accord. Il ressort clairement de l'art. 24 que l'un des éléments de l'infraction est que le résultat recherché constitue une infraction.

I. La tentative d'infraction

Pour que le juge d'extradition puisse ordonner l'incarcération de l'intimé Dynar en vue de son extradition aux États-Unis, la règle de la «double incrimination» doit être respectée. Le juge doit se demander si les agissements reprochés, s'ils avaient eu lieu au Canada, constitueraient une infraction criminelle. Le ministère public appelant soutient que Dynar, compte tenu des faits de l'espèce, pourrait être déclaré coupable de tentative de recyclage des produits de la criminalité ou de complot en vue de recycler des produits de la criminalité en droit canadien. Je doute que l'infraction de tentative puisse être établie à partir des faits de l'espèce, étant donné que les agissements de Dynar, conjugués à son intention, ne constituaient pas une tentative aux termes de l'art. 24.

La tentative est définie au par. 24(1) du *Code criminel*:

24. (1) Quiconque, ayant l'intention de commettre une infraction, fait ou omet de faire quelque chose pour arriver à son but est coupable d'une tentative de commettre l'infraction, qu'il fût possible ou non, dans les circonstances, de la commettre.

Indubitablement, il doit y avoir une infraction sous-jacente susceptible d'être commise, avant que l'on puisse examiner les éléments de l'infraction de tentative. Mes collègues acceptent que, vu les faits, les agissements de Dynar ne constitueraient pas une infraction criminelle au Canada. Il en est ainsi parce que Dynar ne «savait» pas que l'argent à recycler était le produit de la criminalité, puisque ce n'était pas le cas. L'argent était un accessoire utilisé par la police au cours d'une opération d'infiltration. À mon avis, étant donné que Dynar n'a pas tenté en connaissance de cause de recycler les produits de la criminalité, on ne peut affirmer qu'il avait l'«intention de commettre une infraction» aux termes du par. 24(1).

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Section 462.31 of the *Criminal Code* defines the offence of money laundering:

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence or a designated drug offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence. [Emphasis added.]

To the same effect is s. 19.2 of the *Narcotic Control Act*, R.S.C., 1985, c. N-1:

19.2 (1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an offence under section 4, 5 or 6; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 4, 5 or 6. [Emphasis added.]

The substantive offence under either the *Criminal Code* or the *Narcotic Control Act* requires that the accused deal with proceeds knowing that all or a part of those proceeds were obtained or derived directly or indirectly as a result of crime.

156 Knowledge requires truth. The offence of money laundering could not be committed when the proceeds are not the actual proceeds of crime.

L'article 462.31 du *Code criminel* définit l'infraction de recyclage des produits de la criminalité dans les termes suivants:

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462.31 (1) Est coupable d'une infraction quiconque — de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l'intention de les cacher ou de les convertir sachant qu'ils ont été obtenus ou proviennent, en totalité ou en partie, directement ou indirectement:

a) soit de la perpétration, au Canada, d'une infraction de criminalité organisée ou d'une infraction désignée en matière de drogue;

b) soit d'un acte ou d'une omission survenu à l'extérieur du Canada qui, au Canada, aurait constitué une infraction de criminalité organisée ou une infraction désignée en matière de drogue. [Je souligne.]

L'article 19.2 de la *Loi sur les stupéfiants*, L.R.C. (1985), ch. N-1, va dans le même sens:

19.2 (1) Commet une infraction quiconque — de quelque façon que ce soit — utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession — dans l'intention de les cacher ou de les convertir sachant qu'ils ont été obtenus ou proviennent, en totalité ou en partie, directement ou indirectement:

a) soit de la perpétration, au Canada, d'une infraction prévue aux articles 4, 5 ou 6;

b) soit d'un acte ou d'une omission survenu à l'extérieur du Canada et qui, au Canada, aurait constitué une telle infraction. [Je souligne.]

L'infraction matérielle précise exige, tant dans le *Code criminel* que dans la *Loi sur les stupéfiants*, que l'accusé utilise des produits sachant qu'ils proviennent, en totalité ou en partie, directement ou indirectement, de la perpétration d'une infraction criminelle.

La connaissance est indissociable de la vérité. L'infraction de recyclage des produits de la criminalité ne peut pas être commise si les sommes à recycler ne sont pas effectivement des produits de la criminalité.

The appellant Crown has submitted, however, that the Court should define the word “knowing” within s. 462.31 to mean “believing” so as to impose a conviction for the substantive offence when an accused believes what he is laundering is the proceeds of crime. The appellant submits that if Dynar had actually received clean monies from a law enforcement agency and laundered them, he should be convicted of money laundering, despite the fact that he has not laundered the proceeds of crime. However, the plain meanings of “knowing” and “believing” are different. The late Prof. Glanville Williams in his *Textbook of Criminal Law* (2nd ed. 1983) stated at p. 160:

The word “know” refers exclusively to true knowledge; we are not said to “know” something that is not so. Belief, on the other hand, can include a mistaken belief, a subjective conviction whether right or wrong.

A useful comparison can be drawn to the wording of the substantive offence under which Dynar has been charged in the United States. *United States Code*, Title 18, § 1956(a)(3) provides as follows:

§ 1956. Laundering of monetary instruments

(a) . . .

(3) Whoever, with the intent —

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20

Le ministère public appelant a soutenu, cependant, que la Cour devrait donner au mot «sachant», employé à l’art. 462.31, le sens du mot «croyant», de manière à entraîner une déclaration de culpabilité quant à l’infraction matérielle précise lorsque l’accusé croit que ce qu’il recycle est le produit de la criminalité. L’appelant soutient que si Dynar avait effectivement reçu de l’argent propre d’un organisme chargé de l’application de la loi et qu’il l’avait recyclé, il aurait dû être déclaré coupable de recyclage des produits de la criminalité, malgré le fait qu’il n’aurait pas recyclé des produits de la criminalité. Pourtant, le sens ordinaire des mots «sachant» et «croyant» n’est pas le même. Le regretté professeur Glanville Williams dans *Textbook of Criminal Law* (2^e éd. 1983), a affirmé à la p. 160:

[TRADUCTION] Le mot «savoir» renvoie exclusivement à la connaissance véritable; l’on ne peut affirmer «savoir» sans connaître la vérité. En revanche, une croyance peut être erronée, puisqu’il s’agit d’une conviction subjective, juste ou erronée.

Il est utile d’examiner le libellé de l’infraction matérielle précise dont Dynar a été accusé aux États-Unis. Le par. 1956(a)(3) du titre 18 du *United States Code* porte que:

[TRADUCTION]

§ 1956. Recyclage d’instruments monétaires

(a) . . .

(3) Quiconque, avec l’intention

(A) de favoriser la poursuite d’une activité illégale désignée;

(B) de dissimuler ou de masquer la nature, le lieu, la provenance, la propriété ou le contrôle d’un bien qu’on croit être le produit d’une activité criminelle désignée;

(C) de se soustraire à l’obligation de présenter un rapport d’opération conformément à la loi d’un État ou à la loi fédérale,

mène ou tente de mener une opération financière concernant un bien présenté comme étant le produit d’une activité criminelle désignée, ou un bien utilisé pour mener ou faciliter une activité illégale désignée, sera condamné en vertu du présent titre à une amende ou à

years, or both. For purposes of this paragraph and paragraph (2), the term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section. [Emphasis added.]

It is apparent that the offence is defined differently in the United States than here in Canada. The initial requirement is not “knowing” but “believing”. As well by including “property represented to be the proceeds of specified unlawful activity” within the meaning of the proceeds of crime, the U.S. law specifically makes a money-laundering “sting” a legitimate avenue of criminal investigation and prosecution. Our substantive money-laundering section is not drafted in that way.

159 Parliament could easily draft legislation which makes belief the mental element of a crime. Consider s. 4(1) of the *Narcotic Control Act*, which reads:

4. (1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.

By this section if a person believes that the substance he or she is trafficking in is a narcotic, the person is guilty whether or not it is a narcotic. It is evident that Parliament is aware of its options and its choice of “knowing” as a requirement for an offence under s. 462.31 of the *Criminal Code* and s. 19.2 of the *Narcotic Control Act* rather than “believing” should be respected.

160 There are several sections of the *Criminal Code* where different meanings are implied for the two words. For the use of “knowing” alone see:

s. 163(2)(a) (selling or possessing obscene materials), which requires that the accused

une peine d'emprisonnement maximale de 20 ans, ou à l'une et l'autre. Pour l'application du présent paragraphe et du paragraphe (2), le terme «présenté» signifie toute déclaration faite par un agent responsable de l'application de la loi ou par une autre personne à la demande ou avec l'approbation d'un agent fédéral autorisé à enquêter ou à exercer des poursuites en rapport avec les manquements au présent article. [Je souligne.]

Il est évident que l'infraction n'est pas définie de la même façon aux États-Unis qu'ici au Canada. La première exigence n'est pas la «connaissance», mais la «croyance». De même, en incluant [TRADUCTION] «un bien présenté comme étant le produit d'une activité criminelle désignée» dans la définition des produits de la criminalité, le droit américain permet expressément le recours à la ruse pour faire croire à un projet de recyclage d'argent, afin de mener une enquête policière et d'exercer des poursuites. Notre article créant l'infraction de recyclage des produits de la criminalité n'est pas rédigé de cette façon.

Le législateur pourrait facilement adopter un texte qui fasse de la croyance l'élément moral d'un crime. Examinons le par. 4(1) de la *Loi sur les stupéfiants*:

4. (1) Le trafic de stupéfiant est interdit, y compris dans le cas de toute substance que le trafiquant prétend ou estime être tel.

En vertu de ce paragraphe, si une personne croit que la substance dont elle fait le trafic est un stupéfiant, elle est coupable, qu'il s'agisse ou non d'un stupéfiant. Il est évident que le législateur est conscient des options qui s'offrent à lui et le choix du mot «sachant» plutôt que du mot «croyant» pour indiquer une exigence quant à la perpétration de l'infraction visée à l'art. 462.31 du *Code criminel* ou à l'art. 19.2 de la *Loi sur les stupéfiants* devrait être respecté.

Des sens différents doivent implicitement être donnés à ces deux mots dans plusieurs articles du *Code criminel*. Pour l'utilisation des mots «sachant», «sciemment» et «sait» employés seuls, voir:

L'alinéa 163(2)a) (vente ou possession de publications obscènes), qui exige que l'accusé,

“knowingly, without lawful justification or excuse” sells, displays or possesses obscene material;

s. 181 (spreading false news), which requires that the accused wilfully publish a statement “he knows is false” (note that this section was found to be unconstitutional by this Court in *R. v. Zundel*, [1992] 2 S.C.R. 731 (“*Zundel (No. 2)*”));

s. 300 (defamatory libel), which requires that the accused publish “a defamatory libel that he knows is false”;

s. 354(1) (possession of property obtained by crime), which requires that the accused possess a property or thing “knowing” that all or part of the property or thing was obtained by or derived directly or indirectly from crime.

In contrast, see:

s. 495(1)(a) (the standard for warrantless arrest): a peace officer may arrest without warrant a person who, “on reasonable grounds, he believes has committed . . . an indictable offence”.

For the disjunctive use of both knowing and believing see s. 196(4)(a). Parliament obviously intended these two words to have different meanings.

Canadian courts have authoritatively interpreted “knowing” to require the thing to actually be true before it can be known. See *R. v. Zundel* (1987), 31 C.C.C. (3d) 97, where the Ontario Court of Appeal held that s. 181 of the *Criminal Code* (spreading news knowing it to be false) requires proof that the statement published was actually false. The accused could not “know” he was publishing news that was false unless such news actually was false. In *Zundel (No. 2)*, *supra*, McLachlin J. summarized the elements of s. 181 at p. 747:

[T]he Crown, to succeed, must establish beyond a reasonable doubt the following propositions:

«sciemment et sans justification ni excuse légitime», vende, expose à la vue du public ou ait en sa possession des publications obscènes;

L'article 181 (diffusion de fausses nouvelles), qui exige que l'accusé ait volontairement publié une déclaration «qu'il sait fausse» (noter que cet article a été déclaré inconstitutionnel par notre Cour dans l'arrêt *R. c. Zundel*, [1992] 2 R.C.S. 731 («*Zundel (n° 2)*»));

L'article 300 (libelle diffamatoire), qui exige que l'accusé publie «un libelle diffamatoire qu'il sait être faux»;

Le paragraphe 354(1) (possession de biens criminellement obtenus), qui exige que l'accusé ait en sa possession un bien ou une chose «sachant» que tout ou partie d'entre eux ont été obtenus ou proviennent directement ou indirectement de la perpétration d'un crime.

À comparer avec:

L'alinéa 495(1)a) (la norme applicable aux arrestations sans mandat), qui porte qu'un agent de la paix peut arrêter sans mandat une personne qui, «d'après ce qu'il croit pour des motifs raisonnables, a commis [. . .] un acte criminel».

Pour une utilisation disjunctive des mots «sachant» et «croyant», voir l'al. 196(4)a). Il est évident que le législateur avait l'intention de donner des sens différents à ces deux mots.

Les tribunaux canadiens ont statué péremptoirement que le mot «sachant» exige que l'objet de connaissance soit vrai pour être connu; voir l'arrêt *R. c. Zundel* (1987), 31 C.C.C. (3d) 97, où la Cour d'appel de l'Ontario a statué que l'art. 181 du *Code criminel* (diffuser une nouvelle que l'on sait fausse) exige la preuve que la déclaration publiée était réellement fausse. L'accusé ne pouvait «savoir» qu'il diffusait une fausse nouvelle que si cette nouvelle était réellement fausse. Dans *Zundel (n° 2)*, précité, le juge McLachlin a résumé les éléments de l'art. 181 à la p. 747:

[P]our avoir gain de cause, le ministère public doit prouver les propositions suivantes hors de tout doute raisonnable:

1. That the accused published a false statement, tale or news;
2. That the accused knew the statement was false; and
3. That the statement causes or is likely to cause injury or mischief to a public interest. [Emphasis added.]

This decision recognized that s. 181 required the statement that was made to actually be false.

1. L'accusé a publié une déclaration, une histoire ou une nouvelle fausse;
2. L'accusé savait que la déclaration était fausse;
3. La déclaration cause, ou est de nature à causer, une atteinte ou du tort à quelque intérêt public. [Je souligne.]

Cet arrêt reconnaît que l'art. 181 exigeait que la déclaration en question soit réellement fausse.

¹⁶² It has long been a staple of Canadian jurisprudence that s. 354(1), possession of goods “knowing” them to be stolen, requires the goods to actually be stolen goods before an accused can “know” they were. This is made clear in *R. v. Streu*, [1989] 1 S.C.R. 1521. The accused’s belief that the goods were stolen was not enough to ground a conviction for possession of goods knowing them to be stolen. The Court referred with approval to the statement of Dickson J.A. (later C.J.C.) in *R. v. Vogelle and Reid*, [1970] 3 C.C.C. 171 (Man. C.A.), at p. 177, that, “[i]n order for an accused to be found guilty of the offence of receiving stolen goods it is essential the Crown prove beyond reasonable doubt . . . [t]hat the goods are stolen goods”. To now equate “knowing” with “believing” would reverse long established authority to the contrary.

Depuis longtemps la jurisprudence canadienne est fixée: le par. 354(1) (possession de biens, «sachant» qu'ils ont été volés) exige que les biens soient effectivement des biens volés pour qu'un accusé puisse «savoir» qu'ils le sont. Cela a été dit clairement dans l'arrêt *R. c. Streu*, [1989] 1 R.C.S. 1521. Le fait que l'accusé ait cru que les biens avaient été volés n'a pas suffi pour justifier une déclaration de culpabilité pour possession de biens, sachant qu'ils étaient volés. La Cour s'est reportée avec approbation à l'affirmation du juge Dickson (plus tard Juge en chef du Canada) dans l'arrêt *R. c. Vogelle and Reid*, [1970] 3 C.C.C. 171 (C.A. Man.), à la p. 177, selon laquelle [TRADUCTION] «[a]fin qu'un accusé soit déclaré coupable de l'infraction de receler des biens volés, il est essentiel que le ministère public prouve hors de tout doute raisonnable [. . .] [q]ue les biens sont des biens volés». Considérer maintenant que les mots «sachant» et «croyant» ont un sens équivalent renverserait une jurisprudence bien établie affirmant le contraire.

¹⁶³ In addition, Parliament is in the process of amending s. 462.31 to include the phrase “knowing or believing” with the *Criminal Law Improvement Act, 1996* (Bill C-17). Bill C-17 will amend both statutes in the way that the appellant would have this Court amend them. Parliament is the proper place to pursue these changes.

En outre, par le projet de loi C-17, *Loi de 1996 visant à améliorer la législation pénale*, le législateur a entrepris de modifier l'art. 462.31 de manière à y faire figurer les mots «sachant ou croyant». Le projet de loi modifiera les deux lois dans le sens où l'appelant voudrait que notre Cour le fasse. Le Parlement est l'organe compétent pour décider de ces changements.

¹⁶⁴ The substantive offence of money laundering, as it stands unamended, cannot be committed without the actual proceeds of crime being present. The accused cannot “know” that what he is laundering is the proceeds of crime unless the proceeds are the proceeds of crime. We cannot “know” what is not

L'infraction de recyclage des produits de la criminalité, dans sa formulation actuelle, ne peut pas être perpétrée sans l'existence de produits de la criminalité. L'accusé ne peut pas «savoir» que ce qu'il recycle est le produit de la criminalité à moins que ce produit ne soit effectivement le pro-

true. On this point, I agree with my colleagues in their conclusion at para. 47 that

[b]ecause the money that the U.S. undercover agents asked Mr. Dynar to launder was not in fact the proceeds of crime, Mr. Dynar could not possibly have known that it was the proceeds of crime. Therefore, even if he had brought his plan to fruition, he would not have been guilty of any completed offence known to Canadian law.

My colleagues however, have an alternative position. They posit that despite the fact that laundered proceeds must be the actual proceeds of crime before an accused can knowingly launder them, the accused can be convicted of attempting to launder proceeds of crime when he has laundered that which he believes to be actual proceeds. I cannot agree. There must be an underlying offence before an accused could attempt to commit anything. If there is no offence there can be no attempt.

My colleagues state that the knowledge requirement of the money laundering offence does not constitute the accused's *mens rea*. For my part, I do not understand the need to divide the "knowledge" of the accused into subjective and objective components, which my colleagues labour at in paras. 68 through 74 of their reasons. Parliament, perhaps to avoid metaphysics, chose to use a single word to represent the mental element of this offence. We need go no further than their choice. Since the accused did not have knowledge, the *mens rea* of the offence, he cannot be said to have attempted it.

Moreover, it does not logically, on the plain meaning of the word, make sense to say the respondent attempted to launder the proceeds of crime. The respondent only attempted to launder what the FBI provided. It presumably made no difference to him whether the money to be laundered was from crime or legal activity. In fact, what he attempted to do was launder money that was not

duit de la criminalité. Celui qui «sait» connaît forcément la vérité. Sur ce point, je suis d'accord avec la conclusion tirée par mes collègues au par. 47:

Étant donné que l'argent que les agents d'infiltration américains ont demandé à M. Dynar de recycler n'était pas réellement le produit de la criminalité, M. Dynar ne pouvait savoir qu'il s'agissait du produit de la criminalité. Par conséquent, même s'il avait pu réaliser son plan, il n'aurait été coupable d'aucune infraction consommée connue en droit canadien.

Mes collègues, toutefois, font une seconde affirmation. Ils posent en principe que, même si les produits à recycler doivent être des produits de la criminalité pour qu'un accusé puisse les recycler en connaissance de cause, l'accusé peut être déclaré coupable de tentative de recyclage des produits de la criminalité lorsqu'il a recyclé ce qu'il croit être de tels produits. Je ne peux être d'accord. Il doit y avoir une infraction sous-jacente pour qu'un accusé puisse tenter de commettre quoi que ce soit. Sans infraction, il ne peut y avoir de tentative d'infraction.

Mes collègues affirment que la connaissance exigée pour l'infraction de recyclage des produits de la criminalité ne constitue pas la *mens rea* de l'accusé. Pour ma part, je ne comprends pas la nécessité d'une division de la «connaissance» de l'accusé en une composante subjective et une composante objective, division sur laquelle mes collègues peinent aux par. 68 à 74 de leurs motifs. Le législateur, en vue peut-être d'éviter les abstractions de la métaphysique, a choisi de n'utiliser qu'un seul mot pour désigner l'élément moral de cette infraction. Nous n'avons pas besoin d'aller plus loin. Étant donné que l'accusé n'avait pas la connaissance, *mens rea* de l'infraction, on ne peut dire qu'il a tenté de la commettre.

Qui plus est, il n'est pas logique, compte tenu du sens ordinaire des mots, de dire que l'intimé a tenté de recycler des produits de la criminalité. L'intimé a seulement tenté de recycler ce que le FBI devait lui fournir. On peut supposer que cela l'indifférait que l'argent à recycler soit le produit de la criminalité ou le produit d'une activité légale. En fait, ce qu'il a tenté de faire, c'est de recycler

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tainted. There was no offence that could be committed. The laundering of legal proceeds is an imaginary crime.

168 Parliament's proposed amendments (Bill C-17, noted above) relate to money laundering only. If my colleagues are correct, the result of their reasons would apply a lower standard of criminal liability to all offences of attempt.

169 In the absence of a defence of impossibility certain unusual circumstances will result in convictions for criminal offences. As previously noted, a person who possesses goods believing them to be stolen will be convicted of a crime whether or not the goods are actually stolen. If the goods are not stolen, the accused will be convicted for his or her state of mind alone. Criminal law should not patrol people's thoughts. The ecclesiastical courts may find the intentions of the accused immoral but the *Criminal Code* does not make them criminal. Other common law courts have agreed that these facts do not give rise to criminal liability. See *Haughton v. Smith, supra*; *Jaffe, supra*; *Donnelly, supra* (dealing with legislation almost identical to s. 24(1)).

170 My colleagues' opinion leads to the conclusion that the long line of cases referred to earlier and culminating in *Streu, supra*, were cases where the wrong charge was laid. In *Streu*, this Court discussed in depth the evidence that could be used to prove that goods in possession of an accused were actually stolen. However, if my colleagues are correct, that was an unnecessary exercise as the Crown does not need to prove the goods were actually stolen. The accused in such cases could be charged with attempted possession of stolen goods instead of actual possession of stolen goods. Then, all that is relevant is the accused's belief. A common way of inferring an accused's intention to possess stolen goods is to show that he or she purchased them at a fraction of their true value. From this the inference is made that the accused believed

de l'argent non entaché d'illégalité. Aucune infraction ne pouvait être commise. Le recyclage des produits d'une activité licite est un crime imaginaire.

Les modifications que le législateur se propose d'apporter (le projet de loi C-17, mentionné ci-dessus) se rapportent au recyclage d'argent seulement. Si mes collègues ont raison, leur décision conduirait à l'application d'une norme moins exigeante en matière de responsabilité pénale à toutes les infractions de tentative.

En l'absence de la défense d'impossibilité, certaines circonstances inhabituelles entraîneront des déclarations de culpabilité en matière pénale. Comme je l'ai fait remarquer précédemment, la personne qui possède des biens qu'elle croit volés sera déclarée coupable d'un crime, que ces biens aient été effectivement volés ou non. S'il ne s'agit pas de biens volés, l'accusé sera déclaré coupable en raison de son seul état d'esprit. Le droit pénal ne devrait pas scruter les consciences. Les tribunaux ecclésiastiques peuvent conclure à l'immoralité des intentions de l'accusé, mais le *Code criminel* n'en fait pas des infractions criminelles. D'autres tribunaux de common law ont convenu que de tels faits n'engagent pas la responsabilité pénale; voir *Haughton c. Smith*, précité; *Jaffe*, précité; *Donnelly*, précité (relativement à un texte de loi presque identique au par. 24(1)).

L'opinion de mes collègues mène à la conclusion que dans les nombreuses décisions mentionnées précédemment et dont l'arrêt *Streu*, précité, représente le point culminant, les mauvaises accusations ont été portées. Dans *Streu*, notre Cour a examiné en profondeur les éléments de preuve qui pouvaient être utilisés pour établir que les biens en possession de l'accusé avaient effectivement été volés. Toutefois, si mes collègues ont raison, c'était inutile étant donné que le ministère public n'a pas à prouver que les biens ont réellement été volés. L'accusé, dans des affaires comme celles-là, pourrait être accusé de tentative de possession de biens volés au lieu de possession de biens volés. Alors, tout ce qui importe, c'est ce que croit l'accusé. Habituellement, on établit l'intention de l'accusé de posséder des biens volés en prouvant qu'il

the goods to be stolen. Removing the need for the Crown to show that the goods were actually stolen makes the potential for unjust results simply too great. The threshold for conviction of possession of stolen property should not be so substantially lowered.

Section 163 of the *Criminal Code* makes the knowing distribution of obscene material a crime. Assume the police arrest the owner of a video store and confiscate his entire inventory of videotapes. Before viewing any of the videotapes, the police question the owner of the store as to their contents. The owner states that the videotapes depict all manner of degrading and violent sexual acts. In short, he admits his belief that the videotapes he was offering to rent contained “indecent or obscene material”, as those words have been defined. The police view the actual videotapes, and discover that nothing obscene at all is depicted. The video store owner was simply mistaken as to what was contained in the videos. Has he nonetheless committed a crime? If my colleagues are correct the owner is guilty of attempting to distribute obscene material.

An example of the necessary result that follows from my colleagues’ view was adverted to in one of the earliest cases of “impossible attempts”. Part of Baron Bramwell’s judgment in *R. v. Collins* (1864), 9 Cox C.C. 497 (C.C.A.), was that he could not accede to a view of the law which allowed an accused to be “convicted of attempting to steal [his own umbrella]”. The hypothetical he refers to is as follows. An accused, with intent to steal, takes an umbrella from a rack containing many umbrellas. It later turns out that the umbrella the accused thought he was stealing was actually his own which he had forgotten was also in the rack. My colleagues would convict this accused of

se les est procurés à une fraction de leur juste valeur. On en conclut que l’accusé croyait que les biens étaient des biens volés. Dispenser le ministère public de prouver que les biens ont effectivement été volés, c’est tout simplement s’exposer à de trop grands risques d’injustices. Les conditions minimales à remplir pour obtenir une déclaration de culpabilité pour possession de biens volés ne devraient pas être réduites à ce point.

L’article 163 du *Code criminel* réprime le fait de distribuer sciemment des publications obscènes. Supposons que la police arrête le propriétaire d’un club vidéo et qu’elle confisque tout le stock des enregistrements vidéo. Avant de visionner ces enregistrements, la police interroge le propriétaire quant à leur contenu. Le propriétaire affirme qu’ils montrent toutes sortes d’actes sexuels violents et dégradants. Bref, il admet qu’il est persuadé que les enregistrements qu’il offrait en location comportent «des choses obscènes ou une documentation obscène», selon la définition qui a été donnée à ces termes. La police visionne les enregistrements en question et découvre qu’ils ne comportent rien d’obscène. Le propriétaire du club vidéo s’était simplement fait une idée erronée de leur contenu. A-t-il quand même commis un crime? Si mes collègues ont raison, le propriétaire est coupable d’avoir tenté de distribuer des publications obscènes.

L’un des premiers arrêts portant sur les «tentatives d’infractions impossibles» a donné un exemple du résultat auquel conduit nécessairement l’opinion de mes collègues. Dans l’arrêt *R. c. Collins* (1864), 9 Cox C.C. 497 (C.C.A.), le baron Bramwell a notamment affirmé qu’il ne pouvait accepter une interprétation de la loi qui permettrait que l’accusé puisse être [TRADUCTION] «déclaré coupable d’avoir tenté de voler [son propre parapluie]». Il renvoie à l’hypothèse suivante: l’accusé prend, avec l’intention de le voler, un parapluie placé dans un porte-parapluies qui en contient plusieurs. Il s’avère ultérieurement que le parapluie que l’accusé croyait voler était en fait le sien, et qu’il avait oublié qu’il se trouvait là. Mes collègues déclareraient cet accusé coupable de tenta-

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attempted theft. I prefer the answer given by Baron Bramwell 130 years ago.

tive de vol. Je préfère la réponse que le baron Bramwell a donnée il y a 130 ans.

173 The late Prof. Glanville Williams, an ally of my colleagues, is with them a strong opponent of the position I have adopted in these reasons. He was compelled, however, to agree that his analysis leads to a conviction in the following circumstance. A person who sincerely believes in the practice of voodoo sticks a pin into a doll, believing it will cause the death of another. Professor Williams concludes this is an attempt to murder. See *Criminal Law — The General Part* (2nd ed. 1961) and “Attempting the Impossible — A Reply” (1979-80), 22 *Crim. L.Q.* 49, at p. 52, where Professor Williams states that: “The answer to the particular question is that the act of voodoo is proximate to the victim’s death *in the voodooist’s mind*” (emphasis in original). I doubt that the framers of the *Criminal Code* intended a conviction in this circumstance.

Le regretté professeur Glanville Williams, allié de mes collègues, s’oppose vivement, comme eux, au point de vue que j’adopte dans les présents motifs. Cependant, il a dû reconnaître que son analyse entraîne une déclaration de culpabilité dans les circonstances suivantes. Une personne qui croit sincèrement au vaudou enfonce une épingle dans une figurine, persuadée que cela entraînera la mort d’une personne. Le professeur Williams conclut qu’il s’agit d’une tentative de meurtre. Voir *Criminal Law — The General Part* (2^e éd. 1961) et «Attempting the Impossible — A Reply» (1979-80), 22 *Crim L.Q.* 49, à la p. 52, où le professeur Williams affirme: [TRADUCTION] «La réponse à cette question précise est que l’acte vaudou est une cause immédiate de la mort de la victime *dans l’esprit du vaudouisant*» (en italique dans l’original). Je doute que les rédacteurs du *Code criminel* aient voulu qu’il y ait déclaration de culpabilité dans ces circonstances.

174 I cannot agree with my colleagues that these results are the intended consequences of the enactment of s. 24(1). I do not think any of these factual circumstances should result in criminal prosecution. Section 24(1) requires an offence. If there is in fact no offence, no matter what the belief, one cannot be a party to the non-existent offence.

Je ne peux convenir avec mes collègues que de telles conséquences sont celles que recherchait le législateur en adoptant le par. 24(1). Je crois qu’aucune de ces circonstances de fait ne devrait aboutir à une déclaration de culpabilité. Le paragraphe 24(1) nécessite une infraction. Si, en fait, il n’y a pas d’infraction, peu importe ce que l’on croit, l’on ne peut y être partie puisqu’elle n’existe pas.

175 Prof. Glanville Williams has also pointed out some of the “absurdity” that can arise from adopting what he calls the “putative fact” approach to attempts. This appears to be the approach adopted by my colleagues, as it allows a conviction for attempt by simply relying upon what the attempter believed to be true. In “The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*”, [1986] *Cambridge L.J.* 33, Williams points out the most problematic results of this theory (at pp. 81-82):

Le professeur Glanville Williams a aussi montré quelques-unes des absurdités auxquelles peut mener, en matière de tentative, l’adoption de ce qu’il appelle l’approche des «faits putatifs». Il semble que ce soit l’approche adoptée par mes collègues, car elle donne lieu à une déclaration de culpabilité pour tentative sur la seule foi de ce que l’auteur de la tentative croyait être vrai. Dans «The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*», [1986] *Cambridge L.J.* 33, Williams indique quelles sont les conséquences les plus problématiques de cette théorie (aux pp. 81 et 82):

(1) The putative fact approach would in practice result in setting aside the temporal and spatial limits upon the penal law. Suppose a penal statute comes into force at midnight. A man may think he is acting at 12:05 a.m. (after it has come into force), when in fact he was acting at 11:55 p.m. (before it came into force). Is he guilty of attempting to commit what would be an offence under the Act if his facts were right? (Observe that this is not a question of mistake of law, a mistake as to what the Act says; the mistake concerns the facts.) A man may think he is acting within the bounds of territorial jurisdiction, when he is in fact acting just outside those bounds. Or a person who is not a British citizen but who believes he is a British citizen (as a result of mistaking his birth-place) may assist an enemy abroad. Is he guilty of attempted treason? If a person is not subject to the law of treason, how can he be guilty of attempted treason?

(2) My second type of problem concerns a particular type of justification. A statute may make it an offence to pursue some activity without a licence. A person may act believing he has no licence, when in fact he has one. For example, a driver stopped by the police may untruthfully assert that his wife was driving; the police question him closely, and it transpires that he was driving, and believed he had been disqualified from driving, but in fact he had not. Is he guilty of attempting to drive while disqualified? It needs no demonstration that an affirmative answer would be strange, though it is apparently the answer that was intended to be given (in theory) under the Criminal Attempts Act. [The Act adopted the putative fact theory.]

(3) The third hypothetical is somewhat similar. In the old case of *Dadson* [(1850), 2 Den. 5, 169 E.R. 407], the defendant arrested a person for unlawfully cutting and taking wood, and shot him to prevent him escaping. The person arrested had twice been convicted before, and the arrest (and, at that date, the shooting) would consequently have been lawful if the defendant had known this; but he did not know it, so the arrest (and, consequently, the shooting) was held to be unlawful. There is a strong argument for saying that the decision was wrong. Like the putatively disqualified driver, the defendant was in fact licensed by law to do the act he

[TRANSDUCTION]

(1) L'approche des faits putatifs aurait en pratique pour conséquence d'annuler les limites temporelles et spatiales en matière de droit pénal. Supposons qu'une loi pénale entre en vigueur à minuit. Un homme peut penser qu'il accomplit un acte 5 minutes après minuit (donc après l'entrée en vigueur), alors qu'en fait, il a agi à 23 h 55 (soit avant l'entrée en vigueur). Est-il coupable d'avoir tenté de commettre ce qui aurait été une infraction en vertu de la loi s'il avait eu l'heure juste? (À noter qu'il ne s'agit pas d'une erreur de droit, d'une erreur quant à ce que la loi dit; l'erreur porte sur les faits.) Un homme peut penser qu'il accomplit un acte à l'intérieur des limites territoriales d'un ressort, alors qu'en fait, il accomplit cet acte juste à l'extérieur de ces limites. Ou une personne qui n'est pas citoyen britannique, mais croit qu'elle l'est (par suite d'une erreur quant à son lieu de naissance), aide un ennemi à l'étranger. Est-elle coupable de tentative de trahison? Si une personne n'est pas assujettie aux règles de droit relatives à la trahison, comment peut-elle être coupable de tentative de trahison?

(2) Le deuxième genre de problèmes porte sur un type particulier de justification. Une loi peut sanctionner l'exercice sans permis d'une activité quelconque. Une personne peut accomplir un acte, croyant qu'elle n'a pas de permis, alors qu'elle en a un. Par exemple, un conducteur arrêté par la police peut faussement affirmer que son épouse conduisait; la police l'interroge de manière plus serrée et elle découvre qu'il conduisait alors qu'il croyait erronément en avoir perdu le droit. Est-il coupable d'avoir tenté de conduire alors qu'il n'en avait pas le droit? Manifestement, une réponse affirmative serait étrange, encore que ce soit apparemment la réponse que le législateur a voulu donner (en théorie) en édictant la Criminal Attempts Act. [La *Criminal Attempts Act* adoptait la théorie des faits putatifs.]

(3) La troisième hypothèse est quelque peu semblable. Dans l'arrêt ancien *Dadson* [(1850), 2 Den. 5, 169 E.R. 407], le défendeur avait arrêté une personne parce qu'elle avait coupé et pris illégalement du bois, et il lui avait tiré dessus pour l'empêcher de fuir. La personne arrêtée avait été déclarée coupable deux fois déjà et l'arrestation (et, à cette époque, l'utilisation d'une arme à feu) aurait donc été légale si le défendeur l'avait su; mais il ne le savait pas et, par conséquent, l'arrestation (de même que l'utilisation d'une arme à feu) a été déclarée illégale. Des raisons valables permettraient d'affirmer que cette décision est erronée. Comme dans le cas

did, although he did not know it. To all outward seeming his act was lawful, and his ignorance of fact should not have made his otherwise [lawful] [the article actually uses the word “unlawful” here, but it is clear Williams meant “lawful”] act a crime. The policy of this rule was accepted by Parliament in the Criminal Law Act 1967, s. 2(2), where it is provided that “any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an arrestable offence.” [See our *Criminal Code* s. 27.] The wording means that a person committing an arrestable offence can be validly arrested even though the arrester lacks a reasonable cause for suspecting him, and even though he does not suspect him. The state of the arrester’s mind is irrelevant once it is established that the objective facts justifying an arrest were present. If this is the proper rule, it would seem to follow that the arrester is not only guiltless of assault and false imprisonment in arresting, but is (or should be) guiltless of an attempt to commit these crimes. Yet on the putative fact theory of attempt, he would be guilty of an attempt if, on the facts as he believed them to be, his act would have been criminal. A similar problem can arise in cases of self-defence, where a person’s act is in fact necessary in self-defence but he does not realise this.

These are strong reasons to be cautious in accepting the theory adopted by my colleagues. Prof. Williams suggests that these problems that flow from the elimination of “impossibility” as a defence should be cured by legislation. The uncertainties noted by Prof. Williams lead me to the conclusion that the entire area of “impossible attempts” is a problem that should be dealt with by Parliament.

du conducteur putativement sans droit de conduire, le défendeur était de fait légalement autorisé à agir comme il l’a fait, bien qu’il ne l’ait pas su. Selon toute apparence, ce qu’il a fait était légal, et sa méconnaissance des faits ne devrait pas transformer son acte à tous égards [légal] [dans l’article, le mot «illégal» est employé ici mais à l’évidence, Williams voulait dire «légal»] en un crime. La politique sous-tendant cette règle a été incorporée par le Parlement dans le par. 2(2) de la Criminal Law Act 1967, qui prévoit que [TRADUCTION] «toute personne peut arrêter sans mandat une personne qui est, ou qu’il croit, pour des motifs raisonnables, être sur le point de commettre une infraction pour laquelle elle pourrait être arrêtée» [voir l’art. 27 de notre *Code criminel*]. Il ressort de la lecture de cette disposition qu’une personne qui commet une infraction pour laquelle elle est susceptible d’être arrêtée peut valablement être arrêtée même si la personne qui effectue l’arrestation n’a pas de motifs raisonnables d’avoir des soupçons ou même si elle ne la soupçonne pas. L’état d’esprit de la personne qui effectue l’arrestation n’est pas pertinent une fois que les faits objectifs justifiant l’arrestation ont été établis. Si c’est la règle qu’il faut appliquer, il devrait s’ensuivre que la personne qui a effectué l’arrestation est non seulement innocente des voies de fait et de l’emprisonnement fautif qui a suivi l’arrestation, mais qu’elle est (ou devrait être) innocente de tentative de ces crimes. Pourtant, suivant la théorie des faits putatifs en matière de tentative, elle serait coupable de tentative si, vu les faits, tels qu’elle les croyait, son acte était criminel. Un problème similaire peut se poser dans les affaires de légitime défense, où les actes d’une personne sont en fait nécessaires pour assurer sa défense, mais qu’elle ne s’en rend pas compte.

Il y a lieu de se montrer prudent à l’égard de la théorie adoptée par mes collègues. Le professeur Williams donne à entendre que ces problèmes suscités par l’élimination de l’«impossibilité» comme moyen de défense devraient être résolus par la législation. Les incertitudes notées par le professeur Williams m’amènent à conclure que toute la question des «tentatives d’infractions impossibles» est un problème dont la solution relève du législateur.

¹⁷⁶ My view is similar to that adopted by the Law Reform Commission of Canada in Working Paper 45, *Secondary Liability: Participation in Crime and Inchoate Offences* (1985), where it discussed

Mon point de vue est semblable à celui qu’a adopté la Commission de réforme du droit du Canada dans le Document de travail 45, intitulé *La responsabilité secondaire: complicité et infractions*

the classic hypothetical of the man who intends to steal an umbrella (at p. 33):

Where D tries to “steal” his own property, why should he not be liable for attempted theft? Like the unsuccessful pickpocket, he has wrongful intent and does an act towards it. On the other hand, the pickpocket intends to commit a specific offence, while the “self-stealer” only intends wrong in the abstract (to steal). The former’s act can, if successful, be a theft; the latter’s can be no crime at all. True, he could be blamed for being prepared to take the property, no matter whose it is, and break the law in general but this is not, as the law now stands, a criminal offence. Unless our whole approach to criminal law changes, he cannot incur liability.

The Commission recommended that Parliament not amend the *Criminal Code* to make “legally impossible attempts” into crimes, stating that “[t]here should be no liability for [attempting] crimes inherently impossible to commit or acts not qualifying in law as criminal” (p. 36).

II. Conspiracy

I agree with my colleagues that the offence of conspiracy to launder money can be made out on these facts. The gravamen of the offence of conspiracy is the agreement to commit a crime. It was open to the extradition judge to conclude that there was sufficient evidence of an agreement between Dynar and Cohen to commit the offence of money laundering.

The charges of attempt and conspiracy in this case can be distinguished as follows. The charge of conspiracy was based on the agreement to commit the general offence of money laundering, whereas the attempt charge was restricted to the attempted laundering of the money that was to have been

inchoatives (1985), où est analysée l’hypothèse classique de l’homme qui a l’intention de voler un parapluie (aux pp. 37 et 38):

Si une personne tente de «voler» ce qui lui appartient, pourquoi ne devrait-elle pas être responsable de tentative de vol? Tout comme le pickpocket dont la tentative est infructueuse, elle a l’intention de nuire et accomplit une action pour concrétiser cette intention. En revanche, tandis que le pickpocket a le dessein de commettre une infraction spécifique, notre «voleur», lui, n’a qu’une intention de nuire abstraite (le vol). Dans le premier cas, l’infraction peut être commise, alors que dans le second, elle ne peut absolument pas l’être. Bien sûr, on pourrait blâmer le «voleur» du fait qu’il était disposé à prendre le bien en question (peu importe à qui il appartenait) et donc, d’une manière générale, à violer la loi, mais d’après le droit en vigueur, il ne s’agit pas là d’une infraction. À moins que notre façon d’aborder le droit pénal ne change du tout au tout, sa responsabilité pénale ne sera jamais engagée.

La Commission a recommandé que le législateur ne modifie pas le *Code criminel* de manière à incriminer les «tentatives d’infractions impossibles en droit», affirmant qu’«[a]ucune responsabilité pénale ne devrait être imputée pour des actions tendant à la consommation d’une infraction qu’il est impossible de commettre, ou d’actes qui ne sont pas qualifiés d’infraction par le droit pénal» (à la p. 41).

II. Le complot

Je conviens avec mes collègues que les faits de l’espèce permettent d’établir l’infraction de complot en vue de recycler des produits de la criminalité. Le fondement de l’infraction de complot est l’entente en vue de commettre un crime. Il était loisible au juge d’extradition de conclure qu’il y avait suffisamment d’éléments de preuve d’une entente entre Dynar et Cohen en vue de commettre l’infraction de recyclage des produits de la criminalité.

Il est possible en l’espèce d’établir une distinction entre la tentative et le complot de la façon suivante. L’accusation de complot était fondée sur l’entente de commettre l’infraction générale de recyclage des produits de la criminalité, alors que l’accusation de tentative se limitait à la tentative de

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provided by the authorities in the sting operation. No proceeds, of crime or otherwise, need be present to commit the offence of conspiracy.

III. Conclusion

¹⁷⁹ Since it is only necessary to find probable grounds that any extraditable offence has been committed, Dynar was properly ordered extradited on the conspiracy charge. In the result I agree with the disposition of Cory and Iacobucci JJ., and would allow the appeal and dismiss the cross-appeal.

Appeal allowed and cross-appeal dismissed.

Solicitors for the appellants: Robert Hubbard and Croft Michaelson, Toronto.

Solicitors for the respondent: Sack, Goldblatt, Mitchell, Toronto.

recycler l'argent qui aurait été fourni par les autorités lors d'une opération d'infiltration. Aucun produit, de la criminalité ou de toute autre activité, n'est nécessaire pour la perpétration de l'infraction de complot.

III. Conclusion

Étant donné qu'il est seulement nécessaire d'établir la probabilité de la perpétration d'une infraction donnant lieu à l'extradition, l'ordonnance d'extradition prononcée contre Dynar a été rendue à juste titre à l'égard de l'accusation de complot. En définitive, je suis d'accord avec la solution proposée par les juges Cory et Iacobucci et je suis d'avis d'accueillir le pourvoi et de rejeter le pourvoi incident.

Pourvoi accueilli et pourvoi incident rejeté.

Procureurs des appelants: Robert Hubbard et Croft Michaelson, Toronto.

Procureurs de l'intimé: Sack, Goldblatt, Mitchell, Toronto.

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CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to June 19, 2024

À jour au 19 juin 2024

Last amended on December 15, 2023

Dernière modification le 15 décembre 2023

which two entities are affiliated, an entity is affiliated with another entity in respect of any agreement between them in which one of them grants to the other the right to use a trademark or trade name to identify the business of the grantee, if

- (a) the business is related to the sale or distribution, in accordance with a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers; and
- (b) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the “first” person) supplies or causes to be supplied to another person (the “second” person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trademark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3; 2014, c. 20, s. 366(E); 2018, c. 8, s. 113.

Abuse of Dominant Position

Definition of *anti-competitive act*

78 (1) For the purposes of section 79, *anti-competitive act* means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and includes any of the following acts:

- (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;
- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier,

prévus aux alinéas 2(2)a) ou b), mais également en ce qui concerne tout accord entre elles par lequel l’une concède à l’autre le droit d’utiliser une marque de commerce ou un nom de commerce pour identifier les affaires du concessionnaire, à la condition :

- a) que ces affaires soient liées à la vente ou la distribution, conformément à un programme ou système de commercialisation prescrit en substance par le concédant, d’une multiplicité de produits obtenus de sources d’approvisionnement qui sont en concurrence et d’une multiplicité de fournisseurs;
- b) qu’aucun produit ne soit primordial dans ces affaires.

Cas où les personnes sont réputées être affiliées

(6) Pour l’application du paragraphe (4) en ce qui concerne la limitation du marché, dans le cadre de tout accord par lequel une personne (la « première » personne) fournit ou fait fournir à une autre personne (la « seconde » personne) un ou des ingrédients que cette dernière transforme, après apport de travail et de matériaux, en aliments ou boissons qu’elle vend sous une marque de commerce appartenant à la première personne ou dont cette dernière est l’usager inscrit, ces deux personnes sont, à l’égard de cet accord, réputées être affiliées.

Application

(7) Le Tribunal saisi d’une demande présentée par une personne autorisée en vertu de l’article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l’égard de l’objet de la demande.

L.R. (1985), ch. C-34, art. 77; L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 23 et 37, ch. 31, art. 52(F); 2002, ch. 16, art. 11.2 et 11.3; 2014, ch. 20, art. 366(A); 2018, ch. 8, art. 113.

Abus de position dominante

Définition de *agissement anti-concurrentiel*

78 (1) Pour l’application de l’article 79, *agissement anti-concurrentiel* s’entend de tout agissement destiné à avoir un effet négatif visant l’exclusion, l’éviction ou la mise au pas d’un concurrent, ou à nuire à la concurrence, notamment les agissements suivants :

- 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;

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;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(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;

(f) buying up of products to prevent the erosion of existing price levels;

(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;

(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;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market; and

(k) directly or indirectly imposing excessive and unfair selling prices.

(2) [Repealed, 2009, c. 2, s. 427]

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13; 2009, c. 2, s. 427; 2022, c. 10, s. 261; 2023, c. 31, s. 7.1.

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) la péréquation du fret en utilisant comme base l'établissement d'un 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) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

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) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

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) 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) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent;

j) la réponse sélective ou discriminatoire à un concurrent actuel ou potentiel, visant à entraver ou à empêcher l'entrée ou l'expansion d'un concurrent sur un marché ou à l'éliminer du marché;

k) l'imposition directe ou indirecte de prix de vente excessifs et injustes.

(2) [Abrogé, 2009, ch. 2, art. 427]

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 2000, ch. 15, art. 13; 2009, ch. 2, art. 427; 2022, ch. 10, art. 261; 2023, ch. 31, art. 7.1.

Prohibition if abuse of dominant position

79 (1) On application by the Commissioner or a person granted leave under section 103.1, if the Tribunal finds that one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in

- (a) a practice of anti-competitive acts; or
- (b) conduct
 - (i) that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and
 - (ii) the effect is not a result of superior competitive performance.

Additional or alternative order

(2) If, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest 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 persons against whom an order is sought to take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice in that market.

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.

Administrative monetary penalty

(3.1) If the Tribunal finds that a person has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive

Ordonnance d'interdiction : abus de position dominante

79 (1) Lorsque, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, il conclut qu'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 et adoptent ou ont adopté une pratique ou un comportement ci-après, le Tribunal peut rendre une ordonnance leur interdisant d'adopter la pratique ou le comportement :

- a) une pratique d'agissements anti-concurrentiels;
- b) un comportement qui a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne ou les personnes ont un intérêt concurrentiel valable, cet effet ne résultant pas d'un rendement concurrentiel supérieur.

Ordonnance supplémentaire ou substitutive

(2) Dans les cas où, à la suite de la demande visée au paragraphe (1), il conclut qu'une pratique d'agissements anti-concurrentiels constitue un comportement qui a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne a un intérêt concurrentiel valable 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.

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.

Sanction administrative pécuniaire

(3.1) S'il conclut qu'une personne adopte ou a adopté une pratique d'agissements anti-concurrentiels constituant un comportement qui a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne a un intérêt

interest and it makes an order against the person under subsection (1) or (2), it may also order them to pay, in any manner that it specifies, an administrative monetary penalty in an amount not exceeding the greater of

- (a) \$25,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$35,000,000, and
- (b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

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.

Purpose of order

(3.3) The purpose of an order made against a person under 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.

Factors to be considered

(4) In determining, for the purposes of subsections (1) and (2), whether conduct has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may consider

- (a) the effect of the conduct on barriers to entry in the market, including network effects;
- (b) the effect of the conduct on price or non-price competition, including quality, choice or consumer privacy;

concurrentiel valable et rend une ordonnance en vertu de l'un des paragraphes (1) ou (2) contre la personne, le Tribunal peut aussi lui ordonner de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale qui ne peut dépasser le plus élevé des montants suivants :

- a) 25 000 000 \$ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, 35 000 000 \$;
- b) trois fois la valeur du bénéfice sur lequel la pratique a eu une incidence ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de cette personne.

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.

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Facteurs à considérer

(4) Pour l'application des paragraphes (1) et (2), lorsqu'il décide de la question de savoir si un comportement a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, le Tribunal peut tenir compte des facteurs suivants :

- a) les entraves à l'accès au marché, y compris les effets de réseau;

(c) the nature and extent of change and innovation in a relevant market; and

(d) any other factor that is relevant to competition in the market that is or would be affected by the conduct.

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*, *Trademarks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts or conduct more than three years after the practice or conduct has ceased.

Where proceedings commenced under section 45, 49, 76, 90.1 or 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

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

Inferences

(8) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. 19 (2nd Suppl.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4; 2009, c. 2, s. 428; 2014, c. 20, s. 366(E); 2022, c. 10, s. 262; 2023, c. 31, s. 7.2.

b) tout effet du comportement sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

c) la nature et la portée des changements et des innovations dans tout marché pertinent;

d) tout autre facteur qui est relatif à la concurrence dans le marché et qui est ou serait touché par le comportement.

Exception

(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.

Prescription

(6) Aucune demande ne peut être présentée en vertu du présent article à l'égard d'une pratique d'agissements anti-concurrentiels ou d'un comportement, si la pratique ou le comportement en question a cessé depuis plus de trois ans.

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(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) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

Application

(8) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1990, ch. 37, art. 31; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.4; 2009, ch. 2, art. 428; 2014, ch. 20, art. 366(A); 2022, ch. 10, art. 262; 2023, ch. 31, art. 7.2.

substantially the same as the information on the basis of which the certificate was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

General

Leave to make application under section 75, 76, 77 or 79

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76, 77 or 79. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76, 77 or 79.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and

fondée sur les mêmes ou en substance les mêmes renseignements que ceux qui ont justifié la délivrance du certificat.

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 37.

Dispositions générales

Permission de présenter une demande : articles 75, 76, 77 ou 79

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75, 76, 77 ou 79. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

Certificat du commissaire

(3) Quarante-huit heures après avoir reçu une copie de la demande, le commissaire remet au Tribunal un certificat établissant si les questions visées par la demande :

a) soit font l'objet d'une enquête du commissaire;

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente intervenue entre le commissaire et la personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)a) ou b) ou portant sur une question qui fait l'objet d'une demande que lui a présentée le commissaire en vertu des articles 75, 76, 77 ou 79.

Avis du Tribunal

(5) Le plus rapidement possible après avoir reçu le certificat du commissaire, le Tribunal avise l'auteur de la demande, ainsi que toute personne à l'égard de laquelle une ordonnance pourrait être rendue, du fait qu'il pourra ou non entendre la demande.

Observations

(6) Les personnes à qui une copie de la demande est signifiée peuvent, dans les quinze jours suivant la réception de l'avis du Tribunal, présenter par écrit leurs

shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave

(7) The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

Granting leave to make application under section 76

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76, 77 or 79 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76, 77 or 79.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner

observations au Tribunal. Elles sont tenues de faire signifier une copie de leurs observations aux autres personnes mentionnées au paragraphe (2).

Octroi de la demande

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77 ou 79 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

Octroi de la demande

(7.1) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu de l'article 76 s'il a des raisons de croire que l'auteur de la demande est directement gêné en raison d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu du même article.

Durée et conditions

(8) Le Tribunal peut fixer la durée de validité de la permission qu'il accorde et l'assortir de conditions. La demande doit être présentée au plus tard un an après que la pratique ou le comportement visé dans la demande a cessé.

Décision

(9) Le Tribunal rend une décision motivée par écrit et en fait parvenir une copie à l'auteur de la demande, au commissaire et à toutes les personnes visées au paragraphe (2).

Limite applicable au commissaire

(10) Le commissaire ne peut, en vertu des articles 75, 76, 77 ou 79, présenter une demande fondée sur des faits qui seraient les mêmes ou essentiellement les mêmes que ceux qui ont été allégués dans la demande de permission accordée en vertu des paragraphes (7) ou (7.1) si la personne à laquelle la permission a été accordée a déposé une demande en vertu des articles 75, 76, 77 ou 79.

Application

(11) Le Tribunal ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

Enquête du commissaire

(12) Dans le cas où il a déclaré dans le certificat visé au paragraphe (3) que les questions visées par la demande font l'objet d'une enquête et que, par la suite, l'enquête

subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12; 2009, c. 2, s. 431; 2022, c. 10, s. 266.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) or (7.1) makes an application under section 75, 76, 77 or 79, the Commissioner may intervene in the proceedings.

2002, c. 16, s. 12; 2009, c. 2, s. 432; 2022, c. 10, s. 267.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order

(a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81, 84 or 90.1; or

(b) to prevent the taking of measures under section 82 or 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(a) or (b) and that, in the absence of an interim order,

(a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

(b) a person is likely to be eliminated as a competitor; or

(c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81, 84 or 90.1 by an entity incorporated under the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act* or a subsidiary of such an entity, the Commissioner must consult with the Minister of Finance respecting the safety and soundness of the entity.

est discontinuée pour une raison autre que la conclusion d'une entente, le commissaire est tenu, dans les meilleurs délais, d'en informer l'auteur de la demande.

2002, ch. 16, art. 12; 2009, ch. 2, art. 431; 2022, ch. 10, art. 266.

Intervention du commissaire

103.2 Le commissaire est autorisé à intervenir devant le Tribunal dans les cas où une personne autorisée en vertu des paragraphes 103.1(7) ou (7.1) présente une demande en vertu des articles 75, 76, 77 ou 79.

2002, ch. 16, art. 12; 2009, ch. 2, art. 432; 2022, ch. 10, art. 267.

Ordonnance provisoire

103.3 (1) Sous réserve du paragraphe (2), le Tribunal peut, sur demande *ex parte* du commissaire dans laquelle il atteste qu'une enquête est en cours en vertu de l'alinéa 10(1)b), rendre une ordonnance provisoire pour interdire :

a) soit la poursuite d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu des articles 75 à 77, 79, 81, 84 ou 90.1;

b) soit la prise de mesures visées aux articles 82 ou 83.

Restriction

(2) Le Tribunal peut rendre l'ordonnance s'il conclut que le comportement ou les mesures pourraient être du type visé aux alinéas (1)a) ou b) et qu'à défaut d'ordonnance, selon le cas :

a) la concurrence subira vraisemblablement un préjudice auquel le Tribunal ne pourra adéquatement remédier;

b) un compétiteur sera vraisemblablement éliminé;

c) une personne subira vraisemblablement une réduction importante de sa part de marché, une perte importante de revenu ou des dommages auxquels le Tribunal ne pourra adéquatement remédier.

Consultation obligatoire

(3) Le commissaire consulte le ministre des Finances au sujet de la santé financière d'une entité constituée sous le régime de la *Loi sur les banques*, de la *Loi sur les sociétés de fiducie et de prêt*, de la *Loi sur les associations coopératives de crédit* ou de la *Loi sur les sociétés d'assurances* avant de présenter à l'égard de cette entité ou de l'une de ses filiales une demande d'interdiction de poursuite d'un comportement visé aux articles 75 à 77, 79, 81, 84 ou 90.1.

representations before the Tribunal makes an order under that subsection.

Prohibition of extraordinary relief

(10) Notwithstanding section 13 of the *Competition Tribunal Act*, an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).

Duty of Commissioner

(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.

2002, c. 16, s. 12; 2017, c. 26, s. 13.

Interim order

104 (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75, 76, 77 or 79, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Terms of interim order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 13; 2015, c. 3, s. 39; 2022, c. 10, s. 268.

104.1 [Repealed, 2009, c. 2, s. 433]

Consent agreement

105 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

des observations sur l'ordonnance attaquée avant de rendre sa décision.

Interdiction de recours extraordinaire

(10) Par dérogation à l'article 13 de la *Loi sur le Tribunal de la concurrence* mais sous réserve du paragraphe (7), l'ordonnance ne peut faire l'objet d'un appel ou d'une révision judiciaire.

Obligations du commissaire

(11) Lorsqu'une ordonnance provisoire a force d'application, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête à l'égard du comportement qui fait l'objet de l'ordonnance.

2002, ch. 16, art. 12; 2017, ch. 26, art. 13.

Ordonnance provisoire

104 (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75, 76, 77 ou 79, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.

Conditions des ordonnances provisoires

(2) Une ordonnance provisoire rendue aux termes du paragraphe (1) contient les conditions et a effet pour la durée que le Tribunal estime nécessaires et suffisantes pour parer aux circonstances de l'affaire.

Obligation du commissaire

(3) Si une ordonnance provisoire est rendue en vertu du paragraphe (1) à la suite d'une demande du commissaire et est en vigueur, le commissaire est tenu d'agir dans les meilleurs délais possible pour terminer les procédures qui, sous le régime de la présente partie, découlent du comportement qui fait l'objet de l'ordonnance.

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 13; 2015, ch. 3, art. 39; 2022, ch. 10, art. 268.

104.1 [Abrogé, 2009, ch. 2, art. 433]

Consentement

105 (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l'ordonnance provisoire prévue à l'article 103.3 — peuvent signer un consentement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14; 2009, c. 2, s. 434.

Rescission or variation of consent agreement or order

106 (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14; 2009, c. 2, s. 435.

Consent agreement — parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75, 76, 77 or 79 and the terms of the order are

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l'enregistrer immédiatement.

Effet de l'enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 14; 2009, ch. 2, art. 434.

Annulation ou modification du consentement ou de l'ordonnance

106 (1) Le Tribunal peut annuler ou modifier le consentement ou l'ordonnance visés à la présente partie, à l'exception de l'ordonnance rendue en vertu de l'article 103.3 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

Personnes directement touchées

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 14; 2009, ch. 2, art. 435.

Consentement

106.1 (1) Lorsqu'une personne autorisée en vertu de l'article 103.1 présente une demande d'ordonnance au Tribunal en vertu des articles 75, 76, 77 ou 79, que cette

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CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Act

Loi sur le Tribunal de la concurrence

R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2^e suppl.)

NOTE

[1986, c. 26, assented to 17th June, 1986]

NOTE

[1986, ch. 26, sanctionné le 17 juin 1986]

Current to June 20, 2024

À jour au 20 juin 2024

Last amended on June 20, 2024

Dernière modification le 20 juin 2024



R.S.C. 1985, c. 19 (2nd Supp.)

S.R.C. 1985, ch. 19 (2^e suppl.)

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof

Loi constituant le Tribunal de la concurrence, modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

PART I

Competition Tribunal Act

Short Title

Short title

1 This Part may be cited as the *Competition Tribunal Act*.

Interpretation

Definitions

2 In this Part,

judicial member means a member of the Tribunal appointed under paragraph 3(2)(a); (*judge*)

lay member means a member of the Tribunal appointed under paragraph 3(2)(b); (*autre membre*)

Minister means the Minister of Industry; (*ministre*)

Tribunal means the Competition Tribunal established by subsection 3(1). (*Tribunal*)

R.S., 1985, c. 19 (2nd Supp.), s. 2; 1992, c. 1, s. 145(F); 1995, c. 1, s. 62.

Tribunal Established

Tribunal

3 (1) There is hereby established a tribunal to be known as the Competition Tribunal.

PARTIE I

Tribunal de la concurrence

Titre abrégé

Titre abrégé

1 *Loi sur le Tribunal de la concurrence.*

Définitions

Définitions

2 Les définitions qui suivent s'appliquent à la présente partie.

autre membre Membre du Tribunal nommé en application de l'alinéa 3(2)b). (*lay member*)

judge Membre du Tribunal nommé en application de l'alinéa 3(2)a). (*judicial member*)

ministre Le ministre de l'Industrie. (*Minister*)

Tribunal Le Tribunal de la concurrence constitué conformément au paragraphe 3(1). (*Tribunal*)

L.R. (1985), ch. 19 (2^e suppl.), art. 2; 1992, ch. 1, art. 145(F); 1995, ch. 1, art. 62.

Constitution du Tribunal

Tribunal

3 (1) Est constitué le Tribunal de la concurrence.

Constitution of Tribunal

(2) The Tribunal shall consist of

- (a)** not more than six members to be appointed from among the judges of the Federal Court by the Governor in Council on the recommendation of the Minister of Justice; and
- (b)** not more than eight other members to be appointed by the Governor in Council on the recommendation of the Minister.

Advisory council

(3) The Governor in Council may establish an advisory council to advise the Minister with respect to appointments of lay members, which council is to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour.

Consultation

(4) The Minister shall consult with any advisory council established under subsection (3) before making a recommendation with respect to the appointment of a lay member.

R.S., 1985, c. 19 (2nd Suppl.), s. 3; 2002, c. 8, ss. 183, 198, c. 16, s. 16.

Chairman

4 (1) The Governor in Council shall designate one of the judicial members to be Chairman of the Tribunal.

Role of Chairman

(2) The Chairman has supervision over and direction of the work of the Tribunal including, without restricting the generality of the foregoing, the allocation of the work of the members thereof.

Absence or incapacity

(3) Where the office of Chairman is vacant, or the Chairman is absent from Canada or is for any reason unable to act, the powers of the Chairman shall be exercised and the duties performed by the senior judicial member who is in Canada and is able and willing to act.

Tenure of judicial members

5 (1) Each judicial member shall be appointed for a term not exceeding seven years and holds office so long as he remains a judge of the Federal Court.

Composition

(2) Le Tribunal se compose :

- a)** d'au plus six membres nommés par le gouverneur en conseil sur recommandation du ministre de la Justice et choisis parmi les juges de la Cour fédérale;
- b)** d'au plus huit autres membres nommés par le gouverneur en conseil sur recommandation du ministre.

Conseil consultatif

(3) Le gouverneur en conseil peut constituer un conseil consultatif chargé de conseiller le ministre en ce qui concerne la nomination des autres membres et composé d'au plus dix personnes versées dans les affaires publiques, économiques, commerciales ou industrielles. Sans que soit limitée la portée générale de ce qui précède, ces personnes peuvent être des individus appartenant à la collectivité juridique, à des groupes de consommateurs, au monde des affaires et au monde du travail.

Consultation

(4) Avant de recommander la nomination d'un autre membre, le ministre demande l'avis du conseil consultatif constitué en application du paragraphe (3).

L.R. (1985), ch. 19 (2^e suppl.), art. 3; 2002, ch. 8, art. 183 et 198, ch. 16, art. 16.

Président

4 (1) Le gouverneur en conseil nomme, parmi les juges, le président du Tribunal.

Rôle du président

(2) Le président assume la direction des travaux du Tribunal et, notamment, voit à la répartition des tâches entre ses membres.

Absence ou empêchement

(3) En cas d'absence du Canada ou d'empêchement du président ou de vacance de son poste, le juge de rang le plus élevé qui se trouve au Canada assure l'intérim à condition d'être en mesure d'agir et d'y consentir.

Durée du mandat des juges

5 (1) La durée maximale du mandat des juges est de sept ans et ceux-ci occupent leur poste aussi longtemps qu'ils demeurent juges de la Cour fédérale.

Jurisdiction and Powers of the Tribunal

Jurisdiction

8 (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

Powers

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

Power to penalize

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

R.S., 1985, c. 19 (2nd Suppl.), s. 8; 1999, c. 2, s. 41; 2002, c. 16, s. 16.1.

Costs

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

Payment

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

No award against the Crown

(3) Despite any other Act of Parliament, the Tribunal shall not award costs against His Majesty in right of Canada unless it is satisfied

(a) that an award is necessary to maintain confidence in the administration of justice; or

(b) that the absence of an award would have a substantial adverse effect on the other party's ability to carry on business.

Compétence et pouvoirs du Tribunal

Compétence

8 (1) Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

Pouvoirs

(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

Outrage au Tribunal

(3) Personne ne peut être puni pour outrage au Tribunal à moins qu'un juge ne soit d'avis que la conclusion qu'il y a eu outrage et la peine sont justifiées dans les circonstances.

L.R. (1985), ch. 19 (2^e suppl.), art. 8; 1999, ch. 2, art. 41; 2002, ch. 16, art. 16.1.

Frais

8.1 (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence*, peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais — même provisionnels — relatifs aux procédures dont il est saisi.

Détermination

(2) Le Tribunal peut désigner les créanciers et les débiteurs des frais, ainsi que les responsables de leur taxation ou autorisation.

Aucuns frais à la charge de la Couronne

(3) Malgré toute autre loi fédérale, le Tribunal ne peut ordonner à Sa Majesté du chef du Canada de payer des frais, sauf s'il est convaincu :

a) soit que l'ordonnance est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice;

b) soit que l'absence d'ordonnance aurait un effet négatif important sur la capacité de l'autre partie d'exploiter son entreprise.

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CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to June 19, 2024

À jour au 19 juin 2024

- (a) an originating document and any documents accompanying it;
- (b) a document that is filed in multiple copies; and
- (c) a document that contains, to which is appended or that is accompanied by a document containing confidential information.

Cover page

16 A document filed by facsimile transmission shall include a cover page that satisfies the requirements of subrule 10(3).

Filing after 17:00 hours

17 A document filed by facsimile transmission after 17:00 hours Ottawa local time is deemed to be filed on the next day that is not a holiday or Saturday.

Format for electronic filing

18 (1) An electronic version of a document in PDF (Portable Document Format) or any other format allowed by the Tribunal shall be filed in a manner directed by the Registrar.

Filed electronically

(2) All documents filed by electronic transmission shall be electronically time stamped.

Filed after 17:00 hours

(3) Any document transmitted electronically after 17:00 hours Ottawa local time is deemed to be filed on the next day that is not a holiday or Saturday.

Irregularity or defect

19 At any time before judgment is given in a proceeding, the Tribunal may draw the attention of a party to any irregularity or defect relating to an electronic version of a document and permit the party to remedy it on any conditions that the Tribunal considers fair.

Electronic sworn statement or solemn affirmation

20 (1) A statement made under oath or solemn affirmation may be filed electronically, by filing a scanned version of the document that includes a handwritten signature and the following: *“The document that is being electronically submitted to the Tribunal is an electronic version of a paper document that has been signed by the affiant. The signed document in paper copy is available and will be produced if requested by the Tribunal.”*

- a) l’acte introductif d’instance et les documents qui l’accompagnent;
- b) le document qui est déposé en plusieurs exemplaires;
- c) le document dont une partie, une annexe ou un document d’accompagnement renferment des renseignements confidentiels.

Page couverture

16 Le document déposé par télécopieur est accompagné d’une page couverture qui comporte les renseignements exigés au paragraphe 10(3).

Dépôt après 17 heures

17 Le document déposé par télécopieur après 17 heures, heure d’Ottawa, est réputé avoir été déposé le jour suivant qui n’est ni un samedi ni un jour férié.

Format — dépôt électronique

18 (1) La version électronique des documents établis en format PDF (format de document portable) ou selon tout autre format autorisé par le Tribunal est déposée de la manière indiquée par le registraire.

Dépôt électronique

(2) Les documents déposés par transmission électronique sont horodatés électroniquement.

Dépôt après 17 heures

(3) Les documents transmis électroniquement après 17 heures, heure d’Ottawa, sont réputés avoir été déposés le jour suivant qui n’est ni un samedi ni un jour férié.

Lacune ou irrégularité

19 Avant de rendre sa décision dans une instance, le Tribunal peut signaler à une partie toute lacune ou irrégularité que comporte la version électronique d’un document et lui permettre d’y remédier aux conditions qu’il juge équitables.

Dépôt par transmission électronique — serment ou affirmation

20 (1) Le dépôt par transmission électronique de toute déclaration faite sous serment ou affirmation solennelle peut se faire par le dépôt d’une copie numérisée du document comportant une signature manuscrite et l’énoncé suivant : *« Le document que nous présentons par transmission électronique au Tribunal est une version électronique du document papier qui a été signé par le déposant. Le document signé sur support papier est accessible et nous le produirons si le Tribunal nous en fait la demande. »*

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CANADA

CONSOLIDATION

CODIFICATION

Food and Drug Regulations

Règlement sur les aliments et drogues

C.R.C., c. 870

C.R.C., ch. 870

Current to June 19, 2024

À jour au 19 juin 2024

Last amended on June 17, 2024

Dernière modification le 17 juin 2024

specifications means a detailed description of a new drug and of its ingredients and includes

- (a) a statement of all properties and qualities of the ingredients that are relevant to the manufacture and use of the new drug, including the identity, potency and purity of the ingredients,
- (b) a detailed description of the methods used for testing and examining the ingredients, and
- (c) a statement of the tolerances associated with the properties and qualities of the ingredients. (*spécifications*)

SOR/95-411, s. 3; SOR/2011-88, s. 9; SOR/2021-45, s. 13.

C.08.002 (1) No person shall sell or advertise a new drug unless

- (a) the manufacturer of the new drug has filed with the Minister a new drug submission, an extraordinary use new drug submission, an abbreviated new drug submission or an abbreviated extraordinary use new drug submission relating to the new drug that is satisfactory to the Minister;
 - (b) the Minister has issued, under section C.08.004 or C.08.004.01, a notice of compliance to the manufacturer of the new drug in respect of the submission; and
 - (c) the notice of compliance in respect of the submission has not been suspended under section C.08.006.
- (d) [Repealed, SOR/2014-158, s. 10]

(2) A new drug submission shall contain sufficient information and material to enable the Minister to assess the safety and effectiveness of the new drug, including the following:

- (a) a description of the new drug and a statement of its proper name or its common name if there is no proper name;
- (b) a statement of the brand name of the new drug or the identifying name or code proposed for the new drug;
- (c) a list of the ingredients of the new drug, stated quantitatively, and the specifications for each of those ingredients;

biodisponibilité, par comparaison à une drogue visée à l'alinéa a). (*Canadian reference product*)

spécifications S'entend de la description détaillée d'une drogue nouvelle et de ses ingrédients, notamment :

- a) la liste des propriétés et des qualités des ingrédients qui ont trait à la fabrication et à l'emploi de la drogue nouvelle, y compris leur identité, leur activité et leur pureté;
- b) la description détaillée des méthodes d'analyse et d'examen des ingrédients;
- c) la liste des tolérances relatives aux propriétés et aux qualités des ingrédients. (*spécifications*)

DORS/95-411, art. 3; DORS/2011-88, art. 9; DORS/2021-45, art. 13.

C.08.002 (1) Il est interdit de vendre ou d'annoncer une drogue nouvelle, à moins que les conditions suivantes ne soient réunies :

- a) le fabricant de la drogue nouvelle a, relativement à celle-ci, déposé auprès du ministre une présentation de drogue nouvelle, une présentation de drogue nouvelle pour usage exceptionnel, une présentation abrégée de drogue nouvelle ou une présentation abrégée de drogue nouvelle pour usage exceptionnel que celui-ci juge acceptable;
 - b) le ministre a délivré au fabricant de la drogue nouvelle, en application des articles C.08.004 ou C.08.004.01, un avis de conformité relativement à la présentation;
 - c) l'avis de conformité relatif à la présentation n'a pas été suspendu en vertu de l'article C.08.006.
- d) [Abrogé, DORS/2014-158, art. 10]

(2) La présentation de drogue nouvelle doit contenir suffisamment de renseignements et de matériel pour permettre au ministre d'évaluer l'innocuité et l'efficacité de la drogue nouvelle, notamment :

- a) une description de la drogue nouvelle et une mention de son nom propre ou, à défaut, de son nom usuel;
- b) une mention de la marque nominative de la drogue nouvelle ou du nom ou code d'identification projeté pour celle-ci;
- c) la liste quantitative des ingrédients de la drogue nouvelle et les spécifications relatives à chaque ingrédient;

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CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d'interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

Current to June 19, 2024

À jour au 19 juin 2024

Last amended on August 3, 2021

Dernière modification le 3 août 2021

(iii) in a proceeding in relation to matters that have happened before the repeal;

(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(h) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

R.S., c. I-23, s. 36.

Repeal does not imply enactment was in force

45 (1) The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

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.

Repeal does not declare previous law

(3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

(iii) dans toute affaire se rapportant à des faits survenus avant l'abrogation;

e) les sanctions dont l'allègement est prévu par le nouveau texte sont, après l'abrogation, réduites en conséquence;

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

g) les règlements d'application du texte antérieur demeurent en vigueur et sont réputés pris en application du nouveau texte, dans la mesure de leur compatibilité avec celui-ci, jusqu'à abrogation ou remplacement;

h) le renvoi, dans un autre texte, au texte abrogé, à propos de faits ultérieurs, équivaut à un renvoi aux dispositions correspondantes du nouveau texte; toutefois, à défaut de telles dispositions, le texte abrogé est considéré comme étant encore en vigueur dans la mesure nécessaire pour donner effet à l'autre texte.

S.R., ch. I-23, art. 36.

Absence de présomption d'entrée en vigueur

45 (1) L'abrogation, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration portant que le texte était auparavant en vigueur ou que le Parlement, ou toute autre autorité qui l'a édicté, le considérerait comme tel.

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 considérerait comme telles.

Absence de déclaration sur l'état antérieur du droit

(3) L'abrogation ou la modification, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit.

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CANADA

CONSOLIDATION

CODIFICATION

Patented Medicines (Notice of
Compliance) Regulations

Règlement sur les médicaments
brevetés (avis de conformité)

SOR/93-133

DORS/93-133

Current to June 19, 2024

À jour au 19 juin 2024

Last amended on September 21, 2017

Dernière modification le 21 septembre 2017

(8) For the purpose of determining whether a patent or certificate of supplementary protection is to be added to or deleted from the register, the Minister may consult with officers or employees of the Patent Office.

SOR/98-166, s. 2; SOR/2006-242, s. 2; SOR/2011-89, s. 2; SOR/2017-166, s. 2.

3.1 (1) The Minister shall not delete from the register a patent on a patent list that was submitted before June 17, 2006, unless

- (a)** the patent has expired;
- (b)** a court has, under subsection 60(1) of the *Patent Act*, declared that the patent is invalid or void;
- (c)** the identification number assigned to the drug in respect of which the patent is listed is cancelled under paragraph C.01.014.6(1)(a) of the *Food and Drug Regulations*; or
- (d)** the first person in respect of that patent list requests the Minister to delete the patent.

(2) The Minister shall not refuse to add to the register a patent on a patent list that was submitted before June 17, 2006 solely on the basis that the patent is not relevant to the submission for a notice of compliance to which the patent list relates.

SOR/2008-211, s. 2; SOR/2017-166, s. 3.

3.2 [Repealed, SOR/2017-166, s. 4]

4 (1) A first person who files or who has filed a new drug submission or a supplement to a new drug submission may submit to the Minister a patent list in relation to the submission or supplement for addition to the register.

(1.1) The patent list may include a patent whose term under section 44 of the *Patent Act*, without taking into account section 46 of that Act, has expired and that is set out in a certificate of supplementary protection that has taken effect.

(2) A patent on a patent list in relation to a new drug submission is eligible to be added to the register if the patent contains

- (a)** a claim for the medicinal ingredient and the medicinal ingredient has been approved through the issuance of a notice of compliance in respect of the submission;

(8) Pour établir s'il doit ajouter au registre ou supprimer de celui-ci un brevet ou un certificat de protection supplémentaire, le ministre peut consulter le personnel du Bureau des brevets.

DORS/98-166, art. 2; DORS/2006-242, art. 2; DORS/2011-89, art. 2; DORS/2017-166, art. 2.

3.1 (1) Le ministre ne peut supprimer du registre un brevet inscrit sur une liste de brevets présentée avant le 17 juin 2006, sauf dans les cas suivants :

- a)** le brevet est expiré;
- b)** le tribunal a déclaré que le brevet est invalide ou nul aux termes du paragraphe 60(1) de la *Loi sur les brevets*;
- c)** l'identification numérique attribuée à la drogue à l'égard de laquelle le brevet est inscrit au registre est annulée aux termes de l'alinéa C.01.014.6(1)a) du *Règlement sur les aliments et drogues*;
- d)** la première personne à l'égard de la liste de brevets demande au ministre de supprimer le brevet.

(2) Il ne peut refuser d'ajouter au registre un brevet inscrit sur une liste de brevets présentée avant le 17 juin 2006 pour la seule raison que celui-ci n'est pas pertinent quant à la demande d'avis de conformité à laquelle se rapporte la liste.

DORS/2008-211, art. 2; DORS/2017-166, art. 3.

3.2 [Abrogé, DORS/2017-166, art. 4]

4 (1) La première personne qui dépose ou a déposé la présentation de drogue nouvelle ou le supplément à une présentation de drogue nouvelle peut présenter au ministre, pour adjonction au registre, une liste de brevets qui se rattache à la présentation ou au supplément.

(1.1) La liste de brevets peut comprendre un brevet qui est périmé en application de l'article 44 de la *Loi sur les brevets* — compte non tenu de l'article 46 de cette loi — et qui est mentionné dans un certificat de protection supplémentaire ayant pris effet.

(2) Est admissible à l'adjonction au registre tout brevet, inscrit sur une liste de brevets, qui se rattache à la présentation de drogue nouvelle, s'il contient, selon le cas :

- a)** une revendication de l'ingrédient médicinal, l'ingrédient médicinal ayant été approuvé par la délivrance d'un avis de conformité à l'égard de la présentation;

(b) a claim for the formulation that contains the medicinal ingredient and the formulation has been approved through the issuance of a notice of compliance in respect of the submission;

(c) a claim for the dosage form and the dosage form has been approved through the issuance of a notice of compliance in respect of the submission; or

(d) a claim for the use of the medicinal ingredient, and the use has been approved through the issuance of a notice of compliance in respect of the submission.

(2.1) The following rules apply when determining the eligibility of a patent to be added to the register under subsection (2):

(a) for the purposes of paragraph (2)(a), a patent that contains a claim for the medicinal ingredient is eligible even if the submission includes, in addition to the medicinal ingredient claimed in the patent, other medicinal ingredients;

(b) for the purposes of paragraph (2)(b), a patent that contains a claim for the formulation is eligible if the submission includes the non-medicinal ingredients specified in the claim, if any are specified, even if the submission contains any additional non-medicinal ingredients; and

(c) for the purposes of paragraph (2)(d), a patent that contains a claim for the use of the medicinal ingredient is eligible if the submission includes the use claimed in the patent, even if

(i) the submission includes additional medicinal ingredients,

(ii) the submission includes other additional uses of the medicinal ingredient, or

(iii) the use that is included in the submission requires the use of the medicinal ingredient in combination with another drug.

(3) A patent on a patent list in relation to a supplement to a new drug submission is eligible to be added to the register if the supplement is for a change in formulation, a change in dosage form or a change in use of the medicinal ingredient, and

(a) in the case of a change in formulation, the patent contains a claim for the changed formulation that has

b) une revendication de la formulation contenant l'ingrédient médicinal, la formulation ayant été approuvée par la délivrance d'un avis de conformité à l'égard de la présentation;

c) une revendication de la forme posologique, la forme posologique ayant été approuvée par la délivrance d'un avis de conformité à l'égard de la présentation;

d) une revendication de l'utilisation de l'ingrédient médicinal, l'utilisation ayant été approuvée par la délivrance d'un avis de conformité à l'égard de la présentation.

(2.1) Les règles ci-après s'appliquent au moment de la détermination de l'admissibilité des brevets pour leur adjonction au registre aux termes du paragraphe (2) :

a) pour l'application de l'alinéa (2)a), un brevet qui contient la revendication de l'ingrédient médicinal est admissible même si la présentation comprend, en plus de l'ingrédient médicinal revendiqué dans le brevet, d'autres ingrédients médicinaux;

b) pour l'application de l'alinéa (2)b), un brevet qui contient la revendication de la formulation est admissible si la présentation comprend les ingrédients non médicinaux précisés dans la revendication — si des ingrédients non médicinaux y sont précisés —, même si la présentation contient des ingrédients non médicinaux additionnels;

c) pour l'application de l'alinéa (2)d), un brevet qui contient la revendication de l'utilisation de l'ingrédient médicinal est admissible si la présentation comprend l'utilisation revendiquée dans le brevet, même si :

(i) la présentation comprend l'utilisation d'ingrédients médicinaux additionnels,

(ii) la présentation comprend d'autres utilisations,

(iii) l'utilisation comprise dans la présentation requiert l'utilisation de l'ingrédient médicinal en conjonction avec une autre drogue.

(3) Est admissible à l'adjonction au registre tout brevet, inscrit sur une liste de brevets, qui se rattache au supplément à une présentation de drogue nouvelle visant une modification de la formulation, une modification de la forme posologique ou une modification de l'utilisation de l'ingrédient médicinal, s'il contient, selon le cas :

a) dans le cas d'une modification de formulation, une revendication de la formulation modifiée, la

(iii) has obtained the consent of the owner of the patent to its inclusion on the list;

(e) the address in Canada for service, on the first person, of a notice of allegation referred to in paragraph 5(3)(a) or the name and address in Canada of another person on whom service may be made with the same effect as if service were made on the first person; and

(f) a certification by the first person that the information submitted under this subsection is accurate and that each patent on the list meets the eligibility requirements of subsection (2) or (3).

(5) Subject to subsection (6), a first person who submits a patent list must do so at the time the person files the new drug submission or the supplement to a new drug submission to which the patent list relates.

(6) A first person may, after the date of filing of a new drug submission or a supplement to a new drug submission, and within 30 days after the issuance of a patent that was issued on the basis of an application that has a filing date in Canada that precedes the date of filing of the submission or supplement, submit a patent list, including the information referred to in subsection (4), in relation to the submission or supplement.

(7) A first person who has submitted a patent list must keep the information on the list up to date but, in so doing, may not add a patent to the list.

(8) The Minister shall insert on the patent list the date of filing and submission number of the new drug submission or the supplement to a new drug submission in relation to which the list was submitted.

SOR/98-166, s. 3; SOR/2006-242, s. 2; err. (E), Vol. 140, No. 23; SOR/2015-169, s. 4; SOR/2017-166, s. 5.

4.1 (1) In this section, **supplement to the new drug submission** means a supplement to a new drug submission or a supplement to an extraordinary use new drug submission as those terms are used in Division 8 of Part C of the *Food and Drug Regulations*.

(2) A first person who submits a patent list in relation to a new drug submission referred to in subsection 4(2) may, if the list is added to the register, resubmit the same list in relation to a supplement to the new drug submission, but may not submit a new patent list in relation to a supplement except in accordance with subsection 4(3).

SOR/2006-242, s. 2; SOR/2011-89, s. 3.

(iii) soit a obtenu le consentement du propriétaire pour l'inscrire sur la liste;

e) l'adresse au Canada de la première personne aux fins de signification de l'avis d'allégation visé à l'alinéa 5(3)a) ou les nom et adresse au Canada d'une autre personne qui peut en recevoir signification comme s'il s'agissait de la première personne elle-même;

f) une attestation de la première personne portant que les renseignements fournis aux termes du présent paragraphe sont exacts et que chaque brevet qui y est inscrit est conforme aux conditions d'admissibilité prévues aux paragraphes (2) ou (3).

(5) Sous réserve du paragraphe (6), la première personne qui présente une liste de brevets doit le faire au moment du dépôt de la présentation de drogue nouvelle ou du supplément à une présentation de drogue nouvelle qui s'y rattachent.

(6) La première personne peut, après la date de dépôt de la présentation de drogue nouvelle ou du supplément à une présentation de drogue nouvelle et dans les trente jours suivant la délivrance d'un brevet faite au titre d'une demande de brevet dont la date de dépôt au Canada est antérieure à celle de la présentation ou du supplément, présenter une liste de brevets, à l'égard de cette présentation ou de ce supplément, qui contient les renseignements visés au paragraphe (4).

(7) La première personne qui a présenté une liste de brevets doit tenir à jour les renseignements y figurant, mais ne peut toutefois y ajouter de brevets.

(8) Le ministre inscrit sur la liste de brevets la date de dépôt et le numéro de la présentation de drogue nouvelle ou du supplément à une présentation de drogue nouvelle qui se rattache à la liste présentée.

DORS/98-166, art. 3; DORS/2006-242, art. 2; err. (A), Vol. 140, N^o. 23; DORS/2015-169, art. 4; DORS/2017-166, art. 5.

4.1 (1) Au présent article, **supplément à une présentation de drogue nouvelle** s'entend au sens de supplément à une présentation de drogue nouvelle ou supplément à une présentation de drogue nouvelle pour usage exceptionnel au titre 8 de la partie C du *Règlement sur les aliments et drogues*.

(2) La première personne qui présente une liste de brevets se rattachant à la présentation de drogue nouvelle visée au paragraphe 4(2) peut, si cette liste est ajoutée au registre, la présenter de nouveau à l'égard de tout supplément à cette présentation de drogue nouvelle; elle ne peut toutefois présenter de nouvelle liste se rattachant à

File No. CT-2024-006

COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34 (the“Act”);

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 103.1 of the Act granting leave to bring an application under section 79 of the Act;

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 79 of the Act;

BETWEEN:

JAMP PHARMA CORPORATION

Applicant

– and –

JANSSEN INC.

Respondent

**REPLY BOOK OF AUTHORITIES OF THE
APPLICANT, JAMP PHARMA CORPORATION
(Pursuant to s. 103.1 of the *Competition Act*)**

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