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CT- 2024-010

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OTTAWA, ONT.

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CT-2024-010

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an Application by the Commissioner of Competition for one or more Orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

-and-

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

NOTICE OF CONSTITUTIONAL QUESTION

TAKE NOTICE that the Respondents, Google Canada Corporation and Google LLC (collectively, “**Google**”), intend to question the constitutional validity, applicability and/or effect of subsection 79(3.1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Competition Act**” or the “**Act**”), and, in the alternative, to the extent necessary for Google to obtain an effective remedy, the constitutional validity, applicability and/or effect of section 11 and subsections 78(1) and 79(1) of the *Competition Act*, subsections 3(2) and 10(1) and section 12 of the *Competition Tribunal Act*, R.S.C. 1985,

c. 19 (2nd Supp.) (the “**Competition Tribunal Act**”) and rules 61 and 64 of the *Competition Tribunal Rules*, SOR/2008-141 (the “**Competition Tribunal Rules**”).

THE QUESTION IS TO BE ARGUED on a date and at a time and place to be fixed by the Competition Tribunal (the “**Tribunal**”).

THE FOLLOWING ARE THE MATERIAL FACTS giving rise to the constitutional question:

A. Introduction

1. Google seeks remedies in respect of existing and ongoing breaches of its rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the “**Charter**”) and the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III) (the “**Bill of Rights**”) that have already arisen and will be compounded if the Application commenced by the Commissioner of Competition (the “**Commissioner**”) for Orders against Google under section 79 of the abuse of dominance provisions of the *Competition Act* is allowed to proceed.

2. In his Application, the Commissioner seeks an unprecedented financial penalty against Google pursuant to subsection 79(3.1) of the *Competition Act* in an amount equal to three times the value of the benefit allegedly derived from Google’s purported anticompetitive practices or, if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues.

3. Under Canadian law, the extraordinary financial penalty sought by the Commissioner—an amount that could well be measured in the billions of dollars, given

the worldwide gross revenues of Google—is a true penal sanction. As a result, Google is entitled to the protection in this proceeding of rights guaranteed by the *Charter* and the *Bill of Rights*.

4. In light of violations of rights guaranteed to Google under the *Charter* and *Bill of Rights* that have already occurred and will inevitably occur if this Application is permitted to proceed, including as detailed below, the Tribunal should immediately and permanently stay or dismiss this proceeding pursuant to subsection 24(1) of the *Charter*, subsection 2(e) of the *Bill of Rights*, and the power of the Tribunal to control its own processes. In the alternative, if the Commissioner's Application is allowed to move forward, the Tribunal should exclude all evidence that has been or may be obtained from Google in contravention of its rights pursuant to subsection 24(2) of the *Charter*, subsection 2(e) of the *Bill of Rights*, and the power of the Tribunal to control its own processes.

5. The Tribunal should also declare that subsection 79(3.1) of the *Competition Act* is invalid and of no force and effect pursuant to section 52 of the *Constitution Act, 1982*. In the alternative, and to the extent necessary for Google to obtain an effective remedy for the infringement of its rights, the Tribunal should declare that section 11 and subsection 78(1) and 79(1) of the *Competition Act*, subsections 3(2) and 10(1) and section 12 of the *Competition Tribunal Act* and rules 61 and 64 of the *Competition Tribunal Rules* are of no force and effect to the extent of their inconsistency with the *Charter* in light of the Commissioner's pursuit of a true penal consequence against Google under subsection 79(3.1) of the *Competition Act*. Finally, the Tribunal should construe and apply all surviving statutory provisions so as not to abrogate, abridge or infringe Google's rights under the *Bill of Rights*.

B. Background

6. On January 5, 2021, the Competition Bureau (the “**Bureau**”) informed Google that it had initiated an inquiry into certain activities engaged in by Google in relation to its advertising technology business (the “**Inquiry**”).

7. On October 12, 2021, the Bureau obtained an *ex parte* order under section 11 of the *Competition Act* compelling Google Canada Corporation and Google LLC, either directly or indirectly, to produce records and information as well as to provide sworn written responses to questions of the Commissioner in respect of the Inquiry (the “**First Section 11 Order**”).

8. On January 20, 2022, in compliance with the First Section 11 Order, Google produced the requested records and information to the Bureau and provided sworn written responses to the Commissioner’s questions.

9. As at the date of the First Section 11 Order, financial penalties provided for in the *Competition Act* in respect of an alleged abuse of dominance were capped at a maximum of \$10 million for a first offence and \$15 million for each subsequent offence—far less than the financial penalties now sought by the Commissioner in this proceeding, as explained below.

10. On June 23, 2022, while the Bureau’s Inquiry was pending, subsection 78(1) of the *Competition Act* was amended to define “anti-competitive act” to mean “any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition”. On December 15, 2023, while the Bureau’s Ad Tech Inquiry (defined below) was pending, the statutory language of section 79 of the

Competition Act was amended. The purpose of these amendments was to facilitate the Commissioner's efforts to enforce section 79 of the *Competition Act*.

11. Subsection 79(3.1) of the *Competition Act*, which confers upon the Tribunal the jurisdiction to impose financial penalties in relation to allegations of an alleged abuse of dominance, was also amended in June 2022 and December 2023. Following the December 2023 amendments, subsection 79(3.1) of the *Competition Act* now purports to empower the Tribunal to impose the following extraordinary financial penalties on respondents to abuse of dominance proceedings commenced by the Commissioner:

- (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 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***.

[Emphasis added.]

12. Significantly for present purposes, when these provisions were added to the *Competition Act*, none of the *Competition Act*, *Competition Tribunal Act* or *Competition Tribunal Rules* were amended to provide respondents with any of the protections

guaranteed by the *Charter* or *Bill of Rights*. Nor were the *Competition Act*, *Competition Tribunal Act* or *Competition Tribunal Rules* amended to provide that they would operate notwithstanding the rights provided for in the *Bill of Rights*.

13. On December 1, 2023, the Bureau advised Google that it would be expanding the scope of its Inquiry to “determine whether Google is leveraging its market power in the Advertiser Ad Network and [Demand Side Platform] markets to gain and maintain market power in the Ad Exchange and Publisher Ad Server markets; leveraging its power in the Publisher Ad Server market to gain and maintain market power in the Advertiser Ad Network market; and making representations to Publishers and Advertisers in respect of its ad tech products and services that are false or misleading in a material respect; and whether these acts, independently or on a combined basis, substantially prevent or lessen competition or are likely to substantially prevent or lessen competition in a market” (the “**Ad Tech Inquiry**”).

14. On February 12, 2024, following the amendments to the *Competition Act* described above, the Bureau obtained a second *ex parte* order under section 11 of the *Competition Act* compelling Google Canada Corporation and Google LLC, either directly or indirectly, to produce additional records and data, as well as to provide further sworn written responses to questions of the Commissioner in respect of the Ad Tech Inquiry (the “**Second Section 11 Order**”).

15. On April 15, 2024, April 29, 2024 and May 28, 2024, in compliance with the Second Section 11 Order, Google produced the requested records and data to the Bureau and provided further sworn written responses to the Commissioner’s questions.

C. The Commissioner's Application

16. On November 28, 2024, the Commissioner commenced this Application against Google. In the Application, the Commissioner seeks a series of Orders against Google pursuant to subsections 79(1), 79(2), and 79(3.1) of the *Competition Act* in connection with conduct that is alleged to have begun in or around 2008. Among other things, in paragraph 217(a)(iii) of his Notice of Application, the Commissioner seeks an Order “directing Google to pay [a financial penalty] equal to three times the value of the benefit derived from Google’s anti-competitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues”. Depending on the way it is calculated, the financial penalty sought by the Commissioner could be measured in the billions of dollars if Google were found liable. That financial penalty could dwarf the profits Google generates from its display advertising business in Canada.

17. The extraordinary financial penalty sought by the Commissioner in this proceeding is unprecedented not only in abuse of dominance proceedings before the Tribunal, but in Canadian law. The intention of the Commissioner to seek that penalty against Google was disclosed for the first time when he delivered his Notice of Application on November 28, 2024. At no time prior to that date did the Commissioner or representatives of the Bureau advise either Google or the Justices of the Federal Court of Canada who issued the First Section 11 Order and Second Section 11 Order that a financial penalty of this nature or magnitude might be sought in proceedings the Commissioner could commence against Google.

THE FOLLOWING IS THE LEGAL BASIS for the constitutional question:

D. The Bureau and Commissioner Have Violated and Will Inevitably Continue to Violate Google's Rights Under the *Charter* and the *Bill of Rights* if this Application is Permitted to Proceed

18. The familiar and time-honoured rights afforded to defendants under the *Charter* and the *Bill of Rights* are not restricted to prosecutions under the *Criminal Code*, R.S.C. 1985, c. C-46. Rather, these rights extend to any proceeding, however styled, in which the State seeks sanctions of a true penal consequence.

19. A true penal consequence includes the imposition of a fine which, by its nature or magnitude, would appear to be imposed for the purpose of redressing the wrong done to society at large. Fines such as those provided for in subsection 79(3.1) of the *Competition Act* that are not capped at specified amounts, or that are collected with no guidance or restriction on how they are ultimately to be used by the State, are more likely to be regarded by our Courts as truly penal in nature.

20. Depending upon the manner in which it is calculated, the quantum of the financial penalty sought against Google by the Commissioner in this Application will vastly exceed the quantum of *any* fine that has *ever* been imposed in a penal proceeding in Canada—whether pursuant to the *Criminal Code*, under the *Competition Act* or under its predecessor statute, the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Moreover,

the financial penalty sought by the Commissioner in this Application may well be *hundreds* of times greater than the most significant financial penalty ever awarded by this Tribunal.¹

21. By virtue of its nature and magnitude, the financial penalty sought by the Commissioner against Google, and purportedly enabled by subsection 79(3.1) of the *Competition Act*, constitutes a consequence of a true penal character. As a result, it is incumbent upon the State—in this case, the Bureau, the Commissioner and this Tribunal—to respect and safeguard protections guaranteed to Google, including, without limitation, rights guaranteed by the *Charter* and *Bill of Rights*.

22. Despite this clear obligation, the Bureau and Commissioner have already violated, and will inevitably continue to violate, Google's rights under sections 7 and 8 and subsections 11(c), 11(d), 11(g) and 11(i) of the *Charter* as well as under subsection 2(e) of the *Bill of Rights*. This has occurred and will inevitably continue to occur in numerous ways, including by:

- (a) compelling evidence from Google under section 11 of the *Competition Act* in support of a proceeding involving a request by the Commissioner for the imposition by the Tribunal of sanctions that involve true penal consequences starting in at least October 2021 with the First Section 11 Order and again in February 2024 with the Second Section 11 Order, in the form of millions of documents, voluminous information and data and sworn

¹ See *Canada (Commissioner of Competition) v. Cineplex Inc.*, 2024 Comp. Trib. 5, at para. 478 (awarding a \$38.978 million financial penalty).

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written responses Google was required to provide to questions of the Commissioner during the course of the Bureau's Inquiries;

- (b) compelling Google to engage in compulsory documentary and oral discovery pursuant to rules 61 and 64 of the *Competition Tribunal Rules* in a proceeding involving a request by the Commissioner for sanctions that involve true penal consequences;
- (c) providing one or more lay members of the Panel of the Tribunal that will preside over the Commissioner's Application pursuant to sections 10 and 12 of the *Competition Tribunal Act* (the "**Hearing Panel**") with the potentially dispositive power to determine any sanction that may be rendered against Google, notwithstanding any contrary view that the judicial member(s) of the Hearing Panel may hold, unlike in traditional penal proceedings where a judge alone, and not lay members of a jury, determines the sanctions imposed;
- (d) providing, pursuant to sections 10 and 12 of the *Competition Tribunal Act*, that Google's liability and the penal sanctions it is subject to may be determined in the absence of a unanimous determination (or verdict) of all members of the Hearing Panel, unlike in traditional penal proceedings where a verdict must be unanimous;
- (e) providing, pursuant to sections 10 and 12 of the *Competition Tribunal Act*, that Google's liability and potential penal sanction will be decided by a Hearing Panel made up of significantly fewer than 12 individuals, unlike in

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traditional penal proceedings where a jury that includes lay persons has 12 members;

- (f) providing that, pursuant to sections 3 and 10 of the *Competition Tribunal Act*, lay members of the Hearing Panel, unlike juries in traditional penal proceedings, are not representatively and randomly chosen for one-time service, but instead are members of the Tribunal selected for their specialized knowledge who will participate in multiple proceedings;
- (g) seeking to retroactively impose upon Google consequences of a true penal nature under subsection 79(3.1) of the *Competition Act* in respect of conduct that is alleged to have been engaged in commencing as early as 2008 based on amendments to the abuse of dominance provisions in sections 78 and 79 of the *Competition Act* that were enacted in June 2022 and December 2023;
- (h) seeking to retroactively punish Google under subsection 79(3.1) of the *Competition Act* by imposing upon Google a true penal consequence of a significantly greater magnitude than was available under the *Competition Act* in the period before the June 2022 and December 2023 amendments in respect of conduct that is alleged to have been engaged in well before those amendments were enacted; and
- (i) subjecting Google under section 79 of the *Competition Act* to a proceeding involving a request by the Commissioner for the imposition of a true penal sanction in which Google's liability and the sanctions it is subject to will be

determined on the ordinary “balance of probabilities” standard applicable in civil proceedings, rather than the traditional “beyond a reasonable doubt” standard used in penal proceedings throughout Canada, as a result of the failure of Parliament to require, when it amended the *Competition Act*, that requests by the Commissioner for the imposition of financial penalties under subsection 79(3.1) be subject to proof beyond a reasonable doubt.

23. These constitutional violations are not reasonable limits that can be demonstrably justified in a free and democratic society under section 1 of the *Charter*. Nor do provisions of the *Competition Act*, *Competition Tribunal Act* or *Competition Tribunal Rules* state that they are intended to operate notwithstanding the provisions of the *Charter* or the *Bill of Rights*.

E. The Tribunal Should Permanently Stay These Proceedings or, in the Alternative, Exclude Improperly Compelled Evidence

24. In view of serious breaches of Google’s rights under the *Charter* and *Bill of Rights* that have been ongoing for several years, and that will inevitably continue throughout the course of this Application, it would be untenable for the Tribunal to allow the Commissioner’s Application to continue. Thus, an immediate and permanent stay or dismissal of the Application granted pursuant to subsection 24(1) of the *Charter*, subsection 2(e) of the *Bill of Rights* and the power of the Tribunal to control its own processes is necessary, just and appropriate.

25. In the alternative, all evidence compelled from Google during the Inquiry and Ad Tech Inquiry should be excluded from the hearing of the Commissioner’s Application pursuant to subsection 24(2) of the *Charter*, subsection 2(e) of the *Bill of Rights*, and the

Tribunal's power to control its own processes. The Commissioner should also be compelled to redact from his Notice of Application all references to any such evidence. Any failure to do so would bring the administration of justice into disrepute.

26. Moreover, if the Commissioner's Application is permitted to proceed, he should be: (i) required to make full and complete disclosure to Google pursuant to the decision of the Supreme Court of Canada in *R v. Stinchcombe*² and its progeny; and (ii) precluded from requiring Google to submit to documentary or oral discovery pursuant to rules 61 and 64 of the *Competition Tribunal Rules*.

F. Subsection 79(3.1) of the *Competition Act* Should Be Deemed Invalid and of No Force and Effect Under the *Charter*

27. By purporting to provide the Tribunal with the power to impose true penal consequences in otherwise civil proceedings under the abuse of dominance provisions of the *Competition Act* without also amending the *Competition Act*, *Competition Tribunal Act* and *Competition Tribunal Rules* to provide Respondents with various protections guaranteed by the *Charter* and *Bill of Rights* in penal proceedings, Parliament exceeded its constitutional authority and ignored longstanding self-imposed guardrails provided for under the *Bill of Rights*.

28. Thus, the Tribunal should also declare that, having regard to the sanctions sought by the Commissioner against Google in this proceeding, subsection 79(3.1) of the *Competition Act* is of no force and effect. In the alternative, to the extent necessary for Google to obtain an effective remedy, the Tribunal should declare section 11 and

² [1991] 3 S.C.R. 326.

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subsections 78(1) and 79(1) of the *Competition Act*, subsections 3(2) and 10(1) and section 12 of the *Competition Tribunal Act* and rules 61 and 64 of the *Competition Tribunal Rules* to be of no force and effect to the extent of their inconsistency with the *Charter* in light of the Commissioner's pursuit of a true penal consequence against Google under subsection 79(3.1) of the *Competition Act*. The Tribunal should also construe and apply any surviving statutory provisions so as not to abrogate, abridge or infringe Google's rights guaranteed by the *Bill of Rights*, including rights provided for in subsections 1(a) and 2(e).

29. For the various reasons explained above, this Tribunal should grant the relief sought by Google.

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