File No. CT-2025-004

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 Alexander Martin for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 79 and 90.1 of the Act;

BETWEEN:

ALEXANDER MARTIN

Applicant

– and –

ALPHABET INC., GOOGLE LLC, GOOGLE CANADA CORPORATION, APPLE INC. and APPLE CANADA INC.

Respondents

MEMORANDUM OF FACT AND LAW OF APPLE INC. and APPLE CANADA INC. (Pursuant to section 103.1 of the Competition Act)

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Part I. OVERVIEW

1. This application falls short of any plausible interpretation of the new public interest test. Indeed, the Applicant simply "copied and pasted" materials from U.S. proceedings; filed them with the Competition Tribunal; added virtually no evidence or arguments relating to Canada, the applicable statutory elements, or the public interest; and, despite these glaring shortcomings, is seeking substantial remedies, including significant monetary awards against the Respondents. Leave to proceed with an application under section 90.1 of the *Competition Act* should be denied.

2. The application for leave (the "**Leave Application**") seeks the permission of the Competition Tribunal (the "**Tribunal**") to commence a private proceeding under section 90.1 of the *Competition Act*[1] (the "**Act**"), alleging that Apple Inc. ("**Apple**") and Apple Canada Inc. ("**Apple Canada**", and together with Apple, the "**Apple Respondents**") entered into anti-competitive agreements with Alphabet Inc., Google LLC ("**Google**") and Google Canada Corporation (collectively, the "**Google Respondents**") regarding the setting of the Google search engine as a default search engine on Apple devices.[2]

3. Following recent amendments to the Act, section 103.1(7) now sets out two separate tests for granting leave to commence private proceedings: one relates to the applicant's own business interest (the "**Business Impact Test**"), while the other seeks to advance the public interest (the "**Public Interest Test**"). The Apple Respondents submit that these two tests are mutually exclusive.

4. In the present case, even though he claims to be acting in the public interest, the Applicant is in reality acting for his own private business interest and is therefore not eligible to invoke the Public Interest Test. The Tribunal should reject his attempt to circumvent the Business Impact Test by seeking leave under the Public Interest Test.

5. Moreover, even if the Applicant was eligible to invoke the Public Interest Test, his Leave Application must also fail.

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[1] RSC, 1985, c. C-34.

[2] The Apple Respondents are not respondents to the Applicant's Proposed Application under section 79 of the Act, which Applicant brings solely against the Google Respondents. Apple Respondents therefore do not address this claim in their Memorandum of Fact and Law.

6. The common law public interest standing test proposed by the Applicant and the Commissioner of Competition (the "**Commissioner**") relates to the review of government action and is not adequate for applications for leave to bring private proceedings under the Act. Adopting that approach for the Public Interest Test would effectively result in the Tribunal abdicating the screening responsibility that Parliament assigned to it.

7. Instead, in order to grant leave under the Public Interest Test, the Tribunal must be satisfied that (i) the Applicant's proposed Notice of Application ("**Proposed Application**") is suitable for addressing the relevant competition issues and (ii) the Applicant himself is suitable for leading such a proceeding. The Leave Application cannot meet this test, for the following reasons.

8. First, the Applicant has not adduced sufficient evidence of each element of the reviewable practices in section 90.1 to establish a *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) that his allegations have merit:

(a) The Applicant's primary allegation, which characterizes the impugned agreement between Apple and Google as an agreement between non-competitors, failed to allege, or adduce any evidence, that a "*significant purpose*" of the agreement was to prevent or lessen competition in a market. Moreover, if the Tribunal were to consider the U.S. materials put forward by the Applicant (as well as the supplementary evidence adduced by the Apple Respondents with permission of the Tribunal), they indicate that Apple's purpose in entering the impugned agreement was, and continues to be, to make it easy for its users to access the best search engine — Google. This is a pro-competitive, not an anti-competitive, purpose.

(b) The Applicant's alternative allegation, which characterizes the impugned agreement as an agreement between competitors (as defined in the Act), failed to provide any evidence that it is reasonable to believe that Apple is or was ever likely to be a competitor in the alleged general search engine market. On the contrary, the materials from the U.S. proceedings put forward by the Applicant (as well as the evidence adduced by the Apple Respondents) indicate that Apple has never intended, and still does not intend, to launch its own search engine.

(c) Finally, for both the primary and alternative allegations, the Applicant failed to provide any evidence that the effect of the impugned agreement would be to lessen or prevent competition substantially in a market in Canada, as required under section 90.1(1).

9. Second, the Applicant's primary stated public interest concern relates to privacy, which is outside the scope of the Act.

10. Third, the Proposed Application is also not suitable because two class actions related to search engines, search ads, and the same agreements at issue here have already been commenced under sections 45 (the conspiracy offence) and 36 (private action for damages) of the Act. The Apple Respondents strongly believe those actions are without merit. Regardless, the double jeopardy rule in section 90.1(10) precludes parallel proceedings from being commenced under section 90.1 where a proceeding based on section 45 has already been commenced on substantially the same facts. In any event, it clearly would not be in the public interest to duplicate such costly and time-consuming proceedings.

11. Fourth, granting the Leave Application would also revisit published conclusions of the Commissioner, who investigated Google's distribution agreements for its search engine, concluded that they did not result in a substantial lessening or prevention of competition in Canada, and committed to ongoing monitoring and taking enforcement action where appropriate.[3] To date, the Commissioner has not taken any such enforcement action since the conclusion of his prior investigation. It cannot in the public interest to allow a private proceeding on the same issues in these circumstances.

12. Finally, regarding his own suitability as an applicant, the Applicant has not provided evidence or submissions that demonstrate (i) his relevant experience, resources, and ability to represent the public interest, (ii) absence of conflicting private interests, (iii) a plan for advancing the litigation, (iv) the arrangement with his legal counsel and any litigation funders, and (v) any

[3] Competition Bureau Canada, "Position Statement: Investigation into alleged anti-competitive conduct by Google" (19 April 2016) ("**Position Statement**").

indication of the persons who he believes to be affected by the conduct (and who would presumably participate in the requested monetary award).

13. For all of the above reasons, the Proposed Application is not in the public interest under any version of the Public Interest Test that may be adopted by the Tribunal. The Apple Respondents therefore request the Tribunal to deny the Leave Application.

Part II. FACTS

A. The Applicant

14. The Applicant states that he is a video game developer who markets and sells video games online.[4]

15. The Applicant does not claim to have purchased any search-related product or service from the Respondents.

16. The Applicant does not claim to have paid higher prices for any product or service as a result of the Respondents' alleged conduct.

17. The Applicant's primary stated interest in the present proceedings is his own business interest: as a developer and seller of video games online, he claims that he has to optimize the language in his online marketing materials for Google's search engine in order to attract more viewers, because he relies on consumers using online general search engines to find his video games.[5]

18. The Applicant also states that he is "*a Canadian who routinely uses the internet for personal affairs*" and who is "*concerned with being faced with an online ecosystem whereby only one player dominates the method available and utilized by similarly situated consumers to obtain information*."[6]

19. The Applicant has not alleged any other particular interest in the general search engine market, and he has advanced no meaningful evidence that he has been materially impacted by the

[4] Affidavit of Alexander Martin, dated June 20, 2025 ("**Martin Affidavit**") at para 2.
[5] Martin Affidavit at paras 3-4.
[6] Martin Affidavit at para 7.

alleged conduct. The Proposed Application acknowledges that Google's search engine is an innovative product.[7] It also acknowledges that that Google's success as a search engine is due to its superior search technology that is able to quickly and accurately identify search results.[8]

20. The Applicant never mentions the fact that search engines are a zero-priced component of a complex two-sided market.

B. The Apple Respondents

21. Apple is a technology company headquartered in Cupertino, California, U.S.A. Apple designs, markets, and sells consumer electronics, software, and digital services.

22. Apple Canada is a wholly-owned subsidiary of Apple, headquartered in Toronto, Ontario.

C. The Materials Submitted by the Applicant

23. The Applicant's primary support for the Leave Application is an affidavit of Daniel Pallag, a law clerk employed by the Applicant's legal counsel, attaching 135 exhibits.[9] Of these 135 exhibits:

(a) two exhibits consist of corporate profiles of the two Canada-based Respondents: Google Canada Corporation and Apple Canada;[10]

(b) four exhibits are public documents relating to the recent amendments to the Act;[11]

(c) 18 exhibits are screen captures of various online news articles and other webpages about the Respondents and the search industry in general;[12] and

(d) the remaining 111 exhibits consist of transcripts, exhibits, submissions and a judgement from the proceedings brought by United States Department of Justice

[7] Proposed Application at para 4.
[8] Proposed Application at paras 11 and 46.
[9] Affidavit of Daniel Pallag, dated June 20, 2025 ("**Pallag Affidavit**").
[10] Pallag Affidavit, Exhibits 1 and 2.
[11] Pallag Affidavit, Exhibits 73, 96, 122 and 123.
[12] Pallag Affidavit, Exhibits 14, 15, 16, 95, 97, 104, 105, 111-115, 121 and 129-133.

and 14 state attorneys general against Google LLC in the United States (the "**U.S. DOJ Search Proceedings**"),[13] to which Apple is not a party.

24. The Applicant's allegations in respect of the Apple Respondents are focused on the Information Services Agreement ("**ISA**") between Google and Apple.[14] The Applicant alleges that the ISA was first established in 2002, with the latest version effective in 2016 and extended in 2021 to last until 2026.[15] The Pallag Affidavit includes four ISA-related documents, with redactions for public filing, that were produced as trial exhibits in the U.S. DOJ Search Proceedings.[16]

D. Testimony of Apple Witnesses in the U.S. DOJ Search Proceedings

25. The Pallag Affidavit also includes the transcripts of testimonies of Mr. Eddy Cue and Mr. John Giannandrea (both Apple senior executives) from the trial of the merits phase of the U.S. DOJ Search Proceedings.[17]

26. In addition, on August 12, 2025, the Tribunal granted the Apple Respondents leave to file certain portions of the transcript of Mr. Cue's testimony on May 7, 2025 from the remedies trial of the U.S. DOJ Search Proceedings.[18] Accompanying this Memorandum of Fact and Law is an affidavit of Aaron Chiu dated August 28, 2025 attaching the relevant portions of Mr. Cue's May 7 testimony.[19]

27. Mr. Cue's and Mr. Giannandrea's testimonies in the U.S. DOJ Search Proceedings discussed the following topics:

(a) Apple entered into the ISA, which eventually made Google the default search engine on Apple's devices, because it wanted to provide its users with access to a

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[13] *United States of America et al., v. Google LLC*, No. 1:20-cv-03010-APM.
[14] Proposed Application at para 35.
[15] Proposed Application at para 28.
[16] Pallag Affidavit, Exhibits 4, 5, 12, 75.
[17] Pallag Affidavit, Exhibit 102, Testimony of John Giannandrea on September 22, 2023 ("**Giannandrea Merits Testimony**"); Exhibit 103, Testimony of Eddy Cue on September 26, 2023 ("**Cue Merits Testimony**").
[18] *Alexander Martin v Alphabet Inc., Google LLC et al*, 2025 Comp Trib 12, at paras 43-47.
[19] Affidavit of Aaron Chiu, dated August 28, 2025 ("**Chiu Affidavit**"), Exhibit 1, Testimony of Eddy Cue on May 7, 2025 ("**Cue Remedies Testimony**").

superior search engine,[20] and it believed (and still believes) that Google is the best search engine.[21] Under the ISA, Apple makes Google search available to Apple device users and Google pays Apple a percentage share of its search ad revenue.[22] Apple also has promotional agreements with Microsoft, DuckDuckGo, Yahoo, and Ecosia for the non-default distribution of their search engines on the Safari browser.[23]

(b) Apple carefully evaluated Microsoft's Bing search engine as a potential alternative to Google several times. Each time, Apple concluded that Bing is inferior to Google and maintained its view that the Google search engine provided its customers with the best search experience.[24]

(c) Apple never intended and still does not intend to develop its own general search engine.[25] Developing a competitive general search engine is a highly complex and costly undertaking.[26] Investing in a general search engine would require Apple to forgo investments in other areas that it believes could make a material difference for its users.[27]

Part III. ISSUES

28. The Apple Respondents submit that the Leave Application presents the following issues:

(1) Is the Applicant eligible to apply for leave pursuant to the Public Interest Test?

(2) If the Applicant is eligible to apply for leave pursuant to the Public Interest Test, what are the applicable criteria for obtaining leave under the Public Interest Test?

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[20] Pallag Affidavit, Exhibit 103, Cue Merits Testimony, 2472:4-14, 2476:5-2477:4, 2478:14-18; 2502:13-15.
[21] Pallag Affidavit, Exhibit 103, Cue Merits Testimony, 2464:20-24, 2476:24-2477:4; Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3818:13-19.
[22] Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3826:12-14.
[23] Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3819:9-15.
[24] Pallag Affidavit, Exhibit 102, Giannandrea Merits Testimony, 2284:9-2285:22; Exhibit 103, Cue Merits Testimony, 2511:24-2513:20; Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3820:18-21.
[25] Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3825:23-25; 3850:21-25; Pallag Affidavit, Exhibit 102, Giannandrea Merits Testimony, 2247:20-21.
[26] Pallag Affidavit, Exhibit 102, Giannandrea Merits Testimony, 2268:6-7; Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3851:1-3851:1.
[27] Pallag Affidavit, Exhibit 103, Cue Merits Testimony, 2541:1-4, 2541:9-17.

(3) Does the Leave Application meet the criteria for obtaining leave under the Public Interest Test?

Part IV. LAW AND SUBMISSIONS

A. The Applicant Is Not Eligible to Apply for Leave Under the Public Interest Test

29. The Applicant is ineligible to apply for leave under the Public Interest Test because he is not, in fact, truly making the present Leave Application in the public interest. In reality, as is apparent from the Applicant's affidavit,[28] and as will be further discussed below, he is trying to advance his own private business interest.

30. Under section 103.1(7) of the Act, an applicant seeking leave to advance his own business interest should apply under the Business Impact Test and must show that he is "*directly and substantially affected in the whole or part of [his] business*".

31. An Applicant who is advancing his own private business interest, but who does not meet the Business Impact Test cannot sidestep it by invoking the Public Interest Test instead, as the Applicant attempts to do here. This would undermine Parliament's intention in enacting the recent revisions to section 103.1(7) of the Act.

32. In interpreting this newly revised section 103.1(7), the Tribunal must apply the modern principle of statutory interpretation reiterated by the Supreme Court of Canada in *Vavilov*,[29] which is to read and interpret the provision's words "*in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and the object of the legislation, and the intention of Parliament*."[30] This involves an analysis of the wording, context and purpose of the provision.[31]

1. The Language of Section 103.1(7)

33. Section 103.1(7) reads as follows:

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[28] Martin Affidavit at paras 3-4.
[29] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 ("***Vavilov***").
[30] *Vavilov* at para 117.
[31] *Vavilov* at para 118. Also see *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 8 ("***JAMP***") at paras 49-69; *Secure Energy Services Inc v Canada (Commissioner of Competition)*, 2023 FCA 172, at paras 16-42; *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2022 FCA 25, [2022] 2 FCR 430 at paras 49-68.

The Tribunal may grant leave to make an application under section 75, 77, 79 or 90.1 if it has reason to believe that the applicant is directly and substantially affected in the whole or part of the applicant's business by any conduct referred to in one of those sections that could be subject to an order under that section or if it is satisfied that it is in the public interest to do so.	*Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77, 79 ou 90.1 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans tout ou partie de son entreprise en raison de l'existence de l'un ou l'autre des comportements qui pourraient faire l'objet d'une ordonnance en vertu de l'un de ces articles ou s'il est convaincu que cela servirait l'intérêt public.*

34. Since the recent amendments (which came into force on June 20, 2025), section 103.1(7) sets out two alternative paths for private parties to seek leave to commence a private application. An applicant may obtain leave by showing that either (i) its business is directly and substantially affected, pursuant to the Business Impact Test, or (ii) the proposed application is in the public interest, pursuant to the Public Interest Test.

35. As we discuss in detail below, the legislative context and purpose of section 103.1(7) make it clear that the Business Impact Test and the Public Interest Test can only be interpreted appropriately as being mutually exclusive alternatives.

2. The Context and the Purpose of Section 103.1(7)

a. Section 103.1(7) Serves a Screening Function for Private Proceedings

36. Prior to 2002, only the Commissioner was permitted to initiate enforcement actions for reviewable practices under Part VIII of the Act.

37. In 2002, Parliament amended the Act to permit a private right of action in respect of certain reviewable practices.[32] This change was made to address the concern that the Commissioner had limited enforcement resources and could not prioritize "*cases that are very local in nature, or*

[32] Private rights of action initially were permitted only in respect of sections 75 (refusal to deal) and 77 (exclusive dealing, tied selling, market restrictions). Later amendments expanded the private rights of action to also include sections 76 (resale price maintenance), 79 (abuse of dominance), 90.1 (anti-competitive agreements) and 74.1 (deceptive marketing).

whose impact on the economy is small". [33] The private right of action was intended to "*complement*" the Commissioner's public enforcement role by allowing private parties to bring cases that are not prioritized or known by the Commissioner. [34]

38. Unlike the Commissioner, private parties could not commence proceedings in respect of reviewable practices as of right. The purpose of the leave process set out in section 103.1(7) was to permit private parties to commence such proceedings only if they met screening criteria established by Parliament; otherwise, only the Commissioner was permitted to litigate such proceedings.[35]

39. Parliament assigned a screening role for the Tribunal to ensure that the proposed application was suitable for being commenced and litigated by a private applicant and that the applicant was suitable for commencing and litigating the proposed application. This reflected Parliament's intention that private litigation was to "*complement*" the Commissioner's statutory mandate as the primary enforcer of the Act[36] by balancing the advantages of allowing additional potentially meritorious cases to proceed against the disadvantages of unmeritorious proceedings.

b. The Business Impact Test

40. The criteria for obtaining leave that Parliament initially established in 2002 required the private applicant (e.g., a customer, supplier, or competitor of the party alleged to be engaging in a reviewable practice) to show that the Tribunal "*has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under [the alleged reviewable practices in Part VIII of the Act]*".[37]

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[33] House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0920 (then Commissioner of Competition, Konrad von Finckenstein).
[34] House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0920 (then Commissioner of Competition, Konrad von Finckenstein).
[35] *JAMP* at para 65.
[36] House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0920 (then Commissioner of Competition, Konrad von Finckenstein); House of Commons, *A Plan to Modernize Canada's Competition Regime*, (2002 April) at page 110.
[37] *Competition Act*, s. 103.1(7).

41. As the Tribunal stated in *JAMP*, the Business Impact Test was meant to serve two screening objectives:

(a) The requirement that the applicant is "*directly and substantially*" affected in its business by a reviewable practice was meant to ensure that the applicant would be able to provide the Tribunal — both at the leave stage and in any subsequent proceeding on the merits — with first-hand evidence about competition in the market(s) and industry at issue, including the nature and scope of the effects of the impugned practice on rivalrous behaviour.[38] This effectively constitutes a screening for the suitability of the applicant for commencing and litigating the proposed application.

(b) The requirement that there is sufficient evidence addressing each of the elements of the alleged reviewable practice such that the Tribunal "*could*" issue an order was meant to ensure that there is enough substantive merit in the alleged reviewable practice to warrant a proceeding, and that it is worthwhile for the parties and the Tribunal to spend resources on the proposed proceeding.[39] This effectively constitutes a screening for the suitability of the proposed application.

c. The 2024 Amendment to the Business Impact Test

42. The Tribunal interpreted the Business Impact Test to require that the entirety of the applicant's business be substantially affected by the conduct at issue.[40] In response to concerns that this imposed an overly stringent screen,[41] Parliament lowered the threshold for satisfying the Business Impact Test with an amendment in 2024 allowing leave to be granted if the applicant is "*directly and substantially affected in the whole or part of the applicant's business*".[42]

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[38] *JAMP* at para 67.
[39] *JAMP* at para 68.
[40] *Sears Canada Inc v Parfums Christian Dior Canada Inc and Parfums Givenchy Canada Ltd*, 2007 Comp Trib 6 at para 21; *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 at para 54.
[41] Pallag Affidavit, Exhibit 73, "Future of Canada's Competition Policy Consultation – What we Heard Report", section 9; House of Commons, *Standing Committee on Finance*, Meeting No. 135 (9 April 2024) at 1705 (Kate McNeece).
[42] *Fall Economic Statement Implementation Act, 2023*, SC 2023, c. 15, s. 254.

43. With this change, Parliament recalibrated the Business Impact Test so that businesses may more extensively utilize the private action regime to pursue recourse for their own private business interests when they have been affected by a reviewable practice, while retaining a meaningful process for screening out plainly unmeritorious cases.

d. The New Public Interest Test was Enacted for Applicants Seeking to Act in the Public Interest Rather than their Private Interest

44. The same statute that amended the Business Impact Test in 2024 also introduced a separate Public Interest Test as a way for other types of private applicants to obtain leave to commence proceedings involving reviewable practices in Part VIII of the Act.[43]

45. Given that Parliament specifically amended the Business Impact Test to rebalance the way in which it screens between potentially meritorious and plainly unmeritorious cases, Parliament's introduction of a separate Public Interest Test should not be interpreted so as to provide those same businesses with an alternate way to obtain leave that sidesteps the Business Impact Test altogether. By introducing a parallel but different Public Interest Test, Parliament must have intended to accomplish a separate and distinct public policy objective.

46. Because the Business Impact Test is structured to allow private businesses to seek leave to advance their own private business interests,[44] it is apparent that the Public Interest Test cannot logically have been intended for businesses to do the same thing. Given its invocation of the "*public interest*", the Public Interest Test must be interpreted as being available for applicants who do not have their own individual business interests at stake, such as associations or advocacy groups who seek leave to advance a broader public interest.

47. Indeed, as a senior official in the Department of Innovation, Science and Economic Development ("**ISED**")[45] noted in his testimony before the Standing Senate Committee on National Finance, the Public Interest Test was intended to allow organizations, including non-

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[43] *Fall Economic Statement Implementation Act, 2023*, SC 2023, c. 15, s. 254.
[44] House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0935 (then Commissioner of Competition, Konrad von Finckenstein).
[45] Samir Chhabra, Director General, Marketplace Framework Policy Branch, Innovation, Science and Economic Development Canada.

governmental organizations, to commence reviewable practices applications before the Tribunal.[46] This may include organizations that represent consumers and workers that may be affected by market outcomes but are not able to invoke the Business Impact Test.

48. When the leave provision is considered holistically and purposively, it is apparent that the Public Interest Test cannot logically have been intended for businesses who seek leave to commence applications to advance their own private business interests. In other words, the Public Interest Test should be interpreted to be mutually exclusive from the Business Impact Test. It should not be interpreted to effectively provide a backdoor to obtaining leave for those applicants whose business (in whole or in part) is allegedly affected but are otherwise unable to meet the Business Impact Test.

49. For applicants wishing to advance their own private business interests because their businesses have allegedly been affected by anti-competitive conduct, section 103.1(7) continues to require showing the requisite level of impact on the applicant's private business under the Business Impact Test.

3. The Applicant Seeks to Advance His Own Private Interest

50. The Applicant claims to be making the Leave Application "*on behalf of the public interest*".[47] However, the Applicant's affidavit does not provide any meaningful explanation of the public interest that he purports to advance.

51. Instead, the Applicant's affidavit indicates that he is seeking to commence the proposed proceedings because his business is allegedly affected by the conduct at issue:

(a) The Applicant claims that, as a video game developer, he has to optimize the language in his online marketing materials for Google's search engine in order to attract more viewers for the video games that he develops and sells.

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[46] Senate of Canada, Standing Senate Committee on National Finance, *Evidence*, 44th Parl., 1st Sess. (9 April 2024) at 95:16 (Samir Chhabra).
[47] Memorandum of Fact and Law of the Applicant at para 92

(b) He alleges further that he would be less reliant on Google for directing potential customers to his products if there were more alternatives and that he would be able to focus more on his products.[48]

52. Because the Applicant alleges that his business has been affected by the alleged conduct, the Business Impact Test is the only test under which he would be eligible to apply for leave. The Applicant should not be permitted to sidestep the need to show the threshold level of impact required under the Business Impact Test by invoking the Public Interest Test instead. On this basis alone, the Apple Respondents respectfully submit that the Leave Application should be denied.

53. Even if the Applicant *had* applied for leave under the Business Impact Test — which he has not — his Leave Application would necessarily fail. The Applicant has not provided any evidence or submissions that would allow the Tribunal to conclude that he meets the threshold level of impact under the Business Impact Test — *i.e.*, to support a *bona fide* belief that he is directly or substantially affected in the whole or part of his business by the alleged conduct. He does not claim — let alone provide any evidence — that the ISA has caused lost sales, increased costs, reduced profits, or indeed any other negative effect on his video game business that the Tribunal has historically accepted as "*direct and substantial*" effects.[49] All the Applicant claims is that he has to optimize the language in his online marketing materials for Google's search engine in order to attract more viewers and "*[i]n an environment with true alternatives, [he] would be far less reliant on Google to direct potential consumers to my products.*"[50] This does not remotely approach the substantiality requirement and is the kind of plainly unmeritorious case that Parliament established the leave process to allow the Tribunal to screen out. The Leave Application should also be denied on this basis.

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[48] Martin Affidavit at paras 3-6.
[49] For example, *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp Trib 4 at paras 16-22 (applicant adduced evidence showing reduced sales and loss of customers); *Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp Trib 10 at para 31 (applicant adduced evidence showing a potential 50% loss of net income); *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp Trib 1 at para 14 (applicant adduced evidence showing a substantial loss of revenue and employee layoff); *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp Trib 38 at para 54 (applicant adduced evidence showing a potential 50% loss of revenue).
[50] Martin Affidavit at paras 3-6.

54. In the event that the Tribunal finds that a business applicant may also be eligible to invoke the Public Interest Test, the Apple Respondents make further submissions regarding the interpretation of the Public Interest Test and its application to the present Leave Application.

B. The Criteria for Obtaining Leave Under the Public Interest Test

1. The Common Law Public Interest Standing Test is Not Appropriate or Adequate for Competition Cases

55. The Applicant proposes to interpret the Public Interest Test in the same way as the common law test for public interest standing used in constitutional litigation and judicial review, and the Commissioner has also supported this approach. They argue that the Tribunal should consider three factors when applying the Public Interest Test:

(a) whether the case raises a serious justiciable issue;

(b) whether the applicant has a real stake or genuine interest in the issues; and

(c) whether the proposed claim is a reasonable and effective means to bring the case to court.[51]

56. The Apple Respondents submit that this minimalist approach is not appropriate or adequate for addressing the suitability of applications and applicants under the competition law enforcement framework established by Parliament.

a. The Fundamental Purpose of Public Interest Standing is Absent in the Context of Competition Law Enforcement

57. The common law test for public interest standing was developed in the context of constitutional litigation and judicial review, and is rooted in two overarching principles:

(a) Legality principle: state action must conform to the law and there must be practical and effective ways to challenge the legality of state actions; and

[51] Memorandum of Fact and Law of the Applicant at paras 106-107; Written Representations of the Commissioner of Competition at paras 21-53.

(b) Access to justice principle: in the context of public interest standing, this means access to the courts by providing an avenue to litigate the legality of government action notwithstanding social, economic or psychological barriers which may preclude individuals from pursuing their legal rights.[52]

58. Public interest standing at common law is fundamentally about ensuring that there exists an effective way to challenge the constitutionality or legality of government actions and upholding the fundamental rights, even if there are no willing litigants who are themselves affected by the government actions at issue. This fundamental purpose of public interest standing is simply not relevant in the context of competition law enforcement, because government actions are not at issue. Indeed, public interest standing has no clear application at all when dealing with conduct of private sector actors.

59. The Applicant nevertheless argues the Public Interest Test is a mechanism to "*hold powerful business actors accountable*."[53] However, the principles of legality and access to justice have limited relevance in the context of this private enforcement mechanism.

(a) The legality principle is not engaged because reviewable practices under the Act are not *per se* unlawful; they provide a framework for the Tribunal to assess the competitive effects of the interactions between private sector participants in the market. Reviewable practices are subject to remedial orders only if the Tribunal finds them to cause anti-competitive effects in a relevant market.

(b) The access to justice principle is likewise not relevant because the Commissioner has a statutory mandate to enforce the Act on behalf of the public interest and affected businesses (e.g. customers, suppliers and competitors) can obtain leave to commence private applications under the Business Impact Test.

60. The Tribunal should not blindly adopt a public interest standing test developed for other purposes in different contexts as the core of the Public Interest Test under section 103.1(7) of the Act. As will be discussed below, there are additional important factors for assessing the suitability

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[52] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 ("**CCD**") at paras 33-40.
[53] Memorandum of Fact and Law of the Applicant at para 99.

of an applicant and the suitability of an application seeking to undertake competition law enforcement on behalf of the public interest.

b. The Test for Public Interest Standing Does Not Serve Purpose of the Section 103.1 Leave Process

61. The purpose of the public interest standing test is to expand the range of potential plaintiffs who may be able to sue to hold governments to account for various types of state action. In contrast, the leave process established in section 103.1 is intended by Parliament to define a screening mechanism for identifying the limited set of situations in which private applicants may be permitted to commence potentially meritorious proceedings involving complex reviewable practices while preventing unmeritorious cases from going forward.

62. When introducing the private right of action for certain reviewable practices in 2002, Parliament adopted an approach that is different from section 36 of the Act, which provides private litigants with a right to sue for recovery of damages for loss or harm suffered as a result of criminal conduct under the Act without requiring leave of the court. Instead of simply allowing private applicants to commence proceedings without leave, Parliament enacted the leave process in section 103.1 as a screening mechanism to safeguard against frivolous, vexatious, unmeritorious and strategic litigation.[54] It also maintained the Tribunal's exclusive jurisdiction to adjudicate economics-intensive reviewable practices, which could have wide-reaching remedies that impact the parties as well as other market participants. As the Commissioner testified before the House of Commons Standing Committee on Industry, Science and Technology at the time, private parties cannot commence proceedings "*randomly*,"[55] and the leave process was intended to ensure that "*only genuine cases would come forward*".[56] The Committee similarly recognized the need for adequate safeguards and a screening mechanism.[57] To enable the Tribunal to exercise its screening responsibility, Parliament also required in section 103.1(1) that an applicant who seeks leave to

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[54] House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0915 (then Commissioner of Competition, Konrad von Finckenstein); House of Commons, *A Plan to Modernize Canada's Competition Regime*, (2002 April) at pages 50-51.
[55] House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0940 (then Commissioner of Competition, Konrad von Finckenstein).
[56] House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0930 (then Commissioner of Competition, Konrad von Finckenstein).
[57] House of Commons, A Plan to Modernize Canada's Competition Regime, (2002 April) at page 50-51.

bring a private application must file "*an affidavit setting out the facts in support of*" the proposed application.

63. The purpose of the leave process and the requirement that the applicant file supporting evidence did not change when Parliament extended private rights of action to the abuse of dominance and competitor agreements reviewable practices in 2022 and 2024 respectively.[58] Nor did they change when Parliament enacted the Public Interest Test in 2024. As a senior official of ISED[59] testified before the Standing Senate Committee on National Finance, the role of the Tribunal in applying the Public Interest Leave Test is to "*decide if the case has merit*", as a "*safeguard*", in order to determine if a proposed case should be permitted to proceed.[60]

64. Therefore, the Tribunal's core task at the leave stage, whether under the Business Impact Test or the Public Interest Test, is to undertake a screening role and to identify the proposed cases that are worthwhile for the Tribunal and the parties to spend the significant time and resources involved in complex and often lengthy proceedings under the reviewable practice provisions of the Act. This necessarily involves an assessment of the evidence that the applicant is required to file in support of the proposed application.

65. In interpreting the Public Interest Test, the Tribunal must take care not to make the "*purpose error*" identified by Professor Mark Mancini by giving too much weight to the broad and abstract purposes of legislation as a whole while paying insufficient attention to the more specific purpose of particular provisions within a statute.[61] The Applicant and the Commissioner focus on the general purpose clause set out in section 1.1 of the Act. However, they do not pay sufficient attention to the specific screening purpose of the section 103.1 leave process that is evident from the foregoing review of the legislative history.

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[58] *Budget Implementation Act, 2022, No. 1*, SC 2022, c. 10, s. 266; *Affordable Housing and Groceries Act*, SC 2023, c. 31, s. 7.2(1).
[59] Martin Simard, Senior Director, Corporate, Insolvency and Competition Directorate, Innovation, Science and Economic Development Canada.
[60] Senate of Canada, Standing Senate Committee on National Finance, *Evidence*, 44th Parl., 1st Sess. (11 June 2024) at 111:11 (Martin Simard).
[61] Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alberta LR 919.

c. The Test for Public Interest Standing Does Not Serve a Meaningful Screening Function

66. With the Tribunal's screening role in mind, the three-part test for public interest standing sets a threshold that is inadequate in the context of a reviewable practice proceeding under the *Competition Act*. The Applicant's and the Commissioner's treatment of the "*serious justiciable issue*" element involves no consideration of evidence, which would result in the Tribunal serving no meaningful screening function. The Applicant's and the Commissioner's treatment of the "*genuine interest or real stake*" element fails to recognize that the purposes of the Act are limited to competition issues. The Applicant's treatment of the "*reasonable and effective means*" element does not give adequate consideration to additional specific factors that are relevant, including several discussed by the Commissioner.

i. A Serious Justiciable Issue

67. Regarding the first element of the test for public interest standing — that there is a serious justiciable issue — the Commissioner proposes to set the threshold at the bare minimum level of "*the leave application reveals at least one serious issue*".[62] He proposes to define a serious issue as an issue that is "*far from frivolous*."[63] The Commissioner does not address what amounts to an "*issue*", whether such an issue must relate to one or more elements of the alleged reviewable practice, or the evidentiary requirement for demonstrating the existence of a serious issue at the leave stage.

68. Setting the threshold at the level of "*at least one serious issue*" would mean that the Tribunal could not exercise any meaningful screening role. It would not be sufficient to screen out frivolous, vexatious, unmeritorious or strategic litigation. For example, in the context of a proposed application under section 90.1 of the Act, the Tribunal could not decline leave for a proposed application that appeared to be frivolous, vexatious, unmeritorious or strategic litigation if the leave application simply raised an issue about the existence of an alleged agreement between two parties but did not address the other required elements of section 90.1.

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[62] Written Representations of the Commissioner of Competition at para 34.
[63] Written Representations of the Commissioner of Competition at para 35.

69. The Commissioner raises the practical consideration that a public interest applicant is unlikely to have access to confidential evidence from market participants.[64] He therefore argues that the Tribunal should not require evidence of the elements of alleged reviewable practices.[65]

70. But the Commissioner's perspective is backwards. Allowing applicants to simply show up at the Tribunal's doorstep with unsupported assertions about "*public interest*" would be tantamount to inviting fishing expeditions and would provide the Tribunal with no mechanism to avoid the significant risk that proposed applications may be frivolous, vexatious, unmeritorious or strategic litigation. The Tribunal's screening role to distinguish between potentially meritorious and unmeritorious leave applications under the Public Interest Test necessarily requires more information about the suitability of the application (and the applicant) than merely a check-box exercise of whether at least one serious issue has been put forward.

71. The Applicant stated in his response to the Respondents' informal motions to file responding evidence that the Public Interest Test should focus only on screening out "*frivolous and vexatious claims*" based only on an applicant's pleadings, and not consider any evidence.[66] This proposal would appear to convert the leave mechanism into the equivalent of a pleading standard. Respondents already have the right to bring motions to strike deficient pleadings.[67] As a result, the Applicant's proposed test would effectively make the leave mechanism redundant. That absurd outcome could not have been intended by Parliament and cannot be an appropriate interpretation of the criteria required to meet the Public Interest Test.

72. The Applicant's suggestion is also inconsistent with the requirements in the Act and the *Competition Tribunal Rules* that leave applicants must file "*an affidavit setting out the facts in support of*" the proposed private application.[68] This requirement applies to all leave applications, regardless of whether they invoke the Business Impact Test or the Public Interest Test.[69] Therefore, the Tribunal's consideration of a leave application under the Public Interest Test must necessarily

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[64] Written Representations of the Commissioner of Competition at para 37(a).
[65] Written Representations of the Commissioner of Competition at para 38.
[66] Applicant's Response to Google's and Apple's informal motions to file responding evidence, dated August 1, 2025, CT-2025-004, #32, pages 2, 6.
[67] *Federal Courts Rules*, SOR98-106, Rule 221(1).
[68] *Competition Act*, s. 103.1(1); *Competition Tribunal Rules*, SOR/2008-141, rule 115(1).
[69] By contrast, in constitutional litigation, public standing issues often arise at a preliminary stage before any evidence of the merits of the constitutional challenge is before the court. See *CCD* at para 72.

involve an assessment of the factual evidence adduced by the applicant in support of the proposed private application.

73. The Apple Respondents submit that, in order for the Tribunal to properly perform its screening role at the leave stage under the Public Interest Test, the Tribunal cannot ignore its responsibility to undertake a preliminary assessment of the sufficiency of the applicant's evidence in respect of the elements of the alleged reviewable practice. Such a preliminary assessment is necessary to determine whether there is enough substantive merit in the alleged reviewable practice to warrant a proceeding, and it is worthwhile for the parties and the Tribunal to spend resources on the proposed proceeding.

74. Without consideration of this factor as part of the Public Interest Test, proposed applications that allege conduct that plainly do not meet one or more essential elements of the alleged reviewable practice could be granted leave to proceed. This would effectively amount to the Tribunal abdicating its screening responsibility.

75. Granting leave to cases that do not address the required elements for a valid claim under Part VIII of the Act would be a waste of time and money for the parties and a waste of scarce Tribunal resources.[70] Indeed, wasting the Tribunal's scarce resources and clogging up the Tribunal with plainly unmeritorious cases could reduce access to the Tribunal for other potentially meritorious cases by other applicants. Parliament could not have intended that this would be in the public interest.

ii. Real Stake or Genuine Interest

76. The second element of the test for public interest standing — that the applicant has a real stake or genuine interest in the matter — is too vague to be an appropriate test in a case before the Tribunal. As we explain below, it is essential that the applicant be able to demonstrate a public interest that is connected to the Act's purposes and regulatory framework.

77. The Commissioner suggests that, to demonstrate a "*real stake or genuine interest*" in the proceeding, the applicant should not be required to demonstrate a "*close nexus*" to the alleged

[70] *JAMP* at para 93.

conduct, a direct or substantial effect on its business, or that the applicant operates a business at all.[71]

78. As discussed above, the Apple Respondents submit that businesses that are affected by the alleged conduct are ineligible to invoke the Public Interest Test. Therefore, the Apple Respondents agree with the Commissioner that a non-business applicant seeking leave on the basis of the Public Interest Test would not need to show that the applicant has a business or that the alleged conduct had a direct and substantial effect on the applicant's business.

79. However, the public interest that the applicant seeks to advance must be related to the purpose of the Act — that is, "*to maintain and encourage competition in Canada*".[72] The Supreme Court of Canada has instructed that the public interest jurisdiction of administrative decision-makers must be animated by the purposes of their governing statutes, and a failure to consider those purposes in making an order in the public interest is an error.[73] The Tribunal has previously dismissed an application for leave that seeks to address issues outside the scope of the purposes of the Act, and this decision was upheld by the Federal Court of Appeal.[74] Accordingly, the Tribunal should not grant leave to applicants who seeks leave under Public Interest Test to address issues not related to competition (e.g. privacy, as discussed in more detail below).

iii. Reasonable and Effective Means

80. Regarding the third and final element of the test for public interest standing — that the proposed application is a reasonable and effective means of bringing the matter to the court — the Applicant presents a superficial treatment of this element and does not consider any of the factors that the Commissioner acknowledges that the Tribunal should consider, including, among other things:

(a) the applicant's capacity to bring the claim forward;

(b) whether there are realistic alternative means; and

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[71] Written Representations of the Commissioner of Competition at paras 47-49.
[72] *Competition Act*, s. 1.1.
[73] *Committee for the Equal Treatment of Asbestos Minority Shareholders*, 2001 SCC 37 at para 41.
[74] *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 ("***Symbol Technologies***") at para 23.

(c) the potential impact of the proceedings on others.

81. The Apple Respondents agree that these factors are relevant to the Tribunal's consideration of the Public Interest Test. However, the Commissioner does not discuss what these factors mean for a public interest applicant in the context of a private application under the Act, keeping in mind the Tribunal's screening role at the leave stage. We discuss the importance of each of these factors briefly below.

The Applicant's Capacity to Bring the Claim Forward

82. In considering whether a plaintiff should be granted public interest standing in the context of constitutional litigation and judicial review of government action, courts will consider what resources and expertise the plaintiff can provide.[75] A plaintiff which has a "*significant track record*" in the issues at play is uniquely situated to assist the court, and such experience will weigh in favour of granting public interest standing.[76] In contrast, a plaintiff which does not itself possess expertise in the issues arising in the action, nor any history or reputation advocating for the individuals who may be affected is unlikely to be able to provide sufficient resources and expertise to lead the proceeding effectively.[77]

83. This type of consideration of the suitability of a public interest applicant is also relevant for private proceedings under Part VIII of the Act. The Tribunal must be satisfied that the applicant could effectively litigate the proposed application to its conclusion in the public interest. This includes an assessment of the applicant's expertise and resources, including any history of advocating for the public interest as it relates to competition.

84. This consideration can also be informed by the criteria used for assessing the suitability of a representative plaintiff for certifying a class action under the *Federal Court Rules* and similar provincial class proceedings legislation.[78]

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[75] *CCD* at para 55.
[76] *CCD* at para 105; *Ecology Action Centre v. Nova Scotia (Environment and Climate Change)*, 2023 NSCA 12 at para 111; *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 at para 57; *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290 at paras 70-71.
[77] *Coalition for Justice and Human Rights Ltd v. Edmonton (City)*, 2024 ABKB 26 at paras 54-58.
[78] For example, see Ontario *Class Proceedings Act*, 1992, SO 1992, c 6, s 5(1); *Federal Courts Rules*, SOR/98-106, Rule 334.16(1).

85. The Supreme Court indicated in *Western Canadian Shopping Centres* that, in considering the suitability of the representative plaintiff in a class action, a court should consider the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred, in order to be satisfied that the representative will effectively represent the interests of the proposed class.[79]

86. By way of further example, the UK Competition Appeal Tribunal, which (like the Competition Tribunal) is a specialized body that adjudicates complex competition cases, has considered that, in order to ensure that a proposed collective proceeding on competition matters is conducted in the best interests of the class in all respects, the class representative must demonstrate that she is not merely a "*figurehead*" of a proceeding being conducted by her legal representative and that she has sufficient "*independence*" and "*robustness*" to be an independent advocate for the class.[80]

87. The Apple Respondents submit that similar considerations ought to apply when considering the suitability of an applicant seeking leave under the Public Interest Test to bring complex proceedings for broad-based injunctive remedies and monetary awards under Part VIII of the Act.

Whether There Are Realistic Alternative Means

88. Given that proceedings by private applicants are intended to "*complement*" the Commissioner's statutory mandate to enforce the Act, investigative and enforcement actions by the Commissioner may be an available means to address any issues raised by a proposed private application. With his compulsory investigative powers under section 11 of the Act, the Commissioner may in fact be better positioned to address those issues than a private applicant. Where, as here, the Commissioner has already taken investigative or enforcement action in respect of the same matter being raised by the proposed application, the Tribunal should consider whether it is in the public interest to revisit the work already done by the Commissioner.

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[79] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 at para 41.
[80] *Christine Riefa Class Representative Limited v. Apple et. al.*, 2025 CAT 5 at paras 113-114 (UK Competition Appeal Tribunal).

89. In addition, the Tribunal should consider whether parallel proceedings in respect of the same matter have already been commenced in other forums. This is a particularly important consideration if the proposed application engages the double jeopardy rules in the Act, which provide that the separate proceedings may not go forward under multiple provisions of the Act on the basis of facts that are substantially the same.[81]

Potential Impact of the Proceedings on Others

90. The Tribunal must consider this factor where the applicant seeks a broad-based injunctive remedy that affects market participants. This factor is also clearly relevant where the applicant seeks a monetary award on behalf of himself and other persons affected by the alleged conduct. It is critically important for assessing the suitability of a public interest application because customers, competitors, suppliers and others may be affected in a variety of positive or negative ways by prohibition orders and other remedies under Part VIII of the Act. Where there are inter-connected (or, as in this case, two-sided) markets in play, it may be particularly challenging for the Tribunal to determine whether granting leave would be in the public interest.

91. Basic fairness — as well as avoidance of a multiplicity of proceedings with potentially conflicting outcomes — requires that the Tribunal's findings on a private application seeking a broad-based injunctive remedy or a monetary award must be binding on all other persons who may seek leave to bring a private application on the same matter (under either the Business Impact Test or the Public Interest Test). It would not be in the public interest to allow the same respondent to be subject to repeated litigation where a private applicant already failed in a prior application in respect of the same matter. Therefore, the Tribunal needs to be satisfied that the applicant can effectively litigate the proposed application to conclusion and the Tribunal should consider whether other potential applicants may be better positioned to do so.

2. The Tribunal Should Consider the Suitability of the Proposed Application and that of the Applicant when Applying the Public Interest Test

92. Given the inadequacies of the three-part common law test for public interest standing discussed above, the purpose of the leave process set out in section 103.1 of the Act, and drawing inspiration from the other statutory regimes mentioned below, the Apple Respondents submit that

[81] See, for example, *Competition Act*, ss. 45.1 and 90.1(10).

in assessing the applications for leave under the Public Interest Test, the Tribunal must consider (i) whether the proposed private proceeding is suitable for addressing the issues that it raises and (ii) whether the applicant is suitable for taking on the role of litigating the proposed application.

93. Consideration of the suitability of the proposed application and of the applicant are common when a legislature imposes a requirement to obtain leave before a proceeding can be commenced. For example:

(a) Under the Ontario *Securities Act*, a plaintiff seeking public interest standing to bring an application before the Capital Markets Tribunal must demonstrate both: the suitability of the proposed application, by showing among other things that (i) the application relates to both past and future conduct regulated by Ontario securities law, (ii) the application is not enforcement in nature, (iii) the relief sought is future-looking, and (iv) the Commission has the authority to grant an appropriate remedy; and the suitability of the applicant, by showing that the applicant is directly affected by both past and future conduct.[82]

(b) Under provincial class proceedings legislation and the *Federal Courts Rules*, a representative plaintiff seeking to certify a proposed action as a class proceeding must demonstrate both: (i) the suitability of the proposed action, by showing a reasonable cause of action, an identifiable class, common issues and a preferable procedure; and (ii) the suitability of the representative plaintiff, by showing the ability to fairly and adequately represent the interests of the class, a workable litigation plan and the absence of conflicts of interest.[83]

(c) Under provincial securities legislation, a plaintiff seeking leave to commence a secondary market misrepresentation claim must demonstrate both: (i) the suitability of the proposed action, by showing a reasonable possibility of success at trial; and (ii) the suitability of the plaintiff, by showing that he is bringing the action in good

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[82] *Catalyst Capital Group Inc*., 2016 ONSEC 14, at para 26; *MI Developments Inc.*, 2009 ONSEC 47, at paras 109-110.

[83] For example, see Ontario *Class Proceedings Act*, 1992, SO 1992, c 6, s 5(1); *Federal Courts Rules*, SOR/98-106, Rule 334.16(1).

faith[84] (which has been viewed as being similar to the requirement of a suitable representative plaintiff under class action legislation).[85]

94. The Apple Respondents submit that, in order to be satisfied that the proposed application is suitable for a private proceeding, the Tribunal must consider at a minimum:

(a) whether the applicant has adduced sufficient evidence of the alleged reviewable practice to warrant a proceeding on the merits;

(b) whether the applicant seeks to advance a public interest related to the purpose of the Act;

(c) whether the issues raised by the proposed application may be better addressed through other means, including through proceedings in other forums; and

(d) whether the proposed application would revisit work previously undertaken by the Commissioner in the public interest.

95. An applicant who invokes the Public Interest Test to obtain leave is effectively seeking to step into the shoes of the Commissioner, who has the primary mandate under section 7 of the Act to take enforcement actions in the public interest.[86] In order to be satisfied that the applicant is suitable for taking on such a public interest role of litigating the proposed application, the Apple Respondents submit that, the applicant needs, at a minimum, to address the following factors, which are drawn from criteria used for assessing the suitability of a representative plaintiff for certifying a class action under the *Federal Court Rules*[87] and the public interest standing jurisprudence:

(a) the applicant's specific expertise and resources, including any history of advocating for the public interest as it relates to competition;

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[84] For example, see Ontario *Securities Act*, RSO 1990, c. S.5, s. 138.8; Alberta *Securities Act*, RSA 2000, c. S-4, s. 211.08.
[85] *Badesha v. Cronos Group*, 2021 ONSC 4346 at para 34.
[86] *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6 at para 67; *Kobo Inc v The Commissioner of Competition*, 2015 Comp Trib 14 at para 65.
[87] For example, see Ontario *Class Proceedings Act*, 1992, SO 1992, c. 6, s. 5(1); *Federal Courts Rules*, SOR/98-106, Rule 334.16(1).

(b) the ability to fairly and adequately represent the public interest related to competition;

(c) the absence of private interests that may conflict with the public interest;

(d) a plan for the proceeding that sets out a workable method of advancing it on behalf of the public interest;

(e) disclosure of any agreements respecting fees, disbursements, and control of the litigation between the Applicant and his counsel, as well as any litigation funding arrangements; and

(f) identification of what other persons or groups are expected to benefit from, and be bound by, the orders requested from the Tribunal.

96. An assessment of the suitability of the applicant is especially important where the applicant seeks a monetary award under section 90.1(10.1) or other similar provisions of the Act. Since an applicant may seek a monetary award up to the entirety of all benefits obtained by respondents from anti-competitive conduct, the applicant has a potentially significant personal stake in the outcome. However, the Tribunal is required to consider all other persons affected by the anti-competitive conduct when ordering the distribution of such an award. Thus, the applicant is not only seeking to act on behalf of the public interest in the abstract, but is seeking a monetary award that must be distributed by the Tribunal to other affected persons.

97. In order for the Tribunal to make such an order, the applicant must be able to articulate how such other persons are "*affected*" by the conduct and how they are to be identified, notified and benefit from and be bound by such an order. Unless these issues are addressed, the Tribunal cannot be satisfied that the applicant would fairly and adequately represent the affected persons that would become entitled to share in the monetary award.

98. In addition, in situations where the applicant is affected in a manner different from how others are affected, the Tribunal needs to consider whether the applicant is a suitable person for commencing and litigating the application in a manner that considered the interests of those

(differently) affected persons. The Tribunal must be provided with information sufficient to satisfy itself that there are not conflicts of interest between the applicant and other affected persons.

99. The Tribunal also needs to consider whether any fee and litigation funding arrangements the applicant may have entered into are reasonable, fair and in the best interest of the affected persons who may be entitled to participate in a monetary award. This includes the ability to satisfy any order related to costs which may be made by the Tribunal under the costs rules that are an integral feature of the private action framework established by Parliament in 2002.[88]

C. The Leave Application Does Not Satisfy the Criteria for the Public Interest Test

100. Considering the factors set out above, the Apple Respondents submit that the Applicant has not demonstrated that the Proposed Application is suitable for being litigated as a private proceeding nor that the Applicant is suitable for taking on the role of litigating the Proposed Application. Therefore, it is not in the public interest for the Tribunal to grant leave in this case.

1. The Applicant Has Not Adduced Sufficient Evidence of the Section 90.1 Elements

101. As discussed above, the Tribunal's screening role at the leave stage requires it to engage in a preliminary assessment of the sufficiency of the evidence adduced by an applicant to determine whether there is enough substantive merit to warrant a proceeding.

102. The Google Respondents' motion to adduce evidence in response to the Leave Application puts forward the position that the Applicant must adduce sufficient evidence to support a *prima facie* case as to each element of the alleged reviewable practice.[89] The Apple Respondents agree with this position.

103. First, in other regulatory contexts where the public interest is considered, it is common that applicants are required to establish *prima facie* case at a preliminary stage. For example, it is the

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[88] *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), s. 8.1(1); House of Commons, *Standing Committee on Industry, Science and Technology*, Meeting No. 37 (4 October 2001) at 0915 (then Commissioner of Competition, Konrad von Finckenstein).

[89] Informal motion of Alphabet Inc., Google LLC, and Google Canada Corporation requesting leave to file responding affidavit evidence in an application for leave, CT-2025-004, #24 at paras 9 and 29.

standard used by the Capital Markets Tribunal when deciding whether to hold a hearing on the merits in respect of public interest proceedings.[90]

104. Second, there is a heightened risk that proposed applications for which leave is being sought under the Public Interest Test may be frivolous, vexatious, unmeritorious, or strategic litigation because public interest applicants may not be directly involved in the market in question, and therefore are unlikely to have access to evidence from market participants or even have direct personal knowledge or experience of the issues. By contrast, an applicant under the Business Impact Test can be expected to have first-hand evidence about competition in the market(s) and industry at issue, including the nature and scope of the effects of the impugned practice on rivalrous behaviour.[91] Therefore, the Tribunal's preliminary assessment of the applicant's evidence under the Public Interest Test should be more careful than its assessment of whether the alleged conduct "*could*" be subject to an order of the Tribunal under the Business Impact Test.

105. In the alternative, if the Tribunal considers the *prima facie* case standard to be too onerous for applicants at the leave stage, the Apple Respondents submit that the evidentiary standard for the Tribunal's preliminary assessment of the applicant's evidence should be at least as high as the standard applicable under the Business Impact Test: that is, there must be sufficient credible, cogent and objective evidence in respect of each element of the applicable reviewable practice to support a *bona fide* belief that the alleged conduct could be subject to an order of the Tribunal.[92]

106. As the Tribunal summarized in the recent *JAMP* leave decision under the Business Impact Test, the *bona fide* belief standard has been tailored to allow the Tribunal to perform a meaningful but not onerous screening function. The Tribunal assesses evidence summarily and expeditiously on a standard that is lower than a balance of probabilities.[93] But it is still a meaningful standard that requires showing more than a mere possibility.[94]

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[90] For example, *Pearson (Re)*, 2018 ONSEC 53 at paras 71-72, 80-88.
[91] *JAMP* at para 67.
[92] *JAMP* at para 19.
[93] *JAMP* at paras 15-16; *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 15 ("***CarGurus***") at para 60; *Symbol Technologies* at paras 17 and 19
[94] *JAMP* at para 16; *CarGurus* at para 109.

107. In his response to the Respondents' informal motions to file responding evidence, the Applicant argued that the "*sufficient credible, cogent and objective evidence to support a* bona fide *belief*" standard would turn the leave application into a "*mini trial*" on the merits.[95] There is no basis for this concern. The Tribunal has used this standard for many years for assessing evidence adduced on leave applications in a summary and expeditious manner when applying the Business Impact Test, without turning leave applications into mini trials.[96] There is no reason why applying this standard to the Public Interest Test would be any different.

108. Indeed, this Tribunal's order on August 12, 2025 granting the Respondents leave to file limited affidavit evidence in response to this Leave Application ensures that a mini trial would not result here.[97] Consistent with its past practice, the Tribunal limited responding evidence to specific discrete factual issues and declined to allow responding evidence on complex and wide-ranging matters, such as market definition and anti-competitive effects.[98] As a result, there will be limited factual evidence filed by the Respondents on this Leave Application and no expert evidence at all. The Tribunal will not be put in a position to conduct a mini trial or resolve merits issues as it would during the hearing of an application.

a. The Evidence Derived from the U.S. DOJ Search Proceedings Should be Disregarded

109. Other than a limited number of online news articles and webpages (which do not address the market conditions or competitive effects of the alleged conduct in Canada), the Applicant supports the Leave Application exclusively using materials derived from the U.S. DOJ Search Proceedings.

110. The U.S. DOJ Search Proceedings are based on market circumstances that relate to the United States and that may differ from the situation in Canada. The U.S. DOJ Search Proceedings are also based on U.S. antitrust law, which differs in material ways from the reviewable practices

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[95] Applicant's Response to Google's and Apple's informal motions to file responding evidence, dated August 1, 2025, page 4-5.
[96] *JAMP* at para 14; *Symbol Technologies* at para 24; *CarGurus, Inc v Trader Corporation*, 2017 FCA 181, at paras 9, 21-23, 25-28; *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 13 at paras 11, 16-17, 19; *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 12, at paras 9, 32.
[97] *Alexander Martin v Alphabet Inc., Google LLC et al*, 2025 Comp Trib 12.
[98] *Alexander Martin v Alphabet Inc., Google LLC et al*, 2025 Comp Trib 12, at paras 21 and 46.

at issue here.[99] Therefore, the Apple Respondents submit that the materials from the U.S. DOJ Search Proceedings are not credible, cogent or objective for a proposed application alleging anti-competitive effects in Canada and cannot provide the necessary evidentiary basis for granting the Leave Application.

111. However, to the extent that the Tribunal considers materials from the U.S. DOJ Search Proceedings, the Apple Respondents note (without any admission as to the admissibility or relevance of such materials) that the Apple witnesses' testimony in the U.S. DOJ Search Proceedings is inconsistent with the essential elements of section 90.1. This would prevent the Applicant from establishing the requisite *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) necessary for granting of the Leave Application.

b. There is Not Sufficient Evidence Regarding the Elements of Section 90.1 for an Agreement between Non-Competitors

112. The Applicant's primary allegation relies on the expanded scope of section 90.1 of the Act to cover agreements between non-competitors under section 90.1(1.01). The Applicant alleges that Apple and Google are not competitors in respect of general search engines and that the ISA is not an agreement between competitors.[100]

113. The Apple Respondents submit that the Applicant has not adduced sufficient credible, cogent and objective evidence of each of the elements of section 90.1(1) and of the expansion provision in section 90.1(1.01) to support the required *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) regarding the ISA as an alleged agreement between non-competitors.

i. There Is No Evidence that Apple had a Significant Purpose to Lessen or Prevent Competition

114. Section 90.1(1.01) allows the Tribunal to issue an order as to an agreement between non-competitors (*i.e.*, a non-horizontal agreement), only if "*a significant purpose*" of the agreement or

[99] Pallag Affidavit, Exhibit 6, *United States v. Google, LLC*, No. 20-cv-3010, 2024 WL 3647498 (D.D.C. Aug. 5, 2024) ("**U.S. Merits Judgement"**).
[100] Proposed Application at para 48.

a part of it is to prevent or lessen competition in a market. The Applicant fails to meaningfully address this element in his Leave Application.

No Allegation or Evidence of Anti-competitive "Significant Purpose" for the ISA

115. In the Proposed Application, the Applicant fails to allege that a significant purpose of the ISA was to prevent or lessen competition in a market.

116. Moreover, the Leave Application did not adduce any evidence in respect of any purported anti-competitive significant purpose that the Apple Respondents would have had in entering into the ISA.

117. On this basis alone, the Tribunal should conclude that the Applicant has failed to adduce sufficient evidence to support the required *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) in respect of the "*significant purpose*" element.

Apple Purpose Was Not Anti-Competitive

118. To the extent that the Tribunal considers the materials from the U.S. DOJ Search Proceedings, these materials indicate that Apple's purpose for entering into the ISA was not anti-competitive; rather, it was to provide the best search product and experience for its customers. For example:

(a) Apple selected Google, rather than Bing, as the default search engine for Apple devices because, after extensive evaluations, it concluded that Google is a better search engine than Bing.[101] By setting Google as the default search engine, Apple gives its users access to the best search engine right out of the box.[102]

[101] Pallag Affidavit, Exhibit 102, Giannandrea Merits Testimony, 2284:9-2285:22; Exhibit 103, Cue Merits Testimony, 2511:24-2513:20; Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3820:18-21.
[102] Pallag Affidavit, Exhibit 103, Cue Merits Testimony, 2464:20-24, 2472:4-14, 2476:5-2477:4, 2478:14-18; 2502:13-15; Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3818:13-19.

(b) In countries, such as Russia, China and South Korea, where Google is not the best search engine or there is another competitive search engine, the ISA permits Apple to designate a search engine other than Google as the default.[103]

(c) Through an exception set out in the definition of the "*Search Query*" in the ISA, Apple is given the flexibility to determine that certain types of search queries on Apple devices do not have to be sent to Google as the default search engine, if that "*determination is based exclusively on its intent to provide a superior user experience*." [104] This effectively allows Apple to introduce its own search functionalities in its devices, such as Apple *Suggestions*, *Siri*, *Spotlight*, which Apple views as advancing a superior user experience.[105]

119. Apple's purpose of delivering the best product and experience to its users is pro-competitive.

120. The Applicant also does not specifically allege an anti-competitive significant purpose on Google's part in entering into the ISA.

121. Even if there is evidence that Google's significant purpose for entering into the ISA is anti-competitive, that is not sufficient for the Tribunal to conclude that a significant purpose of the ISA is anti-competitive.

122. Section 90.1(1.01) references the significant purpose of the "*agreement*", rather than the significant purpose of one or more parties to the agreement. Parties to an agreement may have different purposes for entering into the agreement. Businesses routinely enter into agreements with other businesses in the ordinary course in order to accomplish their own respective objectives. For example, the supplier and the purchaser have different purposes for entering into the agreement for the supply of a product. If the Tribunal could make an injunctive or other order against all parties to the agreement on the basis that one party had a significant purpose to prevent or lessen competition, the other party or parties who had neutral or even pro-competitive purposes would be unfairly prejudiced by such an order. Therefore, the Apple Respondents submit that the significant

[103] Pallag Affidavit, Exhibit 103, Cue Merits Testimony, 2477:14-2478:23.
[104] Pallag Affidavit, Exhibit 5, the 2016 Amendment, page 1.
[105] Pallag Affidavit, Exhibit 102, Giannandrea Merits Testimony, 2217:3-2218:14, 2235:6-7.

purpose of an agreement can be determined to be to prevent or lessen competition only if all parties to the agreement had such an anti-competitive purpose for entering into the agreement.[106]

123. In the alternative, even if the Tribunal determines that an anti-competitive significant purpose of the agreement could be determined with reference to only one party having an anti-competitive purpose, the Apple Respondents submit that an injunctive order or a monetary award under section 90.1(1) and 90.1(10.1) can only be granted against a party who had an anti-competitive significant purpose.

124. In addition, in using the "*significant purpose*" language, Parliament recognized that a party may have multiple different purposes for an agreement. Some purposes may be significant and others may be insignificant, incidental, tangential or merely ancillary (for instance to other pro-competitive purposes). Analogous to the recognition of legitimate business justifications in the abuse of dominance jurisprudence, the Apple Respondents submit that the Tribunal should not consider any alleged anti-competitive purpose to be "*significant*" when one or more of the parties can demonstrate that there is a legitimate business justification for entering into the agreement. As the Tribunal recognized in *TREB* and *VAA*, justifications include pro-competitive or efficiency-enhancing rationales such as providing improvements in the quality of products and services[107] As discussed above, this is precisely Apple's purpose for entering into the ISA — to give its customer the best product and experience.

125. Therefore, in the absence of evidence of a significant anti-competitive purpose, and especially in this situation with clear evidence of Apple's pro-competitive purpose for the ISA on the record in this Leave Application, the Tribunal cannot conclude that the significant purpose of the ISA is to prevent or lessen competition. This alone precludes the granting of leave to bring a section 90.1 application using the section 90.1(1.01) expansion for non-horizontal agreements, at least as against Apple.

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[106] Where only one party had an anti-competitive purpose, that party's conduct might need to be assessed under unilateral conduct provisions elsewhere in Part VIII of the Act.

[107] *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7, at paras 303-304; *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("***VAA***") at paras 518, 536, 620-629; see also *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 233 at paras 67, 73, 87-88.

ii. There is Insufficient Evidence of Anti-Competitive Effects in a Relevant Market

126. The Applicant also fails to present evidence of a substantial lessening or prevention of competition in a market, another required element of section 90.1.

127. At the leave stage, the Applicant would need to adduce sufficient credible, cogent and objective evidence (i) regarding the definition of relevant product and geographic market, and (ii) that the ISA has resulted in or is likely to result in a substantial lessening or prevention of competition in that relevant market in Canada — that is, but for the ISA, there would be substantially more competition in the relevant market (as compared to a hypothetical world in which the ISA did not exist).[108]

128. Regarding market definition, the Leave Application simply presumes that the relevant product market is for "*general search engines*", and that Canada constitutes the relevant geographic market.[109] However, the Applicant provides no evidence — let alone credible, cogent and objective evidence — to support a *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) that this is the case.

129. Regarding anti-competitive effects, the Leave Application alleges that the ISA:

(a) reinforces Google's alleged market dominance and creates barriers for potential competitors;[110]

(b) dissuades Apple from entering the general search market and eliminates Apple as a potential competitor;[111] and

(c) limits Apple's innovation with respect to search.[112]

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[108] *JAMP* at para 149; *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236 ("***TREB FCA***") at paras 82-92; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 ("***Tervita***") at paras 50-51.
[109] Proposed Application at paras 23-25.
[110] Proposed Application at para 41.
[111] Proposed Application at paras 49, 52, 54.
[112] Proposed Application at paras 52, 53, 55-57.

130. As explained below, however, the Applicant has not adduced any evidence as to what the market outcomes would likely have been but for the ISA, and he has not adduced any evidence to demonstrate possible substantial effects in the market.[113]

131. Indeed, the Applicant did not even include a statement of his economic theory of the case, as contemplated by the *Competition Tribunal Rules*.[114] This statement is essential for the manageability of any complex case under Part VIII of the Act, as it is intended to frame the case at an early stage so that an applicant would not adopt a new approach later in the proceedings[115] and the respondent(s) and the Tribunal can focus on the issues in dispute. It would be an especially important component of an application where complex economic issues such as two-sided markets will be in play.

132. The Applicant simply relies on materials derived from the U.S. DOJ Search Proceedings for his allegation of anti-competitive effects. However, even if the Tribunal considers the materials from the U.S. DOJ Search Proceedings, they do not assist the Applicant in establishing a basis for a *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) in respect of anti-competitive effects under section 90.1 in Canada for at least two reasons.

133. First, the U.S. DOJ Search Proceedings were expressly focused on the United States as the relevant geographic market.[116] They do not address anti-competitive effects in any geographic market that includes Canada. The U.S. DOJ Search Proceedings were also based on the separate and distinct monopolization provision in the *Sherman Act* rather than any provision of the Act.[117] Therefore, the Tribunal cannot simply adopt the findings by the court in the U.S. DOJ Search Proceedings for the purpose of this Leave Application under the *Competition Act*.

134. Second and more specifically, the court in the U.S. DOJ Search Proceedings held that "*when a regulator is seeking only injunctive relief, the standard is somewhat relaxed*,"[118] and the plaintiff there was "*not required to show that, but for the defendant's exclusionary conduct the*

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[113] *JAMP* at para 151.
[114] *Competition Tribunal Rules*, SOR/2008-141, Rule 36(2)(d).
[115] *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2013 Comp Trib 4 at para 38.
[116] Pallag Affidavit, Exhibit 6, U.S. Merits Judgement at page 135.
[117] Pallag Affidavit, Exhibit 6, U.S. Merits Judgement at pages 5, 134.
[118] Pallag Affidavit, Exhibit 6, US Merits Judgement at page 215.

anticompetitive effects would not have followed."[119] In contrast, under section 90.1, the assessment of anti-competitive effects does require proof on a "*but for*" basis.[120] Thus, the U.S. court applied a test that is different from what Canadian law requires and its finding of anti-competitive effects is therefore not applicable to the Applicant's Leave Application.

135. Moreover, to the extent that the Tribunal considers the materials from the U.S. DOJ Search Proceedings, they also contradict important parts of the Applicant's anti-competitive effects allegations.

136. The Applicant alleges that the ISA eliminated Apple as a potential competitor in the general search market.[121] As noted above, testimonies from the U.S. DOJ Search Proceedings confirm that Apple never intended to develop its own general search engine.[122] The Applicant did not adduce sufficient credible, cogent and objective evidence to support a *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) that Apple would have been likely to develop its own general search engine and compete with Google (or that it would even have made economic sense for Apple to do do).

137. Therefore, the Applicant has not adduced sufficient credible, cogent and objective evidence to support a *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) that there would be substantially more competition in Canada, but for the ISA. This alone also precludes the granting of leave to bring the Proposed Application under section 90.1.

c. There is Not Sufficient Evidence Regarding the Elements of Section 90.1 for an Agreement between Competitors

138. As his alternative theory for an order under section 90.1(1), the Applicant alleges that Google and Apple are "*potential competitors*" and that the ISA is an agreement between competitors, relying on the extended definition of a "*competitor*" in section 90.1(11).[123]

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[119] Pallag Affidavit, Exhibit 6, US Merits Judgement at page 216.
[120] *TREB FCA*, at paras 82-92; *Tervita*, at paras 50-51.
[121] Proposed Application at paras 53-54.
[122] Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3825:23-25; 3850:21-25; Pallag Affidavit, Exhibit 102, Giannandrea Merits Testimony, 2247:20-21.
[123] Proposed Application at para 49.

139. The Applicant has not adduced sufficient credible, cogent and objective evidence of each of the elements of sections 90.1(1) or 90.1(11) to support the requisite *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) regarding the ISA as an alleged agreement between competitors.

i. There is No Evidence that Google and Apple are "Competitors"

140. The Applicant argues that Apple is a "*potential competitor*" to Google in the general search engine market, relying on section 90.1(11), which defines "*competitor*" to include "*a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement*."[124]

141. In *Tervita*, the Supreme Court of Canada clarified that an assessment of the likelihood of entry by a potential competitor requires consideration of any factor that could influence entry, including the plans and assets of the potential entrant, current and expected market conditions, as well as barriers to entry in the market, among other things.[125] Cautioning against speculative predictions, the court emphasized that the timeframe for entry must be discernible, *i.e.*, there must be evidence of <u>when</u> the party is realistically expected to enter the market in the absence of the conduct.[126]

142. The Applicant offers no such evidence. The Applicant simply makes conclusory assertions that Apple could be a "*potential competitor*" to Google, which significantly falls short of the "*reasonable to believe*" and "*likely to compete*" elements of the definition in section 90.1(11).

143. The Applicant's assertions regarding Apple and Google being "*potential competitors*" are contained in four paragraphs in the Leave Application:

(a) In paragraph 49, the Applicant simply asserts that Apple "*would be positioned to robustly compete*" with Google but for the revenue sharing payments under the ISA, without any further explanation.[127]

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[124] Proposed Application at para 49-52.
[125] *Tervita* at paras 67, 70, 75.
[126] *Tervita* at paras 68, 75.
[127] Proposed Application at para 49.

(b) In paragraph 50, the Applicant asserts that Apple "*stands as a potential competitor to Google in the search engine market*", referencing Apple's "*vast resources and a significant market presence*."[128]

(c) In paragraph 51, the Applicant asserts that "*it is entirely conceivable that Apple could emerge as a formidable competitor to Google*", referencing Apple's revenue, sales and market capitalization.[129]

(d) In paragraph 52, the Applicant references Apple's "*capacity to challenge Google's dominance*" without further elaboration.[130]

144. The Applicant does not allege, let alone explain why capacity, financial resources and market presence alone would be sufficient to make it "*reasonable to believe*" that Apple is "*likely to compete*" by introducing its own general search engine. By the Applicant's logic, any well-capitalized company in a similar industry should be considered a potential competitor. However, such speculative assertions are inconsistent with the plain meaning of section 90.1(11) as well as contrary to the Supreme Court's guidance in *Tervita* noted above.

145. In fact, to the extent that the Tribunal considers the materials from the U.S. DOJ Search Proceedings, those materials confirm that Apple never intended (and still does not intend) to develop a general search engine that competes with Google.[131]

146. With or without consideration of the testimony of Apple witnesses in the U.S. DOJ Search Proceedings, the Applicant has not adduced sufficient credible, cogent and objective evidence to support a *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) that Apple was or would be "*likely*" to compete with Google in respect of general search engines within a discernible timeframe in the absence of the ISA, and has offered no reason as to why such belief would be "*reasonable*". This alone also precludes the granting of leave to bring the alternative Proposed Application under section 90.1.

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[128] Proposed Application at para 50.
[129] Proposed Application at para 51.
[130] Proposed Application at para 52.
[131] Chiu Affidavit, Exhibit 1, Cue Remedies Testimony, 3825:23-25; 3850:21-25; Pallag Affidavit, Exhibit 102, Giannandrea Merits Testimony, 2247:20-21.

ii. There is Insufficient Evidence of Anti-Competitive Effects in a Relevant Market

147. The lack of sufficient evidence regarding anti-competitive effects for the Applicant's primary section 90.1 claim using the section 90.1(1.01) expansion applies equally to the Applicant's alternative section 90.1(1) claim based on the extended definition of a potential competitor under section 90.1(11) (see Part IV.1.b.ii above).

2. The Proposed Application Seeks to Address Public Interest Issues Unrelated to the Act's Purpose

148. The Applicant does not articulate a clear public interest related to the purpose of the Act — to maintain and encourage competition in Canada. Rather, he claims to be concerned about "*the openness and accessibility of the Internet*" and the "*public policy concerns involving consumer privacy*".[132] These concerns fall outside of the purpose of the Act. There are other legislative and regulatory frameworks that specifically deal with them.

149. It is not in the public interest for the Tribunal to permit this Proposed Application to proceed when it seeks to advance non-competition public interests, but fails to articulate any competition-related public interest. This alone also precludes the granting of leave to bring the alternative Proposed Application under section 90.1.

3. The Proposed Application Relates to Matters Already Subject to Other Actions

150. Two proposed class actions against Apple based on substantially similar factual allegations as those raised in the Proposed Application have previously been commenced in British Columbia and in Québec.[133] Both allege that the ISA between Google and Apple is an agreement between (likely potential) competitors and seek damages pursuant to sections 36 (the private right of action) and section 45 (the conspiracy offence).

151. The Proposed Application will request that the Tribunal order a monetary award under section 90.1(10.1) to be distributed among the Applicant and other affected persons. The proposed

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[132] Memorandum of Fact and Law of the Applicant dated June 20, 2025 at paras. 29, 110.
[133] *Spark Event Rentals Ltd. v Apple Inc. and Apple Canada Inc.*, No-S-218036; *Oli & Eve Maison de Coiffure Inc. c. Google LLC et al.*, No: 500-06-001163-217.

class actions in British Columbia and in Québec also seek monetary awards through the class action process.

152. Section 90.1(10) provides that no application under section 90.1 can be brought against a person on the basis of facts substantially the same as the facts on the basis of which proceedings have been commenced against that person under the conspiracy offence in section 45 of the Act. Therefore, the parallel proceedings already commenced in British Columbia and Québec based on substantially similar allegations preclude the commencement of Applicant's proposed section 90.1 proceeding.

153. Even if the Tribunal were to conclude that the formal requirements of the double jeopardy rule in section 90.1(10) are not satisfied, the duplication, complexity and inefficiencies of multiple proceedings that would arise if the Proposed Application is permitted to proceed would be contrary to the public interest.

4. The Public Interest is Not Served by a Proposed Application that Would Revisit a Discontinued Investigation by the Commissioner

154. The Commissioner has certified that he does not have an ongoing inquiry in respect of the subject matter of the Proposed Application.[134] The Commissioner also advised the Tribunal that he previously discontinued an inquiry that addressed the subject of the Proposed Application and specifically referenced the Position Statement he released when that inquiry was discontinued.[135]

155. The Position Statement indicates that the inquiry examined, among other things, Google's distribution agreements with hardware manufacturers and software developers whereby Google's search engine would be the default search engine used for queries, with the ISA with Apple being one such agreement. The Commissioner consulted with industry and economic experts and conducted over 130 interviews with a broad range of market participants. The Commissioner also analyzed a substantial volume of information collected from various stakeholders, as well as documents and information produced by Google in response to an order under section 11 of the Act. In addition, the Commissioner consulted with international counterparts, including the US

[134] Certification of the Commissioner Pursuant to Section 103.1, June 30, 2025, CT-2025-004, #6.
[135] Certification of the Commissioner Pursuant to Section 103.1, June 30, 2025, CT-2025-004, #6; Position Statement. The Leave Application did not reference this Position Statement.

Federal Trade Commission and the European Commission. The Commissioner was careful to note that his inquiry was focused on the facts and evidence related to the alleged conduct affecting the Canadian marketplace.[136]

156. The Commissioner ultimately discontinued that inquiry because he concluded that the conduct at issue did not result in a substantial lessening or prevention of competition in Canada:

> *The evidence obtained over the course of the investigation supports the conclusion that Google competes with other search engines for the business of hardware manufacturers and software developers. Other search engines can and do compete for these agreements so they appear as the default search engine. The Bureau analyzed data related to the use by hardware manufacturers and software developers of multiple search engines and concluded that the switching activity over time was significant and that these parties are able, for example, to ship multiple devices with different pre-loaded search engine defaults. Finally, consumers can and do change the default search engine on their desktop and mobile devices if they prefer a different one to the pre-loaded default. Accordingly, the Bureau concluded that Google's distribution agreements have not resulted in a substantial lessening or prevention of competition in Canada.*[137]

157. In reaching this conclusion, the Commissioner committed to active ongoing monitoring of Google and market and indicated that he "*will not hesitate to take appropriate action*."[138]

158. While section 103.1(11) of the Act states that the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any prior action when considering a leave application, this appears to be an instruction related to the assessment of the potential merits of a proposed private proceeding. Here, the Tribunal need not draw any inference from the Commissioner's prior actions or inactions regarding the potential merits of the Proposed Application, because the Applicant has failed to adduce sufficient credible, cogent and objective evidence to support a *prima facie* case (or in the alternative, a *bona fide* belief by the Tribunal) regarding his allegations.

159. In the absence of sufficient supporting evidence adduced by the Applicant, the Apple Respondents submit that the Tribunal is entitled to consider the fact that the Commissioner has

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[136] Position Statement.
[137] Position Statement.
[138] Position Statement.

already dedicated years of investigative effort, did not find a substantial prevention or lessening of competition in Canada, and did not find sufficient concern to justify enforcement actions in the years since.

160. Under these circumstances, it cannot be in the public interest to allow a potentially lengthy and complex proceeding on similar issues regarding similar market activity.

5. The Applicant Has Not Shown that He Can Effectively Litigate the Proposed Application to Its Conclusion

161. For the reasons set out above, in assessing the suitability of an applicant under the Public Interest Test, the Tribunal must be satisfied that the applicant could effectively take on a public interest mandate and litigate the proposed application to its conclusion in the public interest.

162. The Applicant states that he is "*a Canadian who routinely uses the internet for personal affairs*" who is "*concerned with being faced with an online ecosystem whereby only one player dominates the method available and utilized by similarly situated consumers to obtain information*".[139] He argues that he "*has an interest in the general search engine market operating efficiently and in the interests of consumers*."[140]

163. Simply asserting that he has these superficial interests does not make the Applicant suitable for leading a public interest proceeding.

164. The Leave Application has not provided any evidence or submission in respect of any of the factors regarding the suitability of the Applicant to lead the litigation of the Proposed Application in the public interest:

(a) The Applicant has provided no evidence related to the Applicant's relevant experience, resources, ability to lead this litigation related to a public interest in competition, or any history for advocating for the public interest as it relates to competition;

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[139] Martin Affidavit at para 7.
[140] Memorandum of Fact and Law of the Applicant at para 113.

(b) The Applicant has provided no evidence to assure the Tribunal that the Applicant does not have private interests that conflict with the public interest or the interests of other persons "*affected*" by the alleged conduct who could be entitled to share in the monetary award that he claims;

(c) The Applicant has not provided is a plan, let alone a workable plan, for advancing a lengthy and complex litigation proceeding in the public interest;

(d) The Applicant has not provided any information about any arrangement he may have with his legal counsel and any litigation funders; and

(e) The Applicant has not identified, or provided a way for identifying, the persons or groups who are believed to be affected by the conduct and could be entitled to share in the requested monetary award.

165. Without a clear articulation of any of the above factors, the Tribunal could not be satisfied that the Applicant is suitable for leading this proceeding in the public interest. On this basis alone, the Tribunal should also reject the Leave Application.

D. If Leave is Granted, the Scope of the Proposed Application Should be Narrowed

166. In the alternative, if the Tribunal grants leave for the Applicant to proceed with the Proposed Application under section 90.1, the Tribunal should impose terms to limit the time period in which the relevant provisions of section 90.1 have been in force:

(a) Section 90.1(1) regarding agreements between competitors came into force on March 15, 2010;

(b) Section 90.1(1.01) regarding agreements between non-competitors came into force on June 20, 2024; and

(c) Section 90.1(10.1) providing for monetary award came into force on June 20, 2025.

Part V. ORDER SOUGHT

167. For the reasons set out above, the Apple Respondents request that the Tribunal deny the Applicant's Leave Application to commence his Proposed Application for an order under section 90.1 of the Act in its entirety.

168. In the alternative, the Apple Respondents request that the Tribunal deny the Applicant's Leave Application as against the Apple Respondents.

ALL OF WHICH IS RESPECFULLY SUBMITTED this 2nd day of September, 2025

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SCHEDULE "A"

LIST OF AUTHORITIES

A. Legislation

1. *Competition Act*, RSC, 1985, c. C-34.
2. *Fall Economic Statement Implementation Act, 2023*, SC 2023, c. 15.
3. *Budget Implementation Act, 2022, No. 1*, SC 2022, c. 10.
4. *Affordable Housing and Groceries Act*, SC 2023, c. 31.
5. *Class Proceedings Act*, 1992, SO 1992, c 6.
6. *Securities Act*, RSO 1990, c. S.5.
7. *Securities Act*, RSA 2000, c. S-4.
8. *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.).
9. *Federal Courts Rules*, SOR98-106.
10. *Competition Tribunal Rules*, SOR/2008-141.

B. Jurisprudence

11. *Alexander Martin v Alphabet Inc., Google LLC et al*, 2025 Comp Trib 12.
12. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.
13. *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 8.
14. *Secure Energy Services Inc v Canada (Commissioner of Competition)*, 2023 FCA 172.
15. *Commissioner of Competition) v Secure Energy Services Inc*, 2022 FCA 25, [2022] 2 FCR 430.
16. *Sears Canada Inc v Parfums Christian Dior Canada Inc and Parfums Givenchy Canada Ltd*, 2007 Comp Trib 6.
17. *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28.
18. *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp Trib 4.
19. *Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp Trib 10.

20. *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp Trib 1.

21. *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp Trib 38.

22. *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27.

23. *Committee for the Equal Treatment of Asbestos Minority Shareholders*, 2001 SCC 37.

24. *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339.

25. *Ecology Action Centre v. Nova Scotia (Environment and Climate Change)*, 2023 NSCA 12.

26. *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship*), 2017 FC 1131.

27. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1290.

28. *Coalition for Justice and Human Rights Ltd v. Edmonton (City)*, 2024 ABKB 26.

29. *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46.

30. *Christine Riefa Class Representative Limited v. Apple et. al.*, 2025 CAT 5 (UK Competition Appeal Tribunal).

31. *Catalyst Capital Group Inc*., 2016 ONSEC 14.

32. *MI Developments Inc.*, 2009 ONSEC 47.

33. *Badesha v. Cronos Group*, 2021 ONSC 4346.

34. *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 6.

35. *Kobo Inc v The Commissioner of Competition*, 2015 Comp Trib 14.

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39. *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 13.

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APPENDIX B

Competition Act, R.S.C., 1985 c. C-34 Provisions Referenced

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.

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

90.1 (1) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that an agreement or arrangement or a proposed agreement or arrangement between persons of whom two or more are competitors prevents or lessens, has prevented or lessened or is likely to prevent or lessen competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

90.1 (1) Dans le cas où, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, a eu cet effet ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance:

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

(1.01) If the Tribunal finds that a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market, it may make an order under subsection (1) even if none of the persons referred to in that subsection are competitors.

(1.01) S'il conclut que l'un des objets importants de l'accord ou de l'arrangement — ou d'une partie de celui-ci — est d'empêcher ou de diminuer la concurrence dans un marché, le Tribunal peut rendre l'ordonnance visée au paragraphe (1) même si aucune des personnes visées à ce paragraphe n'est un concurrent.

(10) 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 has been made under section 76, 79 or 92.

(10) 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 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 rendue contre cette personne en vertu des articles 76, 79 ou 92.

(10.1) If the Tribunal makes an order under subsection (1) as the result of an application by a person granted leave under section 103.1, it may also order the person against whom the order is made to pay an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate.

(10.1) S'il rend une ordonnance en vertu du paragraphe (1) à la suite d'une demande présentée par une personne autorisée en vertu de l'article 103.1, le Tribunal peut également ordonner à toute personne visée par l'ordonnance de payer une somme — ne pouvant excéder la valeur du bénéfice tiré du comportement visé par l'ordonnance — devant être répartie, de la manière qu'il estime indiquée, entre le demandeur et toute autre personne touchée par le comportement.

(11) In subsections (1) and (1.01), ***competitor*** includes a person who it is reasonable to believe would be likely to

(11) Aux paragraphes (1) et (1.01), concurrent s'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement

compete with respect to a product in the absence of the agreement or arrangement.

concurrence à une autre personne à l'égard d'un produit en l'absence de l'accord ou de l'arrangement.

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 74.1, 75, 76, 77, 79 or 90.1. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 74.1, 75, 76, 77, 79 ou 90.1. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

(7) The Tribunal may grant leave to make an application under section 75, 77, 79 or 90.1 if it has reason to believe that the applicant is directly and substantially affected in the whole or part of the applicant's business by any conduct referred to in one of those sections that could be subject to an order under that section or if it is satisfied that it is in the public interest to do so.

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77, 79 ou 90.1 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans tout ou partie de son entreprise en raison de l'existence de l'un ou l'autre des comportements qui pourraient faire l'objet d'une ordonnance en vertu de l'un de ces articles ou s'il est convaincu que cela servirait l'intérêt public.

(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.

(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.

***Competition Tribunal Rules*, SOR/2008-141 Rules Referenced**

36 (1) An application shall be made by filing a notice of application.

36 (1) La demande est introduite par dépôt d'un avis de demande.

(2) A notice of application shall be signed by or on behalf of the applicant and shall set out, in numbered paragraphs,

(2) L'avis de demande est signé par le demandeur ou en son nom, est divisé en paragraphes numérotés et comporte les renseignements suivants:

(a) the sections of the Act under which the application is made;

a) les dispositions de la Loi en vertu desquelles la demande est présentée;

(b) the name and address of each person against whom an order is sought;

(c) a concise statement of the grounds for the application and of the material facts on which the applicant relies;

(d) a concise statement of the economic theory of the case, if any, except in the case of an application made under Part VII.1 of the Act;

(e) the particulars of the order sought; and

(f) the official language that the applicant intends to use in the proceedings.

b) les nom et adresse de chacune des personnes contre lesquelles une ordonnance est demandée;

c) le résumé des motifs de la demande et des faits importants sur lesquels se fonde le demandeur

d) un énoncé concis de la thèse économique de l'affaire, le cas échéant, sauf s'il s'agit d'une demande faite aux termes de la partie VII.1 de la Loi;

e) les détails de l'ordonnance demandée;

f) la langue officielle que le demandeur entend utiliser dans l'instance.

115 (1) An application under subsection 103.1(1) of the Act for leave to make an application under section 75 or 77 of the Act shall be made by filing an application for leave including an affidavit setting out the facts in support of the proposed application, a proposed notice of application and a memorandum of fact and law.

115 (1) La demande visée au paragraphe 103.1(1) de la Loi en vue d'obtenir la permission de présenter une demande au titre des articles 75 ou 77 de la Loi se fait par le dépôt d'une demande de permission qui comprend un affidavit faisant état des faits sur lesquels se fonde la demande proposée, l'avis de demande proposé et un mémoire des faits et du droit.

Federal Courts Rules, SOR/98-106 Rules Referenced

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it:

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas:

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if:

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du

members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.