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CT-2024-010

OTTAWA, ONT.

153

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

REVISED SUPPLEMENTARY MOTION RECORD

VOL 1 of 11

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August 22, 2025

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THE COMPETITION TRIBUNAL
IN THE MATTER OF the Competition Act, R.S.C. 1985 C-34

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION,

Applicant,

- and -

GOOGLE CANADA CORPORATION AND GOOGLE LLC,

Respondents.

CROSS-EXAMINATION of DR. STEVEN TADELIS,
taken on Tuesday, July 29, 2025, via
Veritext Remote Platform at 12:00 p.m.

Job No: ON 7504280

Reported by: Lisa M Barrett, RPR, CRR, CRC, CSR

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A P P E A R A N C E S :

(All parties appeared remotely)

Alexander M. Gay Counsel for the Applicant,

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McLean, Christina Pan, Mallory Kelly

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DR. STEVEN TADELIS: AFFIRMED 8

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**The following list of undertakings, advisements and
refusals is meant as a guide only for the assistance of
counsel and no other purpose**

INDEX OF UNDERTAKINGS

The questions/requests undertaken are noted by U/T and appear
on the following pages: None.

INDEX OF ADVISEMENTS

The questions/requests taken under advisement are noted by U/A
and appear on the following pages: None.

INDEX OF REFUSALS

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1 --- Commencing at 12:04 p.m.

2 PROFESSOR STEVEN TADELIS: AFFIRMED

3 CROSS-EXAMINATION BY MR. THOMSON:

4 1 Q. Do you have a copy with you
5 of your report?

6 A. Yes, I do. I have an unmarked
7 copy of my report with me.

8 2 Q. That's fine. And does that
9 copy of your report include the appendices to
10 it?

11 A. No, I only copied the report.
12 I do have access to a PDF that is
13 also unmarked on my iPad or on my laptop.

14 3 Q. Presumably we can pull the
15 report up with the appendices, as well, if we
16 need it.

17 Alex, I propose to mark documents
18 that I refer to during the examination
19 individually as exhibits; is that acceptable?

20 MR. GAY: That's acceptable. It
21 works just fine.

22 BY MR. THOMSON:

23 4 Q. Thank you. So, Professor
24 Tadelis, I'm going to deal with four matters
25 today in sequence, just to give you a roadmap.

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1 So the issue of your background and
2 experience being the first issue.

3 The second being the determination
4 of optimal penalties in an abuse of dominance
5 case of this nature and then I'm going to deal
6 with the probability of detection, and then I'm
7 going to deal with your evidence concerning how
8 the Tribunal will exercise its discretion in
9 imposing sanctions upon Google, if liability is
10 found.

11 So, let me start with the first
12 issue which is your background and experience.
13 Of course, your report summarizes your
14 background and qualifications to express the
15 opinions set out in your report?

16 A. That is correct.

17 5 Q. And we can proceed, can we
18 not, and the Tribunal can proceed, can it not,
19 on the basis that your report summarizes
20 accurately your background and your experience
21 and your qualifications?

22 A. That is correct.

23 6 Q. And with respect to your
24 academic specialty, if you look at paragraph 2
25 of your report --

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1 A. I'm there.

2 7 Q. -- you say that your academic
3 specialty lies in economics, including the
4 economic and statistical analysis topics in
5 e-commerce and economics of the internet,
6 industrial organization and microeconomics?

7 A. Yes, that is correct.

8 8 Q. And you go on to say --
9 sorry, I don't mean to talk over you and if I
10 am, it's because there is a bit of a gap
11 between you and me.

12 A. I totally understand that, sir.
13 No worries.

14 9 Q. Please understand that if I
15 am interrupting you. It's not intentional.

16 I don't practice that way, so I'll
17 apologize in advance if I do you should have no
18 hesitation to put your hand in the air and just
19 tell me you're not finished.

20 A. I appreciate that, Mr. Thomson.

21 10 Q. You go on to in paragraph 2
22 to say that you have expertise in the
23 economics of institutions, economic analysis
24 for business decisions, including those
25 related to digital advertising and marketing

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1 strategies, pricing and fee-setting, contract
2 theory, game theory and strategic sourcing.

3 I assume that's all fair and
4 accurate.

5 A. That is correct, sir.

6 11 Q. And you would accept that
7 there is no specific mention made in that part
8 of your report of having specific expertise in
9 the determination of optimal antitrust
10 penalties?

11 A. Under the category of
12 industrial organization, subsection is
13 antitrust, and I have been retained as an expert
14 in several antitrust cases in the U.S.

15 I've been deposed and testified
16 on antitrust matters, so I do view myself as
17 an expert in antitrust.

18 I am not familiar with a
19 sub-specialty of optimal penalty calculations.
20 I find that just to be part of antitrust
21 economics.

22 12 Q. So come back to my question:
23 You will agree, as an entirely neutral and
24 independent expert, that there's no specific
25 mention made in this part of your report of

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1 you having specific expertise in determining
2 optimal antitrust penalties, correct?

3 A. I view that as falling under
4 the category of industrial organization and,
5 hence, did not see a reason to offer a specific
6 categorization, especially since the calculation
7 of optimal penalties, to the best of my
8 knowledge, is not considered a sub-specialty of
9 this field.

10 13 Q. All right. So, Professor,
11 I'm going to come back. I'm going to ask the
12 question one last time and I'm going to warn
13 you, at the outset, that I will be reading
14 these exchanges back to the Tribunal when it
15 comes to your qualifications and your ability
16 to testify as an independent expert, so let's
17 try it one last time and give you one last
18 shot at this: There is no specific mention
19 made in this part of your report of you having
20 any specific expertise in determining optimal
21 antitrust penalties, correct?

22 A. That is not mentioned -- as I
23 explained earlier, that's not a well-defined
24 subsection of what I refer to as industrial
25 organization, which includes antitrust

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1 economics. That is correct.

2 14 Q. Let me -- let me pull up your
3 faculty profile at the Haas School of
4 Business, at the University of Berkeley. I'm
5 going to ask my colleague to pull that up,
6 please. Tab 1D.

7 Are you able to see that on your
8 screen?

9 A. Yes, I see that.

10 15 Q. Okay, basic building blocks,
11 you are, as I understand it, a Professor of
12 Economics, Business and Public Policy at the
13 Haas School of Business?

14 A. That is correct, sir.

15 16 Q. The Haas School of Business
16 is one of the faculties at the University of
17 California Berkeley?

18 A. That would be a fair
19 description, sir.

20 17 Q. And you are no doubt aware
21 that the Haas School of Business maintains a
22 website.

23 A. I am aware of that, sir.

24 18 Q. One element of that website
25 is to display profiles of members of the

PUBLIC

14

1 faculty of the Haas School of Business.

2 A. That is correct.

3 19 Q. You would be aware that your
4 profile appears as part of that component of
5 the School's website?

6 A. Yes, I do.

7 20 Q. And if we take a look at your
8 profile, you recognize the handsome gentleman
9 whose picture appears under the heading
10 "Steven Tadelis"?

11 A. Handsome would be in the eyes
12 of the beholder, but I do recognize myself, sir.

13 21 Q. Okay. All right. Good for
14 you.

15 Am I correct in assuming you played
16 a role in the creation and posting of your
17 profile on this portion of the website?

18 A. I provided a CV, an academic
19 CV. Beyond that, I was not involved in this
20 particular profile.

21 22 Q. All right. You have reviewed
22 the profile from time to time, to ensure that
23 it fairly and accurately describes your
24 background and your areas of expertise?

25 A. It's been a while. I'm sure I

PUBLIC

15

1 must have looked at it in the past when it was
2 first put up.

3 I have not paid much attention to
4 it for a while.

5 23 Q. Okay, if we look at the
6 headline at the top of the second page --

7 A. Yes I see that.

8 24 Q. -- the headline describes you
9 as the leading expert on e-commerce and
10 internet economics?

11 A. That is correct.

12 I would just like to clarify that
13 the term "expert" here is not used in the way
14 it would be used as an expert witness, but as
15 my academic expertise that the Haas School
16 decided that they would like to emphasize to
17 the world.

18 25 Q. Okay and you will see that
19 the profile goes on to describe you under the
20 heading "About" and has a heading about --
21 just keep scrolling down, "Expertise and
22 research interest including e-commerce,
23 competition and industrial organization,
24 procurement, contracting, incentives and
25 economics of organizations, theory of the firm

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1 and game theory."

2 A. That's correct.

3 26 Q. And then describes in the
4 pages that follow several publications you've
5 been involved in.

6 A. Yes, I see that as well.

7 27 Q. And you would agree with me,
8 same question I asked you a moment ago that
9 this description of you in your profile on the
10 website of the Haas School of Business makes
11 no specific mention of your involvement in
12 optimal antitrust penalties?

13 A. That is correct.

14 28 Q. Now let's mark that, I guess,
15 as the first exhibit, so that will be
16 Exhibit 1.

17 --- EXHIBIT NO. 1: Professor
18 Tadelis' Berkeley Haas Faculty
19 Profile

20 BY MR. THOMSON:

21 29 Q. Now let me take you to your
22 CV that you included as part of your report.

23 Again, I don't know what you have
24 available to you. We can pull this up if you'd
25 like.

PUBLIC

17

1 If you look at paragraph 6 of your
2 report you say:

3 "A copy of my CV is
4 provided in Appendix A."

5 A. Yes.

6 30 Q. (Reading):

7 "And includes a list of all
8 publications I have authored in
9 peer-reviewed journals."

10 A. That is correct.

11 31 Q. And it goes on to to say:

12 "My CV also includes a list
13 of all cases in which during
14 the previous four years I've
15 testified as an expert at trial
16 or by deposition."

17 I take it that is a correct
18 statement.

19 A. Yes, that is a correct
20 statement.

21 32 Q. So if turn to your CV and I
22 want to focus on several aspects of it, if I
23 may.

24 Let me start with your work
25 experience outside the university setting. So

PUBLIC

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1 if you look at your CV, it's Appendix A. One of
2 my colleagues will pull that up. And the first
3 part of the CV has a heading called
4 "Appointments."

5 A. Yes it does, sir.

6 33 Q. And we can agree, can we not,
7 that in the period since you obtained your
8 Ph.D. in economics in 1997 you've worked at
9 two private sector companies or organizations?

10 A. That is correct, sir.

11 34 Q. So the first was as the
12 Senior Director and distinguished economist at
13 a firm called eBay Research Labs in San Jose
14 California, in the period from August of 2011
15 to August of 2013?

16 A. The firm is actually eBay
17 Incorporated. EBay Research Labs was the
18 organization within eBay that I belonged to at
19 the time.

20 35 Q. Right. And subject to that
21 qualification, you agree with my statement?

22 A. Yes.

23 36 Q. Okay, and then second you
24 also worked as the Vice-president of Economics
25 and Market Design and the Amazon Scholar at

PUBLIC

19

Amazon, Inc. in Seattle, Washington in the
period from July, 2016 to February of 2021.

A. Yes, that is correct.

Physically I was not in Seattle for the whole
period, but the company is headquartered in
Seattle.

37 Q. Let me start with your work
at eBay. Am I correct that while you were at
eBay in the period from August of 2011 to
August of 2013 you hired and led a team of
research economists?

A. That is correct.

38 Q. And as understand it, you
paid particular attention to five matters, so
let me just give you my list.

First to creating better matches
between buyers and sellers.

A. That was one of the areas that
we focussed on.

39 Q. Second, reducing market
functions by increasing trust and safety in
eBay's marketplace?

A. Was that "friction," sir?

40 Q. Sorry, frictions, yes.

A. Yes, that is another area that

PUBLIC

20

1 We worked on.

2 41 Q. Third, understanding the
3 underlying value of different advertising and
4 marketing strategies?

5 A. Yes, that is correct.

6 42 Q. Fourth, evaluating how buyers
7 behave in online auctions?

8 A. Yes, that is correct.

9 43 Q. Fifth, exploring the market
10 outcomes associated with different pricing
11 structures?

12 A. Yes, those are five, among
13 several other areas of work, but those were with
14 the most prominent that I was involved in.

15 44 Q. And if we look at paragraph 4
16 of your report, you describe the very matters
17 that I've just taken you through, where you
18 say:

19 "During the 2011 and 2013
20 academic years I was on leave
21 of absence from the Haas School
22 of Business to serve as Senior
23 Director and Distinguished
24 Economist at EBay Research Labs
25 where I hired and led a team of

PUBLIC

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1 research economists focused on
2 the economics of e-commerce
3 with particular attention..."

4 And I've now read you the list of
5 the five matters that you set out in paragraph
6 4, so that's a fair and accurate description in
7 paragraph 4 of the work that you performed while
8 you were with eBay between 2011 and 2013?

9 A. Yes, with a proviso to be
10 somewhat, you know, short, rather than writing a
11 manifesto on things I did at eBay.

12 45 Q. You will accept that you made
13 no specific mention in this part of your
14 report to paying particular attention to
15 optimal antitrust penalties, correct?

16 A. That is correct, sir.

17 46 Q. And then let me turn to your
18 work at Amazon. You described this in
19 paragraph 5 of your report.

20 Am I right that during the period
21 that you were employed at Amazon between 2016
22 and 2021, you led a team of economists who
23 applied economics and data science to optimize
24 operations, pricing and cost allocations?

25 A. Among other things, yes.

PUBLIC

22

1 47 Q. I also helped Amazon use a
2 wide range of applied research in economics
3 and market design?

4 A. Among other things, yes.

5 48 Q. You will accept, will you
6 not, sir, that you made no specific mention in
7 this portion of your report to working on or
8 specializing in optimal antitrust penalties
9 while you worked at Amazon?

10 A. Optimal penalties as applied to
11 antitrust, that would be correct.

12 There were other types of
13 penalties that were involved in the market
14 design. Penalties of over using space, et
15 cetera. I'm, unfortunately, not able to go
16 into too many details because of
17 confidentiality, but the underlying economic
18 analyses that Dr. Hylton lays out, as what he
19 calls the Chicago view are very much at the
20 heart of any economic calculation of
21 incentives, be them penalizing or promoting.

22 49 Q. Let me come back to my
23 question again: You made no specific mention
24 in this portion of your report to working on
25 or specializing in the determination of

PUBLIC

23

1 optimal antitrust penalties, correct?

2 A. That is correct.

3 50 Q. Now let me turn to your list
4 of publications.

5 So if we go to your CV and look at
6 page 31, you will see a lengthy list of
7 publications that you have been involved in or
8 authored, starting with journal Articles on page
9 31 and then on page 33, book chapters and
10 invited papers. Then if we go to page 34 you
11 list seven or eight working papers or papers
12 under review and, finally, you list two books on
13 page 34.

14 A. Is there a question, sir?

15 51 Q. Am I correct?

16 A. Yes, you are correct.

17 52 Q. And with respect to the two
18 books, the first was published in 1996 and was
19 entitled "Solutions to Exercise: Microeconomic
20 Theory," correct?

21 A. That is correct.

22 53 Q. The second was published more
23 recently in 2012 and it was entitled "Game
24 Theory an Introduction."

25 A. That is correct.

PUBLIC

24

1 54 Q. Am I right that neither of
2 these books focused on or addressed the
3 determination of optimal antitrust penalties?

4 A. That is correct.

5 55 Q. And we've taken a careful
6 look at all of the publications listed in your
7 CV, and am I correct that to cut through this,
8 none of your journal Articles, your book
9 chapters, your invited papers, your working
10 papers or papers under review, focused on the
11 determination of optimal antitrust penalties?

12 A. That is correct.

13 56 Q. Now if you look at Appendix B
14 to your report -- first, let me start with
15 paragraph 6 of your report which takes us to
16 Appendix, so in paragraph 6 of your report you
17 state in the last sentence that:

18 "In Appendix B I provide a
19 list of all documents I relied
20 upon in my report."

21 A. Yes, that is correct.

22 57 Q. And I take it that's a fair
23 and accurate statement.

24 A. To the best of my knowledge,
25 yes.

PUBLIC

25

1 58 Q. Okay, and if we look at
2 Appendix B, which one of my colleagues can
3 pull up. Happy to have you flip through this,
4 if you like. I take it you would agree with
5 me that Appendix B is roughly two and a half
6 pages in length?

7 A. Yeah, about two and a third.

8 59 Q. Okay, and you would accept,
9 would you not, Professor, there is no
10 reference in Appendix B to any of your
11 previous publications?

12 A. That is accurate.

13 60 Q. Now, we can agree, can we
14 not, that none of your previous papers, books,
15 of the matters we've just gone through, focus
16 on Canadian antitrust law, cases or matters?

17 A. That is correct, sir.

18 61 Q. Including, of course,
19 previous decisions of the Competition Tribunal
20 in Canada or the statutory framework within
21 which the Competition Tribunal operates,
22 correct?

23 A. That is correct, sir.

24 62 Q. Now, let me discuss with you
25 briefly your previous experience as an expert

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26

1 witness.

2 As we've already gone through
3 you've listed in your CV all of the cases in the
4 last four years, that you've testified in as an
5 expert witness, either at trial or by way of
6 deposition?

7 A. That is correct, sir.

8 63 Q. And if you turn up your CV,
9 please, and look at Appendix A at page 41, you
10 will find a title in your CV entitled, "Expert
11 witness experience" and the first part of it
12 is depositions and then the second part on the
13 next page is testimony.

14 A. That is correct.

15 64 Q. As I understand, this list,
16 at least, you've been examined via deposition
17 in, I think, six cases or so in the last four
18 years?

19 A. That sounds about right.

20 65 Q. And if we turn to the next
21 page, page 42, you've also testified at trial
22 in three cases --

23 A. That is correct.

24 -- (overspeaking) --

25 66 Q. -- given testimony --

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27

1 -- (overspeaking)

2 A. Yes, sir.

3 67 Q. And what I'm interested in is
4 Canada. Am I right that the only Canadian
5 case that you refer to in this portion of your
6 CV is a case called, "Paid Search Engine Tools
7 LLC vs Google Canada Corporation."

8 A. That is correct.

9 68 Q. And am I correct that that
10 was a patent infringement case involving a
11 patent designed to support advertisers in
12 managing their bids for online advertising on
13 paid search engines?

14 A. Yes, that is correct. I
15 supported Google in that case.

16 69 Q. And if we pull up the
17 decision of the trial judge in that case,
18 Justice McDonald, who you appeared before --
19 let's pull that up, please.

20 Here you will find a copy of the
21 decision of Justice McDonald, Madam Justice
22 McDonald in Fredricton New Brunswick, issued on
23 January 12th of 2022 in the case that you
24 testified in.

25 A. Yes, I see that.

PUBLIC

28

1 70 Q. And am I correct you did, in
2 fact, appear before Justice McDonald at trial
3 on this case?

4 A. Yes, I did, sir.

5 MR. THOMSON: Let's mark this as
6 Exhibit 2.

7 --- EXHIBIT NO. 2: Decision of
8 Justice McDonald in Paid Search
9 Engine Tools, LLC v. Google dated
10 January 12, 2022.

11 BY MR. THOMSON:

12 71 Q. Don't need to spend a lot of
13 time on this, but in a nutshell am I right
14 that Paid Search Engine owned a Canadian
15 patent entitled "Paid Search Engine Bid
16 Management" for an invention described as
17 management of advertising expenses and online
18 media?

19 A. I don't recall the exact words,
20 but those seem in the ballpark to me.

21 72 Q. Look at paragraph 2 of
22 Justice McDonald's decision where Her Honour
23 says:

24 "The plaintiff, Paid Search
25 Engine tools... owns Canadian

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1 Patent No '167 titled 'Paid
2 Search Engine Bid Management'
3 for an invention described as
4 'Management of advertising
5 expenses in online media'."

6 I take it you have no reason to
7 dispute that summary of the case.

8 A. Not at all.

9 73 Q. And you are aware that Paid
10 Engine sued Google for alleging infringing
11 that patent?

12 A. Yes.

13 74 Q. And I believe you just
14 confirmed you testified in this case as an
15 expert witness for Google?

16 A. That is correct.

17 75 Q. You would accept readily, I
18 am sure, this case did not involve the
19 determination of optimal antitrust penalties?

20 A. That is correct.

21 76 Q. You are aware, no doubt, that
22 Google prevailed in this case and the
23 Plaintiff's action was dismissed.

24 A. Yes, I do.

25 77 Q. And are you aware that your

PUBLIC

30

1 evidence was actually commented on by Justice
2 McDonald in her decision?

3 A. Yes, I am.

4 78 Q. If you look at paragraph 59
5 of the decision, please, Justice McDonald says
6 this:

7 "Steven Tadelis was
8 qualified as an expert
9 economist with expertise in the
10 economics of institutions,
11 economic analysis for business
12 decisions, including those
13 related to digital advertising
14 and marketing strategies,
15 contract theory, strategic
16 sourcing and pricing, online
17 auctions and pricing
18 structures. Dr. Tadelis
19 provided one report dated
20 April 7, 2021. I have concerns
21 about the objectivity of his
22 report, as it was revealed in
23 his oral evidence that a
24 consulting firm, Analysis
25 Group, was heavily involved in

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1 the preparation of his report.

2 He was also selective in the

3 Google information he relied

4 upon." [As read.]

5 So you became aware of those

6 findings shortly after they were made by Justice

7 McDonald, when this decision was rendered in

8 January of 2022?

9 A. Yes, that is correct.

10 79 Q. Okay, am I correct this is
11 the one and only case you have testified in in
12 Canada?

13 A. That is correct, sir.

14 80 Q. Now, am I correct that having
15 reviewed your CV in considerable detail that
16 you are not a lawyer?

17 A. That is correct, sir.

18 81 Q. You've never attended at or
19 graduated from an accredited law school either
20 in the United States or elsewhere?

21 A. That is correct.

22 82 Q. You've never been called to
23 the bar or admitted to practice law in any
24 state or federally, correct?

25 A. No, I have not.

PUBLIC

32

1 83 Q. And you would readily agree
2 that you have no legal training or
3 qualifications in Canada?

4 A. That is absolutely correct.
5 Neither in Canada nor elsewhere.

6 84 Q. Now, let me -- just to reach
7 a consensus on your duties before we move
8 forward, show you the acknowledgment of expert
9 witness duties that you executed when you
10 filed your report in this case on July 4th of
11 2025 and ask you to turn that up or I can ask
12 my colleague to turn it up.

13 It is Appendix C to your report.
14 You will recall that you executed this
15 certificate on July 4th of 2025, the date that
16 you filed your report?

17 A. Yes I do.

18 85 Q. And just to make sure we have
19 a consensus concerning your obligations in
20 this matter as an independent expert, you are
21 aware that in that capacity as an independent
22 expert, you owe duties to the Competition
23 Tribunal itself?

24 A. That is correct.

25 86 Q. Including to assist the

PUBLIC

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1 Tribunal impartially?

2 A. Yes, sir.

3 87 Q. Also to confine your evidence
4 to matters relevant to your area of expertise.

5 A. That is correct.

6 88 Q. And you are no doubt aware,
7 Professor, that your duty to the Tribunal
8 overrides any duty you might owe to the
9 Commissioner of Competition or to the
10 Competition Bureau?

11 A. I am well aware of that, sir.

12 89 Q. And you acknowledge, do you
13 not, that you are required to testify today
14 independently and objectively?

15 A. Yes, I do.

16 90 Q. Am I correct -- this flows
17 from the answers you've given to me about four
18 minutes ago, but you've never testified in a
19 proceeding before the Competition Tribunal in
20 Canada?

21 A. No, I have not.

22 91 Q. Am I right that wholly apart
23 from testifying you've never attended a
24 hearing before the Competition Tribunal in
25 Canada?

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1 A. That is correct, sir.

2 92 Q. And to test your knowledge
3 just a little bit about the Tribunal, if I
4 were to ask you to name the current members of
5 the Tribunal, could you do so?

6 A. No, I would not be able to do
7 so.

8 93 Q. Could you at least identify
9 for me the current Chair of the Tribunal?

10 A. That's the kind of information
11 that I typically do not retain, even if I read
12 it so, no, I am not able to offer any names.

13 94 Q. You would acknowledge, would
14 you not, that there is no reference to any
15 decision of the Competition Tribunal in
16 Appendix B to your report on the materials
17 relied upon?

18 A. Sitting here right now I do not
19 recall having such a reference.

20 95 Q. Now I'm just going to test
21 your knowledge about the Tribunal a little
22 bit. This will just take me a moment, but
23 let's talk about this particular case, just
24 for about ten seconds.

25 A. Sure.

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1 96 Q. Am I right in assuming that
2 you can't tell me how many members of the
3 Competition Tribunal will preside over this
4 case when it reaches the stage of a merits
5 hearing?

6 A. Sitting here right now I do not
7 have a recollection of the number of members of
8 the Tribunal that will be sitting in on
9 decisions for this case.

10 97 Q. And can you tell us what
11 members of the Competition Tribunal have been
12 assigned to preside over this case when it
13 reaches the stage of a merits hearing; do you
14 know?

15 A. As I mentioned earlier, sir, I
16 do not retain information, such as the names of
17 members of the Tribunal who would be sitting in
18 on this case.

19 98 Q. Can you tell us what previous
20 cases any of those members have decided under
21 the Abuse of Dominance provisions of the Act?

22 A. Like I mentioned earlier, sir,
23 that's not the kind of information that I try to
24 retain, as part of my preparation for this
25 cross-examination.

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99

Q. Do you know where the
Competition Tribunal sits when it conducts
merits hearings?

MR. GAY: Mr. Thomson, I've, you
know, I've let the questioning go for quite some
time now on the Tribunal, and I'm quite happy to
give you as much latitude as you need, but,
frankly, I just don't see the relevance of this
at all, like at all, so perhaps you can explain
it, otherwise I'm just going to begin to
instruct the witness to not answer these
questions because I just don't see them being,
in any way, helpful to anyone.

MR. THOMSON: Well, Alex, you have
done this for a long time. You are entitled to
object and you are also, therefore, entitled to
suffer the consequences of your objection so I
can't force a witness to answer you are
objecting to. We'll just have to deal with it
in front of the Tribunal when we get that far.

Professor, dealing with your
knowledge of the way the Tribunal functions and
the approach that it might take, as this case
moves forward, are you able to give me a full
list of every decision of the Competition

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37

1 Tribunal you have read?

2 A. No, I am not able to give you a
3 list of the decisions of the Tribunal that I've
4 read. Sitting here right now I recall going
5 over some materials. I'm not even sure they
6 included decisions of the Tribunal, but they may
7 have.

8 Any materials that are not listed
9 in my report that I may have seen and realize
10 they are not of help in writing my report,
11 I definitely wouldn't remember them.

12 Many of the papers or materials
13 in my report at the time I read them and
14 incorporated them, and some I may remember
15 better now; others less so.

16 BY MR. THOMSON:

17 100 Q. Can you tell me what
18 sanctions the Competition Tribunal has imposed
19 in previous abuse of dominance cases?

20 A. Sitting here right now, I
21 cannot offer that kind of information.

22 101 Q. Now, am I correct that you
23 are not aware -- not aware of any guidance
24 that's been published by the Competition
25 Tribunal in Canada concerning the approach

PUBLIC

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1 that it takes or is required to take in
2 determining sanctions?

3 A. Sitting here right now I cannot
4 remember whether I've seen such guidance.

5 I do know that I looked carefully
6 at -- I remember the numbers, it's Section 79
7 of the Competition Act. Guidance beyond that,
8 sitting here right now, I do not recall.

9 102 Q. Okay, let me turn to my
10 second topic, which is the -- the
11 determination of optimal antitrust penalties.

12 Am I correct that one of the
13 approaches that you discuss in your report in
14 determining optimal antitrust penalties is
15 called something like the "internalization
16 approach"?

17 A. That is correct.

18 103 Q. And if you look at your
19 report, just to show you one example -- there
20 are dozens in the report, but if we look just
21 one quick example, and look at your report on
22 page 13, just above paragraph 17 you will see
23 a heading number 2.

24 A. Yes, I see that.

25 104 Q. (Reading):

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39

1 "Professor Hylton's
2 reliance on the internalization
3 approach is misguided." [As
4 read.]

5 So that's one example of using that
6 phrase "The internalization approach"?

7 A. That is one such example, sir.

8 105 Q. Okay, and one of the papers
9 that you reviewed in compiling your report was
10 written by two professors: one named John
11 Connor and another one named Robert Lande.

12 A. That rings a bell, sir.

13 106 Q. If you look at your report at
14 paragraph 43, you are talking about the
15 detection of price fixing cartels, and it's
16 the second sentence in paragraph 43 where you
17 say:

18 "For example, Connor and
19 Lande estimate that the
20 conviction rate for cartels is
21 about 80 per cent."

22 And then you have a footnote 54,
23 and if you scroll down to footnote 54, you will
24 find a reference:

25 "John M. Connor and Robert

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1 H. Lande Cartels as Rational
2 Business Strategy: Crime Pays,"
3 And the paper was published in the
4 Cardozo Law Review in 2012.

5 A. Yes, I see that reference.

6 107 Q. Thank you. Can you pull up,
7 please, the paper by Connor and Lande.

8 So my colleagues just pulled up a
9 paper by Professors Connor and Lande entitled
10 "Cartels as Rational Business Strategy: Crime
11 Pays."

12 Is this the paper you referred to
13 in footnote 54 of your report?

14 A. This does, indeed, look like
15 the paper I'm referring to.

16 MR. THOMSON: Let's mark that then
17 as the next exhibit. So what is the exhibit
18 number? This will be Exhibit 3.

19 --- EXHIBIT NO. 3: Article
20 entitled 'Cartels as Rational
21 Business Strategy: Crime Pays'
22 authored by John M. Connor and
23 Robert H. Lande

24 BY MR. THOMSON:

25 108 Q. And you will see at the very

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1 top, the top right-hand corner of the report,
2 you will see the paper was published in
3 November of 2012.

4 A. That's the date I see on this
5 document.

6 109 Q. As you say in your footnote
7 this is something that was published in the
8 Cardozo Law Review.

9 A. That is where it apparently
10 seems to be published, yes.

11 110 Q. Thank you. And if we pull up
12 just an extract from the website of that law
13 review, my colleague will pull up you will see
14 this is from the website of something called
15 Cardozo Law Review and it describes itself as
16 being established since 1979, and says it
17 consistently ranks among the top law journals
18 in the country.

19 A. I see that, sir.

20 111 Q. You have no reason to dispute
21 that description of the Cardozo Law Review?

22 A. I have no reason to dispute or
23 undispute it; it's what they claim.

24 112 Q. Okay, let's mark that extract
25 as the next exhibit. Exhibit 4.

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--- EXHIBIT NO. 4: Cardozo Law

Review extract

BY MR. THOMSON:

113 Q. Let's start briefly with the
authors of this report. So let's start with
John Connor.

If we go back to the Article now,
you will see the authors are described in the
footnote at the bottom of the first page, page
427 of the paper.

A. Yes, I see the footnote.

114 Q. And with respect to John
Connor, Professor Connor was a Professor
Emeritus at Purdue University?

A. I see that, sir.

115 Q. And just to give a little bit
more detail about Professor Connor, if we look
at his profile on Purdue's website -- do you
know Mr. Connor?

A. No, I do not know Mr. Connor,
personally.

116 Q. And you will see this is a
description of him, born in 1943 and describes
him as since 1983 a Professor of Industrial
Economics at Purdue University's Department of

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1 Agricultural Economics, holds a Bachelors
2 Degree in mathematics from Boston College, an
3 MA from the University of Florida, and Ph.D
4 from the University of Wisconsin..." and so
5 on.

6 And then the next paragraph goes on
7 to say he specializes in research and teaching
8 in empirical industrial economics and antitrust
9 policy.

10 It says, bottom of that paragraph,
11 for the past 15 years the focus of his research
12 has been international price fixing cartels and
13 worldwide antitrust enforcement. Then it says
14 he's the author of 19 books and monographs and
15 more than 600 other scholarly publications in
16 economics and the law and so on.

17 You will see at the bottom of the
18 page the profile describes him as a senior
19 advisor to something called the America
20 Antitrust Institute.

21 It says he consults with government
22 antitrust authorities and law firms and cartel
23 cases.

24 Are you familiar with the American
25 Antitrust Institute?

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1 A. I have personally not had any
2 dealings with them. It's a term I've seen
3 before. I do not know -- sitting here right now
4 I cannot recall what their function is and what
5 they represent.

6 117 Q. Okay. Thank you. Let's mark
7 this profile of Mr. Connor or Professor
8 Connor, rather, as Exhibit 5.

9 --- EXHIBIT NO. 5: Profile of
10 Professor John M. Connor
11 BY MR. THOMSON:

12 118 Q. Robert Lande, the other
13 author of the paper, if you can now go back to
14 the paper, which will be pulled up. Again,
15 the bottom of the first page, describes
16 Professor Lande as something called the
17 Venable Professor of Law at the University of
18 Baltimore School of Law; do you see that?

19 A. I see that.

20 119 Q. And also describes Professor
21 Lande as a Director of the American Antitrust
22 Institute?

23 A. Yes, I see that.

24 120 Q. And with respect to that
25 institute, just to try to reach a quick

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1 consensus on that, if we look at -- it's -- it
2 is an extract from its website which my
3 colleague has pulled up on the screen, you
4 will see it describes itself under the heading
5 as:

6 "... an independent
7 nonprofit organization devoted
8 to promoting competition that
9 protects consumers, businesses,
10 and society."

11 It says:

12 "We serve the public
13 through research, education,
14 and advocacy on the benefits of
15 competition and the use of
16 antitrust enforcement as a
17 vital component of national and
18 international competition
19 policy."

20 A. Yes, I read that, sir.

21 121 Q. No reason to disagree with
22 that description of the America Antitrust
23 Institute?

24 A. I have no basis to disagree
25 with anything they write about themselves.

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1 MR. THOMSON: Okay, let's mark that
2 as the next exhibit, exhibit 6.

3 --- EXHIBIT NO. 6: American
4 Antitrust Institute webpage
5 entitled "Mission and History"

6 BY MR. THOMSON:

7 122 Q. Now, with respect to
8 Professor Lande, we have to be a little
9 careful here. You are aware of another
10 Professor named Landes?

11 A. Oh, yes, he's a -- I think he's
12 cited heavily in Dr. Hylton's report.

13 123 Q. Yes. So I'm talking about
14 Lande, not Landes. Just to be clear.

15 A. I understand.

16 124 Q. So, with respect to Lande,
17 Professor Lande, if we look at his bio -- we
18 found a bio of Professor Lande in the archives
19 U.S. Department of Justice.

20 It's a bit more descriptive of him
21 than the paper itself and describes him as the:

22 "Venable Professor of Law
23 at the University of Baltimore
24 School of Law, and also is a
25 co-founder and Director of the

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American Antitrust Institute."

It says:

"He formerly worked at
Jones, Day, Reavis and Pogue
and at the Federal Trade
Commission. He has authored or
co-authored more than 60 U.S.
and nine foreign publications,
including Articles in the
California Law Journal, Journal
of Law and Economics, Duke Law
Journal, the Georgetown Law
Journal. Seven of his Articles
have been published in books or
collections of Articles."

And we see this was updated in
January 3 of 2024 at the bottom of that page.

Again, you have no reason to
disagree with this description of Professor
Lande.

A. I have no basis on which to
disagree with anything that's written here.

MR. THOMSON: Okay, let's mark that
as the next exhibit.

--- EXHIBIT NO. 7: Robert H. Lande.

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Biography

BY MR. THOMSON:

125 Q. Is it fair to say this, that
you obviously regarded this paper by
Professors O'Connor and Lande as a
sufficiently credible and authoritative source
to cite it in your report?

A. I looked for any information I
could find on a variety of studies that look at
detection and enforcement rates. This is one of
the papers that came up.

Given the fact that it is
published in a Law Review, I viewed it as a
useful piece of information.

126 Q. Let me now introduce you to
Professor Landes, Professor William Landes and
see if we can reach a consensus on him.

So turn up, please, page 431 of
this paper by Connor and Lande.

You will see a heading on the top
of the page. Heading number 1 is "Optimal
deterrence: Individual vs. Corporate
Perspectives".

And then the heading below that is
"Overall Framework for Analysis"?

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1 A. Yes, I see that.

2 127 Q. And it goes on to say:

3 "The generally accepted
4 overall approach to the optimal
5 deterrence of antitrust
6 violations was developed by
7 Professor William Landes."
8 That's why I referred to him
9 earlier.

10 A. I see that.

11 128 Q. I just want to talk about him
12 for a moment.

13 Were you aware that Professor
14 Landes is one the co-founders of a firm called
15 Compass Lexecon?

16 A. I was not aware of that.

17 129 Q. So if we look at the
18 description of Professor Landes on the website
19 of Compass Lexecon, which my colleague will
20 pull up, you will see the -- scroll down,
21 please -- scroll up. I just want to see the
22 top of the page. There.

23 You will see this an extract from
24 the website of Compass Lexecon at the top
25 left-hand corner, and the description of William

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Landes describes him as:

"Co-Founder.

PhD in Economics, Columbia
University."

And then describes him as the
Clifton R Musser Professor of Law and Economics
at The Law School of the University of Chicago.

It says:

"Prior to joining the
University of Chicago Law
School, he taught in the
Economics Departments of
Stanford University, the
University of Chicago, Columbia
University, and the Graduate
Center of the City University
of New York and Fellow of the
American Academy of Arts and
Sciences. Landes is an expert
in the application of economics
and econometrics to legal
problems including intellectual
property, torts and antitrust
and has written widely in these
fields."

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1 Again, no basis to disagree with
2 that description of Professor Landes on the
3 website of Compass Lexecon.

4 A. I understand Compass Lexecon to
5 be one of the premier shops that support expert
6 witnesses and I could see their incentive in
7 making sure that potential clients see the
8 gravitas of people who work with or for them,
9 including co-founders such as William Landes.
10 So I would assume that this is all accurate and
11 verifiable.

12 MR. THOMSON: Thank you.

13 Let's mark that as the next
14 exhibit. Exhibit 8. 9?

15 COURT REPORTER: I have 8.

16 MR. THOMSON: Anyway, let's sort
17 that out a bit later, we'll be able to go
18 through the transcript and see.

19 Thank you.

20 --- EXHIBIT NO. 8: Extracts from
21 Compass Lexecon website

22 BY MR. THOMSON:

23 130 Q. And with respect to Compass
24 Lexecon, just so we have it, you've already
25 confirmed this a moment ago, but just so we

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1 have it, pull up, please, just the extract
2 from the website of Compass Lexecon itself.

3 This is just an extract, but
4 Compass Lexecon describes itself as having been
5 established in 1977 and that it has "grown to
6 become a globally pre-eminent economic
7 consulting firm."

8 A. I see that.

9 131 Q. And in terms of statistics
10 you will see, the next page, over 700
11 employees, 25 offices in four continents, 170
12 plus PhDs, two Nobel Prize winners, and,
13 again, I take it you have no basis to disagree
14 with any of that?

15 A. Do you know when this was
16 published, because I do know -- oh, 7/23, then
17 if it reflects the recent exodus of some of
18 their most senior partners and several of their
19 employees, if that reflects that recent exodus,
20 I have no reason to dispute these numbers.

21 132 Q. You referring to Dr. Mark
22 Israel, correct --

23 -- (overspeaking) --

24 A. My understanding that several
25 of their leading experts, Mark Israel may be

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1 one, there was another famous guy within this
2 area. I'm blanking on his name. His brother, I
3 believe was in the Obama administration, John
4 ... something, I'm sorry, I'm blanking on his
5 last name, was the architect of that departure.

6 They founded a new company called
7 Econic and -- I believe that was a few months
8 ago. I was made aware just through lunch
9 conversations with other antitrust experts
10 that it was quite a shake up for Compass
11 Lexecon, but I don't know quite where the dust
12 settled.

13 So assuming that 7/23/25 takes
14 into account those recent departures, I have
15 no reason to dispute any of the numbers that
16 you've shown me.

17 133 Q. Thank you.

18 Now, let's talk about Professor
19 Landes -- sorry, the other gentleman referred to
20 in the document we looked at a moment ago, which
21 is Professor Becker.

22 Are you familiar with a prominent
23 economist named Gary Becker?

24 A. Deceased prominent economist,
25 Nobel Laureate --

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1 134 Q. Yes.

2 A. -- Gary Becker, yes, very
3 familiar with his work.

4 135 Q. I'm sorry, I didn't mean to
5 interrupt you.

6 Go ahead, can you say it again?

7 A. Prominent deceased former Nobel
8 Laureate, Gary Becker, very prominent economist,
9 I am well aware of his work.

10 136 Q. Okay, and if we look at
11 Dr. Becker's profile which my colleague will
12 pull up, this is from something called Chicago
13 Booth but you are quite right in describing
14 Dr. Becker as a Nobel Laureate. It says that
15 he:

16 "...won the 1992 Nobel
17 Prize in Economic Sciences for
18 having extended the domain of
19 microeconomic analysis to a
20 wide range of human behavior
21 and interaction, including
22 nonmarket behavior."

23 It describes his role at Princeton
24 and other universities over the years.

25 He was certainly one of the most

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1 prominent economists in the United States in the
2 last, call it 50 years; is that fair to say?

3 A. That would be a fair statement.

4 MR. THOMSON: Okay, let's mark that
5 profile as the next exhibit.

6 Thank you.

7 --- EXHIBIT NO. 9: Chicago Booth
8 Profile of Gary Becker

9 BY MR. THOMPSON:

10 137 Q. Turn to the second page of
11 that profile. At the bottom of the page there
12 is a paragraph that starts with the words
13 "Becker taught at":

14 "Becker taught at the
15 University of Chicago from 1954
16 until 1957, when he joined the
17 faculty at Columbia University
18 and the National Bureau of
19 Economic Research. He returned
20 to the University of Chicago in
21 1970 and spent the rest of his
22 career here, joining the
23 Chicago Booth faculty in 2002."

24 Again, any reason to dispute that
25 description of his career?

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1 A. No reason to dispute it.

2 138 Q. Thank you.

3 Now, in your report you quoted from
4 a prior publication of Professor Hylton.

5 It was entitled "Antitrust
6 Enforcement Regimes: Fundamental Differences."

7 And if you'd like to see the
8 reference, it is in your report at paragraph 17.

9 A. Yes, I see that, sir.

10 139 Q. And you describe that paper
11 in summary as Hylton 2015.

12 A. I believe that's correct.

13 140 Q. And am I right that you cited
14 to that paper multiple times in your report.
15 If you want to see several references just to
16 prove the point.

17 If we look at footnote 12, two
18 lines from the bottom of the page you refer to
19 Hylton 2015?

20 A. Yes, I see that.

21 141 Q. And then in footnote 13
22 again, top of that footnote, second line you
23 refer to Hylton 2015?

24 A. Yes, I see that too.

25 142 Q. And again in footnote 16, the

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1 first reference is Hylton 2015?

2 A. Yes, I see that, sir.

3 143 Q. And then in footnote 18, the
4 first reference is Hylton 2015?

5 A. Yes, I see that as well.

6 144 Q. And then the first reference
7 in footnote 19 is also Hylton 2015?

8 A. Yes, that is correct, sir.

9 145 Q. So let me pull up, if I may,
10 I believe to be that paper.

11 And we have pulled up on the screen
12 a paper entitled "Antitrust Enforcement Regimes:
13 fundamental Differences" by Keith N Hylton at
14 the Boston University School of Law in 2015.

15 A. Yes, I see that.

16 146 Q. Is this the paper you refer
17 to in your report?

18 A. It appears to be.

19 MR. THOMSON: Right, can we mark
20 that, please, as the next exhibit.

21 --- EXHIBIT NO. 10: Article by
22 Keith N. Hylton, 2015
23 Entitled "Antitrust Enforcement
24 Regimes: Fundamental
25 Differences."

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1 BY MR. THOMSON:

2 147 Q. And I take it you obviously
3 reviewed Professor Hylton's 2015 paper quite
4 carefully before you cited it in your report
5 on multiple occasions?

6 A. In the best of my ability, yes,
7 that's what I did.

8 148 Q. And if you look, please, at
9 the top of page 5 of the report, there is a
10 heading "Optimal Enforcement Policy"; do you
11 see that?

12 A. Yes.

13 149 Q. And here Professor Hylton
14 says this:

15 "The theory of optimal
16 antitrust enforcement is
17 traceable to Gary Becker's
18 Article on the economics of
19 punishment (Becker 1968)."

20 So it is an Article
21 published by Professor Becker
22 in 1968. Do you see that?

23 A. Yes, I do, sir.

24 150 Q. And then he says:

25 "Becker argued that an

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1 efficient system of punishment
2 would seek to internalize the
3 social costs associated with
4 offensive conduct.
5 Internalization is accomplished
6 by shifting the costs suffered
7 by victim to the offender in
8 the form of a penalty. Becker
9 considered the implications of
10 his argument for antitrust,
11 arguing that the social costs
12 arising from antitrust
13 violations should be
14 internalized by those engaging
15 in anticompetitive conduct ..."
16 And then he goes on to say,
17 this:
18 "Later, Landes (1983)
19 provided a more detailed
20 application of Becker's
21 analysis to antitrust. In the
22 antitrust context,
23 internalization requires the
24 punishment authority to shift
25 the costs suffered by

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consumers, in terms of
monopolistic overcharges or
restrictions in supply, to the
monopolizing firm in the form
of a penalty."

I just wanted to show you
briefly, if I may, those two
papers, the papers referred to
by Professor Hylton in this
portion of his 2015 paper, that
is the Gary Becker article from
1968 and the Landes Article
from 1983.

Let me start, if I may, with the
Becker Article from 1968 and pull that up.

Go to the next page,
please.

So here we find an Article entitled
"Crime and Punishment: An Economic approach" by
Gary S. Becker?

A. Yes, I see that.

151 Q. So this would be the 1968
Article that Professor Hylton is referring to
in that paragraph we just read together?

A. Yes, that would be the 1968

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1 paper.

2 MR. THOMSON: Let's, then, mark
3 that as the next exhibit, please.

4 COURT REPORTER: Exhibit 11?

5 MR. THOMSON: Yes, that's correct,
6 thank you.

7 --- EXHIBIT NO. 11: Article
8 entitled "Crime and Punishment:
9 An Economic Approach"
10 Authored by Gary S. Becker

11 BY MR. THOMSON:

12 152 Q. And Professor, are you
13 familiar with this Article?

14 A. Yes, I am, sir.

15 153 Q. You would confirm that you
16 made no mention of this Article in your
17 report?

18 A. That is correct.

19 154 Q. And let's now turn to the
20 Landes Article, and you will find that -- my
21 colleague will pull that up.

22 So here's a 1983 Article by William
23 M. Landes entitled "Optimal Sanctions for
24 Antitrust Violations."

25 This will be second paper referred

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1 to by Professor Hylton in that portion of his
2 paper from 2015?

3 A. I believe that to be correct,
4 sir.

5 MR. THOMSON: Okay. Let's mark
6 this as the next exhibit.

7 That's Exhibit 12.

8 --- EXHIBIT NO. 12: Article
9 entitled 'Optimal Sanctions for
10 Antitrust Violations' authored by
11 William M. Landes

12 BY MR. THOMSON:

13 155 Q. Are you also familiar with
14 this Article?

15 A. Yes, I am familiar with it.

16 Not as much as I am with the
17 Becker Article, but yes, I have scanned this
18 Article, as well.

19 156 Q. Do you confirm that there is
20 no reference to this Article in your report?

21 A. That is correct.

22 157 Q. Now, with respect to the
23 Landes Article, you can see the date of
24 publication is just above the title, 1983?

25 A. Yes, I see that, sir.

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1 158 Q. So it was published some 40
2 years ago?

3 A. That is correct, sir.

4 159 Q. And we can agree, can we not,
5 Professor, that this paper has been studied,
6 it's been written about, it has been commented
7 on repeatedly in the period since it was
8 published in 1983?

9 A. That would be a fair
10 description.

11 160 Q. And if we look at just one of
12 the building blocks for his analysis, just to
13 put this one to you, if I may.

14 Turn to page 653.

15 Just the sentence at the top of the
16 page that starts with the words "More
17 surprisingly", where Professor Landes says:

18 "More surprisingly, Becker

19 [that's the 1968 Article]

20 Becker also showed that even if
21 enforcement costs are zero, it
22 is still not desirable to deter
23 all violations because some
24 offences -- where the gain to
25 the offender exceeds the harm

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1 to the victim -- are efficient.
2 The concept of an efficient
3 violation is the key to
4 determining the optimal
5 antitrust penalty."

6 Do you see that?

7 A. Yes, I do see that.

8 161 Q. Would you concede, Professor,
9 as a neutral independent expert, that the
10 issue of what does or does not constitute an
11 optimal antitrust penalty has been debated by
12 economists and others for decades?

13 A. Yes, that would be accurate.

14 162 Q. And this paper, to put this
15 in context in your career, this paper was
16 published by Professor Landes some 14 years or
17 so ago before you obtained your PhD in
18 economics in 1997?

19 A. That is correct.

20 163 Q. We can agree, can we not,
21 that one of the theories underlying this
22 so-called internalization approach is that in
23 the field of antitrust, regulated activities
24 can sometimes produce harmful effects and
25 sometimes also produce beneficial effects?

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1 A. That is correct. That's the
2 motivation behind section 2, to the best my
3 interpretation, not being a legal scholar.

4 164 Q. And if we pick one obvious
5 and notorious example that has been written
6 about again and again in works in the area,
7 just to try to reach a consensus on one
8 element, let's talk about exclusive dealing
9 arrangements.

10 A. That's a classic one.

11 165 Q. And you would agree, would
12 you not, that exclusive dealing arrangements
13 can be beneficial to both parties to the
14 arrangements even if they make it more
15 difficult for a third party to compete?

16 A. And that is precisely the
17 reason that we have what we typically refer to
18 as the merit stage of any antitrust case.

19 It is in the merit stage that
20 both sides are going to try to show one side,
21 say the plaintiff, that there was harm that
22 outweighed any benefits. The defendant will
23 then attempt to show that there were benefits
24 that are pro-competitive.

25 Typically that is done by looking

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1 at what we call the conduct at issue and
2 compare it to a but for world where that
3 conduct does not happen.

4 Then at the merit stage, judgment
5 is made to see whether the so-called
6 pro-competitive benefits, if they are
7 established, outweigh the harm, if it's
8 established. If that happens then the case is
9 basically dismissed on the fact that the
10 pro-competitive benefits outweigh the harm.

11 If the opposite is true, then
12 some form of either penalty or, you know, a
13 cease of the alleged anticompetitive conduct
14 is required and so on. That is all what
15 happens in the merits phase.

16 After the merits phase is
17 determined, that's when penalties, if
18 appropriate, are to be determined.

19 So, yes, I very much agree that
20 exclusive dealing is a great example where
21 there may be pro-competitive benefits, there
22 may be anticompetitive harm, those need to be
23 weighed against each other and then a
24 determination needs to be made.

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Q. Now, would you agree with me,

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1 Professor, that there is an important
2 distinction between the existence of a
3 monopoly, on the one hand, and monopolization
4 on the other?

5 Those are two different things;
6 correct?

7 A. Absolutely. The existence of
8 monopoly just describes a situation where a
9 firm, for example, has significant market power.
10 Monopolization is typically used to refer to
11 conduct that is allegedly anticompetitive and
12 that causes some harm to competition --

13 -- (overspeaking) --

14 167 Q. In Canadian terms -- in
15 Canadian terms will you agree that there is an
16 important distinction between the existence of
17 a dominant position on the one hand and an
18 abuse of a dominant position on the other?

19 A. Absolutely. Again, the
20 existence of a dominant position describes a
21 situation where a firm is dominant or has market
22 power. Abusing that dominant position would be
23 to engage in conduct that reinforces or sustains
24 that dominance in ways that are anticompetitive.

25 168 Q. So subject to the caveat

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1 that, of course, you are not a lawyer and
2 certainly not a Canadian lawyer, I'm just
3 trying to test your understanding for the
4 moment, can we agree that, at least in Canada,
5 simply being a dominant firm or even a
6 monopoly does not, in and of itself, engage
7 the abuse of dominance provisions of the
8 Competition Act?

9 A. That is my understanding both
10 of the Canadian law and of the U.S. law, yes.

11 169 Q. Okay. And let me show you a
12 document that I believe will assist us in
13 reaching a consensus on several points and
14 then I'll move forward, and that is the
15 Competition Bureau's abuse of dominance
16 guidelines.

17 So let's pull those up, please.

18 I've asked my colleague to pull up
19 on the screen guidelines issued by the
20 Competition Bureau called "Abuse of Dominance
21 Enforcement Guidelines "

22 A. Mm-hmm.

23 170 Q. And you will see the date is
24 March 7 of 2019?

25 A. I see this.

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1 171 Q. We can agree that these
2 guidelines are not listed in Appendix B to
3 your report?

4 A. To the best of my recollection,
5 they are not.

6 172 Q. Okay. Did you review these
7 guidelines before you finalized and delivered
8 your report?

9 A. I may have. Sitting here right
10 now, I don't quite recall. I looked at many
11 documents.

12 MR. THOMSON: Let's mark these
13 guidelines as the next exhibit.

14 This is Exhibit 13.

15 --- EXHIBIT NO. 13: Abuse of
16 Dominance Enforcement Guidelines,
17 March 7, 2019

18 BY MR. THOMSON:

19 173 Q. Are you aware that when the
20 Competition Bureau enforces the abuse of
21 dominance provisions, and as you said a moment
22 ago, section 79 of the Competition Act, one of
23 its significant considerations is to avoid
24 chilling or deterring pro-competitive or
25 efficiency-enhancing conduct.

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1 A. Yes, I'm aware of that.

2 174 Q. And if we look at these
3 guidelines, you will see they say exactly
4 that.

5 So pull up, please, page 7 of the
6 guidelines, where the guidelines say at
7 paragraph ix:

8 "When enforcing section 79,
9 a significant consideration for
10 the Bureau is to avoid chilling
11 or deterring pro-competitive or
12 efficiency-enhancing conduct.
13 The Bureau recognizes that it
14 is often challenging to
15 distinguish anti-competitive
16 conduct from aggressive
17 competition on the merits, as
18 in many cases the goal of
19 aggressive competition is to
20 marginalize rivals or eliminate
21 them from a market. The Bureau
22 recognizes that firms may
23 acquire a dominant position by
24 simply out-competing their
25 rivals, for example, by

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1 offering higher quality
2 products to consumers at a
3 lower price. In these cases,
4 sanctioning firms for simply
5 being dominant, would undermine
6 incentives to innovative,
7 outperform rivals and engage in
8 vigorous competition. Such
9 vigorous competition is the
10 sort of competitive dynamic
11 that the Act is designed to
12 preserve and, where possible,
13 enhance, as it ultimately leads
14 to a more efficient allocation
15 of resources."

16 And I take it you are not
17 surprised to see this paragraph
18 in these guidelines?

19 A. Not at all, sir.

20 175 Q. This approach taken by the
21 Competition Bureau is consistent with the
22 approach taken by antitrust authorities in the
23 United States, is it not?

24 A. That is correct, sir.

25 176 Q. Okay.

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1 Now, let me show you another set of
2 guidelines of the Bureau concerning something
3 called big data.

4 And I've just pulled up on the
5 screen, or my colleague has, a set of
6 guidelines. You will see the competition --
7 scroll down a bit, please.

8 No, the other way. Keep scrolling.
9 There.

10 These are guidelines issued by the
11 Competition Bureau in Canada?

12 A. I see that, sir.

13 177 Q. And if you now scroll down,
14 you will see the title of this document is
15 "Big data and innovation: key themes for
16 competition policy in Canada."

17 A. Yes, I see that, sir.

18 178 Q. You would agree with me that
19 there is no reference to this set of
20 guidelines in your report?

21 A. I don't believe I referenced
22 this in my report.

23 179 Q. Were you familiar with this
24 document, these guidelines before I showed
25 them to you today?

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1 A. I do not recall seeing these
2 guidelines before.

3 MR. THOMSON: Okay, let's mark this
4 as the next exhibit, please.

5 --- EXHIBIT NO. 14: Competition
6 Bureau Canada. Document entitled
7 "Big data and innovation: key
8 themes for competition policy in
9 Canada."

10 BY MR. THOMSON:

11 180 Q. Let me show you one passage
12 from this set of guidelines, if I may.

13 First of all, in terms of the date,
14 you will see it's on the second page of the
15 guidelines, February 19, 2018?

16 A. Yes, I see that, sir.

17 181 Q. You see that date. Just to
18 situate you in time, and the part I'm
19 interested in for the moment is the bottom of
20 page 4 under the heading "Guiding analytical
21 principles remain are valid", where the Bureau
22 says this:

23 "The key principles of
24 competition law enforcement
25 remain valid in big data

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1 investigations. Specifically,
2 proper enforcement must strike
3 the right balance between
4 taking steps to prevent
5 behaviour that truly harms
6 competition and over
7 enforcement that chills
8 innovation and dynamic
9 competition. Equally
10 important, competition law and
11 policy should continue to rely
12 on market forces to lead to
13 beneficial outcomes, not
14 regulate prices or other
15 outcomes. Enforcers should
16 not, for example, condemn firms
17 merely because they are 'big'
18 or possess valuable big data.
19 Companies that achieve a
20 leading market position -- even
21 a dominant one -- by virtue of
22 their own investment,
23 ingenuity, and competitive
24 performance should not be
25 penalized for doing so.

PUBLIC

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1 Imposing a penalty for
2 excellence removes the
3 incentives to pursue
4 excellence."

5 And again, you would
6 confirm, you are not surprised
7 to see this paragraph in this
8 set of guidelines?

9 A. Not at all.

10 182 Q. The approach taken by the
11 Competition Bureau in Canada is consistent
12 with the position taken by antitrust
13 regulators in the United States, is it not?

14 A. Yes, that is correct.

15 183 Q. And going back to the first
16 page, the note of caution, one of the notes of
17 caution struck by the Competition Bureau in
18 these guidelines deals with something called
19 over-enforcement. Do you see that?

20 A. Do you -- yes, I see that,
21 thank you.

22 184 Q. And again, the point made by
23 the Bureau in the guidelines is that
24 over-enforcement carries the danger of
25 chilling innovation and dynamic competition.

PUBLIC

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1 And would you agree with that,
2 would you not?

3 A. Yes, I would agree with that.

4 185 Q. That takes me back to where
5 we started, namely the Article by Professors
6 Connor and Lande that was published in the
7 Cardozo Law Review in November of 2012
8 entitled "Cartels As Rational Business
9 Strategy" -- let's pull that up one last time,
10 if we can, please.

11 I just want to show you one
12 passage. I've already shown you part of it but
13 let me just give you the whole paragraph, if I
14 may, or at least part of it.

15 Turn to page 431, please, where
16 under the heading -- the first heading is
17 "Optimal Deterrence: Individual vs. Corporate
18 Perspectives."

19 And then it goes on, subheading
20 "Overall Framework for analysis", and it says:

21 "The generally accepted
22 overall approach to the optimal
23 deterrence of antitrust
24 violations was developed by
25 Professor William Landes. He

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1 showed that to achieve optimal
2 deterrence the damages from an
3 antitrust violation should be
4 equal to the violation's
5 expected 'net harm to others'
6 divided by the probability of
7 detection and proof of the
8 violation."

9 A. Yes, I see that.

10 186 Q. And if I pause there for a
11 moment, I take it you have no reason to
12 dispute any of that.

13 A. In fact, I repeat pretty much
14 the same idea when I describe the approaches to
15 optimal penalties in my own report.

16 187 Q. And is this description,
17 I know he's using slightly different words,
18 but is the description by Professors Connor
19 and Lande referring to the internalization
20 approach that you mentioned in your report?

21 A. Well, that would depend on the
22 way that you think about net harm to others.

23 So if you look at the analysis
24 done by Dr. Hylton then he talks about
25 consumer harm. He also talks about benefits

PUBLIC

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1 to the company from the anticompetitive
2 conduct that come in the form, say, of cost
3 reductions.

4 The internalization approach,
5 right, if we take net harm to others by saying
6 we've caused 100 harm to consumers, but there
7 was 50 benefit in cost reduction to the
8 company, then the net harm is 50, even though
9 the consumers bore the whole 100 harm because
10 we're taking society as a whole.

11 If we take the deterrence
12 approach -- that would be the internalization
13 approach, just to make that clear.

14 188 Q. Just pause there. That was
15 my question. My question is whether, in this
16 part of this paper, these professors, Connor
17 and Lande are describing the internalization
18 approach? That's a simple factual question.

19 A. Could we look at footnote 18,
20 because they seem to be referencing the net harm
21 to others. The logic underlying -- if you don't
22 mind, I'll just read this:

23 "The logic" --

24 (Witness reads document to
25 himself).

PUBLIC

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1 The way they describe it here
2 would be consistent with the internalization
3 approach.

4 189 Q. Okay, that's really my
5 question.

6 Now, in terms of the dates, again
7 going back to the first page of the paper, you
8 see it's published again, we've already
9 established it's November of 2012?

10 A. It appears that way.

11 190 Q. And I'm interested in a bit
12 more current work than that. Can we agree
13 that you have not cited in your report in this
14 case, any paper published by an economist in
15 the last decade who takes the position that
16 the deterrence approach is preferable to the
17 internalization approach in the determination
18 of optimal antitrust penalties in abuse of
19 dominance cases?

20 A. I don't recall citing a paper
21 from the last decade that --

22 -- (overspeaking) --

23 BY MR. THOMSON:

24 191 Q. Okay. Now, let me deal with
25 another issue that you raise in your report

PUBLIC

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1 and I'm going to approach it in a little bit
2 of an indirect way but see if we can reach a
3 consensus on some basic building blocks before
4 I do.

5 You would agree as a neutral
6 independent expert that different antitrust
7 regulators in different jurisdictions can take
8 different approaches to the enforcement of
9 different competition laws; correct?

10 A. Could you kindly repeat the
11 sentence?

12 192 Q. Yeah.

13 A. There was a lot of "different"
14 there so I just want to make sure I'm following.

15 193 Q. Yeah, I'm emphasizing the
16 differences.

17 The simple point is this:
18 Different jurisdictions have different antitrust
19 regulators; correct?

20 A. If by jurisdictions you mean
21 Canada versus the U.S. versus Europe, yes, I
22 agree with that statement.

23 194 Q. Versus Australia, versus New
24 Zealand --

25 A. Yes.

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1 195 Q. -- versus India, versus -- we
2 can go through a bunch of European countries
3 as well, but the simple point is that
4 different antitrust regulators operating in
5 different jurisdictions can and sometimes do
6 take different approaches in enforcing
7 competition laws?

8 A. Yes, I agree with that
9 statement.

10 196 Q. And that's the regulators.
11 Let's talk about legislators,
12 people that actually pass legislation,
13 Parliaments, and in the case of the U.S.,
14 Congress, Senate, President, we can agree, can
15 we not, that different legislators, in different
16 jurisdictions can take different approaches in
17 the enactment of legislation governing
18 competition laws?

19 A. I would agree with that
20 statement. Yes, sir.

21 197 Q. And different legislators in
22 different jurisdictions can be driven by
23 different priorities and policy rationales?

24 A. That seems like a fair
25 statement.

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1 198 Q. And although you're not a
2 lawyer, I'm pretty sure you will readily agree
3 that the actual laws themselves, competition
4 laws in different jurisdictions may well
5 contain different provisions and different
6 wording?

7 A. That sounds right to me.

8 199 Q. So to pick two examples that
9 you, indeed, are familiar with, you would
10 accept, would you not, that the wording of the
11 Sherman Act in the United States is not
12 identical to the wording of the Competition
13 Act in Canada?

14 A. I would agree with that.

15 200 Q. The wording is different and
16 the terms are different; correct?

17 A. That sounds right to me.

18 201 Q. And with respect to
19 adjudicators, so we've talked about
20 enforcement agencies, we've talked about
21 legislators, let's talk about adjudicators.

22 You would agree with me that it is
23 entirely conceivable that different adjudicators
24 in different jurisdictions that apply different
25 legislation in different cases involving

PUBLIC

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1 different evidence can arrive at different
2 conclusions?

3 A. Yes, I would agree with that.

4 I would go a step further and
5 say, you know, what I know here in the United
6 States, the same case may have one ruling by a
7 Federal District Judge that is later
8 overturned by the Appeals Court and then that
9 could later be overturned, again, by the
10 Supreme Court all for the same case within the
11 same apparent jurisdiction.

12 202 Q. Quite right, and quite a fair
13 observation.

14 Did you know that a number of
15 courts and the Competition Tribunal itself in
16 Canada have expressed caution about relying on
17 U.S. antitrust cases because of things like
18 differences in wording and approaches? Were you
19 aware of that?

20 A. Sitting here right now, I do
21 not recall that but it wouldn't surprise me that
22 such caution was advised.

23 203 Q. Let me just show you just one
24 example, there are many, but just one example
25 to illustrate the point and turn up a case

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1 called Superior Propane.

2 So my colleague will pull that up
3 but, this is just one passage from a case and it
4 is just an extract, this is a long, long case
5 but it is a decision of the Competition Tribunal
6 that was issued -- you will see the date of the
7 order -- it's the next page -- issued in April
8 of 2002, so quite some time ago.

9 A. Yes. I see it.

10 204 Q. The order was signed by --

11 A. It's from 2001.

12 205 Q. Sorry, dated -- do you see
13 the date of the order, 20020404?

14 A. Yes, yes, yes. Sorry, I was
15 looking at the date at the bottom of the page.

16 206 Q. And the order signed by
17 Justice Nadon. I take it you don't know who
18 Justice Nadon is?

19 A. No, I do not.

20 207 Q. So he was, at this stage, a
21 member of the Federal Court Trial Division
22 that was a member of the Competition Tribunal,
23 became a Justice of the Federal Court of
24 Appeal after this, but I just want to show you
25 one passage at paragraph 158 of the decision,

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1 where Justice Nadon and the Tribunal itself
2 says:

3 "The Tribunal does not
4 criticize the American
5 antitrust regime, but it notes
6 that it is the result of
7 circumstances, policies, and
8 judicial interpretation of the
9 pertinent statutes that are
10 unique to the United States."

11 And again, that is not a
12 surprising observation to you;
13 it is consistent with your
14 understanding?

15 A. Yes, that is consistent with my
16 understanding.

17 208 Q. Okay.

18 Now, just so we have it (unclear),
19 authority let's mark that extract as an exhibit.

20 --- EXHIBIT NO. 15: Extract from
21 Decision in The Commissioner of
22 Competition v. Superior Propane
23 Inc.

24 THE WITNESS: I'm just wondering,
25 whether this specifically talks about opinions

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1 of American commentators on Canada's Act or --

2 BY MR. THOMSON:

3 209 Q. It does in part. It does in
4 part, but it's talking about America
5 jurisprudence as well.

6 A. Yeah, I'm just trying to
7 understand this within context and it's not
8 quite clear to me the context in which this is
9 offered.

10 210 Q. Yep. No worries, it really
11 doesn't matter. It is just a simple point of
12 observing differences between the legislative
13 regimes in the two countries.

14 Let me show you another document
15 that does not appear in Appendix B to your
16 report, namely Google's response in this
17 proceeding.

18 So turn up, please, the response.

19 Here you will see on screen the
20 first page of a lengthy document that was filed
21 with the Tribunal, Competition Tribunal on
22 February 14th, 2025.

23 You will see it's entitled
24 "Response of Google LLC and Google Canada
25 Corporation"?

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1 A. Yes, I see that.

2 211 Q. And you would confirm, would
3 you not, Professor, that although the
4 Commissioner's Notice of Application appears
5 in Appendix B to your report, this response
6 does not?

7 A. That is correct.

8 212 Q. Now, had you seen this
9 response before you filed your report in this
10 proceeding?

11 A. I may have.

12 Just to refresh my memory, is
13 this the response that the report of
14 Dr. Hylton is meant to buttress?

15 213 Q. Well, Dr. Hylton's report is
16 actually meant to address a constitutional
17 issue not the report itself.

18 But my question is: Do you recall
19 actually having read this -- it is a lengthy
20 document, it's -- just for your benefit, it's
21 145 pages long; do you recall having read this
22 response before you filed your report?

23 A. Sitting here right now, I do
24 not recall if I read the whole or parts of this
25 particular one.

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1 The language looks a bit familiar
2 but, like I said, there's reference to
3 section 79, the Competition Act.

4 I've read a bunch of documents to
5 familiarize myself with my assignment and what
6 I need to do. This may be one of them, but
7 sitting here right now, I do not recall the
8 extent to which I went through this document.

9 214 Q. We can agree, can we not,
10 Professor, that your mandate in this matter
11 was and is confined to evaluating the various
12 claims made by Professor Hylton --

13 A. Yes.

14 215 Q. -- in his first report of May
15 6 of 2025?

16 A. That is correct. That is my
17 assignment.

18 216 Q. And you are, no doubt, aware,
19 because you read Professor Hylton's report
20 carefully, that he did not address in his
21 report, the merits of the Commissioner's
22 allegations against Google or the merits of
23 Google's responses to those allegations?

24 A. Yes, which is the reason I was
25 surprised that he was able to make the assertion

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1 that any penalty, even a fraction of the cap
2 would be punitive without any analysis of the
3 merits.

4 217 Q. So come back to my question:
5 You are aware that Professor Hylton did not
6 address in his report, the merits of the
7 Commissioner's allegations against Google or
8 the merits of Google's responses to those
9 allegations; correct?

10 A. Indeed he did not, and yet he
11 was able to reach a conclusion about any
12 fraction of the cap as a penalty, which I find
13 quite surprising.

14 218 Q. With respect to your mandate,
15 you were not asked by the Competition Bureau
16 to review and opine in your report of
17 July 4th of 2025 all of the lay and expert
18 evidence that was tendered at trial during the
19 proceedings before Justice Brinkema in the
20 U.S.?

21 A. That is correct.

22 219 Q. Indeed, none of the evidence
23 that was adduced in that trial is listed in
24 Appendix B to your report?

25 A. That is correct.

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1 220 Q. And with respect to this
2 case, are you aware that the parties only
3 exchanged their initial rounds of production
4 in this case, the one before the Competition
5 Tribunal, roughly ten days or so, on
6 July 18th of 2025?

7 A. I am not aware of the date in
8 which they exchanged their final rounds of
9 disclosures.

10 221 Q. Well, it's not even final
11 rounds of disclosures, it is actually the
12 initial rounds of their disclosures.

13 A. Sorry.

14 222 Q. The point being, they were
15 exchanged by the parties after you filed your
16 report, not before.

17 A. I was not aware of that.

18 I understand that we're in rather
19 early stages of this case.

20 223 Q. All right. And you've -- you
21 have reviewed none of those productions,
22 either of the Competition Tribunal or of
23 Google; correct?

24 A. That was not part of my
25 assignment, that is correct.

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1 224 Q. With respect to the way in
2 which this proceeding will play out, you don't
3 know who the Commissioner will call as
4 witnesses at trial or who Google will testify
5 [sic] at trial in the proceedings before the
6 Tribunal; correct?

7 A. That is correct.

8 225 Q. And you are certainly not
9 purporting to address in your report or your
10 evidence, again, the merits of any of the
11 Commissioner's allegations against Google or
12 the merits of any of Google's responses to
13 those allegations, correct, that's not part of
14 your mandate, not part of your role?

15 A. No, I am not involved at all in
16 any work related to the merits of this case.

17 If I may, Mr. Thomson, it's been
18 an hour and a half and I wouldn't mind --

19 226 Q. Sure.

20 A. -- taking a little bathroom
21 break.

22 227 Q. Yeah, good for you for
23 raising your hand. I have a bad habit of
24 forgetting about these sorts of things because
25 I am not entirely human so ...

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1 A. When you are my age, Mr.
2 Thomson, your body will remind you.

3 228 Q. Okay. Why don't we take 15
4 minutes.

5 --- RECESS TAKEN AT 1:33 P.M.

6 --- UPON RESUMING AT 1:47 P.M.

7 BY MR. THOMSON:

8 229 Q. Are you ready to drive ahead,
9 Professor?

10 A. Yes, I am. Thank you, Mr.
11 Thomson.

12 230 Q. My pleasure. So, another
13 issue -- I'm now on to my third topic that you
14 deal with in your report -- is the issue of
15 the probability of detection in enforcement?

16 A. Yes.

17 231 Q. And I just wanted to ask you
18 a few questions about that issue, if I may.

19 Am I right that in addressing that
20 issue, which both you address and Professor
21 Hylton also addresses it, you both mention
22 several different types of antitrust matters.

23 So you obviously mention abuse of
24 dominance or monopolization cases?

25 A. Yes.

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1 232 Q. You mentioned cartel or price
2 fixing cases?

3 A. Yes.

4 233 Q. And you also mention merger
5 cases.

6 A. Correct.

7 234 Q. So let me deal with each of
8 those, if I may, and let me start at the end
9 of that list. Let me start with merger cases.

10 If we look at paragraph 40 of your
11 report, you refer to certain filing requirements
12 in respect of mergers in the United States under
13 a Federal U.S. statute called the Hart Scott
14 Rodino Act?

15 A. Yes.

16 235 Q. And we can agree, can we not,
17 that putting this as simply as I possibly can,
18 under that Act parties to certain large
19 mergers and acquisitions must file premerger
20 notifications and then wait for government
21 review before completing the transactions.

22 A. That is correct.

23 236 Q. And if we look at one
24 document, it says exactly what I just said.
25 It is an FTC report on premerger notifications

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1 which my colleague will pull up.

2 You will see here a document issued
3 by the Federal Trade Commission, if you look at
4 the top of the page?

5 A. Yes, I see that.

6 237 Q. It's entitled "Premerger
7 Notification and the Merger Review Process."

8 A. Yes, I see that.

9 238 Q. And the first paragraph:
10 "Under the
11 Hart-Scott-Rodino Act ...
12 parties to certain large
13 mergers and acquisitions must
14 file premerger notification and
15 wait for government review.
16 The parties may not close their
17 deal until the waiting period
18 outlined in the HSR Act has
19 passed, or the government has
20 granted early termination of
21 the waiting period."

22 It goes on to say that:

23 "The FTC administers the
24 premerger notification program
25 and its staff members answer

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1 questions and maintain a
2 website with helpful
3 information about how and when
4 to file."

5 And this is consistent with your
6 understanding of the way that statute operates?

7 A. That correct, sir.

8 MR. THOMSON: All right, let's mark
9 that as the next exhibit.

10 --- EXHIBIT NO. 16: Document
11 entitled Premerger Notification
12 and the Merger Review Process
13 BY MR. THOMSON:

14 239 Q. In paragraph 41 of your
15 report, and also in footnote 49, if you want
16 to look at that, you refer to a joint report
17 of the Federal Trade Commission and the
18 Department of Justice called
19 "Hart-Scott-Rodino Annual Report for Fiscal
20 Year 2023"?

21 A. Yes, I see that.

22 240 Q. Let me show you the report as
23 well as the press release that accompanied the
24 report. So, let's start with the press
25 release.

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1 My colleague will pull up -- so you
2 will see on your screen a press release of
3 October 10, 2024.

4 Do you see the date just under the
5 heading?

6 A. Yes, I see that.

7 241 Q. And the title of the press
8 release is:

9 "FTC, DOJ issue Fiscal Year
10 2023 Hart-Scott-Rodino
11 Notification Report and
12 Announce Corrected Fiscal Year
13 2022 Report."

14 A. I see that, sir.

15 242 Q. And then the first paragraph
16 of the release says:

17 "The Federal Trade
18 Commission, together with
19 Justice Department's Antitrust
20 Division, released their annual
21 report detailing fiscal year
22 2023 data on the HSR Premerger
23 Notification Program, which
24 alerts the agencies to
25 transactions that may

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1 substantially lessen
2 competition in violation of
3 federal law."

4 And then it goes on to
5 quote some of the statistics
6 you actually quote in your
7 report.

8 It says:

9 "The agencies' 46th
10 Hart-Scott-Rodino Report notes
11 that in fiscal year 2023, 1,805
12 transactions were reported
13 under the [Hart-Scott-Rodino
14 Act], nearly one quarter of
15 which were valued at more than
16 \$1 billion, continuing a trend
17 in more recent years towards
18 larger and more complicated
19 transactions."

20 So this press release is referring
21 to the report, the joint report of the Federal
22 Trade Commission and Department of Justice that
23 you referred to in your report?

24 A. It appears to, yes.

25 243 Q. And if you look at the report

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1 itself, which my colleague will pull up -- oh,
2 let's mark that last document.

3 That is the press release of
4 October 10, 2024.

5 That's Exhibit 17.

6 --- EXHIBIT NO. 17: FTC Press
7 Release dated October 10, 2024
8 BY MR. THOMSON:

9 244 Q. And now let's look at the
10 report that you refer to in the report and
11 pull that up.

12 So you will see here a report on
13 the letterhead both of the Federal Trade
14 Commission and of the Department of Justice
15 Antitrust Division?

16 A. I see that.

17 245 Q. You see the title of the
18 report is "Hart-Scott-Rodino Annual Report
19 Fiscal Year 2023."

20 This is the report you referred to
21 in paragraph -- sorry, footnote 49 of your
22 report?

23 A. That is correct.

24 MR. THOMSON: Okay, let's mark this
25 as the next exhibit. Exhibit 18.

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1 --- EXHIBIT NO. 18: Hart-
2 Scott-Rodino Annual Report Fiscal
3 Year 2023

4 BY MR. THOMSON:

5 246 Q. Actually, just before I take
6 you actually into the report itself, just to
7 ask you about some of the facts and figures in
8 it, in paragraph 41 of your report, you use a
9 phrase of "second requests."

10 Do you see it says "resulting in 37
11 second requests"?

12 A. Yes.

13 247 Q. And can we agree, Professor,
14 that a second request is simply a request for
15 additional information made either by the
16 Federal Trade Commission, sometimes called the
17 FTC, or by the Antitrust Division of the
18 Department of Justice, which I'll call the
19 DOJ, following the initial notification of the
20 transaction in question?

21 A. That is my understanding, yes.

22 248 Q. Okay, and if we look at one
23 more document just to illustrate this point,
24 and that is the same document that I believe
25 we've already just looked at, Federal Trade

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1 Commission Premerger Notification and the
2 Merger Review Process, that is Exhibit 16.

3 Look at the second page of that,
4 please. At the top of the page, it says:

5 "After a preliminary review
6 of the premerger filing, the
7 agency can," do one of three
8 things:

9 "1. terminate the waiting
10 period prior to the end of the
11 waiting period ..."

12 By granting early termination or
13 ET; second, allowing the initial waiting period
14 to expire; or third, issue a request for
15 additional information, called a second request,
16 to each party asking for more information.

17 And that, again, is consistent with
18 your understanding of what a second request is?

19 A. Yes, it is, sir.

20 Q. Okay, thank you.

21 Now, let me take you to the body of
22 your report in paragraph 41, just the first
23 several sentences where you set out some facts
24 and figures from this report that we are looking
25 at now and you say this:

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1 "Recent data reinforces
2 this point. In 2023 there were
3 1,805 transactions reported in
4 the United States, resulting in
5 37 second requests, and
6 approximately 14 complaints
7 filed. These filings resulted
8 in 3 litigated wins. At least
9 in 2023 the probability of a
10 second request resulting in an
11 agency win in court was 0.08,
12 or eight percent."

13 A. Mm-hmm.

14 250 Q. Do you have that?

15 A. Yes.

16 251 Q. I just want to show you and,
17 therefore, the Tribunal where some of these
18 facts and figures came from.

19 So, first, with respect to the
20 number of transactions reported, that is 1,805.

21 Am I right that if you look at
22 page 1 of the report of the DOJ and the FTC, you
23 will find that that number in the second
24 paragraph, I believe it's the third or fourth
25 sentence in that paragraph.

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1 So in fiscal year 2023, 1,805
2 transactions were reported under the
3 Hart-Scott-Rodino Act?

4 A. Yes, I see that.

5 252 Q. That's where that number came
6 from?

7 A. Correct.

8 253 Q. And with respect to the
9 figure of 37 second requests, that number, as
10 I understand it, if you turn to page 8 of the
11 report, and look at the first full paragraph,
12 the second sentence says:

13 "Of the 1,805 reported
14 transactions in fiscal year
15 2023, Second Requests could
16 have been issued in 1,735 of
17 them. The FTC issued 26 Second
18 Requests in [fiscal year] 2023.
19 In [fiscal year] 2023, the
20 Division issued 11 second
21 requests. See Table 1."

22 So if you add those numbers
23 up, you end up with your 37?

24 A. 26 plus 11 is 37.

25 254 Q. Then with respect to the

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1 three litigated wins, that number actually
2 comes from a combination of a chart concerning
3 the FTC and a chart concerning the
4 Department of Justice.

5 So if we turn to page 3 of the
6 report, you will see at the top of page 3, there
7 is a heading "The Federal Trade Commission"?

8 A. Mm-hmm.

9 255 Q. You have to say "yes" or
10 "no."

11 A. Yes, sorry.

12 256 Q. And then skipping down to the
13 second chart, under the heading "The Federal
14 Trade Commission", "Summary numbers for
15 Enforcement Actions", complaints filed for
16 litigated win, 1. So the FTC had one
17 litigated win in 2023, and the chart for the
18 Department of Justice is on page 5.

19 You will see a heading -- hang on,
20 scroll -- you see a heading at the top of the
21 page "The Department of Justice"?

22 A. Yes, I see that.

23 257 Q. And then below that, the
24 second chart on the page, "Summary Numbers for
25 Enforcement Actions," complaints filed 1, and

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1 litigated win, 2.

2 So that is the three wins,
3 one for the FTC and two for the
4 DOJ?

5 A. That is correct.

6 258 Q. Okay, and then taking you
7 back to paragraph 41 of your report, that is
8 the basis on which you say "At least in 2023"
9 -- this is the second or third sentence:

10 "At least in 2023 the
11 probability of a second request
12 resulting in an agency win in
13 court was 0.08, or
14 eight percent."

15 Right?

16 A. That is correct.

17 259 Q. That figure is basically a
18 comparison between three wins and 37 second
19 requests?

20 A. Precisely.

21 260 Q. So put simply, three divided
22 by 37 is 8 percent?

23 A. Just about.

24 261 Q. Okay. Now, am I correct,
25 that calculation does not include other types

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1 of resolutions that might have been achieved
2 in contentious merger cases by the FTC or the
3 DOJ?

4 A. That is correct.

5 262 Q. And those other resolutions
6 include, just for instance, resolutions
7 achieved by way of the issuance of a consent
8 order?

9 A. Sorry, could you repeat that,
10 Mr. Thomson?

11 263 Q. Yes, those other resolutions
12 include, for instance, resolutions achieved by
13 way the issuance of a consent order?

14 A. Yes.

15 264 Q. And they also include
16 transactions that were -- sorry, I should get
17 closer to the microphone, transactions that
18 were abandoned or restructured as a result of
19 antitrust concerns raised by the FTC or the
20 Department of Justice during their reviews of
21 potentially problematic transactions?

22 A. That is a possibility, yes.

23 265 Q. And if we look at page 2 of
24 the joint report of the Department of Justice
25 and the FTC, this is under the chart, the

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paragraph that begins with the words "During
fiscal year 2023" --

A. Yes.

266

Q. -- it says this:

"During fiscal year 2023,
the Federal Trade Commission
and the Antitrust Division
worked to block unlawful
mergers across a range of
industries, including
pharmaceuticals,
transportation, hospitals,
agriculture, mortgage lending,
financial services, cement,
construction, healthcare
advertising, broadcasting,
medical devices, electricity
and reproductive health
services. The Commission took
action against 16 deals: Two in
which it issued consent orders
for public comment; ten in
which the transaction was
abandoned or restructured as a
result of antitrust concerns

PUBLIC

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1 raised during the
2 investigation; and four in
3 which the Commission initiated
4 administrative or Federal Court
5 litigation."

6 A. Yes.

7 267 Q. (Reading):

8 "The Division took action
9 against 12 merger transactions:
10 two that were blocked through
11 lawsuits in U.S. district
12 courts and ten in which the
13 transaction was abandoned or
14 restructured after the Division
15 raised concerns about the
16 threat it posed to
17 competition."

18 And you obviously read that
19 paragraph in preparing your
20 report?

21 A. Yes, I did.

22 268 Q. Indeed, you quoted from this
23 very paragraph, am I not correct, in footnote
24 49 of your report?

25 A. That is correct.

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Q. So if we factor into your analysis and your calculations, matters that you did not refer to in coming up with that 8 percent calculation, we see that of the 37 transactions that gave rise to second requests, the Federal Trade Commission and Department of Justice took action against 28 of the 37, or 75.7 percent, and of the 28, 20 were abandoned or restructured after concerns were raised by the FTC or Department of Justice during the course of their investigation?

A. It appears so.

270

Q. Is that a fair summary of this paragraph?

A. That appears that way, yes.

271

Q. Okay.

Now, am I right that you have not pointed to a single merger case in Canada in your report that should have been challenged by the Competition Bureau but was not?

A. That is correct.

272

Q. And you are not aware of one, are you?

A. No, I am not aware of one.

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1 The purpose of this section, if
2 you go back to Dr. Hylton's original report,
3 in paragraph 29, he discusses, and I'm quoting
4 from his report:

5 "As a general matter" --

6 273 Q. Sorry, Professor, let me just
7 interrupt you. I'm not sure what question you
8 think you're answering.

9 A. No, I'm answering the question
10 of the relevance of this data --

11 274 Q. I didn't ask you that.

12 A. -- in my report.

13 275 Q. I didn't ask you that.

14 The question I asked you was: You
15 haven't pointed to a single merger case in
16 Canada in your report that should have been
17 challenged by the Competition Bureau but was
18 not, and I believe you confirmed you did not?

19 A. I did not.

20 I was exactly referring to the
21 references that Dr. Hylton makes about the
22 most applicable study of antitrust enforcement
23 probabilities for this report -- that's what
24 he writes -- is the Coate et al. paper that
25 talks about FTC merger challenges.

PUBLIC

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1 So I, in particular, dove into
2 the aspect of FTC and DOJ merger challenges.

3 276 Q. Right. I didn't ask you
4 about any of that.

5 You are going to find that I have
6 little teeny itty bitty questions, little facts.

7 So here my little itty bitty
8 question is: You haven't pointed to a single
9 merger case in Canada in your report that should
10 have been challenged by the Competition Bureau
11 but was not.

12 And I believe you have confirmed
13 that's correct.

14 A. I have confirmed that.

15 277 Q. Thank you.

16 Let me turn to the second type of
17 case referred to in this part of your report
18 that is price fixing cartels.

19 We can agree, can we not, that one
20 of the well-recognized hallmarks of price
21 fixings cartels is that their participants take
22 steps to maintain secrecy?

23 A. That is typical of one of the
24 hallmarks of cartels, and in some cases of
25 monopolization as well.

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1 278 Q. Some -- at least in some
2 cases, maybe not every case but in some cases,
3 participants in price fixing cartels do so,
4 that is they take steps to maintain secrecy
5 because the consequences of getting caught can
6 include prosecution and imprisonment, both in
7 Canada and in the United States; fair enough?

8 A. Assuming that they understand
9 the law, I would agree with that.

10 279 Q. Can we agree on this, that
11 often the victims of price fixing cartels are
12 ordinary consumers?

13 A. That is typically true.

14 280 Q. And by contrast in a
15 monopolization or abuse of dominance case, the
16 conduct in question can actually harm
17 competing businesses; correct?

18 A. Consumers. Businesses and
19 consumers.

20 281 Q. Okay. Would you accept this,
21 that in a monopolization or abuse of dominance
22 case, the conduct in question can be more
23 public in nature?

24 A. It may or may not, depending on
25 the nature of the conduct and the case.

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1 282 Q. And if we go to your report
2 and look at paragraph 43, you refer to -- I'm
3 going to take you to that in about one minute.

4 Let me just pause there for a
5 second. I'm going to take you to Project
6 Bernanke in a minute.

7 Parties that might have cause to
8 complain in a monopolization or abuse of
9 dominance case would typically in your
10 experience include competing businesses or
11 firms?

12 A. I'm sorry, could you repeat the
13 question, counsel?

14 283 Q. Sure. In your experience,
15 parties that might have cause to complain in a
16 monopolization or abuse of dominance case --

17 A. That might have cause to
18 complain, I got it.

19 284 Q. Yes.

20 A. Yeah?

21 285 Q. -- include competing
22 businesses or firms?

23 A. In some cases I would agree
24 with that.

25 286 Q. Okay. And would you accept

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1 this, that competing businesses or firms are
2 likely to have greater financial and other
3 resources and incentives than individuals
4 would to launch complaints to enforcement
5 agencies like the Competition Bureau or the
6 FTC or the Department of Justice?

7 A. That would be more likely than
8 not.

9 287 Q. Now, in this part of your
10 report you do mention a business initiative of
11 Google in the United States known as Project
12 Bernanke [pron.]?

13 A. Bernanke, yes.

14 288 Q. It is actually pronounced,
15 I'm told, Bernake [pron.]

16 A. Well, I have met Professor
17 Bernanke and my understanding is that is how he
18 pronounces his name --

19 289 Q. All right, well --

20 A. -- but I will not argue with
21 the way that Google chooses to pronounce it.

22 290 Q. No, no. No, no, no, I may
23 have been -- I could be misled by one of my
24 colleagues so I defer to you.

25 You -- or were you aware, rather,

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1 that in the proceedings in the United States
2 District Court for the Eastern District of
3 Virginia, those are the proceedings presided
4 over by Judge Brinkema, were you aware that in
5 that case the plaintiffs initially made and then
6 abandoned, during the course of the proceedings,
7 allegations against Project Bernanke?

8 A. I believe that I read that
9 somewhere, yes.

10 291 Q. And you are aware that that
11 case was brought, not only by the United
12 States but also by 17 different states?

13 A. Yes, I'm aware of that.

14 292 Q. You've obviously read the
15 decision of Judge Brinkema?

16 A. I believe I've read parts
17 of it. I don't recall if I've read the full
18 decision.

19 293 Q. Okay, no worries.
20 Would you accept this, that there
21 is no reference in that decision to Project
22 Bernanke?

23 A. From my recollection, I do not
24 recall a reference to Project Bernanke.

25 294 Q. Okay. Now, you of course --

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1 A. I feel that maybe I should
2 remind you about your statement that the
3 Canadian judge mentioned, not necessarily to
4 look at the United States, but I'm just being a
5 bit facetious here.

6 295 Q. Oh, I -- I get the joke.

7 Professor, again, testifying as you
8 are as a neutral independent expert --

9 A. Yes.

10 296 Q. -- you can't express an
11 opinion under oath as to which industry
12 participants knew about this initiative by
13 Google and which did not; it is something you
14 have no knowledge of, right?

15 A. I have no knowledge of that,
16 that's correct.

17 297 Q. Okay, and it's fair to say
18 you've conducted no review or analysis of any
19 of Google's communications with publishers or
20 advertisers at the time to determine what they
21 may or may not have said about Google's
22 discretion to modify bids submitted by
23 advertisers in Ad Exchange or AdX?

24 A. That is correct.

25 298 Q. -- (overspeaking) --

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1 optimized auctions, that is something that
2 you've never looked at?

3 A. No, I have not looked at that.

4 299 Q. Am I correct that you've
5 conducted no review of the technical support
6 pages of Google relating to its Ad Exchange
7 auction model?

8 A. That, I actually have, in
9 another context but that was a while back and it
10 was not for this matter.

11 300 Q. Okay. Certainly none of
12 those materials are listed in Appendix B to
13 your report?

14 A. Correct, those are not things
15 that I looked at for the matter of my report.

16 301 Q. Okay. Now, let me deal
17 quickly, if I may, with other aspects of
18 Google's conduct that have been placed at
19 issue in one form or another in the
20 Commissioner's application, and some of them
21 are referred to in your report.

22 Let me start with acquisitions.

23 So you refer in your report,
24 I believe it's paragraph 35, to two acquisitions
25 of other companies that were completed by Google

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1 over the years.

2 A. Yes.

3 302 Q. So the acquisitions of Double
4 Click and another company called AdMeld?

5 A. That is correct.

6 303 Q. And you're no doubt aware
7 that those both of those transactions were
8 reviewed at the time by antitrust regulators
9 in the United States?

10 A. That is my recollection, yes.

11 304 Q. And were you aware that the
12 DoubleClick acquisition was also reviewed at
13 the time by the Competition Bureau in Canada?

14 A. I do not recall whether I did
15 know that or not.

16 305 Q. Okay, no worries. I'm going
17 to refresh your recollection in about two
18 minutes.

19 Let me start with DoubleClick and
20 start with the U.S.

21 So if we look at a complaint filed
22 by organizations called: EPIC, CDD and the U.S.
23 PIRG, so everyone loved acronyms apparently.
24 And my colleague will pull that complaint up for
25 you. So you should have on your screen,

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1 Professor, a complaint for the Federal Trade
2 Commission in Washington and the date of this,
3 for your benefit, is September 17th of 2020.

4 This is just to situate you in
5 time.

6 A. Mm-hmm.

7 306 Q. Nothing really turns on the
8 date, but that is the date of the complaint.

9 And what it indicates is that in
10 April of 2007 -- it's first paragraph. "So on
11 April 20 --

12 A. Yes.

13 307 Q. (Reading):

14 "On April 20, 2007, the
15 Electronic Privacy Information
16 Center (called EPIC) the Center
17 for Digital Democracy (called
18 CDD), and the U.S. Public
19 Interest Research Group (called
20 the U.S. PIRG) filed a
21 Complaint with the Commission
22 requesting an injunction and
23 investigation alleging that
24 Google, Inc. and DoubleClick
25 are engaging in unfair and

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1 deceptive trade practices..."

2 That's the allegation was.

3 "...that will be

4 exacerbated by the proposed

5 merger of the two companies."

6 A. Hm-hmm.

7 So this was a complaint to the

8 FTC about that acquisition. The acquisition

9 by Google?

10 A. It appears that way.

11 308 Q. And if we look at paragraph

12 23 of the complaint you'll see two things.

13 Number one, that this transaction was reviewed

14 not only by the FTC but also by the European

15 Commission.

16 A. Yes, I see that.

17 309 Q. And this was a sizeable

18 transaction. It was a \$3.1 billion merger.

19 A. Yes, that's what it states.

20 310 Q. Okay, and if we then go back

21 to paragraph 16 of the report, not the report,

22 the complaint rather, there is a reference

23 here to an Article in the Wall Street Journal

24 and then with respect to the European

25 Commission complaint, if you look at paragraph

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1 22 --

2 A. I'm sorry, Mr. Thomson, you
3 referenced paragraph 16, but we didn't go over
4 anything there. I'm just --

5 311 Q. I'm going to try to link a
6 couple of things in a minute.

7 I'm just trying to give you a
8 reference point. Look at paragraph 22.

9 A. Okay.

10 312 Q. Again, back to Europe now.
11 On June 27 in a letter to the European
12 Commission?

13 A. This is June 27 which year?

14 313 Q. 2007.

15 A. Okay, thank you.

16 314 Q. (Reading):

17 "On June 27, in a letter to
18 the European Commission,
19 consumer organizations,
20 including BEUC, urged an
21 investigation into the proposed
22 merger of Google and
23 DoubleClick..."

24 So, the point being that complaints
25 were now made in -- both in Europe by a consumer

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1 organization and in the U.S. by multiple
2 consumer organizations concerning the
3 DoubleClick ad position.

4 A. Yes.

5 315 Q. Fair enough?

6 A. Mm-hmm.

7 316 Q. And let's mark this document
8 as the next exhibit, Exhibit 19.

9 --- EXHIBIT NO. 19: Second Filing
10 of Supplemental Materials in
11 Support of Pending Complaint and
12 Request for Injunction, Request
13 for Investigation and for Other
14 Relief dated September 17, 2007
15 BY MR. THOMSON:

16 317 Q. And then with respect to how
17 this came to an end, if you look at the FTC's
18 press release of December 20 of 2007, you will
19 find a press release issued by the Federal
20 Trade Commission again, December 20, 2007 top
21 left-hand corner, saying:

22 "The Federal Trade
23 Commission today announced that
24 it will not seek to block
25 Google Inc.'s proposed \$3.1

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1 billion acquisition of Internet
2 advertising server DoubleClick
3 Inc. In a 4-1 vote to close its
4 eight-month investigation of
5 the transaction, the Commission
6 wrote in its majority statement
7 that 'after carefully reviewing
8 the evidence, we have concluded
9 that Google's proposed
10 acquisition of DoubleClick is
11 unlikely to substantially
12 lessen competition'." [As
13 read.]

14 318 Q. So the FTC conducted its
15 investigation for about eight months and then
16 closed the investigation?

17 A. It appears that way, yes.

18 319 Q. Okay, let's mark this as the
19 next exhibit.

20 --- EXHIBIT NO. 20: FTC Press
21 Release dated December 20, 2007
22 entitled 'Federal Trade
23 Commission Closes
24 Google/DoubleClick Investigation'
25 BY MR. THOMSON:

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Q. Let's look at what happened
with this acquisition in Canada and let me
take you to the press release issued by a
group called CIPPIC. C-I-P-P-I-C.

This is the Canadian Internet
Policy and Public Interest Clinic in Ottawa and
you will see and the heading, "For Immediate
Release."

The heading is "CIPPIC Calls on
Competition commissioner to Review
Google-DoubleClick merger."

And the first paragraph says:

"August 2, 2007 The
Canadian Internet Policy &
Public Interest Clinic (CIPPIC)
at the University of Ottawa is
requesting that the Competition
Commissioner review the
proposed merger between Google
and DoubleClick. In an
application for an inquiry
filed with the Commissioner
today, CIPPIC alleges that a
merger between Google and
DoubleClick will prevent or

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1 substantially lessen
2 competition in the online
3 targeted advertising market by
4 combining Google's keyword
5 search dominance with
6 DoubleClick's leadership in
7 display advertisement serving
8 and behavioural targeting
9 advertisement products."

10 So, my simple point to you which
11 I'm hopefully you will agree with, is that this
12 transaction was challenged in all of the United
13 States, the European Union and in Canada?

14 A. Yes, I agree with that
15 statement.

16 321 Q. And the transaction was
17 obviously done in a highly public fashion?

18 A. That is correct.

19 322 Q. And you are no doubt aware
20 that all three of those challenges failed.

21 A. That seems to be the case.

22 323 Q. Now let's talk about Admeld.

23 Oh, well let me mark that press
24 release with CIPPIC of August 2, 2007. That's
25 Exhibit 21.

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1 --- EXHIBIT NO. 21: CIPPIC Press
2 Release dated August 2, 2007
3 entitled 'CIPPIC calls on
4 Competition Commissioner to
5 review Google-DoubleClick merger'
6 BY MR. THOMSON:

7 324 Q. Let's turn to Admeld quickly.
8 Google's proposed acquisition of
9 Admeld Inc. was also reviewed by the Antitrust
10 Division of the U.S. Department of Justice in
11 2011.

12 Let me show you the press release
13 issued by the United States Department of
14 Justice on December 2nd, 2011. You will find
15 that, I hope, on your screen.

16 A. Yes, I see it.

17 325 Q. So here you'll see a press
18 release December 2, 2011 in the archives of
19 the U.S. Department of Justice, entitled:

20 "Statement of the
21 Department of Justice's
22 Antitrust Division on Its
23 Decision to Close Its
24 Investigation of Google Inc.'s
25 Acquisition of Admeld Inc."

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1 So you are aware and perhaps you
2 were aware at the time, that although the
3 Department of Justice did investigate the
4 proposed acquisition of Admeld by Google, it
5 ultimately decided to close its investigation.

6 A. Yes, I am aware of that.

7 326 Q. And if we just look at the
8 first little bit of the press release, issued
9 by the U.S. Department of Justice, it says,
10 first paragraph:

11 "The Department of
12 Justice's Antitrust Division
13 issued the following statement
14 today after announcing the
15 closing of its investigation
16 into the proposed acquisition
17 of Admeld Inc., an online
18 display advertising service
19 provider, by Google Inc.:

20 'the Antitrust Division
21 obtained extensive information
22 from Google, Admeld and a wide
23 range of market participants in
24 connection with its merger
25 investigation of the proposed

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1 transaction. After a thorough
2 review of the evidence, the
3 division concluded that the
4 transaction is not likely to
5 substantially lessen
6 competition in the sale of
7 display advertising..."

8 Therefore, they closed their
9 investigation. So, this again was a significant
10 transaction that was proceeded with and
11 completed in a public fashion at the time?

12 A. Yes.

13 327 Q. Now, let's mark this as the
14 next exhibit, Exhibit 22.

15 --- EXHIBIT NO. 22: US DOJ Press
16 Release dated December 2, 2011
17 entitled 'Statement of the
18 Department of Justice's Antitrust
19 Division on Its Decision to Close
20 Its Investigation of Google
21 Inc.'s Acquisition of Admeld
22 Inc.'

23 BY MR. THOMSON:

24 328 Q. Let me turn, finally, on this
25 point to the allegations at issue in our case,

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1 the case pending before the Competition
2 Tribunal in Canada.

3 You are aware, are you not, the
4 Commissioner has alleged several anticompetitive
5 practices in this case?

6 A. That is my understanding.

7 329 Q. If you want to look to a
8 convenient summary of what those allegations
9 there is no better source that I, at least, am
10 aware of than Google's response that puts them
11 all in one paragraph, so let me show you that.

12 So if you pull up Google's
13 response -- go back to the first page, please,
14 filed with the Tribunal on February 14th of
15 2025, there is one paragraph that summarizes the
16 allegations made by the Commissioner in that
17 regard and-that is paragraph 247 on page 112 of
18 the response.

19 So under the heading "Google has
20 not engaged in a practice of anti-competitive
21 acts, Google's pleading says this in paragraph
22 247.

23 A. If I may, just Mr. Thomson, to
24 make sure I understand everything in context.

25 330 Q. Yeah, sure.

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1 A. This is the document that
2 represents Google's reply to the complaint by
3 the CCB of Google engaging in anti-competitive
4 conduct.

5 331 Q. That's correct.

6 A. Okay and this is the --

7 332 Q. What this paragraph does,
8 Professor, is it summarizes what the
9 allegations are.

10 A. Okay.

11 333 Q. I'm trying to give you --

12 A. I just want to make -- yeah,
13 just under the heading that Google has not
14 engaged in the practice of anti-competitive act,
15 under this claim it summarizes what the
16 complaints are about; am I understanding that
17 correctly?

18 334 Q. You have it exactly right.

19 A. Thank you very much.

20 335 Q. And I'm only giving you this
21 to use as a reference point, so we know what
22 we're talking about.

23 A. Totally.

24 336 Q. Under the heading, "Google
25 has not engaged in a practice of

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1 anti-competitive Acts." The response says
2 this:

3 "The Commissioner has
4 selectively put in issue in
5 this Application four out of
6 thousands of product
7 innovations that Google has
8 pursued in the period since the
9 emergence of Ad Tech some 25
10 years ago. As noted above, the
11 four alleged anticompetitive
12 acts are: (i) the tying
13 together of Google's Ad Tech
14 tools; (ii) the use by Google
15 of an innovative technology
16 called 'Dynamic Allocation';
17 (iii) the use by Google of an
18 innovative feature known as
19 'Project Bernanke'; and (iv)
20 the implementation by Google of
21 'Unified Pricing Rules'."

22
23 So that gives you a reference of
24 what we are going to discuss. We already talked
25 about Project Bernanke. So let me begin -- you

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1 can put that away or my colleague can put it
2 away. The first one I want to discuss is
3 dynamic allocation and let me show you just a
4 couple of documents that relate to this issue.

5 First, are you aware that the
6 Competition Tribunal conducted an investigation
7 concerning Google's conduct in the online
8 advertising display sector in the period from
9 2013 to 2016?

10 A. Sitting here right now I do not
11 recall dates of these investigations. I
12 obviously understand that investigations
13 happened, leading up to the complaint, but I do
14 not know during which periods those
15 investigations occurred.

16 337 Q. Okay, I'm of course, reaching
17 back a decade in time to 2013 to 2016 time
18 frame, so let me just show you a couple of
19 documents that relate to that investigation.

20 A. Sure.

21 338 Q. Start with a press release
22 issued by the Competition Bureau on April 19,
23 2016. So pull that up. So here you have a
24 press release issued by the Competition
25 Bureau.

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1 You see the date is just below the
2 heading, "April 19th, 2016 in Ottawa."

3 And the title of the release is:

4 "Competition Bureau
5 completes extensive
6 investigation of Google.

7 Bureau continues to monitor
8 competition issues in the
9 digital economy."

10 So this is obviously announcing in
11 the first paragraph:

12 "The Competition Bureau
13 announced today that it is
14 closing its investigation into
15 a number of allegations of
16 anti-competitive conduct by
17 Google. These allegations
18 related to Google's online
19 search, search advertising and
20 display advertising services in
21 Canada."

22 A. Yes I see that.

23 339 Q. So I'm assuming this is the
24 first time you've seen this press release?

25 A. It is my first time I'm seeing

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1 this press release.

2 340 Q. And I take it that prior to
3 attending to be examined today, you were not
4 aware that over a two or three-year period
5 back in 2013 to 2016 the Competition Bureau
6 did investigate the display advertising
7 services provided by Google in Canada?

8 A. Yeah, since my assignment had
9 nothing to do with the merits, I did not look
10 for any information about which investigations
11 the Competition Bureau performed over the years.

12 341 Q. Okay, and of course you
13 understand right now I'm interested in the
14 issue of detection and enforcement, so that's
15 the issue that I am now debating with you
16 rather than the merits of the underlying
17 allegations, but let me continue on.

18 First of all, let's mark this as
19 the next exhibit.

20 A. I understand that we are
21 talking about the topic of detection and I'm
22 sure at some point you will make that clear.

23 At the moment, I'm still waiting
24 for that.

25 342 Q. All right. Well your job is

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1 to wait and my job is to ask some questions
2 so...

3 A. And I will patiently wait while
4 you ask your questions.

5 343 Q. Thank you very much.

6 --- EXHIBIT NO. 23: Competition
7 Bureau Press Release dated April
8 19, 2016 entitled 'Competition
9 Bureau completes extensive
10 investigation of Google'

11 BY MR. THOMSON:

12 344 Q. Let me show you the document
13 issued by the Bureau that accompanied this
14 press release, and that is the Bureau's
15 position statement of the same date,
16 April 19th, 2016, and my colleague will pull
17 that up on screen.

18 So here you will see a document
19 titled "Investigation into alleged
20 anti-competitive conduct by Google," and the
21 heading below that "Position Statement."

22 A. Yes.

23 345 Q. You will see the date is the
24 same date as the press release April 19th,
25 2016.

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A. Yes, I see that.

Q. And the first paragraph:

"Today, the Commissioner of Competition (Commissioner) announced that he has discontinued an investigation into allegations that Google Inc. (Google) engaged in conduct contrary to the abuse of dominance provisions of the Competition Act (Act). This statement summarizes the extensive investigation conducted by the Competition Bureau (Bureau) in its review of allegations that Google engaged in anti-competitive business practices related to online search, search advertising and display advertising services in Canada."

Let's start by marking this, before I forget as the next exhibit.

--- EXHIBIT NO. 24: Competition

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1 Bureau Position Statement dated
2 April 19, 2016 entitled
3 'Investigation into alleged
4 anti-competitive conduct by
5 Google'

6 BY MR. THOMSON:

7 347 Q. And what I want to show you,
8 Professor, is the part that deals with this
9 issue of dynamic allocation.

10 So with respect to the scope of the
11 investigation conducted by the Bureau, you'll
12 find that summarized on page 2 of the position
13 statement, under the Heading Investigation
14 background, where the position statement says:

15 "Following the receipt of
16 complaints, the Bureau opened
17 an inquiry in 2013 to
18 investigate Google's conduct
19 related to online search and
20 search advertising. Over the
21 course of this inquiry the
22 Bureau received additional
23 complaints regarding Google's
24 conduct in the online display
25 advertising sector, which

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1 prompted a further review."

2 So a couple of points we can easily
3 agree on: This inquiry started in 2013 and came
4 to an end in April of 2016, fair enough?

5 A. It appears that way, yes.

6 348 Q. And the investigation
7 concerned Google's conduct in the online
8 display advertising sector which is the same
9 sector at issue in the current application
10 before the Competition Bureau.

11 A. That is my understanding.

12 349 Q. Now, if we look at the next
13 paragraph, in terms of the breadth of the
14 investigation conducted by the Bureau, you
15 will see the position statement says:

16 "To properly test the
17 allegations, the Bureau took a
18 number of steps to determine
19 the relevant facts. The Bureau
20 consulted with industry and
21 economic experts and conducted
22 over 130 interviews with a
23 broad range of market
24 participants, including
25 competitors, publishers,

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1 advertisers, original equipment
2 manufacturers, wireless
3 carriers and firms that provide
4 online advertising solutions.

5 The Bureau also analyzed a
6 substantial volume of
7 information collected from
8 various stakeholders and
9 obtained an order under section
10 11 of the Act compelling Google
11 to provide documents and
12 written returns of
13 information."

14 So we can agree the Bureau did, in
15 fact, conduct an extensive investigation into
16 these allegations about Google?

17 A. It appears that way.

18 350 Q. With respect to that last
19 statement, that the Bureau obtained an order
20 under section 11 of the Act compelling Google
21 to provide documents and written returns of
22 information.

23 If we turn to that order for a
24 moment my colleague will pull up, you will find
25 here an order issued by the Chief Justice of the

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1 Federal Court on December 24th of 2013. In the
2 case: The Commissioner of Competition versus
3 Google Canada Corporation. The title of the
4 order is "Order for the Production of Records
5 And Written Returns of Information."

6 Do you see that?

7 A. Yes, I do.

8 MR. THOMSON: Let's mark that as
9 the next exhibit.

10 --- EXHIBIT NO. 25: Order of
11 Chief Justice Crampton dated
12 December 24, 2013 for the
13 Production of Records and Written
14 Returns of Information

15 MR. GAY: Excuse me, maybe just
16 turn to the entire document. Give the witness
17 the benefit of seeing what the terms of the
18 order are.

19 MR. THOMSON: That's fine. If you
20 want to look about it. I'm not going to ask
21 about the substance or the order but you're
22 entitled to look at what this is.

23 MR. GAY: Right, maybe if --

24 THE WITNESS: Could you kindly
25 remind me the definition of ex parte?

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1 BY MR. THOMSON:

2 351 Q. In the absence of the other
3 party. So Google was not present during the
4 Commissioner's application to the Chief
5 Justice for the order. The order was issued
6 without Google knowing that the order was
7 being applied for and it had no chance to make
8 submissions.

9 A. Thank you, I appreciate that.

10 MR. GAY: Maybe turn down to the
11 next page too.

12 BY MR. THOMSON:

13 352 Q. Now, I'm going to flip
14 forward now into the issue of dynamic
15 allocation.

16 A. I do have one question,
17 counsel, if I may.

18 353 Q. Sure. Go ahead.

19 A. If you could move back up a
20 little further. There we go.

21 The court further -- so number 2:

22 "That the Respondent shall
23 make and deliver to the
24 Commissioner all written
25 returns of information

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1 specified in this Order, in
2 accordance with the terms of
3 this Order."

4 I know from both my own work at
5 eBay and Amazon, as well as from cases that
6 I've been an expert on, that companies will
7 have internal records with the disclaimer
8 typically in the subject line "Confidential,"
9 "Privileged and Confidential, For Attorneys'
10 Eyes Only," or something like that. Are those
11 documents often or ever provided under these
12 orders or not?

13 A. So the way this process works
14 is I get to ask questions and you get to answer
15 them.

16 354 Q. Okay, I just want to make
17 sure I understand the context of this order,
18 so that's why I am asking, so that if at some
19 point you ask me a question for which this
20 information is relevant, it would help me
21 knowing the answer to that question but, of
22 course, we could wait and see if it becomes
23 relevant later.

24 355 Q. And that's what we'll do.

25 MR. GAY: Mr. Thomson, I don't want

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1 to interject. You've noticed I've been very,
2 very cautious in interjecting, but this order
3 relates to really to search, not display. And
4 so it's a little misleading, I think, to suggest
5 that this relates entirely to the case that's
6 currently before the Tribunal. It is not.

7 I think if the witness was to take
8 the time and actually read this, I think they'd
9 be able to, I think, come to that conclusion.
10 But I think we have to be fair to the witness in
11 asking that witness to draw conclusions as
12 you've done, on really what is really apples and
13 oranges.

14 BY MR. THOMSON:

15 356 Q. And I'm just showing the
16 witness the section 11 referred to in the
17 Bureau's position statement that I just read
18 to him. I'm just trying to be fair to him.
19 Anyway, it doesn't matter to me; I'm just
20 moving on. Let me deal with the issue of
21 dynamic allocation. You're familiar with the
22 phrase "dynamic allocation"?

23 A. I'm familiar with the phrase,
24 but I am not familiar with the exact workings of
25 the technology.

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1 357 Q. Okay, no worries. Did you
2 know that "dynamic allocation" is sometimes
3 referred to as "enhanced dynamic allocation"?

4 A. I am not aware that those terms
5 are interchangeable.

6 358 Q. Okay, let me show you, in
7 terms of the nature and scope of the
8 investigation conducted by the Competition
9 Bureau in this time frame, 2013 to 2016.

10 Turn to page 11 of the position
11 statement. I'm now focusing on the part of the
12 investigation dealing with the display
13 advertising space and Google's role in that
14 space.

15 So you will see a highlighted
16 paragraph.

17 A. I don't see a highlighted
18 paragraph, but if you direct me to the beginning
19 of it, I'll probably figure it out.

20 359 Q. It starts with the words
21 "Notwithstanding."

22 A. "Notwithstanding," yes I see
23 that.

24 360 Q. (Reading):
25 "Notwithstanding the

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1 uncertainty (surrounding)
2 Google's market power in this
3 space, the Bureau considered
4 allegations that Google engaged
5 in conduct to exclude rivals
6 such as competing ad exchanges
7 and demand-side platforms.
8 Specifically, the Bureau
9 examined allegations that
10 Google engaged in the following
11 conduct."

12 And the one I'm interested in
13 right now is the second one:

14 "Enhanced Dynamic
15 Allocation - implementing a
16 software setting in DFP that
17 unfairly advantages Google over
18 competing ad exchanges."

19 Do you see that?

20 A. Yes, if I recall correctly just
21 remind me, DFP is DoubleClick for publishers; am
22 I getting that right?

23 361 Q. That's a good memory. Yes
24 you're right.

25 A. Thank you.

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1 362 Q. And with respect to that
2 issue, the allegation investigated by the
3 Bureau in this time frame about dynamic
4 allocation or enhanced dynamic allocation, in
5 terms of what ultimately happens with that
6 investigation, if we look at the next page you
7 will see a heading "enhanced dynamic
8 allocation."

9 A. Yes.

10 363 Q. Which then describes the
11 nature of the initiative of Google, but in
12 terms of the result of all this, it's the next
13 paragraph "The information gathered..."

14 "The information gathered
15 by the Bureau suggests that
16 there has been no exclusionary
17 effect on competing ad
18 exchanges..."

19 A. If you don't mind, counsel, I'd
20 just like a moment to read the preceding
21 paragraph.

22 364 Q. Yeah, go ahead.

23 A. So just I can put things in
24 context.

25 365 Q. Go ahead.

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1 A. Thank you.

2 366 Q. Just so we have it for our
3 record, I might as well -- if you're reading
4 it, I might as well read it into the record.
5 So under the heading "2. Enhanced Dynamic
6 Allocation." The Bureau's position statement
7 says this:

8 "When Google's DFP receives
9 a request for an ad from a
10 website, under certain
11 circumstances Google's Enhanced
12 Dynamic Allocation (EDA)
13 feature in DFP will check AdX
14 (and only AdX) to see if any
15 advertisers are willing to pay
16 more for the ad impression. The
17 Bureau considered allegations
18 that this gives AdX an unfair
19 advantage because it gives
20 Google a right of first refusal
21 on valuable ad impressions and
22 because it reduces the number
23 of ad impressions available for
24 competing ad exchanges to bid
25 on. The Bureau also considered

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1 allegations that the EDA
2 feature in DFP may disadvantage
3 publishers because DFP does not
4 check other ad exchanges to see
5 if they could obtain more value
6 for their ad impressions."
7 In terms of the result, the next
8 paragraph:

9 "The information gathered
10 by the Bureau suggests that
11 there has been no exclusionary
12 effect on competing ad
13 exchanges as a result of EDA.
14 Moreover, publishers were not
15 generally concerned about EDA
16 owing to the benefits of the
17 feature and the flexibility
18 they retain notwithstanding
19 EDA. In particular, publishers
20 suggest that EDA is beneficial
21 because it provides them with
22 an opportunity to increase
23 revenue. With respect to
24 flexibility, publishers
25 ultimately decide which ad

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1 exchanges to use and can set a
2 'price floor' for each ad
3 exchange. Lastly, EDA is
4 optional, so publishers can
5 decide for themselves whether
6 or not to use this feature in
7 DFP."

8 So two questions for you. Number
9 one, you will accept, will you not, that
10 Google's use of enhanced allocation appears to
11 have been widely known in this segment of the
12 industry?

13 A. It appears to be, yes.

14 367 Q. And you will accept that the
15 Bureau's conclusion not to pursue an abuse of
16 dominance case against Google in relation to
17 enhanced dynamic allocation was announced in a
18 highly public way.

19 A. That is, indeed, the case.

20 368 Q. And not just by way of a
21 summary press release, it was actually
22 described in detail in the Competition
23 Bureau's quite helpful position statement
24 issued in April, 2016.

25 A. I would agree with that.

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369 Q. Now the second allegation,
second of three, that are left.

The tying together of Google's
ad tech tools and we'll see that that allegation
was also investigated by the Competition Bureau
in this period from 2013 to 2016, so staying
with the same document, the position statement
of the Bureau of April 19th, 2016 you will
see -- if you go to page 13 of this document
heading entitled "bundling," do you see that?

A. Yes, I do.

370 Q. And under that heading the
Competition Bureau says this:

"The Bureau also considered
allegations that Google offers
incentives to advertisers to
encourage them to use only
Google's services across the
display advertising ecosystem.
For example, complainants
alleged that Google uses
below-cost pricing and provides
incentives for advertisers that
use Google's demand-side platform
(DBM) to also purchase

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1 inventory on Google's ad
2 exchange (AdX). These practices
3 allegedly foreclose the market
4 to competing demand-side
5 platforms.

6 Based on the information
7 collected by the Bureau, the
8 incentives that Google offers
9 to advertisers are marginal and
10 would not likely induce
11 exclusivity. Many advertisers
12 continue to use multiple
13 demand-side platforms to meet
14 their needs and there is no
15 evidence that rivals have been
16 excluded from competing
17 effectively as a result of such
18 incentives. The Bureau also did
19 not find evidence that these
20 practices substantially
21 lessened or prevented
22 competition in this market."

23 So a couple of questions for you.

24 Number one, you would accept, would you not,
25 that the decision of the Competition Bureau not

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1 to pursue, this bundling allegation was made in
2 a highly public way?

3 MR. GAY: You know, Mr. Thomson,
4 again, I only involve myself when, frankly, a
5 question is unfair.

6 The conduct that's described in
7 this document is not the conduct that the
8 Commissioner is after in our case currently that
9 before the Tribunal.

10 So asking the witness to draw links
11 or somehow suggest that this is conduct that
12 was -- when indeed it isn't the same conduct, is
13 a problem for me. It's a very big problem.

14 It is completely unrelated to the
15 current tie-in claim, so I'm going to voice my
16 objection and it's not a fair question and it
17 is, frankly, not a question that I think
18 characterizes what's said in this document with
19 what, in fact, is before the Tribunal in the
20 current notice of application.

21 BY MR. THOMSON:

22 371 Q. Well, we respectfully
23 disagree and we're going to argue that point
24 before the Tribunal and we'll ask the Tribunal
25 to draw its own conclusions when it compares

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1 the nature of the bundling allegations that
2 were made by the Bureau in the period from
3 2013 to 2016 with the allegations made by the
4 Commissioner in his notice of application, but
5 that's an issue for a later day and we'll have
6 it out in front of the Tribunal.

7 I'm seeking a very simple admission
8 from the good Professor Tadelis concerning a
9 simple issue which is: Professor, forget the
10 debate you've just heard --

11 A. Mm-hmm.

12 372 Q. -- as to what allegation is
13 being made here versus the allegation made in
14 the Notice of Application to the Bureau.

15 With respect to the issue of
16 bundling, as described in this position
17 statement, you would accept that the Bureau's
18 decision not to pursue that allegation by
19 commencing an abuse of dominance case against
20 Google was made in a highly public way and
21 explained in detail in this position statement.

22 REF MR. GAY: I am going to -- I instruct the
23 witness not to answer that question. I think the
24 document speaks for itself. It's not related to the
25 Notice of Application or the issues that we have

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1 addressed or raised in our Notice of Application, and for
2 that reason I'm going to ask Dr. Tadelis not to answer
3 that question.

4 BY MR. THOMSON:

5 373 Q. Let me deal with the third of
6 the -- the third and only remaining allegation
7 made by the Commissioner in this case and that
8 is Google's use of so-called unified pricing
9 rules.

10 You recall, Professor, I showed you
11 that in Google's response at paragraph 247.
12 This is the fourth matter raised by the --

13 A. Could you kindly raise that
14 document, again? I just want to refresh my
15 memory with the language.

16 374 Q. Yeah certainly.

17 A. Thank you also for calling me
18 "good Professor."

19 Everybody likes to be called a
20 good boy.

21 MR. THOMSON: Well you are good
22 Professor. I'm quite sure of that. Let's look
23 at Google's response. Turned to paragraph 247
24 one last time.

25 A. Yes, thank you. I'm looking at

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1 the paragraph. Tying together. Dynamic
2 allocation. Project Bernanke and the
3 implementation by Google of unified pricing
4 rules. Thank you very much, counsel.

5 375

Q. And just so we have it
6 because I need to maintain a very clear
7 record, so when this is read to the Tribunal
8 they'll understand what we're talking about.

9 What I'm interested in now is
10 paragraph 247 of Google's response under the
11 heading, "Google Has Not Engaged in a Practice
12 of Anticompetitive Acts."

13 It says:

14 "The Commissioner has
15 selectively put in issue in
16 this Application four out of
17 thousands of product
18 innovations that Google has
19 pursued in the period since the
20 emergence of Ad Tech some 25
21 years ago. As noted above, the
22 four alleged anticompetitive
23 acts are: (i) the tying
24 together of Google's Ad Tech
25 tools..."

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1 We've dealt with that.

2 "(ii) the use by Google of
3 an innovative technology called
4 'Dynamic Allocation'..."

5 Which we've dealt with.

6 "(iii) the use by Google of
7 an innovative feature known as
8 'Project Bernanke'..."

9 Which we've also dealt with.

10 MR. GAY: Sorry, let me correct
11 here. You've dealt with enhanced dynamic
12 allocation; you have not dealt with dynamic
13 allocation, and there is a difference between
14 enhanced dynamic allocation and dynamic
15 allocation, so let's be very clear on that.

16 BY MR. THOMSON:

17 376 Q. And then the fourth is the.

18 "...the implementation by
19 Google of (something called)
20 Unified Pricing ..."

21 Do you see that?

22 A. Mm-hmm.

23 377 Q. So I'm now on the last issue
24 which is the unified pricing rules.

25 A. Yes.

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1 378 Q. Now let me take to you an
2 Article hosted on Google's web site that deals
3 with unified pricing rules.

4 And look, please, at -- pull up tab
5 -- my colleague will pull up something called
6 "Google Ad Manager" by Jason Bigler, who was, at
7 that point in time, the director of product
8 management of Google. And the headline of the
9 article is "An Update on First Price Auctions
10 for Google Ad Manager;" do you see that?

11 A. Yes, I do.

12 379 Q. And you see the date is
13 May 10 of 2019?

14 A. I see that.

15 380 Q. And just a couple of passages
16 of this, if I may. First paragraph says:

17 "We've heard from many of
18 our partners that they want our
19 help to simplify how they
20 manage their revenue from
21 advertising. That s why Google
22 Ad Manager will be
23 transitioning to a unified,
24 first price auction this year.
25 This change will simplify our

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1 publisher platform and create a
2 fair and transparent auction
3 for everyone, helping our
4 partners create sustainable
5 businesses with advertising."

6 Then if we flip forward in the
7 document to the last page, you will see the
8 heading entitled, "How pricing rules will
9 change."

10 A. Yes, I see that.

11 381 Q. And then it says in the next
12 paragraph:

13 "In addition to impacting
14 how publishers are using floor
15 price rules, changing to a
16 first price auction in Ad
17 Manager requires a change in
18 how our rules function. Our
19 existing price rules that only
20 apply to our second price
21 auction will no longer work in
22 a first price auction."

23 Then it goes on to say:

24 "That's why we released a
25 new feature to all publishers

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1 globally, called unified
2 pricing rules. Our new unified
3 pricing rules will help
4 publishers more easily manage
5 floor prices across all
6 (guaranteed) (sic) partners."

7 And if you skip down a paragraph,
8 you will see how this document includes a quote
9 from Alex Payne, the Vice President of Global
10 Programmatic Solutions at VICE Media.

11 The first sentence of the quote:

12 "We welcome Google's move
13 to first price auctions and
14 unified pricing rules."

15 Then skipping down to the last
16 paragraph on the page:

17 "The switch to unified
18 pricing rules and a unified
19 first price auction will help
20 our partners simplify how they
21 manage advertising revenue and
22 increase transparency for
23 everyone in the ecosystem."

24 So Google's announcement of the
25 implementation of unified pricing rules was done

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1 in quite a public fashion?

2 A. Are these rules the exact rules
3 that are in the complaint?

4 382 Q. I believe they are.

5 A. If they are the exact rules, it
6 seems that they are making them public. If they
7 are not, then they're making something else
8 public.

9 383 Q. Now the let me -- oh, let's
10 mark that as the next exhibit, Exhibit 26.

11 --- EXHIBIT NO. 26: Google
12 Webpage entitled 'An update on
13 first price auctions for Google
14 Ad Manager'

15 MR. THOMSON: Professor, it's ten
16 to 3:00. Do you want to take a quick break
17 here?

18 THE WITNESS: Okay, roughly how
19 much longer do we have?

20 MR. THOMSON: Probably an hour.

21 THE WITNESS: Okay, quick break now
22 would be wonderful.

23 --- RECESS TAKEN AT 2:51 P.M.

24 --- UPON RESUMING AT 3:06 P.M.

25 BY MR. THOMSON:

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1 384 Q. Welcome back, Professor.

2 A. As to you, Mr. Thomson.

3 385 Q. Let me put a proposition to
4 you, in your capacity as a neutral independent
5 expert and see if we can reach a consensus.
6 And, again, I'm dealing with this issue of
7 probability of detection and enforcement.

8 So here's the proposition that I
9 hope we can find a common ground on: you would
10 agree, would you not, that the probability of
11 detection in relation to anti-competitive
12 conduct would increase if the enforcement agency
13 in question were to proactively go out and
14 solicit and encourage filing of complaints,
15 rather than sit back passively and wait to
16 receive complaints, if and when they're filed?

17 A. We are focused only on the
18 probability of detection; not the probability of
19 enforcement.

20 386 Q. Because, of course,
21 enforcement depends on the merits of the
22 complaints, right?

23 A. That statement seems correct to
24 me.

25 387 Q. Now, let me show you what

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1 happened with the Bureau in this part of the
2 economy in Canada in 2019, and ask you to turn
3 up --

4 A. Let me just add a qualification
5 to my statement because I want to be precise.

6 If the baseline probability of
7 detection is a hundred per cent, then it
8 cannot rise, no matter what efforts are there.

9 If the baseline probability of
10 detection is lower, especially significantly
11 low, then any efforts to proactively encourage
12 complaints would, most likely, somewhat
13 increase the probability of detection.

14 388 Q. Let me show you what happened
15 in 2019. First, just to complete the story of
16 what happens with the Bureau and Google in
17 2016, I'll take you back one last time to the
18 position statement issued by the Bureau on
19 April 19, 2016, so let me have my colleague
20 pull that up. You may recall just before the
21 break we looked at this document.

22 This is the Bureau's position
23 statement of April 19th, 2016, entitled:
24 "Investigation into alleged anti-competitive
25 conduct by Google."

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1 And I showed you portions where the
2 Bureau said we are not going to proceed to
3 launch an abuse of dominance case against
4 Google, but the Bureau did keep its feet in the
5 water, as they say, so at the end of the
6 statement on page 14 under the heading
7 "Conclusion" the Bureau says this:

8 "The Bureau conducted an
9 extensive investigation into
10 allegations that Google engaged
11 in a variety of
12 anti-competitive business
13 practices related to online
14 search, search advertising and
15 display advertising services in
16 Canada. For the reasons set out
17 above, the Bureau concluded
18 that there is inadequate
19 evidence to support a
20 conclusion that
21 Google's conduct, outside its
22 practices related to the
23 AdWords API Terms and
24 Conditions, was engaged in for
25 an anti-competitive purpose

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1 and/or that the conduct
2 substantially lessened or
3 prevented competition in
4 Canada."

5 And then skipping down to the next
6 paragraph:

7 "The digital economy,
8 including the increasing
9 competitive significance of
10 data, will continue to play a
11 crucial role for Canadian
12 businesses and consumers.
13 Robust competition policy and
14 enforcement in this sector will
15 nurture a competitive and
16 innovative Canadian
17 marketplace.

18 The Commissioner makes his
19 enforcement decisions based on
20 the available evidence. The
21 Bureau will closely follow
22 developments with respect to
23 Google's ongoing
24 conduct, including the results
25 from investigations of our

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international counterparts.

More generally, the Bureau will continue actively monitoring the digital marketplace. Should new evidence come to light of harm in the Canadian marketplace, whether through subsequent complaints or the Bureau's ongoing monitoring efforts, the Bureau will not hesitate to take appropriate action."

So, as of April 2016 the Bureau made clear that it was going to continue to evaluate the digital marketplace, including Google's conduct in it, fair enough?

A. That seems to be what's written here.

389 Q. Okay let's fast forward three years and see what happens. Let me show you just two documents that will assist you in understanding the initiative the Competition Bureau pursued in 2019.

So, first, a press release issued by the Bureau on September 4th of 2019 entitled

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1 "Competition Bureau calls for businesses to
2 report potentially anti-competitive conduct in
3 the digital economy."

4 You will see this is a news release
5 of September 4th of 2019. Do you have that date
6 just below the heading?

7 A. I see that, yes.

8 390 Q. It says this:

9 "The Competition Bureau has
10 published a call-out for
11 information from Canada s
12 business community about
13 conduct in the digital economy
14 that may be harmful to
15 competition.

16 The Bureau is seeking
17 information from businesses and
18 other interested parties
19 regarding certain strategies
20 that firms may use to hinder
21 competition in certain core
22 digital markets, such as online
23 search, social media, display
24 advertising and online
25 marketplaces."

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1 Do you have that?

2 A. Yes.

3 391 Q. And then -- well, let's start
4 by marking that as an exhibit. It's
5 Exhibit 27.

6 --- EXHIBIT NO. 27: Competition
7 Bureau Press Release dated
8 September 4, 2019 entitled
9 'Competition Bureau calls for
10 businesses to report potentially
11 anti-competitive conduct in the
12 digital economy'

13 BY MR. THOMSON:

14 392 Q. And then let's look at the
15 Bureau's call-out issued the same day. Pull
16 that out, that document up so you will see the
17 very same date the Bureau issues a document
18 entitled, "Competition bureau call-out to
19 market participants for information on
20 potentially anti-competitive conduct in the
21 digital economy." And the first bullet says:

22 "The Competition Bureau
23 (Bureau) is seeking information
24 from market participants about
25 conduct in the digital economy

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1 that may be harmful to
2 competition."

3 Then below that, skipping down to
4 the next paragraph: "Competition issues in the
5 digital economy."

6 "The Bureau is examining
7 concerns that certain core
8 digital markets, like online
9 search, social media, display
10 advertising and online
11 marketplaces, have become
12 increasingly concentrated, to
13 the detriment of consumers and
14 businesses.

15 The Bureau is seeking
16 information from the market to
17 understand whether, and if so
18 why, this is the case."

19 Then it goes on for the next number
20 of pages.

21 Were you aware of this initiative?

22 A. Sitting here right now, I do
23 not recall being aware of this in initiative.

24 MR. THOMSON: Okay, can we mark
25 that as the next exhibit.

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1 --- EXHIBIT NO. 28: Competition
2 Bureau Paper entitled
3 'Competition Bureau call-out to
4 market participants for
5 information on potentially
6 anti-competitive conduct in the
7 digital economy'

8 BY MR. THOMSON:

9 393 Q. Now in terms of participation
10 in this call-out, the Bureau deals with that
11 in its next report. That's the annual report
12 from 2019 to 2020, so let's pull that up.

13 Here you'll find the Competition
14 Bureau's annual report for 2019 and 2020
15 entitled, "Our year in action, safeguarding
16 competition in a digital world."

17 I take it you've never seen this
18 document before?

19 A. I don't believe I have.

20 394 Q. And let's mark that as the
21 next exhibit, so we have it.

22 --- EXHIBIT NO. 29: Competition
23 Bureau Canada annual report for
24 2019/2020, entitled Our Year in
25 Action: Safeguarding Competition

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in a Digital World

BY MR. THOMSON:

395 Q. And the part I wanted to take
you to is at page 9 of the annual report under
the heading, "Calling on businesses to report
anti-competitive conduct in the digital
economy."

Then it goes on to say:

"In September 2019, we
called on Canadian businesses
to provide us with information
on potentially anticompetitive
conduct in the digital economy.
Over 25 businesses and business
associations responded to our
call-out. Some of the issues
highlighted in our call-out
included business strategies
that may harm competition, such
as: refusals to deal,
self-preferencing, margin
squeezing and creeping
acquisitions.

The information we received
may be used to inform and

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1 support future investigations
2 into alleged anti-competitive
3 conduct in digital markets."

4 So it appears that around 25
5 businesses or business associations did respond
6 to the Bureau's call-out?

7 A. It appears that way.

8 396 Q. And then in terms of the
9 sequence of events that followed from this,
10 let me show you two events that then happened
11 involving Google.

12 The first is -- I'm going to show
13 you an affidavit filed by a woman named
14 Stephanie Gallardi (sic), October 12th of 2021
15 in support of an application for what is known
16 as a section 11 order against Google.

17 First of all, do you know what the
18 phrase "section 11" order means? Do you know
19 what I'm talking about?

20 A. No, I do not.

21 397 Q. So section 11 of the
22 Competition Act provides for compulsory
23 investigations and the Commissioner of
24 Competition can apply ex parte, so without the
25 other side being present to a judge of the

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1 Federal Court for an order that requires the
2 respondent to then produce documents, submit
3 returns of information under oath and so on.
4 That is known in Canada as a section 11 order.

5 A. Got it.

6 398 Q. So what I want to show you
7 now is an affidavit that the Competition
8 Bureau relied upon to obtain a section 11
9 order against Google that was issued on
10 October 22 of 2021.

11 A. So I'm putting things in
12 context, is this what led to the investigation
13 that resulted in the complaint that we are
14 discussing, for which Dr. Hylton's report
15 discusses penalties?

16 399 Q. I'm going to ask you
17 questions about that. So, let's take it one
18 step at a time then.

19 I'm going to ask you some questions
20 about that very issue. So let's start with the
21 affidavit of Ms. Gallardi (sic) and my colleague
22 will pull that up. Sorry, I've got the wrong
23 name. It's Guitard. I said "Gallari.: It's
24 actually Guitard. So Stephanie Guitard,
25 G-U-I-T-A-R-D.

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1 You will see this affidavit was
2 affirmed on October 12th, 2021?

3 A. Yes.

4 400 Q. And the part I'm interested
5 in is paragraph 6, top of page 3 that says:

6 "On December 18, 2020, the
7 Commissioner commenced an
8 inquiry under subparagraph
9 10(1)(b)(ii) of the Act on the
10 basis that he has reason to
11 believe that grounds exist for
12 the making of an order under
13 Part VIII of the Act,
14 specifically pursuant to
15 sections 77 and 79."

16 And 79 is the abuse of dominance
17 provision you have read?

18 A. 79 I have read.

19 401 Q. So, my question for you is:
20 do you know what prompted the Commissioner to
21 commence this inquiry on December 18th of
22 2020?

23 A. No I am not aware of what
24 prompted this investigation.

25 402 Q. Okay, is this the first time

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1 you are seeing this affidavit?

2 A. I believe it is. This is the
3 affidavit of so-called Ms. Guitard?

4 403 Q. Yes.

5 A. You are from Ontario, I won't
6 blame you for not pronouncing French names
7 correctly.

8 404 Q. Thank you for that. You are
9 being very generous.

10 A. I am originally from Quebec
11 so...

12 405 Q. Oh, you are. I didn't know
13 that. I hadn't appreciated you had Canadian
14 roots.

15 A. I do and I'm very grateful for
16 them.

17 406 Q. No wonder you are such a nice
18 guy. Let's mark that as the next exhibit.
19 Okay.

20 --- EXHIBIT NO. 30: Affidavit of
21 Stephanie Guitard, dated October
22 12, 2021

23 BY MR. THOMSON:

24 407 Q. Okay, just to complete the
25 story you probably won't be able to help me

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1 with this either, but this affidavit then did
2 result in what we have come in this case to
3 know as the first section 11 order and my
4 colleague will pull that up.

5 So, I'm showing you now, Professor,
6 a section 11 order issued by Justice Little of
7 the Federal Court on October 22, 2021 involving
8 the Commissioner's investigation of Google and
9 this is in the context of the matter that
10 ultimately resulted in the commencement of the
11 application that we're wrestling with now.

12 MR. GAY: No, that's, in fact
13 incorrect, Mr. Thomson. And this is in relation
14 to YouTube and not in relation to the
15 allegations that are currently made in the
16 Notice of Application.

17 I mean you are free to ask him
18 questions about that but let's represent the
19 document for what it is.

20 BY MR. THOMSON:

21 408 Q. Have you seen this document
22 before, Professor?

23 A. Not to the best of my
24 knowledge, no.

25 409 Q. Okay and did the Bureau

PUBLIC

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1 discuss with you this order as part of the
2 background that led to the commencement of the
3 application.

4 A. We have not discussed this
5 order.

6 410 Q. Has that been marked? Let's
7 mark that as the next exhibit.

8 --- EXHIBIT NO. 31: Order of
9 Justice Little dated October 22,
10 2021 to Produce Records and Make
11 and Deliver Written Returns of
12 Information

13 BY MR. THOMSON:

14 411 Q. Let's talk more generally --
15 forget Google for a moment, but talk about the
16 Bureau generally. You are obviously aware
17 that the Competition Bureau is the principle
18 independent agency responsible for
19 administering and enforcing the Competition
20 Act in Canada?

21 A. Yes, I'm aware of that.

22 412 Q. And can we agree that the
23 Competition Bureau does a good job of
24 communicating fairly and accurately with the
25 people of Canada concerning its activities on

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1 a timely basis?

2 MR. GAY: I don't know that the
3 witness can speak to that. I mean whether it
4 communicates is one thing. Whether it does so
5 effectively is a matter of opinion.

6 I mean I don't know if Mr. Tadelis
7 is in a position, really, to comment on the
8 adequacy of communications -- (indiscernible)
9 -- (overspeaking) --

10 THE WITNESS: The answer --

11 MR. GAY: -- authority.

12 THE WITNESS: The answer I was
13 going to give is "I hope so," but I can't say...

14 BY MR. THOMSON:

15 413 Q. I was trying to get you a
16 compliment, Alex.

17 MR. GAY: I know you are, but as
18 nice as you are, you know, Kent, I don't know if
19 that's a fair question.

20 BY MR. THOMSON:

21 414 Q. Let me ask you this: do you
22 know if the Competition Bureau maintains a
23 website?

24 A. Yes, I am definitely aware of
25 that.

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1 415 Q. And you'd agree that that
2 website is accessible to anyone in this
3 country who has access to the internet?

4 A. And probably anyone over the
5 world, who has access to the internet. The
6 question is how many people actually take the
7 time to go read it?

8 416 Q. Well, we're about to find
9 out. And the team that can access that
10 website would include both individuals and
11 businesses, fair enough?

12 A. Fair enough.

13 417 Q. Now, do you know this or are
14 you aware of this that the Competition Bureau
15 also goes to some lengths to ensure that its
16 complaint processes and procedures are readily
17 accessible and understandable?

18 A. I would assume as much. I
19 don't know it as a fact.

20 418 Q. Okay, well let me show you
21 just one or two documents that will shed light
22 on some of this.

23 First, let's turn to a document
24 entitled, "Share information with the
25 Competition Bureau," posted on the Bureau's

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1 website.

2 So here you'll find a document on
3 the website entitled, "Share information with
4 the Competition Bureau."

5 You will see the date of the
6 document, the date it was accessed on the
7 website is on the top left-hand corner, July --

8 A. Yes I see it, yes.

9 419 Q. July 27th, 2025.

10 A. Mm-hmm.

11 420 Q. So, about two days ago.

12 A. Yep, someone was working on a
13 Sunday.

14 421 Q. I guarantee you it was not
15 me.

16 A. I'm sure it wasn't.

17 422 Q. And you will see if you
18 scroll halfway down the page, it says, you can
19 share information about suspicions of
20 anti-competitive conduct, collusion, deceptive
21 marketing practices and so on, and then how to
22 file a report. Next heading.

23 "Online via our website,
24 over the phone, by email."

25 A. May I ask just a clarifying

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1 question: I'm assuming that the underlying --
2 underlined words that I see under, "you can
3 share information about..." those would be links
4 to explain to people what anti-competitive or
5 collusion are; is that correct?

6 423 Q. That's correct, yes.

7 A. Okay, but there is no link
8 under "online via our website;" is that correct?

9 424 Q. Not on that part of the
10 document.

11 A. Got it, I'm just trying to
12 establish --

13 425 Q. And let me show you a link.
14 So just to answer your question directly, look
15 at the page 3 of the document under the bold
16 heading, "Get in touch... it's quick and easy,
17 exclamation point. All bold. And then below
18 that we're here to help.

19 Your questions and feedback are
20 important to us. We'll address them as quickly
21 as possible and the first bullet is Competition
22 "bureaucanada.ca" with a link?

23 A. Yes I see that.

24 426 Q. And then below that a 1-800
25 number and then two other numbers. One to

PUBLIC

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1 report cheating in federal contracts and one
2 for hearing impaired people?

3 A. I see that.

4 427 Q. So you would accept that the
5 Competition Bureau does, in fact, make efforts
6 to ensure that its complaint processes and
7 procedures are readily accessible and
8 understandable?

9 A. And just to make sure I
10 understand, this would be the way in which the
11 so-called 25 businesses followed with complaints
12 in the previous document that you've just showed
13 me?

14 428 Q. I don't know. I can't answer
15 that question.

16 A. I see.

17 429 Q. But I'm going to ask you a
18 more basic question on that.

19 A. Okay.

20 430 Q. Based on its website --

21 A. Yes.

22 431 Q. Based on its posting, the
23 Competition Bureau goes to some lengths to
24 ensure that its complaint processes and
25 procedures are readily accessible and

PUBLIC

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1 understandable.

2 A. It appears that way.

3 432 Q. Now, if you look at -- let's
4 mark that as an exhibit. We haven't already.
5 Exhibit 32.

6 --- EXHIBIT NO. 32: Competition
7 Bureau webpage entitled 'Share
8 information with the Competition
9 Bureau'

10 BY MR. THOMSON:

11 433 Q. Let me now try to help you
12 answer your own question which is: Do people
13 actually access the website?

14 So, I've already shown you one or
15 two examples of the Competition Bureau's annual
16 report.

17 Let me show you an annual report
18 this time more recently for the year 2023 and
19 2024. So here you'll find another annual report
20 of the Competition Bureau, this time entitled
21 "Empowering Competition, a Landmark Year."

22 Do you have that?

23 A. I do.

24 434 Q. Okay and if we look at page 7
25 of the annual report, you will find a series

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1 of four boxes.

2 A. Yes.

3 435 Q. And under the heading
4 "Outreach," bottom left-hand corner; do you
5 have that box?

6 A. Yes.

7 436 Q. It indicates that in that
8 year, there were 916,711 web visits, 103
9 publications and 147 presentations and
10 speeches. So you'd accept that a number of
11 people, in fact, did visit the Bureau's
12 website during that year?

13 A. Yes, I just wouldn't know of
14 those close to 1 million web visits how many
15 were bots and how many were actual individuals,
16 but clearly they were close to a million clicks
17 on the website that could either be from bots or
18 individuals.

19 437 Q. Right. And why are you
20 raising bots? You have no idea whether a bot
21 ever accessed this website, do you?

22 A. Of course not.

23 438 Q. And in terms of the types of
24 complaint that the Bureau receives, the Bureau
25 also, as it turns out, keeps track of that

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1 issue.

2 So let's look at a different
3 document issued by the Bureau and have my
4 colleague pull this up.

5 This is something called the
6 "Competition Bureau Performance Measurement &
7 Statistics Report for 2024-2025."

8 Do you have that?

9 A. Yes, I do. Do you mind
10 going back to the previous page. There is
11 something there that confused me. I just want
12 to make sure that I'm holding all the right
13 numbers in my head as we're moving forward.
14 Thank you for indulging me.

15 439 Q. You're talking about the
16 annual report now?

17 A. Yeah, yeah, exactly this page.
18 So I recall that you showed me a previous
19 document that said there were 25 businesses that
20 followed with a complaint and here there are
21 5,113 complaints received.

22 I'm just trying to put those
23 numbers in context and understand how they
24 relate to each other, if at all.

25 440 Q. You've got two completely

PUBLIC

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1 different timeframes. One was in 2019 --

2 A. Okay.

3 441 Q. -- dealing with the Bureau's
4 call-out.

5 A. Got it.

6 442 Q. It did not say that the
7 Bureau had received 25 complaints; it said 25
8 businesses or organizations had engaged in the
9 Bureau's call-out.

10 A. I understand, okay.

11 443 Q. So now let's go to this
12 document.

13 A. Thank you for clarifying that,
14 counsel.

15 444 Q. My pleasure. So this is the
16 Competition Bureau Performance Measurement and
17 Statistics Report 2024, 2025. And you will
18 see the heading just below that is, "Term 2
19 (October 1, 2024 - March 31, 2025)."

20 And to understand why it's
21 referring to term 2, you've got to read down
22 into the ensuing paragraph. It says:

23 "The Competition Bureau's
24 Performance Measurement and
25 Statistics Report (or the PMSR)

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1 demonstrates progress towards
2 the Bureau's priorities and
3 commitments by publicly
4 reporting on the Bureau's
5 performance data on a
6 semi-annual basis broken down
7 into Term 1 (April 1, 2024
8 September 30, 2024) and Term 2
9 (October 1, 2024 March 31,
10 2025) ."

11 A. Mm-hmm.

12 445 Q. Then it goes on to say:

13 "In support of the Bureau's
14 commitment to enhance its
15 performance measurement
16 framework ..."

17 A. Performance measurement and
18 Statistics Report.

19 446 Q. Yeah.

20 "...includes results for
21 the 2024-2025 commitments and
22 on the Bureau's performance in
23 the areas of enforcement,
24 advocacy, outreach compliance
25 and collaboration."

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1 So what I'm interested in is the
2 types of complaints the Bureau received during
3 term 1, so, again, term 1 was April 1, 2024 to
4 September 30, 2024.

5 A. Mm-hmm.

6 447 Q. And you will find the answer
7 on the next page.

8 You will see a heading called,
9 "Highlights for Term 1."

10 A. Yes.

11 448 Q. And then there is a series of
12 six boxes below that.

13 The one that -- I'm interested in
14 two boxes. One is -- scroll down. There. So,
15 complaints and requests for information, you
16 will see that in that first term the Bureau
17 received 2,877 complaints.

18 A. Yes.

19 449 Q. And then beside that, "Top 5
20 complaints by business conduct."

21 Number one is "False or misleading
22 representations" and the second is "Abuse of
23 dominance"?

24 A. Yes I see that.

25 450 Q. So apparently a number of

PUBLIC

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1 complaints that the Bureau received in that
2 timeframe concerned allegations of abuse of
3 dominance.

4 A. Yes, I see that.

5 451 Q. And then if you look at term
6 2, highlights for term 2, again that's a
7 period of October 1, 2024 and March 31, 2025
8 you will see the same boxes. Scroll to the
9 next page.

10 Again, complaints and requests for
11 information so in that six-month period, 4,214
12 complaints received and, again, the second of
13 the top five complaints about business conduct
14 was an prohibition where abuse of dominant
15 position. So abuse of dominance complaints;
16 fair enough?

17 A. Yes.

18 452 Q. Okay, let's mark that as the
19 next exhibit.

20 MS. McMASTER: We need to mark the
21 report first.

22 MR. THOMSON: Oh, sorry, okay.

23 MS. McMASTER: Annual report for
24 2023 - 2024, will be Exhibit 33.

25 --- EXHIBIT NO. 33: Competition

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Bureau Canada Annual Report
2023-24 Empowering Competition A
Landmark Year.
MS. McMASTER: This document will
be Exhibit 34.

--- EXHIBIT NO. 34: Competition
Bureau report dated July 24, 2025
entitled 'Competition Bureau
performance measurement &
statistics report 2024-2025'

BY MR. THOMSON:

453 Q. This document, again, is the
Competition Bureau performance measurement and
statistics report for 2024 and 2025, the date
of which is July 24, 2025.

Okay, am I right that sitting here
today, are have not identified in your report
even a single abusive dominance case, the
Competition Bureau should have pursued but did
not?

A. That is correct.

454 Q. Now, I think I'm on to just
about my last topic, which I'm sure you'll be
relieved to be rid of me.

A. Oh, I'm actually enjoying your

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1 questions. They are precise, for the mostpart
2 and even though maybe not on topic, interesting.

3 455 Q. Okay. We'll debate the
4 relevance at a later stage in front of
5 somebody other than you, but I appreciate
6 that. If we turn back to your report, one of
7 the topics that you address in your report
8 concerns the manner in which you believe the
9 Competition Tribunal would determine the
10 sanctions it will impose on Google if
11 liability is ultimately found; do you recall
12 that?

13 A. That is correct, yeah.

14 456 Q. And just to pick an example
15 if we look at the body of your report and look
16 at paragraph 54, you talk about that subject.

17 A. Yes, that is correct.

18 457 Q. And if we look at the last
19 paragraph of your report, you say this:

20 "I understand that this
21 process..."

22 That's the process that you
23 envisage for the Tribunal to follow.

24 You say:

25 "I understand that this

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1 process is consistent with how
2 the European competition
3 authorities calculate antitrust
4 penalties."

5 Do you see that?

6 A. I recall that. I just don't
7 see it in front of me at the moment.

8 458 Q. Oh, sorry, it's the last
9 sentence in paragraph 54.

10 A. Oh, yes.

11 459 Q. So just, again, just to put
12 this in context so you've now described in
13 that paragraph the approach that you believe
14 the Tribunal would follow in determining the
15 sanction to be imposed against Google, if
16 liability were to be found and in that last
17 sentence you say:

18 "I understand that this
19 process is consistent with how
20 the European competition
21 authorities calculate antitrust
22 penalties."

23 A. That is correct. That was my
24 understanding.

25 460 Q. And I assume you stand by

PUBLIC

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1 that position?

2 A. I always reserve the right to
3 modify my opinion, if presented with material
4 that I either missed or misinterpreted, but,
5 right now, sitting here, I don't see any reason
6 not to stand behind what I said.

7 461 Q. Okay, and you'll see that
8 there's a footnote at the end of that
9 paragraph, footnote 73.

10 A. Yes, I think that cites
11 something from the DMCMA. Yeah, that's right.

12 462 Q. And I just want to look --
13 one of the documents you cite in footnote 73,
14 so if we scroll down to the bottom of the page
15 one of the documents you cite is the European
16 Union?

17 A. Yes.

18 463 Q. Called, "Guidelines on the
19 method of setting fines imposed pursuant to
20 Article 23(2)(a) of regulation No. 1/2003"?

21 A. Yes, I see that.

22 464 Q. I just want to explore that
23 with you briefly to see if we can reach a
24 consensus and educate the Tribunal as to what
25 that footnote involves.

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1 So let me show you the document
2 that I believe to be the guidelines you've
3 referred to in that footnote.

4 I'm going to have my colleague pull
5 those up. Again, if you compare the title on
6 this document to the title that you've inserted
7 in footnote 73, footnote 73 refers to guidelines
8 on the method of setting fines imposed pursuant
9 to Article 23 (2)(a) of Regulation No. 1/2023.

10 And I believe you'll find an
11 identical heading.

12 A. Yes, I do see that.

13 465 Q. So am I right that these are
14 the guidelines that you referred to in
15 footnote 73?

16 A. They indeed appear to be.

17 466 Q. Okay, let's mark these as the
18 next exhibit.

19 --- EXHIBIT NO. 35: Guidelines on
20 the method of setting fines
21 imposed pursuant to Article 23
22 (2)(a) Regulation No 1/2003
23 article from Official Journal of
24 the European Union

25 BY MR. THOMSON:

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1 467 Q. Now, let's start, if we may,
2 Professor, by seeing if we can explain to the
3 Competition Tribunal this reference to Article
4 23(2)(a) of Regulation No 1/2003.

5 Do you see that in the heading of
6 the guidelines?

7 A. Yes, I see that.

8 468 Q. So, I just wanted to explore
9 what is Article 23 (2)(a) of this regulation
10 and how does that have any application here,
11 so if we turn up the next document which is
12 the regulations. So it's Article 23(2)(a) of
13 Regulation No. 1/2003. Let's look at what
14 Article 23(2)(a) of Regulation No. 1/2003
15 says.

16 That's the next document that my
17 colleague has pulled up titled, conveniently
18 "Council Regulation No. 1/2003."

19 Do you see that?

20 A. It's Council Regulation (EC) No
21 1/2003."

22 Yes I see that.

23 469 Q. So this is the regulation
24 that contains Article 23(2)(a).

25 Let's now look at Article 23(2)(a)

PUBLIC

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1 of this regulation and you'll see in a minute
2 what this pertains to.

3 So let's flip to Article 23(2)(a)
4 which is on page 18 of this document.

5 A. Would you mind scrolling up a
6 bit so I can see the header "penalties."

7 470 Q. That's a good point.

8 You see the heading above Article
9 23(2)(a) is "Chapter VI, Penalties, Article 23."

10 A. Yeah.

11 471 Q. There's a subheading entitled
12 "Fines."

13 A. Yeah.

14 472 Q. And if we look at 23(2)(a) of
15 this regulation, it says:

16 "The Commission may by
17 decision impose fines on
18 undertakings and associations
19 of undertakings where, either
20 intentionally or negligently,
21 (a) they infringe Article
22 81 or Article 82 of the
23 Treaty."

24 A. So this seems to be 1(a),
25 correct?

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1 473

Q. This is 23(2)(a).

2

A. Oh now two. I've got it. Yes,

3

I see that.

4 474

Q. So just so again, Article

5

23(2)(a) of this regulation says:

6

"The Commission may by

7

decision impose fines on

8

undertakings and associations

9

of undertakings where, either

10

intentionally or negligently...

11

(a) they infringe Article

12

81 or Article 28 of the

13

treaty."

14

A. Yes.

15 475

Q. The other question is: what

16

is the treaty?

17

So if we go back now to the second

18

page of the same regulation. Page 2.

19

This is now under the heading

20

"Council of the European Union." This now

21

defines the word "Treaty."

22

So having regard to the treaty --

23

so it's the treaty establishing the European

24

community. In particular, Article 83 thereof.

25

A. Yes.

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1 476 Q. And that treaty, you probably
2 would know this, but sometimes that treaty is
3 the referred to as the TEC, treaty
4 establishing European Community.

5 A. Mm-hmm.

6 477 Q. You have to say "yes" or
7 "no."

8 A. Yes, I believe that's the case.

9 478 Q. And I'm just trying to
10 connect a couple of dots here.

11 You will see we are going to get
12 home in about one minute, but just so we have it
13 if we now go back to where we started, which is
14 the guidelines on the method of setting fines
15 imposed pursuant to Article 23(2)(a) -- go back
16 to the first document, the first guidelines.

17 This is the document that's now
18 referred to in your footnote 73. So guidelines
19 on the method of setting fines imposed pursuant
20 to Article 23(2)(a) of Regulation Number 1/2003.

21 Turns out that that Article,
22 Article 23(2)(a) of that regulation is the one I
23 just took you to, saying:

24 "The Commission may by
25 decision impose fines on

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1 undertakings and associations
2 of undertakings where, either
3 intentionally or negligently
4 they infringe Article 81 or
5 Article 82 of the treaty,"
6 okay."

7 A. Mm-hmm.

8 479 Q. So it all hangs together.

9 Now the question is what is that
10 reference to Article 81 or Article 82 of the
11 treaty mean? What are they referring to?

12 A. Okay, so could you go back to
13 where we looked at 23? I think I could see
14 where the -- I may have created a bit of
15 confusion.

16 480 Q. No, you're fine. You're
17 fine. You've actually got it right. I'm just
18 trying to -- I'm just trying to educate the
19 Tribunal.

20 A. Yeah, yeah. No I just want to
21 go to a particular sentence there.

22 481 Q. Sure. So do you want to see
23 Article 23(2)(a)?

24 A. If we could go back to that
25 yes.

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1 482 Q. Sure. Let's pull that up.

2 Just for the record what we're in
3 now is Council Regulation Number 1 of 2003 and
4 we're looking at Article 23(2)(a) of that
5 regulation. So pull that up.

6 A. This is the page that I was
7 asking for, so that's perfect. If you actually
8 look earlier on the page, where they have the
9 discussion of fines, right?

10 483 Q. Yes.

11 A. And they --

12 "The Commission may by
13 decision impose on undertakings
14 and associations of
15 undertakings fines not
16 exceeding 1% of the..."

17 Blah, blah, blah.

18 If you look back at my report,
19 I'm discussing the idea of a cap and a
20 penalty, and that last two sentences in
21 paragraph 54, I write:

22 "However, if the penalty is
23 below the cap, the lower
24 (optimally calculated) penalty
25 is the one that is implemented.

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1 I understand that this
2 process is consistent with how
3 the European competition
4 authorities calculate antitrust
5 penalties."

6 So once again here there is a
7 reference to a cap not exceeding. But then,
8 of course, it cannot be above. It can be
9 below. These are the parallels that I am
10 discussing here.

11 484 Q. And just while we're on the
12 cap, just for fun, while you're there and you
13 pointed us to it, look at Article 23 and look
14 at the heading "Fines" and then number 1.

15 "The Commission may by
16 decision impose on undertakings
17 and associations of
18 undertakings fines..."

19 Let me take you to the operative
20 wording:

21 "...not exceeding 1% of the
22 total turnover in the preceding
23 business year where
24 intentionally or
25 negligently..."

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1 A. Mm-hmm.

2 485 Q. Then they go on to say a
3 variety of things.

4 A. Right.

5 486 Q. You're not aware of any such
6 temporal limitation in Section 79 of the
7 Competition Act, are you?

8 A. No, I am not.

9 487 Q. And are you aware that the
10 conduct at issue in this case, placed and
11 issued by the Commissioner in his Notice of
12 Application, dates all the way back to 2008?

13 A. I believe that's when the
14 alleged anti-competitive conduct began.

15 488 Q. All right. So there are some
16 key differences between the approach taken in
17 the European Union and the approach taken in
18 Canada, fair enough?

19 A. On some matters. On the matter
20 of that there exists a cap and the fine is
21 determined up to that cap, that is the
22 similarity that I was pointing to here.

23 489 Q. Okay, so let me just continue
24 on with the story. I'm now trying to educate
25 the Tribunal as to this reference in Article

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1 23(2) (a) of Regulation No. 1/2003 to
2 infringements of Article 81 or Article 82 of
3 the treaty and in this case the treaty is the
4 treaty that established the European
5 Community, okay?

6 A. Mm-hmm.

7 490 Q. Now, let's just see -- see
8 what happened to Article 81 and 82.

9 And you will see it just takes a
10 bit of footwork, but we're going to get to the
11 right place in about two minutes.

12 A. Take your time, counsel.

13 491 Q. Okay. Thank you. Now, pull
14 up please the consolidated version of the
15 treaty on the functioning of the European
16 Union.

17 Professor, if I'm pushing you
18 beyond your limits of your knowledge, you just
19 say so, but let me show you what happened.

20 A. Sure.

21 492 Q. And that is this: We started
22 moments ago with the treaty establishing the
23 European Community. That's the one we just
24 saw the reference to and that's the so-called
25 TEC.

PUBLIC

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1 A. Mm-hmm.

2 493 Q. And then in December of 2009
3 that treaty's renamed as the treaty on the
4 functioning of the European Union. Also
5 called the TFEU.

6 A. Okay.

7 494 Q. And you will see here a
8 consolidated version of that treaty, so a
9 consolidated version of the treaty on the
10 functioning of the European Union. Do you see
11 that?

12 A. Yes, I do.

13 495 Q. This is an extract. And what
14 I wanted to show you is what happens to the
15 relevant Article.

16 Look at page in this treaty that
17 contains Article 102.

18 A. I see that.

19 496 Q. And what's really important
20 here is the subheading. Article 102 you see
21 it says "ex Article 82 TEC "?

22 A. Yes, I see that.

23 497 Q. So Article 80 -- remember we
24 just looked at --

25 A. 81 and 82.

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1 498 Q. 81 and 82. Eighty-two is the
2 abuse of dominance provision, and it becomes
3 Article 102.

4 So put very simply: Article 82 in
5 the treaty establishing the European Community
6 or the TEC becomes Article 102 in the Treaty on
7 the Functioning of the European Union, and
8 you've got the extract before you here. That's
9 the abuse of dominance provision.

10 A. I see that.

11 499 Q. So whether you call it
12 Article 82 or Article 102 you talk about the
13 same provision and this is the provision that
14 says:

15 "Any abuse by one or more
16 undertakings of a dominant
17 position within the internal
18 market or any substantial part
19 of it shall be prohibited as
20 incompatible with the internal
21 market insofar as it may effect
22 trade between member states."

23 And then it goes on to specify what
24 constitutes an abuse, so this is the analogue in
25 the European community of section 79 of the

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1 Competition Act?

2 A. I am not in a position to say
3 whether this is the analog to section 79.

4 500 Q. Okay, that's fine. Let me
5 then take you back to the guidelines that you
6 included in or referred to, rather, in
7 footnote 73 of your report. I just showed you
8 those a moment ago.

9 Well, let's just mark that as an
10 exhibit, as well.

11 MS. McMASTER: Before the
12 guidelines are marked, we need the regulation
13 marked.

14 MR. THOMSON: Let's start by
15 marking the regulation. So the regulation is
16 Council Regulation Number 1 of 2003. Let's mark
17 that as exhibit.

18 MS. McMASTER: Exhibit 36.

19 --- EXHIBIT NO 36: Council
20 Regulation (EC) No 1/2003 of 16
21 December 2002 on the
22 implementation of the rules on
23 competition laid down in Articles
24 81 and 82 of the Treaty

25 BY MR. THOMSON:

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1 501 Q. And let's mark the
2 Consolidated Version of the Treaty on the
3 Functioning of the European Union that
4 contains Article 102, as Exhibit 37.

5 --- EXHIBIT NO. 37: Extract of
6 the Consolidated Version of the
7 Treaty on the Functioning of the
8 European Union

9 BY MR. THOMSON:

10 502 Q. Okay, now that takes me in a
11 round about route back to the guidelines that
12 we started with. And these, again, are the
13 guidelines that are referred to in footnote 73
14 of your report. Let's pull those up on the
15 screen.

16 And Professor you'll see -- I know
17 you've read these because they are referred to
18 in your report, but they go on for, I think, six
19 or seven pages. They are quite detailed setting
20 out, as an example, on the second -- scroll
21 down, please. So they have a -- just above
22 paragraph 9. Yeah.

23 So method for setting of fines and
24 then -- but detailed procedures for how fines
25 are set, the basic amount of a fine.

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1 And the next page heading
2 "Calculation of the value of sales," and then
3 below that, scrolling down, determination of the
4 basic amount of the fine.

5 And then below that, just above
6 paragraph 27, "Adjustments to the basic amount."

7 This is a section on aggravating
8 circumstances just above paragraph 28. There's
9 a section on mitigating circumstances, just
10 above paragraph 29.

11 Scroll down just above paragraph 30
12 there's a -- provides for a specific increase
13 for deterrence, and below that just above
14 paragraph 32 --

15 A. If you could can pause just for
16 a second.

17 503 Q. Sure.

18 A. On the legal maximum:

19 "The final amount of the
20 fine shall not in any event
21 exceed 10 per cent of the total
22 turnover in the preceding
23 business year of the
24 undertaking or association of
25 undertakings."

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1 Right. So once again, you know,
2 there we saw 1 per cent. Here we see
3 ten per cent.

4 The crux of the analogy in my
5 report is having a cap and determining an
6 amount that is not to exceed that cap is
7 consistent with the way things are done in
8 Europe.

9 504 Q. And, again, I believe you've
10 already confirmed this key difference, that
11 the cap here specified in these guidelines is
12 that the final amount of the fine shall not,
13 in any event, exceed 10 per cent of the total
14 turnover in the preceding business year of the
15 undertaking or association of undertakings?

16 A. That is what they have here in
17 this section. There may be other sections that
18 for certain types of conduct offer something
19 else. I am not providing any legal opinion.

20 505 Q. No.

21 A. I was just making the analogy
22 that the idea of having a cap is something that
23 is customary across jurisdictions.

24 As we established in an earlier
25 round of questioning different jurisdictions

PUBLIC

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1 have different approaches to antitrust,
2 different objectives.

3 Within regions we have different
4 adjudicators that have different conclusions
5 so, yes, there are differences and there are
6 similarities.

7 506 Q. And, again, I believe you've
8 confirmed this, but you are not aware of a
9 similar temporal cap that is confined to the
10 preceding business year in section 79 of the
11 Competition Act, are you?

12 A. I am not aware of such a cap.

13 507 Q. Now, so you would agree with
14 me that these are quite detailed guidelines
15 and they deal with a host of different
16 considerations in respect of the determination
17 of sanctions to be imposed by parties that are
18 found to have been engaged in an abuse of
19 dominance.

20 A. There are apparently many, many
21 details here and, again, the analogy I was
22 drawing was to the idea of a penalty that is
23 bound by a cap. Another way to think about this
24 is if you use the language of Dr. Hylton, that
25 there's an optimal penalty, and if you are above

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1 that optimal penalty, you are being over
2 deterrent.

3 If you are below that optimal
4 penalty you are being under deterrent.
5 Naturally, there's a cap to how low you could
6 go. That cap is zero.

7 So if you calculate a penalty
8 that is too low, you are not offering the
9 right kind of deterrence.

10 If you are calculating a penalty
11 that is too high, you are over deterring.

12 What caps do is they basically
13 put guardrails around how much there could be,
14 in order to prevent excessive penalty.

15 That's what these caps are doing
16 in Europe. That's what these caps are doing
17 in Canada.

18 508 Q. And just to illustrate that
19 point, I know you're not a lawyer, but when we
20 look at section 79 of the Competition Act,
21 that has no temporal limitation and where the
22 conduct in issue dates back 16 or 17 years, as
23 it does here and where the respondent to the
24 case commenced by the Commissioner is one of
25 the world's biggest companies, you can see,

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1 can you not, how the amount of the cap
2 increases dramatically when expressed in
3 reference to the annual worldwide revenues of
4 the respondent to the case in question?

5 A. The way I understand the
6 statute is as follows: I understand it to
7 provide the Tribunal with the tools needed to
8 prevent anti-competitive conduct through
9 imposing amps, administrative monetary penalties
10 that are very much in the spirit of the Chicago
11 school that Dr. Hylton promotes, and the --
12 either if it's through full internalization or
13 just through deterrence, where the calculation
14 is best seen, if I may, refer you to footnote --
15 I think it's footnote 9 in my report. If we go
16 to -- I think it's footnote 9. Let me just
17 confirm that. Yes.

18 If we go to footnote 9 in my
19 report it basically makes the following
20 straightforward claim. If the expected gain
21 from the alleged monopolization is denoted G
22 for gain and G is a positive number, the
23 penalty is denoted by F , the fine, greater
24 than zero and the likelihood of enforcement is
25 noted by P , a number between zero and one,

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1 then the expected gain must outweigh the
2 expected loss, which occurs if and only if,
3 the probability P times F , the fine is greater
4 than G or the fine is greater than the gain
5 divided by the probability. This goes back to
6 Landes. This goes back to Becker.

7 If a company is considering
8 taking a risk and violating an
9 anti-competitive -- violating through
10 anti-competitive conduct, and they're doing
11 this with the lens of the Bicarman [phon.] or
12 Landesian approach, then they are doing a
13 following calculation.

14 509 Q. Sorry, can I just interrupt?
15 What question are you answering
16 right now?

17 A. I'm answering the question of
18 whether, if I understood your question, by not
19 having a time cap and allowing it to go back,
20 this could not be an excessive penalty.

21 That's what I understood your
22 question to be.

23 510 Q. No, it's a very, very simple
24 proposition that when you have a combination
25 of no temporal cap.

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1 A. Yes.

2 511 Q. Okay, no time limit. Not
3 like we have in Europe, where it's confined --
4 the turnover in the preceding year.

5 A. Yes.

6 512 Q. None of that.

7 A. Yes.

8 513 Q. Where the allegations of
9 misconduct date back over a period of 18
10 years --

11 A. Yes.

12 514 Q. -- and where the company in
13 question is one of the world's biggest
14 companies --

15 A. Yes.

16 515 Q. -- you end up with a very,
17 very sizeable fine; would you not accept that?

18 A. Which may not be enough to
19 deter anti-competitive conduct.

20 516 Q. That's not my question. The
21 question is: You end up with a very, very
22 large fine. It's a simple question.

23 A. If the conduct caused
24 significant harm, then the fine can, indeed, and
25 should be significant.

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1 517 Q. Okay, now let's look at what
2 happened in the European Union.

3 Again, I'm back right to the
4 guidelines that you referred to in paragraph 73
5 of your -- sorry, footnote 73 of your report.
6 You may want to pull that up.

7 This is, again, the guidelines that
8 we just looked at. Guidelines on the method of
9 setting fines imposed pursuant to Article
10 23(2)(a) of Regulation 1/2003.

11 A. Right. Mm-hmm.

12 518 Q. Are you aware that the
13 European Union has actually issued guidelines
14 about those guidelines?

15 A. Sitting here right now, I don't
16 recall seeing guidelines about the guidelines.

17 I may have, but as I explained,
18 the purpose of footnote 73 is to explain that
19 the process of administering fines subject to
20 a cap are not just unique to Canada; they are
21 used elsewhere.

22 519 Q. Yeah but, again, I have
23 little itty bitty questions.

24 Are you aware that the European
25 Union has actually issued guidelines about those

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1 guidelines?

2 A. Sitting here right now I do not
3 recall whether I saw guidelines about the
4 guidelines.

5 520 Q. Let me ask my colleague to
6 pull up guidelines about the guidelines.

7 So she's -- my colleague Alisa's
8 pulled up on the screen, you'll see guidelines.
9 You see the top left-hand corner. It is a bit
10 hard to read, in the black print at the top, an
11 official website of the European Union.

12 A. Yes, I see that.

13 521 Q. And just below that, the logo
14 of the European Union.

15 A. Yes.

16 522 Q. And then these are now
17 guidelines for setting fines.

18 A. Yes, I see that.

19 523 Q. And you see the summary.

20 The summary is of guidelines and
21 the method of setting fines imposed pursuant to
22 Regulation No. 1 of 2003.

23 A. Yes.

24 524 Q. That's the regulation we just
25 looked at?

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1 A. Is this what you are referring
2 to as: "Guidelines for the guidelines"?

3 525 Q. This is guidelines about the
4 guidelines.

5 A. Okay, I see guidelines for
6 setting fines.

7 526 Q. But just below that, "Summary
8 of guidelines on the method of setting fines
9 imposed pursuant to Regulation No. 1 of 2003."

10 A. Yes.

11 527 Q. That's the regulation we
12 looked at 15 minutes ago.

13 A. Yes, correct.

14 528 Q. So look below that. What is
15 the aim of the guidelines? They set out the
16 methodology to be used by the European
17 Commission when setting fines on undertakings
18 that infringe the EU's competition rules which
19 prohibit cartels and then the second one,
20 abuse of dominance position ex Article 82 of
21 the brief treaty establishing in the European
22 Community, now Article 102 of the Treaty on
23 the Functioning of the European Union." Right?

24 That's what we've just gone through
25 ten minutes ago.

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1 A. I believe we went through these
2 exactly as you described.

3 529 Q. "Key Points" below that.

4 "Regulation No 1/2003 ...
5 based on Article 103 of the
6 Treaty of the Functioning of
7 the European Union (ex Article
8 83), gives the Commission
9 powers to enforce the
10 competition rules and to fine
11 companies for infringements.
12 The guidelines, which replace
13 previous guidelines adopted in
14 1998, impose tougher fines on
15 firms that violate EU rules
16 prohibiting cartels and other
17 restrictive business
18 practices."

19 Then it goes on to say:

20 "Article 23 of Regulation
21 ... No 1/2003 indicates that
22 fines shall be set with regard
23 to both the gravity and the
24 duration of the infringement.
25 Fines can reach up to 10% of

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1 the worldwide turnover of the
2 Corporate group to which the
3 infringing company belongs in
4 the previous business year."
5 Then it goes on to say this:

6 "To achieve its objectives
7 of imposing fines that are
8 sufficiently high both to
9 punish..."

10 That's in bold print:

11 "...punish the firms
12 involved and to deter others
13 from practices that flout the
14 competition rules, the
15 Commission takes certain
16 factors into account such as:
17 the value of the sales of goods
18 or services to which the
19 infringement relates"... "The
20 duration of the
21 infringement..."

22 Below that: the gravity of the
23 infringement.

24 And below that: Factors specific
25 to individual companies that may justify

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1 increasing or decreasing a fine.

2 Do you see that?

3 A. Yes I do.

4 530 Q. So one of the objectives of
5 the European Commission in establishing and
6 imposing fines is to ensure that there is
7 sufficiently high both to punish the firms
8 involved and to deter others from practices
9 that flout the competition rules; correct?

10 A. That's what the language here
11 says.

12 531 Q. And then are you aware that
13 the European Union -- sorry we should mark
14 that as an Exhibit.

15 MS. McMASTER: Exhibit 38.

16 --- EXHIBIT NO. 38: EUR-Lex
17 document Entitled: "Guidelines
18 for setting fines"

19 BY MR. THOMSON:

20 532 Q. Are you aware that the
21 European Union has also issued guidelines
22 concerning the procedures that are followed an
23 abuse of dominance investigation under Article
24 102 of the treaty -- on the functioning of the
25 European Union; do you know that?

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1 A. Sitting here right now I'm not
2 aware of those guidelines.

3 What I am not clear about, given
4 the language and, once again, I'm not a
5 lawyer, it is -- from what I see here there is
6 fines can reach up to 10 per cent of the
7 worldwide turnover of the corporate group to
8 which the infringing company belongs in the
9 previous business year.

10 533 Q. Right.

11 A. So what that leaves me
12 questioning to understand this better is the
13 following: Imagine a company was accused and
14 then the facts in court showed that they abused
15 a certain anti-competitive practice over the
16 course of seven years. Let's just say 2015 to
17 2022. Does that mean that the penalty can be up
18 to 10 years of world -- 10 per cent of worldwide
19 turnover in the previous business year, for each
20 one of the years?

21 534 Q. No, it doesn't.

22 A. I don't know. I mean, that's
23 what I don't understand.

24 535 Q. But you -- again, you are
25 here to answer my questions, not to ask them.

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1 So let me move on.

2 I asked you whether you were aware
3 that the European Union has also issued
4 guidelines concerning procedures that are
5 followed in an abuse of dominance investigation.

6 Let me show you those guidelines
7 now, if I can, and ask my colleague to pull up
8 on the screen, again another -- another set of
9 guidelines published by the European Commission
10 entitled, "Procedures in Article 102
11 Investigations."

12 A. Yes, I see that.

13 536 Q. And we've now reached a
14 consensus that Article 102 is the equivalent
15 of the old Article 82, and this is the Article
16 that prevents abuse of dominance.

17 A. That's my understanding, yes.

18 537 Q. So you see under the heading,
19 "Procedures in Article 102 investigations, how
20 a case starts." It goes on to say:

21 "Article 102 of the Treaty
22 on the Functioning of the
23 European Union (TFEU) prohibits
24 abusive conduct by companies
25 that have a dominant position

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1 on the particular market."

2 And so on and so on. I'm not going
3 to waste more time with that, but let me show
4 you the section on fines, bottom of page 3. Do
5 you see a heading entitled "Fines" at the bottom
6 of page 3?

7 A. Yes, I do.

8 538 Q. And then the top of the next
9 page, the guidelines say:

10 "A company that has
11 participated in an
12 anti-competitive agreement and
13 therefore infringed
14 competition law may have to pay
15 a fine. The Commission's fining
16 policy is aimed at punishment
17 and deterrence. They are
18 calculated under the framework
19 of the 2006 Guidelines on
20 Fines."

21 Do you see that?

22 A. I do see that.

23 539 Q. So, again, the goal of the
24 commission in establishing sanctions against
25 parties that have engaged in a prohibited

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1 abuse of dominance is aimed both at punishment
2 and at deterrence, correct?

3 A. Which is unrelated to the cap.

4 I just want to make sure we are
5 talking about the same thing.

6 540 Q. No, just the goals.

7 A. Right. Which are apparently
8 different from the goals of the Canadian
9 Competition Bureau.

10 541 Q. Well, we're going to debate
11 that. We'll debate that at a later stage.

12 A. This nicely fits into the
13 conversation we had earlier about different
14 jurisdictions having different objectives and
15 different goals.

16 542 Q. Let's mark this as the next
17 exhibit.

18 MS. McMASTER: Exhibit 39.

19 --- EXHIBIT NO. 39: European
20 Commission webpage entitled
21 'Procedures in Article 102
22 Investigations'

23 BY MR. THOMSON:

24 543 Q. And let me just take five
25 minutes with my colleagues. I may be done

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1 with you, but let me just see. We'll be back
2 in five minutes.

3 A. Sure.

4 MR. THOMSON: Thank you.

5 --- RECESS WAS TAKEN AT 4:08 P.M.

6 --- UPON RESUMING AT 4:16 P.M.

7 MR. THOMSON: Thank you very much,
8 Professor Tadelis. Those are all my questions.

9 THE WITNESS: Thank you, Mr.
10 Thomson. It was a pleasure meeting you.

11 MR. THOMSON: And you.

12 MR. GAY: Thank you, Kent. That
13 was -- I would say it was well done, but it was
14 well done and we'll see how all this works.
15 Thanks very much. See you, guys.

16 MR. THOMSON: Yeah. Thank you all
17 very much.

18 --- The cross-examination was concluded at 4:16
19 p.m.

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CERTIFICATE OF COURT REPORTER

I hereby certify the foregoing
to be a true and accurate transcription of my
stenographic shorthand notes, to the best of my skill
and ability.

A handwritten signature in blue ink, appearing to read "Barrett", with a stylized flourish at the end.

Lisa Barrett, RPR, CRR, CRC, CSR
Certified Realtime Court Reporter

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Exhibit 1 to the Cross-Examination of Professor Tadelis



Faculty Profile

Steven Tadelis



Sarin Chair in Strategy and Leadership | Professor of Economics
Business & Public Policy | Economic Analysis & Policy

Leading expert on e-commerce and internet economics



About

Steve Tadelis holds the Sarin Chair in Strategy and Leadership and is a Professor of Economics at the Haas School of Business, UC Berkeley. His research primarily revolves around e-commerce and the economics of the internet.

During the 2016-2017 academic year he was on leave at Amazon, where he applied economic research tools to a variety of product and business applications and worked with technologists, computer and ML scientists, and business leaders. During the 2011-2013 academic years he was on leave at eBay research labs, where he hired and led a team of research economists who focused on the economics of e-commerce, with particular attention to creating better matches of buyers and sellers; reducing market frictions by increasing trust and safety in eBay's marketplace; understanding the underlying value of different advertising and marketing strategies; and exploring the market benefits of different pricing structures.

Aside from the economics of e-commerce, his main fields of interest are the economics of incentives and organizations, industrial organization, and microeconomics. Tadelis explored firm reputation as a valuable, tradable asset; the effects of contract design and organizational form on firm behavior with applications to outsourcing and privatization; public and private sector procurement and award mechanisms; and the determinants of trust.

[Collapse](#)

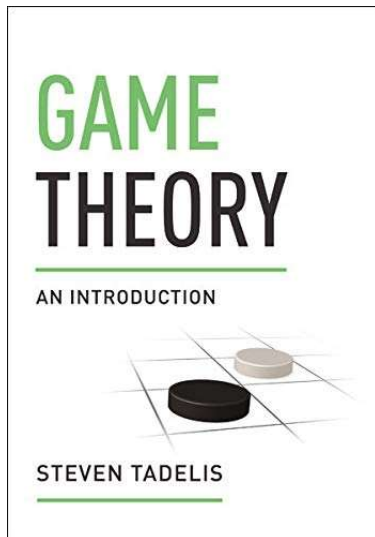
Expertise and Research Interests

- E-Commerce
- Competition and Industrial Organization
- Procurement Contracting
- Incentives and Economics of Organizations
- Theory of the Firm
- Game Theory

Collapse All

Multimedia

Books



Selected Papers and Publications

- Mitchell Hoffman and Steven Tadelis. People Management Skills, Employee Attrition, and Manager Rewards: An Empirical Analysis.

Journal of Political Economy.

How much do a manager's interpersonal skills with subordinates, which we call people management skills, affect employee outcomes? Are managers rewarded for having such skills? Using personnel data from a large high-tech firm, we show that survey-measured people management skills have a strong negative relation to employee turnover. A causal interpretation is reinforced by several research designs, including those exploiting new workers joining the firm and workers switching managers. However, people management skills do not consistently improve most observed non-attrition outcomes. Better people managers themselves receive higher subjective performance ratings, higher promotion rates, and larger salary increases.

- Tom Blake, Kane Sweeney, Sarah Moshary, and Steven Tadelis. Price Salience and Product Choice. *Marketing Science*.

Online vendors often employ drip-pricing strategies, where mandatory fees are displayed at a later stage in the purchase process than base prices. We analyze a large-scale field experiment on StubHub.com and show that disclosing fees upfront reduces both the quantity and quality of purchases. The effect of salience on quality accounts for at least 28% of the overall revenue decline. Detailed click-stream data show that price shrouding makes price comparisons difficult and results in consumers spending more than they would otherwise. We also find that sellers respond to increased price obfuscation by listing higher-quality tickets.

- Matt Backus, Tom Blake, Brad Larsen, and Steven Tadelis. Sequential Bargaining in the Field: Evidence from Millions of Online Bargaining Interactions. *Quarterly Journal of Economics*.

.We study patterns of behavior in bilateral bargaining situations using a rich new data set describing back-and-forth sequential bargaining occurring in over 25 million listings from eBay's Best

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Offer platform. We compare observed behavior to predictions from the large theoretical bargaining literature. One-third of bargaining interactions end in immediate agreement, as predicted by complete-information models. The majority of sequences play out differently, ending in disagreement or delayed agreement, which have been rationalized by incomplete information models. We find that stronger bargaining power and better outside options improve agents' outcomes. Robust empirical findings that existing models cannot rationalize include reciprocal (and gradual) concession behavior and delayed disagreement. Another robust pattern at odds with existing theory is that players exhibit a preference for making and accepting offers that split the difference between the two most recent offers. These observations suggest that behavioral norms, which are neither incorporated nor explained by existing theories, play an important role in the success of bargaining outcomes.

- Steven Tadelis, Michael Gelman, Shachar Kariv, Matthew Shapiro, Dan Silverman. How Individuals Respond to a Liquidity Shock: Evidence from the 2013 Government Shutdown. *Journal of Public Economics*.

Using comprehensive account records, this paper examines how individuals adjusted spending and saving in response to a temporary drop in liquidity due to the 2013 U.S. government shutdown. The shutdown cut paychecks by 40% for affected employees, which was recovered within 2 weeks. Because the shutdown affected only the timing of payments, it provides a distinctive experiment allowing estimates of the response to a liquidity shock holding income constant. Spending dropped sharply, implying a naïve estimate of 58 cents less spending for every dollar of lost liquidity. This estimate overstates the consumption response. While many individuals had low liquid assets, they used multiple sources of short-term liquidity to smooth consumption.

Sources of short-term liquidity include delaying recurring payments such as for mortgages and credit card balances.

- Steven Tadelis, Lingfang (Ivy) Li, and Xiaolan Zhou. Buying Reputation as a Signal of Quality: Evidence from an Online Marketplace. *Rand Journal of Economics*.

Seller reputation, generated by buyer feedback, is critical to fostering trust in online marketplaces. Marketplaces or sellers may choose to compensate buyers for providing feedback. Signaling theory predicts that only sellers of high-quality products will reward buyers for truthful feedback, especially when a product lacks any feedback and when the seller is not established. We confirm these hypotheses using Taobao's reward-for-feedback mechanism. High-quality products, especially without established feedback, are chosen for feedback rewards, which cause sales to increase by 36%. Marketplaces and consumers can therefore benefit from allowing sellers to buy feedback and signal their high-quality products in the process.

- Matt Backus, Tom Blake, and Steven Tadelis. On the Empirical Content of Cheap-Talk Signaling: An Application to Bargaining. *Journal of Political Economy*.

We outline a framework for the empirical analysis of signaling games based on three features: sorting, incentive compatibility, and beliefs. We apply it to document cheap-talk signaling in the use of round-number offers during negotiations. Using millions of online bargaining interactions, we show that items listed at multiples of \$100 receive offers that are 8–12 percent lower but are 15–25 percent more likely to sell, demonstrating the trade-off requisite for incentive compatibility. Those same sellers are more likely to accept a similar offer, and buyers are more likely to investigate their listings, consistent with seller sorting and buyer belief updating.

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- Steven Tadelis. Reputation and Feedback Systems in Online Platform Markets. *Annual Review of Economics*.
2016
- Steven Tadelis, Florian Zettelmeyer. Information Disclosure as a Matching Mechanism: Theory and Evidence from a Field Experiment. *American Economic Review*.
2015
- Steven Tadelis, Chris Nosko, Tom Blake. Consumer Heterogeneity and Paid Search Effectiveness: A Large Scale Field Experiment. *Econometrica*.
2015
- Steven Tadelis, Michael Gelman, Shachar Kariv, Matthew D. Shapiro, Dan Silverman. Harnessing Naturally-Occurring Data to Measure the Response of Spending to Income. *Science*.
2014
- Steven Tadelis, Pat Bajari, Stephanie Houghton. Bidding for Incomplete Contracts: An Empirical Analysis. *American Economic Review*.
2014
- Steven Tadelis, Patrick Bajair, and Robert McMillan. Auctions versus Negotiations in Procurement: An Empirical Analysis. *Journal of Law, Economics and Organization*.
2009
- Steven Tadelis and Jonathan Levin. Profit Sharing and the Role of Professional Partnerships. *Quarterly Journal of Economics*.
2005
- Steven Tadelis. The Market for Reputations as an Incentive Mechanism. *Journal of Political Economy*.
2002
- Steven Tadelis. Complexity, Flexibility and the Make-or-Buy Decision. *American Economic Review Papers and Proceedings*.

2002

Working Papers

- Counter-stereotypical Messaging and Partisan Cues: Moving the Needle on Vaccines in a Polarized U.S.

1652425200

We report a large scale randomized controlled trial designed to assess whether the counter-stereotypical messaging and partisan cues can induce people to get COVID-19 vaccines. Our study involves creating a 27-second video compilation of Donald Trump's comments about the vaccine from Fox News interviews. We presented the video to millions of U.S. YouTube users in October 2021. Results indicate that the campaign increased the number of vaccines in the average treated county by 103. Spread across 1,014 treated counties, the total effect of the campaign was an estimate increase of 104,036 vaccines. The campaign was cost-effective: with an overall budget of about \$100,000, the cost of an additional vaccine was about \$1 or less.

- The Limits of Reputation in Platform Markets: An Empirical Analysis and Field Experiment

January 2015

Steven Tadelis and Chris Nosko Reputation mechanisms used by platform markets suffer from two problems. First, buyers may draw conclusions about the quality of the platform from single transactions, causing a reputational externality. Second, reputation measures may be coarse or biased, preventing buyers from making proper inferences. We document these problems using eBay data and claim that platforms can benefit from identifying and promoting higher quality sellers. Using an unobservable measure of seller quality we demonstrate the benefits of our approach through a

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large-scale controlled experiment. Highlighting the importance of reputational externalities, we chart an agenda that aims to create more realistic models of platform markets. JEL classifications: D47, D82, L15, L21, L86

- The Power of Shame and the Rationality of Trust

March 2011

Steven Tadelis A mounting number of studies suggest that individuals are not selfish, which perhaps explains the prevalence of trust among strangers. Models of players who care about their opponents' payoffs have been used to rationalize these facts. An alternative motive is that players care directly about how they are perceived by others. I propose and implement an experimental design that distinguishes perception motives from payoff motives. Participants not only exhibit concerns for perception, but they seem strategically rational by anticipating the change in behavior of their opponents. The approach can explain previously documented behaviors, both in the lab and in the field, and can shed light on some determinants of trust. JEL classifications C72, C91, D03, D82

Positions Held

At Haas since 2005

2018 – present, Sarin Chair in Strategy and Leadership

2016 – 2018, James J. and Marianne B. Lowrey Chair in Business

2016 – 2017, VP of Economics and Market Design, Amazon.com Inc.

2015 – present, Professor of Economics, Business and Public Policy, Haas School of Business

2015 – 2016, Joe Shoong Chair in International business

2005 – 2015, Associate Professor, Haas School of Business

2011 – 2013, Senior Director and Distinguished Economist, eBay Research Labs

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2006 – 2009, Associate Dean for Strategic Planning, Haas School of Business

1997 – 2005, Assistant Professor, Stanford University

External Service and Affiliations

- 2016 – present, CESifo Research Network Fellow
- 2015 – present, Research Fellow, Centre for Economic Policy Research (CEPR)
- 2014 – present, Research Associate, National Bureau of Economic Research (NBER)
- 2011 – 2014, Co-Editor, Journal of Law, Economics and Organization
- 2004 – 2007, Editorial Board, American Economic Review
- 2004 – 2007, Associate Editor, International Journal of Industrial Organization

Languages

- Hebrew

Selected Honors and Awards

Fellow of the Econometric Society

Elected 2020

Honorable Mention, Cheit Teaching Award, Full-Time MBA Program

2010 – 2011

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Montias prize – best article published in the Journal of Comparative Economics

2010 – 2011

Barbara and Gerson Bakar Faculty Fellow, UC Berkeley Haas School of Business

2008 – 2015

Phi Beta Kappa Undergraduate Teaching Award, Stanford University,
2005

Department of Economics Advising Award, Stanford University
2002

W. Glenn Campbell and Rita Ricardo-Campbell National Fellow, Hoover Institution
1999 – 2000

Review of Economic Studies Eurorpean Tour Speaker
May 1997

Alfred P. Sloan Doctoral Dissertation Fellowship
1995 – 1996

National Science Foundation Research Grants
1999 – 2000, 2000 – 2002, 2003 – 2008

In the News

- [Bay Area Iranians, Israelis share fears for loved ones facing 'death by lottery'](#), KQED, 06/21/2025

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- [This common checkout trick just became illegal. Here's what to look out for.](#) HuffPost, 05/16/2025
- [More than 100 UC Berkeley Jewish faculty condemn calls for student protester deportations.](#) The Daily Californian, 03/13/2025
- [StubHub is in the hot seat for 'drip pricing.' Here's how it affects consumer behavior.](#) CX Dive, 08/07/2024
- [StubHub vs. Ticketmaster vs. SeatGeek: What's the difference?](#) Sportico, 07/17/2024
- [Your brand's spokesperson just got arrested—now what?](#) Freakonomics, 06/26/2024
- [E-commerce is witnessing the Amazon-ification of Shein, as the fast-fashion behemoth woos skincare and toy brands.](#) Fortune, 05/05/2024
- [Epic v. Google day 12 kicks off with Berkeley economics professor Steve Tadelis.](#) The Verge, 11/28/2023
- [Hundreds rally at UC Berkeley to demand action on Gaza hostages.](#) J. the Jewish News of Northern California, 11/01/2023
- [Amazon's new challenge: Bargain retailers that are playing a different game.](#) The Wall Street Journal, 09/22/2023
- [Biden is targeting the 'junk fees' you're always paying. But it may not save you money.](#) USA Today, 07/23/2023
- [The sinister logic of hidden online fees.](#) The Wall Street Journal, 12/01/2022
- [Facebook is broken. Execs say a fix won't come fast.](#) Barron's, 04/25/2022
- [Study finds Trump's support of vaccines may have swayed some vaccine skeptics.](#) KRON4, 04/04/2022
- [Trump Helped Boost Vaccine Use After Endorsement in Online Ad.](#) Bloomberg, 04/04/2022

Teaching

- Economic Analysis for Business Decisions, MBA 201A
- The Economics of Institutions, PhD
- Mechanism Design and Agency Theory, Economics 206, PhD

LINKS

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EDUCATION

- PhD, Economics, Harvard University
- MSc, Economics, Techion, Haifa, Israel
- BA, Economics, University of Haifa, Haifa, Israel

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