COMPETITION TRIBUNAL
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File No.

COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Samuel Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC"), for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "***Competition Act***"), granting leave to bring an application under sections 77 and 79 of the *Competition Act*;

B E T W E E N:

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Applicant

and

APPLE CANADA INC. AND APPLE INC.

Respondents

MEMORANDUM OF FACT AND LAW
(Leave under section 103.1 of the *Competition Act*)

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PART I - OVERVIEW

1. The applicant applies pursuant to s. 103.1 of the *Competition Act* (the "**Act**") for leave to apply for an order pursuant to s. 77 and s. 79, alleging that the respondents (collectively, "**Apple**") engaged in and continue to engage in a practice of anti-competitive acts in their administration of the Apple App Store (the "**App Store**") in Canada.

2. The App Store is a digital marketplace where iOS users can find and purchase applications or "apps" for their iOS devices (i.e., iPhones and iPads), and where app developers can offer iOS apps to users. Apple uses non-negotiable contractual restrictions to prohibit developers from distributing iOS apps outside the App Store. Apple charges a significant commission, up to 30%, on all app sales. It also collects up to a 30% commission on all in-app purchases. Apple prohibits developers from using any third-party payment processors for in-app purchases or to direct iOS users to alternative options. Developers have no other option but to agree to the App Store's one-sided terms, which reinforces Apple's dominance. Apple's anti-competitive acts allow it to charge *supra*-competitive commissions to developers, and indirectly to iOS users.

3. There are two relevant markets at issue in this case: (i) the market for the distribution of Apps on iPhones and iPads (the "**App Distribution Market**") and (ii) the market for payment processing for apps that are distributed on iPhones and iPads (the "**In-App Payment Services Market**").

4. The application alleges that Apple engaged in anti-competitive conduct in both markets, including:

(a) Exclusive dealing contrary to s. 77 of the Act by requiring all iOS apps to be distributed exclusively through the App Store;

(b) Tied selling contrary to s. 77 of the Act by mandating the use of Apple's in-app payment system ("**IAP**") for all in-app purchases;

(c) Engaging in anti-competitive acts contrary to s. 79 of the Act, including by:

(1) prohibiting developers from listing iOS apps outside the App Store;

(2) prohibiting developers from using alternative IAP options;

(3) prohibiting developers from informing users about alternative IAP options ("**anti-steering rules**");

(4) using one-sided, non-negotiable contracts of adhesion to enforce these anti-competitive acts, reserving broad rights to Apple to suspend or terminate developer access for any reason; and

(5) directly or indirectly imposing excessive and unfair prices through the App Store and IAP commissions.

5. Regulators, tribunals and courts worldwide have considered similar allegations to the ones advanced in this application. They have determined that Apple's administration of the App Store is contrary to competition laws in those jurisdictions or raises significant competitive concerns. These regulators, tribunals, and courts have variously recommended or required changes to the App Store and monetary penalties. This proceeding also seeks orders to make changes to Apple's

administration of the App Store in Canada and financial redress for Canadian consumers and developers in Canada.

PART II - STATEMENT OF FACTS

A. Launch of the Apple iPhone and App Store

6. The respondents launched the Apple iPhone ("**iPhone**") in the United States in 2007[1] and in Canada in 2008.[2]

7. iOS is the operating system for the iPhone and was released on the same day as the iPhone. At its launch, only Apple-developed native applications were available, with third-party native applications unavailable.[3]

8. On July 10, 2008, the App Store launched in markets around the world, including in Canada. The App Store is accessed via an app that is pre-installed on iPhones. The App Store is also a two-sided platform operated by the respondents that connects third-party app developers ("**Developers**") to iPhone users, enabling Developers to offer apps to users, and users to find and download apps produced by Developers.[4]

(i) Launch of the iPad

9. Apple launched the iPad in the spring of 2010.[5]

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[1] Affidavit of Luca Bellisario, affirmed December 18, 2025, ("**Bellisario Affidavit**"), Exhibit "M", Apple Press Release dated January 30, 2007.
[2] Bellisario Affidavit, Exhibit "O", Apple Press Release dated June 9, 2008.
[3] Bellisario Affidavit, Exhibit "H", European Commission's decision in *Apple – App Store Practices (music streaming)*, case no. AT.40437, dated March 4, 2024 ("**EC 2024 Decision**"), para. 105.
[4] Bellisario Affidavit, Exhibit "Q", Apple Press Release dated July 5, 2018; Exhibit "K", Decision of the UK Competition Appeal Tribunal in *Dr Rachel Kent v Apple Inc and Apple Distribution International Ltd* ("***Kent***"), dated October 23, 2025 ("**CAT Decision**"), para. 32.
[5] Bellisario Affidavit, Exhibit "P", Apple Press Release dated January 27, 2010.

10. Between 2010 and 2019, the iPad was powered by iOS. Since September 2019, iPadOS has been the operating system for the iPad, providing functionality unique to the iPad. As is the case with the iPhone, the App Store is the exclusive app marketplace for the iPad.[6]

(ii) <u>Apple's "Walled Garden" App Store</u>

11. When it launched the iPhone in 2007 and the App Store in 2008, Apple's purpose was to create an integrated "ecosystem" that seamlessly weaved together Apple devices with Apple software. In 2010, Apple's then-CEO, Steve Jobs, stated that the strategy of the company was to "tie all of our products together, so we further lock customers into our ecosystem," to "make [the] Apple ecosystem even more sticky."[7]

12. This integrated iOS ecosystem has been called a "walled garden," in which "Apple controls and supervises access to any software which accesses the iOS device." Apple claims that the walled garden furthers consumer privacy and security.[8]

(iii) <u>Use of the Canadian App Store by Canadian iOS users</u>

13. The Canadian App Store is accessed by Canadian residents, i.e. persons who set Canada as their country or region when setting up their Apple ID. In addition, if persons wish to make purchases on the Canadian App Store, they must provide Canadian billing information.[9]

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[6] Bellisario Affidavit, Exhibit "H", EC 2024 Decision, para. 100.
[7] Bellisario Affidavit, Exhibit "X", email by Steve Jobs dated October 24, 2010.
[8] *Epic Games, Inc v Apple Inc*, 559 F. Supp. 3d 898, 922 (N.D. Cal 2021), p. 2.
[9] Bellisario Affidavit, Exhibit "Z", Apple webpage dated November 17, 2025; Exhibit "AA", Apple's Media Services Terms and Conditions dated September 15, 2025.

(iv) Use of the Canadian App Store by App Developers operating in Canada

14. In order to be eligible to list an app on the App Store, a Developer must enter into a Developer Agreement ("**DA**") and a Developer Program Licence Agreement ("**DPLA**").[10] Both are contracts of adhesion, drafted unilaterally by Apple, that apply to every Developer who lists their app on the App Store in Canada.

15. Pursuant to these agreements, Developers are prohibited from distributing native iOS apps other than through the App Store. Consequently, if Canadian iOS users wish to obtain iOS apps, they must do so via the Canadian App Store.[11]

16. The Canadian App Store offers both free and paid apps. When a payment is necessary to download an app, Apple collects the payment from a Canadian iOS user, deducts a commission (the "**Commission**"), and then remits the remaining balance to the Developer.[12]

(v) The Commission charged by Apple on App Store purchases

17. When the App Store was launched, Apple set a standard 30% Commission on paid app downloads and in-app purchases. Steve Jobs, Apple's CEO, stated during the March 6, 2008 launch event for the iOS Software Developer Kit and the App Store that Apple did not intend to make money from the App Store, and that the hope was that the 30% Commission would cover the costs of running the App Store. The 30% Commission was not set by reference to any costs

[10] Bellisario Affidavit, Exhibit "K", CAT Decision, paras. 48-51.
[11] Bellisario Affidavit, Exhibit "V", Apple Developer Program License Agreement dated October 8, 2025 ("**DPLA**"), s. 7.6. These submissions do not address the rare situation in which an iOS user can carry out complex "jailbreaking" procedures to permit apps to be downloaded from third party sites.
[12] Bellisario Affidavit, Exhibit "V", DPLA, s. 7.2 and Schedule 2, ss. 3.4(a)-(b) and 3.5.

that Apple expected to incur in the creation and development of the App Store, or to the security, privacy, or value provided.[13]

18. The respondents reduced the Commission from time to time in some circumstances (primarily due to litigation or regulatory action, rather than competition), but have otherwise maintained the 30% Commission since 2008. For example, since January 2021, Developers who earn no more than USD$1 million in app revenue (after deduction of the Commission) can qualify for the "App Store Small Business Program" ("**SBP**") and pay a reduced Commission of 15%.[14]

(vi) The Commission charged by Apple on in-app purchases

19. In addition to the Commission charged to Developers in respect of Canadian app purchases, a 30% Commission is payable on all in-app purchases by Canadian iOS Users. Apple's App Review Guidelines requires Developers to use Apple's IAP for all iOS and in-app purchases. Therefore, Developers are prohibited from using third-party payment processors (offering numerous better terms, including lower prices, than the Commission payable to Apple).[15] By requiring Developers to use Apple's IAP for Canadian sales, Apple effectively prevents Developers from offering a competitive payment processor, leaving them with only Apple's payment systems.[16]

20. Furthermore, by requiring Developers to use Apple's IAP, Apple also gains significant market intelligence on the use of apps by iOS users, which it does not share with Developers. Apple uses this information to identify revenue growth opportunities, competing with Developers

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[13] Bellisario Affidavit, Exhibit "K", CAT Decision, paras. 627(2) and 631.
[14] Bellisario Affidavit, Exhibit "S", Apple Press Release dated November 18, 2020: Affidavit of Kelli Fairbrother, affirmed December 17, 2025 ("**Fairbrother Affidavit**"), para. 10.
[15] Fairbrother Affidavit, para. 9.
[16] Fairbrother Affidavit, para. 9-12.

whose data played an instrumental role in Apple's ability to do so. The respondents' gatekeeper power over Developers means that Developers have no choice but to grant Apple access to their data.[17]

(vii) The App Store has been the subject of numerous government investigations

21. The App Store has been the subject of several reports and decisions by governments, tribunals and courts around the world. These reports and decisions describe numerous competitive concerns with Apple's administration of the App Store that are equally applicable to Apple's administration of the App Store in Canada. For example:

(a) In 2021, the Netherlands Authority for Consumers and Markets imposed an order on Apple, finding that Apple imposed unreasonable conditions on dating app Developers to use Apple's payment systems. Since February 2022, dating app Developers in the Netherlands have been able to use payment service providers other than Apple.[18]

(b) In 2022, the U.K.'s Competition and Markets Authority ("**CMA**") published the final report of its market study into mobile ecosystems. The CMA found that the lack of competition faced by the App Store allows Apple to charge a commission above a competitive rate. It also found that, in the absence of the requirement to use Apple's IAP, Developers would be able to choose other, bespoke payment solutions that better met their needs and users' needs.[19]

[17] Fairbrother Affidavit, para. 15.
[18] Bellisario Affidavit, Exhibit "A", Netherlands Authority for Consumers and Markets August 24, 2021 decision, summary dated December 12, 2024; Affidavit "T", Apple Press Release, dated January 14, 2022.
[19] Bellisario Affidavit, Exhibit "E", CMA Report, dated June 10, 2022.

(c) In 2022, the U.S. House of Representatives Judicial Committee released its report on *Investigation of Competition in Digital Markets*. It concluded that "Apple leverages its control of iOS and the App Store to create and enforce barriers to competition and discriminate against and exclude rivals while preferencing its own offerings. Apple also uses its power to exploit Developers through misappropriation of competitively sensitive information and to charge Developers *supra*-competitive prices within the App Store. Apple has maintained its dominance due to the presence of network effects, high barriers to entry, and high switching costs in the mobile operating system market."[20]

(d) On March 4, 2024, the European Commission released its Spotify decision, which concluded that Apple's rules, which prevented Developers from informing users about alternative subscription possibilities outside iOS apps, constituted an infringement of European abuse of dominance rules. The EC fined Apple over €1.8 billion, and ordered Apple to revise its EC developer agreements.[21]

(e) On June 24, 2024, the EC informed Apple of its preliminary view that Apple was in breach of the EU's *Digital Market's Act*. On April 22, 2025, the EC found that Apple failed to comply with its obligation to permit Developers to inform customers of alternative distribution channels outside the App Store. The EC fined Apple €500 million.

[20] Bellisario Affidavit, Exhibit "G", US House of Representatives Judicial Committee Report, dated July 2022, pp. 11-12.
[21] Bellisario Affidavit, Exhibit "H", EC 2024 Decision.

(f) In March 2025, the Australian Competition and Consumer Commission ("**ACCC**") released its final report on digital platforms, concluding that Apple's market power in mobile app distribution was likely significant, the commission rates charged on payments made through apps were "highly likely to be inflated" by Apple's market power, and that there was a lack of effective competition in app marketplaces. Despite certain changes to in-app payments by Apple, the ACCC found that restrictive payment terms practices continued to hinder competition and informed choice, and that third-party app marketplaces could bring competition benefits.[22]

(g) On October 23, 2025, the U.K. Competition Appeal Tribunal ("**CAT**") found that Apple infringed EU rules on abuse of dominance, exclusive dealing and tied selling on Developers in relation to iOS app distribution services and iOS in-app payment services, and by charging Developers an excessive headline 30% commission rate. The CAT found that the overcharge suffered by Developers in relation to iOS app distribution services was the difference between 17.5% and the commission actually charged by Apple, and the overcharge suffered by Developers in respect of Apple IAP was the difference between 10% and the commission actually charged. On November 13, 2025, the CAT denied Apple permission to appeal this ruling.[23]

[22] Bellisario Affidavit, Exhibit "D", ACCC Report, dated March 2025, p. 117.
[23] Bellisario Affidavit, Exhibit "K", CAT Decision, paras. 1086-1087; Bellisario Affidavit, Exhibit "L", UK Competition Appeal Tribunal decision, dated November 13, 2025.

(viii) The effect of Apple's anti-competitive policies on Developers

22. Apple uses its dominant position to require Developers to distribute their apps to iOS users solely via the App Store. Apple further forces Developers to use Apple's IAP services for all in-app purchases.[24]

23. The applicant's record contains an affidavit from Kelli Fairbrother, CEO of a UK-based Developer, which describes the disadvantages the business faces by using Apple's IAP, compared to alternatives. For example, she states that Apple charges Developers about five to ten times more than they would pay to a competitor (about 3%).[25] Ms. Fairbrother states that Apple's commission structure puts Developers at a competitive disadvantage by undermining their profitability and cashflow.[26]

24. Ms. Fairbrother describes numerous other disadvantages of Apple's IAP, compared to competitors, including:

- delays of over 2 months before Developers are provided with revenue earned from customers' purchases, compared to seven days from other payment processors;
- a payment system failure rate for IAP that is six times that of competitors, with no visibility into the reasons for failure (in contrast to competitors);
- the inability to perform transaction-level reconciliations, making revenue earned via IAP basically incapable of being audited;

[24] Fairbrother Affidavit, paras. 8-9.
[25] Fairbrother Affidavit, para. 9.
[26] Fairbrother Affidavit, para. 11.

- the inability to control refunds and Apple's unwillingness to respect Developers' terms & conditions in their refund process;

- Apple's control of Developers' transaction data, even in circumstances where Apple itself is a direct competitor; and

- gaps in basic payments functionality, including: the inability for customers to add items to a basket, to pay for multiple items at once, or to receive itemized receipts, as well as delays in issuing those receipts to customers.[27]

25. The same App Store issues, DLPA, and anti-competitive conduct described above and analyzed by courts and competition authorities elsewhere in the world, equally apply in Canada, the subject matter of this application.[28]

(ix) <u>The Applicant</u>

26. CIPPIC is a legal clinic founded at the University of Ottawa's Faculty of Law. It was established in September 2003 with funding from the Ontario Research Network on Electronic Commerce and an Amazon.com Cy-Pres fund.[29]

27. CIPPIC's purpose is threefold:

(a) to fill voids in public policy debates on technology law issues;

(b) to ensure balance in policy and law-making processes; and

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[27] Fairbrother Affidavit, para. 15.
[28] Fairbrother Affidavit, paras. 5-6.
[29] Affidavit of David Fewer, affirmed December 12, 2025 ("**Fewer Affidavit**"), para. 6.

(c) to provide legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology.[30]

28. CIPPIC's core mandate is to advocate in the public interest in debates arising at the intersection of law and technology, such as the issues in this application.

29. CIPPIC has been active in the courts as counsel to primary parties in proceedings implicating law and technology broadly.[31] CIPPIC has been granted leave to intervene in matters in the Federal Court and the Federal Court of Appeal under Rule 109 as well as numerous matters before the Supreme Court of Canada[32] In addition, CIPPIC has been invited to provide expert testimony to parliamentary committees and in other governmental processes regarding the societal and legal challenges posed by online environments and digital technologies.[33]

30. CIPPIC has filed complaints with the Office of the Privacy Commissioner of Canada, on issues stemming from the rise of digital technologies.[34]

31. CIPPIC has advocated for consumer protection in the area of competition law via complaints with the Competition Bureau and extensive submissions on competition law reform.[35] In particular, in 2023, CIPPIC made submissions to the Government of Canada on similar issues to the ones raised in this application, stating in part that: "the dominant control over the app market also allows the dominant app store operators to reduce competition by limiting the payment options

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[30] Fewer Affidavit, para. 5.

[31] Fewer Affidavit, para. 13: *Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic v Sanhi*, Fed Ct. No. T-1717-24; *Bell Canada v Amtelecom*, 2015 FCA 126; *Voltage v Doe #1*, SCC File No. 41026; *Authors Guild v Google, Inc*, No 05-Civ-8136 (DC) (SDNY March 22, 2011); *Lawson v Accusearch*, 2007 FC 125.

[32] Fewer Affidavit, para. 15.

[33] Fewer Affidavit, para. 16.

[34] Fewer Affidavit, para. 17.

[35] Fewer Affidavit, para. 12.

available to consumers [and] charging exorbitant fees to developers […]. Many critics have expressed concerns over the monopolistic nature of Apple's App Store […] where app developers have no other marketplace in which they can publish their apps and they are forced to accept the terms [of the App Store]."

32. CIPPIC's public-interest mandate places this application squarely within its core objectives.

PART III - POINTS IN ISSUE

33. The only question on this application is whether leave should be granted pursuant to s. 103.1 to bring an application against the respondents to allege they have violated (and are violating) s. 77 and s. 79 of the Act.

PART IV - SUBMISSIONS

A. <u>Principles of statutory interpretation</u>

34. The modern principle of statutory interpretation requires the words of the provision to be read within their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation, and the intention of Parliament.[36]

B. <u>The words of the provision</u>

35. The relevant provisions of s. 103.1 are reproduced below:

103.1(1) Any person may apply to the Tribunal for leave to make an application under section 74.1, 75, 76, 77, 79 or 90.1. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.	103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 74.1, 75, 76, 77, 79 ou 90.1. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

[36] *JAMP Pharma Corporation v Janssen Inc,* 2024 Comp Trib 8 at para. 47.

103.1(7) The Tribunal may grant leave to make an application under section 75, 77, 79 or 90.1 if it has reason to believe that the applicant is directly and substantially affected in the whole or part of the applicant's business by any conduct referred to in one of those sections that could be subject to an order under that section or **if it is satisfied that it is in the public interest to do so.**[37]	103.1 (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77, 79 ou 90.1 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans tout ou partie de son entreprise en raison de l'existence de l'un ou l'autre des comportements qui pourraient faire l'objet d'une ordonnance en vertu de l'un de ces articles ou **s'il est convaincu que cela servirait l'intérêt public.**

36. On June 20, 2025,[38] an amendment to section 103.1(7) of the Act came into force, allowing the Tribunal to grant leave to make an application under s. 77 or s. 79 if "it is satisfied that it is in the public interest to do so".

37. Prior to that date, leave could be granted only if the Tribunal had "reason to believe that the applicant is directly and substantially affected" by the impugned practices. Therefore, with the recent amendments, in addition to the "directly and substantially affected" test, s. 103.1(7) now permits leave to be granted if the Tribunal is "satisfied" that the proposed application "is in the public interest".

38. CIPPIC applies for leave under the "public interest" arm of s. 103.1(7).

39. The Tribunal has not yet interpreted the public interest test.

40. Neither "satisfied" nor "public interest" are defined in the Act. The Supreme Court of Canada has recently held that the undefined word "change" in the Ontario *Securities Act* was intended to maintain flexibility for the *Securities Act* to be applied to widely varying factual

[37] *Competition Act*, RSC 1985, c C-34 ("**Act**"), ss. 103.1(1) and 103.1(7) (emphasis added).
[38] Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, Ch 15 (assented to on June 20, 2024) ss. 254, 272.

scenarios.[39] Similarly, the undefined term "public interest" can include an enormous range of interests and scenarios, ranging from those of market participants, to the promotion of competition law principles more generally.

41. Nevertheless, "satisfied" is different than the "reason to believe" test that applies under the "directly and substantially affected" branch. The "satisfied that it is in the public interest" test is also not subject to the "could be subject to an order" criteria applicable to the "directly and substantially affected" branch. If Parliament had sought to require the public interest test to be subject to the same criteria as the "directly and substantially affected" branch, it could have said so.

42. Section 103.1 specifies that an application must be accompanied by an affidavit that sets out the "facts" in support. Therefore, evidence is required to bring an application under s. 103.1, but the provision does not explain what type of evidence is required. For example, s. 103.1 does not specify that opinion or expert evidence is required.

43. In *JAMP*, the Tribunal considered whether to allow responding evidence to be filed. It held that "[…] to be acceptable on the section 103.1 leave application, [the respondent's] evidence in this area must be limited to factual (not expert) evidence and be tailored to negate or respond directly to [the applicant's] factual allegations."[40]

44. In addition, in *Martin*, the Tribunal rejected the respondent's request to adduce expert evidence on the "non-static nature of the relevant markets," which the respondent stated was needed "to explain why the applicant has not advanced a cogent and proper definition of the

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[39] *Lundin Mining Corp v Markowich*, 2025 SCC 39 at para. 73.
[40] *Martin v Alphabet Inc et al*, 2025 Comp Trib 12 at para. 22

relevant market."[41] The Tribunal held that questions of market definition "is often a complex issue and the subject of extensive expert and factual evidence on the merits of the application […]," which was not "suitable for the Tribunal's screening role on a leave application […]."[42]

45. *JAMP* and *Martin* both make clear that expert evidence is not required under s. 103.1.

46. The language of "facts" in section 103.1 contrasts with the language used in Rule 96(2) of the *Competition Tribunal Rules*, which states that a notice of application for an interim order "shall be accompanied by any supporting affidavits that the applicant intends to rely on."[43]

C. The Context of the Provision

47. The leave process is intended to be summary and expeditious. For example, the Commissioner must certify within 48 hours of being served with a leave application whether the Commissioner is investigating the matter in respect of which leave is sought. A respondent has only 15 days from the date of notice to make representations. Moreover, subsection 9(2) of the *Competition Tribunal Act* states that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."[44]

48. Furthermore, the Tribunal has held that the leave process "is a screening process meant to be decided expeditiously and not on the basis of a full evidentiary record".[45] The respondent has no right to file responding evidence,[46] and the applicant has no right to file reply evidence,[47] though each can seek leave to do so. There is no right to cross-examine on affidavits in leave

[41] *Martin v Alphabet Inc et al*, 2025 Comp Trib 12 at para. 39.
[42] *Martin v Alphabet Inc et al*, 2025 Comp Trib 12 at para. 40.
[43] *Competition Tribunal Rules*, SOR/2008-141, r. 96(2).
[44] *Competition Tribunal Rules*, SOR/2008-141, rr. 119(1), 119(3), 121.
[45] *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 13 at para. 16.
[46] *Competition Tribunal Rules*, SOR/2008-141, r. 119(3).
[47] *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 at paras. 35-36.

materials.[48] Since leave is decided at an early stage, there "will inevitably be incomplete information on some topics". The applicant has no access to discovery evidence. The Tribunal can draw reasonable inferences from circumstantial evidence.[49] Where the respondent does not seek leave to present evidence on a point that lies exclusively within their knowledge, the Tribunal can draw an adverse inference against the respondent on that point.[50] The Tribunal can also draw reasonable inferences from circumstantial evidence.[51]

49. Since leave is decided at an early stage, there "will inevitably be incomplete information on some topics". Thus, "hard and fast evidence" is not always required.

50. Based on these contextual factors, the Tribunal has held that a leave application must proceed "summarily and expeditiously to carry out a screening function based on the sufficiency of credible, cogent and objective evidence advanced."[52] A leave decision is not akin to a final determination made based on a full evidentiary record.[53] The Tribunal can "address each element summarily in keeping with the expeditious nature of the leave proceeding."[54]

(i) Well-Understood Legal Meaning

51. When Parliament uses a term with a well-understood legal meaning, it is presumed to intend to incorporate that legal meaning into the statute.[55] In this case, although the Act does not

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[48] *Symbol Technologies Canada ULC v Barcode Systems Inc,* 2004 FCA 339 at para. 24.
[49] *The Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10 at paras. 32-34.
[50] *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 12 at paras 26-27.
[51] *The Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10 at paras. 32-34.
[52] *JAMP Pharma Corporation v Janssen Inc,* 2024 Comp Trib 8 at para. 14.
[53] *JAMP Pharma Corporation v Janssen Inc,* 2024 Comp Trib 8 at para. 20.
[54] *Symbol Technologies Canada ULC v Barcode Systems Inc,* 2004 FCA 339 at paras. 18-19.
[55] *R v DLW, 2016 SCC 22 (CanLII)*, 2016 SCC 22 at para. 18.

define "public interest," the courts have developed common-law tests over decades to determine whether a litigant should be granted public-interest standing.

52. Under the public-interest standing test, a court must weigh three factors: (a) whether there is a serious justiciable issue; (b) whether the applicant has a genuine interest in the matter; and (c) whether the case is a reasonable and effective means of bringing the case to court.[56]

53. On factor (a), the court assesses the claim in a "preliminary manner" to determine whether there is at least one question that is "far from frivolous."[57] On factor (b), the court can consider the applicant's reputation and whether they have a "continuing interest in and link to the claim."[58] The applicant does not need "to show that its interests are precisely as narrow as the litigation it seeks to bring."[59] Ultimately, the common law test must be applied flexibly due to the statutory context of s. 103.1, which expressly permits public interest applications to be brought.

D. <u>**The scheme and object of the legislation**</u>

54. The paper "The new Abuse of Dominance Regime in Canada" suggests that the public interest test under s. 130.1 should follow the Supreme Court of Canada's interpretive approach to the "public interest" in the Ontario *Securities Act*. In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*,[60] the Supreme Court concluded that the OSC's public interest jurisdiction was animated in part by both purposes of the

[56] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para. 28.
[57] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para. 28.
[58] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para. 51.
[59] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para. 102
[60] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37.

Securities Act.[61] Similarly, the purposes of the *Competition Act* may also inform the "public interest" analysis.

55. The purposes of the *Competition Act* include the promotion of the "efficiency and adaptability of the Canadian economy," ensuring that "small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" and to provide "consumers with competitive prices and product choices."[62]

56. In the proposed application, Ms. Fairbanks is an example of a small to medium-sized business that is seeking an "equitable opportunity" to participate in the Canadian economy. The restrictions on the App Store restrict product choices and result in uncompetitive prices. The issues in the proposed application raise significant questions about the intersection of technology and competition law, which are relevant to the adaptability of the Canadian economy.

E. The intention of Parliament

57. Hansard may be used to identify legislative intent. Although Hansard may be rhetorical and imprecise, "providing information and explanations of proposed legislation is an important ministerial responsibility, and courts rightly look to it" – especially to speeches by the Minister(s) who introduced the bill or for whose departments they are brought.[63] Although there are no such relevant speeches on the meaning of "public interest" by the Minister who introduced the bill, there were discussions on the expansion of the private right of action.

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[61] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para. 41.
[62] *Competition Act*, RSC 1985, c C-34, s 1.1 (emphasis added).
[63] *R v Safarzadeh-Markhali*, 2016 SCC 14 at para. 36.

58. For example, in the House of Commons (report stage), the Parliamentary Secretary to the Minister of Veterans Affairs and Associate Minister of National Defence stated:

> The expansion of private enforcement and the ability of the Competition Tribunal to issue monetary payment orders in cases initiated by private parties are also significant changes to our existing enforcement approach. By **relaxing the requirements** to bring a case and providing an incentive to bring matters directly to the Competition Tribunal, there would be greater accountability throughout the marketplace and more action on cases that the Competition Bureau may not be able to take.[64]

59. The reference to "relaxing the requirements" suggests that the "satisfied that it is in the public interest" standard is low.

60. This is consistent with the evolution of the rights of private parties to bring applications to the Tribunal. Although private applicants were given the right to bring applications to the Tribunal beginning in 2002, relatively few cases were brought. For example, the first case to seek leave to commence a proceeding under s. 79 was not brought until 2024.[65]

61. The purpose of the amendments to the *Competition Act*, as described by the Government of Canada in its 2023 Fall Economic Statement, was to "broaden the reach of the law by enabling more private parties to bring cases before the Competition Tribunal and receive payment if they are successful."[66]

F. Summary of the public interest test under s. 103.1

62. The Tribunal should assess the facts described in the affidavit evidence to determine whether the proposed applicant has satisfied the public interest test. The test is fact-specific and

[64] *House of Commons Debates*, 44th Parl, 1st Sess, No 312 (9 May 2024) at 23382 (Randeep Sarai) (emphasis added).
[65] *JAMP Pharma Corporation v Janssen Inc,* 2024 Comp Trib 8 at para. 23.
[66] See online: https://www.budget.canada.ca/fes-eea/2023/report-rapport/FES-EEA-2023-en.pdf (p. 36).

discretionary. In considering whether the applicant has satisfied the public interest test, the Tribunal should consider the common law test for public interest litigation in a flexible manner, against the overall context and purpose of the *Competition Act*. The evidentiary threshold is low. Expert evidence on issues that are likely to be in dispute on the merits is not required. The purpose of the 2025 amendments was to expand access to the Tribunal based on the "public interest" and to permit the recovery of "the benefit derived from the conduct," to be distributed among affected persons.

G. <u>Application of the Test</u>

(i) There is a sufficient factual record to establish the App Store allegations

63. The "facts" needed to obtain leave will vary from case-to-case and can include, where appropriate, evidence that would not be admissible on a merits hearing to prove the truth of the allegations. At the leave stage, otherwise inadmissible hearsay evidence can be accepted to show the type of evidence that would be available at the later merits stage.[67]

64. While the Tribunal must be "satisfied" of the public interest, the legislative scheme surrounding the public interest test demonstrates that the analysis is intended to be neither searching nor extensive. The Tribunal does not determine facts or the merits, and the analysis does not occur on a full evidentiary record.

65. The factual record includes detailed investigations and findings that consider very similar issues to the ones raised in the proposed application. The App Store operates worldwide with common features and restrictions that are equally applicable to Canada. The government, regulatory and court findings are not being relied on prove the case on the merits, which is neither

[67] See by way of analogy: *Pinon v Ottawa (City)*, 2021 ONSC 488 at para. 17.

possible nor appropriate at this stage, but (1) to show the nature of evidence that may be produced on the merits and (2) to demonstrate that a similar analysis could take place in Canada pursuant to Canada's competition laws.

(a) Abuse of Dominant Position

66. The applicant alleges that Apple has abused its dominant position contrary to section 79(1). In support of this allegation, the applicant relies on facts alleged at paras. 14 to 25 above.

67. Section 79 states:

79 (1) On application by the Commissioner or a person granted leave under section 103.1, if the Tribunal finds that one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in

(a) a practice of anti-competitive acts; or

(b) conduct

(i) that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and

(ii) the effect is not a result of superior competitive performance.

79 (1) Lorsque, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, il conclut qu'une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions et adoptent ou ont adopté une pratique ou un comportement ci-après, le Tribunal peut rendre une ordonnance leur interdisant d'adopter la pratique ou le comportement :

a) une pratique d'agissements anti-concurrentiels;

b) un comportement qui a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne ou les personnes ont un intérêt concurrentiel valable, cet effet ne résultant pas d'un rendement concurrentiel supérieur.

68. Pursuant to s. 79, the Tribunal must find that the respondents "substantially or completely control a class or species of business throughout Canada," engaged in a "practice of anti-competitive acts" or "conduct that is having the effect of preventing or lessening competition substantially" and that "the effect is not a result of a superior competitive performance." "Anti-

competitive acts" are defined in s. 78 as including "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition."

69. There is a sufficient factual basis alleged for a proposed s. 79 application against the respondents.

(1) Substantial or complete control

70. The application alleges that Apple exercises substantial or complete control over the iOS app distribution and iOS in-app payment, or IAP, services markets within its "walled garden". Apple has near absolute market power in these markets, buttressed by contractual restrictions that create high barriers to entry. Apple's market share in both is effectively 100%, as there is no alternative lawful channel for native iOS apps or in-app payments for digital content/services.

(2) Practice of Anti-Competitive Acts

71. There is a satisfactory pleading that Apple's conduct constitutes a practice of anti-competitive acts:

(a) Exclusive Dealing (s. 78(1)(h)): Apple requires all iOS apps to be distributed exclusively through the App Store, prohibiting alternative distribution channels. This is imposed through the DPLA, which is a contract of adhesion. Apple has foreclosed competition in iOS app distribution services by requiring this exclusivity.

(b) Tied Selling (s. 78(1)(g)): Apple mandates the use of its IAP for all in-app purchases of digital content/services, prohibiting alternative payment processors.

Apple infringed by tying its payment services to the App Store. This obligation limits competition and innovation among payment service providers.

(c) Anti-Steering Rules(s. 78(1)(e),(g) and (h)) : Apple's guidelines prohibit Developers from informing users about alternative purchasing options outside the App Store, such as through in-app links or other mechanisms.

(d) Excessive and Unfair Selling Prices (s. 78(1)(k)): Apple's 30% commission rate is excessive and unfair. The rate was set for commercial reasons rather than in response to market competition.

(e) Selective and discriminatory responses to actual or potential competitors (s. 78(1)(j): Requiring all Developers to enter into non-negotiable, standard-form contracts of adhesion with terms that that reinforce Apple's dominance.

(3) Substantial Lessening or Prevention of Competition (SLPC)

72. The "but for" test is used to assess SLPC, comparing the level of competitiveness with the impugned practice to what would exist in its absence.[68] There is an adequate pleading of SLPC in the application:

(a) Creating High Barriers to Entry: The combination of exclusive dealing, tying requirements, and technical/contractual restrictions creates high barriers to entry for rival app stores and payment processors. Apple has effectively created a captive group of iOS users and controls access to them. This forecloses competition by

[68] *Canada (Commissioner of Competition) v Canada Pipe Co (FCA),* 2006 FCA 233 at para. 38.

preventing Developers from using alternative app-distribution and payment-processing channels.

(b) Harm to Developers and Consumers: *Supra*-competitive commissions result in higher costs for Developers, and indirectly to consumers. Developers are excluded from alternative channels, and consumers lack choice in app stores and payment options. The restrictions limit innovation and competitive pressure on commission rates and service quality.

(4) No Superior Competitive Performance

73. Apple's justifications, primarily privacy and security, have been found to be insufficient. The CAT found that the restrictions are not necessary or proportionate to the objective of delivering these benefits, noting that less restrictive alternatives are feasible.

(b) Exclusive dealing

74. Pursuant to s. 77(1), exclusive dealing occurs when a supplier requires a customer to deal only or primarily in products supplied by the supplier, or induces them to do so by offering more favourable terms. Pursuant to s. 77(2), the Tribunal may prohibit exclusive dealing on application by a person under s. 103.1 if it is engaged in by a major supplier and is likely to impede entry or expansion, or have other exclusionary effects, resulting in a substantial lessening of competition.

75. In support of this allegation, the applicant relies on facts alleged at paras. 14 to 16, above.

76. There is an adequate case of exclusive dealing alleged against Apple for the purposes of the leave application:

(a) Exclusive App Store Distribution: Apple requires all iOS apps to be distributed exclusively through the App Store, prohibiting distribution through any other channel. This directly forecloses rivals in app distribution.

(b) Anti-Steering Rules: Apple prevents Developers from informing users about alternative purchasing channels, reinforcing the exclusivity of Apple's IAP system. This entrenches Apple's control over in-app transactions.

77. Given Apple's position as a major supplier in the relevant markets, these practices are likely to impede entry and expansion of competitors, leading to a substantial lessening of competition.

(c) Tied Selling

78. Tied selling occurs when a dominant firm requires customers to purchase a second product or service as a condition of obtaining the first. A respondent can be found to have tied products if they provide one product either "on the condition that the buyer takes a second product as well or on terms that induce the buyer to take the second product as well".[69] The fundamental question is whether consumers "actually do have an **effective** choice".[70]

79. In support of this allegation, the applicant relies on facts alleged at paras. 19 to 25, above.

80. There is a satisfactory case alleged to grant leave to determine whether Apple's mandatory IAP constitutes tied selling. Apple mandates its own in-app payment system for all in-app purchases of digital content/services, prohibiting alternative payment processors. Access to app

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[69] *Director of Investigation and Research v Tele-Direct Inc* (1997), 73 CPR 1 (Can CT), s. VIII.A.
[70] *Director of Investigation and Research v Tele-Direct Inc* (1997), 73 CPR 1 (Can CT), s. VIII.E (emphasis added).

distribution through the App Store (the tying product) is conditional on the mandatory use of Apple's IAP (the tied product). This conduct excludes competitors altogether.

81. The cumulative effect of these practices, including the exclusive distribution, mandatory IAP, anti-steering rules, and excessive commissions, demonstrates a systematic effort by Apple to leverage its dominance in one market to create or maintain dominance in others, thereby substantially lessening competition in the Canadian digital economy.

(ii) Does the applicant have a genuine interest in the alleged conduct?

82. As discussed above at paras. 26 to 32, CIPPIC has a long history of advocating for the protection of consumer interests, and those of other vulnerable parties, in respect of the conduct of technology corporations. In 2023, CIPPIC made submissions to the Government of Canada on similar issues to the ones in this application:

> Canada should follow the EU's lead in developing legislation to regulate gatekeeping by dominant digital platforms. Gatekeeping in the digital economy is where a dominant platform controls the access and behaviors of the internal ecosystem in which it operates. Mobile app stores are an example of digital gatekeepers. The app store operators have significant power in regulating the type of apps published on their platform. The policies and terms and conditions of dominant app store operators, such as Google and Apple, play an important role in the marketplace by banning dangerous apps, maintaining quality standards, and regulating content to protect the privacy and safety of its users. However, the dominant control over the app market also allows the dominant app store operators to reduce competition by limiting the payment options available to consumers, charging exorbitant fees to developers, and in extreme circumstances, removing apps from third parties that are offering a similar service to the app that the operator launched.
>
> Many critics have expressed concerns over the monopolistic nature of Apple's App Store and Google's Play Store, where app developers have no other marketplace in which they can publish their apps and they are forced to accept the terms of these two dominant platforms. The EU has taken the lead by enacting the Digital Markets Act, which explicitly sets out a list of criteria to qualify an online digital platform as a "gatekeeper." Canada

> should follow suit and enact its own platform-specific legislation to better protect Canadian businesses from anti-competitive behaviours.

83. CIPPIC has a genuine interest in the proposed application.

(iii) *The application engages the broad purposes of the* Competition Act

84. As described above, the public interest standing provision must be interpreted in accordance with the purposes of the *Competition Act*, namely:

> to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that **small and medium-sized enterprises** have an equitable opportunity to participate in the Canadian economy and in order to provide **consumers with competitive prices and product choices**.[71]

85. The circumstances underlying this application – the effects of Apple's allegedly anti-competitive conduct on consumers and Developers – are directly responsive to these purposes. In this regard, it is noteworthy that governments, courts, tribunals and regulators around the world have found it appropriate to inquire into Apple's conduct, and have made specific findings of anti-competitive conduct by Apple. In particular:

(a) The U.K. Competition and Markets Authority (CMA) and the U.K. Competition Appeals Tribunal (CAT) each found that Apple had abused its dominance through a practice of abusive acts:

(i) The CMA found that Apple possesses substantial and entrenched market power in native app distribution, with the App Store holding a monopoly over downloads on iOS devices. This lack of competition allows Apple to

[71] *Competition Act*, RSC 1985, c C-34, s 1.1 (emphasis added).

charge *supra*-competitive commission rates, which have remained between 25% and 30% over the years, contributing to high profitability with an estimated gross profit margin of [75-100]% in 2021. The CMA concluded that these commission rates are not based on costs, but are set above competitive levels due to the absence of effective competition. The CMA found that Apple's control over the App Store enables it to set the rules for Developers, who have limited ability to negotiate terms. The app review process was noted as opaque and inconsistently applied, leading to delays and uncertainty for Developers. The report highlighted anti-competitive conduct, including exclusive dealing through the mandatory use of Apple's IAP, effectively tying app distribution to its payment system. The CMA found that Apple's anti-steering rules restrict Developers from informing users about alternative payment methods within the app or through other means. These practices, combined with barriers to entry and innovation, result in higher prices, lower quality, and less choice for consumers, and stifle innovation.

(ii) The CAT found that Apple abused its dominant position in two distinct markets: iOS app distribution services and iOS in-app payment services. Apple held a 100% market share in these markets and imposed contractual restrictions that foreclosed all competition. Apple's conduct was also deemed exclusionary, infringing exclusive dealing, tying, and anti-steering provisions. Exclusive dealing was established by Apple's requirement that all iOS apps be distributed via the App Store and all in-app purchases use

its payment system, thereby foreclosing competition. Tying occurred because Developers were forced to use Apple's in-app payment system as a condition for App Store access. Anti-steering rules prevented Developers from informing users about alternative payment options, further entrenching Apple's control. The Tribunal determined that Apple's 30% commission rate was excessive and unfair, set arbitrarily without competitive pressure, and resulted in high operating margins. Apple's justifications, based on privacy, security, and efficiencies, were rejected, finding that these restrictions were not objectively necessary or proportionate and did not outweigh the exclusion of competition. The CAT calculated damages as the difference between Apple's actual commission and the competitive rates, with a 50% pass-on rate to end users. The CAT awarded simple interest at 8%.

(b) A Committee of the U.S. House of Representatives found that Apple possesses significant and durable market power in mobile operating systems and app stores through its exclusive control of iOS and the App Store. The report concluded that Apple leverages its control to create and enforce barriers to competition, discriminating against rivals, while favoring its own offerings. Developers reported that App Store guidelines are vague, arbitrarily enforced, and subject to change without notice, with preferential treatment sometimes given to large partners. The investigation identified exclusive dealing, where the App Store is the only distribution channel for iOS apps, giving Apple monopoly power over software distribution. Tied selling was also noted, as Apple requires apps offering digital

goods or services to use its in-app purchase (IAP) mechanism, tying payment processing to App Store access and prohibiting alternative payment options. Apple's anti-steering rules prohibit developers from informing users about alternative payment methods or linking to external options, with non-compliance risking app removal. The report criticized Apple's standard 30% commission on paid apps and IAPs as excessive, given that payment processing costs are typically much lower. An absence of competition allows these rates to persist, leading to higher consumer prices, reduced innovation, and fewer choices.

86. These decisions and reports have concluded, *inter alia*, that (i) Apple's 30% headline commission charged to Developers for any App Store purchases, and (ii) Apple's 30% in-app commission charged to Developers, are abusive, anti-competitive, and excessive. The same anti-competitive conduct by Apple takes place in Canada.[72]

87. A leave application is not the time and place to determine the merits of the case, and the applicant does not seek to rely on the facts found in the various foreign decisions for the truth of their contents. However, the fact that such findings were made confirms that similar issues have been debated, and the broad public interest has been engaged in other jurisdictions, and that the proposed application engages the broad purposes of the *Competition Act*. These decisions illustrate the existence of potential frameworks that could be used in Canada to decide similar issues based on facts applicable to Canada and Canadian law.

[72] Fairbrother Affidavit, paras. 7-16.

(iv) Relief sought

88. The applicant has alleged a series of plausible remedies that could be made if a breach of s. 77 or s. 79 is proven, including:

(a) an order pursuant to s. 77(2), (3) and s. 79(1) of the Act:

(i) prohibiting Apple from enforcing restrictions that require Developers in Canada to distribute Apps exclusively through the Canadian App Store;

(ii) prohibiting Apple from enforcing restrictions that require Developers in Canada to exclusively use IAP;

(iii) prohibiting Apple from enforcing restrictions preventing Developers in Canada from informing Canadian iOS Users about alternative payment channels (“anti-steering provisions”); and

(b) an order pursuant to ss. 77(3.1) and 79(4.1) of the Act requiring Apple to pay an amount equal to the benefit derived from its conduct that is the subject of the orders requested above.

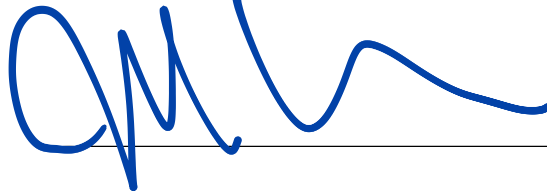
(v) Conclusion

89. The Apple App Store operates worldwide in similar ways that are indistinguishable from jurisdiction to jurisdiction. For many years, Apple has imposed arbitrary restrictions and commissions that have stifled competition and innovation, but which have generated billions of dollars for Apple. Canadian iOS users and Canadian App Developers have not obtained any relief. The applicants have alleged a sufficient basis for the Tribunal to be satisfied that it is in the public interest to grant leave under s. 103.1 to commence an application under s. 77 and s. 79 of the Act.

PART V - ORDER REQUESTED

90. The applicant respectfully requests an order granting leave to make an application pursuant to s. 77 and s. 79 of the Act in the form requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of December, 2025.



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PART VI - LIST OF AUTHORITIES

Tab	Title
1.	*Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 13
2.	*British Columbia (Attorney General) v Council of Canadians with Disabilities,* 2022 SCC 27
3.	*Canada (Commissioner of Competition) v Canada Pipe Co (FCA),* 2006 FCA 233
4.	*CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 12
5.	*Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission), 2001 SCC 37*
6.	*Director of Investigation and Research v Tele-Direct Inc* (1997), 73 CPR 1 (Can CT)
7.	*JAMP Pharma Corporation v Janssen Inc,* 2024 Comp Trib 8
8.	*Lundin Mining Corp v Markowich*, 2025 SCC 39
9.	*Martin v Alphabet Inc et al*, 2025 Comp Trib 12
10.	*R v DLW, 2016 SCC 22 (CanLII)*, 2016 SCC 22
11.	*R v Safarzadeh-Markhali,* 2016 SCC 14
12.	*Symbol Technologies Canada ULC v Barcode Systems Inc,* 2004 FCA 339
13.	*The Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10

APPENDIX "A"
STATUTES AND REGULATIONS RELIED UPON

Competition Act, RSC 1985, c C-34

Purpose of Act

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

Definitions

77(1) For the purposes of this section,

exclusive dealing means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

market restriction means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

tied selling means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Exclusive dealing and tied selling

77(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Additional order — person granted leave

77(3.1) If the Tribunal makes an order under subsection (2) or (3) as the result of an application by a person granted leave under section 103.1, it may also order any supplier in respect of whom the order applies to pay an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate.

Implementation of the order

77(3.2) The Tribunal may specify in an order made under subsection (3.1) any term that it considers necessary for the order's implementation, including any term referred to in any of paragraphs 75(1.3)(a) to (g).

Definition of anti-competitive act

78 (1) For the purposes of section 79, anti-competitive act means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

- **(d)** use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- **(e)** pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- **(f)** buying up of products to prevent the erosion of existing price levels;
- **(g)** adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- **(h)** requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;
- **(i)** selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;
- **(j)** a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market; and
- **(k)** directly or indirectly imposing excessive and unfair selling prices.

Prohibition if abuse of dominant position

79 (1) On application by the Commissioner or a person granted leave under section 103.1, if the Tribunal finds that one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in

- **(a)** a practice of anti-competitive acts; or
- **(b)** conduct
  - **(i)** that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and
  - **(ii)** the effect is not a result of superior competitive performance.

Additional or alternative order

79(2) If, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all persons against whom an order is sought to take actions, including the divestiture of assets or shares, that are reasonable and necessary to overcome the effects of the practice in that market.

Limitation

79(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is

directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Factors to be considered

79(4) In determining, for the purposes of subsections (1) and (2), whether conduct has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may consider

- **(a)** the effect of the conduct on barriers to entry in the market, including network effects;
- **(b)** the effect of the conduct on price or non-price competition, including quality, choice or consumer privacy;
- **(c)** the nature and extent of change and innovation in a relevant market; and
- **(d)** any other factor that is relevant to competition in the market that is or would be affected by the conduct.

Additional order — person granted leave

79(4.1) If, as the result of an application by a person granted leave under section 103.1, the Tribunal makes an order under subsection (1) or (2), it may also order the person against whom the order is made to pay an amount, not exceeding the value of the benefit derived from the practice that is the subject of the order, to be distributed among the applicant and any other person affected by the practice, in any manner that the Tribunal considers appropriate.

Implementation of the order

79(4.2) The Tribunal may specify in an order made under subsection (4.1) any term that it considers necessary for the order's implementation, including any term referred to in any of paragraphs 75(1.3)(a) to (g).

Leave to make application under section 74.1, 75, 76, 77, 79 or 90.1

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

Granting leave — sections 75, 77, 79 or 90.1

103.1(7) The Tribunal may grant leave to make an application under section 75, 77, 79 or 90.1 if it has reason to believe that the applicant is directly and substantially affected in the whole or part of the applicant's business by any conduct referred to in one of those sections that could be subject to an order under that section or if it is satisfied that it is in the public interest to do so.

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Affidavit evidence

119(3) Representations in writing shall not contain affidavit evidence, except with leave of the Tribunal.

Decision without oral hearing

121 The Tribunal may render its decision on the basis of the written record without a formal oral hearing.

Power of Tribunal

122 The Tribunal may grant the application for leave to make an application, with or without conditions, or refuse the application.