Competition Tribunal Tribunal de la concurrence

Citation: *Martin v Alphabet Inc., Google LLC, Google Canada Corporation, Apple Inc., and Apple Canada Inc.*, 2026 Comp Trib 3
File No.: CT-2025-004
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IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

AND IN THE MATTER OF an application by Alexander Martin for an application for an order pursuant to section 103.1 granting leave to bring an application under sections 79(1) and 90.1(1) of the *Competition Act*;

BETWEEN:

Alexander Martin
(applicant)

and

Alphabet Inc., Google LLC, Google Canada Corporation, Apple Inc., and Apple Canada Inc.
(respondents)

Decided on the basis of the written record and oral submissions from counsel.
Before: Justice Andrew D. Little (Chairperson)
Date of order: January 13, 2026

ORDER AND REASONS (APPLICATION FOR LEAVE UNDER SECTION 103.1)

[1] The applicant applied for leave under section 103.1 of the *Competition Act* to commence an application against the respondents Alphabet Inc., Google LLC, Google Canada Corporation (together, "Google") and Apple Inc., and Apple Canada Inc (together, "Apple") under section 79 (against Google) and section 90.1 (against Google and Apple). At a very high level, the applicant seeks to make an application to allege that Google is dominant in the general search engine market and has exercised its market power to maintain its dominant position using anti-competitive agreements with Apple and others that position Google as the default search engine.

[2] This is the first application for leave in which the Tribunal must decide "if the Tribunal is satisfied that it is in the public interest" to grant leave under subsection 103.1(7).

[3] For the following reasons, the application for leave is dismissed.

I. THE APPLICATION FOR LEAVE

A. Sections 79 and 90.1

[4] Both sections 79 and 90.1 are in Part VIII of the *Competition Act*, which concerns Reviewable Trade Practices. Section 79 establishes the reviewable practice related to abuse of dominance, while section 90.1 defines a reviewable practice involving horizontal anti-competitive agreements or arrangements between parties.

[5] Abuse of dominance concerns anti-competitive activities by a person who has substantial market power in a market. Subsection 79(1) first requires substantial or complete "control" of a "class or species of business", which has been interpreted to mean substantial market power in a defined product market. The allegedly controlling respondent must then have engaged or be engaging in either:

(a) "a practice of anti-competitive acts", meaning a practice of behaviour "intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition" (see section 78); or

(b) conduct that had, is having, or is likely to cause a substantial lessening or prevention of competition (i.e., an "SLC/SPC") in a market in which the respondent has a plausible competitive interest.

[6] The elements of section 79, as it read before recent amendments, were discussed in the *VAA* and *TREB* decisions: *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6 ("*VAA CT*"); *Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 ("*TREB CT*"), aff'd 2017 FCA 236, [2018] 3 FCR 563 (leave to appeal dismissed August 23, 2018, SCC File No. 37932).

[7] Section 90.1 concerns anti-competitive agreements or arrangements between persons, of whom two or more are competitors. Under subsection 90.1(1), if such an accord causes an SLC/SPC, the Tribunal may make an order prohibiting any person from doing anything under the agreement or arrangement, or (if the affected party and the Commissioner consent) requiring a person to take any other action. Subsection 90.1(1.01) provides that if the Tribunal finds that a

"significant purpose" of such an accord, or any part of it, is to prevent or lessen competition in any market, it may make an order under subsection (1) even if none of the persons referred to in that subsection are competitors.

[8] The elements and fundamental attributes of section 90.1 were identified in *Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10, at paras 60-61; *Rakuten Kobo Inc v Commissioner of Competition*, 2016 Comp Trib 11, at paras 56-57; and *Rakuten Kobo Inc. v Canada (Commissioner of Competition)*, 2018 FC 64, [2018] 4 FCR 111 ("*Rakuten Kobo FC"*), at para 126.

[9] Subsections 79(4.1) and 90.1(10.1) each contemplate that, in specified circumstances, the Tribunal may make a monetary order. Notably, an order under subsection 79(1) or (2), or subsection 90.1(1), is a prerequisite to such a monetary order .

B. The Proposed Application under sections 79 and 90.1

[10] The following is a summary of the allegations that the applicant proposes to make in his application on the merits under sections 79 and 90.1, if the Tribunal grants leave under section 103.1. This outline is based on the applicant's draft notice of application and his initial and reply submissions on leave.

[11] The applicant will seek orders against Google for alleged abuse of dominance, and against Apple and Google based on an alleged anti-competitive agreement or arrangement.

[12] The applicant proposes to allege that Google controls over 90% of the general search engine market in Canada. A general search engine is a software tool that helps users find information online using keywords or phrases. It works by continuously scanning, indexing, and ranking web pages to return the most relevant results. General search engines allow users to search the entire web, making them the primary gateway to information for most users.

[13] The applicant alleges that Google dominates the general search engine market, indexing vast amounts of information from web pages. He further alleges that Google maintains its dominance through exclusionary practices and anti-competitive revenue sharing agreements with web browsers, original equipment manufacturers and wireless carriers that require Google's general search engine to be installed as the default product. In return, Google pays substantial amounts each year to the counterparties, totalling over US$26 billion in 2021 (of which it paid more than US$20 billion to Apple). The applicant alleges that these arrangements have impeded other general search engines from entering the market or expanding their businesses.

[14] The applicant claims that Google identified Apple as a potential rival that was well positioned to enter the general search engine market. The applicant contends that, to avoid such entry, Google entered into a revenue sharing agreement with Apple (entitled "Information Services Agreement" or "ISA") that made Google the exclusive default search engine on the over two billion Apple devices in use worldwide, in exchange for large payments that disincentivize Apple from developing its own general search engine. The applicant asserts that "default" distribution is the most efficient way to distribute a search engine, by preloading it as the default option on various

devices. It also creates stickiness, or "choice friction", that has the effect of inhibiting user switching to other general search engines that compete with Google, such as Yahoo! and Bing.

[15] The applicant claims that Apple is a key partner for Google due to its large user base and control over distribution. In 2024, Apple sold over 225 million iPhones globally, making up 60% of smartphones in Canada, each with Google as the default search engine. With over 2 billion active devices worldwide, Apple's integrated ecosystem includes iPhones, iPads, Macs, Apple Watches, and HomePods, along with services like iCloud, Apple Music, and the App Store. This means an iPhone user likely has multiple Apple devices, all with Google as the default search engine.

[16] According to the applicant, by securing this default position in Apple devices, Google controls critical points of distribution of general search engines, which would limit competition, as users are unlikely to switch from the preloaded option on any of their devices. In turn, the arrangement entrenches Google's market dominance and creates significant barriers for competitors, who must rely on users discovering their search engine and manually changing from the Google default.

[17] The applicant asserts that the latest version of the ISA was entered in 2016 and lasts until 2026, with possible extensions. The applicant claims that in 2022 alone, Google paid Apple US$20 billion under the ISA.

[18] For the purposes of section 79, the applicant alleges that Google's conduct constitutes a practice of anti-competitive acts and its revenue sharing arrangements, including with Apple under the ISA, constitute anti-competitive conduct. The applicant's materials are not internally consistent or clear on his allegations of a practice under paragraph 79(1)(*a*) or conduct under paragraph 79(1)(*b*) or both.

[19] The applicant contends that Google's agreements with web browsers, original equipment manufacturers and wireless carriers substantially lessened or prevented competition in the market for general search engines in Canada, including by: (i) foreclosing competitors from key distribution points; (ii) denying competitors the opportunity to gain scale; (iii) discouraging investment in general search engines; and (iv) creating a stagnant market with little innovation or consumer choice.

[20] The applicant further alleges that the ISA between Google and Apple is an anti-competitive agreement under subsection 90.1(1), or alternatively subsection 90.1(1.01) (assuming Apple is a potential competitor). According to the applicant, a significant purpose of the ISA is to prevent or lessen competition for general search engines globally, including in Canada. According to the applicant, the ISA helps ensure no rival search engine (including Apple itself) gains traction with the large number of Apple device users.

[21] The applicant alleges that the circumstances above substantially lessened Apple's competitive behaviour. The applicant contends that the ISA results in Apple opting to take Google's annual, multi-billion-dollar payment rather than to enter the general search engine market and compete with Google. The applicant alleges that under the ISA, Apple cedes its ability to

leverage its own ecosystem to challenge Google, which stifles competition and innovation both in the general search engine market and in the broader tech industry.

[22] According to the applicant, the ISA has created a market environment where rival general search engines and potential market entrants cannot effectively compete, leading to reduced innovation and less competition in the Canadian general search engine market. In addition, the applicant contends that the ISA has entrenched Google's position as the default general search engine across Apple devices in Canada, preventing other general search engines from gaining a foothold and stifling competitive dynamics.

[23] The applicant seeks prohibition orders under subsections 79(1), 90.1(1), and 90.1(1.01) and monetary orders under subsections 79(4.1) and 90.1(10.1) of the *Competition Act*.

[24] In response, Google and Apple maintain that there is no merit in these allegations. Google and Apple oppose the application for leave.

II. SECTION 103.1 OF THE *COMPETITION ACT*

[25] Subsection 103.1(1) provides that "any person" may apply to the Tribunal for leave to make an application under specified sections, including sections 79 and 90.1. The same provision states that the "application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section" (referring to the section that would be the subject of the application on the merits).

[26] On applications under section 103.1 for leave to apply under sections 79 and 90.1, the Tribunal applies subsection 103.1(7):

General	*Dispositions générales*
…	*…*
Granting leave — sections 75, 77, 79 or 90.1	**Octroi de la demande : articles 75, 77, 79 ou 90.1**
103.1 […]	**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	**(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

it is satisfied that it is in the public interest to do so.	en vertu de l'un de ces articles ou s'il est convaincu que cela servirait l'intérêt public.

[27] The Tribunal's decision to grant or dismiss an application for leave is discretionary. The decision is based on the legal test in subsection 103.1(7) of the *Competition Act* and the applicant's evidence and draft notice of application, and the written representations filed by the applicant and respondent(s) on the application for leave. The Tribunal will also consider evidence filed by a respondent, if it has obtained leave to do so under the *Competition Tribunal Rules*, SOR/2008-141.

[28] As may be seen from the text of the provision, subsection 103.1(7) contemplates two circumstances in which the Tribunal may grant leave to make an application under the identified sections.

[29] First, the Tribunal may grant leave "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" (the "Affected Business Test"). The Tribunal recently summarized the approach under this first part of subsection 103.1(7) in *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 8, at paras 12-21 ("*JAMP*").

[30] This application for leave concerns the other test for leave. To reach a decision on this application, the Tribunal must interpret the statute to determine the circumstances in which it will be "satisfied that it is in the public interest" to grant leave under the second part of subsection 103.1(7) (the "Public Interest Test"). The Tribunal must then apply the test to the present case to decide whether to grant leave.

III. THE PARTIES' POSITIONS ON THE PUBLIC INTEREST TEST IN SUBSECTION 103.1(7)

[31] The applicant, Google and Apple each provided submissions on the proper test under the "public interest" part of subsection 103.1(7) and on the merits of the present application for leave.

[32] The Commissioner made submissions on the proper legal test to be applied under the "public interest" part but took no position on the merits or outcome of this leave application.

A. The Applicant's Position

[33] The applicant's initial position was that he sought leave "on behalf of" the public interest, aiming to address the "anti-competitive practices of the respondents that have substantially lessened competition in the Canadian general search engine market". The applicant submitted that the recent amendments to the *Competition Act* should be read with recent cases on public interest standing.

[34] The applicant submitted that the proper test for leave "in the public interest" were the three factors for public interest standing established by the Supreme Court in the context of constitutional and public law cases: (i) whether the case raises a serious justiciable issue; (ii)

whether the party bringing the action has a genuine interest in the matter; and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court: *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27, [2022] 1 SCR 794; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524; *Parkdale Community Legal Services v Canada*, 2025 FC 912.

[35] The applicant argued orally that, at the preliminary stage of a leave application, he should only have to satisfy the Tribunal that it is "worth going into discovery" in order to explore the (Canadian) issues. He should not have to meet the high bar of the Affected Business Test, including producing evidence that the conduct at issue could be the subject of a Tribunal order, because it would signal to other applicants that they "better be loaded for bear" at nearly a trial level before discovery, if they want any chance for their case to be heard.

[36] The applicant argued that he met the three-step test established by the Supreme Court and that leave should be granted "in the public interest". The applicant provided additional submissions that the respondents' anti-competitive acts could be subject to an order by the Tribunal under sections 79 and 90.1, as required by the traditional Affected Business Test in subsection 103.1(7).

[37] In his written reply submissions, the applicant endorsed the Commissioner's proposed modifications to the three-part test.

B. The Commissioner's Position

[38] The Commissioner submitted that the Tribunal should adopt a modified version of the public interest standing test that weighs the three factors from *Downtown Eastside Sex Workers* and endorsed in *Council of Canadians with Disabilities* "in a flexible and generous manner that takes into account the underlying purposes of granting or limiting private access to the Tribunal as well as the underlying purposes" of the *Competition Act*. In addition to the traditional purposes of public interest standing, the Commissioner submitted that the Tribunal should weigh the three factors in light of the underlying purposes of granting private access, the underlying purposes of limiting private access, and the purposes of the *Competition Act* in section 1.1.

[39] The Commissioner submitted that when Parliament amended subsection 103.1(7) to enable the Tribunal to grant leave if it is "satisfied" that it is in the public interest to do so, it adopted a different and lower standard than the requirement for "reason to believe" in the Affected Business Test in the same provision.

[40] With respect to the first step in the public interest standing test – whether a case raises a serious justiciable issue – the Commissioner submitted that the Tribunal should consider on a preliminary basis whether an issue is "serious" in that it is "far from frivolous". The Commissioner recognized that the purposes of limiting private access included avoiding frivolous, vexatious and strategic litigation (citing *The Future of Competition Policy in Canada*, a consultation paper published in November 2022 by Innovation, Science and Economic Development Canada ("ISED"); and ISED's "Future of Canada's Competition Policy Consultation – What We Heard Report" (Ottawa: 20 September 2023), under the heading "Private Enforcement").

[41] In assessing whether a public interest applicant has met the applicable evidentiary burden, the Commissioner submitted that the Tribunal should account for: (i) the preliminary nature of a leave application; and (ii) the ability of a public interest applicant to obtain evidence prior to commencing a proceeding. The Commissioner argued that while the applicant must file evidence at the leave stage, the burden "should not be overly onerous". The Commissioner maintained that it would not be appropriate to require an applicant under the Public Interest Test to bring "sufficient, credible, cogent evidence of each of the elements of the alleged reviewable practice": see *Symbol Technologies Canada ULC v Barcode Systems Inc.*, 2004 FCA 339, [2005] 2 FCR 254, at paras 17-19; *JAMP*, at paras 13, 19. In other words, the Commissioner argued that an applicant should not be required to establish a *bona fide* belief (required under the Affected Business Test for leave) or a *prima facie* case (used in class proceedings and other contexts, and relied on by the respondents).

[42] At the second step of the Public Interest Test, the Commissioner suggested that the Tribunal should require that the applicant demonstrate a "genuine interest" in the issues "but not more", and that it should not require an applicant to demonstrate that they are a suitable representative of other persons alleged to have been affected by the conduct at issue (citing *Council of Canadians with Disabilities*, at para 90).

[43] At the third step of the Public Interest Test, the Commissioner maintained that the Tribunal should take a purposive approach to considering whether a proposed application by a public interest applicant is a "reasonable and effective means" of bringing the matter to judicial determination, referring to the existing case law under the public interest standing test. The Commissioner observed that there was no indication in either the legislative history or the statute that the monetary remedies available in subsections 79(4.1) and 90.1(10.1) were intended to transform a private applicant seeking leave under section 103.1 into a representative of persons affected by the conduct at issue. The Commissioner agreed that the Tribunal could consider the impact of the proposed application on persons similarly affected by the conduct and the impact of the proposed application on related class proceedings.

C. The Respondents' Positions

[44] In their respective arguments, Google and Apple submitted that the proper approach to the Public Interest Test in subsection 103.1(7) should include consideration of evidence related to both the applicant and the basis for the proposed application. Both respondents made comprehensive written and oral submissions that referred to court decisions in the class proceedings context and to leave tests used in other statutory contexts that require that an applicant demonstrate a *prima face* case by adducing evidence supporting the merits of the proposed application.

[45] Both respondents also raised concerns about unmeritorious, frivolous and vexatious, or strategic litigation. Like the Commissioner, Google and Apple noted that concerns about such litigation have arisen regularly in the historical debates about private enforcement and private access to the Tribunal.

(1) Google's Position

[46] Like the Commissioner, Google adopted a modified approach to the three steps for public interest standing. Google's proposal incorporated requirements from the Affected Business Test in subsection 103.1(7) and the elements used to decide whether to certify a proposed class proceeding or grant leave in the context of other statutory regimes.

[47] For the first step of the Public Interest Test, Google submitted that the test proposed by the applicant was too permissive, as it would enable fishing expeditions that hope to find relevant evidence that will one day materialize and turn into a case (citing *Painblanc v Kastner* (1994), 58 CPR (3d) 502 (FCA), at p. 503). According to Google, the applicant's approach would "open the floodgates to plainly unmeritorious claims" that would unfairly burden respondents while straining the scarce resources of the Tribunal. Google emphasized the importance of screening out unmeritorious, frivolous and vexatious, and strategic claims (relying in part on excerpts from ISED's "Future of Canada's Competition Policy Consultation – What We Heard Report").

[48] Google's position was that the purpose of amending section 103.1(7) to include the Public Interest Test was not to enable litigation before the Tribunal of private grievances. Google contended that Parliament's intention was to allow parties such as non-governmental and environmental organizations (rather than self-interested private parties) to seek remedies for reviewable practices under the *Competition Act* (citing evidence given by an ISED official to a Senate committee: Senate of Canada, Standing Committee on National Finance, Evidence, 44-1 (9 April 2024)). Google submitted that there was no support for the position that the Public Interest Test was added to subsection 103.1(7) to enact a "less strict" threshold to broaden the pool of potential applicants.

[49] Google submitted that to be "satisfied" that it is in the public interest to grant leave in a given scenario, the Tribunal must engage in a preliminary consideration of the merits of the proposed application by reviewing the contents of the proposed pleadings (the notice of application) and the admissible evidence filed on the leave application. Google noted the applicant's obligation under subsection 103.1(1) and Rule 115 to file an affidavit setting out the facts in support of the proposed application. Google supported a preliminary but rigorous evidentiary analysis of the merits of the proposed application in all cases.

[50] Drawing in part on certification decisions in class proceedings and under other statutory regimes, Google encouraged the Tribunal to maintain its gatekeeping role by ensuring that applicants demonstrate, on a *prima facie* basis, that there is merit in the proposed application before unleashing proceedings that are "monsters of complexity and cost" on businesses across Canada (citing an early class action decision: *Tiemstra v I.C.B.C.* (1996), 22 BCLR (3d) 49 (SC), 1996 CanLII 2819, at para 20, aff'd 38 BCLR (3d) 377 (CA)). Google also referred to *Theratechnologies Inc. v 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 SCR 106, at paras 38-39; *Pearson (Re)*, 2018 ONSEC 53; *MI Developments Inc.*, 2009 ONSEC 47, decided under the Ontario *Securities Act*, RSO 1990, c S.5). Google argued that the leave process is slanted to favour the applicant because respondents have no right to adduce their own evidence, cross-examine the applicant or make oral submissions. Thus, Google asserted, there is no risk that a more onerous test of the merits would be too burdensome or turn into a "mini trial" as the applicant contended.

[51] With respect to the applicant's request for a monetary remedy under subsection 79(4.1) or 90.1(10.1), Google argued that the leave application should have to show that the applicant is representative of the group of persons "affected by the conduct" (although subsection 79(4.1) states "… affected by the practice …").

[52] Google proposed that the following non-exhaustive factors should be considered by the Tribunal when deciding whether it is "in the public interest" to grant an application for leave:

i. Is the proposed application in the public interest having regard to the purposes and scope of the *Competition Act*, as well as the statutory provisions at issue?

ii. Is there sufficient credible, cogent and objective evidence to establish each element of the reviewable practice(s) at issue on a *prima facie* basis?

iii. Is the applicant a suitable representative to prosecute the proposed application in the public interest?

iv. Is there a more suitable forum for adjudicating the claims and allegations the applicant proposes to advance?

[53] Google's legal submissions emphasized some of the key factors discussed in *Downtown Eastside Sex Workers* and *Council of Canadians with Disabilities*, including the suitability of applicants.

(2) Apple's Position

[54] Apple maintained that the Tribunal should only grant leave under the Public Interest Test if it is "satisfied" ("*convaincu*") that both the applicant and the proposed application are suitable. Apple submitted that the suitability of the applicant is particularly important if the applicant seeks a monetary order under subsection 90.1(10.1) or similar sections (e.g., subsection 79(4.1)) because in that circumstance, the applicant seeks to represent others affected by anti-competitive conduct – as in a class proceeding.

[55] Apple's position was that the leave process established in section 103.1 is intended by Parliament to "define a screening mechanism for identifying the limited set of situations in which private applicants may be permitted to commence potentially meritorious proceedings involving complex reviewable practices while preventing unmeritorious cases from going forward". In Apple's submission, the "core task" of the Tribunal is to undertake a screening role and to identify the proposed cases that are worthwhile for the Tribunal and the parties to spend the significant time and resources involved in complex and often lengthy proceedings under the reviewable practice provisions of the *Competition Act*. According to Apple, this necessarily involves an assessment of the evidence that the applicant is required to file in support of the proposed application under subsection 103.1(1).

[56] Referring to *JAMP*, Apple observed that the Affected Business Test in subsection 103.1(7) set out screening mechanisms related to the suitability of the application and the suitability of the applicant: see *JAMP*, at paras 67-68.

[57] Apple submitted that the interpretation of "in the public interest" cannot render subsection 103.1(7) a tautology. The Public Interest Test should not enable applicants who otherwise qualify under the Affected Business Test, such as competitors in a market, to avoid the requirements of that test.

[58] Apple opposed the "minimalist" approach to granting leave as proposed by the applicant, arguing that this context is different from granting standing to commence constitutional or public law litigation. Apple submitted the leave process in section 103.1 operates as a safeguard against frivolous, vexatious, unmeritorious and strategic litigation. Apple also submitted that there was a heightened risk of strategic litigation in "public interest" cases, as applicants who are not participants in the relevant markets may not have relevant information about the competition issues to offer as evidence during the litigation process. According to Apple, this objective justifies a higher threshold for a leave application than merely raising one "serious issue" and justifies requiring that an applicant have evidence of every element of the substantive application.

[59] To determine whether a proposed application is suitable under the Public Interest Test, Apple submitted that the Tribunal must consider at a minimum:

i. whether the applicant has adduced sufficient evidence of each element of the alleged reviewable practice to warrant a proceeding on the merits, by showing either a *prima facie* case on the merits or sufficient evidence to give rise to a *bona fide* belief by the Tribunal that the case has merit;

ii. whether the applicant seeks to advance a public interest related to the purpose of the *Competition Act*;

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

iv. whether the proposed application would revisit work previously undertaken by the Commissioner in the public interest.

[60] Apple submitted that the applicant is ineligible to seek leave under the Public Interest Test of subsection 103.1(7) because he is seeking to advance his own business interests in the proposed section 79 application. While Apple's written submissions suggested that the applicant could apply under the Affected Business Test, its oral submissions acknowledged that he was not sufficiently "affected" to do so. Apple argued, however, that the Public Interest Test was aimed at granting leave to organizations "with a mission".

[61] According to Apple, an applicant is suitable to take on the public interest role (akin to the Commissioner) if the applicant has addressed the following factors, drawn from criteria used for assessing the suitability of a representative plaintiff for certifying a class action under the *Federal Courts Rules*, SOR/98-106, and the public interest standing jurisprudence:

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

ii. the ability to fairly and adequately represent the public interest related to competition;

iii. the absence of private interests that may conflict with the public interest;

iv. a plan for the proceeding that sets out a workable method of advancing it on behalf of the public interest;

v. disclosure of any agreements respecting fees, disbursements, and control of the litigation between the applicant and his counsel, as well as any litigation funding arrangements; and

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

IV. THE PUBLIC INTEREST TEST UNDER SUBSECTION 103.1(7)

A. Recent Amendments to the *Competition Act*

[62] Parliament recently amended the *Competition Act* in ways that affect the present application: see S.C. 2022, c. 10, sections 261-264, 266; S.C. 2023, c. 31, sections 7.1-7.2, 8(1); S.C. 2024, c. 15, sections 247-248, 254.

[63] There were three amendments that affect the present application for leave. First, subsections 103.1(1) and (7) were amended in 2022 to add section 79 to the provisions for which leave may be requested: see S.C. 2022, c. 10, section 266.

[64] Second, Parliament amended the substantive provisions in sections 78, 79 and 90.1, to revise the requirements for an order under subsections 79(1) and 90.1(1) and to include the monetary remedies in subsections 79(4.1) and 90.1(10.1).

[65] Third, in 2024, Parliament added section 90.1 to the provisions for which leave may be granted. Parliament amended the statutory test to grant leave in subsection 103.1(7) to read:

Granting leave – sections 75, 77, 79 or 90.1	**Octroi de la demande : articles 75, 77, 79 ou 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	**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

section or if it is satisfied that it is in the public interest to do so.	vertu de l'un de ces articles ou s'il est convaincu que cela servirait l'intérêt public.
[Emphasis added.]	[Je souligne.]

See S.C. 2024, c. 15, section 254 (underlined amendments). This amended provision came into force on June 20, 2025.

[66] At the same time, Parliament added subsection 103.1(6.1) under which the Tribunal may grant leave to a private applicant to make an application under section 74.1 "if it is satisfied that it is in the public interest to do so".

[67] These and other amendments to the *Competition Act* have attracted attention from the legal community: see e.g., Chris Margison, Tony Di Domenico and Musa Mansuar, "The Evolving Competition Law Landscape in Canada: Where Are We Now?" 38 *Can Comp L Rev* 46 (2025), at pp. 71-74; Debbie Salzberger, Alykhan Rahim, Lucinda Chitapain and Samantha Steeves, "2024 Year in Review" 38 *Can Comp L Rev* 1 (2025), at pp. 6-7; Linda J. Visser, Charles M. Wright, and Georgia Hamilton, "The New Abuse of Dominance Regime in Canada: An Opportunity for Greater Enforcement and Access to Justice", 37 *Can Comp L Rev* 130 (2025), at pp. 148-151; Saro Turner and Andrea Roulet, "Empowering Private Attorneys General Under Bill C-59: Disequilibrium Persists in Canadian Competition Law", 37 *Can Comp L Rev* 40 (2024), at pp. 51-54.

B. ISED Consultations on the *Competition Act*

[68] Before setting out the specific considerations for interpreting the added Public Interest Test for leave, it is useful to provide some background.

[69] In November 2022, the federal Minister responsible for ISED began a consultation process leading to additional amendments to the *Competition Act*, including to section 103.1. ISED released a consultation paper at the outset entitled *The Future of Competition Policy in Canada* (November 2022). ISED later released a paper setting out the results of its consultation entitled the "Future of Canada's Competition Policy Consultation – What We Heard Report" (September 2023).

[70] ISED's consultation paper explained the landscape as of late 2022 as follows:

> Since 2002, private parties have been able to bring cases directly to the Competition Tribunal when granted leave, under certain, limited reviewable conduct provisions of the Act. This process does not afford the applicant any compensation for damages, but rather simply takes the Commissioner's place in initiating a proceeding that may ultimately result in a remedial order. No successful case has been mounted by a private party to date, and one significant reason is that private access was not historically available for abuse of dominance cases, widely regarded as the Act's cornerstone unilateral conduct provision. The BIA Amendments [Budget Implementation Act, S.C. 2022, c.10] have now permitted such private cases, which may help alleviate hardship suffered by aggrieved parties in

compelling dominant firms to alter their behaviour. Absent the possibility of damages, however, a strong incentive for private cases does not appear to be present.

The Act's s. 36 allows a civil cause of action for damages suffered due to conduct that is subject to criminal prosecution, such as cartels or deceptive telemarketing, or the breach of an order. There is no equivalent to s. 36 for civilly reviewable conduct, however, and the fact that such conduct is not actually deemed unlawful under the Act (merely subject to a remedial order upon review) prevents civil recovery in tort for losses suffered.

A more robust framework for private enforcement, encompassing both 'private access' to the Competition Tribunal and 'private action' to provincial and federal courts for damages, would complement resource-constrained public enforcement by the Bureau, clarify aspects of the law through the development of jurisprudence, and lead to quicker case resolutions. It may also lessen the effect of any strategic litigation on public resources. At the same time, changes in this regard would have to be designed to avoid unmeritorious or strategic litigation, or an unmanageable number of actions for the Competition Tribunal or courts to process.

[Emphasis added.]

The Future of Competition Policy in Canada, at pp. 52-53.

[71] The following passages appear in section 9 of ISED's September 2023 "What We Heard Report", entitled "Administration and Enforcement of the Law":

Private Enforcement

What we consulted on: While private parties are now able to bring abuse of dominance cases directly to the Competition Tribunal, at present there does not appear to be a strong incentive for them to do so. The Government is considering allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the Act.

What we heard: Albeit in various degrees, a significant number of stakeholders who commented on the issue of private enforcement agreed that reform is needed to recalibrate the balance of incentives associated with the current framework. The Bureau is limited in resources and must prioritize cases of national importance, which inevitably leads to many smaller or less certain matters going unchecked. Privately initiated cases before the Tribunal are largely intended to help bridge this gap in some forms of civil enforcement, with a focus on securing corrective orders – i.e. assuming the Commissioner's usual role – rather than seeking compensation for damage. The latter is available only under private lawsuits allowed by s. 36 of the Act for losses suffered due to criminal conduct.

To date, no successful private case has been litigated at the Tribunal, and many stakeholders pointed to the absence of strong financial incentives as one of the reasons why they so rarely occur. The other most often cited reason was what the stakeholders perceived

as a particularly rigid leave threshold that the Tribunal has interpreted to mean a substantial effect must be apparent across an applicant's entire business, and not merely one part of it. For the most part, this requires businesses to be injured to such a degree that they may no longer be in a position to undertake a case, while other parties – affected consumers or public interest groups, for example – have no standing at all.

Many submissions therefore recommended allowing the Tribunal to award damages alongside remedial orders, or else opening up civil conduct to lawsuits for damage recovery through s. 36 (or a similar provision), or some combination of both. A less strict leave threshold was also sought, so as to enable new and larger classes of applicant. A majority of those in favour of reform also suggested expanding the scope of civil provisions available for private enforcement to include competitor collaborations under s. 90.1, drawing no distinction between harm caused by a single dominant firm or two or more firms together.

Many voices, particularly among the larger business community and among legal practitioners whose practice was not focused on litigation, preferred the status quo. They expressed concerns that the threat of private challenges under s. 90.1 would result in chilling legitimate and pro-competitive collaborations, and that allowing financial awards either by the Tribunal or in court proceedings for damages could open up the floodgates for unmeritorious, frivolous, and strategic litigation that is not currently incentivized to the same extent. There was an objection expressed about the legal inconsistency of allowing financial compensation based on conduct that is not actually unlawful in the manner of a tort, but only subject to correction under the Act based on economic effects. However, there are stakeholders who would resolve this conflict by simply declaring anti-competitive conduct to be unlawful as such.

Some concerns were also expressed about the level of expertise of the general courts in relation to that of the Tribunal, the potential burden on the judicial system, and the unease with which private and Commissioner-led actions could co-exist, particularly if heard in two different fora. These stakeholders argued that should changes be considered, a high bar to obtain leave must be maintained and the Tribunal, as gatekeeper, be allowed to award costs against leave applicants as a potential deterrent to unfounded settlement-hunting. A few suggested the lack of jurisprudence may be attributed to the fact that access was unavailable for abuse of dominance before 2022, and the effects of this development should be monitored before proceeding further.

[Emphasis added.]

[72] These passages from the ISED documents provide some additional context and specific background for the 2024 enactment of the Public Interest Test and the addition of monetary relief in subsections 79(4.1) and 90.1(10.1).

C. Statutory Interpretation of subsection 103.1(7)

[73] To establish the test for leave in the public interest, the Tribunal must determine the proper interpretation of subsection 103.1(7), using the modern approach to statutory interpretation. The

words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The Tribunal must therefore consider the text, context and purpose of the provision. See *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, [2019] 4 SCR 653, at paras 117-118; *Secure Energy Services Inc v Canada (Commissioner of Competition),* 2023 FCA 172, at paras 16-42; *Canada (Commissioner of Competition) v Secure Energy Services Inc,* 2022 FCA 25, [2022] 2 FCR 430, at paras 49-68.

[74] The text of a provision is the starting point and "anchor" for statutory interpretation, particularly if the words of a statute are "precise and unequivocal". The text plays a central role in specifying how Parliament intended to implement its purposes. See *Piekut v Canada (National Revenue),* 2025 SCC 13, at para 45; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A,* 2024 SCC 43, at para 24; *Kosicki v Toronto (City),* 2025 SCC 28, at para 37; *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, [2005] 2 SCR 601, at para 10.

[75] The context of a provision is often its surroundings within the legislation: adjacent or neighbouring provisions that may affect the understanding of its text within the scheme and structure of the statute: *Pepa v Canada (Citizenship and Immigration),* 2025 SCC 21, at paras 107-114; *Piekut*, at paras 44, 67, 73; *R. v. Wilson*, 2025 SCC 32, at para 131 (Jamal, J., dissenting). Contextual factors outside the statute may also be considered: see *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner),* 2024 SCC 4; *Wilson*, at para 131 (*per* Jamal J.: "context includes the surrounding words, the [statute] as a whole, related statutes, and the relevant legal context").

[76] The purpose analysis may consider both the purpose(s) of the provision and the purpose(s) of the statute as a whole: *Piekut*, at paras 76, 81-96, 99-101, 110, 128-129.

[77] In this case, the language, context and purposes of subsection 103.1(7) lead to the conclusion that the Public Interest Test for leave should use the three steps in the common law test for public interest standing in *Council of Canadians with Disabilities* and *Downtown Eastside Sex Workers*, after adapting those steps for the specific context and purposes of the *Competition Act*.

(1) Text of subsection 103.1(7)

[78] In Tribunal proceedings, the usual applicant is the Commissioner, whose responsibility is the administration and enforcement of the *Competition Act*: see section 7.

[79] Section 103.1 creates an opportunity for private applicants – "[a]ny person" who meets the requirements of the section – to apply for leave to commence an application under a specified provision: see subsection 103.1(1). Like the original enactment of the private access provision in 2002, the recent amendments to section 103.1 were designed to provide an opportunity for private parties to have access to the Tribunal to enforce additional specific provisions in Parts VII.1 and VIII of the *Competition Act*.

[80] Subsection 103.1(7) contains the tests for granting leave to commence a proceeding. It establishes the requirements used to decide who is permitted to sue and confirms the specific

provisions in Part VIII of the *Competition Act* under which a private party may be granted leave to apply.

[81] The substantive provisions under which an applicant may be granted leave to file an application are mentioned specifically in the opening language of subsection 103.1(7). Thus, as noted in *JAMP*, for interpretation purposes, the very language of subsection 103.1(7) directs the Tribunal to consider the context of the practices in the provisions for which leave may be granted in sections 75, 77, 79 and 90.1 (as appropriate for the leave application). See *JAMP*, at paras 52-53.

[82] The recent evolution of the statutory language advances the textual analysis. The text of subsection 103.1(7) indicates that Parliament has now created two alternative bases on which the Tribunal may grant leave: either (i) if the Tribunal 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 (ii) if the Tribunal is satisfied that it is in the public interest to do so.

[83] Parliament's changes in 2024 show an expansion of the rules on granting leave. Prior to the 2024 amendments (which came into effect in June 2025), a private applicant could only obtain leave under the Affected Business Test by showing that there was reason to believe that it was directly and substantially affected in its business by conduct that could be subject to an order under the section for which leave was requested. Prior to the Tribunal's decision in *JAMP* and the recent amendments, an applicant for leave under subsection 103.1(7) had to show that they were "directly and substantially affected" in the applicant's business as a whole. Parliament's 2024 amendments enabled more businesses to fall within this first part of the provision, by adding the words "in the whole or part" (emphasis added): see also *JAMP*, at paras 28, 48-69, 72, 76-77. The 2024 amendments also enabled leave to be granted to applicants in addition to those who are directly and substantially affected in the whole or in part of their business by the alleged anti-competitive conduct – if the applicant meets the Public Interest Test.

[84] Both tests for leave – the Affected Business Test and the Public Interest Test – require the Tribunal to come to a finding. In the first, the text contemplates that the Tribunal must have "reason to believe" that the applicant is affected in the manner stated and that the impugned conduct could be the subject of an order under the relevant provision. In the second, the text requires that the Tribunal be "satisfied" that it is in the public interest to grant leave. Parliament must be taken to have deliberately used two different phrases, "reason to believe" and "satisfied", as both are used elsewhere in the *Competition Act*: see, e.g., paragraph 10(1)(b) and subsections 11(1) and (2), 15(1) and 17(3). It is not necessary to attempt to define "satisfied" ("*convaincu*") in the abstract.

[85] Findings on leave applications about whether the Tribunal has "reason to believe" or is "satisfied" are made by an expert tribunal that has a sophisticated understanding of one of its home statutes, including the nature of the competition problems that the provisions of the *Competition Act* have been enacted to address, the requirements of the provision for which leave is sought, and the evidence that will be needed to support an order under each section. See *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 SCR 394, at p. 406; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, at para 49; *Canada (Commissioner of*

Competition) v. Superior Propane Inc., 2001 FCA 104, [2001] 3 FC 185, at para 77; *Rakuten Kobo Inc. v Canada (Commissioner of Competition),* 2015 FCA 149, at para 11.

[86] Zeroing in on the phrase "in the public interest" in subsection 103.1(7), Parliament did not expressly state the criteria to be considered when deciding whether to grant leave. However, given the function of an application for leave, the phrase "in the public interest" has obvious textual links to the public interest standing test at common law. As we shall see, there are also contextual and purposive factors that lead to that test.

[87] It is relevant here to note what Parliament did not do in the text when it amended subsection 103.1(7) to create an application for leave "in the public interest". Parliament did not repeat any of the words of the first part of subsection 103.1(7) for the Affected Business Test. It did not require an applicant to show that the applicant's business has been affected by the impugned conduct, or that the impugned conduct "could be the subject of an order" under the section for which leave is sought. Parliament also did not use language incorporating some but not all of the elements of the Affected Business Test, as it did when it enacted subsection 103.1(7.1) which requires an applicant to be "directly affected by" the impugned conduct, but omits the words "and substantially" and does not refer to an applicant's business.

[88] Further, nothing in the text of subsection 103.1(7) suggests that the requirements for the certification of proposed class proceedings should be incorporated into the test for leave "in the public interest". The provision does not use any of the language used for the certification of proposed class proceedings in the *Federal Courts Rules* or provincial class proceedings legislation. Parliament also did not expressly adopt a test such as the one in Québec and Ontario securities legislation (i.e., that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff"): see *Lundin Mining Corp. v. Markowich,* 2025 SCC 39, at paras 105-114; *Theratechnologies,* at paras 38-39; *Canadian Imperial Bank of Commerce v. Green,* 2015 SCC 60, [2015] 3 SCR 801.

[89] In sum, these textual points imply that Parliament used the phrase "in the public interest" to enable the Tribunal to grant leave to a person who meets criteria that are not the same as those stated earlier in subsection 103.1(7). Doing so expands the range of persons who may be granted leave. The use of the phrase "in the public interest" implies a textual link to the case law for public interest standing. The references in the provision to the specific sections for which leave may be granted directs the Tribunal to read and apply the language of subsection 103.1(7) in conjunction with each of the stated provisions in Part VIII of the *Competition Act*.

(2) Context of subsection 103.1(7)

[90] The context of the test for leave in subsection 103.1(7) includes the broader legal context in which the text of the provision exists, including the law of standing. Parliament is presumed to know the law and be aware of the legal context in which it legislates, which in this case includes the common law on public interest standing: see *R v Rousselle,* 2025 SCC 35, at para 127; *R v Summers,* 2014 SCC 26, [2014] 1 SCR 575, at para 55; *Townsend v Kroppmanns,* 2004 SCC 10, [2004] 1 SCR 315, at para 9.

[91] It may be readily observed that subsection 103.1(7) is structured to mirror the common law of standing, whose role is to determine who may initiate proceedings to litigate certain disputes. At common law, a party whose legal interests are directly affected by another party has standing to sue – this is ordinary "private interest" standing. In addition, Canadian common law has developed over time to recognize that some persons should have standing to litigate public and constitutional law issues in the public interest, to ensure that such disputes could be heard by the courts: see *Council of Canadians with Disabilities*, at paras 37-40; *Downtown Eastside Sex Workers*, at paras 1-2, 22; Peter W. Hogg & Wade Wright, Constitutional Law of Canada, 5th ed (1 July 2025), at paras 59:5; T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Carswell, 1986).

[92] The parallels between the Public Interest Test under subsection 103.1(7) and the common law of standing are apparent. The Affected Business Test in the first part of subsection 103.1(7) addresses the circumstances in which a person whose business is affected by a reviewable practice may be granted leave, while the Public Interest Test enables the Tribunal to grant leave in the public interest.

[93] Like the text itself, this context implies that Parliament used the phrase "in the public interest" to refer to the requirements developed by the Supreme Court for public interest standing.

[94] It is again worthwhile to note what Parliament did not do, given that there is another existing mechanism for "private" enforcement in section 36 of the *Competition Act*. If Parliament desired to create a cause of action for money damages or a class proceeding, it could have done so through section 36, by allowing an applicant to file an action in court (without leave) for loss or damage as a result of conduct that is contrary to section 79, section 90.1 or another provision in Part VIII (as it currently does for conduct that is contrary to any provision of Part VI, the criminal provisions of the statute). Parliament did not choose that path.

[95] The remaining contextual considerations for the Public Interest Test concern the substantive elements in the common law public interest standing test and process contemplated for leave applications in the statute and the *Competition Tribunal Rules*, the substantive provision(s) under which the applicant seeks to file an application, and other provisions in the *Competition Act*. They will be considered below.

(3) Purpose of subsection 103.1(7)

[96] Private enforcement supplements and complements the Commissioner's statutory enforcement role under the *Competition Act.* See John S. Tyhurst, *Canadian Competition Law and Policy*, (Toronto: Irwin Law Inc., 2021) at p. 58; Antonio Di Domenico, *Competition Enforcement and Litigation in Canada*, (Toronto: Emond Montgomery Publications Limited, 2019), at p. 358; S. McGrath and E. Keogh, "Private Actions Before the Tribunal", in Nikiforos Iatrou, ed, *Litigating Competition Law in Canada*, 2nd ed (Toronto: LexisNexis Canada Inc, 2023) c. 7, esp. at p. 223.

[97] The purpose of section 103.1 and the leave test in subsection 103.1(7) is to enable the Tribunal to grant leave to parties other than the Commissioner to make substantive applications

under the specified provisions of Part VIII of the *Competition Act*. The use of a well-established common law test for public interest standing implements and accords well with this purpose.

[98] While there was some commentary during the legislative process on specific issues and concerns, the parties have not pointed to anything comprehensive in the recent Parliamentary debates to assist the Tribunal to find a definitive purpose for leave "in the public interest" in subsection 103.1(7) or that contributes to the criteria to be used for leave.

[99] The passages from ISED's consultation process, quoted above, provide insight into the concerns that the later Parliamentary amendments appear to have addressed: (i) the desire for a more robust private enforcement regime to complement the Commissioner's role in resolving competition concerns; (ii) the existence of a relatively restrictive legal test for leave in the Affected Business Test in subsection 103.1(7); (iii) a lack of financial incentive for persons to seek leave; and (iv) the risk of unmeritorious or strategic litigation.

[100] The actual text of the amended section 103.1 reflects the choices made by Parliament after the consultation. For statutory interpretation purposes, the results of the text and context analysis (above) are well aligned with the excerpts from the two ISED documents quoted above.

[101] To address a point made by the respondents: the 2023 ISED consultation paper expressly confirmed that "affected consumers" and "public interest groups" had no standing at all to litigate a private case at the Tribunal under section 103.1 as it read before 2024. In April 2024, an ISED official testified to the Senate committee that expanded private access would allow organizations, *including* environmental organizations, to engage on competition issues when they notice a problem in the marketplace. However, neither that official nor anyone else cited on this application testified that organizations were intended to be the only type of applicant contemplated by the 2024 amendments to the leave test. The official's testimony supports the view that the class of potential applicants that fall under the Public Interest Test includes "affected consumers" and "public interest groups".

[102] Adopting the public interest standing test does provide "affected consumers" and "public interest groups" with an opportunity to apply for leave.

(4) The phrase "in the public interest" in subsection 103.1(7) refers to the common law requirements for public interest standing

[103] In my view, the Tribunal should interpret the phrase "in the public interest" in the second branch of the leave test in subsection 103.1(7) in a manner consistent with the law on public interest standing set out in *Council of Canadians with Disabilities* and *Downtown Eastside Sex Workers*.

[104] The interpretation process must continue, however, with a view to determining what modifications may need to be made to the common law public interest standing test to adapt it for applications for leave to make a "private" enforcement application under Part VIII of the *Competition Act*, in accordance with additional contextual factors and the purposes of the leave provision and the statute overall.

(5) Adapting common law public interest standing to the *Competition Act* setting

[105] The public interest standing case law provides a well-considered framework that has developed over decades. The Supreme Court has established and affirmed the three-part test and the principles that animate each part, and has applied them to the facts in both *Council of Canadians with Disabilities* and in *Downtown Eastside Sex Workers*. These two decisions will help to guide the Tribunal's decisions on whether to grant leave if it is satisfied that it is in the public interest to do so under subsection 103.1(7).

[106] The three parts of the test for standing in constitutional and public law matters are:

i. whether the case raises a serious justiciable issue;

ii. whether the party bringing the action has a genuine interest in the matter; and

iii. whether the proposed suit is a reasonable and effective means of bringing the case to court.

[107] These factors are weighed, cumulatively, in the exercise of a court's discretion.

[108] I agree with the Commissioner that some aspects of the Supreme Court's three-part test should be modified to account for factors endemic to an application for leave under section 103.1 in the present statutory competition law setting, including the specific provision under which the proposed application will be commenced and the broader purposes of the leave provision and the statute.

[109] At a high level, in the public and constitutional law setting, an individual or organization seeks to commence a lawsuit against a government or other state actor to challenge the legality of state action, including under Canada's constitution. In the *Competition Act* setting, a person seeks to commence a Tribunal proceeding against one or more participants in a market, under statutory provisions that Parliament has carefully designed to resolve concerns about competition (usually the competitive process) and to advance one or more of the purposes of the *Competition Act* as a whole.

[110] The public interest standing test in public and constitutional matters is informed by several purposes, including: properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; preserving the proper role of courts and their constitutional relationship to the other branches of government; the principle of legality; and ensuring access to justice (including through a court proceeding) for vulnerable and marginalized people: *Council of Canadians with Disabilities*, at paras 29-31, 42-55; *Downtown Eastside Sex Workers*, at paras 25-52. These considerations have led the courts to adopt a purposive approach to the development of the law of standing in public law cases.

[111] Granting leave to commence a proceeding under the *Competition Act* is informed by similar factors that are specific to and focus on the statutory context in which leave may be granted, including: the scarcity of Tribunal resources and a need to screen out unmeritorious, vexatious or

strategic claims; the need to provide enhanced access to the Tribunal by those who may be affected by anti-competitive behaviour; that the proceeding concerns a competition problem suitable for determination by the Tribunal under the statutory provision(s) for which leave is requested; that the Tribunal will have the benefit of contending points of view on the competition questions presented by the proceeding; and that the proposed Tribunal proceeding is a reasonable and effective means to apply the statutory provision(s) to the conduct of the proposed respondents.

[112] At a more detailed level, there are several important distinctions between the two settings that necessitate some modifications to the three steps in *Council of Canadians with Disabilities* and *Downtown Eastside Sex Workers* for the Public Interest Test.

(a) Adapting the First Step of the Public Interest Test

[113] The first step for common law public interest standing considers whether the case raises a "serious justiciable issue".

[114] A "serious" issue in the public and constitutional law setting is one that is "important", "substantial" or "far from frivolous": *Council of Canadians with Disabilities*, at paras 49, 98; *Downtown Eastside Sex Workers*, at paras 42, 54. The court's assessment is done by reviewing the pleadings (i.e., the statement of claim) to see whether such an issue is raised, with material facts pleaded in support: *Council of Canadians with Disabilities*, at paras 49, 82-84, 98-100; *Downtown Eastside Sex Workers*, at paras 42, 56.

[115] However, leave under the *Competition Act* is different, because subsection 103.1(1) requires that an application for leave to make an application under sections 74.1, 75, 76, 77, 79 or 90.1 be accompanied by sworn evidence – an affidavit "setting out the facts in support of the person's application" under that section. Parliament's recent amendments did not alter this obligation. While the applicant's proposed notice of application and written representations are also relevant, the first step of the Public Interest Test under subsection 103.1(7) must respect the statutory requirement for such affidavit evidence.

[116] "Justiciability" in a public or constitutional law matter focuses on the proper institutional or constitutional role of the court, often in relation to the legislative and executive branches: *Council of Canadians with Disabilities*, at paras 47, 50; *Downtown Eastside Sex Workers*, at paras 30, 39-40. In addition, some disputes are beyond the proper role of the courts or are not appropriate for judicial determination: see, e.g., *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750; *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441.

[117] Justiciability (or something closely analogous) in the competition law context concerns whether there is an appropriate role for the Tribunal as contemplated by Parts VII.1 or VIII of the *Competition Act*. The Tribunal's role is to assess whether conduct of a commercial participant in a market meets the statutory threshold for intervention into the market through a Tribunal order, as mandated by the specific requirements of the *Competition Act* provision. Some disputes are not covered by Parts VII.1 or VIII of the *Competition Act* or may not be an enforcement proceeding within the Tribunal's statutory mandate: *Competition Tribunal Act*, RSC, 1985, c. 19 (2nd Supp), section 8. The proposed proceeding may also in substance constitute a commercial dispute that is

not actually concerned with competition issues as identified by the *Competition Act*: *Symbol Technologies*, at para 23.

[118] As a result of these distinctions, the first step of the public interest test must be reformulated for the competition law setting, in two ways. At this stage, the Tribunal should consider whether there is a substantial and genuine competition law dispute that warrants a Tribunal proceeding under the provision in Parts VII.1 or VIII for which leave is sought.

[119] **A "substantial" competition law dispute**: First, the Tribunal will consider whether the proposed proceeding constitutes a substantial dispute that warrants a Tribunal proceeding under the relevant provision(s) in Part VIII.

[120] To address this aspect of the first step, the Tribunal will consider whether the applicant has provided a sufficient factual basis to support the proposed application, including one or more affidavits setting out the facts in support of the proposed application. The factual basis for the proposed application should be directed at the elements of relevant provision(s) in Parts VII.1 or VIII for which leave is requested. The Tribunal will also consider the contents of the draft notice of application, any representations filed by the applicant and by persons served with the leave application, and any permitted evidence from a respondent: see *Competition Act*, subsection 103.1(1); *Competition Tribunal Rules*, sections 35-36, 115, 119, 124.

[121] In its assessment of whether there is a substantial competition law dispute, the Tribunal will focus principally on the nature and scope of the filed evidence and the contents of the proposed notice of application. Taking a practical and flexible approach, and drawing on its expertise and experience, the Tribunal will consider whether the proposed proceeding raises worthwhile substantive issues to be tried between the parties in light of the overall requirements of the provision(s) for which leave is requested.

[122] However, the Tribunal will not weigh competing evidence at the leave stage, nor will it seek to resolve complex or factually nuanced issues (for example, market definition or anti-competitive intention or purpose) that are better resolved with the benefit of full evidence available at a hearing of the merits. Further, the Tribunal will not grant leave if the applicant has no realistic chance of success on the proposed application.

[123] This modified approach to the first step described in *Council of Canadians with Disabilities* and *Downtown Eastside Sex Workers* is consistent with the expeditious and summary nature of a leave application under section 103.1, which inherently involves little or no evidence from the proposed respondents. It is also consistent with the low threshold for leave overall. See Part 8 of the *Competition Tribunal Rules*, esp. Rule 119; *Martin v Alphabet Inc., Google LLC, Google Canada Corporation, Apple Inc., and Apple Canada Inc.*, 2025 Comp Trib 12; *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 4, at para 14; *Bank of Nova Scotia v B-Filer Inc.*, 2006 FCA 232, at para 2; *Symbol Technologies*, at paras 17, 24.

[124] The applicant and Commissioner raised concerns that the evidentiary requirements for leave not be too onerous, because a private applicant may not have direct evidence to prove every element of a case at the early stage of seeking leave. An applicant also does not have the formal fact-gathering powers of the Commissioner under the *Competition Act* (see section 11).

[125] I agree that, at the leave stage, an applicant under the Public Interest Test in subsection 103.1(7) should not be held to a standard of filing credible, cogent and objective evidence of each element of the proposed application. That requirement is a part of the Affected Business Test because of the express requirements of that test, including that the impugned conduct "could be the subject of an order": see *Symbol Technologies,* at para 22. There is no persuasive reason to import the same requirement into the Public Interest Test given the absence of those words in the second part of subsection 103.1(7).

[126] However, concerns about a public interest applicant's possible lack of access to evidence at the leave stage cannot overcome the statutory requirement in subsection 103.1(1) for an affidavit setting out the facts in support of the applicant's proposed application. In my view, these concerns are addressed by the modifications to the three-part test explained in these Reasons, particularly the Tribunal's approach at the first step to assessing whether there is a substantial competition law dispute. Among other things, the modifications also give the opportunity for the applicant to provide a concrete explanation of how the applicant will adduce additional evidence for the merits hearing (discussed below at the third step).

[127] For their part, the respondents raised various concerns about having an evidentiary and legal standard that is too low, including opening the floodgates to unmeritorious litigation. The respondents advocated a test that would require a leave applicant show a *prima facie* case on the merits or adduce evidence that the impugned practice could be the subject of an order as is required in the Affected Business Test.

[128] In my view, the modified three-step process described in these Reasons will not open the floodgates, as alleged. The Tribunal's modified three-step approach, taken as a whole, will screen out unmeritorious litigation, including frivolous and vexatious proceedings. There is little basis for a more stringent evidentiary standard at the first step than the one described above. The respondents did not point to any link in the legislative record between the public interest basis for leave under subsection 103.1(7) and any other statutory provision under which standing to sue may be subject to a more onerous standard. Nor did they show why leave under the *Competition Act* is analogous to leave in the cases related to certain securities proceedings: *MI Developments*, at paras 109-110, esp. 110(ii), (v) and (vi); *Pearson (Re),* at paras 70-72.

[129] While the Tribunal's approach at the first step may ease the evidentiary burden on an applicant (compared with applicants seeking leave under the Affected Business Test), public interest applicants will have evidentiary or explanatory burdens at the second and third steps that are not present for applicants under the Affected Business Test. I observe in passing that in some public and constitutional law cases, considerable evidence has been filed to support a plaintiff's position for public interest standing: see *Downtown Eastside Sex Workers,* at paras 59, 74; *Coalition for Justice and Human Rights Ltd v Edmonton (City),* 2024 ABKB 26.

[130] Finally, I recognize that public interest applicants whose proposed applications will seek a monetary order under, for example, subsections 79(4.1) or 90.1(10.1) are not required to file evidence to prove their right to that remedy on an application for leave. However, they will be aware of the requirements under those provisions and will have incentives both to adduce evidence at this first step and to provide explanations at the third step that indicate to the Tribunal on leave how they expect to meet those requirements. Under subsection 79(4.1), in order to make an order

for a monetary remedy, the Tribunal must (i) find that the respondent has engaged in or is engaging in a practice of anti-competitive acts that amounts to conduct that has had or is having the effect of preventing or lessening competition substantially in a market in which the person has a plausible competitive interest, and (ii) make an order under subsection (1) or (2) against the respondent. Similarly, under subsection 90.1(10.1), the Tribunal must make an order under paragraph 90.1(1) in order to make a monetary order. An applicant must also be "affected by" the practice (under subsection 79(4.1)) or the conduct (under subsection 90.1(10.1).

[131] An "genuine" competition law dispute: Second, the Tribunal will assess whether the proposed proceeding is a genuine competition dispute for determination by the Tribunal under the *Competition Act*. Put another way, the essential character of the proposed proceeding is relevant and must be directed towards addressing competition in a market through the enforcement of a provision mentioned in subsection 103.1(1). As noted, the proposed proceeding cannot concern a mere commercial quarrel between competitors: see *Symbol Technologies*, at para 23.

[132] As part of its assessment of whether the proposed application truly concerns competition, the Tribunal may consider the alleged conduct and, for example, whether and how it involves the creation, maintenance or enhancement of market power, and its alleged impact on competition "in a market" (or a material part of a market). Market power and the alleged effect in a market are two important concepts in applications under Part VIII for which leave may be granted, as well as to other provisions in the statute and the overall purposes of the statute: *Competition Act*, sections 1.1, 75(1)(*e*), 77(2), 79(1)(*b*)(i), 90.1(1), 92-93; *Symbol Technologies*, at para 23; *VAA CT*, at paras 423-426, 625, 632-644; *TREB CT*, at paras 115, 165, 166-174, aff'd 2017 FCA 236, [2018] 3 FCR 563, at paras 83-85, 89-92.

[133] The Tribunal may also consider the nature of one or more remedies that will be requested by an applicant to resolve the alleged competition issue in the market. As just noted, in order to obtain a monetary remedy under subsections 79(4.1) and 90.1(10.1), an applicant must obtain a remedial order under subsections 79(1) or (2) and 90.1(1) respectively.

(b) The Second Step of the Public Interest Test

[134] The second step concerns whether the applicant has a "genuine interest in the matter". Here, the considerations in public and constitutional law appear to be relatively transposable to the competition law context.

[135] On a public interest application for leave under subsection 103.1(1), the Tribunal will expect evidence on matters such as the applicant's "real stake" in the proposed proceeding, "engagement" with the issues, reputation, and "real and continuing interest" in the matter at issue: *Council of Canadians with Disabilities*, at paras 51, 101-103; *Downtown Eastside Sex Workers*, at paras 43, 57-59.

[136] The wording of the Tribunal's task at the second step does not need to be revised in light of the competition law setting.

(c) Adapting the Third Step of the Public Interest Test

[137] The third step in the public and constitutional law setting is whether the proposed suit is a "reasonable and effective means" of bringing the case to court. The courts consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting, and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality: *Council of Canadians with Disabilities*, at para 54; *Downtown Eastside Sex Workers*, at para 50.

[138] Again, many of the considerations in public and constitutional law public interest standing appear to transpose to the competition law context. The factors described in paragraph 51 of *Downtown Eastside Sex Workers* will be relevant to an application for leave in the public interest under subsection 103.1(7). For ease of reference, I will reproduce an excerpt from each of those factors:

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting. […]

- The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. […]

- The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. […]

- The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. […]

[139] Similarly, in *Council of Canadians with Disabilities*, at paragraph 55, the Supreme Court provided the following non-exhaustive list of interrelated matters to consider:

> 1. *The plaintiff's capacity to bring the claim forward*: What resources and expertise can the plaintiff provide? Will the issue be presented in a sufficiently concrete and well-developed factual setting?
>
> 2. *Whether the case is of public interest*: Does the case transcend the interests of those most directly affected by the challenged law or action? Courts should take into account that one of the ideas animating public interest litigation is that it may provide access to justice for disadvantaged persons whose legal rights are affected.
>
> 3. *Whether there are alternative means*: Are there realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination? If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues?

4. *The potential impact of the proceedings on others*: What impact, if any, will the proceedings have on the rights of others who are equally or more directly affected? Could "the failure of a diffuse challenge" prejudice subsequent challenges by parties with specific and factually established complaints?

[140] I will note three points of difference between the public and constitutional law setting and the competition law setting.

[141] First, consideration of whether the proposed application will present a "concrete and well-developed factual setting" to determine the issues may be more important in the context of leave in competition matters, compared with constitutional or public law matters. That is because a proceeding under Parts VII.1 or VIII will so often turn on individual facts. For example, the Tribunal has observed several times in proceedings under section 79 that when analyzing a proposed practice of anti-competitive acts, it is not an easy task to distinguish between competition on the merits and anti-competitive conduct: *TREB CT*, at para 271, citing *Canada (Commissioner of Competition) v Tele-Direct Publications Inc* (1997), 73 CPR (3d) 1 (Comp Trib), at p. 179.

[142] Accordingly, concerns about a proper evidentiary basis for a later hearing on the merits may weigh more heavily in the balance even at the preliminary stage of seeking leave: *Council of Canadians with Disabilities,* at paras 71-72.

[143] An applicant may address those evidentiary concerns at the third step of the analysis. While the requirement at the leave stage is not to provide the extent of evidence expected at a Tribunal hearing on the merits (*Council of Canadians with Disabilities*, at para 72), the Tribunal may consider during the third step whether the applicant's evidence and representations have shown a realistic or tangible prospect of obtaining the necessary additional evidence for an eventual hearing on the merits of the proposed application. For example, an applicant could identify witnesses who can provide first-hand evidence about competition in the market and the effects of the impugned conduct on the intensity of competitors' rivalrous behaviour: see *JAMP*, at para 67. An applicant could also provide evidence that one or more experts have been retained and explain how the factual basis for the expert evidence will be developed.

[144] The second and third differences between the public and constitutional law setting and the competition setting relate to the "realistic alternative means" to resolve the competition issues raised by the proposed application.

[145] Unlike the provincial superior courts, the Tribunal is a national tribunal and is the only tribunal that has a statutory mandate to hear applications under Part VIII of the *Competition Act*. That may be relevant when considering whether other applicants have opportunities to pursue a lawsuit elsewhere on the same or similar basis as the proposed application. This consideration may be salient for certain applications for leave (e.g., to commence an application under section 79) but not as much for others (e.g., if the subject matter of the proposed application under section 90.1 overlaps with an existing class proceeding under section 36 alleging conduct that violates section 45).

[146] Finally, in contrast to the public and constitutional law setting, a public official (the Commissioner) has principal responsibility for enforcement of the *Competition Act*. On leave

applications, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it: subsection 103.1(11). In addition, under the Affected Business Test, the statute continues to require leave for persons that are "affected" in their business by an impugned practice, and only a subset of all persons affected by the impugned conduct will be affected in the manner required by Parliament (i.e., persons must directly and substantially affected in the whole or part of their business and by conduct that could be the subject of an order).

[147] In sum, the language used to describe the third step does not need to be reformulated to account for the differences in the competition law setting. How these differences may affect the Tribunal's assessment of "realistic alternative means" will have to be assessed in the specific circumstances of future applications for leave.

(6) Other Principles Integrated into the Three Steps

[148] The three-part test involves the "wise exercise of judicial discretion": *Downtown Eastside Sex Workers*, at para 35 (quoted in *Council of Canadians with Disabilities*, at para 31). The Tribunal will exercise its discretion using its knowledge and expertise in competition matters litigated under Parts VII.1 and VIII to determine whether or not it is "satisfied" that it is in the public interest to grant leave.

[149] The three-step test is not a mandatory checklist, or a list of technical requirements that must be fulfilled to obtain public interest standing. Rather, the considerations at all three steps are weighed, cumulatively, in the exercise of a court's discretion: *Council of Canadians with Disabilities*, at paras 69, 96, 118; *Downtown Eastside Sex Workers*, at paras 20, 33, 35-36, 48, 51, 53. The same will apply to the Tribunal under section 103.1. None of the modified three steps will be considered in isolation or as an independent threshold that must be met.

[150] The Supreme Court has also emphasized repeatedly that a court should take a practical, pragmatic and purposive approach to each of the considerations relevant to a decision on standing: *Council of Canadians with Disabilities*, at paras 28, 54, 93; *Downtown Eastside Sex Workers*, at paras 23, 37, 41, 47, 51 (third bullet), 54, 64, 67, 71, 77. Again, the same shall apply to the Tribunal under section 103.1.

[151] The overall threshold for an applicant to obtain leave should remain one that is not difficult to meet, provided the applicant files the required materials: see similarly, *Symbol Technologies*, at para 17; *B-Filer Inc.*, at para 2.

[152] However, like any significant constitutional challenge, some applications under Parts VII.1 or VIII will not be for the faint of heart. Applications are typically a major undertaking for both the parties and the Tribunal: see, for example, the orders and reasons for order in *VAA CT*; *TREB CT*; and *Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib 10.

(7) Proposed Proceedings that do not Warrant Leave "in the public interest"

[153] As noted earlier, the submissions on the present application for leave dealt at some length with concerns about unmeritorious or frivolous and vexatious proceedings.

[154] The Supreme Court recognized these concerns in *Council of Canadians with Disabilities* and *Downtown Eastside Sex Workers*. The three-step test operates in part to screen out cases that are unmeritorious or frivolous and vexatious: *Council of Canadians with Disabilities*, at paras 1, 57. The Supreme Court also found that the concern with a multiplicity of lawsuits and busybodies may be overstated: *Downtown Eastside Sex Workers*, at para 28. The Court recognized that there are other procedures that create disincentives to such litigation and that litigation management options may be used to terminate a proceeding: *Downtown Eastside Sex Workers*, at paras 28, 56, 64; *Council of Canadians with Disabilities*, at paras 45, 73.

[155] The Tribunal's process has such disincentives and litigation management procedures, including costs awards and motions for summary disposition: *Competition Tribunal Act*, section 8.1, subsections 9(4)-(5); *JAMP Pharma Corporation v Janssen Inc*, 2024 Comp Trib 10 ("*JAMP Costs*").

[156] In my view, proposed Part VIII applications that are evidently unmeritorious or constitute frivolous and vexatious litigation ought to be screened out by the three-step Public Interest Test to be used by the Tribunal. If there are some relevant facts that do not fall neatly within the modified three-step framework but that nevertheless suggest that a matter is indeed inappropriate for determination as unmeritorious or frivolous and vexatious, the Tribunal may consider the circumstances in the exercise of its overall discretion.

[157] Strategic litigation is a related but distinct concern. It has been raised persistently in relation to private access to the Tribunal for enforcement proceedings. In industries in which competition is fierce and competitors are well funded, an application to the Tribunal may appear strategically attractive.

[158] The Tribunal will continue to be vigilant at the leave stage to identify applications that are strategic in nature, including proposed proceedings that are (for example) not based on genuine competition issues under the provisions of the *Competition Act* for which leave is requested.

[159] For screening purposes, the Tribunal will endeavour to identify applicants that are seeking leave to commence strategic proceedings based on all the circumstances arising in the leave application, including the indicia in the three-step analysis.

[160] The same attentiveness to strategic litigation will apply to applications under subsection 103.1(6.1) for leave to apply "in the public interest" to commence a Part VII.1 application under section 74.1.

[161] Finally, the enactment of the Public Interest Test for leave does not imply that persons whose businesses are directly affected by alleged reviewable conduct can simply ignore the first test for leave under subsection 103.1(7) – the Affected Business Test – and apply for leave under the Public Interest Test. An analysis of the interaction between the first and second tests for leave under subsection 103.1(7) may also be relevant in some cases.

D. Summary: The Three-Step for Leave in the Public Interest under subsection 103.1(7)

[162] The Tribunal may grant leave under subsection 103.1(7) if the Tribunal is satisfied, based on the materials filed, that it is in the public interest to do so. Decisions on leave applications will be guided by the Supreme Court's reasons in *Council of Canadians with Disabilities* and *Downtown Eastside Sex Workers*, adapted for the *Competition Act* as described above.

[163] The Tribunal will consider the following three questions:

> 1. Is the proposed application a substantial and genuine competition law dispute that warrants resolution by the Tribunal under the provision for which leave is requested?
>
> 2. Does the applicant have a genuine interest in the proposed application?
>
> 3. Is the proposed proceeding a reasonable and effective means to determine the competition issues raised?

[164] In the exercise of its discretion under section 103.1, the Tribunal will weigh these considerations cumulatively and assess each of them practically, pragmatically and purposively using its expertise in competition law matters. In doing so, it will adopt a flexible approach that does not treat the three steps in the analysis as a checklist of mandatory requirements.

[165] The overall threshold for an applicant to obtain leave should not be difficult to meet, provided the applicant adduces sufficient evidence related to the three questions.

[166] The Tribunal will be alert for possible strategic litigation and to applicants whose request for leave should be made under the first test in subsection 103.1(7) rather than the Public Interest Test.

V. THE PRESENT APPLICATION FOR LEAVE

A. The Evidence filed by the Applicant

[167] The applicant filed his own affidavit and an affidavit from a paralegal in the office of his counsel.

[168] The applicant's affidavit is just over a page in length, with only seven paragraphs. Its substantive content is as follows:

> 2. I am an independent video game developer known online by my user handle Droqen. I have published a multitude of games, including four on the largest provider of video games in Canada. Attached hereto as Exhibit "A" is a screenshot of my page on Steam – the online distributor through whom I distribute four of the titles that I have produced.
>
> 3. In the course of my business, I rely on consumers utilizing online general search engines to find my products, which are principally sold online. In

> particular, the prevalence and ranking of my products to consumers by general search engines is core to my business to maintain social visibility. The online search market therefore directly affects me and my business.
>
> 4. I must therefore engage in optimizing language in the material I post online relevant to my games in such a way as to attract more viewers from general search engines.
>
> 5. In the current market, this means that I must engage specifically with the capriciousness of Google's search algorithm, as it dominates the market.
>
> 6. In an environment with true alternatives, I would be far less reliant on Google to direct potential consumers to my products. I believe that in a more competitive environment, I and similarly situated producers of online content reliant on general search engines would be able to focus less on optimization of our messaging for only Google and could focus instead on our products themselves.
>
> 7. In addition, as a Canadian who routinely uses the internet for personal affairs in addition to my business as outlined above, I am concerned with being faced with an online ecosystem whereby only one player dominates the method available and utilized by similarly situated consumers to obtain information.

[169] The paralegal's affidavit advises that the affiant has "knowledge of the matters to which I hereinafter depose, unless otherwise indicated" and proceeds to list and attach 135 documents as exhibits. This affidavit has no other content.

[170] Numerous documents attached to the paralegal's affidavit stemmed from a proceeding in the United States District Court for the District of Columbia between the United States of America *et al.* and Google LLC (Case No. 20-cv-3715) (the "US District Court Proceedings"), including an Amended Complaint, transcripts of two days of the hearing, expert evidence, certain legal submissions and proposed factual findings filed by the plaintiffs, and certain documents apparently filed as evidence.

(1) Should the Tribunal consider the applicant's documentary evidence?

[171] The applicant's submissions relied on some of the documents attached to the paralegal's affidavit. The applicant advised that the documents were "curated" by counsel for the Tribunal on the application for leave, while Google suggested they were "cherry-picked" from over 4,600 exhibits filed during the liability phase of the US District Court Proceedings to present a one-sided perspective on the merits of that case.

[172] Google submitted that the documents attached to the paralegal's affidavit are inadmissible hearsay. Google observed that the paralegal did not testify that he has personal knowledge of any of the documents in question, nor attest to the source, collection method, selection criteria, authenticity or veracity of the content of any of those documents. Google noted that none of the

authors or recipients of any of these documents has testified as to the existence or contents of any of these documents.

[173] The applicant's counsel confirmed that the source of some of the documents was the US District Court Proceedings. The applicant noted that Google and Apple did not dispute the existence of agreements for default placement of Google's general search engine on Apple devices, or their terms. The applicant argued that the documents are relevant and have a strong degree of reliability, having met the evidentiary standards for admission in a US federal court in a contested proceeding that went to a decision on the merits and a decision on remedy. The applicant observed that the respondents sought and obtained leave from this Tribunal to submit evidence about the US District Court Proceedings or (in Apple's case) testimony given in that proceeding.

[174] I would not adopt a blanket rule that excludes categories of documents or other information from consideration on a leave application merely because they may, at the time of the leave application, technically constitute hearsay. In my view, it is permissible for a leave application to rely on documents tendered by affidavit and obtained by the applicant (or the applicant's counsel) from sources such as publicly accessible court files, in order to provide some information in support of a proposed application of the *Competition Act*. The documents may be considered in the mix with the rest of the evidence filed for leave, at the first step of the Public Interest Test.

[175] However, in this case, there are several issues to resolve.

[176] The first issue is that the paralegal's affidavit has no substantive content of its own. There is no explanation in the affidavit where the attached documents came from, how and when they were obtained, or how and why they were chosen.

[177] Affidavits whose purpose is to put documents into the record are filed in all sorts of litigation in this country. Even the most routine affidavits are expected to state where the documents came from (the office file when entering exhibits about correspondence between counsel; from a party's affidavit of documents; from an online search for corporate records; and so on). This is not just good practice: it is very straightforward information, easily explained, to provide the reader with an understanding of why the documents are authentic and pertinent to the pending matter.

[178] In this case, the applicant should have added content to the paralegal's affidavit, or explained through his own affidavit what he had obtained through his counsel's office. That did not occur. The absence of any evidence at all about the source and collection of the documents is unsatisfactory – all the more so because the documents from the US District Court Proceeding were filed to assist to "set out the facts in support" of the applications under sections 79 and 90.1 on a leave application.

[179] The Tribunal has the ability to do things less formally and more expeditiously than a court, subject to procedural fairness: *Competition Tribunal Act*, subsection 9(2). I take applicant's counsel at their word that the documents came from the US District Court Proceedings. In addition, no one contested the legal authenticity of the documents on this leave application, as both Google and Apple had the opportunity to do. In the circumstances, I accept that the mere absence of direct

evidence from the authors or recipients of the documents should not, on its own, prevent the Tribunal from considering the documents on this leave application.

[180] Accordingly, the Tribunal will exercise its discretion to refer to some of the documents from the US District Court Proceedings attached to the paralegal's affidavit on this leave application, as limited immediately below, with the expectation that such an anaemic affidavit will not be tendered in future.

[181] The second issue is that the applicant's submissions did not refer to all of the documents attached to the paralegal's affidavit. By my count, the applicant only referred to 41 of the 135 – less than a third. For example, the applicant filed the transcripts of two days of trial in the US District Court Proceedings, but did not mention them anywhere in his submissions. There are also two draft amendments of the ISA (one apparently in 2009 and the other undated) (Exhibits 12 and 75) and a draft Term Sheet for amendment of the ISA (dated in 2016) (Exhibit 33), to which the applicant did not refer.

[182] The Tribunal will not consider documents that were not mentioned in the applicant's submissions. It is not the Tribunal's role on a leave application to try to work out how they might contain facts that could support the proposed application under sections 79 and 90.1.

[183] The third issue is that some of the documents attached to the paralegal's affidavit do not constitute evidence of facts. They are variously pleadings, arguments, opinions or do not contain meaningful factual content.

[184] For this reason, the Tribunal will not consider the factual allegations made in the Amended Complaint in the US District Court Proceedings or the plaintiffs' submissions during that proceeding (including a redacted excerpt from a PowerPoint of their closing statement). Similarly, the Tribunal will also not consider the plaintiffs' proposed factual findings at trial as filed in that proceeding.

[185] The Tribunal will also not consider the contents of three PowerPoint presentations apparently tendered as part of one expert's opinion evidence in the US District Court Proceedings (Exhibits 116, 117, 118). Similarly, the Tribunal will not consider a PowerPoint presentation by another expert, in behavioural economics, related to default choices, which includes consideration of "choice friction" (Exhibit 110). All these documents contain opinions, rather than facts. In addition, they contain references to and excerpts from other trial exhibits that do not constitute proper documents filed on this application.

[186] The applicant referred to a number of emails that have no substantive content (Exhibits 108, 109) or whose contents cannot meaningfully be considered without their attachments or explanatory testimony (Exhibits 63, 127, 135).

[187] The paralegal's affidavit attached numerous articles from news websites or online magazines commenting on Google or Apple's affairs (Exhibits 16, 97, 111, 114, 128, 129, 130, 131, 132, 133). The content of such articles can be assessed individually. I add that this kind of document may be admissible but will typically be of modest value as evidence of facts supporting a proposed application under sections 79 and 90.1.

(2) The Tribunal's use of prior court decisions on leave applications

[188] A further issue is that the applicant's leave submissions referred extensively to one document from the US District Court Proceedings: a decision of Judge Mehta dated August 5, 2024, rendered after the liability phase (the "US Liability Decision"). The applicant's reply also referred to Judge Mehta's decision on remedies dated September 2, 2025.

[189] Google objected to the use of US Liability Decision, citing "significant risks associated with opening [the Tribunal's] doors to copycat claims" that do not have a demonstrated connection to substantive provisions of the *Competition Act*, or to its purposes and enforcement scheme. Google advised that the US Liability Decision is subject to appeal and referred to numerous distinguishing factors between the US Liability Decision and the proposed application under sections 78-79 and 90.1, including that it involved different parties, legal requirements and evidence. Google noted that the US Liability Decision did not consider certain elements or facets of a proceeding under sections 79 and 90.1, such as intent and the "but-for" test for anti-competitive effect. Google referred to *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2014 BCSC 1281.

[190] The applicant advised that he did not rely on the "legal findings" made by the US District Court under section 2 of the *Sherman Act*, but only "factual findings" because "facts are facts". The applicant explained that the liability opinion contains a "detailed recitation of facts admitted into evidence during the nine-week trial with extensive citations to the underlying testimony and documents" and argued that a US court's factual analysis may be relevant where, as here, the proceedings are based on substantially the same factual allegations (citing my Federal Court decision in *Mancinelli v Bank of America Corp.*, 2024 FC 1777, at para 47). The applicant noted that he relied on the US Liability Decision because it is the only publicly available information about redacted or sealed materials, such as the ISA and internal Google analyses.

[191] The applicant characterized the factual findings in the US District Court Proceedings as "helpful" on this application for leave, recognizing that they could not be used at an eventual hearing on the merits. According to the applicant, the US District Court made findings about the same parties, conduct, market power and payments, so the Tribunal should find them helpful.

[192] As a matter of law, a prior judicial decision may be technically admissible, depending on the purpose for which it is filed and the use to be made of its findings and conclusions: *Canada Evidence Act*, section 23; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 SCR 657, at paras 37, 46-48; see also *HarperCollins*, at paragraphs 15-18, 187-191. As *Malik* advises, the weight to be given to the earlier decision will be affected by all the circumstances, including the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the opposite party to contest it.

[193] On an application for leave under section 103.1, there are three other important factors. One is the statutory requirement to file an affidavit setting out the facts in support of the proposed application. In that context, factual findings made in a prior decision cannot serve as a complete workaround or proxy for admissible evidence of facts to support a proposed application under the *Competition Act*.

[194] Second, the Tribunal's decision on leave will not make any findings of fact relating to the merits of a proposed application under sections 79 and 90.1. The decision is solely about whether to grant leave to make an application.

[195] Third, the use of court decisions for facts to support a proposed application could introduce issues and arguments between the litigating parties that are not compatible with a summary application for leave. Courts make factual findings in the context of a particular case, as advanced by a plaintiff or applicant to meet the specific legal requirements of a cause of action. Not all findings of facts are the same – some may be admitted or uncontentious while others are hotly contested. Some factual findings are based on inferences. When facts are found about an email or meeting, there can be surrounding circumstances, events before and after, and considerable nuance arising from witness testimony. And so on. These considerations (and more) affect the strength and basis of factual findings in a court decision. While the Tribunal does not make factual findings at the leave stage that will bind the parties on the proposed application, neither the parties nor the Tribunal should have to deal with time and resource-intensive arguments about those issues during a leave application under section 103.1.

[196] In the present application, the applicant has placed considerable reliance on the US Liability Decision to support his overall position on the merits of the proposed application. He advanced numerous arguments that purported to rely on findings and conclusions in it.

[197] The US Liability Decision and the associated remedy decision are admissible on this leave application. While certain Apple employees testified, Apple was not a defendant in the proceedings that led to the US Liability Decision. As the respondents observed, there are significant legal differences between under section 2 of the United States Sherman Act and section 79 of the *Competition Act*. The Tribunal will not consider the US court's legal determinations or findings that are significantly infused with US antitrust law.

[198] The applicant's written submissions referred to paragraphs in the US Liability Decision that contained the following information:

- In 2022 alone, Google paid Apple US$20 billion under their revenue sharing agreement. (US Liability Decision, at para 299)

- Google "estimate[d] that the total capital expenditures required [for Apple] to reproduce [Google's technical] infrastructure dedicated to search would be in the rough order of [US] $20 [billion]." (para 51)

- Apple would forego significant revenues under the ISA if it were to enter the general search engine market. An internal Apple assessment from 2018 concluded that, even assuming that Apple would retain 80% of queries should it launch a general search engine, it would lose over US$12 billion in revenue during the first five years following a potential

separation from Google. It would also have to undertake the risk of consumer backlash. (para 302)

- The concept of "choice friction". (paras 69-70)

- The Term of the ISA and its extension. (paras 291-293)

- In 2021, Google paid out a total of US$26.3 billion in revenue share under its contracts, an expense listed in its financial statements as "traffic acquisition costs," or TAC, which was Google's greatest expense in 2021, almost four times more than all other search-related costs combined. (para 289)

- The terms in Google's agreements with various parties, including Mozilla (and the impact of Mozilla's switch to Google as its general search engine), and Google's agreements with Android original equipment manufacturers. (paras 334-338, 348)

- In 2020, Google's internal modeling projected that it would lose between 60-80% of its iOS query volume should it be replaced as the default general search engine on Apple devices. (para 75)

- Google's internal study of whether a competitor could realistically match its financial contribution to Apple. (para 328)

- Google has long recognized that, if Apple were to develop and deploy its own search engine as the default general search engine in Safari, it would come at great cost to Google. For example, Google projected that without the ISA, it would lose around 65% of its revenue, even assuming that it could retain some users without the Safari default. (para 300)

[199] The list above refers to the factual points made in the cited paragraphs of the US Liability Decision, rather than the statement made or position taken by the applicant in the leave materials. The Tribunal will only consider this extricated factual information on the present application for leave. I have also excluded repetitious references and paragraphs in the US Liability Decision that did not support or connect to the applicant's submissions. For example, the applicant's submissions referred to the steps that a consumer must take on their device to switch from Google as the default general search engine, to another general search engine. The applicant referred to paragraphs 65-68 of the US Liability Decision in support of this, but these paragraphs instead dealt with expert evidence on default bias.

B. Application of the Three-Part Test for Leave in the Public Interest

(1) Step 1: Is the proposed application a substantial and genuine competition law dispute that warrants resolution by the Tribunal under the provision(s) for which leave is requested?

[200] I have reviewed the applicant's affidavit, the information in the pertinent documents attached to the paralegal's affidavit and cited by the applicant, and the proposed draft notice of application. I have also considered all parties' submissions.

[201] As will be evident from the discussion below, the essential character of this proposed application concerns true competition issues suitable for the Tribunal. The proposed notice of application raises genuine competition law issues, which are not merely commercial disputes between competitors outside the Tribunal's mandate. However, as I will describe, there are some concerns about whether the applicant has raised a substantial competition law issue.

[202] The applicant's draft notice of application, read with and supplemented by the applicant's written and oral submissions, set out a basis for alleging an abuse of dominance, with some provisos (noted below). They allege a market (presumably in Canada) for general search engines in which Google has a very high market share (exceeding 90%), which could indicate substantial market power. They describe a practice of anti-competitive acts involving contract terms (in the ISA as amended) that are alleged to have an exclusionary effect and that establish exclusive distribution channels for Google's general search engine, in exchange for substantial funds. There is an allegation about data from searches through these channels to its general search engine and generate revenue. There are allegations that the effect of Google's conduct is that Apple and others have been excluded, have decided not to enter the general search engine market, or have been unable to expand their market share. At a high level, there are allegations of an SLC/SPC.

[203] Similarly, there is an arguable conceptual basis in the draft notice of application and the applicant's submissions for an application under section 90.1, based on allegations related to an agreement (the ISA) between Google and Apple. The applicant referred to subsection 90.1(11), which provides that a "competitor" under subsections 90.1(1) and (1.01) includes "a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement." The applicant's submissions referred to an actual "arrangement" and implied that Apple was an "actual" competitor, but his draft notice of application expressly acknowledged that Apple is not "presently" a competitor of Google and characterized Apple as a "potential" competitor. The applicant submitted that Apple is a formidable potential competitor in the general search engine market, and that Google used the ISA to neutralize Apple, its most likely competitor, as a competitive threat. The applicant did not address in detail how subsections 90.1(1) and (1.01) interact as a matter of law. The applicant argued that Apple, as a "technological giant with vast resources and a significant market presence, stands as a potential competitor to Google in the general search engine market. Its extensive ecosystem, including products like the iPhone and the iPad, provides a robust platform for launching a competitive general search engine". The applicant also referred to Apple's substantial annual worldwide revenue and to billions of its devices, making it "entirely conceivable that Apple could emerge as a formidable competitor to Google".

[204] As noted, there are shortcomings in the applicant's materials. To begin, there are some aspects of the applicant's positions in his submissions that are not reflected in the draft notice of application. For example, the pleading does not describe the applicant's position on an SLC in detail, but there is more in the applicant's submissions, and an allegation of an SPC. That is to say, while the draft notice of application seems to plead a lessening case, the applicant's submissions on leave provided additional allegations related to a lessening case and also refer to a prevent case.

[205] In addition, the applicant's materials pay little specific attention to how the proposed application connects to Canada. The applicant's draft notice of application and submissions do not make many specific allegations related to Canada or any alleged effects on competition in Canada.

Conversely, the same materials refer to Google's agreements with wireless carriers in the United States, yet there is no reference to similar arrangements (if they exist) with wireless carriers in Canada.

[206] Asked at the hearing of the leave application how the proposed application connects to Canada, the applicant pointed to the terms of the ISA and submitted that Google's conduct and the terms of the ISA apply to Canada just as they did to the United States in the US District Court Proceedings. That is an important point because of the nature of the applicant's allegations. The ISA and the alleged conduct related to Google's general search engine are said to transcend national borders. Although the parties apparently entered the ISA outside Canada, the Tribunal has held that section 90.1 does not contain territorial limits requiring an agreement or arrangement to be made "in Canada": *HarperCollins*, at paras 77-79, 119-123. See also *Rakuten Kobo FC*, at paras 90-140, 186.

[207] I turn to the evidence filed to support the proposed application under sections 79 and 90.1.

[208] The applicant's affidavit contains few salient facts in support of the proposed application under sections 79 and 90.1. Indeed, the applicant's own memorandum of fact and law did not refer to his affidavit at all to support the proposed application (i.e., at the first step of the Public Interest Test). The applicant's reply referred to his affidavit only a handful of times.

[209] There are numerous omissions of straightforward facts in the applicant's affidavit evidence that could have supported the proposed application. There is no affidavit evidence that Apple devices in Canada have Google as their default general search engine. There is no affidavit evidence about how to change from Google to another general search engine, and whether a user finds it easy or difficult (i.e., experiences the "choice friction" mentioned by the applicant). There is no affidavit evidence about who else, beyond Google, offers a general search engine in Canada. The applicant's filed affidavits did not attach any of Google's or Apple's mandatory annual filings or periodic reports to show the nature and scope of their businesses.

[210] Only a few of the documents attached to the paralegal's affidavit expressly mention Canada. Those that do so relate to Google's market share in Canada. (See Exhibits 95, 105, 115, 121, 133.)

[211] The applicant relied heavily on the terms of agreements, particularly the ISA. The documents attached to the paralegal's affidavit include two agreements: a redacted version of a Joint Cooperation Agreement executed on May 15, 2014, between Google Inc. and Apple Inc. (Exhibit 4); and a redacted version of an agreement entitled "Amendment to the Information Services Agreement" executed on September 29 and 30, 2016, between two Google entities and several Apple entities (Exhibit 5).

[212] The Joint Cooperation Agreement in part amended an Information Services Agreement dated December 20, 2002, (a copy of which is not in the record). On its face, it extends the term of the ISA; implements "Rev share" effective July 31, 2025; provides that Google "shall remain the default search engine in all Geo's" other than certain countries (Canada was not mentioned) after specified dates; and contemplates additional exclusions to be considered in the future. The contents of the Joint Cooperation Agreement in the record do not define "Rev share" or "Geo's".

[213] The Amendment to the Information Services Agreement was effective September 30, 2016. It provided that:

- Apple will pre-set and use the Services (Google's search services) as the Default search service for Search Queries in Apple's web browser software (i.e., meaning that Google's search services will automatically be used for responding to Search Queries initiated from the Web Browser Software).

- During the Term of the agreement (which is redacted), the parties agreed that Apple's use of the Services as Default in the Web Browser Software will remain substantially similar to its use as of the Execution Date of the agreement.

- Effective September 1, 2016, Google will pay Apple a redacted part of its Net Ad Revenue for the remainder of the Term.

- The parties agreed that they were entering the agreement for the following purposes: (i) to create tangible and intangible value for each party; (ii) to increase the revenue performance of each party; and (iii) to improve the search experience and performance of the Services and other services for End Users on Apple products.

[214] The other documents attached to the paralegal's affidavit and relied upon by the applicant concerned the following:

- Google's high market share, including in Canada (Exhibits 115, 121) (apparently sourced from StatCounter, an organization not explained in the evidence).

- Additional Statistics related to Google and its search engine in Canada (Exhibit 95; the applicant did not explain the source "Made in CA").

- A document entitled "Google's Search+ margins", which refers to its revenue and "TAC" of (US$26,344) (Exhibit 119). Applicant's counsel advised that TAC referred to Traffic Acquisition Costs and included payments to Apple and others, but did not refer to any evidence of this explanation other than in Judge Mehta's liability decision.

- An internal email concerning the terms of the two agreements discussed above (Exhibit 29);

- A redacted internal Google presentation deck discussing the strategic value of default Home Page to Google (undated, appears to be in draft) (Exhibit 124).

- Information related to Mozilla, that a majority of its revenue is generated by "global browser search partnerships, including the deal negotiated with Google in 2017", apparently related to fiscal 2018 (Exhibit 125).

- A mobile incentive agreement between Google and a Motorola counterparty (Exhibit 100) (title of the Exhibit refers to "Motorola Mobile").

- A Mobile Revenue Share Agreement between Google and Samsung Electronics Co., Ltd. (Exhibit 101).

- Web browser market share information (relevance unclear) (Exhibit 126).

- Information related to Bing usage and revenue (not from Bing/Microsoft itself, but in an article) (Exhibit 128).

- Presentation decks or pre-meeting briefing notes, cited without specificity or explanation (Exhibits 78, 93, 94, 127).

[215] With respect to the proposed application under section 79, there is some evidence and information before the Tribunal consistent with an allegation that Google may have substantial control in the market for the delivery of general search engine services in Canada (owing to its high market share). There is some evidence to support an allegation that Google has engaged in a practice of acts (i.e., the performance of the ISA) but little evidence of how they are anti-competitive – that this conduct had, as an objectively intended or foreseeable consequence, an exclusionary effect on one or more competitors or an adverse effect on competition. There is little or no evidence of an SLC/SPC under paragraph 79(1)(*b*).

[216] With respect to the proposed application under section 90.1, there is evidence of an agreement or arrangement between Google and Apple (the ISA as amended). There is no evidence that Apple is a competitor of Google in the market for the supply of general search engines in Canada. Apple is said to be a potential competitor, but there is little factual evidence that it is a potential or poised entrant into that market, or to support the applicant's position that it is reasonable to believe that Apple would be likely to compete in the noted market in the absence of the ISA. For the purposes of subsection 90.1(1.01), the applicant submitted that a "significant purpose" of the amended ISA was to lessen or prevent competition substantially in the market for general search engines in every place it applies (i.e., including Canada). There is no direct evidence on this leave application that a "significant purpose" of the ISA (or any part of it) was to cause an SLC/SPC. The applicant effectively relied on Apple's absence from the noted market and inferences based on the terms of the ISA, including that the ISA has prevented Apple's entry into the general search market and it has prohibited Apple from offering either (i) a choice screen that would permit Apple users to select a default search engine, and (ii) a different default search engine in Safari's private browsing mode. For its part, Apple adduced evidence on this leave application from testimony in the US District Court Proceeding that it was not a purpose of the ISA to cause an SLC/SPC but rather that it had a pro-competitive purpose: to make it easy for its users to access the best search engine – Google. The Tribunal will not attempt to resolve this issue on an application for leave.

[217] Taken as a whole, this assessment of a substantial competition law dispute at the first step suggests a genuine and conceptually plausible application under sections 79 and 90.1, but one that is not well supported by evidence at this stage. There are aspects of the filed evidence that are unsatisfactory on their face.

[218] Overall, these considerations weigh in favour of granting leave, but not strongly.

(2) Step 2: Does the applicant have a genuine interest in the proposed application?

[219] Relying on his affidavit, the applicant submitted that he has a genuine interest in the proposed application as an independent video game developer who sells and publishes his games online. He submitted that he is dependent on consumers finding his video games online, including through general search engines, and is representative of the large cohort of Canadians operating in e-commerce that rely on general search engines for consumers to locate and then purchase their products. In addition, as a Canadian internet user beyond his aforementioned business concerns, the applicant submits having an interest in the general search engine market operating efficiently and in the interests of consumers. Thus, the applicant claims to be "emblematic of thousands of Canadians who use general search engines to gain online visibility for their businesses and also use general search engines in their day-to-day lives to navigate online content".

[220] The applicant also maintained that the new public interest leave mechanism allows individuals, like the applicant, to address anti-competitive practices like exclusivity agreements such as the ISA, which may otherwise escape review in the civil context because they do not inflict discrete, traceable damage on any one actor, but rather corrode competition systemically. As an "informed citizen actively engaged in his community", the applicant's submissions stated that he has "bravely stepped forward to challenge" the respondents' conduct on behalf of his fellow citizens.

[221] The applicant submitted that his "genuine interest—to ensure that the market for general search engines in Canada is efficient, competitive, and in the interest of Canadian consumers — is clearly aligned with the intent and purpose" of the *Competition Act*, referring to "promoting competition and efficiency, allowing smaller enterprises to have an equitable opportunity, and providing consumers with product choices".

[222] In response to the respondents' position that he was merely seeking to advance his private interest, the applicant submitted that his intentions are clear and focused solely on addressing anti-competitive conduct, not personal gain: "His interest is not focused on a benefit to his own business, but rather in a commitment to ensuring that the digital ecosystem improves by advocating for an open and diverse general search engine market that may attract Canadian innovation." The applicant referred to his affidavit, in which he stated: "I am concerned with being faced with an online ecosystem whereby only one player dominates the method available and utilized by similarly situated consumers to obtain information."

[223] At this second step of the Public Interest Test, the "genuine interest" question focuses on the evidence of the applicant's "real stake" in the proposed proceeding, "engagement" with the issues, reputation, and "real and continuing interest" in the matter at issue. The indicia for this assessment, including how they have been applied, may be found in *Council of Canadians with Disabilities*, at paras 51, 101-103; *Downtown Eastside Sex Workers*, at paras 43, 57-59; *Parkdale Community Legal Services*, at para 58; and *Coalition for Justice and Human Rights Ltd*, at paras 14-18, 47-52.

[224] The applicant's evidence on this leave application did not address these issues in any depth. Essentially, his evidence is that he is a user of Google's general search engine who needs it to attract customers to his business, represents others who use the product for business and for

personal inquiries, and seeks a more competitive search engine market in Canada. The most pertinent statement is one sentence in which he expressed concern with an online ecosystem in which one party dominates.

[225] While the applicant's evidence shows he uses and relies on Google's general search engine in his business, the filed evidence does not otherwise support the applicant's submissions asserting that he has a genuine interest in whether and how the general search engine market in Canada operates efficiently, competitively, and in the interests of consumers. He does not elaborate on his stated concern with a market in which one player dominates. While the applicant testified that in a competitive environment, he and other users would be able to focus less on optimization of their messaging for only Google and could focus instead on their products, this evidence provides little meaningful insight into the applicant's competition concerns or his genuine interest as described in the case law. In addition, as the respondents observed, additional competitors in the general search engine market could cause the applicant or similar users to do more (not less) work to optimize for the additional competitors' search engines.

[226] The applicant's submissions further asserted that he is representative of the large cohort of Canadians operating in e-commerce that rely on general search engines for consumers to locate and then purchase their products. That may or may not be the case; there is no substantive evidence one way or the other.

[227] The applicant's affidavit does not show any history of engagement in the competition or technology issues raised in the proposed application. While the evidence shows that the applicant is a user of Google's general search engine, there are no facts to show his interest or involvement in the issues prior to the filing of this leave application.

[228] The applicant's affidavit provides no information to support the submission that he is an "informed citizen actively engaged in his community". The applicant's reply submissions cited (with links) magazine articles for his achievements in the gaming industry. They are not properly before this Tribunal and in any event do not purport to provide evidence of his genuine interest in the proposed application or the competition or technology issues in it.

[229] I am not suggesting that the applicant is not acting *bona fides* or that his business interest as a user of general search engines precludes him from being an applicant in the public interest. Indeed, the applicant sensibly chose to make his application under the Public Interest Test. However, he and his business are not affected by the impugned practices identified in the proposed application in a manner that attracts the Affected Business Test. There is little to suggest that he is pursuing this leave application or the proposed application under sections 79 and 90.1 to advance his own business interests, as the respondents contended.

[230] In sum, the applicant's evidence on this leave application does not adequately support his genuine interest in the proposed proceeding. This consideration weighs against granting leave.

(3) Step 3: Is the proposed proceeding a reasonable and effective means to determine the competition issues raised?

[231] **The applicant's capacity to bring the application**: I am not persuaded that the applicant has shown his capacity to bring the application or that the issues in the proposed application under sections 79 and 90.1 will be presented in a sufficiently concrete and well-developed factual setting.

[232] The individual applicant provided no evidence to show the resources he will have for the proposed application. He is represented by a law firm, whose experience appears to be in securities class actions. The applicant's evidence did not explain anything about how the law firm plans advance the proposed application on the merits.

[233] The applicant provided no evidence to show his own expertise to contribute to the proposed application. I appreciate that the applicant is likely to be a "complainant" type of witness who might testify at the beginning of a hearing to set the stage and show the practical concerns that underlie the application – something often seen in enforcement matters. While the applicant testified that he is a user of Google's general search engine in his business and for personal use, he did not provide much (if any) information about what his own evidence might be and how it could support his application under sections 79 and 90.1. For example: does the applicant own an Apple device? If so, did it (or another device he uses) include Google as a preloaded general search engine? Has the applicant attempted to switch away from Google's product by installing another search engine? If so, how did the attempt to switch go, and how well did the other search engine work for him or his business? In the absence of evidence on these types of issues on this leave application, I am unable to find that the applicant personally will provide any material evidence at a hearing on the merits, or a particularly useful or distinctive perspective that could assist the resolution of those issues in the proposed application.

[234] Providing actual evidence to support a proposed application, or a list of potential witnesses and the evidence they expect to provide, is a clear and compelling way to show an applicant's capacity to litigate the proposed application at the leave stage: see *Council of Canadians with Disabilities*, at para 72 #5. However, none of that type of potential evidence was mentioned in the affidavits filed on this leave application. The applicant's materials did not identify any other fact witness who might provide evidence at a hearing. The applicant did not testify that he has already collected any evidence to support his application (other than the documents attached to the paralegal's affidavit). The applicant did not advise, by evidence or counsel representations, that any expert had been retained for the purposes of the proposed application.

[235] Presumably the applicant's evidence would have developed over time. However, the applicant did not offer an undertaking or provide any indication about how he and his counsel intend to adduce their own evidence to support the application under sections 79 and 90.1, recognizing that an undertaking to file evidence will rarely suffice to show that evidence will actually be adduced: *Council of Canadians with Disabilities* at paras 19, 72. The applicant did not offer any realistic prospect or tangible means to obtain fact evidence in support of the proposed application.

[236] I appreciate that the applicant's position is that there is enough in the record to go to discovery, which implies that he proposes to prove the case through evidence obtained from the

respondents through documentary discovery and oral examinations under the *Competition Tribunal Rules*. However, that position does not demonstrate the applicant's capacity for the purposes of the third step. Nor does the opportunity for discovery under the *Competition Tribunal Rules* show that the matter will be presented in a sufficiently concrete and well-developed factual setting.

[237] The applicant argued that the requirements to show capacity, resources and expertise were not rooted in the *Competition Act* and that the respondents' demands that he prove his capacity, resources and expertise were unfounded. I am unable to agree. A plaintiff/applicant's capacity, resources and expertise are factors expressly stated and explained in the public interest standing decisions of the Supreme Court – cases that the applicant himself relied upon, from his initial written representations through to the end of his oral argument, to support his application for leave in the public interest. The applicant cannot maintain that it is unnecessary to adduce evidence to meet the very legal considerations identified in his own application for leave.

[238] Whether the case is of public interest: The issues raised in the proposed application transcend the interests of the applicant and concern matters in the public interest.

[239] Whether there are alternative means to resolve the issues: The Tribunal is the only adjudicative decision maker that has jurisdiction over matters under sections 79 and 90.1.

[240] The respondents referred to an investigation by the Competition Bureau, which concluded in 2016 with the release of a position statement. However, subsection 103.1(11) provides that the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it. That includes action or no action with respect to the matters in a proposed application. Consequently, I decline to consider the Bureau's position statement.

[241] The respondents also referred to certain proceedings in the courts of Quebec and British Columbia: *Spark Event Rentals Ltd. v Apple Inc. and Apple Canada Inc.*, Supreme Court of British Columbia, Vancouver Registry No. S-218036; *Oli & Eve Maison de Coiffure Inc. c Google LLC et al*, Cour Supérieure du Québec, District de Montréal, No. 500-06-001163-217.

[242] The parties referred to the Amended Notice of Civil Claim in the British Columbia proceedings. The proceeding has been stayed against Google in favour of arbitration: *Spark Event Rentals Ltd. v Google LLC,* 2023 BCSC 1115. The status of the proceeding as concerns Apple is unclear. Accordingly, I give no weight to the argument that this proceeding is a possible alternative place to resolve the issues raised in the proposed application.

[243] The allegations in the *Demande pour autorisation d'exercer une action collective* in the Quebec proceeding against Google and Apple, issued in 2021, appear to overlap with the allegations in the proposed notice of application in this matter. However, the record on this leave application does not contain any material information about the status of the Quebec proceeding as of 2025. I give the Quebec proceeding no weight for present purposes.

[244] The potential impact of the proceedings on others: While Apple raised concerns under this heading, there is no evidence or indication that there are others who may be better placed and have the capability to pursue similar legal proceedings before the Tribunal. The parties did not

develop evidence or argument to show the impact of this proceeding on other persons involved in the relevant market (customers, competitors, suppliers and others who may be affected in a variety of positive or negative ways by prohibition orders and other remedies). Therefore, this consideration is neutral on this leave application.

[245] While some considerations relied upon by the respondents are neutral or of no weight, the overall assessment of the third step weighs heavily against granting leave on this application for leave in the public interest.

(4) Conclusion

[246] Having considered the three steps applicable to the Public Interest Test for leave under subsection 103.1(7), and weighing the factors cumulatively, the Tribunal is not satisfied that it is in the public interest to grant leave to the applicant under section 103.1 to make the proposed application against the respondents under sections 79 and 90.1.

VI. CONCLUSION

[247] This application for leave under section 103.1 is dismissed.

[248] The respondents requested costs. The applicable legal principles are set out in *JAMP Costs*. In the present case, the parties expended considerable submissions and time on the legal test for leave under the Public Interest Test. In the exercise of the Tribunal's discretion, I find that the present application is not a case for a costs order.

THEREFORE THE TRIBUNAL ORDERS:

[249] The application for leave under section 103.1 is dismissed.

[250] There is no costs order.

DATED at Ottawa, this 13th day of January, 2026.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

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