COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

Received / Reçu: 2026-03-10
CT- 2025-006
Doc 39

PUBLIC

Court File No. CT-2025-006

COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an applicationby 8X Labs Inc. for one or more orders pursuant to section 75 of the *Competition Act*;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 76 of the *Competition Act*;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 77 of the *Competition Act*.

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 79 of the *Competition Act*.

B E T W E E N:

8X LABS INC.

Applicant

- and -

VISTAR MEDIA INC.

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, VISTAR MEDIA INC.

March 10, 2026

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Emrys Davis (#57391B)
Email: davise@bennettjones.com

Ethan Schiff (#70448W)
Email: schiffe@bennettjones.com

Dylan Yegendorf (#85016M)
Email: yegendorfd@bennettjones.com

Telephone: (416) 863-1200
Facsimile: (416) 863-1716

Lawyers for the Respondent,
Vistar Media Inc.

TO: LCM ATTORNEY INC.
600, de Maisonneuve Blvd. West
27th Floor
Montreal, QC H3A 3J2

Sebastian Caron
Email: scaron@lcm.ca

David Quesnel
Email: dquesnel@lcm.ca

Telephone: (514) 375-2665

FRED DIONNE LEGAL INC.
465 McGill Street, Suite 700
Montreal, QC H2Y 2H1

Frederic Dionne
Email: fred@fredlegal.com

Telephone: (514) 995-5334

Lawyers for the Applicant,
8X Labs Inc.

AND TO: THE REGISTRAR OF THE COMPETITION TRIBUNAL
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Email: tribunal@ct-tc.gc.ca
Telephone: (613) 957-7851

AND TO: ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Paul Klippenstein
Email: paul.klippenstein@cb-bc.gc.ca
Telephone: (613) 325-1760

Kevin Hong
Email: kevin.hong@cb-bc.gc.ca
Telephone: (819) 665-6381

Facsimile: (819) 953-9267

Lawyers for the Commissioner of Competition

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

PART I: OVERVIEW

1. Vistar Media Inc. (**Vistar**) operates a digital out-of-home (**DOOH**) advertising platform, connecting marketers and media owners through data-driven buying of ads on digital screens worldwide. Over five years ago, Vistar signed an agreement with the applicant, 8X Labs Inc. (**8X**). Over the short course of that relationship, 8X misrepresented the nature of its company. It did not engage in the business that it claimed, it did not have an in-house sales team to promote its media, and it did not bring its own assets online with Vistar directly, as contemplated. 8X used its SSP account to upload third party media in the United States, including that of another Vistar SSP partner (Kolvanta) causing that partner to breach its contract. In light of 8X's conduct, Vistar lawfully terminated the agreement – 8X's response was to threaten Vistar with legal action.

2. More than two years later, 8X again approached Vistar seeking a partnership, this time in Canada. Given the parties' history, Vistar was hesitant. Vistar nonetheless offered to partner with 8X with a unique modification to ensure that 8X generated at least some revenue for Vistar. 8X declined, again threatened legal action, and then waited 17 months before filing its application for leave before this Tribunal.

3. 8X glosses over this unique and tortured history, instead asserting "staggering" similarities between this application for leave about DOOH advertising and the Commissioner of Competition's case against Google for abuse of dominance in online advertising. 8X generally alleges that, like Google, Vistar holds "near total control" over Canadian DOOH programmatic advertising. And so, 8X's story goes, Vistar, like Google, has "deliberately and aggressively" abused its dominant position in the Canadian DOOH business and engaged in unlawful tied-selling and refusal to deal schemes to "maliciously" harm 8X and other competitors.

4. 8X's story bears no resemblance to reality. 8X has painted Vistar as a behemoth solely through bald statements in the inadmissible affidavit of its lawyer in this very proceeding, Frédéric Dionne (the **Dionne Affidavit**).[1] Beyond such conjecture, Mr. Dionne provides no cogent evidence of Vistar's Canadian DOOH competitive position. In fact, as established by Vistar's evidence, Vistar is not even the leading Canadian player in respect of either product[2] at issue: (i) the supply-side platform (**SSP**), whereby media owners make their digital inventory available to buyers; and (ii) software as a service (**SaaS**), to integrate with SSPs.

5. 8X's other allegations of anticompetitive conduct are similarly unsubstantiated. Vistar does not prohibit its SSP customers from using competitors' technology (including that of 8X), and Vistar does not link its SSP and SaaS products. In fact, nearly all of Vistar's clients use competitor SaaS technology hand-in-hand with Vistar's SSP.

6. 8X further alleges that Vistar had purportedly malicious intent in its business dealings, despite the fact that it was 8X who misrepresented its business and threatened Vistar with legal action. Any charge of malicious intent is patently inconsistent with the facts.

7. 8X has similarly failed to provide any evidence upon which to establish that Vistar's conduct would adversely or substantially affect competition in Canada. Much of 8X's evidence focuses on events in the United States from five years ago, not on competition in Canada today. In any event, 8X has failed to plead any cogent evidence that Vistar's alleged conduct has had any effect on competition at all. 8X appears to assert that some undefined market would be more competitive had it remained an operating business. But other companies have acquired 8X's assets and are active in

[1] Affidavit of Frédéric Dionne sworn November 27, 2025 (the **Dionne Affidavit**).

[2] If leave is granted, the "product" dimension of the relevant market analysis will necessarily be the subject of further evidence, including expert evidence. Vistar uses "product" here and in this memorandum only to respond to 8X's alleged theory of harm, not because it admits that these are "products" as defined in the Tribunal's jurisprudence.

Canada. They can provide the competition that 8X asserts is lacking using its technology and assets if they so choose. It is not at all apparent what competition 8X could have offered that these companies cannot.

8. In short, 8X has only through the artifice of Mr. Dionne's improper and uncogent evidence sought to analogize Vistar to Google. This case is nothing like the Commissioner's claim against Google. Given the reality of Vistar's business, there can be no *bona fide* belief that the conduct alleged by 8X could give way to an order under the cited provisions of the *Competition Act*.

9. Finally, 8X's application for leave under section 103.1 of the *Competition Act* is limitations-barred. 8X delivered its application for leave more than one year after the last interaction that it had with Vistar, at which time Vistar declined a second partnership with 8X and any alleged misconduct ceased.

PART II: THE FACTS

A. The DOOH industry includes technology companies like Vistar who facilitate digital advertising in public spaces.

10. Vistar is a global DOOH advertising technology company with a Canadian office in Toronto, Ontario made up of only about 10 employees.[3]

11. DOOH advertising is a subsegment of out-of-home advertising, which generally covers advertising on billboards, posters, public displays, and bus shelters.[4] Unlike traditional out-of-home advertising,[5] DOOH uses digital screens, including outside on things like billboards, urban panels,

[3] Affidavit of Scott Mitchell sworn March 6, 2026 (the **Mitchell Affidavit**), at paras. 4 and 28.
[4] Mitchell Affidavit at para. 4.
[5] Traditional out-of-home advertising industry has relied on static advertising, such as static billboards, posters and vinyl, among other media: see Mitchell Affidavit at para. 4.

transit screens, bus shelters, and outdoor digital walls,[6] or inside at shopping and recreational centres, gas stations, restaurants, and universities.[7]

12. DOOH advertising provides significant flexibility and adaptability: unlike traditional media which is static, digital screen contents can be adjusted within a given ad campaign based on, among other things, the time of day.[8]

13. The relevant DOOH players generally fall into one of two distinct groups: (i) media owners, who own the screens that display ads; and (ii) buyers, who are looking to put their ads on the screens. As described below, Vistar's products connect DOOH advertising buyers to a catalogue of media owners' inventory. There are far more screens available to display DOOH advertising in Canada than there is demand to advertise on them.[9] While most Canadian DOOH sales take place directly between buyers and media owners,[10] the remaining unused inventory can be made available for bidding through auctions, which open revenue streams to media owners.[11]

14. Vistar's products facilitate these auctions through "programmatic advertising", which uses technology and algorithms to buy and sell digital advertising space in real-time.[12] Media owners identify their screens' availability through SSPs, and buyers use demand-side platforms (**DSPs**) to bid on that availability in real time.[13]

[6] Mitchell Affidavit at para. 4.
[7] Mitchell Affidavit at para. 5.
[8] Mitchell Affidavit at para. 6.
[9] Mitchell Affidavit at para. 8.
[10] Mitchell Affidavit at paras. 9, 27.
[11] Mitchell Affidavit at paras. 10, 14. See also, Dionne Affidavit at paras. 32-33
[12] Mitchell Affidavit at para. 11.
[13] Mitchell Affidavit at paras 11-12, 14, 19. See also Dionne Affidavit at para. 11.

1. Vistar prioritizes high-value, proactive partners for its SSP.

15. Vistar provides an SSP for media owners to make their catalogue of inventory available to buyers to bid on.[14]

16. Vistar does not, however, partner with anyone who happens to own or manage a screen. Buyers rely on Vistar to provide a reliable catalogue of media inventory, including accurate descriptions of the likely number of times that their ads will be seen when displayed.[15]

17. Vistar accordingly prioritizes high-value media owners, and invests significant resources to onboard them.[16] Vistar evaluates potential SSP partners based on a range of factors, including but not limited to: (i) the scale and characteristics of the partners' media inventory, (ii) the extent to which that inventory will meet buyers' needs, and (iii) the partners' willingness and ability to increase the demand for their media inventory.[17] SSP partners are not passive – Vistar promotes its partners' media inventory, but Vistar also relies on and expects partners to have their own sales teams to promote their media assets to buyers.[18]

18. Vistar and its SSP partners share the revenue generated when a buyer purchases ad space.[19] The revenue share varies by customer and depends on factors including the likely value of the media owner's screens to buyers and the media owner's ability to increase demand for its inventory.[20]

19. In general, media owner partners can be distinguished from aggregators. Aggregators are generally companies that do not themselves own screens but instead control and sell an inventory

[14] Mitchell Affidavit at para. 14. See also, Dionne Affidavit at paras. 16-17.
[15] Mitchell Affidavit at para. 16.
[16] Mitchell Affidavit at para. 19.
[17] Mitchell Affidavit at para. 20.
[18] Mitchell Affidavit at para. 15.
[19] Mitchell Affidavit at para. 15.
[20] Mitchell Affidavit at para. 15.

collection of multiple smaller media owners. Vistar typically does not partner with aggregators because:

(a) aggregators typically are not able to provide sufficient assurances of the quality of the media offered; and

(b) aggregators typically do not have comprehensive sales teams to help drive the demand for their inventory.[21]

20. Vistar will, however, partner with aggregators when those concerns are sufficiently addressed.[22]

21. Vistar applies these criteria neutrally and consistently, which are intended to ensure reliability and effective promotion of media inventory to buyers. They are not intended to – and do not – prevent other media owners or technology companies from competing in the Canadian DOOH industry.[23]

2. Vistar offers non-exclusive, entirely optional software products to its SSP partners.

22. Vistar also offers SaaS products to its media owner clients in the Canadian DOOH industry for a monthly fee.[24] Vistar's two main SaaS products are:

(a) "Vistar Media Ad Server", an ad server technology that assists clients with executing advertising campaigns, including connecting the assets to an SSP;[25] and

[21] Mitchell Affidavit at para. 16
[22] Mitchell Affidavit at para. 17.
[23] Mitchell Affidavit at para. 18.
[24] Mitchell Affidavit at para. 21.
[25] Mitchell Affidavit at para. 21(a).

(b) "Cortex", a content management system (**CMS**) with which ad server technology can integrate to provide management, monitoring, remote deployment, troubleshooting, performance alerts, and application development.[26]

23. The use of Vistar's SaaS products is unrelated to – and not tied to – access to Vistar's SSP.[27] Vistar's SSP is fully integrated and compatible with other SaaS products, and Vistar's SaaS products are interoperable with non-Vistar SSPs.[28] In other words, Vistar's customers are not (and never have been) required to use Vistar's SaaS products to access Vistar's SSP (and *vice versa*).[29] In fact, more than 90% of Vistar's Canadian SSP partners do not use Vistar's SaaS products, but instead those of other providers, including Vistar's competitors.[30]

3. There is substantial and vigorous competition in the Canadian DOOH industry, which is a subsegment of the industry in which Vistar competes.

24. Canadian out-of-home advertising is an approximately $800 million industry, 60-70% of which is attributable to traditional out-of-home advertising, and 30-40% is attributable to DOOH advertising.[31] Vistar competes in the broader Canadian out-of-home advertising industry and not solely against DOOH players in a DOOH industry.[32] Further, approximately $100 million of the yearly DOOH advertising spend in Canada is attributable to programmatic, auction-based advertising solutions (as opposed to direct sales, which represent the majority of Canadian DOOH advertising spend).[33]

[26] Mitchell Affidavit at para. 21(b).
[27] Mitchell Affidavit at para. 23.
[28] Mitchell Affidavit at para. 24; Affidavit of Jordan Fraser sworn March 6, 2026 (the **Fraser Affidavit**), at para. 24.
[29] Mitchell Affidavit at para. 23, 25; Fraser Affidavit at para. 24.
[30] Mitchell Affidavit at para. 23.
[31] Mitchell Affidavit at para. 27.
[32] Mitchell Affidavit at para. 6.
[33] Mitchell Affidavit at para. 27.

25. The total programmatic advertising dollars spent in Canada through Vistar's SSP and DSP (combined) did not exceed [redacted] million in either 2024 or 2025, not even [redacted] of the broader Canadian DOOH industry.[34] Vistar's share of total SaaS revenues for DOOH in Canada is even smaller than its share of Canadian DOOH programmatic advertising revenue.[35] Vistar's revenue share has fallen in recent years.[36] Given the limited nature of the DOOH landscape in Canada, only one of Vistar's Canadian employees is responsible for managing relationships with media owners – the remainder are responsible for increasing demand by engaging with buyers.[37]

26. It follows that, contrary to 8X's unsubstantiated allegation,[38] even assuming there is a separate DOOH industry segment, Vistar is not the "dominant" market player in the Canadian DOOH advertising industry, nor is it even the largest.[39] Hivestack (recently acquired by Perion) operates Canada's largest SSP by advertising revenues and also has significant ad server offerings.[40] Broadsign (which recently acquired another significant industry player called Place Exchange) is either the second largest provider of Canadian DOOH technology solutions, or third largest behind Vistar.[41] Broadsign has the most prominent and widely adopted CMS platform in Canada.[42]

27. Given the competitive DOOH landscape, media owners, aggregators, and technology providers across the Canadian DOOH industry have routinely grown their businesses by accessing

[34] Mitchell Affidavit at para. 29.
[35] Mitchell Affidavit at para. 30.
[36] Mitchell Affidavit at para. 29.
[37] Mitchell Affidavit at para 28, footnote 2.
[38] See *e.g.*, Dionne Affidavit at paras. 31, 44, 61, 67, 69, 71, 118, 139, 178, 184, 189, 190, 233, 245, 247, 249, 251, 259, 263, 264, 268, 269, 271, 273.
[39] Mitchell Affidavit at para. 28.
[40] Mitchell Affidavit at paras. 28-29.
[41] Mitchell Affidavit at paras. 28-29.
[42] Mitchell Affidavit at paras. 28-29.

the SSPs and/or ad server technologies of other industry players, including without doing any business with Vistar.[43]

4. T-Mobile acquired Vistar in January 2025 for its global reach.

28. T-Mobile acquired Vistar in January 2025. T-Mobile is a United States-based telecommunications company with limited pre-existing operations in Canada. T-Mobile had (and still has) no business, operations or assets relevant to the Canadian DOOH industry that it could have consolidated with Vistar or leveraged for Vistar's benefit.[44]

29. Although 8X makes much of the price T-Mobile paid for Vistar, that price reflected Vistar's global value, not its position in the Canadian DOOH industry. At the time of the acquisition, Vistar had business, operations, and assets across the United States and elsewhere.[45]

B. 8X's behaviour between 2020 and 2022 in the United States forced Vistar's hand to terminate their relationship.

30. 8X was a Quebec-based company that was part of a media sales aggregator group called Ads Alfresco.[46] As of 2024, 8X is no longer an operating entity and holds no assets.[47]

1. 8X misrepresented its business when signing its September 2020 SSP Partnership Agreement with Vistar.

[43] Mitchell Affidavit at para. 32.
[44] Mitchell Affidavit at para. 37.
[45] Mitchell Affidavit at para. 38. See also, *e.g.*, Dionne Affidavit at paras. 8-9.
[46] Fraser Affidavit at paras. 11-12. See also, *e.g.*, Dionne Affidavit at para. 45.
[47] See Fraser Affidavit at para. 33; Fraser Affidavit, Exhibit J; Mitchell Affidavit at para. 51. See also, Dionne Affidavit at paras. 202-208.

31. Vistar and 8X executed an SSP partnership agreement in September 2020 (the **SSP Agreement**).[48] The SSP Agreement provided a one-year initial term and the right for either party to terminate on 90-days written notice thereafter, with or without cause.[49]

32. The SSP Agreement also contemplated, and 8X represented, that 8X would operate as a "publisher" (*i.e.*, a media owner, and not an aggregator or technology company), as set out in the recitals:

> WHEREAS, Vistar operates an advertising exchange (the "Exchange") enabling publishers, advertising networks and other parties seeking to buy or sell digital advertising inventory to engage in the purchase and sale of advertising inventory; and
>
> WHEREAS, pursuant to the terms herein, [8X Labs Inc.] desires to utilize the Exchange as a publisher…[50]

33. Vistar signed the SSP Agreement on the premise that 8X owned and operated 250 screens, and 8X claimed that number would quickly rise by approximately 500.[51]

34. 8X's characterization of its business in negotiations was not accurate,[52] which, as explained below, led to the termination of the SSP Agreement.

2. 8X failed to bring its own inventory online with Vistar and instead caused a Vistar partner to breach its contract.

35. In summer 2021, Vistar learned that 8X was operating media assets through Ads Alfresco's SSP account with Vistar and not making any of its inventory directly available on Vistar's SSP.[53] 8X

[48] Fraser Affidavit at para. 6.
[49] Fraser Affidavit at para. 8; Fraser Affidavit, Exhibit A.
[50] Fraser Affidavit at para. 9; Fraser Affidavit, Exhibit A, recitals.
[51] Fraser Affidavit at para. 10.
[52] See, *e.g.*, Dionne Affidavit at paras. 23, 34-38, 43, 45, 49.
[53] Fraser Affidavit at para. 11.

was instead attempting to bring third-party screens online in 8X's SSP account.[54] Rather than acting as a media owner as promised, 8X was operating as an aggregator.

36. One of the third-party media owners 8X had aggregated was Kolvanta, an American Vistar SSP client who had also agreed to purchase Vistar's ad server.[55] In summer 2021, Vistar began investigating Kolvanta's failure to make its regular monthly payment for Vistar's SaaS product and, in doing so, identified both Kolvanta's media inventory on 8X's account and that Kolvanta was using 8X's SaaS product instead of the Vistar ad server that Kolvanta had agreed to purchase.[56]

37. Vistar's concerns about these circumstances were, among other things:

(a) Kolvanta's breach of contract and failure to pay for Vistar's SaaS product;

(b) 8X's failure to bring its represented media inventory online within its SSP account, and its failure to market its assets (including not having a sales team as represented); and

(c) 8X's unilateral addition of third-party media assets onto Vistar's SSP to promote 8X's technology product – in other words, 8X provided media owners with a backdoor to access Vistar's SSP despite its representations during the parties' contractual negotiations that it was merely a media owner looking to sell its own screen time.[57]

38. Despite the contractual breach, Vistar attempted to salvage the relationship with Kolvanta. In a correspondence dated November 8, 2021, Vistar offered to reconfigure the revenue share given the

[54] Fraser Affidavit at para. 12.
[55] Fraser Affidavit at paras. 3-4; Dionne Affidavit at. para 89.
[56] Fraser Affidavit at paras. 3-4, 12.
[57] Fraser Affidavit at para. 13.

changed circumstances but maintain the SSP relationship.[58] Vistar did not prohibit Kolvanta from using 8X's technology – to the contrary, Vistar expressly offered to permit Kolvanta to continue using 8X's SaaS software alongside Vistar's SSP:[59]

> 8x may remain as your chosen technology partner, however any revenue share or partnership terms between Kolvanta and 8x will need to be handled independently of Vistar…

39. Over the course of negotiations, Kolvanta became non-responsive. Vistar repeatedly tried to follow up regarding the proposed terms, and not once stated that Kolvanta, or any other company, could not use 8X's SaaS product to integrate to Vistar's SSP.[60]

40. Because Kolvanta failed to respond, the relationship eventually dissolved.[61]

3. Given 8X's misrepresentations, Vistar terminated the SSP Agreement in late 2021-2022.

41. It became apparent to Vistar that 8X would not operate as contemplated by the SSP Agreement, including because 8X had no plans to operate as a media owner/publisher with a marketing team. 8X instead planned to leverage backdoor access to Vistar's SSP to build a customer base for 8X's SaaS product.[62] Therefore, following the SSP Agreement's initial one-year term, Vistar terminated on 90-days' written notice.[63]

42. Vistar's decision to terminate was solely in respect of the legitimate business concerns outlined above. As is clear from Vistar's communications with Kolvanta, Vistar did not object to

[58] See Fraser Affidavit, Exhibit B.
[59] Fraser Affidavit at para. 23; Fraser Affidavit, Exhibit B; Dionne Affidavit, Exhibit 20.
[60] Fraser Affidavit at para. 24.
[61] Fraser Affidavit at para. 26-27; Fraser Affidavit, Exhibit G.
[62] Fraser Affidavit at paras. 17-18.
[63] Fraser Affidavit at para. 19; Fraser Affidavit, Exhibit E.

8X's existence as a SaaS provider. Vistar did not terminate the SSP Agreement to exclude competitors from the Canadian DOOH industry, nor for any alleged 8X low pricing policy, which is nowhere described in the Dionne Affidavit (or otherwise).[64] Terminating 8X's access to the Vistar SSP did not preclude 8X from continuing to offer its SaaS products to media owners, nor did it prevent media owners from engaging with Vistar's (or any other) SSP through 8X's SaaS product – it simply required such media owners to directly partner with Vistar or have their inventory brought online through another Vistar-partner aggregator that had not misrepresented itself to Vistar.

43. 8X responded on February 1, 2022, alleging that Vistar's termination was a breach of the SSP Agreement and threatening legal action if Vistar did not reconsider.[65]

44. Vistar responded on February 7, 2022, reiterating its position and right to terminate, with or without cause, under the express terms of the SSP Agreement.[66] Vistar dissolved 8X's accounts from its SSP shortly thereafter and did not hear from 8X again until spring 2024.[67]

45. There is no evidence that 8X complained to the United States antitrust authorities, nor that it otherwise pursued legal remedies in the United States relating to any of this alleged conduct.

46. 8X acknowledged in responding to Vistar's informal motion to adduce responding evidence for this leave application that the above-described matters are not relevant "in respect of the Canadian market".[68] But 8X has not withdrawn its corresponding evidence.[69]

---

[64] Fraser Affidavit at paras. 22-23. See general references to a low pricing policy in the Dionne Affidavit at paras. 108, 110, 177, 182.
[65] Fraser Affidavit at para. 28; Fraser Affidavit, Exhibit H.
[66] Fraser Affidavit at para. 29; Fraser Affidavit, Exhibit I.
[67] Fraser Affidavit at para. 30.
[68] 8X's Response to Informal Motion to Adduce Evidence dated January 30, 2026 (**8X Response**), at p. 4.
[69] Vistar's Reply to Informal Motion to Adduce Evidence dated February 9, 2026 (**Vistar Reply**), at p. 3.

C. Despite 8X's prior conduct, Vistar entertained 8X's Canadian partnership request in 2024.

47. In late spring 2024, 8X approached Vistar's Canadian office about negotiating a new SSP partnership agreement.[70] Ads Alfresco had ended its aggregation business (including hosting 8X's inventory), so 8X was interested in listing its inventory directly.[71]

48. Based on the above-described history between Vistar and 8X, including among other things 8X's mischaracterization of its business and media inventory, its lack of in-house sales team, and its threat of legal action, Vistar was reluctant to engage in a new SSP partnership on standard terms.[72] Vistar conveyed this in a phone call on June 25, 2024.[73] Following 8X's further entreaties on that call, however, Vistar floated the possibility of a bespoke deal whereby 8X would also become a SaaS partner to cover the shortfall resulting from 8X's lack of inventory and in-house sales team.[74] This offer was made solely in the context of 8X's specific circumstances, including its problematic background with Vistar. Vistar does not generally offer partnerships on such terms.[75]

49. 8X rejected the proposal and no deal could be reached.[76] 8X's representatives threatened further legal action against Vistar.[77] Vistar and 8X had no further communications following the June 2024 call until 8X commenced this application almost 1.5 years later, on November 27, 2025.[78]

[70] Mitchell Affidavit at paras. 41-42.
[71] Dionne Affidavit at paras. 148-151, 156, 159; Mitchell Affidavit at para 42.
[72] Mitchell Affidavit at paras. 44-45.
[73] Mitchell Affidavit at para. 44.
[74] Mitchell Affidavit at para. 46.
[75] Mitchell Affidavit at para. 46; Dionne Affidavit, para 176.
[76] Mitchell Affidavit at para. 47.
[77] Mitchell Affidavit at para. 47.
[78] Mitchell Affidavit at para. 48.

D. Vistar continues to partner with companies operating 8X assets and products.

50. Since Vistar's last communication with 8X in June 2024, Vistar has continued to partner with other media companies that operate 8X's assets and ad server products.

51. For example, Vistar partnered with Network Communications of Northwest Florida, Inc. (**NetCom**), which approached Vistar in or around February 2025 about bringing its extensive media inventory onto Vistar's SSP in the United States.[79] NetCom had acquired assets from 8X in or around early October 2024.[80]

52. Another current Vistar SSP partner, Retail Fluent, informed Vistar in or around early 2025 that it planned to use 8X's ad server technology for its media network.[81]

PART III: ISSUES

53. This Tribunal should dispose of 8X's application for leave under section 103.1 of the *Competition Act* on two bases:[82]

(a) First, 8X's application is limitations-barred under section 103.1(8) of the *Competition Act*, because it was not brought within one year of the alleged conduct or practice having ceased;[83] and

[79] Fraser Affidavit at paras. 32-34.
[80] Fraser Affidavit at para. 33; Fraser Affidavit, Exhibit J. See also, Mitchell Affidavit at para. 51. In early 2025, FutureSign Multimedia Displays Inc., the agent of NetCom in Canada, confirmed to Vistar that NetCom had acquired 8X's media inventory: Mitchell Affidavit at para. 52.
[81] Fraser Affidavit at para. 35.
[82] *Competition Act,* RSC 1985, C-34 (the ***Competition Act***), s. 103.1(1).
[83] *Competition Act*, s. 103.1(8).

(b) Second, 8X has not met the test for leave set out in section 103.1 of the *Competition Act*. 8X has not provided sufficient credible evidence to give rise to a *bona fide* belief that:

(i) the alleged reviewable conduct could be the subject of an order under the applicable sections of the *Competition Act*; and

(ii) 8X's business has been directly and substantially affected (in whole or in part) by Vistar's alleged conduct.[84]

PART IV: LAW AND ARGUMENT

A. 8X's application is limitations-barred.

54. Section 103.1(8) of the *Competition Act* provides that any application for which leave is granted under section 103.1 "must be made no more than one year after the practice or conduct that is the subject of the application has ceased".[85]

55. 8X is out of time. As described at paragraph 49 above, the last alleged interaction between Vistar and 8X (*i.e.*, the time when the conduct underlying this application ceased) occurred in June 2024, well over one year before 8X commenced this application for leave on November 27, 2025.[86] 8X's casual approach to prosecuting this application stands in contrast to the diligence contemplated

[84] While section 103.1 of the *Competition Act* now contemplates a "Public Interest" Test for leave, 8X has expressly *not* sought leave on that basis. These responding submissions accordingly only address the "Affected Business" Test pursuant to which 8X has advanced its application for leave under section 103.1 of the *Competition Act*: *Martin v. Alphabet Inc., Google LLC et. al.*, 2026 Comp. Trib. 3 at para. 99.

[85] For reference, section 103.1 (1) of the *Competition Act* provides that "[a]ny person may apply to the Tribunal for leave to make an application under section 74.1, 75, 76, 77, 79 or 90.1…"

[86] The Dionne Affidavit also references a discussion with FutureSign alleging that Vistar seemingly indicating that 8X refused to integrate 8X owned/managed signage: see Dionne Affidavit at para. 187, Exhibit 41. Apart from that evidence being hearsay and not being the subject of 8X's proposed application, it also took place more than one year before 8X commenced this application for leave on November 27, 2025.

by the Supreme Court of Canada,[87] and prior applicants to this Tribunal. For example, the applicant in *Nadeau Poultry Farm Limited v. Groupe Westco Inc.* (***Nadeau***) sought leave alongside an application for an interim supply order within two months of being advised of an impending supply withdrawal that was the subject of its complaint.[88] 8X waited 17 months to bring its application for leave.

56. 8X has failed to file even its leave application within the timeline contemplated for filing its application. In emphasizing the finality of limitation periods and the importance of diligence,[89] the Supreme Court of Canada held in *CIBC v. Green* that courts may backdate filings through *nunc pro tunc* orders if an applicant has filed a request for leave within the contemplated limitation period.[90] But that is not the situation here.

57. Likewise, 8X cannot credibly argue that Vistar's alleged conduct has been somehow continuing. Vistar terminated the SSP Agreement in 2022, and the parties failed to reach a new partnership in June 2024. Since that time, 8X did not so much as communicate with Vistar. These circumstances cannot amount to continuing conduct: "actionable conduct is not continuing merely because it can be rectified or because the harm it causes is either continuing or delayed."[91] Rather, a "continuous act or omission requires a succession or repetition of separate acts of the same character."[92]

---

[87] *CIBC v. Green,* 2015 SCC 60 [***CIBC***] at para. 58.
[88] See, *e.g.*, *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.,* 2008 Comp. Trib. 7 [***Nadeau***] at paras. 11-13; *Nadeau Poultry Farm Limited v. Groupe Westco Inc.,* 2008 Comp. Trib. 16 at para. 5. Similarly, see *Used Car Dealers Assn. of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10 at para. 13, noting ongoing negotiations following initial indications of membership termination, termination on June 17, 2011, and an affidavit being sworn in respect of the application by June 29, 2011 (see para. 4).
[89] *CIBC* at para. 58.
[90] *CIBC* at paras. 53-54.
[91] *Huether v. Sharpe,* 2025 ONCA 140 [***Huether***] at para. 43.
[92] *Huether* at para. paras. 44-45. citing *Sunset Inns Inc. v. Sioux Lookout (Municipality),* 2012 ONSC 437 at para. 22, aff'd 2012 ONCA 416, and *Bowes v. Edmonton (City of),* 2007 ABCA 347 at paras. 173-174. In the contract context, see

58. There is simply no reason that 8X could not have sought leave under section 103.1 of the *Competition Act* by June 2025, as it was required to do under the applicable limitation period. Even if discoverability principles applied to section 103.1(8), 8X knew or ought to have known about all of the material facts underlying its application by June 2024.[93]

59. 8X's application for leave under section 103.1 should be dismissed on this basis alone.

B. 8X has not met the standard required under Section 103.1.

60. 8X has failed under section 103.1 of the *Competition Act* to adduce "sufficient credible, cogent and objective evidence"[94] to give rise to a *bona fide* belief that: (i) its business has been directly and substantially affected (in whole or in part) by the alleged reviewable practice; and (ii) such practice could be the subject of an order of the Tribunal.[95]

1. 8X's only factual evidence is the improper affidavit of its counsel that should not be admitted.

61. 8X relies solely on the Dionne Affidavit. But Mr. Dionne is 8X's active counsel in this matter.[96] Rule 82 of the *Federal Court Rules* explicitly precludes a lawyer from furnishing an affidavit and also arguing the matter, without leave from the court.[97]

Nygard International Partnership v. Hudson's Bay Company, 2018 ONSC 5143 at paras. 81-83. See also, *Huether* at para. 40, referencing *McIntosh v. Parent* (1924), 1924 CanLII 401 (Ont CA) at 424.

[93] *Grant Thornton LLP v. New Brunswick,* 2021 SCC 31 at paras. 29, 42.

[94] *JAMP Pharma Corporation v. Janssen Inc.*, 2024 Comp. Trib. 8 [***JAMP***] at para. 16.

[95] The threshold is lower than a balance of probabilities, but greater than a mere possibility per *JAMP* at para. 16, citing *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28 [***Audatex***] at para. 45.

[96] See, *e.g.*, 8X Response; Letter from F. Dionne to Competition Tribunal dated January 26, 2026; 8X's Notice of Application for Leave (Pursuant to section 103.1 of the *Competition Act*) dated November 27, 2025; 8X's Memorandum of Fact and Law (Pursuant to Section 103.1 of the *Competition Act*) dated November 27, 2025 (**8X Memo**).

[97] *Federal Court Rules* (SOR/98-106), r. 82. The *Competition Tribunal Rules* (SOR/2008-141) provide at rule 34(1) that the *Federal Court Rules* may be followed in circumstances (as here) where an issue is not addressed by the *Competition Tribunal Rules*.

62. As the Federal Court of Appeal has identified, generally, "it is improper for a solicitor to compromise his independence by acting in a proceeding in which a member of his firm has given an affidavit on a point of substance."[98] This principle is "well grounded in the various codes of conduct governing the lawyers of this country, as well as logic."[99] Courts considering such affidavits are accordingly "reluctant to accept or give weight to evidence where an affidavit addresses matters in dispute or expresses opinions."[100]

63. As the sole affidavit relied upon by 8X in this application, the Dionne Affidavit goes directly to the core matters in dispute and, as discussed below, includes significant improper opinion evidence. There is no basis to exempt Mr. Dionne from the normal standard applied to counsel. The Dionne Affidavit should not be admitted and the application for leave should be dismissed on this basis.

2. The Dionne Affidavit includes inadmissible and uncogent hearsay and opinion evidence.

64. Alternatively, the Dionne Affidavit includes hearsay and opinion evidence. As a general rule, including in Competition Tribunal proceedings, a lay witness may give evidence of facts based on knowledge, observation, and experience.[101] But much of the evidence advanced in the Dionne Affidavit is supposition and speculation, entirely unrelated to his knowledge, observation and experience.

---

[98] *Cross-Canada Auto Body Supply (Windsor) Ltd. v. Hyundai Auto Canada,* 2006 FCA 133 [***Hyundai***] at para. 7.
[99] *Hyundai* at para. 7.
[100] *Mobile Telesystems Public Stock Company v. Canada (Attorney General),* 2025 FC 181 at para. 28.
[101] *The Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 [***VAA***] at paras. 145-146. *Toronto Real Estate Board v. Canada (Commissioner of Competition),* 2017 FCA 236 at para. 78, citing *Competition Tribunal Rules*, rules 68(2) and 69(2). Generally, the rules of evidence applicable in court apply to the Competition Tribunal: *VAA* at paras. 142-143.

(a) The Dionne Affidavit contains extensive improper hearsay.

65. The Dionne Affidavit includes hearsay, often multiple-level hearsay, to support the most critical elements of 8X's application.

66. Mr. Dionne asserts without any foundation or corroboration that "Vistar is the leading and dominant player in the DOOH market",[102] and that Vistar's "dominant position in the market" requires "all prospective customers" to have access to Vistar's SSP.[103] This allegation is the lynchpin to 8X's conflation of Vistar with Google. But Mr. Dionne provides no foundation for these statements, except attaching at paragraph 69 and Exhibit 12 an email from someone named "Brian Wyatt", who Mr. Dionne asserts is an "expert in DOOH advertising".[104] Mr. Wyatt's assertions about Vistar's alleged competitive position quote from an unidentified "major agency buying group",[105] thereby constituting double hearsay from an unidentified source, which is inadmissible, even if not proffered for the truth of its contents (which it is).[106]

67. Such evidence is, in any event, not cogent,[107] including because Mr. Wyatt's email opines on Vistar's market position ***in the United States***.[108] On top of being double hearsay, this evidence has nothing to do with Canada.

68. Separate from the admissibility problems underlying this evidence, 8X has simply failed to put forward sufficient non-speculative evidence about Vistar's competitive position in the Canadian

---

[102] See *e.g.*, Dionne Affidavit at para. 61. See also, Dionne Affidavit at para. 31. Mr. Dionne also includes at paragraph 150, Exhibit 33 revenues from Ads Alfresco, noting that 45% came from Vistar. Notwithstanding any issues with the accuracy or reliability of that information, that is not evidence of Vistar's general competitive position.
[103] See *e.g.*, Dionne Affidavit at para. 44.
[104] Dionne Affidavit at para. 69. Mr. Wyatt is also identified at paragraph 47 of the Dionne Affidavit as a former leader of Ads Alfresco.
[105] Dionne Affidavit at Exhibit 12.
[106] See *Harris v. Bayerische Motoren Werke Aktiengesellschaft,* 2019 ONSC 5967 at paras. 41-48; *Syngenta AG v. Van Wijngaarden*, 2025 BCCA 334 at para. 69.
[107] See *JAMP* at paras. 134-135.
[108] See *e.g.*, Dionne Affidavit at para. 69; Dionne Affidavit, Exhibit 12.

DOOH industry. The Tribunal dealt with a similar problem in *CarGurus, Inc. v. Trader Corporation* (***CarGurus***), wherein the applicant failed to provide any "clear explanation" for how it identified the respondents' alleged 42.5% market share. The Tribunal stated:

> I appreciate that there will inevitably be incomplete information on some topics at the application for leave stage… However, sufficient and credible information on the magnitude of the supply of the product at stake and on the proportion represented by the supplier refusing to supply are fundamental and basic elements needed by the Tribunal in order to be able to make a determination on whether the evidence provides the basis for the Tribunal to form a *bona fide* belief of a direct and substantial effect pursuant to subsection 103.1(7) of the Act.[109]

69. The same conclusion applies here.

70. One additional example of Mr. Dionne's reliance on multiple-level hearsay is his assertion at paragraph 195 that "[a]t least one other technology company in Canada has been targeted by Vistar's unfair and restrictive trade practices".[110] Mr. Dionne includes at Exhibit 42 an email he had with the purported CEO of a company called AdStash, who asserts that Vistar directly solicited AdStash's "venue partners".[111] In other words, Mr. Dionne gives hearsay evidence that AdStash's CEO asserts that AdStash's unidentified venue partners assert that Vistar solicited their business.

71. Apart from such evidence being inadmissible multiple-level hearsay, there is no allegation in this application that Vistar engaged in improper solicitation of competitors' partners.

72. The correspondence from Ad Stash's CEO dated March 2022 goes on to indicate that he would not participate in filing an antitrust complaint against Vistar in the United States with respect to the conduct at issue,[112] indicating that the issue was unrelated to the Canadian market.

---

[109] *CarGurus, Inc. v. Trader Corporation*, 2016 Comp. Trib. 15 [***CarGurus***] at para. 76, citing *Audatex* at para. 68.
[110] Dionne Affidavit, para. 195.
[111] Dionne Affidavit, para 196, Exhibit 42
[112] Dionne Affidavit, Exhibit 42.

73. The following paragraphs of the Dionne Affidavit contain improper hearsay and cannot provide the basis for a *bona fide* belief as contemplated by section 103.1 of the *Competition Act*: paragraphs 69, 104, 137, 139, 192, 195-197, 203, 226, 254, and 270.

(b) The Dionne Affidavit contains extensive improper opinion "evidence".

74. Like his unsupported assertion of Vistar's competitive position in the Canadian DOOH industry, Mr. Dionne regularly swears to unsubstantiated opinions about which he has no personal knowledge. For example, Mr. Dionne opines that T-Mobile's acquisition of Vistar will increase Vistar's "leading and dominant position",[113] and that it reflects Vistar's "aggressive, predatory, and illegal practices".[114]

75. Mr. Dionne also often swears to his opinion about Vistar's intentions, including asserting that "for Vistar, it was more important to weaken 8X and force it out of the ad server market than to earn additional revenue through its SSP division".[115]

76. In a particularly egregious example, the Dionne Affidavit states, "[i]t is my opinion… that the tied selling engaged in by the Respondent is and was not reasonable having regard to technological relationships between or among the products to which it applies".[116]

77. The following paragraphs and exhibits of the Dionne Affidavit contain improper opinion evidence and cannot provide the basis for a *bona fide* belief as contemplated by section 103.1 of the *Competition Act*: paragraphs 31, 44, 61, 67-68, 70, 71, 110-112, 117-119, 128, 139, 140, 149-150, 157-158, 169, 175-184, 189-191, 195, 199-201, 205-206, and 210-281.

---

[113] See *e.g.*, Dionne Affidavit at paras. 71, 249-250.
[114] See *e.g.*, Dionne Affidavit at para. 265.
[115] Dionne Affidavit at para. 119.
[116] Dionne Affidavit at para. 176.

78. All of this (among other) evidence in the Dionne Affidavit is incorrect and is directly contradicted by Vistar's more direct and cogent responding evidence that addresses these matters, as summarized in the above "Facts" section of this memorandum.

79. As an example, in response to Mr. Dionne's uncorroborated suppositions regarding Vistar's purported "power" or "dominance" over the Canadian DOOH industry, Vistar provides direct responding evidence that:

(c) Vistar is not dominant, and not even the leading player in the Canadian DOOH industry, with less than [redacted] of the advertising dollars spent on DOOH programmatic advertising solutions in Canada through its SSP and DSP combined, which revenue share has recently declined;[117] and

(d) T-Mobile neither had, nor has, any material business, operations or assets in the Canadian DOOH industry to consolidate with Vistar in connection with its acquisition.[118]

80. In these circumstances, to the extent necessary, Vistar's evidence should be preferred over the Dionne Affidavit.[119] Additional deficiencies in 8X's evidence are addressed below.

3. The alleged conduct cannot be the subject of an order because it has nothing to do with competition in the Canadian market.

[117] See *e.g.*, Mitchell Affidavit at para. 29. See also, Mitchell Affidavit at paras. 28-32, describing the significant and direct competition Vistar faces for all its relevant offerings in the Canadian DOOH industry.
[118] See Mitchell Affidavit at para. 37.
[119] The Tribunal preferred the respondent's evidence, which "squarely contradicted" the applicant's lack of direct evidence on point, in *CarGurus* at para. 122.

81. Generally, 8X's application for leave must fail because 8X cannot establish that any alleged conduct of Vistar will adversely or substantially impact competition in Canada.[120] This requirement applies to all of the *Competition Act* sections cited upon by 8X.[121]

82. 8X has failed to provide sufficient non-speculative and cogent evidence upon which the Tribunal could conclude that any of Vistar's conduct substantially or adversely impacted competition.[122] Vistar is not the leading player for either its SSP or SaaS products in Canada. This is far from the Google case (where Google's market share was alleged as high as 90%)[123] or *Nadeau* (where the applicant specifically identified that the respondents had about 75% market share).[124]

83. 8X's allegation that Vistar's conduct targeted 8X is not consistent with the *Competition Act*'s protection of competition generally.[125] 8X must provide clear, non-speculative and cogent evidence of harm to competition, not only harm to itself.[126] Viewed from this perspective, 8X's evidence is lacking.

84. First, much of 8X's evidence focuses on events in the United States five years ago, not on competition in Canada today.

85. Second, there is no evidence of 8X's competitive presence in Canada such that the Tribunal could conclude that its exit has had any impact on competition whatsoever. 8X has not provided any

---

[120] An "adverse" effect is less than a "substantial" effect. In the context of a refusal to deal, to create an adverse effect, the conduct must place the participant in a position of created, enhanced or preserved market power: *B-Filer Inc. et al. v. The Bank of Nova Scotia,* 2006 Comp. Trib. 42 at paras. 208, 210.
[121] See *Competition Act,* ss. 75(1)(e), 76(1)(b), 77(2) and 79(1).
[122] *CarGurus* at paras. 132-133
[123] See paragraph 6 of the Notice of Application in the Google matter, noting Google's variably 50% to 90% market share for the products at issue in that proceeding.
[124] *Nadeau* at para 32.
[125] See, *Competition Act*, s. 1.1: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy…"
[126] See *Audatex* at para. 50, citing *Symbol Technologies Canada ULC v. Barcode Systems Inc.,* 2004 FCA 339 at para. 23; *Kobo Inc. v. The Commissioner of Competition,* 2014 Comp. Trib. 2 at para. 32.

evidence that it had any significant or meaningful share of the ad server industry in Canada or that it was poised to grow that market share. It has provided no evidence of any significant growth to its ad server business in Canada before the relevant interactions with Vistar, nor has it provided evidence that any new Canadian customers would have done business with 8X but-for its lack of partnership with Vistar.[127] 8X instead argues, without specifics, that it at some point "re-focused its business in Canada".[128] 8X sold all of its assets in October 2024.[129] Again, this is not a case like *Nadeau* where the applicant, who was a major competitor in the underlying market,[130] moved diligently to address an allegedly existential concern.[131]

86. Third, 8X's evidence (confirmed by Vistar) is that other operating companies have acquired 8X's assets.[132] If 8X's SaaS technology is as good as 8X claims, there is no reason that these companies cannot monetize that technology and provide the competition that 8X speculates is lacking.

87. For all these reasons, 8X has failed to provide non-speculative and cogent evidence of any adverse impact on competition in Canada. Because an adverse or substantial effect on competition is required for 8X to obtain an order, 8X's application for leave fails on this basis alone.

88. Separately, as set out below, 8X has not demonstrated with sufficient credible evidence that Vistar's alleged conduct could be the subject of an order of the Tribunal under the other elements of sections 79, 75, 76 or 77 of the *Competition Act.*

(a) Vistar neither has a dominant market share nor abused its market position in violation of section 79.

---

[127] See, *e.g.*, 8X Memo at para. 25; Dionne Affidavit at para. 66.
[128] See 8X Memo at para. 26; Dionne Affidavit at para. 174.
[129] See, *e.g.*, Fraser Affidavit at para. 33; Fraser Affidavit, Exhibit J. See also, Mitchell Affidavit at para. 51.
[130] *Nadeau* at para. 36.
[131] *Nadeau* at paras. 11-13.
[132] See, *e.g.*, Dionne Affidavit at paras. 202-208. See also, Fraser Affidavit at para. 33 and Mitchell Affidavit at para. 51.

89. Section 79 of the *Competition Act* can be summarily disposed of because Vistar is not dominant in the Canadian DOOH industry (even assuming DOOH is a separate market in which a "market power" determination could apply). Section 79 requires that the respondent hold a "*substantial*" degree of market power: "no *prima facie* finding of dominance would arise when it is determined that the respondent's share of the relevant market is below 50%".[133] As described above, Vistar makes up far less than 50% of the Canadian DOOH industry,[134] and 8X has provided no rationale to establish Vistar's purported substantial market power beyond Mr. Dionne's unsupported assertion of dominance. 8X's only evidence of Vistar's industry presence is: (i) stale (*i.e.*, from 2022); (ii) limited to 8X's experience as opposed to reflecting a broader industry perspective; (iii) assumes that any market is limited to programmatic DOOH advertising when most DOOH advertising occurs through direct purchases; and (iv) still does not rise to the 50% level described in the Tribunal jurisprudence.[135] Furthermore, 8X's evidence largely relates to events in the United States, which 8X has itself acknowledged is not relevant "in respect of the Canadian market."[136]

90. Separately, 8X has failed to demonstrate sufficient credible (or any) evidence that Vistar engaged in any "practice" of anti-competitive acts. A "practice" is "more than an isolated act".[137] There is no evidence of any impugned "practice" – only a single instance of Vistar declining to re-partner with 8X in 2024 for idiosyncratic and legitimate business reasons.[138]

91. Section 79 also considers the purpose of the impugned practice, specifically "whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a

---

[133] *The Commissioner of Competition v. The Toronto Real Estate Board,* 2016 Comp. Trib. 7 [***TREB***] at paras. 171-174.
[134] See, *e.g.*, Mitchell Affidavit at paras. 27-29.
[135] See, *e.g.*, Dionne Affidavit at paras. 149-150, 200; Dionne Affidavit, Exhibit 33.
[136] 8X Response at p. 4.
[137] *TREB* at para. 273.
[138] See, *e.g.*, Mitchell Affidavit at paras. 44-45.

competitor".[139] Beyond Mr. Dionne's improper opinion evidence, there is no evidence of anticompetitive intent by Vistar – to the contrary, Vistar's evidence establishes that it questioned renewing its relationship with 8X because of 8X's prior mischaracterization of its business and threats to sue Vistar.[140]

(b) 8X has not shown a need for access to Vistar's SSP or that Vistar refused to deal with 8X in violation of section 75.

92. In addition to requiring evidence of an adverse effect on competition, section 75 of the *Competition Act* requires 8X to demonstrate with sufficient credible evidence that, among other things:

> (e) 8X has been substantially affected in the whole or part of its business, or has been precluded from carrying on business, due to its inability to obtain adequate supply of the product (*i.e.*, SSP service) anywhere in the market on usual trade terms;
>
> (f) 8X has been unable to obtain adequate supply of the product because of insufficient competition among suppliers of the product in the market; and
>
> (g) 8X has been willing to meet Vistar's usual trade terms for the product.[141]

93. First, there is no evidence that 8X required direct access to Vistar's SSP to provide its ad server technology to customers or otherwise to make its limited inventory available to advertisers. As explained above, Vistar's SSP is operable with 8X's ad server software.[142] 8X could also use

[139] *TREB* at para. 272.
[140] Mitchell Affidavit at paras. 44-45.
[141] *Competition Act*, s. 75.
[142] See, *e.g.*, Mitchell Affidavit at paras. 23-25; Fraser Affidavit at para. 24.

other Canadian SSP platforms to operate its ad server business, as it did with Broadsign and Hivestack in 2020.[143]

94. Second, there is no lack of competition in Canada. The Canadian DOOH industry includes multiple major competitors to Vistar, who make up [redacted] of all SSP revenue.[144]

95. Third, 8X cannot meet usual trade terms with Vistar for an SSP partner because, as discussed above, 8X had limited and low-value value media inventory, no sales staff to promote that inventory, and was unilaterally onboarding third-party inventory. As described above, Vistar offered a proposal to 8X in 2024 on bespoke terms intended to accommodate 8X's unique circumstances and the parties' contentious history.[145]

(c) Vistar has never discriminated against 8X because of a low-pricing policy in violation of section 76.

96. In addition to the adverse effect on competition requirement, section 76 of the *Competition Act* requires 8X to demonstrate with sufficient credible evidence that Vistar refused to supply a product to or has otherwise discriminated against 8X because of a low-pricing policy.[146]

97. There is no evidence that 8X offered its ad server technology at a low price. Mr. Dionne states that 8X's ad server agreements involved a revenue share arrangement, but does not identify the amount.[147] That is not enough to show a low-pricing policy. Depending on the amount of revenue

[143] See, *e.g.*, Dionne Affidavit at paras. 51, 54, 59, 153.
[144] See, *e.g.*, Mitchell Affidavit at paras. 23-25.
[145] See, *e.g.*, Mitchell Affidavit at para. 46.
[146] *Competition Act*, s. 76.
[147] See Dionne Affidavit at paras. 65-66. See also, Mitchell Affidavit at para. 33.

generated and the share split, 8X's ad server may have been more expensive for its clients than Vistar's (and other competitors') SaaS products.[148]

98. Mr. Dionne's limited evidence mirrors the facts in *CarGurus*:

> CarGurus must first provide evidence on its own low pricing policy. In this case, the evidence offered in that respect is limited, at best unclear and uncertain, and not convincing. CarGurus simply states in the Blue Affidavit and the Blue Copyright affidavit that it offers its services either for free or for a lower cost than Trader. Surprisingly, no material evidence has been provided on the actual pricing offered by CarGurus, despite the fact that the existence of a low pricing policy is a key element of its application under section 76.[149]

99. In any event, there is no evidence that Vistar declined to enter a new SSP partnership with 8X in 2024 because of any purported low-pricing policy. Vistar had legitimate concerns about 8X's business integrity, including because of its mischaracterization of its business in 2020 and its threats to commence baseless legal action. Mr. Dionne speculates that Vistar was concerned about pricing because of earlier events that took place exclusively in the United States, which 8X has itself acknowledged are not relevant for this application.[150] In any event, Mr. Dionne's speculation is undercut by that fact that Vistar made its SSP interoperable with 8X's ad server technology.[151]

100. Once again, Mr. Dionne's bald assertions about his self-serving belief as to Vistar's intentions, and Vistar's direct responding evidence, are analogous to *CarGurus*:

> [N]o direct evidence has been provided by CarGurus such as correspondence from Trader or internal notes reflecting discussions to that effect with Trader, showing that Trader's refusal to supply the Trader Vehicle Listings is motivated or caused in any way by CarGurus' low pricing policy. I would add that not only has CarGurus failed to provide direct evidence bearing on Trader's motives, but its claim in that respect has been squarely contradicted by Mr. Dunbar in the Dunbar Affidavit, where Mr.

[148] See Mitchell Affidavit at para. 33.
[149] *CarGurus* at para. 112.
[150] See, 8X Response at p. 4.
[151] See, *e.g.*, Fraser Affidavit at para. 35; Fraser Affidavit, Exhibit B.

Dunbar denied that Trader was motivated in any way by CarGurus' low pricing policy.[152]

(d) Vistar has never tied its SSP and SaaS products together in violation of section 77.

101. In addition to market impact, a finding of "tied selling" under section 77 of the *Competition Act* requires 8X to demonstrate with sufficient credible evidence that:

(a) Vistar, as a supplier of a product, engaged in a "practice" of imposing as a condition of supplying the product to 8X (as a customer), a requirement that 8X buy another one of Vistar's products; and

(b) the alleged tied selling:

(i) impeded 8X's entry or expansion into the relevant market;

(ii) impeded the introduction or expansion of sales of a product into the relevant market; or

(iii) had some other exclusionary effect in the relevant market.[153]

102. 8X has failed to demonstrate sufficient credible (or any) evidence for the elements of tied selling. Vistar's proposal to re-partner with 8X if 8X purchased Vistar's SaaS product was a bespoke

[152] *CarGurus* at para. 122.
[153] *Competition Act*, s. 77.

offer made based on the parties' unique circumstances and history.[154] As Mr. Dionne himself swears, Vistar did not have a "practice" of tied selling:

> [the tying arrangement was] absent from the dealing between [Vistar] and competitors of 8X, including without limitation FutureSign and VSI, which were granted access to the [Vistar] SSPs without a tied requirement of licensing the [Vistar] CMS ad server.[155]

103. Nor did Vistar impose a "condition" on 8X to purchase its SaaS products. Vistar only proposed that approach as an option to facilitate the SSP re-partnership in circumstances in which Vistar would normally have declined such a partnership, and in which 8X insisted.[156]

104. There is also no evidence that 8X was poised to expand into the Canadian ad server market. 8X purports to have "re-focused" its operations in Canada for at least 3 years prior to the alleged tied-selling conduct in 2024, and yet it has provided no evidence of any significant growth (or projected growth) of its business during that time.[157]

4. 8X has not been substantially affected by any of Vistar's actions.

105. Though 8X's business has apparently degraded, it has not connected that degradation to the alleged conduct of Vistar. At the leave application stage, there must be sufficient credible evidence of a causal relationship between the action of the supplier and the business consequences of the applicant.[158]

106. Contrary to any connection between Vistar's conduct and the adverse consequences to 8X, the Dionne Affidavit emphasizes the importance of 8X's relationship with Ads Alfresco, through

---

[154] See Mitchell Affidavit at para. 46.
[155] Dionne Affidavit, para 176.
[156] Mitchell Affidavit at para. 46.
[157] See, *e.g.*, 8X Memo at para. 25; Dionne Affidavit at paras. 141, 174.
[158] *CarGurus* at para. 87.

which 8X's inventory was, for years, made available on SSPs, including Vistar and Broadsign.[159] Mr. Dionne asserts that he only sought to re-partner with Vistar "[w]hen Ads Alfresco decided to exit in May 2024 the programmatic DOOH market in Canada".[160]

107. 8X's request to re-partner, and Vistar's corresponding response, were only symptoms of Ads Alfresco's "exit". From February 2022 until March 2024, 8X carried on business despite no engagement with Vistar except through Ads Alfresco's aggregation of 8X's screens. Mr. Dionne's assertion in this context that Vistar's June 2024 rejection of 8X's request to re-partner constituted "a final blow in the Canadian market, with the intention of eliminating 8X's competition" is contradicted by the factual record.[161]

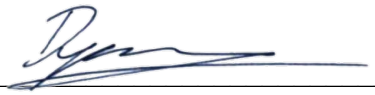
108. There is no causation between Vistar's conduct and any consequences to 8X. 8X has also failed to show credible evidence that any customers or potential customers refused to use its technology because of its limited access to Vistar's SSP. In these circumstances, 8X cannot satisfy its burden to demonstrate the causal link between Vistar's conduct and 8X's adverse business consequences.

PART V: REQUESTED RELIEF

109. Vistar requests an Order: (i) dismissing the application for leave to proceed with the proposed application under section 103.1 of the *Competition Act*; and (ii) awarding Vistar its costs of the application for leave.

[159] See *e.g.*, Dionne Affidavit at paras. 45-54.
[160] See, *e.g.*, Dionne Affidavit at para. 148.
[161] Dionne Affidavit, para 183.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March 2026.



BENNETT JONES LLP
Emrys Davis (LSO# 57391B)
Ethan Schiff (LSO# 70448W)
Dylan Yegendorf (LSO# 85016M)
Lawyers for the Respondent

SCHEDULE "A" – LIST OF AUTHORITIES

A. Legislative History and Secondary Authorities

B. Judicial Authorities

1. *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28.
2. *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42.
3. *Bowes v. Edmonton (City of)*, 2007 ABCA 347.
4. *CarGurus, Inc. v. Trader Corporation*, 2016 Comp. Trib. 15.
5. *CIBC v. Green*, 2015 SCC 60.
6. *Cross-Canada Auto Body Supply (Windsor) Ltd. v. Hyundai Auto Canada*, 2006 FCA 133.
7. *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31.
8. *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967.
9. *Huether v. Sharpe*, 2025 ONCA 140.
10. *JAMP Pharma Corporation v. Janssen Inc.*, 2024 Comp. Trib. 8.
11. *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 2.
12. *Martin v. Alphabet Inc., Google LLC et. al.*, 2026 Comp. Trib. 3.
13. *McIntosh v. Parent* (1924), 1924 CanLII 401 (Ont CA) at 424.
14. *Mobile Telesystems Public Stock Company v. Canada (Attorney General)*, 2025 FC 181.
15. *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2008 Comp. Trib. 16.
16. *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 7.
17. *Nygard International Partnership v. Hudson's Bay Company*, 2018 ONSC 5143.
18. *Sunset Inns Inc. v. Sioux Lookout (Municipality)*, 2012 ONCA 416.
19. *Sunset Inns Inc. v. Sioux Lookout (Municipality)*, 2012 ONSC 437.
20. *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339.
21. *Syngenta AG v. Van Wijngaarden*, 2025 BCCA 334.
22. *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7.

23. *The Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp. Trib. 6.

24. *Toronto Real Estate Board v. Canada (Commissioner of Competition)*, 2017 FCA 236.

25. *Used Car Dealers Assn. of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10.

C. Enactments (Textual Extracts)

Federal Court Rules, SOR/98-106

Use of solicitor's affidavit

82 Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

Competition Act, RSC 1985, C-34

Purpose of Act

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

Refusal to Deal

Jurisdiction of Tribunal — cases of refusal to deal

75 (1) The Tribunal may, on application by the Commissioner or a person granted leave under section 103.1, order one or more suppliers of a product, including a means of diagnosis or repair, in a market to accept a person as a customer, or to make the means of diagnosis or repair available to a person, within a specified period and on the terms that the Tribunal considers appropriate if the Tribunal finds that

> **(a)** the person is substantially affected in the whole or part of their business or is precluded from carrying on business due to their inability to obtain adequate supplies of the product anywhere in the market on usual trade terms;
>
> **(b)** the person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
>
> **(c)** the person is willing and able to meet the usual trade terms of the supplier or suppliers of the product;
>
> **(d)** the product is in ample supply or, in the case of a means of diagnosis or repair, can be readily supplied; and
>
> **(e)** the refusal to deal is having or is likely to have an adverse effect on competition in a market.

Price maintenance

76 (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

Exclusive Dealing, Tied Selling and Market Restriction

Definitions

77 (1) For the purposes of this section,

exclusive dealing means

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

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

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

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

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

tied selling means

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

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

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

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

Exclusive dealing and tied selling

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

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

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

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

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

Abuse of Dominant Position

Definition of anti-competitive act

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

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

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would

otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

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

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market; and

(k) directly or indirectly imposing excessive and unfair selling prices.

Prohibition if abuse of dominant position

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

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

(b) conduct

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

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

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

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

Granting leave – sections 75, 77, 79 or 90.1

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

Granting Leave to make application under section 76

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 74.1, 75, 76, 77, 79 or 90.1 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

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

Questions as to practice or procedure

34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Courts Rules* may be followed.

List of documents and witness statements

68 (1) The applicant shall, at least 60 days before the commencement of the hearing, serve on every other party and on all intervenors

> **(a)** a list of documents on which the applicant intends to rely at the hearing, noting any waivers of privilege claimed in regard to those documents; and
>
> **(b)** witness statements setting out the lay witnesses' evidence in chief in full.

Content of witness statements

(2) Unless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents.

Response

69 (1) Each respondent shall, at least 30 days before the commencement of the hearing, serve in response on every other party and on all intervenors

> **(a)** a list of documents on which the respondent intends to rely at the hearing, noting any waivers of privilege claimed in regard to those documents; and
>
> **(b)** witness statements setting out the lay witnesses' evidence in chief in full.

Content of witness statements

(2) Unless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents.

Court File No. CT-2025-006

COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an applicationby 8X Labs Inc. for one or more orders pursuant to section 75 of the *Competition Act*;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 76 of the *Competition Act*;

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 77 of the *Competition Act*.

AND IN THE MATTER OF an application by 8X Labs Inc. for one or more orders pursuant to section 79 of the *Competition Act*.

B E T W E E N:

8X LABS INC.

Applicant

- and -

VISTAR MEDIA INC.

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

BENNETT JONES LLP
3400 One First Canadian Place
Toronto, ON M5X 1A4

Emrys Davis (LSO# 57391B)
Email: davise@bennettjones.com

Ethan Schiff (LSO# 70448W)
Email: schiffe@bennettjones.com

Dylan Yegendorf (LSO# 85016M)
Email: yegendorfd@bennettjones.com

Telephone: 416-863-1200
Facsimile: 416-863-1716

Lawyers for the Respondent,
Vistar Media Inc.