Competition Tribunal **Tribunal de la concurrence**

Citation: *Commissioner of Competition v Google Canada Corporation and Google LLC*, 2026 Comp Trib 17
File No.: CT-2024-010
Registry Document No.: 262

PUBLIC VERSION – SAME AS CONFIDENTIAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

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

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

BETWEEN:

Commissioner of Competition
(applicant)

and

Google Canada Corporation and Google LLC
(respondents)

Dates of hearing: March 10 and 13, 2026
Before: Justice Andrew D. Little (Chairperson)
Date of Reasons for Order and Order: March 25, 2026

ORDER AND REASONS

(Refusals Motions)

[1] These Reasons address motions by the applicant ("Commissioner") and by the respondents Google Canada Corporation and Google LLC (together, "Google") to compel answers to questions refused at the examinations for discovery in this proceeding.

[2] The Commissioner commenced this proceeding by Notice of Application dated November 28, 2024 (amended July 8, 2025). The Commissioner alleges that Google has engaged, and continues to engage, in certain activities related to online advertising that constitute reviewable conduct under section 79 of the *Competition Act*. On February 14, 2025, Google filed its Response opposing the Commissioner's allegations. On March 28, 2025, the Commissioner filed a Reply. As the pleadings reveal, this proceeding is complex and involves many issues that are vigorously contested.

[3] The Tribunal issued a Bifurcation and Scheduling Order dated May 7, 2025, following several case management conferences and extensive negotiations between the parties. It contains a detailed schedule of events, currently leading to a six-week hearing scheduled to start on January 25, 2027.

[4] The Bifurcation and Scheduling Order contains deadlines for the delivery of pre-hearing disclosure including the exchange of affidavits of documents and the pre-hearing service of witness statements, expert reports and lists of documents to be relied upon, all as contemplated by the *Competition Tribunal Rules*, SOR/2008-141.

[5] On July 18, 2025, the parties exchanged affidavits of documents. On November 14, 2025, the Commissioner updated his initial affidavit of documents. On November 21, 2025, the Commissioner provided Google with a supplemental affidavit of documents.

I. LEGAL PRINCIPLES

[6] Consistent with prior Tribunal decisions and Rule 34 of the *Competition Tribunal Rules*, the parties agreed that the Tribunal should apply the legal principles related to examinations for discovery arising from the *Federal Courts Rules*, including Rules 240 and 242.

[7] The Tribunal has summarized the general legal principles on refusals motions arising from examinations for discovery in *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 23, 2025 CanLII 131729, at paras 15-18; *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 16, 2022 CanLII 135601 ("*Rogers/Shaw CT*"); *Commissioner of Competition v Secure Energy Services Inc*, 2022 Comp Trib 3, 2022 CanLII 9498, at paras 3, 7-8, 14-16; *Commissioner of Competition v Live Nation Entertainment, Inc*, 2019 Comp Trib 3, 2019 CACT 3, at paras 6-11; *Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 16, 2017 CACT 16 ("*VAA CT*"), at paras 20, 41-46.

[8] As the parties recognized, the Tribunal cases follow the guidance in *Canada v Lehigh Cement Limited*, 2011 FCA 120. The Federal Court of Appeal stated:

> [34] The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly

> or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary.

[9] This passage has been noted and applied by the Tribunal: see *Rogers/Shaw CT*, at para 11; *Live Nation*, at para 8; *VAA CT*, at paras 41-46; *Commissioner of Competition v Hudson's Bay Company*, 2018 Comp Trib 20, 2018 CACT 20, at para 10.

[10] Refusals motions are guided by the key objective of achieving a level of disclosure sufficient to allow each side to proceed fairly, efficiently, and effectively towards a hearing, with sufficient knowledge of the case that each party must meet: *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 23, at para 18, citing *Live Nation*, at para 6, and *Secure Energy*, at para 6.

[11] The parties also recognized that the Tribunal will apply principles of proportionality: see *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11, 2025 CanLII 79245, at paras 28-31; *VAA CT*, at paras 35-37; *Federal Courts Rules*, Rule 3(b).

II. THE COMMISSIONER'S MOTION

A. The Commissioner's Requested Undertaking, Google LLC's Answers and the Parties' Positions

[12] By notice of motion dated February 19, 2026, the Commissioner requested an order related to testimony provided by certain individuals who are currently employed by Google, during depositions and at trial in proceedings commenced by the United States and seventeen States against Google LLC in the District Court for the Eastern District of Virginia (the "US District Court Proceeding").

[13] The Commissioner's motion seeks an order requiring Google LLC's representative at oral examination for discovery to answer the Commissioner's request for an undertaking to ask the employees to review and confirm that excerpts of their testimony "are true and accurate, whether any of the facts deposed to have changed, and if so how".

[14] This original request for an undertaking concerned 12 employees. The Commissioner provided the dates of their trial testimony or deposition and specific page and line references. The Commissioner also advised that Competition Bureau staff reviewed approximately 15-20,000 pages of deposition and trial transcripts in the US District Court Proceeding and that in aggregate, the request for an undertaking involved about 600 transcript pages. The trial transcripts are from testimony in September 2024. The depositions were taken mostly between November 2020 and September 2021, with one in August 2023 and another in November 2023. They were taken in the US District Court Proceeding and at least one other US proceeding.

[15] Google's initial position in response to the Commissioner's request for an undertaking, provided on February 5, 2026, was as follows:

> The transcripts identified in Exhibit "C" of [the Commissioner's] December 2, 2025 contain the sworn evidence of the relevant witnesses. Neither Google LLC nor any of the employees identified by [the Commissioner] are required to review the sworn evidence the employees provided in completely different proceedings to confirm their accuracy in this proceeding. That is particularly so in circumstances where there is a voluminous and overly burdensome amount of additional sworn evidence provided by any number of other witnesses called on behalf of Google LLC or other parties in the multitude of other proceedings referenced in Exhibit "C" of [the Commissioner's] December 2, 2025 letter that would have to be carefully reviewed in conjunction with the transcripts the Commissioner of Competition has demanded be reviewed before the evidence provided in the transcripts identified could be put in their proper context.
>
> Moreover, it is overly burdensome and disproportionate for the Commissioner to demand that 12 employees of Google LLC, some of whom are among the most senior executives at the company, review approximately 600 pages of transcripts that contain compound questions and compound answers, and then self-identify and extract unspecified statements of fact and to self-assess whether those facts have changed in unspecified ways for unspecified periods of time.
>
> It is inappropriate for the Commissioner of Competition to seek to read-in swathes of evidence that have been cherry-picked from certain witnesses that provided evidence in multiple distinct foreign proceedings as evidence in this proceeding before the Competition Tribunal. The evidence provided by the relevant witnesses was the product of the distinct litigation process, evidentiary record, substantive claims, and legal framework that, independently or in combination, was unique to each of those proceedings.

[16] On February 9, 2026, the Commissioner narrowed the requested undertaking. The narrowed request concerned 11 employees (rather than 12) and (in aggregate) approximately 300 pages of transcript. Some requests are 10 or fewer pages, while the longest is approximately 70 pages.

[17] Google responded by letter dated February 24, 2026. Google advised that the Commissioner had misunderstood its position. Google provided a supplemental response. Referring to the testimony of its employees and the transcript passages in the narrowed undertaking request, Google's supplemental response was as follows:

> Subject to the express qualifications set out below, their evidence was true and accurate at the time it was given, to the best of each witness's subjective knowledge, experience and capabilities.
>
> While the evidence given by the witnesses in the Commissioner's selected excerpts was true and accurate at the time it was given, that evidence was, at best, incomplete—and cannot be relied on by the Commissioner to

confirm the truth and accuracy of facts these witnesses may have testified about or deposed to—for at least the following five reasons:

1. In a number of instances, witnesses were invited to speculate about matters outside their personal knowledge or expertise. Other individuals at Google had (and have) better or different knowledge and are better positioned to address those matters;

2. The evidence was a product of the circumstances in which it was given, including the time allocated for questioning, the matters that examining counsel chose to raise or not raise and the precise wording of the questions examining counsel asked. Testimony in the extracts from trial transcripts selected by the Commissioner from the proceeding commenced by the U.S. Department of Justice in the Eastern District of Virginia (the "EDVA Proceeding") was the product of a highly expedited and abbreviated trial process during which witnesses may not have been given the opportunity to explain their evidence fully, fairly and properly;

3. Witnesses identified by the Commissioner may not have had access to documents, records and information during their testimony that bore directly on the substance of their evidence and may have resulted in different, or differently worded, evidence;

4. The evidence was taken or given in proceedings that are subject to rules of evidence and procedure that have no parallel in Canada; and

5. Most of the Commissioner's selected excerpts are from out-of-court deposition transcripts of examinations where these witnesses were not subject to cross-examination or re-examination on their evidence.

Additionally, this evidence must be considered in its proper context. The Commissioner has cherry-picked excerpts from transcripts spanning weeks of trial and months of depositions from a select number of witnesses and has cobbled together portions that supposedly support her position in this proceeding. These excerpts cannot properly or fairly be read in isolation, divorced from the substantial body of other evidence given by each witness—whether in deposition or at trial—and from the testimony of the dozens of other witnesses that participated in the EDVA Proceeding as well as in other proceedings involving Google in the United States.

Indeed, these concerns are consistent with the well-established principle that sworn testimony from a separate proceeding is inadmissible hearsay unless the litigant seeking to adduce the prior testimony can satisfy an exception to the hearsay rule. In light of the concerns outlined above, among others, the Commissioner has not, and cannot, do so here.

> Finally, Google cannot reasonably be expected to update or explain whether any of the many hundreds of facts contained in the hundreds of pages of transcript excerpts identified by the Commissioner have changed and if so how, including because these transcripts include numerous compound questions and answers. Requiring Google to do so would be unfair, unduly burdensome and disproportionate. If the Commissioner had identified particular factual issues raised in the transcripts she wanted clarity on, it was incumbent on her to raise the matters in question during her eight days of examination for discovery of Mladen Raickovic and Nitish Korula [who represented each of the respondents]. She did not, and has not, done so. It is not appropriate for the Commissioner to now attempt to conduct what amounts to extensive written interrogatories by asking Google to engage in a complex and time consuming process of this nature.
>
> In substance, what the Commissioner seeks would require Google to deliver witness statements from nearly a dozen individuals before the Commissioner has put in her own evidence—and to do so a full six months before Google is required to deliver its evidence pursuant to the Competition Tribunal's Bifurcation and Scheduling Order … This would also, in effect, permit the Commissioner to examine for discovery nearly a dozen additional Google employees, in circumstances where she only had, and fully exercised, the right to examine one representative from each of Google LLC and Google Canada Corporation. This is hardly a proper, proportionate or fair use of the discovery process, and instead amounts to an impermissible attempt to circumvent the orderly discovery and evidentiary framework the Scheduling Order establishes.
>
> [Footnotes omitted.]

[18] Google's position on this motion is captured in this correspondence.

[19] The Commissioner's position on this motion was that the testimony in the US proceedings is relevant, reliable, and concerns the "very same matters" as are at issue in this proceeding. The Commissioner argued that the factual basis for the US District Court Proceeding is substantially the same as this proceeding before the Tribunal. The Commissioner challenged each of the five numbered qualifications quoted above in Google's letter dated February 24, 2026, arguing that they are without merit.

[20] The Commissioner also observed that Google's answers to other undertakings in this proceeding referred to the entirety of the same trial transcripts in the US District Court Proceeding that it resists on this motion. Having relied on the truth of those same transcripts in its own answers to undertakings, the Commissioner submitted that Google's "stunning" position in response to the requested undertaking is inconsistent and "tactical".

[21] The Commissioner's submissions invited the Tribunal to "sanction" Google with an order for costs of this motion at the highest possible scale, as its refusal was "nothing more than a

baseless tactical move". At one point during oral submissions, the Commissioner's counsel characterized Google's position as disingenuous.

B. Analysis and Decision

[22] I conclude that, on the specific facts of this case, the Commissioner's motion should be granted in part.

[23] The Commissioner's requested undertaking seeks to have employees of a respondent confirm the current accuracy of sworn testimony given during a proceeding in a non-Canadian court. Both parties confirmed that their legal research did not reveal any decided cases in which a Canadian court has granted an order to answer an undertaking as requested by the Commissioner.

[24] The Tribunal does not need to assess whether an answer to the Commissioner's requested undertaking could be compelled on motion, applying the legal standard for questions at an examination for discovery of a corporate representative. For the following reasons, this motion will be decided on a narrower basis.

[25] First, the Commissioner's requested undertaking has been answered in part: Google has confirmed the accuracy of the excerpts from each transcript, subject to certain stated qualifications (to which we will return below).

[26] Second, in its answers to undertakings in this proceeding – all such answers being sworn evidence – Google LLC has advised that it relies on the deposition and trial evidence in the US District Court Proceedings of the following employees:

a) Dr Jayaram (relied upon in the answer to three undertakings);

b) Dr Korula (relied upon in the answer to two undertakings);

c) Mr Mohan; and

d) Six other individuals, some of whose deposition and trial evidence was relied upon in two answers to undertakings.

[27] The Commissioner's requested undertaking includes excerpts from the trial transcript of Dr Jayaram, Dr Korula and Mr Mohan. None of the other six individuals mentioned immediately above are part of the Commissioner's requested undertaking.

[28] Conversely, Google LLC's answers to undertakings did not rely upon the deposition transcripts of any of the other eight individuals in the Commissioner's requested undertaking.

[29] Third, I have read the excerpts identified by the Commissioner from the trial transcripts for these three individuals. The excerpts are testimony given in cross-examination that, in substantial part, concerns their recollections based on the contents of documents prepared or received by those individuals, or documents that mention their activities (e.g. participation in a meeting), during their employment and mostly before 2020.

[30] Fourth, Dr Jayaram, Dr Korula and Mr Mohan testified approximately about 18 months ago during the trial in the US District Court Proceedings. The District Court has since rendered its decision: see *United States v Google LLC*, 778 F Supp (3d) 797 (ED Va 2025).

[31] Fifth, I do not agree that providing an answer to the requested undertaking for Dr Jayaram, Dr Korula and Mr Mohan is unfair, burdensome or disproportionate. Google LLC filed no evidence about the burden. It is not self-evident on the face of the question posed and the evidence filed (including the transcript excerpts) that there is a real problem with the burden. Indeed, Google LLC has relied on the entirety of the trial evidence given by all three individuals in answers to other questions undertaken at discovery in this proceeding. That reliance suggests that Google LLC has already done the work to ensure the transcript is accurate and up to date. Given the scope of this matter and the parties involved, there is no concern about proportionality in relation to these three individuals' testimony.

[32] Lastly, how the Commissioner may use the Google LLC's answers at the hearing is a matter to resolve in the future. Right now, the question is whether the Commissioner is entitled to an answer to the question posed by way of requested undertaking at the discovery stage. Google raised concerns about hearsay; however, in my view, whether the transcript excerpts constitute hearsay or could arguably be inadmissible at a later hearing is not a valid response to the requested undertaking at this point in the proceeding: see *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24, [2018] 3 FCR 633 ("*VAA FCA*"), at paras 31-32; Rule 242(2) of the *Federal Courts Rules*.

[33] In these specific circumstances, I make three conclusions. First, the Commissioner is entitled to an answer to the requested undertaking as concerns the excerpts from the trial transcripts of testimony by Dr Jayaram, Dr Korula and Mr Mohan. That is, the Commissioner is entitled to know whether their testimony in the excerpts remains true and accurate today, or whether it has changed since it was given to the District Court in September 2024 and if so, how.

[34] I appreciate the Commissioner's concerns with the qualifications that Google LLC has attached to the transcript excerpts, particularly as described in the qualifications numbered 1 to 5 in the letter from counsel dated February 24, 2026. These concerns are valid given the subject matter of the questions, the reliance on the transcripts in other answers to undertakings, and the recency of the District Court trial. From Google's perspective, I also understand the overall concern with the use of transcripts, the generality of the answer and the numerous transcripts and questions to which the qualifications (or some of them) could apply.

[35] Google's answers to the Commissioner's questions will be subject to the following requirements and limitations.

a) If Google LLC intends to raise any of the qualifications raised in its correspondence dated February 24, 2026 (including qualification #1 to #4, as #5 relates only to deposition transcripts) in relation to any excerpts from the testimony provided by Dr Jayaram, Dr Korula and Mr Mohan at trial in September 2024, Google LLC must identify and explain the specific qualification(s) that attach to the specific question(s) and facts in the answer(s) provided by the three individuals. This requirement aims to ensure that the Commissioner

is aware of the facts that Google may present from each individual at the hearing before the Tribunal in respect of the questions and answers in the transcript excerpts.

b) Google LLC's answers is not required to identify all facts of which Google LLC itself is aware that relate to the accuracy of the answers provided by Dr Jayaram, Dr Korula and Mr Mohan at the District Court trial, as that was not what the Commissioner requested by way of undertaking.

c) The additional qualification in Google's letter that the "evidence must be considered in its proper context" is a matter for the hearing.

d) Google LLC's answers are limited to facts and thus will not include any reference to the objections and rulings of the court during the trial nor to Google's "stipulation" at the District Court trial (which appears to relate to handwriting on documents);

e) The answer related to excerpts from Dr Jayaram need not refer to page 40, lines 4-5; and the identified transcript passages ending on page 76 line 6 should end at line 7.

f) The excerpts from Dr Korula's testimony on page 146 should end at line 16 given the sustained objection there. The excerpt ending on page 148 should end at line 22, not line 23.

[36] In my view, this outcome represents the practical, fair and proportionate solution to the Commissioner's motion to compel, one that meets the legal standard at discovery and the objectives of that process. The Commissioner will be served with Google LLC's witness statements and documents on September 14, 2026, some four months before the hearing commences in this proceeding.

[37] The second conclusion on this motion is that the Tribunal will not make any order on the Commissioner's request for an order compelling Google LLC to provide an answer related to the deposition transcripts of the other eight employees. Google did not rely upon their deposition testimony in its answers to undertakings in this proceeding. These eight individuals provided testimony at depositions for the US District Court Proceedings and in at least one other US proceedings, in most cases several years ago. While there is no specific evidence about the US depositions filed on this motion, I am aware that at such depositions there is typically no judge present and the rules on answering deposition questions often differ from those at trial.

[38] Third, there is insufficient basis for a sanction or other higher costs award against Google LLC on this motion. Google's position and the outcome of this motion do not warrant such a costs award. Despite the firm positions taken on this motion, both sides' counsel confirmed that their exchanges were (and continue to be) cordial and generally productive. Other than one comment during oral argument, the parties' exchanges were not unusual between parties' counsel in contested Tribunal proceedings.

[39] The Tribunal's order will provide for costs fixed overall for both motions.

III. GOOGLE'S MOTION

[40] By notice of motion dated February 19, 2026, Google requested an order to compel the Commissioner to answer certain questions posed at examination for discovery. These questions may be categorized under the following headings:

A. Category 1: Questions related to the Commissioner's 2013-2016 investigation and recommendation memoranda to the Commissioner;

B. Category 2: Questions related to the Commissioner's alleged product and geographic markets and assertions concerning the "but for" world;

C. Category 3: Questions related to the Commissioner's knowledge of the AdTech Tools and Services;

D. Category 5: Documents over which the Commissioner has claimed litigation privilege, and

E. Category 6: Whether the Commissioner has any basis to contest the accuracy of information found on certain third parties' websites.

[41] The questions in Category 4 have been resolved between the parties since Google filed its notice of motion.

[42] Some additional background will set the stage for the analysis.

[43] In 2013, following the receipt of complaints, the Commissioner opened an inquiry to investigate certain activities of Google relating to online search and search advertising. The parties and these Reasons refer to the 2013-2016 abuse of dominance investigation and inquiry into Google as the "first inquiry" or as the "first investigation".

[44] During the first inquiry, the Commissioner applied to the Federal Court and obtained an order under section 11 of the *Competition Act* compelling Google to provide records and returns of information. Kristen McLean's affidavit, filed on this motion, advised that the section 11 order related only to Google's conduct in online search and search advertising, not display advertising.

[45] In April 2016, the Commissioner discontinued the first inquiry and issued a Position Statement dated April 19, 2016. The Position Statement advised that during the first inquiry, which was started in relation to search and search advertising, the Commissioner received additional complaints concerning Google's conduct in the display advertising sector, which prompted further review. The Position Statement summarized the extensive investigation conducted by the Bureau in its review of allegations that Google Inc. engaged in anti-competitive business practices related to online search, search advertising and display advertising services in Canada.

[46] The Position Statement separately addressed the Bureau's search and search advertising review, and its display advertising review. The section on display advertising has content related to a feature of Google's ad tech services called Enhanced Dynamic Allocation, to which Google referred on this motion.

[47] In December 2020, the Commissioner opened a new inquiry into Google's activities. By letter to Google's counsel dated January 5, 2021, the Commissioner advised that the second inquiry sought to determine the facts concerning whether Google was engaging in conduct contrary to the abuse of dominance provisions in the *Competition Act*, namely, anti-competitive conduct in online display advertising markets in Canada. According to that letter,

> […] the focus of the inquiry [was] to determine the facts regarding whether Google [was] leveraging its market power in the supply of in-stream video ad inventory into adjacent markets, including, but not limited to the market for demand-side platform services, and whether this practice has prevented or lessened or is likely to prevent or lessen competition substantially.

[48] Google's submissions on this motion characterized this second inquiry as an investigation into "Google's conduct in the display advertising business in Canada" and defined the Commissioner's "focus" described in the letter as the "YouTube Allegations".

[49] In the context of this second inquiry, the Commissioner applied to the Federal Court and obtained a section 11 order against Google. Ms McLean's affidavit advised that this section 11 order primarily focused on advancing the Commissioner's understanding of facts regarding certain allegations about YouTube related to Google's alleged use of the supply of in-stream video advertising space to gain or maintain market power in adjacent demand-side markets (restricting third party ad buying platforms from being able to bid on YouTube advertising space).

[50] In 2023, the Commissioner expanded the second inquiry. By letter to Google's counsel dated December 1, 2023, the Commissioner advised that the expanded inquiry sought "to additionally determine the facts" concerning whether Google:

> […] is leveraging its market power in the Advertiser Ad Network and DSP markets to gain and maintain market power in the Ad Exchange and Publisher Ad Server markets; leveraging its power in the Publisher Ad Server market to gain and maintain market power in the Ad Exchange market; using predatory pricing to gain and maintain market power in the Advertiser Ad Network market; and making representations to the Publishers and Advertisers in respect of its ad tech products and services that are false or misleading in a material respect; and whether these acts, independently or on a combined basis, substantially prevent or lessen competition or are likely to substantially prevent or lessen competition in a market.

[51] In February 2024, the Commissioner applied to the Federal Court and obtained an additional section 11 order against Google.

[52] Google's submissions on the present motion advised that in the Commissioner's initial affidavit of documents, the Commissioner produced notes from over 200 interviews with more than 100 market participants: 24 from the first investigation, 180 from the period after the Commissioner commenced the second inquiry into the "YouTube Allegations", and one set from

after the Commissioner expanded that inquiry in December 2023 to the matters now at issue in the Notice of Application.

[53] With this background, these Reasons will address each of the unresolved categories in turn.

A. Category 1: Questions related to the Commissioner's 2013-2016 investigation and recommendation memoranda to the Commissioner

[54] Google seeks an order compelling the Commissioner to answer questions posed at the examination for discovery of Ms McLean, as the representative of the Commissioner, concerning: (i) the first inquiry conducted by the Commissioner between 2013 and 2016; (ii) internal memoranda to the Commissioner to open the second inquiry into Google in December 2020, to expand that inquiry in 2023, and to commence proceedings against Google in 2024.

[55] In more detail, the refused questions may be summarized as follows:

The first investigation/inquiry in 2013-2016

a) To provide a full list of employees or representatives of the Bureau who played a role in the first investigation, including in-house or internal economists and/or industry experts whom the Bureau used, as well as external economists and/or industry experts;

b) Production of all internal or other documents including emails, other electronic or physical communications, within the Bureau [related to the first investigation]; and production of all communications between representatives of the Bureau and third parties concerning this investigation including, but not limited to, industry participants as well as external experts or consultants;

c) Whether there was a recommendation memorandum or slide deck to the Commissioner to discontinue this investigation into Google in 2016, or some other form of document that would have been submitted to the Commissioner recommending the discontinuance of the investigation in 2016;

d) Production of any assessment document and/or slide deck that were prepared in relation to this investigation against Google that may have been submitted to the Commissioner or others at the Bureau;

The second inquiry leading to this proceeding

a) Whether a recommendation was made to the Commissioner to commence the second inquiry, and if so, to produce the recommendation and any related or supporting documents that were provided to the Commissioner in support of the recommendation;

b) Whether a recommendation was made to the Commissioner before he made the decision to expand this inquiry against Google in early December 2023, and if so, to produce it as well as any evidence, data, or analysis that support the recommendation;

c) To provide the document or documents provided to the Commissioner recommending the commencement of proceedings against Google, including any underlying or other documents that were used to support any recommendation that may have been made.

[56] The parties made lengthy submissions, both written and oral, on whether the Tribunal should compel the Commissioner to provide answers to these questions.

[57] Google submitted that the Commissioner has already produced numerous documents related to the first investigation including contacts with industry participants. Google argued that the questions on the first investigation requested additional relevant documents and information concerning that investigation.

[58] Google also argued that the requested information was relevant to the pleaded defence in its Response that the Commissioner's application is statute-barred owing to subsection 79(6) of the *Competition Act*. That provision provides that no application may be made under section 79 "in respect of a practice of anti-competitive acts or conduct more than three years after the practice or conduct has ceased". I understand Google's position to be that discoverability does not apply to subsection 79(6), but if it does, Google maintains that the Commissioner has long known about some of the activities relied upon in the Notice of Application including activities that were reviewed during the first investigation. According to Google, it is entitled to know what the Commissioner knew and when for the purposes of subsection 79(6), including all steps that were taken.

[59] The Commissioner advised that all facts related to the first investigation and inquiry have been produced to Google. The Commissioner characterized the refused questions as seeking disclosure of the Commissioner's internal analysis and thinking processes, which the Commissioner argued is not relevant, disclosable or producible information on discovery under the Tribunal's decided cases.

[60] With respect to subsection 79(6), the Commissioner submitted that:

a) the internal analysis and recommendations made to the Commissioner containing opinions of Bureau officers are not relevant to the limitation period issues;

b) the case law on the discoverability of causes of action should apply to subsection 79(6); that is, that the trigger for the limitation period in subsection 79(6) to begin to run is actual or constructive knowledge of all the necessary elements of the practice of anti-competitive act(s) or the anti-competitive conduct at issue, or such knowledge that the relevant practice or conduct has ceased;

c) some questions relating to the second inquiry are irrelevant to issues under subsection 79(6) because the only facts that could be relevant are those for the period up to November 28, 2021 (which is three years before the Commissioner filed the Notice of Application). According to the Commissioner, facts after that date could not be relevant to the limitation period issues.

[61] Finally, the Commissioner submitted that Google's requests for internal documents and communications from the first investigation are vague, overbroad, disproportionate and a fishing expedition. As a result, the Commissioner contended, the Tribunal should exercise its discretion not to order the Commissioner to answer the questions.

[62] I turn to the analysis of the issues.

[63] Both parties acknowledged that few Tribunal cases have mentioned subsection 79(6) of the *Competition Act*. The Tribunal has never interpreted or applied subsection 79(6) following a hearing on the merits under section 79, nor has it considered whether principles of discoverability may apply. I find it unnecessary to engage in a legal interpretation of subsection 79(6) to decide this motion, nor to engage with case law concerning limitation periods that may or may not be applicable.

[64] In addition, whether "the practice or conduct has ceased" under subsection 79(6) will depend in part on what the "practice" or "conduct" is alleged or proven to be. The parties do not agree on this and on many other aspects of whether Google's activities constitute a practice of anti-competitive acts or conduct under paragraphs 79(1)(*a*) and (*b*). At a high level, the parties disagree on whether Google's activities were anti-competitive. As is material here, the Commissioner argues a series of acts that constitute a continuous practice, while Google disagrees and argues that certain activities pleaded by the Commissioner ceased at points in the past and in any event none of them constitutes a continuing practice.

[65] The parties referred to the Tribunal's analysis of discovery questions related to an earlier investigation in *Live Nation*, at paras 12-18. Google argued that its pleading of a limitation defence under subsection 79(6) was akin to the pleading of estoppel and waiver in *Live Nation* and that the considerations in paragraphs 12-16 apply to the refused questions in this case. The Commissioner maintained that subsection 79(6) attracts different considerations than a pleading of estoppel and waiver and that the reasoning in paragraph 18 of *Live Nation* applies here.

[66] For a decision on questions refused, some guidance is provided by the *Federal Courts Rules*. Rule 240(a) requires a person examined for discovery to answer any question that is relevant to any unadmitted "allegation of fact" in a pleading filed by the party being examined. Rule 242(1)(b) provides that a person may object to a question asked in an examination for discovery on the ground that the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party.

[67] In the Federal Courts, it is a fundamental rule is that an examination for discovery may seek only facts, not law: *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, aff'd 2005 FCA 144. This statement has been adopted by the Tribunal: *Rogers/Shaw CT*, at para 14; *Secure Energy*, at para 6; *Live Nation*, at para 10.

[68] It is sometimes difficult to find the line between proper questions (for example, seeking disclosure of relevant facts or the factual basis for an allegation), and improper questions (e.g. seeking the facts or evidence relied upon to support an allegation): *Secure Energy*, at para 14; *Live Nation*, at para 27: *VAA CT*, at para 20. There may also be questions of degree and specificity: see *VAA CT*, at paras 20, 46, 56, 58.

[69] Some questions seek to discover opinions or analysis of facts, rather than the facts themselves. In *VAA CT*, Gascon J stated:

> [69] […] I agree with the Commissioner that several of these requests from VAA remain improper in any event, as they invite economic analysis, opinion or conclusions from the Commissioner on certain issues, or require comparative analyses between different price and non-price factors, as opposed to the facts themselves (*NutraSweet* at paras 23, 38; *Southam* at paras 12-13). Such requests essentially seek to reveal how the Commissioner assessed and interpreted facts, and therefore need not be answered. These are: […] [List of questions omitted.]

[70] In previous cases commenced under several different provisions of the *Competition Act*, the Tribunal has frequently declined to compel the Commissioner to answer questions about: (i) the Commissioner's (i.e., Bureau officers') internal analysis, thought process, assessment and interpretation of facts and internal decision making; and generally, (ii) the conduct of the Commissioner's investigation into the matter in litigation or another investigation in the past: see, under Part VIII of the *Competition Act*, *Secure Energy*, at paras 10, 19, 22, 27, 30; *Live Nation*, at paras 14, 18; *VAA CT*, at paras 69, 71; and under Part VII.1, *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2026 Comp Trib 1, at paras 1(a), 7, 9; *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 21, at paras 36-41 (denying an amendment to a response pleading); *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2025 Comp Trib 11, at paras 9-16. As Gagné J recently stated, "[t]he Tribunal's decision will be based on the evidence gathered during the investigation and presented at trial, not on anybody's past assessment of this evidence": *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2025 Comp Trib 23, at para 24.

[71] In *Live Nation*, the Tribunal (*per* Gascon J) required the Commissioner to answer questions about the conduct of a prior investigation into the respondent when the conduct of the Commissioner's investigation was "clearly at play" in the application owing to allegations of estoppel and waiver. However, the Tribunal did not require answers to "why" questions that concerned the Commissioner's "thought process", which essentially sought to obtain an opinion from the Commissioner on the "why" questions: *Live Nation*, at para 14. In that context, the facts related to the length of time taken by the Commissioner to raise issues with the respondent and to follow up on complaints was relevant, not the reasons or explanations behind the Commissioner's decisions: *Live Nation*, at para 18.

[72] In the present case, the Commissioner's answers to undertakings stated that the Commissioner has provided Google with all of the facts related to display advertising that were in the possession of the Commissioner in connection with the first investigation and, for greater certainty, as at the time the Bureau issued the 2016 Position Statement.

[73] The Commissioner's answers to undertakings also stated that all communications, including notes from calls between representatives of the Bureau and third-party industry participants concerning the first investigation in respect of display advertising have already been produced. In addition, the Commissioner produced to Google two presentations prepared by consultants for the Bureau in connection with the first investigation that relate in part to certain

aspects of display advertising, and call notes taken in connection with calls with said consultants, which documents contain relevant facts that the Commissioner was made aware of in connection with the first investigation.

[74] The aspects of Google's questions at discovery that have not already been answered concern a list of the Bureau personnel involved in the first investigation and production of their communications "within the Bureau", including all emails. It stands to reason that Google's question comprises internal Bureau communications by all these persons on a broad spectrum, from the mundane (e.g., logistics for an internal meeting or a call with a market participant) to the internal analysis by Bureau personnel of the facts related to the matters investigated at that time.

[75] In addition to their sweeping scope, I also note the generality of the questions at issue on this motion related to the first investigation, particularly as concerns their possible relationship with subsection 79(6) as pleaded and argued on this motion. None of the questions at issue ask whether the Commissioner was aware of any specific fact(s) and when, nor whether the Commissioner was aware of X or Y that is alleged to constitute a practice or conduct and when, nor whether the Commissioner was aware of when X or Y alleged practice or conduct ceased. Instead, the questions requested a list of all involved Bureau personnel and all their communications within the Bureau during the first investigation.

[76] In this context, and considering the objectives of the examination for discovery process in Tribunal proceedings and the general guidance in *Lehigh*, Google has not persuaded me that the list of personnel and all of the Bureau's emails and internal communications are relevant and producible in this proceeding. The questions at issue seek additional production by the boatload, rather than zeroing in to identify additional information or documents that might be relevant to the determination of issues arising under subsection 79(6) concerning if and when the "practice or conduct has ceased" as identified by the parties on this motion.

[77] Google's submissions noted that in the 2016 Position Statement, the Commissioner stated that the Bureau had investigated a feature of Google's ad tech services called Enhanced Dynamic Allocation, including an allegation that Google had engaged in misconduct by "implementing a software setting in DFP that unfairly advantages Google over competing ad exchanges" by "giv[ing] Google a right of first refusal on valuable ad impressions" [Google's quotations from the Position Statement, in its submissions]. Google submitted that this is similar to or the same as allegations the Commissioner has now made against Google in this proceeding. This argument does not assist Google on this motion. The quotations in Google's submissions were taken from the section of the Position Statement that discussed the Bureau's review of display advertising. The Commissioner has advised that facts gathered during calls with market participants related to display advertising have all been produced to Google. There is no mention of "Enhanced Dynamic Allocation" in the section of the Position Statement on the Bureau's review of search and search advertising.

[78] The recommendation memo, slide deck and other communications to the Commissioner in relation to the discontinuance of the first inquiry need not be produced. These materials obviously include Bureau officers' selection of key facts and an assessment of those facts to make a recommendation to the Commissioner. The refused questions on this specific topic seek an internal opinion of Bureau personnel, provided to the Commissioner, which is not producible.

[79] In support of these conclusions, see in particular *Secure Energy*, at paras 6, 10, 22, 27; *Live Nation*, at paras 6, 8, 14, 18; *VAA CT*, at para 69.

[80] With respect to the second inquiry commenced in late 2020, the discovery questions at issue seek production of the recommendation made to the Commissioner in 2020 and any associated documents provided to the Commissioner in support of the recommendation, and any recommendation to the Commissioner to expand the inquiry in 2023 and any evidence, data or analysis provided to support that recommendation. The Commissioner's answers to undertakings stated that the Commissioner has provided Google with all documents containing facts relating to display advertising that were in the Commissioner's possession at the time the second inquiry was commenced and when it was expanded.

[81] What remains not produced to Google are the recommendation memorandum or other communication to the Commissioner, and supporting documents, when the second inquiry was commenced and the same documents when it was expanded. For the reasons explained above related to the recommendation memorandum to the Commissioner in 2016, the unanswered discovery questions were properly refused and the requested documents need not be produced. In addition to the cases cited above, see also *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2025 Comp Trib 23, at Schedule "A", Category (1)(b), Sept. 5/25, qq 66-68.

[82] As requested by the parties, Google's motion to compel the production of the internal memorandum to the Commissioner recommending that this proceeding be commenced will be addressed below, under Category 5.

[83] Google's motion with respect to Category 1 will therefore be dismissed, except for the questions just mentioned to be analyzed under Category 5.

B. Category 2: Questions related to the Commissioner's alleged product and geographic markets and assertions concerning the "but for" world

[84] Google seeks to compel the Commissioner to answer certain questions related to market share in the product and geographic markets identified in the Commissioner's pleadings, and questions about the "but for" world if Google had not engaged in the activities that are alleged to constitute a practice of anti-competitive acts.

[85] Some of Google's questions concern how the Commissioner defined relevant markets during the Commissioner's first investigation into certain of Google's activities, which began in 2013 and ended in 2016 with the termination of the investigation and the publication by the Commissioner of the Position Statement. The Commissioner objected to the relevance of these questions, which Google submitted are relevant.

[86] In relation to the Commissioner's market share allegations in the Commissioner's Notice of Application, Google also asked at discovery:

a) For the specific market share calculations performed by the Bureau in 2022 and what data was used to arrive at them, and for production of all of the Bureau's working papers, evidence, data and analysis that support those market share allegations;

b) Whether the Commissioner has performed other market share calculations since 2011 (other than in 2022);

c) For the calculations performed by the Commissioner as to Google's market shares in each of the three alleged product markets for each year since the commencement of the alleged anti-competitive acts up to the present, and for production of the working papers and any evidence, data, or analysis used to arrive at those market share figures;

d) Whether similar calculations have been done for the geographic areas of North America and globally, since the commencement of the alleged anti-competitive acts up to the present, and for production of the working papers and any evidence, data, or analysis used to arrive at those market share figures;

e) Whether the Bureau has done any such calculations using certain other assumptions, namely: (i) if direct sales were included, including direct sales made programmatically; (ii) assuming that all formats of display advertising were included in the markets including banner, native, in-stream, and out-stream video and web-based game advertisements; (iii) if advertisements sold through all channels were included in the calculations including in-app, Connected TV, social media and closed channels, and (iv) if the Tribunal were to accept Google's proposed market definition; and, for each of (i) to (iv), to provide those calculations for each year since the commencement of the alleged anti-competitive acts up to the present, and for production of the working papers and any evidence, data, or analysis used to arrive at those market share figures.

[87] Google also asked questions at examination for discovery related to "but for" analyses conducted by the Commissioner, which may be summarized as follows:

a) what analysis the Commissioner has conducted with respect to greater choice, increased innovation and lower prices that publishers and advertisers would have allegedly benefitted from but for the conduct alleged in the Notice of Application;

b) the impact of AI in the digital industry;

c) what the revenue share or take rate for (i) Google Ads, (ii) the ad exchange function in Google Ad Manager, (iii) the ad serving function in Google Ad Manager, (iv) the prices of Google Ads, AdX and DFP, would have been, for each period from 2009 to 2025, but for the conduct alleged in the Notice of Application;

d) changes in certain market patterns (QQ 1749, 1755), changes in quality of service over time, non-existent technologies or features, new or exiting competitors, all in a world "but for" the conduct alleged in the Notice of Application.

[88] Google submitted that market share is factual and that, having raised market definition and its market share in the Notice of Application, Google is entitled to know the Commissioner's factual basis for the market share calculations and the resulting market power allegations. Google argued that the information was the result of – and did not relate to the conduct of – the Bureau's

investigation and that it was not seeking economic opinions that are properly the subject of litigation privilege.

[89] Rather, Google submitted that it is entitled to know the facts in the case it must meet now, at the discovery stage, while preparing its own evidence in response. Google argued that it only has three months between the Commissioner's delivery of witness statements, documents relied upon and expert reports in mid-June 2026 and Google's deadline in mid-September 2026 to serve its own witness statements, documents relied upon and expert reports.

[90] The Commissioner submitted that Google's questions seek the thought process and subjective opinions of Bureau personnel about potential product markets, market shares, and the world "but for" Google's anti-competitive practices.

[91] The Commissioner submitted that in respect of four questions, answers have been provided within the Commissioner's knowledge. According to the Commissioner, the remaining 32 questions seek irrelevant information because:

a) Three questions relate to the Bureau's market definition in a past investigation, and Google has not advanced a basis for these questions' relevance to the current matter;

b) Eighteen questions seek Bureau opinions, analyses and calculations, which are not discoverable facts. Requests for "analyses," "calculations," or "assessments" seek the means of reasoning, not the facts being reasoned upon;

c) Eleven questions request counterfactual "but-for" modelling of the Bureau, which is a matter for expert evidence, not fact, and is likewise improper. The proper vehicle for exploring such issues is expert opinion disclosure under the Tribunal's schedule, not disclosure of the Bureau's working investigative opinions.

(1) Analysis and Decision

[92] For the following reasons, I conclude that Google's questions are not proper at the examination for discovery of the Commissioner and need not be answered.

[93] The Commissioner has advised that all of the facts in the Commissioner's possession that relate to a calculation of market share relevant to this proceeding have been disclosed (which I take to mean produced to Google, whether in document or data form).

[94] The Commissioner has provided an answer concerning the pleaded market share allegations at paragraph 6 of the Notice of Application. The answer described the nature of the calculation done to arrive at the specifically pleaded market share figures. The answer also advised that expert reports, including market share calculations, will be provided on June 15, 2026. Google did not specifically challenge the sufficiency of the description of the calculation in that answer. It seeks the working papers that show the calculation and to know the data that were used.

[95] The rest of Google's market share questions at discovery seek the internal calculations and analysis done by Commissioner related to market shares and market definition, together with all records showing those calculations and analyses.

[96] However, in my view, both the product and geographic markets to be relied on by the Commissioner on the merits of the application, and the determination of market shares in those markets, centrally involve the selection and assessment of relevant facts using legal and economic knowledge, skill and judgment. I agree with the Commissioner that the questions posed by Google seek opinions and the thought processes used by the Commissioner (i.e., personnel at the Bureau) to define markets and calculate market shares in time periods before and after the 2022 market share allegations in paragraph 6 of the Notice of Application. That is, the questions "essentially seek to reveal how the Commissioner assessed and interpreted facts": *VAA CT*, at para 69 (quoted above); see also *Secure Energy*, at para 22. Google's market share questions in this Category 2 need not be answered.

[97] Similarly, Google's "but for" questions also need not be answered. They also seek internal analysis, which involves the selection and interpretation of facts combined with a reasoned assessment predicting what would have happened if Google had not engaged in the activities that the Commissioner claims were anti-competitive.

[98] Finally, the questions at issue on this motion that concern how the Commissioner defined relevant markets internally during the Commissioner's first investigation are not relevant to the substantive issues in this proceeding. They also seek internal opinions that assess and interpret facts, as discussed above. See *Live Nation*, at para 18; *Secure Energy*, at para 22; *VAA CT*, at para 69. Product and geographic market definitions in the Notice of Application in this proceeding concern just that: market definition in this proceeding, not during a past investigation.

[99] During its submissions, Google raised concerns about knowing the case to meet on market definition and market share issues. In my view, a respondent's understanding of the case to meet in Tribunal matters starts with the contents of the Commissioner's pleadings, particularly the Notice of Application which includes a concise statement of economic theory of the case: see the requirements in Rule 36 of the *Competition Tribunal Rules*. The case to meet is further revealed through the document production process and oral examinations for discovery. It continues through the pre-hearing service of witness statements, expert reports, the documents to be relied on by the Commissioner, any documents to be filed pursuant to section 69 of the *Competition Act*, and the Commissioner's reply materials: see *Competition Tribunal Rules*, Rules 68, 70, 72, 74.

[100] In this case, I am not persuaded by Google's suggestion that it may not know the case it will have to meet on market definition and market share issues. The Bifurcation and Scheduling Order provides that, in mid-June 2026, Google will receive the Commissioner's expert reports, as well as any records (including data) and witness statements that the Commissioner intends to rely on in relation to market definition and market share. Google will have three months to file its own responding expert reports on market definition and market share, with its related hearing materials. It will have the Commissioner's reply filings by the end of October 2026. (The specific deadlines are in the Bifurcation and Scheduling Order.) The hearing is scheduled to commence on January 25, 2027, more than seven months after Google receives the Commissioner's expert reports and other materials. Google has the right to cross-examine witnesses including experts at the hearing. There is ample opportunity for Google to know and meet the Commissioner's case in this proceeding.

[101] Accordingly, Google's motion with respect to Category 2 will be dismissed.

C. Category 3: Questions related to the Commissioner's knowledge of the AdTech Tools and Services

[102] Google seeks an order compelling the Commissioner to answer certain questions concerning how certain Google tools work and how the Commissioner learned about them. The questions may be summarized as follows:

a) Who provided a demonstration to the Bureau of how Google Ad Manager and Google Ads function;

b) Who at the Bureau used Google's tools, when and how; and

c) Whether Bureau employee(s) did so by entering into a contract with Google and if so, to identify that contract.

[103] These questions need not be answered. These questions go to the conduct of the Commissioner's investigation, which is not an issue in this proceeding. Obviously, Google knows how Google Ad Manager and Google Ads function. Google provided no explanation as to how the answers to these questions could help advance its case on the substantive issues in this proceeding, or damage the Commissioner's substantive case, or how the answers could advance a line of proper inquiry towards those objectives: see *Lehigh*, at para 34.

[104] Google's motion with respect to Category 3 must be dismissed.

D. Category 5: Documents over which the Commissioner has claimed litigation privilege

[105] Schedule "B" of the Commissioner's initial and supplemental affidavits of documents contain a list of documents over which the Commissioner claims privilege. Google seeks an order compelling the Commissioner to produce copies of certain documents listed in Schedule "B".

[106] The question posed by Google at the examination for discovery sought production of all such documents, except certain documents carved out in the question. The Commissioner's written answers advised that the Commissioner has produced all relevant, non-privileged information in the Commissioner's possession, power and control. In addition, the Commissioner advised that as of July 2, 2024, there was a reasonable prospect of litigation; all documents listed in Schedule "B" that postdate July 2, 2024, were created for the dominant purpose of ongoing or reasonably anticipated litigation. Accordingly, the Commissioner advised that the requested documents are subject to litigation privilege.

[107] Google requested an order that the Commissioner produce all communications with third parties during the second investigation, and the documents provided by those third parties to the Commissioner. Google's motion does not seek copies of draft witness statements created for the specific purpose of this litigation, and to that end expressly carved out specific rows in the lists in Schedule "B" of the Commissioner's affidavits of documents from its requested order.

[108] Google submitted that the Commissioner's claim for litigation privilege was a bald assertion and that the documents were not prepared for the dominant purpose of litigation. Google

also identified certain documents listed in the Commissioner's Schedule "B" that appeared, from the descriptions in the list, to be non-privileged documents. For example, one appears to be required filings by a public company with the US Securities and Exchange Commission. Google maintained that the mere addition of a document to a barrister's brief does not cloak the document with a privilege. Google submitted that production of the requested documents was essential to its ability to defend itself fully and fairly in this proceeding and that, in any event, the Commissioner must disclose the underlying facts and information in privileged documents.

[109] The Commissioner relied on passages from Ms McLean's affidavits sworn on February 19, 2026, and March 5, 2026, to show that the requested documents listed in the Schedule "B" of the initial and supplemental affidavits of documents are subject to litigation privilege.

[110] The Commissioner also provided a memory stick containing the documents in question. Having conferred before the motion hearing, the parties confirmed that they were content for the Tribunal to review them if necessary, as contemplated by Rule 61 of the *Competition Tribunal Rules*. As noted at the hearing, I regard this process as somewhat akin to considering evidence at a *voir dire*. The parties also confirmed that reviewing the documents would not give rise to concerns about my participation on the panel that will hear the section 79 application on the merits. In the result, I did not find it necessary to conduct my own review of the documents under Rule 61 to reach conclusions on litigation privilege. The envelope containing the memory stick will be returned unopened.

[111] The Commissioner also took the position that Google's motion was out of time, owing to the deadline in the Bifurcation and Scheduling Order for motions arising from affidavits of documents (which was August 22, 2025). While this position may well be valid on some issues related to the Commissioner's initial affidavit of documents, I find it preferable to decide the issue on its merits.

(1) Legal Principles – Litigation Privilege

[112] Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation: *Lizotte v Aviva Cie d'assurance du Canada*, [2016] 2 SCR 521, 2016 SCC 52, at para 19. The legal principles applicable to litigation privilege were discussed in *Rogers/Shaw CT*, at paras 50-56.

[113] The purpose of litigation privilege is to ensure the efficacy of the adversarial process: *Blank v Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39, at para 27; *Lizotte*, at para 22. It maintains a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate: *Lizotte*, at para 24; *Blank*, at paras 32, 34. To achieve the purpose of ensuring the efficacy of the adversarial process, parties to litigation, whether represented by legal counsel or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure: *Blank*, at para 27.

[114] There are two elements to assess in order to determine whether litigation privilege attaches: (i) whether litigation is pending or reasonably apprehended, and (ii) whether the document or group of documents was created for the dominant purpose of litigation: *Lizotte*, at para 33; *Canada v Tk'emlúps te Secwépemc First Nation*, 2020 FCA 179, at para 37. Litigation privilege covers

only those documents whose "dominant purpose" was litigation and not those for which litigation was a "substantial" purpose: *Lizotte*, at para 23.

[115] Litigation privilege is a class privilege; once the conditions for its application are met, there is a presumption that the documents falling in the class may not be produced to the opposing party. In other words, a document is immune from production if it falls within the class of documents created for the dominant purpose of the pending or reasonably contemplated litigation: *Lizotte*, at paras 33-37; *Tk'emlúps te Secwépemc First Nation*, at paras 37-38; see also *VAA FCA*, at para 35.

[116] If litigation privilege applies, the claiming party need not produce the document unless the party seeking production shows that the document falls within an exception to litigation privilege. Exceptions include public safety, the innocence of an accused, for criminal communications, and evidence of the claiming party's abuse of process or similar blameworthy conduct. See *Lizotte*, at para 41; *Tk'emlúps te Secwépemc First Nation*, at para 39.

[117] Documents and communications may be subject to litigation privilege, even if a party is not represented by a lawyer: *Lizotte*, at para 22; *Blank*, at paras 27, 32, 34. Litigation privilege may also apply to non-confidential documents: *Lizotte*, at para 22, referring to *Blank*, at para 28.

[118] The Supreme Court in *Blank* expressly decided not to determine whether litigation privilege attaches to documents gathered or copied, but not created, for the dominant purpose of litigation: see *Blank*, at paras 62-64. It appears that the latter question has not been resolved by this Tribunal or in the Federal Courts.

(2) Analysis and Decision

[119] In assessing litigation privilege in this Tribunal proceeding, the following legal and factual context is relevant:

a) Section 7 of the *Competition Act* provides that the Commissioner is responsible for the administration and enforcement of the statute;

b) The confidentiality obligations in section 29 of the *Competition Act* apply to information collected by the Commissioner during an investigation or inquiry (neither party referred to this provision during argument on this motion, presumably owing to the disclosure requirements in the *Competition Tribunal Rules*);

c) In December 2020, the Commissioner commenced an inquiry on the basis that he had reason to believe Google was engaging in anti-competitive conduct contrary to sections 77 and 79 of the *Competition Act*, and that grounds existed for the making of an order under Part VIII of the statute;

d) In January 2023, the US District Court Proceeding began (it is described above). This proceeding continued to a three-week bench trial in September 2024 and a decision from the District Court dated April 17, 2025;

e) The Commissioner expanded the inquiry under section 10 after reviewing the 2023 complaint in the US District Court Proceeding and concluding that that the new allegations

in that complaint were applicable and relevant to Canada, and that there was reason to believe the conduct underlying the allegations constituted additional grounds for the making of an order under Part VIII;

f) In October 2021 and February 2024, the Commissioner obtained orders from the Federal Court under section 11 of the *Competition Act* requiring Google to produce records and returns of information related to the Commissioner's second inquiry;

g) In March 2024, the Bureau issued Requests for Information to over 20 industry participants for data and records in relation to display advertising;

h) On July 2, 2024, the Commissioner determined that there was a reasonable prospect of litigation and a litigation hold was put in place in relation to this matter;

i) On September 6, 2024, the Department of Justice and Bureau staff jointly recommended that the Commissioner commence this proceeding. The memorandum is subject to claims of privilege, but the facts underlying the recommendation have been produced. The Commissioner has provided Google with a list of the documents used in support of the litigation;

j) On November 28, 2024, the Commissioner filed the Notice of Application for one or more orders under section 79 of the *Competition Act*;

k) There will be additional pre-hearing disclosure in this proceeding as contemplated by the *Competition Tribunal Rules* and the Tribunal's Bifurcation and Scheduling Order:

    a. By June 15, 2026, the Commissioner is required to serve Google with the Commissioner's expert reports, witness statements and documents relied upon;

    b. By September 14, 2026, Google is required to responding expert reports and witness statements and documents relied upon;

    c. By October 26, 2026, the Commissioner is required to serve reply expert reports and witness statements and reply documents relied upon;

l) The Bifurcation and Scheduling Order provides that the hearing of this application is scheduled to commence on January 25, 2027, and continue for six weeks.

[120] Finally, Google does not seek production of draft witness statements on this motion.

[121] The first element of the legal test for litigation privilege is met. As noted in the answer to the discovery question, and as Ms McLean's affidavit confirmed, litigation was reasonably apprehended on July 2, 2024, when the Commissioner placed a litigation hold in relation to this matter. Google did not contest that litigation between the parties was reasonably apprehended as of that date. Indeed, by that time, the Commissioner had been investigating Google's activities for several years. A few months later, the Commissioner commenced this abuse of dominance proceeding on November 28, 2024.

[122] The second element is the central issue for Google's motion: whether the requested documents were created for the dominant purpose of litigation.

[123] The Commissioner's two affidavits of documents listed, in Schedule "B", the relevant documents that are or were in the Commissioner's possession, power or control as of June 30, 2025, for which privilege was claimed by the Commissioner, including the grounds for each such claim (including litigation privilege). Schedule "B" included the date of the documents, a description, the document type, its author or sender, recipient and copies, the document identification number, and the confidentiality level under the Tribunal's Confidentiality Order dated May 7, 2025 (all were classified as Highly Confidential). Presumably to preserve the claimed privilege, the list contained anonymization in some fields (e.g., by referring to a "third party" in document descriptions, author/sender, recipient).

[124] Ms McLean's affidavit affirmed on March 5, 2026, contains more than a mere claim or assertion of litigation privilege. It provides details relevant to the application of the legal test based on Ms McLean's review of the documents over which the Commissioner claims litigation privilege. Of course, the Tribunal must come to its own conclusion.

[125] As noted above, the applicable litigation privilege need not be separately established on a document-by-document basis, but each document for which litigation privilege is claimed must be shown to fall within the class of documents covered by the litigation privilege that is demonstrated by the evidence.

[126] Ms McLean testified that she reviewed the Schedule "B" documents that are the subject of Google's motion. All of these documents post-date July 2, 2025, when the Commissioner determined that litigation was reasonably apprehended. With three specified exceptions, Ms McLean's testimony was that the documents were prepared for the dominant purpose of litigation. (On the three exceptions: Ms McLean's affidavit advised that two have been produced and that the third is not relevant.)

[127] Ms McLean's affidavit categorized the documents as follows (noting that "some documents relate to multiple categories"):

a) *Communications with third parties requesting data or information for the purposes of litigation*. In a footnote in her affidavit, Ms McLean identified the specific rows in the Schedule "B" that describe the requested documents in this category (102 rows in the Commissioner's initial affidavit of documents and 1 row in the supplemental affidavit of documents). She confirmed that the data and the documents received have been produced to Google;

b) *Communications with prospective witnesses* (9 listed in the initial and 8 in the supplemental affidavit of documents that fall into this category);

c) *Communications with third parties regarding their witness statements* (244 listed in the initial, 30 in the supplementary affidavit that fall into this category);

d) *Witness statement exhibits* (22 listed in the supplemental affidavit of documents that fall into this category).

[128] Based on the contents of her affidavit, I am satisfied that Ms McLean did review all of the documents that are the subject of Google's motion and that she found them to be prepared for the dominant purpose of reasonably contemplated litigation.

[129] In my view, each of the four categories described above is a kind of document for which litigation privilege may be properly claimed. In addition, in light of the affidavit evidence filed on this motion and the legal and factual context described above (*Rogers/Shaw CT*, at paras 68-69), I am satisfied that that litigation privilege attaches to the documents in each of the first three categories of documents identified in Ms McLean's affidavit.

[130] For these reasons and the additional reasons below, I reach the same conclusion for the fourth category – the witness statement exhibits. For these documents, further explanation is warranted, given the submissions on this motion and the context of Tribunal proceedings. The reasons below also support the conclusion on litigation privilege for the third category identified by Ms McLean – the communications with third parties regarding their witness statements.

[131] There is no dispute that each of the witness statements listed in the Commissioner's Schedule "B" is not producible. Ms McLean's affidavit identified the exhibits attached to witness statements by the rows that describe them in the Commissioner's supplemental affidavit of documents (rows 1-6, 18, 66, 68-73, 87, 161-163, 171-172, 237, and 239-240). I have reviewed the entries in those rows. As Google noted in its submissions, some of the exhibits attached to the witness statements appear, from their Schedule "B" descriptions, to be documents that may be publicly available. Other exhibits appear not to be.

[132] In my view, the proper approach in Tribunal proceedings is to determine whether litigation privilege attaches to a witness statement and its exhibits as a single unit or bundle, recognizing that at the current stage of this proceeding, the witness statement is itself covered by litigation privilege. Thus, applying the same legal test as above, each bundle of documents (witness statement and exhibits) for which litigation privilege is claimed must be shown to fall within the class of litigation privileged documents established by the evidence and circumstances on this motion, on bundle-by-bundle basis.

[133] In my view, the Commissioner has done so. In the context of civil proceedings before the Tribunal under the *Competition Tribunal Rules*, the exhibits attached to a litigation privileged witness statement should also be treated as litigation privileged, assuming that the privilege has been established by the evidence and unless an exception applies as discussed above.

[134] To elaborate, the preparation of witness statements for a Tribunal hearing is expressly contemplated by the *Competition Tribunal Rules*: see Rules 68-70. Rule 74(1) provides that the evidence in chief of each lay witness shall be tendered by way of the witness statements in Rules 68-70 and "consist of their full statement of evidence and relevant documents or references to those documents". Rule 74(4) provides for the receipt of a witness statement in evidence at a hearing only if the witness is in attendance and available for cross-examination or questioning by the Tribunal.

[135] The disclosure of witness statements before a Tribunal hearing (including "relevant documents or references to those documents") is also expressly contemplated by the *Competition Tribunal Rules*. Further, the Rules prescribe a specific minimum number of days before the commencement of the hearing for their disclosure by the applicant, the respondent, and in reply: see Rules 68(1), 69(1) and 70.

[136] In practice, witness statements including their exhibits are served on opposite parties before the hearing and provided to the Tribunal before the hearing. Witness statements are adopted by each witness at the outset of their oral testimony. Witness statements almost always attach exhibits, which may run to thousands of pages in complex proceedings. As the language in Rule 74(1) suggests, exhibits are usually documents that are non-privileged and producible in the litigation.

[137] It is not only consistent with the *Competition Tribunal Rules* to recognize that a witness statement and its exhibits prepared for a Tribunal hearing should be analyzed and treated together for litigation privilege. Doing so also advances the core purposes of litigation privilege: to maintain a protected area to facilitate investigation and preparation of a case for a Tribunal hearing and to ensure parties can prepare the contents of their witness statements without adversarial interference and without fear of premature disclosure: *Lizotte*, at para 24; *Blank*, at paras 32, 34. The selection of exhibits for a witness statement is inherently bound up with deciding on the contents of the witness statement and drafting it. Knowledge by an opposing litigant of what is attached to a witness statement may well provide insight into a party's selection, organization and analysis of the facts and the party's strategy, distinct from the factual matters that are disclosable during examinations for discovery. See *Blank*, at para 64.

[138] As may be seen, the parties' competing interests in a protected zone to prepare for litigation, on one hand, and full and timely disclosure on the other hand, are reconciled through the disclosure to the opposing party of witness statements with exhibits and the receiving party's opportunity to respond or reply. These events occur after documentary and oral discoveries but prior to the hearing on the merits, under the Tribunal's rules and scheduling orders. The receiving party also has a right to cross-examine on the witness statement and exhibits during the hearing.

[139] This approach to litigation privilege for witness statements and their exhibits does not create dissonance with a party's obligation to list relevant and producible documents in Schedule "A" to an affidavit of documents. The drafting of a witness statement that complies with Rule 74(1) raises the possibility that the same document could appear in both Schedule "A" and Schedule "B" if a witness statement is prepared with exhibits before the affidavit of documents is executed. The point is that the selection and organization of certain documents to be attached as exhibits to such a witness statement may attract litigation privilege as part of a bundle, even if some attached documents are otherwise relevant and producible – assuming always that litigation privilege is established by the evidence and no exception applies. A party may have to list and produce documents in Schedule "A" to its affidavit of documents and may also list them in Schedule "B" in a way that properly identifies, but does not reveal too much about, the documents (e.g. through anonymization). With such a dual listing, the mere fact that a document is an exhibit to a witness statement does not impermissibly shield a document from production.

[140] Treating a witness statement and its exhibits as a single bundle for the potential application of litigation privilege may also have the salutary effect of avoiding pre-hearing motions that could

otherwise arise if a document-by-document approach were taken on this issue: see a similar concern in *Lizotte*, at para 39, as noted in *Tk'emlúps te Secwépemc First Nation*, at para 38.

[141] There may be occasions when a witness statement is prepared but not served. For example, a party may determine that another witness covers the same ground as the witness with the unserved statement, or perhaps a witness may be unable to participate in the hearing. I do not believe that this possibility affects the Tribunal's analysis of whether a litigation privilege attaches to the witness statement and its exhibits at the discovery stage of the litigation.

[142] In the present proceeding, the dates for service of the parties' witness statements and other supporting materials are much earlier before the hearing than is stated in the *Competition Tribunal Rules*. The deadline for Google to serve its responding materials after receiving the Commissioner's materials is also longer than the time stated in the rules. The pre-hearing deadlines and this spacing of deadlines were set almost a year ago in the Bifurcation and Scheduling Order, following negotiations between the parties. Google has not shown how this early disclosure and longer spacing is insufficient to enable it to answer the Commissioner's case fully and fairly.

[143] As Google did not argue that any exception to litigation privilege applies, I conclude that Google's motion for production of certain documents listed as litigation privileged in the Commissioner's Schedule "B" must be dismissed.

[144] I note, for clarity, that the analysis above is restricted to the application of litigation privilege principles to witness statements and their exhibits during civil proceedings before the Tribunal under the *Competition Tribunal Rules*. These Reasons do not recognize some form of public interest privilege in documents or information collected by the Commissioner during an inquiry: see *VAA FCA*.

[145] Finally, Google requested an order compelling production of the recommendation to the Commissioner to commence the present litigation and documents used in support of that recommendation. The recommendation was made on September 6, 2024, by personnel from the Bureau and the Department of Justice. Substantially the same issue arose in *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2025 Comp Trib 23, at Schedule A, Sept 3/25, qq 274-279. A similar issue also arose with respect to a recommendation memorandum to the Commissioner in *Rogers/Shaw CT*. In both cases, the Tribunal did not order production of the memorandum.

[146] Here, the recommendation to the Commissioner to commence the present proceeding is also not producible. The following points are material to this conclusion: (i) the recommendation was prepared by personnel from the Bureau and the Department of Justice, and must contain the analysis of facts identified and selected from the information gathered during the Commissioner's inquiry; (ii) the recommendation was made during the period to which litigation privilege applies to documents prepared for the dominant purpose of litigation, which must include a recommendation to commence the present application; and (iii) the recommendation includes contributions from the Department of Justice as Commissioner's legal counsel, which are covered by legal professional privilege. In addition, Google did not raise any exception to privilege.

[147] I also note that Ms McLean's affidavit advised that the facts underlying the recommendation have been produced and that the Commissioner has provided Google with a list of the documents used in support. See *Rogers/Shaw CT*, at para 73.

[148] Accordingly, Google's motion to compel production of documents in the Commissioner's Schedule "B" must be dismissed. The Tribunal also dismisses the motion for production of the recommendation to the Commissioner to commence this proceeding, as raised under Category 1.

E. Category 6: Whether the Commissioner has any basis to contest the accuracy of information found on certain third parties' websites

[149] Google seeks to compel the Commissioner to answer questions concerning whether the Commissioner has any basis to dispute the contents of 11 websites and a press release of certain commercial entities identified by Google that it advises are market participants interviewed by the Commissioner during the investigations. Google has asked during examination for discovery whether the Commissioner disputes how those market participants describe themselves on their websites.

[150] Google submitted that the information on the third-party websites is uncontentious, and that the question/answer on discovery will save time at the hearing.

[151] These questions need not be answered at the discovery stage. The questions go to the evidence to be adduced at the hearing and essentially ask the Commissioner to confirm the truth of information on third party market participants' websites. In that light, if Google seeks to adduce hearing evidence from market participants, it can do so in an efficient way. For example, if the information to be provided is in fact uncontentious, as Google suggests, and is also important enough to be part of Google's case, then the evidence may be easily adduced and speedily entered into evidence at the hearing through a witness after serving a pre-disclosed witness statement. However, by rule, doing so involves an opportunity for the other party – here, the Commissioner – to cross-examine, if so advised: see Rule 74(4). Whether the Commissioner decides to cross-examine or not is a matter for the Commissioner later in the process, following the filing of both parties' materials for the hearing and in light of the chess-clock time allocated for to each party. It is premature to deal with these hearing issues on this motion.

[152] Google's motion with respect to Category 6 must be dismissed.

IV. CONCLUSION

[153] For these reasons, I conclude that the Commissioner's motion must be granted in part. Google's motion must be dismissed.

[154] The Commissioner is entitled to costs, given that he has been partially successful on his motion and fully successful on Google's motion. These motions were extensively argued both in writing and over a day and half of oral argument. Both parties had two legal counsel deliver oral argument, which was reasonable on a refusals motion of this scale.

[155] In the exercise of the Tribunal's discretion, costs will be fixed in the amount of $10,000, payable by Google to the Commissioner in the cause and in any event of the outcome of the application.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[156] The Commissioner's motion is granted in part, only in relation to the trial transcript excerpts of Dr Jayaram, Dr Korula and Mr Mohan. In particular:

a) Google shall confirm to the Commissioner whether the testimony of Dr Jayaram, Dr Korula and Mr Mohan, in the trial transcript excerpts identified by the Commissioner as of the date of this Order, remains true and accurate today, and advise whether the testimony has changed since it was given in the US District Court Proceedings in September 2024 and if so, how.

b) Google's answers are subject to the specific qualifications set out in paragraph 35 of the Reasons.

c) Unless otherwise directed, Google's answers will be due 14 days from the date of this Order, and the date to provide answers in the Bifurcation and Scheduling Order is amended accordingly.

d) If the Commissioner has additional examination for discovery arising from these answers provided by Google, the last date for that examination is extended to seven days after the answers are provided, again unless otherwise directed.

[157] The balance of the Commissioner's motion, related to the other eight Google employees' transcript excerpts, is dismissed.

[158] Google's motion is dismissed.

[159] The Tribunal awards costs of these motions payable by Google to the Commissioner in the cause, fixed in the amount of $10,000, in any event of the outcome of the Commissioner's application under section 79 of the *Competition Act*.

DATED at Ottawa, this 25th day of March 2026.

SIGNED on behalf of the Tribunal by the Chairperson

(s) Andrew D. Little

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