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COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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April 13, 2026

VIA EMAIL

Competition Tribunal
17th Floor
333 Laurier Avenue West
Ottawa, Ontario K1A 0G7

Dear Registry:

Re: The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic v. Apple Canada Inc. et al. – Competition Tribunal File No.: CT-2025-007

Pursuant to the Tribunal's direction dated March 16, 2026, this is the response of The Samuel-Glushko Canadian Internet Policy and Public Interest Clinic ("**CIPPIC**") to the informal motion to adduce evidence brought by Apple Canada Inc. and Apple Inc. (collectively, "**Apple**").

As described below, CIPPIC objects to paragraphs 8, 17, 20 and 21 and Exhibits "D", "E", "F" and "G" of the proposed draft affidavit of Julian Kleinbrodt ("**Kleinbrodt Affidavit**"). CIPPIC does not object to the remaining proposed evidence.

<u>The Test for Admitting Responding Evidence</u>

In the responding evidence motion in *Martin*,[1] the Tribunal applied the 3-part test for responding evidence on a leave application set out in *JAMP Pharma*.[2] This test can be paraphrased as follows:

1. The moving party must set out, in as much detail as possible, the discrete facts and specific evidence that it wishes to include in the proposed affidavit;

2. The proposed responding evidence must relate to one or more "narrowly-defined issues or discrete facts,"[3] not wide-ranging issues; and

3. The proposed responding evidence must be limited to factual (not expert) evidence and be tailored to negate or respond directly to the applicant's factual allegations. The Tribunal's role in the leave application is a summary and screening role.

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[1] *Martin v Alphabet Inc et al*, 2025 Comp Trib 12 ("***Martin*** **Evidence Decision**").
[2] *Martin* Evidence Decision at para 11, citing *JAMP Pharma Corporation v Janssen Inc,* 2024 Comp Trib 4 ("***Jamp Pharma***") at paras 6-13.
[3] *Jamp Pharma* at para 12.

In the *Martin* leave decision, the Tribunal further held that the leave test under s. 103.1 "[…] inherently involves little or no evidence from the proposed respondents."[4]

The US Proceedings – Paragraphs 5-7; Exhibits A-C

CIPPIC tendered evidence of foreign proceedings involving the Apple App Store, placing particular emphasis on proceedings in the UK and Australia, to support CIPPIC's argument that the competition law issues in this case are substantial, genuine and justiciable.[5]

Paragraphs 5-7 of the Kleinbrodt Affidavit attach copies of U.S. decisions between Epic Games and Apple (akin to CIPPIC's reliance on the Australian court decision, also involving Epic Games), as well as a U.S. decision in a class-action antitrust case involving the App Store.

CIPPIC does not object to this evidence. However, CIPPIC will argue that these decisions provide further evidence that the competition law disputes in this case are substantial, genuine and justiciable.

Additional US Proceedings – Paragraph 8

Unlike paragraphs 5-7, paragraph 8 of the Kleinbrodt Affidavit merely lists the styles of cause of five U.S. proceedings that Mr. Kleinbrodt states, without explanation: (a) are antitrust claims; and (b) based on allegations similar to those contained in the Applicant's Proposed Notice of Application pursuant to sections 77 and 79 of the *Competition Act*. No copies of the orders or decisions are attached as exhibits.

The paragraph does not meet the *JAMP* criteria. It is vague, unsupported commentary by a non-Canadian lawyer about the contents of foreign proceedings and their alleged similarity to this proceeding brought pursuant to Canadian law. Furthermore, the failure to attach copies of the actual decisions and orders prevents the Tribunal from being able to assess the accuracy of the statements made. Paragraph 8 should be denied leave.

Paragraph 9-16, 18; Exhibit "C.1"

These paragraphs provide a "status update" on five decisions cited in CIPPIC's record, for example, by describing Apple's appeals or requests to appeal those decisions. CIPPIC does not object to this evidence. It is akin to the "update" evidence permitted in *Martin*.[6] However, as with paragraphs 5-7, CIPPIC will argue that these appeals and proposed appeals confirm that the competition issues in this case are substantial, genuine and justiciable, and that Canadian

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[4] *Martin v Alphabet Inc et al*, 2026 Comp Trib 3 ("***Martin*** **Leave Decision**") at para 123.
[5] See e.g. CIPPIC Revised Memorandum of Fact and Law dated March 23, 2026 at paras 49-61.
[6] *Martin* Evidence Decision at para 35.

consumers, and app developers who do business in this country, should also be able to have the legality of Apple's practices in this country decided, as they have been in other countries.

Paragraph 17, Exhibit "D"

This paragraph and exhibit describe and attach a 70-page affidavit sworn by Philip Schiller (the "**Schiller Witness Statement**") in the UK Competition Appeal Tribunal (the "**UK CAT**") proceeding relied on by CIPPIC in its submissions. Apple submits that the affidavit "includes specific facts addressing Apple's intentions and business rationales for the App Store business model," which Apple states is relevant because "section 78 […] require[s] an anti-competitive intention […]."[7]

In *Martin*, the Tribunal held that it will not "[…] seek to resolve complex or factually nuanced issues (for example, market definition **or anti-competitive intention or purpose**) that are better resolved with the benefit of full evidence at a hearing on the merits."[8] Apple's purpose in tendering this affidavit is contrary to *Martin*.

In addition, it would be unfair to admit the Schiller Witness Statement in isolation without the broader context before the UK CAT. The Schiller Witness Statement is akin to the applicant's "cherry-picked" evidence in *Martin*.[9] The UK CAT decision cites Schiller 74 times.[10] Mr. Schiller gave oral evidence over two days. The Schiller Witness Statement does not include the documentary record that Mr. Schiller cites throughout the affidavit.[11] The UK CAT considered extensive evidence on the defences described in paragraph 21 of Apple's letter submission, which was not limited to the Schiller Witness Statement.[12]

In short, the Schiller Witness Statement does not relate to issues that are discrete and focused. It presents "relatively unconstrained and wide-ranging matters that are not suitable for responding evidence during the screening process at the leave stage."[13] There is little to be gained by converting the leave stage into a proxy re-litigation battle over evidence filed in foreign proceedings. This would be inconsistent with the Tribunal's "summary and screening role" on a

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[7] See Apple's informal motion at paras 19-27.
[8] *Martin* Leave Decision at para 122 (emphasis added).
[9] *Martin* Leave Decision at para 171.
[10] See e.g. *Kent v Apple et al,* [2025] CAT 67 ("**UK CAT Decision**") at paras 12, 36-39, 42, 72-73, 179-180, 295, 302, 312, 318, 421, 465, 848 and 891, amongst many others, where Mr. Schiller's statement and evidence is analyzed. In *Epic Games Inc v Apple Inc,* [2025] FCA 900, the Federal Court of Australia cited Mr. Schiller's evidence 274 times.
[11] See Exhibit "D" to the Kleinbrodt Affidavit at para 6.
[12] See generally UK CAT Decision at paras 685-800, which considered Apple's justifications, akin to the factors described in the *Competition Act*, RSC 1985, c c-34, s 79(4).
[13] *Martin* Evidence Decision at para 46.

leave application. Apple can make arguments about its defences without the Schiller Witness Statement. Paragraph 17 and Exhibit "D" should be denied leave.

Paragraphs 20-21 & Exhibits "E", "F", "G"

In its record, CIPPIC included evidence from a UK-based developer, xigxag, and stated that it had engaged Eugene Burrus (global policy counsel for the Coalition for App Fairness ("**CAF**")). In response, paragraphs 20-21 and Exhibits "E", "F" and "G" of the Kleinbrodt Affidavit seek to include printouts from xigxag and CAF's websites. Apple's letter states that this evidence "demonstrates their lack of connection to Canada," which Apple argues is relevant because the Act's purpose is to "deal with conduct that has alleged anticompetitive effects in Canada."

Apple misses the point. CAF is not a proposed witness in this proceeding. As described in CIPPIC's materials, Mr. Burrus, global policy counsel to the CAF, has been engaged as a consultant because of his detailed knowledge of Apple's global practices, app developer concerns with App Store practices, insight into disputes over the App Store that are ongoing worldwide, as well as contacts with numerous industry experts. The CAF webpages are not relevant to Mr. Burrus' engagement.

There is also no dispute that xigxag is a UK-based developer. That is explicit in Ms. Fairbrother's affidavit. There is no purpose in adducing evidence on a matter that is not in dispute.

If Apple wishes to argue that the Act requires the proposed application to exclude app developers domiciled outside Canada, that is a legal argument that does not require paragraphs 20-21 and Exhibits "E", "F" and "G". These paragraphs and exhibits are irrelevant and should be denied leave.

Order requested

CIPPIC requests an order that the costs of Apple's motion be reserved to the Tribunal's disposition of the leave application under section 103.1.

Yours truly,
SOTOS LLP

Louis Sokolov
LS/ja

cc. Éric Vallières, Neil Campbell, Samantha Gordon, William Wu, *McMillan LLP*
Paul Klippenstein, Kevin Hong, *Competition Bureau Legal Services*