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VIA E-MAIL

21 May 2025

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

RECEIVED / REÇU
Date: May 21, 2025
CT- 2024-010

Sarah Sharp-Smith for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. | # 80

Att: Justice Little
The Tribunal Registry
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Dear Registrar:

RE: CT-2024-010 – Commissioner of Competition v Google Canada Corporation and Google LLC

We would ask that you bring this letter to the attention of Justice Little.

The Commissioner has provided notice to counsel for Google that it intends to bring a motion to strike Google's proposed constitutional challenge. Attached is a copy of the correspondence to Google counsel with a copy of the proposed Notice of Motion, as well as correspondence received from Google counsel this afternoon. The motion materials served on the Commissioner make it abundantly clear that there is no legal basis upon which to proceed with the constitutional challenge. In the absence of a decision by the Tribunal fixing an AMP amount, if any, it cannot be said that there has been a breach of a constitutional right. While a maximum AMP is theoretically possible and a matter that lies with the Tribunal to decide in due course, the amount of that AMP, if any, remains to be determined. In these circumstances, it would be grossly unfair for the Commissioner to have to respond to a motion that is anchored on conjecture, not to mention the precious judicial resources that the Tribunal would be asked to apply. The fact that not a single province has responded to the Notice of Constitutional challenge speaks volumes.

Google has anchored the constitutional challenge on the Commissioner's Application where he seeks a maximum AMP. This is baseless given that a pleading cannot form the basis of a constitutional breach. Regardless, we are prepared to amend the pleading to

include the words “not exceeding” instead of “equal to” in the prayer for relief, which underscores the Tribunal’s ultimate discretion in deciding an AMP amount. In any event, the Application and the Reply make the Commissioner’s position clear that the amount of any AMP is entirely within the discretion of the Tribunal.

The Commissioner is unlikely to file affidavit evidence in response to the constitutional challenge. For the purposes of the motion to strike, the Tribunal will have all of the required materials before it to dispose of the matter, having given Google every opportunity to makes it case. The evidence that Google has filed may be relied upon in the remedies portion of the proceedings, assuming there is one.

The Commissioner is of the view that this motion to strike can be heard on very short notice and is prepared to have the matter heard at the earliest possible date. No affidavits will be relied upon by the Commissioner and the Tribunal can, for the purposes of this motion to strike, assume that the assertions made in Google’s Notice of Motion are true. The Commissioner only requires three hours to argue the motion. The Commissioner is available for a CMC to discuss motion dates, although this may not be necessary as dates maybe fixed by the Tribunal.

We await your guidance.

Yours truly,

Alexander M Gay

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Alexander Gay
General Counsel
Competition Bureau Legal Services
Department of Justice Canada

Cc Donald Houston, Derek Leschinsky, John Syme, Katherine Rydel, Sanjay Kumbhare (*Competition Bureau Legal Services)*

Kent Thompson, Elisa Kearney, Chantelle Cseh, Chanakya Sethi, Chenyang Li (*Davies Ward Phillips & Vineberg LLP)*

Encls.

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WITH PREJUDICE

VIA Email

16 May 2025

Kent Thompson
Davies Ward Phillips & Vineberg LLP
155 Wellington Steet West
Toronto, Ontario
M5V 3J7

Dear Mr. Thompson:

RE: CT-2024-010 – Commissioner of Competition v Google Canada Corporation and Google LLC

We acknowledge receipt of your motion materials in support of Google's constitutional challenge. Upon review of your materials, we believe that the constitutional challenge is premature and without merit for the reasons described in the attached Notice of Motion. As such, we have instructions to bring a motion to strike your motion at the earliest date possible.

A constitutional challenge must rest on a constitutional breach. Without it, the challenge is hypothetical, premature and a waste of precious court resources. The motion materials that you served do not describe a constitutional breach. The motion materials only contain assertions in relation to a remedy that the Competition Tribunal has not yet ordered and may only consider ordering following the Phase II/remedy portion of the case, which would proceed, only if the Tribunal finds that Google has engaged in reviewable conduct within the meaning of ss. 79(1) of the Act in the Phase I/liability portion of this proceeding.

The Commissioner has great difficulty with Google's position for a number of reasons. Firstly, a general claim for relief in a pleading does not give rise to a cause of action nor can it form the basis of a constitutional breach. Secondly, your proposition that the Commissioner's pleading constitutes a breach of a constitutional right ignores the

legislative scheme which bestows discretion on the Competition Tribunal to decide whether to order the payment of an AMP and, if so, in what amount. A number of factors will also have to be considered by the Tribunal when arriving at a quantum. The fact that the Commissioner has requested the maximum AMP in no way limits the Competition Tribunal's discretion. Thirdly, no actual AMP amount has been considered or awarded by the Tribunal. It remains to be seen whether an amount will be awarded at all and, if awarded, in what amount, all of which makes the motion entirely speculative.

We have reviewed your expert evidence in detail. While that evidence might be relied upon at the remedies hearing, it is irrelevant to the constitutional challenge Google brings at this time, where no AMP has been considered or awarded by the Tribunal. The language contained in all of your experts' reports speaks to a potential consequence **if and when** a high AMP is awarded by the Tribunal. This event has not materialized and is entirely hypothetical.

This is a case where the circumstances warrants a motion to strike and where the interests of justice call for it. The Commissioner does not believe that in the face of what are speculative expert reports, that he should be put to the burden of having to file responding materials. The interests of justice militate against having a party incur costs on what is a patently unmeritorious motion.

In response to your motion, the Commissioner will seek to amend the Application, even though it is unnecessary given that a pleading cannot form the basis of a constitutional challenge. Not to mention that our Reply explains that the Competition Tribunal has ultimate discretion on the AMP amount. Regardless, we are prepared to amend the pleading to include the words **"not exceeding"** instead of "equal to" in the prayer for relief, which underscores the Competition Tribunal's ultimate discretion in deciding an AMP amount. Again, while this amendment is unnecessary, we bring it forward in the interests of resolving this matter expeditiously.

We invite you to re-consider your motion of constitutional challenge. We are prepared to consent to an immediate discontinuance without costs. If we are unable to reach agreement on the discontinuance, by 4PM on Wednesday, May 21, 2025, we will write to the Competition Tribunal and request a motion date. A copy of this letter, along with the Notice of Motion will be made available to the Competition Tribunal.

The proposed motion to strike does not call for evidence and is straightforward. In our view, little time is required to respond and the allotted time to hear the motion should be no longer than a half day. We will be asking the Tribunal to make the motion returnable at the earliest date possible.

We await your reply,

Alexander M Gay

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CT-2024-010

THE COMPETITION TRIBUNAL

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

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

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.

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

NOTICE OF MOTION

(Commissioner of Competition's Motion to Strike)

TAKE NOTICE THAT the Applicant, The Commissioner of Competition (the "**Commissioner**"), will make a motion to the Competition Tribunal ("the "**Tribunal**") pursuant to Rule 34(1) of the *Competition Tribunal Rules*, SOR/2008-141 (the "***Competition Tribunal Rules***") and Rule 221 of the *Federal Courts Rules,* SOR/98-106 (the "***Federal Courts Rules***") on a date and at a place to be determined by the Tribunal. The estimated duration of the hearing of the motion is less than two hours.

THE MOTION IS FOR:

1. An order striking the Respondents', Google Canada Corporation and Google LLC ("collectively, "**Google**"), Notice of Motion dated May 6, 2025, in its entirety, without leave to amend;

2. Costs of this motion; and

3. Such other relief as counsel may advise and the Tribunal may permit.

THE GROUNDS FOR THE MOTION ARE:

A. Introduction

4. The Commissioner of Competition (the "**Commissioner**") filed an Application with the Tribunal alleging that Google has abused its dominant position in certain advertising technology markets (the "**Application**").

5. The Application seeks, *inter alia*, an order requiring Google to pay an administrative monetary penalty ("**AMP**") equal to three times the value of the benefit derived from Google's anticompetitive practices; or, if that amount cannot be reasonably determined, 3% of Google's annual worldwide gross revenues, "or such other relief as the Tribunal may consider appropriate."

6. Google has brought a motion challenging the constitutionality of s. 79(3.1) of the *Competition Act,* R.S.C., 1985, c. C-34 (the "***Act***"), and its application in this case. Google asserts that its rights under s. 7, 8, 11(c), 11(d), 11(g) and 11(i) of the *Charter of Rights and Freedoms* (the "***Charter***"), as well as under s. 2(e) of the *Bill of Rights* S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III) (the "***Bill of Rights***") have been violated and will continue to be violated if the Application is permitted to proceed.

7. Google's motion is fundamentally and irretrievably flawed.

8. Google invokes s. 7, 8, and 11 of the *Charter* and s. 2(e) of the *Bill of Rights* on the basis that the Application *could* result in the Tribunal ordering it to pay an AMP in an amount that Google asserts would represent a "true penal consequence". In effect, Google seeks to have the Tribunal rule that its rights have been breached on the basis of a hypothetical possibility, rather than an actual breach.

9. The expert evidence Google has filed in support of its motion is similarly conditional, offering opinions on the reputational and financial impact on Google *if* the Tribunal were to award an AMP in the maximum amount provided for in the *Act*.

10. Google's motion ignores that the decision to order Google to pay an AMP and the amount of any AMP so ordered are matters entirely within the discretion of the Tribunal, to be decided at the conclusion of Phase II of this proceeding. This would occur only if the Tribunal first decides at the conclusion of Phase I of this proceeding that Google has engaged in conduct contrary to s. 79(1) of the *Act,* and if the Tribunal also decides that its conduct has had or is having the effect of preventing or lessening competition substantially in one or more of the relevant markets identified by the Commissioner.

11. Google's motion also ignores the fact that if the Tribunal were to decide to order Google to pay an AMP at the conclusion of Phase II, in determining the amount of that AMP, the Tribunal would be required to have regard to the factors set out in s. 79(3.2) of the *Act* and, importantly, the requirement in s. 79(3.3) of the *Act* that any AMP ordered be for the purpose of promoting compliance by Google with s. 79(1) of the *Act* and not to punish Google. By legislative stipulation, an AMP issued by the Tribunal in compliance with the *Act* cannot be punitive.

12. At Phase II of this proceeding, Google will have every opportunity to contest whatever AMP amounts the Commissioner seeks, including any arguments that ordering such an AMP would violate its constitutional rights.

13. Google's motion also ignores the well-established principle that it cannot be assumed, before the fact, that judges will exercise their discretion, including their discretion to order the payment of an AMP, in a manner inconsistent with the constitution.

14. Google's constitutional challenge is bereft of any possibility of success and should be struck.

B. Background

15. On November 28, 2024, the Commissioner filed the Application with the Tribunal alleging that Google's anti-competitive conduct in certain ad tech markets constitutes an abuse of dominance within the meaning of s. 79(1) of the *Act*.

16. On February 14, 2025, Google filed a Notice of Constitutional Question ("**NCQ**").

17. Google asserts in the NCQ that because the Application "could" and "may well" result in Google being ordered to pay an AMP which could be a "true penal consequence", the Application breaches the protections guaranteed by s. 7, 8, 11(c), 11(d), 11(g) and 11(i) of the *Charter* and s. 2(e) of the *Bill of Rights*.

18. In paragraph 16 of the NCQ, after describing the AMP order sought in the Application, Google states:

> *"Depending on the way it is calculated, the financial penalty sought by the Commissioner could be measured in the billions of dollars if Google were found liable. That financial penalty could dwarf the profits Google*

> *generates from its display advertising business in Canada." [emphasis added]*

19. Paragraph 20 of the NCQ states:

> *Depending upon the manner in which it is calculated, the quantum of the financial penalty sought against Google by the Commissioner in this Application will vastly exceed the quantum of any fine that has ever been imposed in a penal proceeding in Canada - whether pursuant to the Criminal Code, under the Competition Act or under its predecessor statute, the Combines Investigation Act [cite omitted]. Moreover, the financial penalty sought by the Commissioner in this Application may well be hundreds of times greater than the most significant financial penalty ever awarded by this Tribunal. [emphasis added]*

20. On February 14, 2025, Google filed its Response to the Application. Google's Response echoes the conditional framing of the alleged violation of its constitutional rights set out in the NCQ.

21. On March 28, 2025, the Commissioner filed the Commissioner's Reply to Google's Response.

22. In the Reply, the Commissioner pled that though the Application requested an AMP in the maximum amount provided by the *Act*, the decision regarding whether or not to award an AMP and the amount of any such AMP so ordered, are matters entirely within the discretion of the Tribunal. The Commissioner observed that with respect to the amount of any AMP ordered, the Tribunal must have regard to the factors set out in s. 79(3.2), as well the requirement in s. 79(3.3) that the purpose of any AMP ordered be to promote compliance by Google with the *Act* and not to punish a person against whom the award is made.

23. The Commissioner's Reply states at paragraphs 142 to 146:

> ***VIII. GOOGLE MISCHARACTERIZES THE ADMINISTRATIVE MONETARY PENALTY REMEDY SOUGHT BY THE COMMISSIONER***
>
> *142. Google misreads the Act and the relief sought by the Commissioner in the Application, all with a view to lending support to an ill-conceived constitutional challenge to the administrative monetary penalty or AMP provisions of the Act.*

143. The Act allows the Tribunal to assess Google's conduct and award an appropriate AMP amount to promote conformity with the Act, after having assessed several factors. An AMP is ultimately at the discretion of the Tribunal, although the Act circumscribes that discretion by providing general parameters on the AMP amounts that can be awarded.

144. Subsection 79 (3.1) of the Act provides that the Tribunal may make an order requiring a person to pay an AMP amount that it determines to be appropriate, not exceeding the greater of: (a) $25,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $35,000,000; and (b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues. The continuous duration of the "practice", which stems back to about 2008, is a relevant consideration in determining an appropriate AMP under the Act.

145. The AMP provisions make it clear that the maximum AMP amount of 3% of a person's annual worldwide gross revenues is only possible where: (a) three times the value of the benefit derived from the anti-competitive practice cannot be reasonably determined; and (b) after various factors have been considered.

146. Subsection 79(3.1) of the Act provides the Tribunal with discretion to order the payment of an AMP and its amount. In deciding the amount of any AMP, the Tribunal is required to take account of the factors set out in ss. 79(3.2) of the Act. Moreover, the Act expressly provides that the purpose of any AMP ordered against a person "is to promote practices by that person that are in conformity with [ss. 79(1)] and not to punish that person." The Commissioner acknowledges that though the Application has requested an AMP in the maximum amount provided for in the Act, as a matter of law, any AMP order issued by the Tribunal must conform to the foregoing limits. As such, any AMP ordered by the Tribunal cannot be punitive or constitute a true penal consequence.

C. Google's Motion Record for its Constitutional Challenge

24. On May 6, 2025, Google filed its Motion Record, including its Notice of Motion and affidavit evidence (the "**Motion Record**").

25. Google's Notice of Motion is consistent with the NCQ and its Response, in that it bases Google's constitutional challenge on the assumption that

the Tribunal may, at some future time, order Google to pay an AMP in the maximum allowable amount under s. 79(3.1)(b) of the *Act*.

26. As part of its Motion Record, Google filed the following affidavits from non-expert witnesses:

    a) **Ron Zember**, the Senior Finance Manager and Global Head of Finance for Google Network. Mr. Zember's affidavit provides a suggested calculation for 3% of gross worldwide revenues for both Google Inc. and Google Network (which encompasses the ad tech tools at issue in this proceeding). Mr. Zember's affidavit further describes perceived difficulties in calculating the benefit derived from Google's alleged abuse of dominance;

    b) **Laura Pearce**, Google's Head of Marketing in Canada. Ms. Pearce's affidavit asserts that Google generally has a positive brand and reputation as perceived by consumers, businesses, and employees, which would be negatively affected by the imposition of the maximum allowable fine under s. 79(3.1) of the *Act*, if imposed;

    c) **Corrine Lester**, a Senior Competition Law Clerk at Davies, Ward, Phillips, & Vineberg LLP ("***Davies***"), who outlines the history of the inquiry leading up to the Application; and

    d) **Mary DeCaire**, a Law Clerk at Davies, whose affidavit includes a variety of exhibits relating to, among other things, the legislative history of the *Act*.

27. Google's Motion Record also includes expert affidavits from Rupert Younger and Keith N. Hylton. Both Mr. Younger and Mr. Hylton's opinions are framed in the conditional, i.e., they offer opinions as to the impact on Google if the Tribunal were to order Google to pay an AMP in the maximum amount permitted under the *Act*.

i. Younger Affidavit

28. Mr. Younger is the Director of the Oxford University Centre for Corporate Reputation. Google offers Mr. Younger as an expert in the study, research, and management of corporate reputations. Google requested Mr. Younger to opine on the impact on Google's reputation if the Tribunal were to impose the maximum AMP, provided for in s. 79(3.1) of the *Act*. Mr. Younger was also asked to opine on whether, and to what extent, Google has already suffered prejudice from the fact the Commissioner filed the Application alleging abuse of dominance and seeking an AMP in the maximum amount. Finally, Mr. Younger was asked to opine on whether the maximum AMP, if imposed, would be likely to result in the stigmatisation of Google.

29. Mr. Younger concluded that if the Tribunal were to order Google to pay an AMP in the maximum amount, it would likely experience significant incremental harm to its reputation. In terms of stigma, Mr. Younger opined that Google risks becoming stigmatised should a financial penalty in the maximum amount be ordered by the Tribunal.

30. Mr. Younger's opinions are made almost entirely in the abstract, conditional on the possibility that an AMP could be imposed in the maximum amount. For example, in the overview section at paragraph 26 of his report Mr. Younger summarizes his conclusions as follows:

> *"In brief my opinions may be summarised as follows:*
>
> *a) Corporations, including Google have multiple capability and character reputations; capability reputations are anchored on perceptions of a corporation's competence and ability, while character reputations relate to perceptions about how an organization acts;*

b) *If the financial penalty sought by the Commissioner were to be imposed and the allegation of the Commissioner that Google has "abused" a position of dominance in Canada were to be upheld, Google would likely suffer significant incremental harm to its various character reputations in Canada;*

c) *If imposed, the unprecedented size of the financial penalty sought by the Commissioner in this proceeding, together with the allegation by the Commissioner that Google has "abused" a position of dominance, is likely to negatively impact Google in Canada in terms of human, organizational, and financial capital; and*

d) *The financial penalty sought by the Commissioner, if imposed, together with the allegation by the Commissioner that Google has "abused" a position of dominance in Canada, may result in Google becoming stigmatized in its dealings with a number of its most important stakeholder groups in Canada." [emphasis added]*

31. The balance of Mr. Younger's report is consistent with his summary, offering conditional opinions throughout, for example at paras 58, 63, 76, 95, 107, 113, and 116, as follows:

58. "…in my view, should the Competition Tribunal find that Google, "abused" a position of alleged dominance and impose the extraordinary penalty sought by the Commissioner…"

63. "In my view, if the extraordinary financial penalty sought by the Commissioner were to be imposed by the Competition Tribunal…"

76. "*…the potential imposition against Google …"*

95. "…in the event that the financial penalty in the amount sought by the Commissioner is imposed…"

107. "…if the significant financial penalty sought by the Commissioner is imposed by the Competition Tribunal."

113. "If Google were to receive an unprecedented financial penalty in the proceedings commenced by the Commissioner…"

116. "…should a financial penalty in the order of magnitude sought by the Commissioner be imposed against it by the Competition Tribunal." [emphasis added]

ii. Hylton Affidavit

32. Mr. Hylton is a professor of law at Boston University School of Law. Google has offered him as an expert in the topic of optimal penalties in the antitrust context. Google has requested that Mr. Hylton opine on the purpose and effect of a potential AMP in the maximum amount provided for by s. 79(3.1) of the *Act*.

33. Mr. Hylton opines under two different methodologies, the Chicago school antitrust enforcement model and the dynamic competition model. He opines that, if imposed by the Tribunal, the maximum AMP amount would exceed the optimal penalties from the perspective of antitrust economics.

34. Google uses these conditional opinions based on a hypothetical outcome to the Phase I and Phase II proceedings, as a basis for asserting its constitutional rights have been and will inevitably continue to be breached.

D. Google's Constitutional Challenge is Underpinned by an Overarching and Fatal Flaw

35. Google constitutional challenge is fatally flawed because it asks this Tribunal to find that its rights have been and will continue to be breached based on the possibility of a future breach of those rights. A breach of Google's rights would only occur:

- If in Phase I (liability) of this proceeding, the Tribunal finds that Google has engaged in reviewable conduct within the meaning of s. 79(1) of the *Act*;

- if in Phase I (liability) of this proceeding, the Tribunal finds that Google's reviewable conduct has had or is having the effect of preventing or lessening competition substantially in one or more of the ad tech markets identified in the Application;

- if in Phase II (remedy) of this proceeding, the Tribunal exercises its discretion to order Google to pay an AMP; and

- if in Phase II (remedy) of this proceeding, the Tribunal orders Google to pay an AMP which constitutes a true penal consequence.

36. The Tribunal has not yet awarded or even considered the awarding of any AMP, let alone the quantum of such an AMP. Google's contention that its rights have *already* been breached and will continue to be breached is baseless and speculative.

37. While the Commissioner has sought the maximum AMP in the Application, the Application explicitly recognizes the discretion of the Tribunal to grant "such other relief as the Tribunal may consider appropriate". In any event, the Application is a pleading that cannot in itself give rise to a substantive breach of rights. Google's attempt to rely on the Commissioner's pleading to anchor its entire constitutional challenge is misguided. A request for a maximum AMP in no way takes away or limits the discretion bestowed on the Tribunal in deciding whether to order an AMP, and if so, in what amount.

38. Google misconstrues s. 79(3.1) of the *Act*. S. 79(3.1) specifies the maximum amounts or upper limit of what the Tribunal could order in any

given case. However, subject to that limit, the *Act* in no way prescribes what monetary amount an AMP should be.

39. Instead, the *Act* leaves it to the Tribunal to decide the appropriate amount of any AMP ordered, based on all of the circumstances of the case and having regard to the factors set out in s. 79(3.2), as well as Parliament's instruction under s. 79(3.3) that AMP amounts shall be determined with a view to promoting practices by Google that are in conformity with the purposes of this section and not to punish.

40. Google's motion presupposes that the Tribunal will order Google to pay an AMP in the maximum amount. Google's position disregards both the Tribunal's discretion, and the fact that the determination of an appropriate AMP is a context dependent exercise.

41. Moreover, Google's motion flies in the face of the presumption that this Tribunal will interpret and exercise its discretion under the *Act* in a way that does not result in *Charter* rights being infringed.

42. There is no basis to suggest, and Google offers none, that the process provided for under the *Competition Tribunal Rules* will not afford Google with a fair hearing in this matter. Google will have every opportunity to contest whether an AMP should be issued at all and, if so, the amount of any such AMP at Phase II, the remedies phase of this Application. It is premature to do so at this early stage of the proceeding.

43. Regardless, if the Tribunal were to impose an AMP that Google considered to be punitive, Google would have a right of appeal. The Federal Court of Appeal would be the appropriate forum to raise concerns, but only if the Tribunal has failed to exercise its discretion in accordance with the *Act* and Google's constitutional rights.

44. Google's allegation that it had already suffered prejudice as a result of the filing of the Application is without merit. Moreover, even if such

prejudice existed, which is denied, as a matter of law, it could not constitute a true penal consequence.

E. General Grounds

45. Subsections 8(1), 9(4) and 9(5) of the *Competition Tribunal Act*.

46. Rules 2(1), 34(1), 89, and 92 of the *Competition Tribunal Rules*.

47. Rules 75 and 221 of the *Federal Courts Rules*.

48. Such further and other grounds as Counsel may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Google's Motion record dated May 6, 2025, including the following:

    a) Google's Notice of Motion dated May 6, 2025;

    b) Google's Notice of Constitutional Question dated February 14, 2025;

2. Such other materials as counsel may advise and the Tribunal may permit.

Dated: May 16, 2025.

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May 21, 2025

WITH PREJUDICE

BY EMAIL

Alexander M. Gay
General Counsel
Competition Bureau Legal Services
Department of Justice Canada

Dear Mr. Gay:

Constitutional Challenge in *Commissioner of Competition v. Google Canada et al.* (CT-2024-010)

We write in response to your letter of May 16, 2025 inviting Google to withdraw its constitutional challenge.

Google will not do so. We believe the Commissioner's proposed attempt to strike Google's challenge under the *Charter* and *Bill of Rights* is ill-considered and entirely without merit. All of the arguments the Commissioner apparently intends to advance can and should be raised during the hearing of the constitutional challenge that the Tribunal has already scheduled during the week of September 29, 2025.

Accordingly, we respectfully urge the Commissioner to reconsider initiating a wasteful and inappropriate motion that conflicts with the orderly schedule for the resolution of the constitutional challenge. That schedule was only recently agreed to by all parties and endorsed by the Tribunal in a formal Scheduling Order that has now been issued.

Moreover, and with the greatest of respect, the fact that the Commissioner waited to take the position that Google's constitutional challenge is somehow premature until after: (i) the Scheduling Order of the Tribunal had been agreed to and issued; and (ii) Google had delivered the evidence it relies upon in support of its constitutional challenge in accordance with the terms of that Order, speaks volumes and alone renders the Commissioner's intended motion abusive and inappropriate. In the circumstances, if the Commissioner takes steps to initiate his proposed motion, Google will object to that motion being scheduled or heard.

The various reasons supporting Google's position concerning the merits of the proposed motion of the Commissioner include the following:

First, the Commissioner is incorrect in asserting that Google's motion is premature because the Tribunal has not yet ordered a multibillion-dollar financial penalty against Google. The Commissioner's position in that regard appears to misapprehend settled law.

As the Supreme Court of Canada made clear in its foundational precedent in this area, *Charter* protections are triggered in any situation where "the offence ***may*** lead to a true penal consequence" (*R. v. Wigglesworth*, [1987] 2 SCR 541 at p. 559 (emphasis added)). The Supreme Court's interpretation of the application of the *Charter* follows from the plain text of section 11, which states that *Charter* rights are triggered where "[a]ny person [is] *charged*"—that is, where a proceeding is commenced by some sort of initiating *pleading*.

As a result, whether a true penal consequence has (or has not) actually been imposed is hardly a precondition to a constitutional challenge of this nature. Indeed, in many cases the true penal consequence that an individual or corporation faces may never be imposed, including because no liability is found. Thus, individuals and corporations faced with the *possibility of* the imposition of a true penal consequence are entitled to all of the procedural protections the *Charter* affords.

Wigglesworth illustrates this important point. The Supreme Court held in that case that even though the member of the RCMP at issue had only received a fine of $300, the mere *possibility* that the administrative tribunal that imposed that fine *could have* imposed a term of imprisonment was sufficient to trigger the various protections under the *Charter*.

As a result, the Commissioner's late breaking tactical offer to amend his Notice of Application to state that he seeks a penalty in an amount "not exceeding" (as opposed to "equal to") 3% of Google's annual worldwide gross revenues does nothing to change the constitutional analysis. To the contrary, this proposed amendment *confirms* that the Commissioner is unwilling to abandon his efforts to obtain an unprecedented, multibillion-dollar penalty from Google—even after having been placed squarely on notice concerning the constitutional ramifications of his decision in that regard.

Your assertion that no constitutional breach has occurred is also misplaced. The constitutional violation is crystalized when *Charter* protections are denied to an individual or corporation facing the *possibility* of a true penal consequence. Thus, the Commissioner is incorrect in asserting that there has been no breach of Google's constitutional rights. Far from it, Google's *Charter* rights have already been violated and will continue to be violated absent relief from the Tribunal, for the reasons set forth in Google's Notice of Motion and its earlier Notice of Constitutional Question. That is precisely why the primary substantive relief Google has sought in paragraph (b)(ii) of its Notice of Motion is an Order "immediately and permanently staying or dismissing the Application as against Google".

Second, the proposed motion of the Commissioner ignores the fact that the Supreme Court of Canada has "often stressed the importance of a full evidentiary record when deciding constitutional questions" (*R. v. Downes*, 2023 SCC 6 at para. 58). More specifically, the Court has been clear that "*Charter* decisions should not and must not be made in a factual vacuum" (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at p. 361). That is so because the absence of a proper factual record will "inevitably result in ill-considered opinions" (*MacKay* at p. 361).

Mindful of this teaching, Google has made substantial efforts to prepare a comprehensive evidentiary record that will no doubt be of significant assistance to the Tribunal in resolving the important constitutional question the Commissioner's Application has given rise to. That record was delivered by Google in accordance with the briefing schedule agreed to by the parties and endorsed in the Scheduling Order of the Tribunal.

It is deeply unfortunate that the Commissioner—having urged Parliament to enact the draconian penalty at issue in this proceeding during the course of the Bureau's investigation of Google, and then having sought that penalty against Google when he commenced his Application—is now considering an attempt to short circuit a serious and *bona fide* constitutional challenge concerning the consequences and implications associated with that penalty while trying to evade and depriving the Tribunal of the benefit of Google's constitutional evidence.

Third, the Commissioner's request ignores the important fact that the parties negotiated in good faith (and with full disclosure regarding Google's intentions with respect to its constitutional challenge) an agreed upon schedule concerning the briefing and litigation of that challenge. Google was forthright at all times in previewing with the Commissioner's counsel the kinds of evidence it intended to marshal in support of its challenge in discussions that you, I and others participated in as early as February 25, 2025. Indeed, you acknowledged as much during a Case Management Conference before Justice Little two days later, on February 27, 2025.[1] In short, there have been no surprises by Google. Rather, *the Commissioner has known for almost three months* the sorts of evidence Google intended to rely upon in support of its constitutional challenge.

Thus, the surprise is the Commissioner's apparent decision—after receiving and reviewing Google's constitutional evidence—to attempt to resile from his agreement concerning the established timetable and procedure for the briefing and resolution of Google's constitutional challenge.

Accordingly, we wish to make clear that Google will oppose strenuously any attempt the Commissioner might make to upend, frustrate or modify the agreed-upon schedule imposed by the Tribunal concerning Google's constitutional challenge. In this regard, as adverted to above, Google does ***not*** agree that the proposed motion of the Commissioner should be scheduled or argued, let alone be granted. Nor does Google accept that any motion to strike the Commissioner might bring to strike Google's constitutional challenge can somehow be heard in the absence of evidence. The exact opposite is true.

As stated above, if the Commissioner elects to proceed with his proposed motion, Google will object to the motion being scheduled or heard. If Justice Little elects to entertain the motion, Google will be compelled to file its entire constitutional record in response to the Commissioner's motion and will explain in considerable detail during the argument of the motion the basis of its constitutional challenge and the applicable law that supports the challenge as well as the substantial evidence Google has already delivered. Consequently, the half-day you have proposed for a hearing of the Commissioner's proposed motion is not realistic.

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[1] Case Management Conference T. 34:11-13 (Feb. 27, 2025).

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As a consequence, the proposed motion of the Commissioner is inconsistent with the overriding goals of judicial efficiency and economy, as well as Rule 2(1) of the Tribunal's Rules. It makes no sense whatsoever for many of the same arguments to be made by both parties twice, once during the return of the Commissioner's proposed motion and then again during the argument of Google's constitutional challenge.

Finally, if the proposed motion of the Commissioner is heard, Google will also make clear that if Justice Little were somehow to grant the Commissioner's motion, Google will: (i) immediately appeal any such Decision to the Federal Court of Appeal; and (ii) seek an immediate stay of the Commissioner's Application unless and until its constitutional challenge has been heard and determined.

In view of the above, we sincerely hope the Commissioner will reconsider his position. The parties negotiated in good faith a mutually acceptable schedule for the briefing, hearing and determination by Justice Little of Google's constitutional challenge that the Tribunal has now endorsed. Google has provided its Motion Record. The Commissioner should now provide his. If the Commissioner nonetheless insists on proceeding with his proposed motion to strike, we ask that you please include this correspondence in your materials to the Tribunal, alongside your letter to us.

Yours very truly,

Kent E. Thomson

cc Donald Houston, Derek Leschinsky, John Syme, Katherine Rydel & Sanjay Kumbhare
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