Federal Court  Cour fédérale

Date: 20241011

Docket: T-589-22

Citation: 2024 FC 1623

Ottawa, Ontario, October 11, 2024

PRESENT: THE CHIEF JUSTICE

PROPOSED CLASS PROCEEDING

BETWEEN:

PASS HERALD LTD.

Plaintiff

and

GOOGLE LLC, GOOGLE IRELAND LIMITED, GOOGLE CANADA CORPORATION, META PLATFORMS INC., FACEBOOK IRELAND LIMITED, and FACEBOOK CANADA LTD.

Defendants

ORDER AND REASONS

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Overview

[1] These reasons concern two similar Motions in this proposed class proceeding. One of the Motions is brought by the defendants Google LLC, Google Ireland Limited and Google Canada Corporation (collectively "Google" or the "**Google Defendants**"). The other Motion is brought by Meta Platforms Inc., Facebook Ireland Limited, and Facebook Canada Ltd. (collectively, "**Facebook**" or the "**Facebook Defendants**").

[2] Each of the two Motions claims three similar types of relief. Specifically, the Motion brought by the Google Defendants seeks an Order (i) staying or dismissing the claims made against Google Ireland Limited for lack of personal jurisdiction, (ii) staying or dismissing the claims made against all three of the Google Defendants for lack of subject matter jurisdiction, and/or (iii) striking the Fresh as Amended Statement of Claim (the "**Claim**") in the underlying proceeding, for failure to disclose a reasonable cause of action.

[3] The Motion brought by the Facebook Defendants seeks essentially the same relief, although the first head of relief pertains to Facebook Ireland Limited, now known as Meta Platforms Ireland Inc.

[4] In the underlying action, the plaintiff, Pass Herald Ltd. ("**Pass Herald**"), represents two classes of publishers (collectively, the "**Class Members**"). The first class (the "**Conspiracy Class"**) consists of publishers, other than the defendants (collectively, the "**Defendants**"), who sold an impression for display on a website or application between September 27, 2018 and the date this action may be certified as a class proceeding (the "**Certification Date**"). The second class (the "**Misrepresentation Class**") consists of publishers, other than the Defendants, who

used a digital display advertising product or service ("**Google Tools**") supplied by Google between February 9, 2010 and the Certification Date.

[5] In its capacity as representative plaintiff, Pass Herald claims various types of relief, including $4 billion in damages against the defendants, jointly and severally, for breach of sections 45, 46 and 47 of the *Competition Act*, RSC 1985, c C-34 (the "**Act**"). Pass Herald also claims a further $4 billion in damages against Google for breach of section 52 of the Act. These four principal categories of claims are brought pursuant to section 36 of the Act.

[6] With respect to section 45, Pass Herald alleges three distinct contraventions. First, it claims that the Defendants conspired, agreed or arranged to fix, maintain, increase, or control the price for services to transact the right to show a specific type of advertisement called a Display Ad (an "**Impression**"), contrary to paragraph 45(1)(a) of the Act. Second, Pass Herald claims that the Defendants conspired, agreed or arranged to allocate sales or markets for the supply of Impressions, contrary to paragraph 45(1)(b) of the Act. Third, Pass Herald claims that the Defendants conspired, agreed or arranged to fix, maintain, control, prevent, lessen, or eliminate the supply of services to exchange Impressions, contrary to paragraph 45(1)(c) of the Act.

[7] Among other things, Pass Herald maintains that in the absence of these alleged contraventions of section 45, Facebook would have bought or built a product that competed directly with certain Google Tools, and that this likely would have reduced the fees charged by Google and Facebook for their services.

[8] The alleged breach of section 46 consists of the implementation by Google Canada Corporation and Facebook Canada Ltd. (the "**Canadian Defendants**") of certain directives, instructions, intimations of policy or other communications from the other four Defendants, as contemplated by section 46.

[9] Regarding section 47, Pass Herald alleges bid-rigging agreements or arrangements between Google and Facebook, contrary to each of paragraphs 47(1)(a) and 47(1)(b), respectively.

[10] The alleged breach of section 52 consists of certain misrepresentations by Google to the public for the purpose of promoting the use of Google Tools, even though it knew or was reckless to the possibility that such statements were false or misleading in a material respect.

I. The Parties

A. *Pass Herald*

[11] Pass Herald is a corporation incorporated under the laws of Alberta. It operates Crowsnest Pass Herald, which is a local newspaper in Crowsnest Pass, Alberta.

B. *The Defendants*

[12] The following descriptions are taken from the Claim.

[13] Google LLC is a corporation incorporated under the laws of Delaware. Its headquarters are in Mountain View, California.

[14] Google Ireland Limited is a corporation incorporated under the laws of Ireland. Its headquarters are in Dublin, Ireland. It is part of the same corporate group as Google LLC.

[15] Google Canada Corporation is a corporation incorporated under the laws of Nova Scotia. It has multiple offices in Ontario, including one in downtown Toronto. It is a second-level subsidiary of Google LLC.

[16] Collectively, the three entities described immediately above are claimed to directly or indirectly offer the services of Google Tools in Canada.

[17] Meta Platforms Inc. is a corporation incorporated under the laws of Delaware. Its headquarters are in Menlo Park, California. It is the successor corporation of Facebook, Inc., which was also incorporated under the laws of Delaware and had the same headquarters.

[18] Facebook Ireland Limited is a corporation incorporated under the laws of Ireland. Its headquarters are in Dublin, Ireland. It is part of the same corporate group as Meta Platforms Inc.

[19] Facebook Canada Ltd. is a corporation incorporated under the laws of Canada. It has an office in downtown Toronto. It is part of the same corporate group as Facebook Inc. It is a second-level subsidiary of Meta Platforms Inc.

II. Background — Online Advertising

[20] The focus of the Claim is stated to be "on the marketplace for the exchange of Impressions." The Claim explains that, in the fraction of a second between when a user opens a website or an application and when it finishes loading, publishers request bids for the right to display an advertisement (i.e., an Impression) to that user on that website or application. These requests are processed by tools known as **Publisher Layer Tools**, which act on behalf of publishers in two principal ways. First, they solicit bids for Impressions. Second, they sell those Impressions through what is known as **Middle Layer Tools**. The latter tools run auctions or otherwise intermediate between the Publisher Layer and the Advertising Layer. They do so by taking bids from Advertiser Layer Tools, choosing the one they consider best, and submitting that one to the Publisher Layer Tool. Middle Layer tools do not act on behalf of Publishers or Advertisers directly. In the industry, they are commonly referred to as ad exchanges or ad networks.

[21] Advertiser Layer Tools act on behalf of advertisers. Their purpose is to help Advertisers buy the highest value Impressions at the lowest price.

[22] Pass Herald's claims are focused primarily on Publisher Layer Tools, and to a lesser extent on Middle Layer Tools.

[23] In particular, a central focus of Pass Herald's claims is on its allegation that Google and Facebook entered into an arrangement pursuant to which Facebook agreed to abandon (i) its

support for a particular type of Publisher Layer Tool, called Header Bidding, and (ii) its plans to build or buy a tool in the Publisher Layer that would compete head-on with certain Google Tools. Facebook is alleged to have entered this arrangement in exchange for certain advantages that it negotiated with Google. Among other things, the Claim maintains that some of those advantages enabled Facebook to reduce its bids for Impressions but still win the auctions for them.

[24] For the purposes of these Motions, it is unnecessary to discuss the details of how Header Bidding works. It will suffice to note that the Claim alleges that Header Bidding is so called because it uses code embedded in the header of a website or an application, to solicit bids from multiple Middle Layer Tools at once, and then select the highest offer.

III. The Alleged Arrangement

[25] The alleged arrangement between Defendants consists of a written agreement and various unwritten terms (collectively, the "**Arrangement**").

[26] The written agreement is referred to throughout the Claim as "**Jedi Blue,**" which is allegedly the internal code name given to the agreement within Google. It is common ground between the parties that this agreement is the agreement entitled "Network Bidding Agreement" (the "**NBA**").

[27] The NBA was executed on September 24, 2018 by Facebook, Inc. and Facebook Ireland Ltd. It was then signed by Google LLC on September 27, 2018 and by Google Ireland Ltd. the following day. The NBA will be further discussed in part VI.C.(2)(b)(i) of these reasons below.

[28] The alleged unwritten terms include:

i. Facebook's abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool that would compete with Google Publisher Layer Tools;

ii. Secret bidding advantages over competitor Middle Layer Tools, including (a) privileged access by Facebook to Google's "trove of personal data to help Facebook identify viewers of Impressions," and (b) additional time to submit bid responses;

iii. Unified pricing, which was achieved by preventing publishers from setting any reserve prices; and

iv. Facebook's withdrawal from the "website segment" of the online advertising business, which "effectively ced[ed] that market segment to Google Middle Layer Tools," and led to a significant reduction in the average price pad for Impressions on websites. (For greater certainty, Facebook continued to bid on Impressions in the "applications segment," where it enjoyed the alleged advantages conferred on it pursuant to the NBA.)

[29] As with the NBA, the above-mentioned alleged unwritten terms will be further discussed in part VI.C(2)(b)(i) of these reasons below.

IV. Issues

[30] These Motions raise three principal issues. The parties have each characterized those issues in somewhat different terms. In my view, they can conveniently be restated as follows:

i. Does the Court have personal jurisdiction over Google Ireland Limited ("**Google Ireland**") and Facebook Ireland Limited (now known as Meta Platforms Ireland Ltd. – "**Meta Ireland**")?

ii. Does the Court have territorial and subject matter jurisdiction over the claims?

iii. Should the Claim be struck for failure to disclose a reasonable cause of action?

V. Analysis

A. *Does the Court have personal jurisdiction over Google Ireland and Meta Ireland?*

(1) Applicable legal standard

[31] Facebook maintains that the standard applicable in determining whether to stay or dismiss a claim for lack of personal jurisdiction is whether the plaintiff has demonstrated a "good arguable case," which is sometimes described as a "*prima facie* case."

[32] In advancing this position, Facebook relies on Rule 4 of the *Federal Courts Rules*, SOR/98-106 (the "**Rules**"), which is commonly referred to as the "gap rule." Facebook then cites

to jurisprudence from Ontario, British Columbia and Alberta that applied the "good arguable case" standard.

[33] However, the Federal Court of Appeal (the "**FCA**") has applied the "plain and obvious" standard in this context: *Canada v Toney*, 2012 FCA 167 (CanLII) [***Toney***] at para 5. So has this Court: *Canada (Ship-Source Oil Pollution Fund) v British Columbia (Finance)*, 2012 FC 725 at paras 31 and 42–43; *Safe Gaming Systems Inc v Atlantic Lottery Corporation*, 2013 FC 217 [***Safe Gaming***] at para 26. By analogy to the application of that test in the traditional motion to strike context under Rule 221(1)(a), a defendant asserting that the Court does not have personal jurisdiction over it must demonstrate that it is plain and obvious, assuming the facts pleaded to be true, that the Court has no such jurisdiction. This essentially requires the defendant to demonstrate that the case against it is "doomed to fail": *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 [***Atlantic Lottery***] at para 90. In this context, the Court's focus would be on the issue of personal jurisdiction.

[34] The "plain and obvious" standard is also used in assessing territorial matter jurisdiction over *ex juris* defendants: *Sun Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [***Sun Rype***] at paras 46–47.

[35] I note that a somewhat similar standard is applied outside the Rule 221(1)(c) context, in connection with motions to strike *applications* filed in this Court: *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 (CanLII) [***JP Morgan***] at para 47; *Wenham v Canada (Attorney General)*, 2018 FCA 199 [***Wenham***] at para 33, leave to appeal to

SCC refused, 39518 (10 June 2021); *Empire Company Limited v Canada (Attorney General)*, 2024 FC 810 at para 20.

[36] Given all of the foregoing, I am inclined to consider that the appropriate standard to be applied by this Court is the "plain and obvious" standard. Nothing turns on this, as I consider that Pass Herald has in any event established a "good arguable case" that this Court has personal jurisdiction over Google Ireland and Meta Ireland (collectively, the "**Irish Defendants**").

[37] Although the classic formulation of the plain and obvious standard assumes the pleaded facts to be true, the Court may consider evidence filed by the defendant(s) on issues of jurisdiction: *Adelberg v Canada*, 2024 FCA 106 at para 40; *Mil Davie Inc v Société d'Exploitation et de Développement d'Hibernia Ltée*, 1998 CanLII 7789 (FCA) at paras 8–9; *Safe Gaming* at para 4; *General MPP Carriers Ltd v SCL Bern AG*, 2014 FC 571 at para 34.

[38] The Court may assert personal jurisdiction over a foreign party based on (i) its presence in Canada; (ii) its consent or attornment to the jurisdiction of this Court, or (iii) the "real and substantial connection" test: *Chevron Corp v Yaiguaje*, 2015 SCC 42 [***Chevron***] at para 82; *Club Resorts Ltd v Van Breda*, 2013 SCC 17 [***Van Breda***] at para 79. I will address each of these alternatives immediately below.

(2) Presence in Canada

[39] At paragraph 16 of the Claim, Pass Herald baldly alleges that the business of Google Ireland "is inextricably interwoven with the business of the [other Google Defendants]," and

that, collectively, all three of the Google Defendants "directly or indirectly offered the services of Google Tools in Canada" during the relevant period.

[40] At paragraph 20 of the Claim, Pass Herald makes the same allegation with respect to Meta Ireland and the other Facebook Defendants.

[41] The only other specific allegations made with respect to the Irish Defendants in particular is that they "entered into" the NBA.

[42] However, representatives of each of Google Ireland and Meta Ireland filed affidavits that contradict the above-mentioned allegations.

[43] Specifically, Mr. Peter O'Neill, a Director and Associate General Counsel, Commercial, of Facebook Ireland stated in his affidavit that Facebook Ireland does not maintain any corporate presence in Canada. He explained that Facebook Ireland:

- is not authorized, registered, or licensed to do business in Canada;
- does not make any management or operational decisions in Canada or undertake any related activities in Canada;
- does not maintain any offices, telephone listings, or mailing addresses in Canada;
- does not own, lease, or rent any property or any other assets in Canada;
- does not hold any bank accounts in Canada;
- does not maintain any corporate books or records in Canada;
- does not file any tax returns in Canada;
- does not sell advertisements in Canada; and

- does not have any employees in Canada.

[44] Mr. O'Neill added that Facebook Ireland:

> [. . .] does not offer any advertising or publishing services in Canada. The Company offers services only in jurisdictions outside of North America. It does not deliver any services or have any business dealings with advertisers or publishers in Canada. It does not process or collect any advertising or publishing data from Canada.

[45] Turning to Google Ireland, Mr. Neil McHale, a Managing Director with that entity, provided the following affidavit evidence regarding Google Ireland:

- it does not have any offices in Canada or own any property in Canada;
- it does not file Canadian corporate tax returns;
- its executive personnel who make decisions for the company are not located in Canada;
- it does not provide services to users and customers located in Canada. Rather, it provides services to users and customers located in Europe, the Middle East and Africa;
- it provides the online advertising services referenced in the Claim to business customers in Europe, the Middle East and Africa; and
- it does not provide those online Advertising services to business customers in Canada.

[46] Pass Herald did not file any evidence in response to the evidence provided by Messrs. O'Neill and McHale. Indeed, it appears that Pass Herald did not cross-examine those individuals on their evidence. Consequently, their evidence is unchallenged.

[47] Based on that evidence, I find that neither Google Ireland nor Meta Ireland (formerly Facebook Ireland) has any *presence* in Canada.

(3) Consent or attornment

[48] Neither of the Irish Defendants has consented to the jurisdiction of this Court.

[49] Moreover, those entities maintain that they have not attorned to the jurisdiction of the Court.

[50] Pass Herald asserts that the Irish Defendants attorned to the Court's jurisdiction when they each brought a Motion to Strike for failure to disclose a reasonable cause of action.

[51] I agree.

[52] The bringing of a Motion to Strike for failure to disclose a reasonable cause of action constitutes attornment to the jurisdiction of this Court, even where such relief is only sought in the alternative to a request for an Order dismissing or permanently staying the proceeding for lack of personal jurisdiction: see *Mid-Ohio Imported Car Co v Tri-K Investments Ltd*, 1995 CanLII 2084 (BC CA) [***Mid-Ohio***] at paras 7–16; *Nadi Inc v Montazemi-Safari*, 2012 ONSC 4723 at paras 27 and 38; and *Dovenmuehle v Rocca Group Ltd*, 1981 CanLII 3564 (NB CA) at para 14, aff'd 1982 CanLII 206 (SCC). Unless the Court, in advance, permits defendants to seek such alternative relief in a single Motion, proceeding in such a manner will constitute attornment.

[53] In the Notice of Motion filed by the Google Defendants, the first head of relief sought is for an Order permanently staying or dismissing Pass Herald's claims "for lack of jurisdiction." It is clear from the statement of grounds for the Motion that this is a request for an Order that section 45 of the Act has no application to alleged foreign conspiracies that are entered into entirely outside Canada, without any participation of a Canadian entity. This is a request for an Order on the merits of the case.

[54] Google's Notice of Motion then requested "in addition, to or in the alternative" an Order striking the Claim for failure to disclose a reasonable cause of action. It was only in the further alternative that the Google Defendants sought an Order staying the Claim against Google Ireland for lack of *in personam* jurisdiction.

[55] Turning to the Facebook Defendants, their Notice of Motion requests (in the first head of relief sought) an Order dismissing or permanently staying this proceeding as against Facebook Ireland, for lack of personal jurisdiction. In the alternative, the Facebook Defendants sought an Order dismissing or permanently staying this proceeding against Facebook Ireland and Meta Platforms Inc. for lack of subject matter jurisdiction. In the further alternative, the Facebook Defendants sought an Order dismissing this proceeding against all of them, for failure to disclose a reasonable cause of action.

[56] In these circumstances, I find that it is not plain and obvious that Google Ireland and Facebook Ireland have not voluntarily attorned to the jurisdiction of this Court. Indeed, I find that Pass Herald has advanced a "good arguable case" in this regard.

[57] If I proceed to find in favour of the Irish Defendants with respect to the two other principal issues that they and the other defendants have raised in this proceeding, it is readily apparent that they will want to rely on those findings. However, they can't have it both ways: they cannot seek and rely upon the Court's findings on the merits while maintaining that they have not attorned to the Court's jurisdiction. As the saying goes, "they can't have their cake and eat it too."

[58] Google Ireland relies on Rule 208(b)(iv) of the *Federal Courts* Rules, SOR/98-106 [Rules] to argue that it did not attorn to the jurisdiction of the Court by bringing a motion objecting to the jurisdiction of the Court. However, as discussed above, Google Ireland did more than simply object to the jurisdiction of the Court.

[59] I recognize that, in some cases, it may be consistent with the spirit of Rule 3(a) for a request for relief on grounds of a lack of personal jurisdiction to be sought together with a request for other types of relief, such as under Rule 221(1)(a).

[60] Rule 3(a) requires that the Rules be interpreted and applied "so as to secure the just, most expeditious and least expensive outcome of every proceeding."

[61] Including alternative grounds for relief in a single Motion can sometimes significantly reduce the litigation costs likely to be incurred by the parties. It can also be consistent with the interests of judicial economy, and with this Court's efforts to find more efficient ways to use scarce public resources. When they are present, these considerations can weigh in favour of the

Court being open to *granting a request* to proceed in this manner, while enabling the defendants in question to avoid being found to have attorned to the jurisdiction of the Court. Ultimately, the exercise of the Court's discretion will depend on the particular facts in each case. However, a request must first be made.

[62] In any event, if such a request is granted, and a ruling is made in favour of the defendants on the issue of personal jurisdiction, they should not expect to also receive a ruling on the other issues they have raised.

[63] I acknowledge that Associate Judge Horne issued a Direction, dated June 7, 2023, stating that the Defendants' Motions to strike and to challenge jurisdiction would be heard together on a particular date. However, Google Ireland did not seek the consent of the Court before joining its name to the single Notice of Motion requesting relief on *both* the issue of personal jurisdiction and on issues going to the merits. The same is true of Meta Ireland. At the case management conference that took place on June 7, 2023, the Defendants did not indicate that the Irish Defendants wished to preserve their ability to avoid attorning to the Court's jurisdiction. After the Court expressed an interest in hearing the motion to strike before any other motions, it was agreed that the motion to strike would be heard on the same date as the motions on jurisdiction.

[64] Ultimately, the three distinct requests for relief made by the Google Defendants were made in a single Notice of Motion. The same is true for the Facebook Defendants. There were not multiple Motions filed by each of those groups of Defendants that were directed to be heard together. Stated differently, contrary to Facebook Ireland's contention, the Defendants'

arguments with respect to *in personam* jurisdiction, subject matter jurisdiction and the failure to plead a reasonable cause of action were not heard together simply due to "scheduling mechanics." They were heard together because the Defendants requested that they be heard together, without making it clear that they wished to preserve their ability to refrain from attorning to this Court's jurisdiction.[1]

[65] I also acknowledge that the Irish Defendants refrained from responding to Pass Herald's Motion for an Order approving a draft litigation funding agreement. However, the Canadian Defendants responded to the motion approving a draft litigation funding agreement after the Irish Defendants had already attorned to this Court's jurisdiction.[2]

[66] I further acknowledge that the Facebook Defendants filed with the Court correspondence with Pass Herald dated July 5, 2022 in which they advised Pass Herald that the Defendants did not intend, through the delivery of that letter, to "a) attorn to the jurisdiction of this Court, b) waive their rights to contest any one or more of service, jurisdiction or forum, or c) waive their rights to seek a stay of the action." Likewise, the Google Defendants filed a letter dated April 21, 2022 in which they advised Pass Herald that they "reserve[d] all of their rights in response to this action, including with respect to jurisdiction." However, each of the Facebook Defendants and the Google Defendants then proceeded to file the Notices of Motions discussed above, without engaging with the Court regarding the issue of attornment.

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[1] In their correspondence dated June 23, 2023, following up on the above-mentioned case management conference, the Google Defendants wrote to confirm the date for the hearing of a single motion, to propose a timetable and to provide particulars of an agreement that was reached with the plaintiff regarding the interplay between the outcome of the motion to strike and the pending certification motion.

[2] The Notices of Motion filed by the Google Defendants and the Facebook Defendants, respectively, were filed on July 21, 2023. The Responding Motion Record of the Defendants Facebook Canada Ltd. and Google Canada Corporation (Litigation Funding) was filed on August 3, 2023.

[67] In summary, for the reasons set forth above, I find it is not plain and obvious that the Irish Defendants have not voluntarily attorned to the jurisdiction of this Court by joining their names to the Notices of Motion described above. Indeed, I consider that Pass Herald has raised a "good arguable case" in this regard. Consequently, I reject the Defendants' request to permanently stay or dismiss Pass Herald's claims against the Irish Defendants for lack of personal jurisdiction.

(4) Real and substantial connection

[68] Given the foregoing conclusion, it is unnecessary to address whether there is a real and substantial connection between the Irish Defendants and this forum, for the purposes of assessing the personal jurisdiction issue: *Chevron* at paras 81, 84 and 87; *Van Breda* at para 79; *Morgan v Guimond Boats Limited*, 2006 FCA 401 (CanLII) at paras 27–28; *Mid-Ohio* at para 17.

[69] However, I will observe in passing that uncontested evidence of the type provided by Messrs. O'Neill and McHale will not necessarily preclude a finding of a "real and substantial connection" between a foreign defendant and the jurisdiction of this Court, where that defendant is a party to an agreement contemplated by section 45 or section 47 of the Act. It will depend on the facts of each case. In this regard, the demonstration of the existence of a single presumptive connecting factor would appear to be sufficient, unless the presumption of jurisdiction based on that factor is rebutted by the defendant(s): *Van Breda* at paras 94, 96 and 100; *Haaretz v Goldhar*, 2018 SCC 28 [***Haaretz***] at para 34; *NHK Spring Co Ltd v Cheung*, 2024 BCCA 236 [***Cheung 2***] at paras 38, 44 and 53. Such rebuttal may be achieved by demonstrating "a weak relationship between the subject matter of the litigation and the forum": *Haaretz* at para 40.

(5) Conclusion

[70] Given my conclusion in Part VI.A.(3) above that the Irish Defendants voluntarily attorned to the jurisdiction of this Court by joining their names to the Notices of Motion described at paragraphs 53–55 above, this Court has personal jurisdiction over those Defendants.

B. *Does the Court have territorial and subject matter jurisdiction over the claims?*

(1) Introduction and Summary of the Parties' Positions

[71] The Defendants submit that this Court lacks subject matter jurisdiction over the claims made against them by Pass Herald under sections 45 and 47 of the Act, in relation to their alleged foreign Arrangement (i.e., the NBA and the alleged unwritten terms summarized at paragraph 28 above). In support of this position, the Defendants rely on three principal arguments.

[72] First, they maintain that subsection 6(2) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], limits the territorial reach of criminal offences to offences committed in Canada. They note that the offences contemplated by sections 45 and 47 of the Act are complete upon the entry of an alleged arrangement outside Canada, and that none of the constituent elements of those offences occurs within Canada.

[73] Second, and given the foregoing, the Defendants assert that there can be no "real and substantial link" between those offences and Canada, even if an impugned agreement or arrangement has anti-competitive effects in Canada.

[74] Third, the Defendants state that, as a statutory court, this Court has no subject matter jurisdiction over the Claims with respect to sections 45 and 47, because the federal Parliament has not granted this Court jurisdiction to apply those provisions to alleged agreements or arrangements entered into entirely outside of Canada. In support of this position, the Defendants assert that the plain wording of sections 45 and 47 reflects that they do not apply to conspiracies, agreements or arrangements entered into outside Canada. The Defendants add that the scheme of the Act, the object of the Act and the intention of Parliament also support this interpretation.

[75] Pass Herald rejects each of the foregoing submissions and maintains that they have been repeatedly rejected in the jurisprudence.

[76] For the reasons set forth below, I reject the Defendants' submissions. In my view, this Court has both territorial and subject matter jurisdiction over the Claims made under sections 45 and 47 of the Act, in relation to the impugned foreign Arrangement between the Defendants.

[77] The Defendants maintain that this jurisdictional issue is "ripe for determination" and ought to be definitively resolved on this Motion, rather than simply being assessed under either the "plain and obvious" standard or the "good arguable case" standard (see paragraphs 31–36

above). For greater certainty, the Defendants encouraged me to resolve this legal issue now, rather than deferring a definitive determination on it to a later point in these proceedings.

[78] I consider it appropriate to grant the Defendants' request. Among other things, this issue has given rise to considerable, longstanding and persistent uncertainty within the bar and the business community. In addition, this issue is central to the underlying action and significant costs would likely be associated with deferring its resolution to a later point in the action, in the event that this issue would otherwise be resolved in the Defendants' favour: *Atlantic Lottery* at paras 18–22. Moreover, I agree with the Defendants that the submissions made in relation to this issue are purely legal in nature.

[79] I recognize that, in *Mohr v National Hockey League*, 2022 FCA 145 [***Mohr FCA***] at para 52, the FCA cautioned that "[a]s a general proposition, definitive legal pronouncements on the meaning of legislation should not be made on a motion to strike where there are competing, credible interpretations." However, that caution is in tension with certain teachings of the Supreme Court of Canada ("**SCC**") in *Atlantic Lottery*. These include that "[w]here possible, courts should resolve legal disputes promptly, rather than referring them to a full trial," and that "perpetuat[ing] an undesirable state of uncertainty" should be avoided: *Atlantic Lottery* at paras 18 and 21. To this end, the SCC recognized that it is "not uncommon for courts to resolve complex questions of law and policy" on a motion to strike: *Atlantic Lottery* at para 19. As I read the entire paragraph in which the latter statement was made, this teaching was intended to apply both to novel and to non-novel claims.

[80] Moreover, in this particular case, I agree with the Defendants that the issue regarding the jurisdiction of courts in Canada to adjudicate claims made under sections 45 and 47 of the Act in relation to a foreign agreement is "ripe for a decision." It has been the subject of commentary in numerous decisions, without ever having been definitively resolved. An additional consideration that is particular to the present case is that the conclusion I have reached on this legal issue does not preclude the claims that have been made in relation to the impugned foreign Arrangement from proceeding. Given my conclusion below regarding the interplay between the factual claims, this legal issue and the plain and obvious standard applicable on this Motion, the claims will proceed. However, they will do so without the cost and uncertainty that would otherwise have been associated with them, had I simply dealt with the legal issue on one of the alternative standards discussed at paragraph 77 above. Pass Herald has not identified any sound reason why this issue ought to be deferred to a later stage of this proceeding, and has not suggested that it did not have a full opportunity to put its best foot forward in relation to this issue, in the present Motions.

[81] I will now turn to the three principal arguments raised by the Defendants.

(2) Subsection 6(2) of the *Criminal Code*

[82] Subsection 6(2) of the *Criminal Code* provides as follows:

> **6(2)** Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.

[83] The Defendants maintain that this provision prohibits the application of criminal laws to conduct outside Canada, absent a provision to the contrary in the *Criminal Code* or in "any other Act of Parliament." They assert that their impugned foreign Arrangement (i.e., the NBA and the various alleged unwritten terms summarized at paragraph 28 above) falls within the scope of this provision, because none of the constituent elements of sections 45 and 47 of the Act occurred within Canada. In brief, they state that the conduct contemplated by those provisions is complete upon the entering into of an agreement described therein. In the case of the NBA, it is common ground between the parties that it was entered into outside Canada. Pass Herald has not alleged that the alleged unwritten terms were entered into in Canada.

[84] The Defendants further maintain that because there is nothing in the *Criminal Code* or the Act that purports to override subsection 6(2) of that legislation, sections 45 and 47 of the Act cannot be read to apply to foreign conspiracies, agreements or arrangements. Regarding the *Criminal Code*, they note that several provisions in section 7 of that legislation deem certain conduct committed outside Canada to be offences in Canada. In each case, the provision in question includes the words "that if committed in Canada." This includes paragraph 7(2)(e), which addresses "act[s] or omission[s] outside Canada that *if committed in Canada* would constitute a conspiracy or an attempt to commit an offence referred to in this subsection" [emphasis added]. The Defendants suggest that this language makes it clear that the foreign conduct in question would not constitute an offence in the absence of the deeming provision.

[85] I disagree with the Defendants' position that subsection 6(2) of the *Criminal Code* prohibits the application of subsections 45 and 47 of the Act to their alleged foreign Arrangement.

[86] This provision of the *Criminal Code* was discussed in *Libman v The Queen*, 1985 CanLII 51 (SCC) [***Libman***]. At that time, it appeared in essentially the same form, in subsection 5(2). Speaking for the Court, Justice La Forest described that subsection as a codification of the common law "presumption against the application of laws beyond the realm": *Libman* at para 65. He proceeded to observe as follows:

> Interestingly, s. 5(2) of the *Code* expresses the territorial principle in a manner that rather reflects its purpose. That provision does not say that criminal law is confined to Canadian territory; it says rather that no person "shall be convicted in Canada for an offence committed outside of Canada."
>
> *Libman* at para 66.

[87] It follows that what is now subsection 6(2) of the *Criminal Code* should not be read as stating or contemplating that conduct occurring outside Canada's territorial boundaries cannot constitute a criminal offence in Canada. Additional analysis is required to determine whether courts in Canada, including this Court, have territorial jurisdiction over the conduct: see also *R v Oler*, 2018 BCCA 323 [***Oler***] at paras 32–44; *Cheung v NHK Spring Co, Ltd*, 2022 BCSC 1738 [***Cheung***] at paras 104–112; *Cheung 2* at paras 80–85 and 93–103.

[88] This view is consistent with the observation in *Cygnus Electronics Corporation v Panasonic Corporation*, 2023 ONSC 2559 [***Cygnus***] at paras 73–74 (unreported) that the "no person shall be convicted" language in subsection 6(2) "does not expressly or impliedly limit the

availability of any civil remedy" under section 36 of the Act, for conduct that is contrary to a provision in Part VI of the Act.

(3) The "real and substantial link" test

[89] The territorial reach of sections 45 and 47 of the Act, and by implication the applicability of subsection 6(2) of the *Criminal Code* to the claims that have been made in relation to those offences, is determined by applying the "real and substantial link" test.

[90] The Defendants assert that there can be no "real and substantial link" between those offences and Canada, even if an impugned agreement or arrangement has anti-competitive effects in Canada. They state that this is so because those offences are complete upon the entry into of any agreement or arrangement described in those sections.

[91] I disagree with the first of those assertions.

[92] The real and substantial link test is part of a family of tests. Those tests include versions of the "real and substantial *connection*" test that are applied in different contexts, including in determining the reach of the court to persons located abroad (personal jurisdiction), and the reach of Canadian law to conduct that occurs outside this country (territorial jurisdiction): *Sharp v Autorité des marchés financiers*, 2023 SCC 29 at paragraphs 116–122; *Van Breda* at paras 80–100; and paragraph 38 above.

[93] Where the "real and substantial link" test is satisfied, subsection 6(2) does not prevent courts in Canada from assuming territorial jurisdiction over the conduct in question: *Oler* at paras 41 and 43; *R v Coban*, 2022 BCSC 1441 [***Coban***] at paras 8–9. This also appears to have been implicitly recognized in *Sun Rype* at paras 44–45.[3]

[94] In *Libman*, Justice La Forest reviewed the jurisprudence regarding the territorial reach of the courts and concluded that Canadian courts have the territorial jurisdiction over an alleged offence if there is a "real and substantial link" between the offence and this country: *Libman* at paras 74-76. In an alternate formulation of the test, he observed: "As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada": *Libman* at para 74.

[95] However, since that time, courts in this country have recognized that adverse impacts or harmful consequences in Canada that are likely to result from the impugned foreign conduct *may* suffice to provide the requisite "real and substantial link," even if those consequences do not fall within the purview of any of the constituent elements of the offence in question.

[96] The Defendants maintain that jurisprudence concerning the version of section 45 of the Act that existed prior to 2010 is not relevant because it required, among other things, an agreement to prevent, lessen or otherwise restrain competition in Canada, unduly. They assert

[3] There, the Court agreed with the respondents that the "real and substantial connection" test described in *Van Breda* should be applied in determining whether Canadian courts had jurisdiction *over violations of the Competition Act* (including the alleged violation of section 45 of the Act) by foreign defendants. The Court also appeared to agree with the proposition that conduct may be contrary to Part VI of the Act where there is a *real and substantial link* between that conduct and Canada.

that this provided the justification for courts to find the existence of the requisite "real and substantial link" to Canada, based solely on adverse effects in Canada.

[97] For the present purposes, it is not necessary to rely on any jurisprudence with respect to the pre-2010 version of section 45. Additional jurisprudence will be discussed below. However, I will observe in passing that the case law with respect to prior versions of section 45 is not irrelevant in considering this issue. In brief, as with the offences set forth in the current version of section 45, the offences contemplated by its predecessor legislation were complete upon the entry into one of the proscribed types of agreement or arrangement. It was not necessary to establish any acts in furtherance of the agreement or arrangement. Nor was it required to demonstrate actual adverse effects on competition: see e.g., the pre-2010 jurisprudence cited in *Difederico v Amazon*, 2023 FC 1156 [***Amazon***] at paras 39 and 42. In other words, there was no element of the pre-2010 version of section 45 that required a demonstration of actual or likely harm in Canada. All that was required was proof of a conspiracy, agreement or arrangement to put into effect a common *design* with respect to one of the matters described in paragraphs 45(1)(a)–(d) of that legislation, which is reproduced at Annex 1 below. To establish "the *actus reus* that *the agreement* was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or *should have known* that this was the likely effect of the agreement" [emphasis added]: *R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC) [***PANS***] at 660. See also *Pioneer Corp v Godfrey*, 2019 SCC 42 [***Godfrey***] at para 75, quoting a summary of the constituent elements of the former section 45, as articulated in *Watson v Bank of America Corp*, 2015 BCCA 362 [***Watson***] at para 73.

[98] The Defendants also state that much of the jurisprudence involving section 45 ought to be distinguished on the basis that the cases in question focused primarily on additional allegations involving tort law, which recognizes that a tort is committed in the place where the harm occurs: *Moran v Pyle National (Canada) Ltd*, 1973 CanLII 192 (SCC) at 405 and 409; *Tolofson v Jenson*, 1994 CanLII 44 (SCC) at 1050**;** *Cheung 2* at paras 43 and 53.

[99] However, courts in non-tort cases have also found that harmful consequences in Canada or other relevant facts such as the receipt of benefits in this country can suffice to constitute a "real and substantial link" to Canada: see, e.g., *R v Barra*, 2021 ONCA 568 [***Barra***] at paras 53–57; *R v Stucky*, 2009 ONCA 151 [***Stucky***] at para 27; *R v Greco*, 2001 CanLII 8608 (ON CA) at para 25; and *R c Ouellette*, 1997 CanLII 7993 (QC CS) [***Ouellette***] at paras 89–90 and 92. See also *VitaPharm Canada Ltd v F Hoffman LaRoche Ltd*, [2002] OJ No 298 [***VitaPharm***] at paras 57–59, where the Court rejected the defendants' submissions that section 45 of the Act only applies to agreements made within Canada; and *Coban* at para 24(c).

[100] This approach adopted in the jurisprudence cited immediately above has also received favourable treatment in a number of other cases, where it was unnecessary to make a definitive determination in this regard: see, e.g., *Cheung* at paras 111–114, and 118; *Cheung 2* at paras 64 and 74–103; *The Commissioner of Competition v HarperCollins LLC and HarperCollins Canada Limited*, 2017 CACT 10 [***HarperCollins***] at paras 135–144; and *Rakuten Kobo Inc v Commissioner of Competition*, 2018 FC 64 [***Rakuten Kobo***] at paras 115–123 and 134.

[101] I note that this approach was also endorsed in the following passage of Robert J. Currie, "Transnational Crimes of Domestic Concern" in *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 424:

> The "real and substantial connection" inquiry is broad and requires assessment of all of the facts related to the alleged offence, including but not limited to (1) where some or all of the elements took place; (2) where the offence was initiated; (3) where the offence was prepared or formulated; (4) where harm or injury resulting from the offence occurred, including the location of the victims; or (5) where proceeds of the offence were brought. The inquiry must be shaped by the nature of the offence which is alleged.

[102] Likewise, Pierre-André Côté has observed that legislation which governs persons, juridical acts or facts which have a "real and important link" with the enacting jurisdiction is within the territorial authority of the enacting state: Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 212.

[103] The Defendants maintain that there can be no real and substantial link between an alleged criminal offence and Canada unless "a significant portion of the activities constituting the offence took place in Canada": *Libman* at para 74. However, elsewhere in *Libman*, Justice La Forest observed that it is necessary to "take into account *all relevant facts that take place in Canada* that may legitimately give this country an interest in prosecuting the offence" [emphasis added]: *Libman* at para 71. This includes whether "the fruits of the transaction were obtained in Canada as contemplated by the scheme": *Libman* at para 71. These statements followed Justice La Forest's observation that "[t]his country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here": *Libman* at para 67. He later expressed concerns about the "protection of the public" and "allowing criminals to go free

simply because their operations have grown to international proportions": *Libman* at para 72. He added: "The protection of the public in this country is widely acknowledged to be a legitimate purpose of criminal law, and one moreover that another nation could not easily say offended the dictates of comity": *Libman* at para 67. Nevertheless, it remains necessary to consider whether there is anything in the relevant facts "that offends international comity": *Libman* at para 71. See also *Stucky* at para 27.

[104] The view that the location of the fruits of the impugned conduct can be an important relevant fact to consider in applying the real and substantial link test is also supported by Justice La Forest's observation that this test "simply amounts to a revival of the earlier way of formulating the principle": *Libman* at para 74. This was a reference to Justice La Forest's preceding discussion of an approach that was previously prevalent in Canada, when the courts focused upon where the "gist or gravamen" of the offence occurs. Justice LaForest observed that, pursuant to that approach, the location of the offence "also corresponds to the place where the fruits of the wrongful scheme are obtained . . .": *Libman* at para 69. That approach evolved from an earlier approach, pursuant to which Canadian courts "were also ready to hold that the country where the results contemplated by the conspiracy took effect also had jurisdiction though the accused was not present there": *Libman* at para 50.

[105] Subsequent to *Libman*, other courts have recognized that it is not necessary for the facts that "legitimately give this country an interest in prosecuting the offence" (*Libman* at para 71) to concern the constituent elements of the offence: see e.g., *Cheung 2* at para 95; *Barra* at para 55;

R v Karigar, 2017 ONCA 576 at paras 26–30; *Coban* at paras 12, 15, 22 and 25; *Ouellette* at para 81. See also *Cheung* at para 113.

[106] In summary, subsection 6(2) of the *Criminal Code* does not prevent an action under sections 36, 45 and 47 of the Act when the real and substantial link test is met. That test is flexible and permits a court to take into account *all relevant facts that take place in Canada* that may legitimately give this country an interest in prosecuting the offence. This includes where the fruits of the impugned conduct were obtained, and where the harm occurred. It is not necessary for such facts to pertain to the constituent elements of sections 45 or 47. However, after considering the relevant facts, it is necessary to consider "whether there is anything in those facts that offends international comity": *Libman* at para 71.

[107] In this latter regard, the Defendants have not identified any requirements of international comity that would be offended by this Court asserting subject matter jurisdiction over the alleged Arrangement. Indeed, they may be hard-pressed to do so: see *Rakuten Kobo* at paras 133–137.

[108] Consequently, I reject the Defendants' legal submission that there can be no "real and substantial link" between an agreement that falls within the scope of sections 45 or 47 and Canada, even if the agreement has anti-competitive effects in Canada. Such harm in Canada can indeed provide a basis for finding such a real and substantial link.

[109] Claims alleging such effects provide courts in Canada with territorial jurisdiction to adjudicate the subject matter of those claims.

[110] I will address at paragraphs 143–145 below whether it is plain and obvious that the Claims made in this proceeding have no reasonable prospect of success in relation to this territorial jurisdiction issue as well as with respect to the subject matter jurisdictional issue addressed immediately below.

(4) Has Parliament granted this Court jurisdiction to apply sections 45 and 47 to agreements entered into entirely outside of Canada?

[111] The Defendants state that this Court cannot exercise jurisdiction to apply sections 45 and 47 to agreements entered into entirely outside Canada unless Parliament has specifically granted such jurisdiction to the Court. This is because the Court is a statutory Court established pursuant to section 101 of the *Constitution Act*, 1867, 30 & 31 Vict, c3 [***Constitution Act,* 1867**]: *Windsor (City) v Canadian Transit Co.*, 2016 SCC 54 [***Windsor***] at para 33.

[112] Relying on what they maintain is a plain reading of sections 45 and 47 and the scheme of the Act, the Defendants assert that no such jurisdiction has been granted to the Court. I disagree.

[113] The requirement for a statutory grant of jurisdiction to the Court is the first prong of a three-part test required to be satisfied before this Court will have jurisdiction in a given case. That test is as follows:

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the Constitution Act, 1867.

ITO-Int'l Terminal Operators v Miida Electronics, 1986 CanLII 91 (SCC) at 766; *Windsor* at para 34.

[114] The Defendants have not raised any issue with respect to the second and third prongs of the foregoing test. Accordingly, it is unnecessary to address them in the discussion below.

[115] Pursuant to section 3 of the *Federal Courts Act*, RSC 1985, c F-7, this Court is "a superior court of record having civil and criminal jurisdiction."

[116] Under section 26 of that legislation, this Court has original jurisdiction in respect of any matter, not allocated specifically to the Federal Court of Appeal (the "**FCA**"), in respect of which jurisdiction has been conferred by an Act of Parliament on the FCA, this Court, or their predecessor Courts (the Federal Court of Canada and the Exchequer Court of Canada).

[117] In the present context, the requisite Act of Parliament is the *Competition Act*. Pursuant to subsection 36(3) of that legislation, this Court is a court of competent jurisdiction for the purposes of any action brought under subsection 36(1). The underlying action in this proceeding

specifically seeks damages pursuant to subsection 36(1) for, among other things, breaches of sections 45 and 47 of that legislation.

[118] The Defendants maintain that agreements and arrangements entered into entirely outside Canada cannot breach sections 45 or 47. As a consequence, they assert that Parliament has not granted the Court any jurisdiction to adjudicate the Claims made in respect of the impugned foreign Arrangement and sections 45 and 47.

[119] In support of this position, the Defendants begin by stating that, absent clear statutory provisions to the contrary, the territoriality of criminal offences is presumptively limited to offences committed in Canada. They explain that, because there is no express language in sections 45 or 47 that addresses foreign agreements or arrangements, such agreements or arrangements are not within the purview of those provisions. For the reasons set forth in part VI.B.(3) of these reasons above, I reject that argument.

[120] Contrary to the Defendants' assertions, a plain reading of the text of sections 45 and 47 does not indicate an intention by Parliament to confine the operation of those provisions to domestic agreements or arrangements: *HarperCollins* at para 111; *Rakuten Kobo* at para 115; *VitaPharm* at para 59; *Cheung 2* at 74.

[121] Reading such a limitation into sections 45 and 47 would constitute a "reading down" of those provisions. In my view, this would not be appropriate, as it would be inconsistent with the plain wording of those provisions, the objectives of the Act, the general scheme of the Act, and

the principle that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, RSC 1985, c I-21, s. 12; *CanadianOxy Chemicals Ltd v Canada (Attorney General)*, 1999 CanLII 680 (SCC) [***CanadianOxy***] at para 18; *Machtinger v HOJ Industries Ltd*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986 at 1002-1003. See also *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 [***Lavigne***] at paras 53–54. Stated differently, the Defendants' reading down of sections 45 and 47 is inconsistent with a purposive interpretation of those provisions: Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) [**Sullivan, *The Construction of Statutes***] at § 9.04 [5].

[122] It is trite law that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [***Tran***] at para 23; *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) [***Rizzo***] at para 21.

[123] The purpose of the Act is set forth in section 1.1, which states as follows:

1.1	The purpose of this Act to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing	La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada,

the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy *and in order to provide consumers with competitive prices and product choices.*	d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que *dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits*.
[Emphasis added].	[Je souligne].

[124] In *Godfrey* at para 65, the SCC observed that "[a] conspiracy to price-fix is 'the very antithesis of the *Competition Act's* objective.'" The same can be said with respect to section 45 (*PANS* at 649), and indeed section 47.

[125] In *Godfrey*, the SCC added that two other objectives that have been recognized include deterrence of anti-competitive behaviour and compensation for the victims of such behaviour: *Godfrey* at para 65. Interpreting sections 45 and 47 in a manner that deters foreign agreements that have harmful effects within Canada, and that therefore permits victims of such behaviour to seek compensation, would be consistent with these additional objectives of the Act.

[126] These additional objectives of the Act were also recognized in *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 676, in relation to the Act's predecessor legislation:

> From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place.

> The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and *provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.* In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation *designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy*.
>
> [Emphasis added].

[127] The following reasoning in *Rakuten Kobo*, in relation to the civil provisions of the Act pertaining to anti-competitive agreements, applies with equal force to section 45, although in the present context it is a private plaintiff, rather than the Commissioner, who is pursuing remedies:

> [106] More specifically, interpreting the words "agreement or arrangement" in the manner that I have described above would yield a result that is more harmonious with the scheme of the Act contemplated by s. 1.1, than interpreting them to exclude agreements or arrangements entered into outside Canada. This is because the former interpretation would permit the Commissioner to seek remedies under s. 90.1 in respect of foreign anticompetitive agreements and arrangements that undermine one or more of the objectives set forth in s. 1.1, whereas the latter interpretation would preclude the Commissioner from doing so. To the extent that this latter interpretation would expose Canadian businesses and consumers to paying higher prices for a potentially broad range of inputs and final products than would otherwise be the case, it would undermine and frustrate an important purpose of the Act.
>
> [107] Such an interpretation would also produce an absurd result that is to be avoided (*R v McIntosh*, [1995] 1 SCR 686, at para 36; *Tran*, above, at para 31; *Rizzo*, above, at para 27). To the extent that such anticompetitive effects can also seriously undermine the attainment of the other purposes enunciated in s. 1.1, the frustration of the Act's purposes and the related absurdity to be avoided is even greater (*Stucky*, above, at paras 37 and 48). These problems are further compounded when it is considered that, under the interpretation advanced by Kobo, parties wishing to enter into agreements or arrangements that are contemplated by s. 90.1

> would be able to avoid the operation of that provision by simply driving across the border and concluding their agreement in the U.S.
>
> See also *Rakuten Kobo* at para 118; and *HarperCollins* at paras 119–122.

[128] In my view, interpreting section 90.1 of the Act as applying to foreign agreements and arrangements that have anti-competitive effects within Canada, while interpreting sections 45 and 47 as not applying to foreign agreements and arrangements that can have much more harmful effects in Canada, would produce an additional absurdity that is to be avoided: Sullivan, *The Construction of Statutes* at § 10.01; *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 at paras 41–43 [***West Fraser***].

[129] Interpreting the application of sections 90.1, 45 and 47 to foreign agreements in a consistent matter achieves an outcome that more harmoniously aligns with the objectives of the Act, and that results in a more uniform scheme of the Act.

[130] The Defendants' arguments with respect to the scheme of the Act are based on subsection 46(1) and paragraph 83(1)(b). Those provisions state as follows:

46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a	**46 (1)** Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne

conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

…..

…..

83 (1) Where, on application by the Commissioner, the Tribunal finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province

83 (1) Lorsque à la suite d'une demande du commissaire, le Tribunal conclut qu'une décision a été ou est sur le point d'être prise par une personne qui se trouve au Canada ou par une personne morale constituée aux termes ou en application d'une loi fédérale ou provinciale :

[…]

[…]

(b) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45,

b) par suite d'une directive, d'une instruction, d'un énoncé de politique ou d'une autre communication à cette personne, à cette personne morale ou à toute autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par cette personne ou cette personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'extérieur du Canada qui, s'il était intervenu au Canada, aurait constitué une contravention à l'article 45,

the Tribunal may, by order, direct that	le Tribunal peut rendre une ordonnance qui :
(c) in a case described in paragraph (a) or (b), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication . . .	c) dans un cas visé à l'alinéa a) ou b), interdit à cette personne ou à cette personne morale de prendre au Canada des mesures d'application de la règle de droit, de la directive, de l'instruction, de l'énoncé de politique ou de l'autre communication;
[…]	[…]
[Emphasis added].	[Je souligne].

[131] The Defendants maintain that the underlined words in the language of subsection 46(1) and paragraph 83(1)(b) quoted above necessarily imply that agreements and arrangements entered into outside Canada are not within the purview of section 45. They further assert that this is the only interpretation of subsection 46(1) and paragraph 83(1)(b) that gives meaning to those underlined words.

[132] I disagree. Another interpretation of those underlined words is that they were meant to exclude from the purview of subsection 46(1) and paragraph 83(1)(b) the implementation in Canada of foreign conspiracies, combinations, agreements or arrangements that do not involve any of the types of matters listed in section 45. Put differently, the underlined words can be interpreted as limiting the operation of subsection 46(1) and paragraph 83(1)(b) to the implementation in Canada of foreign agreements, etc., to do one of the things listed in paragraphs 45(1)(a)–(c). Pursuant to this interpretation, those underlined words implicitly convey that the implementation in Canada of foreign agreements, etc., with respect to other matters is not captured by subsection 46(1) or paragraph 83(1)(b).

[133] In my view, this interpretation achieves an outcome that is more harmonious with the objectives and scheme of the Act than the interpretation advanced by the Defendants. Under the latter interpretation, foreign agreements with respect to one or more of the matters listed in paragraphs 45(1)(a)–(c) would not be within the purview of section 45, no matter how much harm they caused in Canada. However, the *implementation* of those agreements, even by far less culpable parties who had no knowledge of the agreement, would be subject to criminal liability under subsection 46(1) and to remedial sanctions under paragraph 83(1)(b). An alternative interpretation that does not give rise to this incongruous outcome is to be preferred: *West Fraser* at paras 41-43; *Rizzo* at para 27.

[134] In this latter regard, the alternative interpretation described immediately above contemplates criminal liability both for persons who agree or arrange to do things that are contemplated by section 45, as well as for persons who implement those agreements, as described in subsection 46. This interpretation is not only more harmonious with the objectives of the Act, as discussed at paragraphs 123–129 above, but also avoids the incongruous outcome described at paragraph 133 above.

[135] Moreover, this interpretation of subsection 46(1) and paragraph 83(1)(b) has the additional benefit of avoiding a reading down of the plain wording in section 45, which does not state that it is confined to agreements or arrangements entered into within Canada: *HarperCollins* at para 88; *Vitapharm* at para 59; *Cygnus* at para 74. In other words, this interpretation focuses solely on the former provisions, without implying anything at all about section 45. Viewed in this light, subsection 46(1) simply creates a new offence for those who

implement agreements or arrangements contemplated by section 45: *Rakuten Kobo* at para 114; *HarperCollins* at paras 91–96; *Vitapharm* at para 60. Likewise, a finding of conduct described in subsection 83(1) simply gives the Competition Tribunal the remedial power described in paragraph 83(1)(c). Neither subsection 46(1) nor paragraph 83(1)(b) would be understood to convey anything at all about the meaning of section 45, which may be interpreted by reference to its plain wording and the objectives of the Act, without the "reading down" implied by the Defendants' interpretation of subsection 46(1) and paragraph 83(1)(b).

[136] I recognize that essentially the same result could have been achieved by much simpler and straightforward language than the words underlined in the statutory text reproduced at paragraph 130 above. Instead of the words "if entered into in Canada, would have been in contravention of section 45," Parliament could have used the words "contravenes section 45."

[137] I also recognize that there is a presumption that Parliament did not use surplus language: Sullivan, The Construction of Statutes at § 8.03; R v Proulx, 2000 SCC 5 at para 28.

[138] However, at worst, a plain reading of sections 45, 46 and 83 together gives rise to two competing interpretations (or ambiguity regarding) the territorial scope of section 45. This gives rise to the need for a contextual and purposive analysis of the Act: Ruth Sullivan, Statutory Interpretation 3rd ed (Toronto: Irwin Law, 2016) [Sullivan, Statutory Interpretation] at 201.

[139] As between the Defendants' interpretation and the alternative interpretation described above, the latter is preferable, as it is more consistent with the objectives of the Act and it avoids

the other shortcomings associated with the former interpretation, as described above: Sullivan, Statutory Interpretation at 185, 201, 216 and 220; Celgene Corp v Canada (Attorney General), 2011 SCC 1 at para 21.

[140] In summary, for all the reasons set forth in this part VI.B.(4) above, I conclude that foreign agreements and foreign arrangements are within the purview of sections 45 and 47 of the Act. I also conclude that Parliament has granted this Court subject matter jurisdiction to adjudicate the Claims made in relation to those provisions and the impugned foreign Arrangement. Put differently, I reject the Defendants' position that Parliament has not granted such jurisdiction to this Court. My conclusion in this regard is based on the plain wording of those provisions and the consistency of this interpretation with the objectives of the Act. This interpretation also yields a more uniform scheme of the Act. This is because it avoids the incongruous outcome of civilly reviewable foreign anti-competitive agreements being captured by section 90.1 of the Act, while hard-core cartel agreements that have potentially much more serious adverse consequences in Canada would be beyond the scope of the Act. In addition, this interpretation avoids relying on other provisions of the Act (subsection 46(1) and paragraph 83(1)(b)), to read down the plain wording of sections 45 and 47.

(5) Conclusion — territorial and subject matter jurisdiction

[141] For the reasons set forth in Parts VI.B.(2) and (3) above, I conclude that this Court has the territorial jurisdiction to adjudicate claims made with respect to sections 45 and 47 of the Act, when the allegations made in a Statement of Claim are sufficient to meet the requirements of the "real and substantial link" test.

[142] For the reasons provided in Part VI.B.(4) and summarized in paragraph 140 above, I conclude that foreign agreements and arrangements are within the purview of sections 45 and 47 of the Act. I also conclude that Parliament has granted this Court subject matter jurisdiction to adjudicate the Claims made in relation to those provisions and the impugned foreign Arrangement.

[143] Having resolved those purely legal issues, I will now turn to the interplay between them and the alleged facts, for the purposes of the "plain and obvious" test applicable to the Claims made in relation to sections 45 and 47.

[144] In brief, I conclude that it is not plain and obvious that those Claims are insufficient to meet the requirements of the "real and substantial link" test. This is because the allegations therein articulate real and substantial effects of the impugned Arrangement in Canada, including the following:

i. Reduced the revenues of Publishers in Canada, as a result of lower and fewer bids for Impressions: Claim at paras 92 (a) and (b);

ii. Additional reductions of revenues as a result of (a) Facebook's abandonment of its efforts to create a new Publisher Layer Tool, and (b), the undermining of Competitor Publisher Layer Tools that used or supported Header Bidding: Claim at para 92(c);

iii. Higher (supra-competitive) fees/prices charged by Google and Facebook for the use of Google Tools and Facebook Tools, respectively, in all three layers of the business for Impressions— which were passed on to Publishers in Canada, thereby further reducing their revenues: Claim at para 92(e); and

iv. "Umbrella effects" on users of other Middle Layer Tools or Publisher Layer Tools, such that all members of the Conspiracy Class received less for their Impressions: Claim at para 92(f).

[145] For the purposes of this Motion, I must assume that the foregoing Claims are true. For greater certainty, they are not deficient in any of the ways described in the next section below. Given the foregoing, I find that those Claims are not "doomed to fail" and are not "so clearly improper as to be bereft of any possibility of success": *Wenham* at para 33, citing *JP Morgan* at para 47; *Atlantic Lottery* at paras 89–90. Indeed, I find that Pass Herald has raised a "good arguable case" in this regard.

C. *Should the Claim be struck for failure to disclose a reasonable cause of action?*

(1) General principles on a Motion to Strike

[146] The general principles applicable in determining whether pleadings should be struck for failure to disclose a reasonable cause of action were recently summarized in *Sunderland v Toronto Real Estate Board*, 2023 FC 1293 [***Sunderland***] at paras 46–51. In brief:

i. The basic test is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiff's pleaded claims disclose no reasonable cause of action;

ii. If a claim has no reasonable prospect of success, it should not be allowed to proceed to trial;

iii. A claim will fail to disclose a reasonable cause of action if it contains a "radical defect," is "doomed to fail" or is "so clearly improper as to be bereft of any possibility of success": see also the jurisprudence cited at paragraph 145 above.

iv. In applying this test, the Court's task is not to resolve conflicting facts and evidence and assess the strength of the case. Rather, the Court's focus is on the pleadings, not on the evidence. Those pleadings must be read generously, holistically, and practically, with a view to erring on the side of permitting a novel but arguable claim to proceed.

v. Nevertheless, the Court has an important screening role to play. That role includes assessing whether the pleadings (i) are sufficient to put the defendant on notice of the essence of the plaintiff's claim, (ii) have adequately addressed the constituent elements of each cause of action, and (iii) provide enough facts or particulars to ensure that the trial proceedings will be both manageable and fair.

vi. Moreover, the presumption of truth that applies to pleaded facts:

> "[. . .] does not extend to matters which are manifestly incapable of being proven, to matters inconsistent with common sense, vague generalization[s], conjecture[s], bare allegations, bald conclusory statements or speculation that is unsupported by material facts."
>
> *Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89 at para 15 [***Jensen FCA***] at para 52(b), endorsing *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 [***Jensen FC***] at paras 81–82. See also *L'Oratoire Saint-Joseph du Mont-Royal v JJ*, 2019 SCC 35 at paras 59–60.

vii. Where a cause of action advanced is under section 36 of the Act, the Court will assess the sufficiency of the pleadings with respect to (i) the alleged "loss or damage suffered," (ii) whether that loss or damage was as a result of "conduct contrary to part VI of the Act" (which establishes various criminal offences), and (iii) the cost of any investigation alleged to have been incurred in connection with

the matter and the proceedings taken under that provision: see also Jensen FCA at para 19; Jensen FC at paras 93 and 123.

(2) Section 45

(a) *Elements and sub-elements of subsection 45(1)*

[147] Subsection 45(1) creates an indictable offence for anyone who conspires, agrees or arranges with a competitor to do certain specific things. The provision states as follows:

Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement:
(a) to fix, maintain, increase or control the price for the supply of the product;	**a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	**b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

[148] The various parts of section 45 that are relevant for the present purposes are reproduced in Annex 2 to these reasons.

[149] The elements and sub-elements of section 45 were described in detail in *Amazon* at paras 34–44. They do not need to be fully reproduced here.

[150] In essence, section 45 is concerned with the objects or purposes of the impugned agreement, rather than with its effects: *Container Materials Ltd et al v The King*, 1942 CanLII 1 (SCC) at 159; *Mohr FCA* at para 38; *Regina v Abitibi Power & Paper Co*, 1960 CanLII 501 (QC CQ) [***Abitibi***] at 237–238; *R v Armco Canada Ltd*, [1974] OJ No 2200, 6 OR (2d) 521 (ONSC) [***Armco***] at para 146. See also *PANS* at 655.[4]

[151] There are three constituent elements of section 45. These are: (i) a "conspiracy, agreement or arrangement," (ii) with a "competitor," (iii) to do one of the things set forth in paragraphs 45(1)(a)–(c), respectively: see paragraph 147 above.

[152] It is incumbent upon a plaintiff to plead sufficient material facts with respect to each of the constituent elements of those offences: *Jensen FC* at paras 73, 75 and 94, aff'd *Jensen FCA* at para 19; see also Rules 174 and 181.

(i) "Conspiracy, agreement or arrangement"

[4] To the extent that the Court in *PANS* proceeded to reference "any behaviour that tends to reduce competition or limit entry," those comments must be understood in the context of the prior wording of section 45. That wording included a requirement pertaining to "effects" that is no longer present in that provision.

[153] To properly plead the "act of conspiracy, agreement or arrangement," or *actus reus*, a plaintiff should provide sufficient material facts with respect to *either* (i) two way communications reflecting a meeting of the minds or a concerted purpose regarding one or more of the matters described in paragraphs 45(1)(a)–(c), *or* (ii) a communication from one party followed by a course of conduct from which a meeting of the minds or a concerted purpose regarding those matters can be inferred: *Jensen FC* at para 98.

[154] To properly plead the requisite *mens rea*, it is incumbent upon a plaintiff to provide sufficient material facts with respect to (i) a subjective intention to enter into the alleged agreement and knowledge of its terms, and (ii) an objective intention to do one or more of the things described in paragraphs 45(1)(a)–(c): *PANS* at 659–660; *Watson* at para 76; *Shah v LG Chem Ltd*, 2018 ONCA 819 [***Shah***] at para 50, leave to appeal to SCC refused, 38440 (17 October 2019). Nevertheless, to survive a motion to strike, it *may* suffice for a plaintiff to allege that the impugned agreement was entered into knowingly and voluntarily, so long as the pleadings also provide sufficient material facts from which the requisite objective intention may be inferred: *Watson* at paras 100–102.

(ii) With a "competitor"

[155] The term "competitor" is defined in subsection 45(8) to include "a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement," regarding one or more of the matters described in paragraphs 45(1)(a)–(c). Given that each of the latter paragraphs use the term "the product," it is readily apparent that the product in question is the product referred to in the "chapeau" or

opening words of subsection 45(1). That is to say, the relevant product is the product in respect of which the parties to the alleged agreement compete: *Mohr v National Hockey League*, 2021 FC 488 [***Mohr FC***] at paras 35 and 42. Consequently, plaintiffs who allege an agreement contrary to section 45 must plead sufficient material facts with respect to competition between the parties to the impugned agreement, in relation to that relevant product.

(iii) The objects or subject matter prohibited by paragraphs 45(1)(a)–(c)

[156] Paragraphs 45(1)(a), (b) and (c) establish three separate offences. The specific conduct prohibited by each of those offences is to conspire, agree or arrange with a competitor:

> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

[157] The agreements contemplated by these provisions are those that are generally considered to be so unambiguously harmful as to warrant *per se* prohibition, without any analysis of their effects. Such agreements are also known as “hard-core cartel” agreements. Other types of agreements that may or may not have unambiguously harmful effects, depending on the

circumstances, are not within the purview of paragraphs 45(1)(a), (b) or (c): *Amazon* at paras 82–111.

[158] The unambiguously harmful conduct contemplated by paragraphs 45(1)(a), (b) and (c) must be objectively intended, in the sense that a reasonable businessperson who is familiar with the business in question would or should know that the impugned agreement had as its object or purpose one of the prohibited types of subject matters articulated in those provisions: *Amazon* at para 112.

[159] The requirement for a plaintiff to plead sufficient material facts with respect to each of the constituent elements of an offence includes the need to provide such facts with respect to each of the offences in subsection 45(1) that is alleged in a statement of claim: see subparagraph 146 v. above.

(b) *Analysis*

(i) Conspiracy, agreement or arrangement

[160] As briefly noted at paragraphs 25–28 above, the impugned Arrangement between Defendants consists of the NBA and various unwritten terms. The NBA is referred to throughout the Claim as "**Jedi Blue,**" which is allegedly the internal code name given to the agreement within Google.

[161] The Defendants acknowledge that they executed the NBA. However, they maintain that it is a vertical agreement that does not fall within the purview of section 45 of the Act. This will be discussed in the next section below, in connection with the requirement that the impugned agreement be between "competitors." For the present purposes, I find that it is not plain and obvious that the allegation that the NBA constitutes an "agreement" within the meaning of section 45 of the Act is doomed to fail.

[162] Turning to the alleged unwritten terms described in the Claim, they consist of the following (note that the Claim uses "**FAN**" to refer to one of Facebook's Middle Layer Tools):

i. Facebook's abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool that would compete with Google Publisher Layer Tools – this is alleged to be an integral part of the Arrangement.

ii. Secret bidding advantages conferred upon one of Facebook's Middle Layer Tools which were not provided to competitor Middle Layer Tools.

iii. Unified pricing, which was allegedly rolled out by Google following meetings with Facebook. This allegedly prevented publishers from setting any reserve prices. In turn, this is claimed to have resulted in Google AdX winning nearly twice as many auctions, but paying "only half as much." It is further alleged that "FAN also won more but paid less."

iv. Facebook's withdrawal from the "website segment" of the online advertising business, which "effectively ced[ed] that market segment to Google Middle Layer Tools," and is claimed to have led to a significant reduction in the average price

> paid for Impressions on websites. In this regard, the Claim states that the average price paid for Impressions displayed on websites in 2020 was 34% lower than the average price paid in 2019. (For greater certainty, Facebook continued to bid on Impressions in the "applications segment," where it enjoyed the alleged advantages conferred on it pursuant to the NBA.)

[163] I will discuss each one of these alleged terms immediately below.

Abandonment of Header Bidding and plans to enter the Publisher Layer Tool business

[164] The Claim contends that Facebook's alleged abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool is an integral part of the Arrangement. During the hearing, Pass Herald stated that the object of the Arrangement was to "kill header bidding."

[165] As previously noted, the Claim uses the term Header Bidding to describe a practice used by some publishers to add a particular code to the header of their website or application. Since it was in the header, the code ran before the auction, and would solicit bids from multiple Middle Layer Tools at once and then select the highest offer.

[166] The Claim states that Google viewed Header Bidding as a serious threat. The Claim proceeds to support that allegation by quoting statements made by Google employees at meetings on specific dates, and in particular documents.

[167] The Claim then quotes an internal Facebook document referencing its embrace of an "18-month 'header bidding' strategy." As part of that strategy, the Claim alleges that Facebook supported Header Bidding and planned to build or buy a new Publisher Layer Tool to compete head-on with Google Publisher Layer Tools. The Claim adds that Facebook repeatedly and publicly announced those plans over the ensuing years. Among other things, Facebook allegedly issued a press release stating that Header Bidding increased Publishers' revenues by between 10% and 30%. In addition, the Claim maintains that, in an article that appeared in *AdExchanger* in August 2017, a Facebook executive proposed developing Header Bidding technology for applications.

[168] The Claim adds that, according to internal Google documents, Google feared that these moves would allow Facebook to "disintermediate" Google and eliminate Google Publisher Layer tools' "must call status."

[169] The Claim proceeds to allege that, shortly after Facebook announced its intention to actively embrace Header Bidding, Google made overtures to Facebook, in the hope of striking a deal to prevent Facebook from working on Header Bidding or building or buying a Publisher Layer Tool to compete head-on with Google. The Claim quotes from two internal Facebook documents in which Facebook *recognized* Google's objective of killing Header Bidding. The Claim also refers to Google documents that referenced "collaborat[ing] when necessary to maintain the status quo" and "avoid[ing] competing with FAN."

[170] The Claim further alleges that Facebook was "willing to go along because a conspiracy was cheaper than its next-best alternative: building or buying a competing Publisher Layer Tool." In support of this, the Claim quotes an internal Facebook document that *recognized* this collaboration with Google as "relatively cheap compared to build/buy and compete in a zero sum ad tech game."

[171] With respect to the NBA, the Claim states at paragraph 56 that FAN committed to submitting most if not all of its bid responses to Google Publisher Layer Tools. In this regard, the Claim identifies the following three provisions in the NBA which are alleged to "lock up bids for Google Publisher Layer Tools":

- Paragraph 4(b) in EXHIBIT B, which commits Facebook to meeting a minimum spend of US$500 million per year after the third year under the NBA;

- Paragraph 5 of EXHIBIT B, which reduces the fee charged by Google to 5% on all of Facebook's "gross spend" above US$500 million per year, and which enables Facebook to get the benefit of this 5% fee in any quarter following a quarter in which its gross spend is US$375 million; and

- Paragraph 2.4(e) and sections 6.6 and 6.8, which place restrictions on Facebook's use of Google's confidential information, including on Facebook's use of that information to develop or enhance a competing product or service, to bid or inform bidding on any competing platform or to retarget publishers via other platforms or channels. In addition, section 6.9 places restrictions on Facebook's use of data defined as Publisher-Specific Data.

[172] Although the Claim has a heading entitled “Giving Up Header Bidding” in the section dealing with the NBA, this specific allegation is only advanced in a separate section, dealing with the unwritten terms of the Arrangement. There, the Claim consists of the following two sentences, in paragraph 61:

> When Jedi Blue was executed, Facebook abandoned its support for Header Bidding and its plans to build or buy a Publisher Layer Tool that would compete with Google Publisher Layer. This was an integral part of the Arrangement, as indicated by the terms in Jedi Blue making Facebook’s support of a competitive Publisher Layer tool practically impossible, described above at paragraphs 55–56.

[173] Paragraph 55 of the Claim simply describes the threat that Facebook posed to Google as a potential entrant into the Publisher Layer Tool segment of the business. As for paragraph 56, its contents are described at paragraph 171 above.

[174] The allegation that Facebook’s abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool was an integral part of the Arrangement is a bald, unsupported and speculative statement.

[175] The Claim itself sets forth facts that provide an entirely legitimate explanation for the changes in Facebook’s support for Header Bidding and its plans to build or buy a Publisher Layer Tool. In brief, Facebook recognized that it was “relatively cheap compared to build/buy and compete in a zero sum ad tech game”: Claim at para 52. In other words, entering into the NBA was a more profitable option for Facebook, relative to continuing with its plans to build or buy a Publisher Layer Tool and then competing with Google in that segment of the business. This was implicitly recognized by the allegation that if Facebook “could not partner with

Google, its *next best* option was to 'build/buy ad tech', meaning a Publisher Layer Tool" [emphasis added]. Given the favourable business terms that it negotiated with Google, the NBA offered Facebook a better business option than continuing to support Header Bidding and continuing to pursue its plans to build or buy a Publisher Layer Tool.

[176] In the presence of this entirely legitimate explanation, one is not left wondering about the circumstantial link between Facebook's entry into the NBA and its apparently unilateral abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool.

[177] Facebook was entitled to choose the more profitable course of action available to it. Stated differently, it was not obliged to pursue its plans to build or buy a new Publisher Layer Tool that would compete directly with Google's Publisher Layer Tools: *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, 1980 CanLII 226 (SCC) [***Atlantic Sugar***] at 657.

[178] Moreover, paragraph 2.4(e) of the NBA explicitly states that certain restrictions regarding Facebook's use of Google's confidential information do not restrict Facebook from developing or enhancing a product or service that competes with Google's Program, as it is defined in the NBA. Likewise, paragraph 6.8, which is entitled "Restrictions on Facebook's use of Google Data," explicitly provides that it "does not restrict Facebook from developing or enhancing a

product or service that competes with DoubleClick for Publishers, AdX, or AdMob without Google Data."[5]

[179] Pass Herald's allegation that Facebook's abandonment of support for Header Bidding and plans to build or buy a Publisher Layer Tool were an integral part of the Arrangement is entirely speculative. The Claim does not set forth any material facts, whether in paragraphs 55–56, 61 or elsewhere, that provide the basis for any reasonable prospect for Pass Herald to succeed with this allegation. The requisite material facts to provide such a reasonable prospect for success are absent, not only with respect to the act of agreeing or arranging, but also with respect to any intention to agree: *Jensen FCA* at paras 64 and 69.

[180] Consequently, even when read generously, holistically and practically, the claim that Facebook conspired, agreed or arranged with Google to abandon its support for Header Bidding and its plans to build or buy a Publisher Layer Tool is bereft of any possibility of success, and is doomed to fail.

[181] I pause to observe that this finding is consistent with a conclusion reached in *In re Google Digital Advertising Antitrust Litigation*, 627 F Supp (3d) 346 at 381 (US Dist Ct NY 2022) [***Google States' Litigation***], that "the States' allegations do not plausibly allege joint or concerted action between Google and Facebook to restrict Facebook's use of header bidding." The Court explained as follows:

> Facebook realized that "build / buy ad tech" was a conceivable option but would require "huge [engineering] and services investment, and patience for sales cycle." (Id. ¶ 422.) Nowhere in

[5] DoubleClick for Publishers, AdX, and AdMob are all Google products.

> these internal memos is there a hint that Facebook was offering a commitment to substantially curtail use of header bidding or that Google was insisting on such a commitment.

[182] In written submissions, Pass Herald maintains that the fact that the NBA does not contain any terms related to Header Bidding is circumstantial evidence that there were additional terms, outside the NBA, pursuant to which Facebook agreed to abandon Header Bidding. This is a bald and circular assertion. It falls short of what is required to demonstrate a reasonable prospect of success with respect to the existence of an arrangement between Google and Facebook regarding the latter's abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool. The same is true with respect to Pass Herald's assertions that continued meetings between Google and Facebook after the execution of the NBA provides circumstantial evidence that meetings about the NBA were used as a cover to negotiate other terms of the alleged Arrangement. Indeed, this position is inconsistent with the Claim itself, which states that those meetings took place in connection with the *implementation* of the NBA, and concerned its technical specifications: Claim at para 62.

[183] Pass Herald's suggestion that certain other provisions in the NBA also provide circumstantial evidence of the existence of the Arrangement also does not provide a sufficient basis to demonstrate a reasonable prospect of success with this allegation – which is not in the Claim itself. Those provisions concern regulatory cooperation "[t]o the extent permitted by applicable law" (NBA at para 7.1), coordination with respect to public statements regarding the NBA (NBA at para 10), and the favourable incentives for Facebook to comply with the NBA (NBA at Exhibit B).

[184] Regarding the latter incentives, I note that the US court decision reached a similar finding:

> The States' allegations are not plausible because they fail to adequately account for Facebook's motivation to use its economic clout as an advertiser to drive the hardest bargain it could with Google, and that Google was motivated by the legitimate, pro-competitive desire to obtain as much business as possible from Facebook. *Twombly*, 550 U.S. at 566, 127 S.Ct. 1955 ("there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway....") An inference of conspiracy is not supported by acts that "made perfect business sense*." Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 138 (2d Cir.2013). There is nothing inexplicable or suspicious in the parties entering into the NBA for reasons that go no further than the four corners of that agreement.
>
> *Google States' Litigation* at 371.

[185] In summary, for the reasons set forth above, I conclude that it is plain and obvious that Pass Herald's allegations that Facebook conspired, agreed or arranged with Google to abandon its support for Header Bidding and its plans to build or buy a Publisher Layer Tool are doomed to fail. This aspect of the Defendants' request to strike the Claim will therefore be granted.

Secret bidding advantages

[186] The Claim alleges that, to implement the NBA, Google and Facebook met further to discuss technical specifications. As a result of those meetings, one of Facebook's Middle Layer Tools (defined as "**FAN**" in the Claim) is claimed to have received two types of secret bidding advantages which have not been provided to competitor Middle Layer Tools.

[187] The first of those advantages is alleged to consist of privileged access by Facebook to Google's "trove of personal data to help Facebook identify viewers of Impressions." This advantage is described at paragraph 62(a), which in turn cross references paragraph 57(a), where part of this advantage is discussed in describing subsection 1(a) and section 3 of Exhibit A to the NBA. Paragraph 62(a) further alleges that, after executing the NBA, Google and Facebook integrated their software development kits for matching cookies to the user IDs of views. This is alleged to have not only allowed Facebook to identify users, but also to circumvent their privacy restrictions, especially on Apple devices. This is claimed to give Facebook more information than its rivals, and "meant that Google and Facebook had access to the same information." The Claim adds "[a]s a result, they were able to develop similar valuations for impressions": Claim at para 62(a).

[188] The second secret bidding advantage is alleged to consist of additional time for FAN to submit bid responses to Google Publisher Layer Tools. This is alleged to have permitted Facebook Middle Layer Tools to win more auctions but pay less.

[189] At paragraph 41, the Claim alleges that Facebook agreed not to compete in exchange for these secret benefits.

[190] To the extent that this latter claim is a reference to Facebook's abandonment of its plans to enter the Publisher Layer Segment, I consider that it is plain and obvious that it is doomed to fail: see paragraphs 174–185 above. To the extent that this claim refers to some other agreement,

it shall be struck from the Claim because it is a bald, unsupported and speculative allegation. It is bereft of any possibility of success.

[191] Insofar as the alleged secret bidding advantages discussed at paragraphs 187 and 188 above are concerned, I consider that they are sufficiently particularized and supported by material facts for the purposes of the present Motion and the "agreement" element of subsection 45(1) of the Act. Stated differently, it is not plain and obvious that Pass Herald's allegations that these advantages form part of the impugned Arrangement is doomed to fail.

[192] However, the issue of whether the Arrangement meets the other requirements of subsection 45(1) of the Act is another matter entirely. This will be discussed in the ensuing sections of this part VI.C(2)(b) below.

Unified Pricing

[193] The Claim alleges that representatives of Google and Facebook met on May 2, 2019 to discuss the possibility that the most sophisticated Publishers with the most sophisticated data might have set higher reserve prices for Google Middle Layer Tools and Facebook Middle Layer Tools. The Claim states that this was a concern because those Publishers might discover that those tools were winning more of their higher quality Impressions, but paying less.

[194] The Claim further alleges that at their above-mentioned meeting, Google and Facebook decided to prevent Publishers from setting any reserve prices. The Claim states that Google then implemented this part of the Arrangement by rolling out "Unified Pricing" four days later.

[195] The Defendants maintain that the Claim does not explain what "Unified Pricing" is, how it was allegedly agreed, or provide any further particulars. They add that this "Unified Pricing" also specifically described *unilateral* conduct on the part of Google, namely, its *implementation* of unified pricing.

[196] In my view, it is not plain and obvious that the allegation that the Arrangement included an agreement between Google and Facebook to prevent Publishers from setting any reserve prices is doomed to fail. For the purposes of the present Motions, the Claim provides sufficient particulars. Among other things, it specifies the date upon which this alleged agreement was reached (May 2, 2019), the nature of the agreement (to prevent publishers from setting any reserve prices), the underlying rationale of the agreement (to prevent the prices that Google Middle Layer Tools and Facebook Middle Layer Tools paid from rising), and the fact that it was implemented four days later by Google's "Unified Pricing" initiative. Although the terms of the "Unified Pricing" initiative are not described, it is implicit that this initiative prevented Publishers from setting any reserve prices. The Defendants therefore know the case they have to meet on this issue.

[197] Agreements contemplated by subsection 45(1) of the Act are often reached in secret. Prior to discovery, it can be exceptionally difficult for a plaintiff to obtain additional particulars.

[198] I recognize that the Claim characterizes the "Unified Pricing" program as having been *implemented* by Google alone. However, it also specifically alleges a joint decision "to prevent Publishers from setting any reserve prices." For the reasons described immediately above, it is not plain and obvious that the latter allegation is doomed to fail.

[199] I will pause to add that the implementation of an agreement is distinct from the act of agreeing. An offence is committed once an agreement proscribed by section 45 is entered into: *Howard Smith Paper Mills Ltd et al v The Queen*, 1957 CanLII 11 (SCC) at 413, quoting *R v Elliott*, [1905] 9 OLR, 648, 9 CCC 505 (ONHCJ) at 651, aff'd 9 CCC 505 (ON CA). See also *The Queen v O'Brien*, 1954 CanLII 42 (SCC) at 669. Stated differently, the agreement itself is the "gist" of the offence: *Atlantic Sugar* at 674, quoting *Paradis v The King*, 1933 CanLII 75 (SCC) at 168. As soon as such an agreement is entered into, the offences contemplated by section 45 are complete, regardless of whether any acts in furtherance of the agreement are ever undertaken: *Abitibi* at 209. It follows that if there are such acts, it matters not whether they are undertaken by two or more parties to the agreement, or unilaterally by only one of the parties thereto.

[200] I will discuss below whether this aspect of the alleged Arrangement meets the remaining requirements of subsection 45(1).

Facebook's withdrawal from the website segment

[201] At paragraph 65, the Claim alleges that "[i]n February 2020, under the Arrangement, FAN stopped submitting Bid Responses on Impressions displayed on websites, effectively

ceding that market segment to Google Middle Layer Tools." The Claim then proceeds to discuss the adverse effects of this action on the average price paid for Impressions displayed on websites in 2020, relative to 2019.

[202] This allegation is repeated at paragraphs 79(b), 80(b) and 81(b) of the Claim, without any further material facts or other particulars.

[203] Even reading this allegation generously, holistically, and practically, with a view to erring on the side of permitting arguable claims to proceed, it constitutes a bald, unsupported and speculative assertion.

[204] In the absence of any further material facts or other particulars, I consider that it is plain and obvious that this allegation is doomed to fail. This is particularly so given the long length of time between the execution of the NBA in September 2018, and Facebook's exit from the website segment of the business in February 2020.

[205] Moreover, this allegation is not sufficiently particularized to put the Defendants on notice of the case they have to meet, or to ensure that a trial of this issue would be both manageable and fair.

[206] Consequently, this aspect of the Defendant's request to strike the Claim will be granted.

Summary

[207] In summary, for the reasons set forth at paragraphs 160-161 above, it is not plain and obvious that the allegation that the NBA is an "agreement" within the meaning of subsection 45(1) of the Act is doomed to fail. The issue of whether the NBA meets the other elements of subsection 45(1) will be discussed below.

[208] For the reasons provided at paragraphs 191–199 above, it is not plain and obvious that the claims that the Arrangement between Google and Facebook includes the unwritten terms in relation to "secret bidding advantages" and preventing Publishers from setting reserve prices are doomed to fail. Once again, the issue of whether these aspects of the alleged Arrangement meet the other elements of subsection 45(1) will be discussed below.

[209] For the reasons provided at paragraphs 164–185 above, it is plain and obvious that Pass Herald's allegations that Facebook conspired, agreed or arranged with Google to abandon its support for Header Bidding and its plans to build or buy a Publisher Layer Tool are doomed to fail. Consequently, this aspect of the Defendants' Motions to Strike will be granted.

[210] For the reasons given at paragraphs 201-206, it is plain and obvious that the Claim that Facebook's exit from the website segment of the business was part of the Arrangement is doomed to fail. Consequently, this aspect of the Defendants' Motions to Strike will also be granted.

(ii) "With a competitor"

[211] The second of the three principal elements of subsection 45(1) requires that an impugned conspiracy, agreement or arrangement be between "competitors." More specifically, for the purposes of paragraphs 45(1)(a) and (b), the parties to the alleged conspiracy, agreement or arrangement must be competitors with respect to the *supply* of product that is contemplated by those provisions. That is to say, they must be competitors with respect to the supply of the product (a) whose price is alleged to have been fixed, maintained, increased or controlled, or (b) whose sales, territories, customers or markets are alleged to have been allocated. For the purposes of paragraph 45(1)(c), the parties must be competitors with respect to the production or supply of the product whose production or supply is alleged to have been fixed, maintained, controlled, prevented, lessened or eliminated: see paragraph 155 above.

[212] Given the conclusions summarized at paragraphs 207–210 above, the "between competitors" element of subsection 45(1) will be considered only in respect of the NBA, the "secret bidding advantages" and the alleged unwritten agreement or arrangement to prevent Publishers from setting reserve prices.

[213] At paragraphs 27–29 and subparagraph 77(a), the Claim alleges that Google and Facebook are direct competitors in respect of Publisher Layer Tools, Middle Layer Tools and Advertiser Layer Tools. Insofar as Publisher Layer Tools are concerned, Facebook's existing Monetization Manager tool is described as being distinct from the new Publisher Layer Tool that Facebook was allegedly planning to build or buy, prior to entering into the impugned Arrangement.

[214] At paragraph 78(b), the Claim further alleges that Google and Facebook are competitors within the meaning of subsection 45(8) of the Act because, had they not entered into the Arrangement, Facebook would have bought or built a Publisher Layer Tool that competed head-on with Google.

[215] Section 45(8) of the Act provides as follows:

(8) The following definitions apply in this section.	**(8)** Les définitions qui suivent s'appliquent au présent article.
competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)…	*concurrent* S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (*competitor*)…

[216] The Claim further alleges that on September 15, 2020, Donald Harrison, Google's President of Global Partnerships testified before the United States Senate that Facebook was a competitor in the market for "buying and selling ads online": Claim at para 30.

[217] The Defendants do not appear to contest that Facebook and Google are competitors as described above.

<u>The NBA</u>

[218] However, the Defendants maintain that the NBA is not an agreement among competitors, but rather a vertical agreement. That is to say, they maintain that the NBA is an agreement between Facebook, in its capacity as a purchaser, and Google, as a seller, regarding the terms on which Google will be compensated for successful bids submitted by Facebook through Google's Publisher Layer Tools. Consequently, the Defendants assert that the NBA is not the type of "sell-side" agreement to which subsection 45(1) applies: *Mohr FCA* at para 33; *Mohr FC* at paras 42–46.

[219] I agree. This is readily apparent from a brief review of the NBA, which may be considered to be incorporated by reference and part of the Claim, due to the fact that it is "central enough to the claim to form an essential element or integral part of the claim itself or its factual matrix": *Jensen FCA* at para 52(c), endorsing *Jensen FC* at paras 85 and 87. In this regard:

> If the documents referred to in the pleadings do not actually say what the plaintiff alleges they say, or if the plaintiff has ascribed a meaning to those paraphrases and quotes that is not consistent, on a plain reading, with the documents from which they originate, the court cannot consider these allegations as material facts. The certification judge's task is not to look at these documents in detail to determine whether or not the plaintiff has correctly interpreted them, but can determine whether the references made by the plaintiff accurately reflect what has been expressly stated in the documents: Reasons at paras. 86–87.
>
> *Jensen FCA* at para 52(d). See also paragraph 59, where the Federal Court of Appeal endorsed this Court's more detailed assessment of this issue, at *Jensen FC* paras 144–146.

[220] The first paragraph of the NBA states that it "governs Facebook's participation in [Google's] Network Bidding Pilot Program" (the "**Program**"). To that end, various provisions in

the NBA address Facebook's role *as a purchaser* of services from Google. These include the following:

- Article 1.3, which defines "Advertiser" to mean a third-party advertiser on whose behalf Facebook *buys* Ad Inventory via the Program.

- Article 2.1, which addresses the operation of the Program. The opening words of paragraph 2.1(a) state: "Facebook authorizes Google and its Affiliates to place Facebook's or its Advertiser's Ads on any Publisher Property made available through the Program in accordance with the terms of this Agreement."

- Article 2.3, which states that "Google and its Affiliates *may make available to* Facebook certain Program features (e.g., geographic targeting) to assist with the selection of Targets" [emphasis added].

- Article 5.1(a), which provides for Google's invoicing of its Fee to Facebook, who in turn "will Pay Google the Fee, in immediately available funds or as otherwise approved by Google, within thirty (30) days after the date of invoice."

- Article 5.1(b), which states that "[c]harges to Facebook are solely based on Google's measurements for the Program and its applicable billing metrics (e.g., impressions)."

- The Fee Payment provisions in Exhibit B to the NBA, which define the term "Fee" as meaning "the amount owed to Google" by Facebook. Other

> provisions in that Exhibit (which is explicitly referenced at paragraph 56 of the Claim, and indirectly referenced at paragraph 61) then address Facebook's minimum spend commitments and the minimum Fees payable by Facebook to Google.

[221] It is plain and obvious from the foregoing terms in the NBA, and indeed from a brief review of the NBA as a whole, that it is not a horizontal agreement among parties in their capacity as competitors who compete in the production or supply of Publisher Layer Tools or any other product. Rather, it is a vertical arrangement between Google in its role as auctioneer and Facebook as an auction participant. I note that the US courts that have reviewed the NBA reached the same conclusion: *Google States' Litigation* at 374; *Singh v Google LLC (In re Google Digital Advertising Antitrust Litigation*), 2024 US Dist LEXIS 37657 (SDNY) [***Google Advertisers' Litigation***] at 71. Stated differently, the NBA is an agreement for the supply of services by Google to Facebook.

[222] Given the foregoing, it is also plain and obvious that the Claim's assertions in this regard are doomed to fail. That is to say, the Claim's assertions that the NBA constitutes an agreement among competitors, as contemplated by subsection 45(1) of the Act, is bereft of any possibility of success, even when read generously, holistically and practically. The Defendant's Motion with respect to this aspect of the Claim will therefore be granted.

The "secret bidding advantages"

[223] It is plain and obvious that alleged arrangement concerning the "secret bidding advantages" described at paragraphs 186–188 above do not constitute agreements between the parties in their capacities as competitors in the production or supply of Publisher Layer Tools or any other product. Rather, once again, those arrangements are vertical in nature, entered into in Google's capacity as a provider of services to Facebook, in its capacity as a purchaser of such services: see also *Google States' Litigation* at 373; and *Google Advertisers' Litigation* at 69–71.

[224] Consequently, it is plain and obvious that the Claim's assertions regarding those aspects of the alleged Arrangement are doomed to fail. That is to say, the Claim's assertions that the "secret bidding advantages are part of an arrangement among competitors, as contemplated by subsection 45(1) of the Act," are bereft of any possibility of success, even when read generously, holistically and practically. The Defendant's Motion with respect to these aspects of the Claim will therefore be granted.

Unified Pricing

[225] As discussed at paragraph 193-194 above, the Claim alleges that Google and Facebook met on May 2, 2019 and agreed to prevent publishers from setting reserve prices for Google Middle Layer Tools and Facebook Middle Layer Tools. The Claim proceeds to state that Google then "*implemented* this part of the arrangement by rolling out 'Unified Pricing' four days later" [emphasis added]: Claim at paras 63–64.

[226] The Defendants maintain that the alleged Arrangement in relation to Unified Pricing does not constitute the type of agreement among competitors contemplated by section 45 because it is an arrangement between parties in their capacity of *purchasers* of Impressions.

[227] I agree.

[228] As noted in *Mohr FCA* at para 33: "Section 45 is limited to agreements between competitors to fix prices or allocate markets relating to "the production or supply" of a product or a service—otherwise known as "sell-side" conspiracies." See also *Mohr FC* at paras 42–46.

[229] The Claim does not articulate how the alleged arrangement between Google and Facebook to prevent publishers from setting any reserve prices may be an arrangement between competitors in *the production or supply* of any product, as contemplated by subsection 45(1): see paragraph 211 above. The Claim specifically alleges that this arrangement was entered into to prevent "publishers from setting any reserve prices": Claim at para 64. The Claim describes the result of this alleged agreement as having been that Google and Facebook won more auctions but paid less: Claim at para 64. These are patently allegations that concern Google and Facebook in their capacity as competitors in *the purchase* of Impressions. They are not allegations concerning any type of "sell-side" agreement to which subsection 45(1) applies.

[230] Consequently, I consider it plain and obvious that the allegations in the Claim regarding an alleged arrangement between Google and Facebook to prevent publishers from setting any reserve prices do not state a reasonable cause of action. Those allegations are doomed to fail,

because they do not claim an agreement between Google and Facebook in their capacity as competitors in the production or supply of any product.

Conclusion regarding the "between competitors" element of subsection 45(1)

[231] For the reasons set forth above, it is plain and obvious that Pass Herald's allegations concerning the NBA, the alleged agreement with respect to "secret bidding advantages," and the alleged arrangement to prevent publishers from setting any reserve prices do not state a reasonable cause of action. This is because it is plain and obvious that the Claim does not describe any agreement among competitors in the production or supply of a product, insofar as any of these aspects of the alleged Arrangement are concerned. Consequently, the Defendants' Motions to Strike will be granted insofar as these aspects of the Claim are concerned.

(iii) The objects or subject matter of the alleged Arrangement

[232] Given the conclusions reached in parts VI.C.(2)(b)(i) and (ii) immediately above, it is unnecessary to dwell on the third principal element of subsection 45(1), which concerns the conduct described in paragraph 45(1)(a), (b), and (c), of the Act.

[233] An analysis of this third element is not required because it is plain and obvious that the Claims made in relation to the various aspects of the alleged Arrangement do not state a reasonable cause of action with respect to one of the first two principal elements of subsection 45(1).

(iv) Conclusion regarding section 45

[234] For the reasons set forth in part VI.C.(b)(i) above, it is plain and obvious that the Claims made in relation to Facebook's abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool are doomed to fail with respect to the "agreement or arrangement" element of subsection 45(1). The same is true with respect to the Claims made in relation to Facebook's withdrawal from the website segment of the business.

[235] For the reasons set forth in part VI.C.(b)(ii) above, it is plain and obvious that Pass Herald's allegations concerning the NBA, the alleged Arrangement with respect to "secret bidding advantages," and the alleged Arrangement to prevent publishers from setting any reserve prices, do not describe any agreement or arrangement among competitors *in the production or supply of a product*, as required by subsection 45(1).

[236] Accordingly, given that the foregoing conclusions address all aspects of the alleged Arrangement and the alleged contravention of section 45 of the Act, the Defendants' Motions to Strike will be granted as they relate to the allegations made in relation to section 45.

[237] I will pause to make one further observation in relation to those allegations. As vertical arrangements that objectively have at least some readily ascertainable pro-competitive objects, it is plain and obvious that the NBA and the alleged secret bidding advantages described at paragraph 62 of the Claim do not constitute unambiguously harmful, hard-core cartel conduct, as contemplated by subsection 45(1): see paragraph 157 above. I note that the courts in *Google*

States' Litigation at 371 and 376, and *Google Advertisers' Litigation* at 69–72, also identified some pro-competitive aspects of the NBA and of at least one of the "secret bidding advantages" identified in the claim – namely, the additional time Facebook negotiated to evaluate a bid request and submit a bid.

(3) Section 46(1)

[238] Section 46 essentially creates an indictable offence for a corporation carrying on business in Canada to implement a communication from a person outside Canada made for the purpose of giving effect to a foreign conspiracy, combination or agreement that, if entered into in Canada, *would have been in contravention of section 45*. The person outside Canada must be in a position to direct or influence the policies of the corporation within Canada. An offence is committed whether or not any director or officer of the corporation in Canada has knowledge of the impugned conspiracy, agreement or arrangement. The full text of subsection 46(1) is reproduced in Annex 3.

[239] Given the nature of the pleadings made by Pass Herald in respect of section 46, it is unnecessary to say more about the specific elements of that provision. Those pleadings are bald and conclusory. They consist of a two-sentence paragraph, which simply tracks the language of the Act: Claim at para 82. This falls far short of the requirements for pleadings discussed at subparagraphs 146 v. and vi. above: see also *Jensen FC* at paras 177–179.

[240] I acknowledge that the Claim also alleges that the business of each of the Google Defendants is interwoven with the business of the others, and that the same is true with respect to

the Facebook Defendants. However, the fact remains that the pleadings with respect to section 46 are woefully inadequate.

[241] Consequently, I find that it is plain and obvious that those pleadings are "doomed to fail." They will therefore be struck from the Claim.

(4) Section 47

(a) *Elements of subsection 47(1)*

[242] Subsection 47(1) of the Act defines two types of "bid-rigging," in paragraphs 47(1)(a) and (b), respectively. Pursuant to subsection 47(2), each of those types of bid-rigging are indictable offences.

[243] Paragraph 47(1) states as follows:

47 (1) In this section, bid-rigging means	**47 (1)** Au présent article, truquage des offres désigne :
(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or	**a)** l'accord ou arrangement entre plusieurs personnes par lequel au moins l'une d'elles consent ou s'engage à ne pas présenter d'offre ou de soumission en réponse à un appel ou à une demande d'offres ou de soumissions ou à en retirer une qui a été présentée dans le cadre d'un tel appel ou d'une telle demande;
(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or	**b)** la présentation, en réponse à un appel ou à une demande, d'offres ou de soumissions qui sont le fruit d'un

among two or more bidders or tenderers,	accord ou arrangement entre plusieurs enchérisseurs ou soumissionnaires,
where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.	lorsque l'accord ou l'arrangement n'est pas porté à la connaissance de la personne procédant à l'appel ou à la demande, au plus tard au moment de la présentation ou du retrait de l'offre ou de la soumission par une des parties à cet accord ou arrangement.

[244] As is apparent, paragraph 47(1)(a) contains the following four elements:

1) an agreement or arrangement between or among two or more persons,

2) whereby one or more of those persons agrees or undertakes to either:

3) (a) not to submit a bid or tender, or

(b) to withdraw a bid or tender submitted,

4) in response to a call or request for bids or tenders.

[245] Paragraph 47(1)(b) contains the following 5 elements:

1) the submission,

2) in response to a call or request for bids or tenders, of

3) bids or tenders,

4) that are arrived at by agreement or arrangement,

5) between two or more bidders or tenderers.

[246] In addition, the language following paragraph 47(1)(b) establishes the following supplementary elements that are common to both types of "bid-rigging" established by subsection 47(1):

1) the agreement or arrangement is not made known,

2) to the person calling for or requesting bids or tenders,

3) at or before the time when any bid or tender is submitted or withdrawn, as the case may be,

4) by any person who is a party to the agreement or arrangement.

[247] In brief, the type of bid-rigging contemplated by paragraph 47(1)(a) has eight elements, while the conduct contemplated by paragraph 47(1)(b) has nine elements.

(b) *Analysis*

[248] The Claim states that the alleged Arrangement contravenes paragraph 47(1)(a) in two ways. First, it alleges that Facebook and Google agreed or arranged that Facebook (FAN) would stop sending bid responses for Impressions displayed on websites: Claim at para 86(a).

[249] As with the similar allegation made in relation to subsection 45(1), Pass Herald's allegation of an agreement or arrangement between Google and Facebook in this regard is bald,

speculative and not supported by any further particulars. For the reasons provided at paragraphs 201-205 above, it is plain and obvious that this claim is doomed to fail in relation to the first element contemplated by paragraph 47(1)(a) alone.

[250] The second way in which the Claim states that the alleged Arrangement contravenes paragraph 47(1)(a) is that it "secretly *allow[ed]* Facebook Middle Layer Tools not to submit bids on low-value Impressions," and "*allowed* FAN to identify and win high-value Impressions" [emphasis added].

[251] Once again, it is plain and obvious that this claim is doomed to fail. This is because the Claim describes the *effects* of the "secret bidding advantages" and "Unified Pricing," discussed above at paragraphs 187–188 and 193–194, respectively. The Claim with respect to paragraph 47(1)(a) does not describe an agreement or arrangement *to do* any of the things described in that provision. Specifically, the Claim does not allege an agreement or arrangement between Google and Facebook, pursuant to which Facebook undertook not to submit a bid or tender, or to withdraw a bid or tender submitted, in response to a call or request for bids or tenders. Even reading the Claim generously and holistically, the Claim at best only alleges (in another section) that, as a result of the unequal information provided to Facebook by Google, "*they were able to* develop similar valuations for Impressions" [emphasis added]: Claim at para 62(a). This is an *effect* of the alleged Arrangement, rather than one of the objects of that Arrangement. As with section 45 of the Act, section 47 concerns the objects of agreements or arrangements, not their effects: see discussion at paragraphs 150 above. In any event, even if the Claim could somehow be construed to imply an agreement or arrangement between Google and Facebook in this

regard, the Claim would remain a bald, speculative and unsupported assertion, without sufficient particulars to provide fair or adequate notice to the Defendants of the case they have to meet.

[252] The Claim also alleges that the Arrangement contravenes paragraph 47(1)(b) of the Act because it *allowed* Google Middle Layer Tools and Facebook Middle Layer Tools to develop similar valuations for Impressions, and to bid in accordance with those valuations. Once again, this is a bald allegation and does not provide sufficient particulars to provide fair or adequate notice to the Defendants of the case they have to meet.

[253] Moreover, this claim does not allege an agreement or an arrangement *to do* anything contemplated by paragraph 47(1)(b). Stated differently, Pass Herald has not alleged that Google or Facebook submitted bids or tenders that were arrived at by an agreement or arrangement between them. Pass Herald has simply alleged that the Arrangement *allowed* Google and Facebook to do certain things. At best, this is an unsupported claim with respect to an *effect* of the impugned Arrangement.

[254] Having regard to the foregoing, it is plain and obvious that Pass Herald's allegations with respect to section 47 of the Act are doomed to fail. They will therefore be struck from the Claim.

(5) Section 52

(a) *Elements of subsection 52(1) and general principles*

[255] Section 52 of the Act establishes an offence for making false or misleading representations. It is a hybrid offence that can be prosecuted either by way of indictment or by way of summary conviction.

[256] Subsection 52(1) states as follows:

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.	**52 (1)** Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

[257] The principal elements of subsection 52(1) are as follows:

1) knowingly or recklessly;

2) making a representation to the public;

3) that is false or misleading;

4) in a material respect;

5) for the purpose of promoting, directly or indirectly, by any means whatsoever:

    a. the supply or use of a product; or

    b. any business interest.

[258] The first element, sometimes referred to as the subjective intent element, requires that the person making the representation either knew that it was false or misleading, or was reckless in that regard: *R v Stucky*, 2009 ONCA 151 [***Stucky***] at paras 123–129. Given the challenges associated with proving subjective intent, knowledge or recklessness may be inferred based on common sense and a consideration of objective factors: *Stucky* at para 128.

[259] Turning to the second element, subsection 52(1.1) states that it is not necessary to prove that (i) any member of the public to whom the representation was made was within Canada, or (ii) that the representation was made in a place to which the public had access.

[260] With respect to the third and fourth elements, subsection 52(1.1) also states that it is not necessary to prove that the representation deceived or misled any person. In addition, subsection 52(4) provides that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect."

[261] The literal meaning of a representation is the ordinary meaning of the words used in the representation: *Richard v Time Inc*, 2012 SCC 8 [***Richard***] at para 47.

[262] The general impression conveyed by a representation is analysed in the abstract, without considering the personal attributes of the party who instituted proceedings against the defendant: *Richard* at para 49. In conducting that analysis, the Court's focus is upon the general impression of the hypothetical average consumer: *Bell Mobility v Telus Communications Company*, 2006

BCCA 578 [***Telus BCCA***] at para 16; *Richard* at para 62. This is a test of "first impression" following initial contact with the entire representation. The Court is not required to review the representation several times, to ensure that it understands all of its subtleties: *Richard* at paras 56–57. Stated differently, the relevant consumer is not "a careful and diligent" consumer, but rather one who takes "no more than ordinary care to observe that which is staring them in the face upon first contact with an advertisement": *Richard* at para 67.

[263] I will pause to observe that *Richard* involved the interpretation of the "average consumer" for the purposes of the *Consumer Protection Act*, RSQ, c P-40.1, which appears to have been modelled on section 52 of the *Competition Act*. Given the provincial legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques, the Court in *Richard* defined the "average consumer" as the "credulous and inexperienced" consumer: *Richard* at paras 71–12. In the absence similar of evidence regarding Parliament's intention to specifically protect vulnerable persons, courts elsewhere have approached this aspect of the teachings in *Richard* with caution: see, e.g., *Drynan v Bausch Health Companies, Inc*, 2021 ONSC 7423 [***Drynan***] at paras 99–104; and *Rebuck v Ford Motor Company*, 2023 ONCA 121 [***Rebuck***] at paras 24–26. For the present purposes, I consider it prudent to do the same. For the purposes of determining the present Motions, it is unnecessary to determine whether the hypothetical average member of the relevant consumer group simply has the characteristics described in the immediately preceding paragraph above, or is also "credulous and inexperienced."

[264] Where the impugned misrepresentation is targeted at a particular subgroup within the general public, the Court's focus is upon the general impression conveyed to the average member of that subgroup: *Canada (Commissioner of Competition) v Canada Tax Reviews Inc*, 2021 FC 921 at paras 83–85; *Canada (Competition Bureau) v Chatr Wireless Inc*, 2013 ONSC 5315 at para 129.

[265] Moreover, in conducting its assessment, the Court is required to consider the entire context, rather than simply the actual text of the alleged misrepresentation: *Richard* at para 55; *R v Stucky*, 2006 CanLII 41523 (ON SC) at para 77, rev'd on other grounds, *Stucky.*

[266] Given the objective nature of the test, it is not relevant whether the impugned representation(s) did or did not cause prejudice to one or more persons, including the plaintiff(s): *Richard* at paras 50 and 75; *Rebuck* at para 21.

[267] In assessing whether a representation is false or misleading in a *material* respect, the focus of the Court's assessment is upon whether the representation was "so pertinent, germane or essential" that it could affect the decision to purchase: *Apotex Inc v Hoffman La-Roche Limited*, 2000 CanLII 16984 (ON CA) [***Apotex***] at para 16; *Energizer Brands, LLC v The Gillette Company*, 2023 FC 804 [***Energizer***] at para 176(4); *Maritime Travel Inc v Go Travel Direct Inc*, 2008 NSSC 163 at para 76, aff'd 2009 NSCA 42 [***Go Travel***] at paras 27-29. This test will not be met by mere "puffery" that is unlikely to be taken seriously: *Energizer* at para 176(4); *Marcinkiewicz v General Motors*, 2022 ONSC 2180 [***General Motors***] at para 137; *Telus*

Communications v Bell Mobility Inc, 2007 BCSC 518 [***Telus BCSC***] at para 19; *Williams v Cannon Canada Inc,* 2011 ONSC 6571 at para 227.

[268] Finally, with respect to the fifth element of subsection 52(1), the word "promote" contemplates "to move forward or advance," or to "enhanc[e] or increase[e] the volume of business for the company": *Apotex* at para 11. The words "promote, directly or indirectly, any business interest" have "a very wide meaning and can include any business interest" of the person or persons making the representation: *Apotex* at paras 13–14.

(b) *Analysis*

(i) Pass Herald's Claims

[269] The Claim states that Google made various representations to the public for the purpose of promoting the use of Google Tools, even though it knew or was reckless to the possibility that those representations were false or misleading in a material respect. The Claim asserts that those representations (the "**Misrepresentations**" or the "**Misrepresentation Claims**") were intended to be viewed directly or indirectly by Publishers, and that they breached section 52 of the Act.

[270] The Claim also alleges that Google represented, on multiple dates that are specifically identified, that Google Tools maximized Publishers' revenues. In two instances, the alleged Misrepresentations specifically stated that Google maximizes Publishers' revenues. In other instances, the Misrepresentations state either that Google helps Publishers to "generate the most

profit for every ad unit," to "get the highest yield for every impression," or to "create the most revenue possible."

[271] For example, the Claim states that on February 9, 2010, Google posted an article on its website titled "Maximizing advertising revenues for online publishers." The Claim alleges that this article includes the following statements:

> **Maximizing revenues for our AdSense partners …**
>
> AdSense helps publishers get the most revenue possible for their ad space …
>
> When a publisher enables AdSense on their site, Google automatically maximizes the publisher's revenues every time a page loads …
>
> [T]he Ad Exchange goes further than traditional "yield management." It provides a more complete revenue maximization solution. …
>
> As a result of this dynamic allocation, publishers essentially have a risk-free way to get the highest real-time revenues for all their non-guaranteed impressions. …
>
> [O]ur goal is to maximize all our partners' online advertising revenues[.]

[272] The Claim also alleges that Google failed to provide Publishers with information that could have corrected those misrepresentations. These "omissions" included:

- failing to disclose the existence of the NBA and the broader Arrangement;
- failing to explain that Dynamic Revenue Sharing (as defined in the Claim) could decrease Publishers' revenues, or that it often had that effect;

- redacting certain fields of information from the overall information given to Publishers, in order to prevent Publishers from uncovering that Header Bidding was better for them, or from quantifying the difference;

- splitting up the data that Google Tools gave Publishers, thereby preventing Publishers from uncovering that Google Tools and Facebook Tools were winning a disproportionate and increasing share of Publishers' high-value Impressions.

[273] The Claim further asserts that Dynamic Revenue Sharing was one of two algorithms – the other being "Bernanke," adopted by Google which had the effect of decreasing Publishers' revenues. Those two algorithms are explained at paragraphs 73–76 of the Claim.

[274] The Claim adds that the Misrepresentations and omissions materially and intentionally reduced Publishers' revenues.

(ii) Analysis

[275] Google maintains that the Misrepresentation Claim has no reasonable chance of success and should be struck for three reasons. For the reasons provided below, I disagree.

Google's First Argument – the Misrepresentations constitute "mere puffery":

[276] First, Google states the alleged Misrepresentations summarized at paragraphs 270-271 above are not actionable because they are statements of opinion or expectation, rather than

statements of fact. (Google does not address the alleged omissions discussed at paragraphs 272-273 above). Google maintains that such statements have been characterized by courts as constituting "mere puffery" that have no legal significance and cannot provide the basis for a misrepresentation claim: see paragraph 267 above.

[277] I disagree. It is not plain and obvious to me that the Misrepresentation Claims are doomed to fail on the basis that they constitute "mere puffery."

[278] The cases relied upon by Google are distinguishable.

[279] In *General Motors*, the plaintiffs alleged that some of the defendants misrepresented, in their advertising and marketing materials, that their vehicles were "clean diesel" vehicles. For example, those defendants represented that their Chevrolet Cruz vehicle "is powerful, efficient and clean," that its "turbo-diesel engine provides greater fuel economy than a comparably sized gasoline engine …" and that "it maximizes both efficiency and performance [….with] fuel economy that's unsurpassed by any other gasoline or diesel car in America": *General Motors* at para 70(a)–(b). Those defendants also represented that the GMC Sierra was "…cleaner and faster with lower emissions and greater power than the previous model": *General Motors* at para 70(d). The plaintiff added that certain other defendants misrepresented features of an automobile engine computer part (the Bosch EDC17), by stating that vehicles equipped with that component "are cleaner than ever before," maximize "fuel efficiency" and reduce "CO2 and other emissions": *General Motors* at paras 7 and 71. For the purposes of the tort of negligent misrepresentation, the

foregoing statements were found to be “puffs” or statements that a purchaser of a vehicle would not take seriously and would understand not to be legally binding: *General Motors* at para 137.

[280] In my view, the alleged Misrepresentations summarized at paragraphs 270-271 above are distinguishable from those that were at issue in *General Motors*. Although the alleged Misrepresentations appear to have a certain degree of *prima facie* similarity with the latter representations, I am inclined to consider at this early stage of the proceedings that they are qualitatively different. Put differently, *taken in their particular context*, it is not plain and obvious that the alleged Misrepresentations would not have been taken seriously by Publishers.

[281] In contrast to the average purchaser of a car, who may not be generally expected to take seriously statements such as those that were at issue in *General Motors*, it is not immediately apparent to me that the average Publisher, including the average sophisticated Purchaser described in the Claim, would not take the alleged Misrepresentations seriously. This is particularly so given that the test contemplates the general impression left by the Misrepresentations upon an average Publisher’s first contact with those Misrepresentations: see paragraphs 260 and 262 above. It is equally not apparent to me that those Misrepresentations did not, and could not, affect the average Publisher’s decisions to purchase Google’s services. Publishers would have recognized Google to be a very sophisticated participant in the marketplace for Display Ads. Statements that it made, such as those summarized at paragraphs 270-271 above, may very well have been not only taken seriously but also intended to be taken seriously, as alleged in the Claim.

[282] My conclusion in this regard is reinforced by the fact that some of the Misrepresentations were published in an article specifically titled "Maximizing advertising revenues for online publishers." I consider that such an article might very well be taken more seriously by the average Publisher than very short representations of the nature that were at issue in *General Motors*.

[283] I pause to observe that *General Motors* is also distinguishable for two other reasons, insofar as it concerned the representations regarding the Bosch EDC17 component. First, the court there found that most of the alleged representations in the plaintiffs' record did not relate to the General Motors vehicles. Second, it found that the putative class members were not the audience for those statements alleged to have been made by Bosch.

[284] In my view, and at this early stage of proceedings, the alleged Misrepresentations made by Google appear to be somewhat closer in nature to those that were at issue in *Drynan*. In that case, the statements at issue included claims that COLD-FX® products were "proven by science" and "clinically proven" to help (i) reduce the frequency, duration, and severity of cold and flu symptoms, and (ii) increase the proportion of natural killer cells and T-helper cells to boost the immune system: *Drynan* at para 6. The court found that if such statements were ultimately proven to be true at trial, they could constitute an unfair practice and a contravention of section 52 of the Act: *Drynan* at paras 106–117 and 257–264. In my view, some of the Misrepresentations made by Google have a similar scientific nuance. That might well lead the hypothetical average Publisher to take them more seriously, especially given the statements that "Google automatically maximizes the publisher's revenues every time a page loads," that Google

helps Publishers to "get the highest yield for every impression," and that "[a]s a result of this dynamic allocation, publishers essentially have a risk-free way to get the highest real-tie revenues for all their non-guaranteed impressions": see paragraph 271 above.

[285] In reaching its conclusion that the disputed representations were not mere "advertising pitches," the court in *Dynan* relied on *Rebuck v Ford Motor Company*, 2018 ONSC 7405 and *Kalra v Mercedes Benz Canada Inc*, 2017 ONSC 3795. In those cases, the courts certified claims alleging contraventions section 52 of the Act that were based on alleged misrepresentations regarding the fuel consumption or fuel emissions of the defendants' vehicles. It is not immediately apparent that those misrepresentations were any more likely to be taken seriously, or to influence purchasing decisions, by average members of the target audience than were the Misrepresentations alleged in the present proceeding. To the contrary, those two cases would suggest that it is not plain and obvious that statements such as the Misrepresentations constitute mere "advertising pitches" or "puffery." The same is true of *Go Travel*, where the court found that the alleged misrepresentations concerning price were sufficiently specific to be material considerations for potential purchasers of vacation packages: *Go Travel* at paras 28–29. In my view, it is not plain and obvious that the alleged Misrepresentations are not similarly sufficiently specific to be taken seriously and be material considerations for the hypothetical average Publisher.

[286] Google also relies on *Williams v Canon Canada Inc*, 2011 ONSC 6571 at para 227. There, the court concluded that the statement "You always get your shot," which was not pleaded with any particularity, was simply "puffery and not an actionable representation." Once

again, I consider that the Misrepresentations in the present proceeding were qualitatively very different, and were much more likely to be taken seriously and to influence purchasing decisions made by members of the target audience, namely, Publishers.

[287] I reach essentially the same conclusion regarding the alleged misrepresentation in *Telus Communications Company v Bell Mobility Inc*, 2007 BCSC 518 at para 19. That misrepresentation concerned the phrase "On the most powerful network in Western Canada." In dismissing an application for an interim injunction restraining the defendant from continuing to use that phrase in its advertisements, the court concluded that anyone reading that phrase would consider it to be nothing more than mere puffery. Once again, it is not plain and obvious that the alleged Misrepresentations in this case are not much more likely to be taken seriously by, and to influence average members of, the target audience.

[288] Two additional cases relied upon by Google are *Atec Marketing Ltd v Heart and Stroke Foundation of Canada*, 2005 CanLII 44381 (ON SC) at para 61 and *Forest Hill Homes v Ou*, 2019 ONSC 4332 at para 13. Those cases are distinguishable on the basis that the alleged misrepresentations concerned statements made at the time of contractual negotiations. Moreover, the causes of action in question were the tort of negligent misrepresentation and breach of contract, respectively, rather than sections 36 and 52 of the Act.

[289] In summary, for the reasons set forth above, I conclude that it is not plain and obvious that the Misrepresentation Claims are doomed to fail on the ground that they constitute "mere puffery" that is not actionable. For greater certainty, it is not plain and obvious that the general

impression left by the Misrepresentations with the average hypothetical Publisher was not that their revenues would be maximized if they used Google's Publisher Layer Tools. This is particularly so given that the relevant Publisher for the purposes of the analysis of the Misrepresentation Claims is the average hypothetical Publisher who takes "no more than ordinary care to observe that which is staring them in the face upon first contact with an advertisement": *Richard* at para 67. In reaching this conclusion, I have also taken into account the literal meaning of the Misrepresentations.

Google's Second Argument – The Claim Lacks Sufficient Particulars

[290] Google maintains that the Claim does not include sufficient material facts required to demonstrate intent under section 52. Specifically, Google asserts that the Claim does not provide particulars of what the Google Defendants allegedly knew or how this showed recklessness as to the truth of the alleged Misrepresentations.

[291] In my view, this is not a sufficient shortcoming to warrant striking the Misleading Claims at this stage of the proceeding. The jurisprudence has repeatedly recognized that the overall adequacy of pleadings concerning *mens rea* can be assessed by reference to what they say, as well as to common sense inferences that can reasonably be made: see *Stucky* at para 128; *Sunderland* at para 135, including the cases cited therein. For the purposes of the present Motions, I find that it is not plain and obvious that the Misrepresentation Claims are doomed to fail because they do not contain sufficient particulars of what the Google Defendants allegedly knew or how this showed recklessness on their part.

[292] My finding on this point is reinforced by various factual allegations in the Claim that must be taken to be true for the purposes of the present Motions. These include the following:

- paragraphs 37–41, which describe steps taken by Google to suppress auction prices, thereby allowing Google Middle Layer Tools to win more and pay less to Publishers;
- paragraph 64, which discusses Google's implementation of Unified Pricing;
- paragraphs 71–76, which describe how Google allegedly introduced two algorithms that it knew would decrease Publishers' revenues.

Google's Third Argument – the Misrepresentation Claims Are Impermissibly Inconsistent

[293] Google maintains that the Misrepresentation Claims should be struck because they contravene Rule 180. That Rule states as follows:

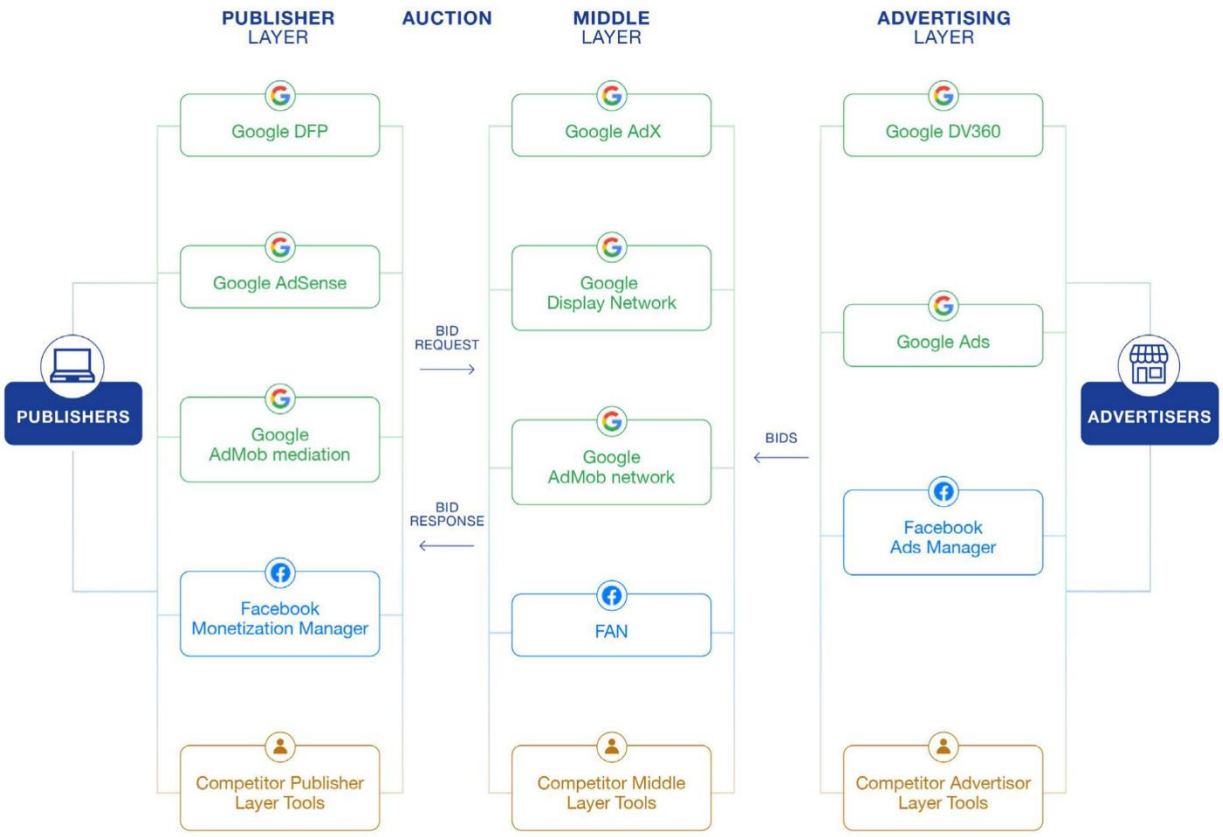
180 A party may plead an allegation of fact, or raise a new ground of claim in a pleading, that is inconsistent with a previous pleading only if the party amends the previous pleading accordingly.	**180** Une partie ne peut, dans un acte de procédure, faire des allégations de fait ou soulever de nouveaux motifs qui sont incompatibles avec ceux figurant dans un acte de procédure antérieur que si elle modifie ce dernier en conséquence.

[294] In support of its position, Google states that the Misrepresentation Claims are inconsistent with the claim that the Arrangement prevented Header Bidding from becoming viable. Google asserts that Pass Herald cannot simultaneously claim that the NBA prevented Header Bidding from becoming viable, and that, but for the alleged Misrepresentations,

Publishers would have used non-viable Header Bidding products. Google maintains that, in the absence of an alternative to Google's products, the Misrepresentations could not have affected Publishers' purchase decisions.

[295] It is not plain and obvious to me that the Misrepresentation Claims are entirely inconsistent and incompatible with Pass Herald's claim that the Arrangement prevented Header Bidding from becoming viable. It is also not plain and obvious that the Misrepresentations could not have affected the purchase decisions of the average hypothetical Publisher who takes "no more than ordinary care to observe that which is staring them in the face upon first contact with an advertisement": *Richard* at para 67.

[296] Among other things, the Claim included, at paragraph 29, the following chart identifying alternatives to Google's Publisher Layer Tools.



[297] In addition, at paragraph 3 of the Claim, Pass Herald states that "[i]n more than 90% of [the transactions between Publishers and Publisher Layer Tools], the tools acting for Publishers are Google Publisher Layer Tools." This implies that there are one or more alternatives to Google Publisher Layer Tools, even if they only account for approximately 10% of the relevant market. Indeed, at paragraph 28, the Claim explicitly states that Facebook's Monetization Manager is one such alternative Publisher Layer Tool, as is also reflected in the diagram immediately above.

[298] It bears underscoring that, on the present Motions, the facts alleged in the Claim must be taken as true: see subparagraphs 146 i. and vi**.** above.

[299] Having regard to the foregoing, it is by no means plain and obvious that Publishers had no alternative to those Google Tools, and that therefore the alleged Misrepresentations could not have affected decisions by the average Publisher to purchase the services provided by those tools.

[300] A reasonable and holistic reading of the Misrepresentation Claims is that Google made the alleged Misrepresentations to promote greater use of its Publisher Layer Tools by Publishers and increase its revenues at their expense. Implicit in this is that those Misrepresentations were intended to be sufficiently "pertinent, germane or essential" that they could affect the decision to purchase: see paragraph 267 above. In my view, this Claim is not doomed to fail. Pass Herald's failure to make this allegation clearer is the type of "drafting deficiency" that does not warrant striking its claims in relation to section 52: *Canada v Scheuer*, 2016 FCA 7 at para 12.

[301] I pause to observe that, in view of my conclusions that the claims made with respect to sections 45, 46 and 47 of the Act should be struck, the alleged inconsistency that Google has identified between those claims and the Misrepresentation Claims will be eliminated.

(iii) Summary

[302] In summary, for the reasons set forth above, I find that it is not plain and obvious that the Misrepresentation Claims are doomed to fail. For greater certainty, it is not plain and obvious

that the Claim does not state a reasonable cause of action in respect of each of the elements of subsection 52(1) that are summarized at paragraph 257 above. Consequently, I will not grant this aspect of Google's request to strike the Claim.

VI. Conclusion

[303] For the reasons provided in Part VI.A.(3) above, this Court has personal jurisdiction over the Irish Defendants. This is because they voluntarily attorned to the jurisdiction of this Court by joining their names to the Notices of Motion that initiated the present Motions.

[304] For the reasons set forth in Parts VI.B.(2) and (3) above, this Court has the territorial jurisdiction to adjudicate claims made with respect to sections 45 and 47 of the Act when the allegations made in a Statement of Claim are sufficient to meet the requirements of the "real and substantial link" test.

[305] For the reasons provided in Part VI.B.(4) and summarized at paragraph 140 above, I conclude that foreign agreements and arrangements are within the purview of sections 45 and 47 of the Act. I also conclude that Parliament has granted this Court subject matter jurisdiction to adjudicate the Claims made in relation to those provisions and the impugned foreign Arrangement.

[306] For the reasons set forth in part VI.C.(2)(b)(i) above, it is plain and obvious that the Claims made in relation to Facebook's abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool are doomed to fail with respect to the "agreement or

arrangement" element of subsection 45(1). The same is true with respect to the Claims made in relation to Facebook's withdrawal from the website segment of the business.

[307] For the reasons set forth in part VI.C.(2)(b)(ii) above, it is plain and obvious that Pass Herald's allegations concerning the NBA, the alleged Arrangement with respect to "secret bidding advantages," and the alleged Arrangement to prevent publishers from setting any reserve prices, do not describe any agreement or arrangement among competitors *in the production or supply of a product*, as required by subsection 45(1).

[308] Accordingly, given that the foregoing conclusions address all aspects of the alleged Arrangement and the alleged contravention of section 45 of the Act, the Defendants' Motions to Strike will be granted as they relate to the allegations made in relation to section 45.

[309] For the reasons set forth in Part VI.C.(3) above, I find that it is plain and obvious that the Claims made with respect to section 46 of the Act are "doomed to fail." They will therefore be struck from the Claim.

[310] For the reasons set forth in Part VI.C.(4) above, I find that it is plain and obvious that the Claims made with respect to section 47 of the Act are "doomed to fail." They will therefore be struck from the Claim.

[311] For the reasons set forth in Part VI.C.(5) above, I find that it is not plain and obvious that the Claims made with respect to section 52 of the Act are "doomed to fail." Consequently, I will

not grant this aspect of the Google's request to strike the Claim on the basis that it fails to disclose a reasonable cause of action.

VII. Pass Herald's Request for Leave to Amend

A. *Introduction and applicable principles*

[312] In its written submissions, Pass Herald requested, in the alternative, leave to amend "if the claim does not disclose a cause of action but could [do so] with minor amendments." During the hearing, Pass Herald reiterated that request with respect to the portion of its Claim addressing section 46. The Defendants opposed the latter request, but did not otherwise take a position regarding potential amendments to the Claim.

[313] In *Jensen FC* at paras 181–182, Justice Gascon summarized the principles applicable to considering a request for leave to amend a deficient Statement of Claim, as follows:

> [181] … I do not dispute that, when pleadings suffer from drafting deficiencies, do not meet the requirements of a reasonable cause of action and fail to provide the required particulars to support a cause of action, leave to amend is generally granted unless it is plain and obvious that the defect cannot be cured by an amendment (*Enercorp* [*Sand Solutions Inc v Specialized Desanders Inc*, 2018 FC 215 [***Enercorp***]] at para 27; *Collins v Canada*, 2011 FCA 140 para 26; *Simon v Canada*, 2011 FCA 6 at para 8; *Pelletier v Canada*, 2020 FC 1019 [*Pelletier 2020*] at para 60; *Pelletier v Canada* 2016 FC 1356 at para 28). A claim will only be struck without leave to amend when it is considered "beyond redemption" and where "amendments are simply not possible" (*Baird v Canada*, 2007 FCA 48 at para 3). However, if a pleading, once amended, would still result in another successful motion to strike for lack of legal foundation, the amendment should be refused (*Pelletier 2020*, at para 62, citing *Carom v Bre-X Minerals Ltd*, [1998] OJ No. 4496 (QL) (Ont Gen Div)). A defect may be

> incurable when there are no facts disclosing a cause of action (*Enercorp* at para 27).
>
> [182] In [*Canada (Attorney General) v Jost*, 2020 FCA 212 [***Jost***]], the FCA recently reminded that, in light of the generous approach to the application of class action certification laws, "leave to amend a pleading in a proposed class proceeding will only be denied in the clearest cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment" (*Jost* at para 49). Indeed, some decisions of this Court have recognized that, on certification motions, leave to amend the pleadings should be granted to cure drafting deficiencies (see, e.g., *Poundmaker Cree Nation v Canada*, 2017 FC 447 at para 25; *Sivak v Canada*, 2012 FC 272 at paras 1, 94).

[314] Another important principle is that the fact that a Statement of Claim has previously been amended is a relevant consideration in deciding whether to grant leave to amend: *Incognito v Skyservice Business Aviation Inc*, 2022 ONSC 1795 at para 14. This is particularly so when the amendments have been made "in the face of … [a] motion to strike": *Horfil Holding Corp v Queens Walk Inc*, 2019 ONSC 1381 at para 34.

[315] In the underlying action, Pass Herald alleges four distinct causes of action under section 36 of the Act, for breaches of sections 45, 46, 47 and 52 of the Act, respectively.

[316] As summarized at paragraphs 305-310 above, I have concluded that the alleged causes of action with respect to sections 45, 46 and 47 should be struck. For the reasons set forth below, I consider that it would not be appropriate to exercise my discretion to grant leave to amend the Claim with respect to those alleged breaches of the Act.

[317] In coming to this conclusion, I have also considered that Pass Herald already substantially amended the Claim when it filed an Amended Statement of Claim on December 9, 2022. This was shortly before the deadline for filing its certification motion record and the deadline for the filing of any motions arising from that motion record, including the motions to strike that had been signalled by Google and Facebook.[6] The very significant extent of the amendments that were made at that time are reflected in that document, which was subsequently renamed the Fresh as Amended Statement of Claim.[7] I consider this to be an additional factor, beyond those discussed below, that weighs in favour of not granting Pass Herald leave to make further amendments.

[318] In this regard, I note that the substantial amendments Pass Herald made to the Claim followed the release of the *Google States' Litigation* decision, which rejected many of the core conspiracy allegations made in the initial Statement of Claim filed on March 16, 2022. According to Google's written submissions, the conspiracy claims made in the current proceeding were largely copied from the pleadings in that US case. Indeed, in an e-mail dated September 10, 2023, counsel for Pass Herald rejected Google's request for copies of documents directly quoted from in the Claim, confirming that that such quotes were "taken from the pleadings in the [*Google States' Litigation*]" and that the source documents were thus "not in the [Pass Herald's] possession, power or control": Memorandum of Fact and Law of the Defendants,

[6] At that time, pursuant to an oral direction from the Court dated June 7, 2022, the deadline for the filing of the certification motion record was December 30, 2022. The deadline for filing any motions arising from that record, including motions to strike, was March 31, 2023. Those deadlines were later extended on consent.
[7] In a letter to the Court dated March 16, 2023, Pass Herald's counsel explained that the Fresh as Amended Statement of Claim "is the same as the Amended Statement of Claim filed on December 9, 2022, except that it does not include the strikeouts and underlining."

Google LLC, Google Ireland Limited and Google Canada Corporation ("**Google Memorandum**") at para 21 and Schedule 1.

B. *The section 45 claims*

[319] Turning to the specific claims made by Pass Herald, the claims under section 45 are based on its allegation that the Arrangement contravenes each of the three offences in paragraphs 45(1)(a)–(c) of the Act, respectively.

[320] The Claim alleges that the Arrangement consists of the NBA and four "unwritten terms," namely, as they relate to (i) Facebook's abandonment of Header Bidding, (ii) the "secret bidding advantages" that Facebook obtained from Google, (iii) "unified pricing," and (iv) Facebook's exit from the website segment of the Display Ad business.

[321] The unsuccessful claims made in relation to the NBA could not be cured by an amendment because they are legally untenable. As discussed at paragraph 219-222, it is plain and obvious from a brief review of the NBA that it is not an agreement between competitors, as required by paragraphs 45(1)(a)–(c) of the Act. No amendment can change this fact. Moreover, as noted at paragraph 237, it is plain and obvious that the NBA and the alleged secret bidding advantages described at paragraph 62 of the Claim do not constitute unambiguously harmful, hard-core cartel conduct, as contemplated by subsection 45(1). This may explain why Pass Herald clarified, in its written submissions, that "[t]he claim does not allege that [the NBA] on its own, breached the *Competition Act*": Memorandum of Fact and Law of Pass Herald at para 22.

[322] I also consider that, as bare allegations devoid of any detail, the Claim as it relates to the four "unwritten terms" mentioned above suffers from deficiencies so significant that it could not be cured by an amendment: *Amos v Canada*, 2017 FCA 213 [***Amos***] at para 36. In brief, insofar as the claims made in relation to Facebook's abandonment of Header Bidding are concerned, there are no facts disclosing a cause of action (*Enercorp* at para 27), and there is no reason to suppose that Pass Herald could improve its case by an amendment (*Jost* at para 49). This is particularly so given the substantial amendments that were made to the claim subsequent to the release of *Google States' Litigation*, where the court specifically addressed similar allegations. As noted at paragraphs 174 and 179 above, the allegation that Facebook's abandonment of its support for Header Bidding and its plans to build or buy a Publisher Layer Tool was an integral part of the Arrangement is a bald, unsupported and speculative statement. Moreover, Pass Herald's position that the existence of the NBA is circumstantial evidence of the existence of "unwritten terms" regarding Facebook's abandonment of Header Bidding is not only bald, but also circular in nature: see paragraph 182 above. In addition, the Claim itself sets forth facts that provide an entirely legitimate explanation for the changes in Facebook's support for Header Bidding and its plans to build or buy a Publisher Layer Tool: see paragraph 175 above.

[323] Turning to the "secret bidding advantages" that form part of the alleged Arrangement, the allegations made in the Claim are not curable because it is plain and obvious that the advantages in question were negotiated by Facebook in its capacity as a purchaser of services from Google: see paragraphs 223–224 above. As with the NBA, this aspect of the alleged Arrangement is vertical in nature, and therefore not within the purview of subsection 45(1) of the Act. Again, no amendment could change this fact.

[324] Likewise, the claims made with respect to "Unified Pricing" are not within the purview of subsection 45(1) because it is plain and obvious that this aspect of the alleged Arrangement was between parties in their capacity as purchasers of impressions. The Claim does not allege facts with respect to any type of "sell-side" agreement or arrangement to which subsection 45(1) applies: see paragraphs 228–230 above.

[325] Finally, the claims made with respect to Facebook's withdrawal from the website segment of the Display Ad business, are so bald, speculative and generally deficient that they could not be cured by amendment: *Amos* at para 36.

[326] In summary, having regard to all of the foregoing, I decline to exercise my discretion to grant Pass Herald leave to amend the Claim as it relates to its cause of action under section 45 of the Act.

C. *The section 46 claims*

[327] I consider that the section 46 claims also cannot be cured by an amendment to the Claim. In brief, one of the elements of that provision requires the existence of "a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45." However, the Claim does not plausibly allege any such "conspiracy, combination, agreement or arrangement." Given my conclusion that this shortcoming cannot be cured by amendments to the Claim, it follows that the same is true with respect to the allegations made in relation to section 46.

[328] Moreover, as noted at paragraphs 239-240, the claims made with respect to section 46 are bald and conclusory. They consist of a two-sentence paragraph, which simply tracks the language of the Act. Once again, there are no facts disclosing a cause of action (*Enercorp* at para 27).

D. *The section 47 claims*

[329] The Claim states that the alleged Arrangement contravenes paragraph 47(1)(a) in two ways and that it contravenes paragraph 47(1)(b) an additional way.

[330] As discussed at paragraphs 248-249, the first alleged contravention of paragraph 47(1)(a) is stated to consist of an agreement or arrangement that Facebook (FAN) would stop sending bid responses for Impressions displayed on websites. This allegation is made in a single sentence that is bald, speculative and not supported by any further particulars. In all of the circumstances, I decline to exercise my discretion to grant leave to amend this aspect of the Claim.

[331] The second alleged contravention of paragraph 47(1)(a) cannot be cured by an amendment because it is legally untenable. This is because it is entirely premised on *effects* of the alleged Arrangement - in other words, what the Arrangement *allowed* Facebook to do. As discussed at paragraph 251 above, the claims made by Pass Herald do not describe an agreement *to do* any of the things described in paragraph 47(1)(a) of the Act. Moreover, those claims are bald, speculative and unsupported. Once again, there are no facts disclosing a cause of action.

[332] The claims made with respect to paragraph 47(1)(b) are also based on what Google and Facebook's Middle Layer Tools were *allowed* to do. Hence, they suffer from essentially the same shortcomings described immediately above: see also paragraphs 252-253 above.

[333] Considering the foregoing, I decline to exercise my discretion to grant leave to amend the claims made with respect to section 47 of the Act.

VIII. Costs

[334] In its Notice of Motion, the Facebook Defendants requested an order for their costs of their Motion. No such request was made by the Google Defendants or by Pass Herald.

[335] The general rule is that costs are not awarded unless they were requested: *Exeter v Canada (Attorney General)*, 2013 FCA 134 at para 12; *Canada v Hudson*, 2024 FCA 61 at para 9; *Chen v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 170 at para 60.

[336] In any event, it is also well established that costs are not awarded against parties to a proposed class proceeding after the plaintiff has filed their motion for certification, unless one or more of the exceptions listed in Rule 334.39(1)(a)–(c) applies: *Hudson* at para 6; *Mohr FCA* at para 76; *Campbell v Canada*, 2012 FCA 45 at paras 45–47; *Sunderland* at para 206.

[337] In my view, none of those exceptions applies. In brief, there was no conduct of any party that unnecessarily lengthened the duration of these Motions: Rule 334.39(1)(a). Moreover, no party took any step that was improper, vexatious, or unnecessary; or that was taken through

negligence, mistake or excessive caution: Rule 334.39(1)(b). Finally, there are no exceptional circumstances that would make it unjust to deprive the successful party of costs: Rule 334.39(1)(c). In reaching this latter conclusion, I am mindful that “exceptional” in this context “connotes something quite remarkable, extraordinary or, if not rare, at least very far from common”: *Wenham v Canada (Attorney General)*, 2021 FCA 208 at para 37.

[338] Pass Herald filed its Motion for Certification on February 1, 2023. The Defendants filed their respective Notices of Motion to strike, dismiss or stay the within proceeding several months later, on July 21, 2023. Accordingly, costs may not be awarded on these Motions.

ORDER in T-589-22

THIS COURT ORDERS that:

1. Google's Motion is dismissed with respect to Google's requests for:

    (a) an Order staying or dismissing the claims made against Google Ireland Limited for lack of personal jurisdiction;

    (b) an Order staying or dismissing the claims made against all three of the Google Defendants for lack of subject matter jurisdiction, and

    (c) an Order striking the Claim against Google for failure to disclose a reasonable cause of action under section 36 of the *Competition Act*, for an alleged breach of section 52 of the *Competition Act*.

2. Google's Motion is granted with respect to Google's request for an Order striking the Claim against Google for failure to disclose a reasonable cause of action under section 36 of the *Competition Act*, for alleged breaches of sections 45, 46 and 47 of that legislation. The claims made in respect of those alleged breaches of the *Competition Act* shall be struck from the Claim, without leave to amend.

3. Facebook's Motion is dismissed with respect to Facebook's request for:

    (a) an Order dismissing or permanently staying this proceeding as against Facebook Ireland Limited, for lack of personal jurisdiction; and

    (b) an Order dismissing or permanently staying this

proceeding as against Meta Ireland and Meta Platforms Inc.,

for lack of subject matter jurisdiction.

4. Facebook's Motion is granted with respect to Facebook's request for an Order dismissing the Claim against Facebook for failure to disclose a reasonable cause of action under section 36 of the *Competition Act*, for alleged breaches of sections 45, 46 and 47 of that legislation.

5. No costs are awarded on this Motion.

"Paul S. Crampton"
Chief Justice

ANNEX 1 (pre-2010 version of section 45)

Competition Act, RSC 1985, c C-34 **(as it appeared on March 9, 2010)**	***Loi sur la concurrence, LRC 1985, c C-34*** **(dans sa version du 9 mars, 2010)**
Part VI	**Partie VI**
Offences in Relation to Competition	**Infractions relatives à la concurrence**
Conspiracy	**Complot**
45 (1) Every one who conspires, combines, agrees or arranges with another person	**45 (1)** Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :
(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,	**a)** soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;
(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,	**b)** soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;
(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or	**c)** soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;
(d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.	**d)** soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

ANNEX 2 (current version of section 45)

Competition Act, RSC 1985, c C-34	***Loi sur la concurrence, LRC 1985, c C-34***
Part VI	**Partie VI**
Offences in Relation to Competition	**Infractions relatives à la concurrence**
Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement:
(a) to fix, maintain, increase or control the price for the supply of the product;	**a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	**b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.
[…]	[…]
Penalty	**Peine**
(2) Every person who commits an offence under subsection (1) or (1.1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the court, or to both.	**(2)** Quiconque commet l'infraction prévue aux paragraphes (1) ou (1.1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende dont le montant est fixé par le tribunal, ou l'une de ces peines.
[…]	[…]
Definitions	**Définitions**
(8) The following definitions apply in this section.	**(8)** Les définitions qui suivent s'appliquent au présent article.

competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (*competitor*)

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)

prix S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (*price*)

ANNEX 3 (subsection 46(1))

Competition Act, RSC 1985, c C-34	***Loi sur la concurrence, LRC 1985, c C-34***
Part VI	**Partie VI**
Offences in Relation to Competition	**Infractions relatives à la concurrence**
[…]	[…]
Foreign directives	**Directives étrangères**
46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.	**46 (1)** Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-589-22
STYLE OF CAUSE:	PASS HERALD LTD. v. GOOGLE LLC ET AL.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 19, 2024 TO MARCH 21, 2024
LAST SUBMISSIONS:	JULY 19, 2024
JUDGMENT AND REASONS:	CRAMPTON C.J.
DATED:	OCTOBER 11,2024

APPEARANCES:

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