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Reasons for Order and Order Dated October 8, 2021

Reference: *The Commissioner of Competition v Citrus, Inc.*

IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended;

BETWEEN

The Commissioner of Competition
(Applicant)

and

Citrus, Inc.
(Respondent)

REASONS FOR ORDER AND ORDER DATED OCTOBER 8, 2021

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A. Executive Summary

1. The Commissioner of Competition (the "**Commissioner**") has filed an application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), seeking an order to remedy the substantial lessening or prevention of competition ("**SLPC**") that she alleges has occurred as a result of the alleged abuse of a dominant position by Citrus, Inc. ("**Citrus**").

2. Citrus is a leading producer of electronic devices and software products. Its product portfolio includes tablets and smartphones, which it markets under the Blood Orange and Kumquat brands, respectively. Citrus' Blood Orange and Kumquat devices exclusively run on Citrus' own, proprietary, mobile operating system ("**OS**"), Seed, which includes an application store (Grove) through which users can download both Citrus and third-party mobile applications (commonly referred to as "apps").

3. Both in Canada and globally, Citrus' Seed OS is a commanding force, battling for mobile supremacy with its primary competitor, Ogle, Inc. ("**Ogle**"), which offers an open-source mobile OS, Humanoid.

4. On April 1, 2021, Citrus released an updated version of Seed (Seed 4). Among other changes, Seed 4 introduced new policies governing the manner in which user data is collected and shared by third-party apps, which Citrus has promoted as a suite of "enhanced privacy measures." These measures include a requirement that all third-party apps receive user consent (through user "opt-in") before engaging in certain types of data usage categorized by Citrus as "tracking" ("**Specified Data Usage**"; the "**Data Policy**").

5. The Data Policy does not apply to Citrus' own apps. Rather, under Seed 4, users continue to provide consent to Specified Data Usage by Citrus apps by default. However, users can withdraw their consent to Specified Data Usage by Citrus (through user "opt-out").

6. Apps rely on Specified Data Usage in order to deliver targeted advertisements and to track the effectiveness of the advertisements they display. Many apps rely on advertising revenues in place of, or in order to limit, user fees. Without the ability to effectively target and track advertisements, an app's value as an advertising platform is substantially reduced, impairing the viability of advertising supported business models.

7. The Commissioner's application alleges that the Data Policy contravenes section 79 of the Act. Specifically, the Commissioner alleges that each of the three elements of section 79 is satisfied:

    a. Citrus substantially or completely controls the market for of apps for Seed through Grove (the "**Grove Market**") in Canada as a result of its gatekeeper function and ability to dictate the terms on which apps are made available to consumers;

    b. Citrus is engaged in a practice of anti-competitive acts by discriminating against third-party apps in favour of its own through the unequal application of the Data Policy, a practice for which there is no legitimate business justification; and

c. the practice has had, is having and is likely to continue to have the effect of substantially lessening or preventing competition in the Grove Market and the mobile OS market by increasing app prices, raising barriers to entry for new apps, stifling innovation and increasing the cost of switching from Seed to a competing OS.

8. Citrus disputes the Commissioner's positions with respect to each element of section 79. Specifically, Citrus submits that:

a. The Grove Market is not a class or species of business and, rather, all mobile OS apps, including those available for Seed and Humanoid, constitute a single class or species of business, which Seed does not substantially or completely control;

b. the Data Policy, including its dissimilar application to Citrus and third-party applications, is not an anti-competitive act; rather, the Data Policy merely serves to facilitate consumer choice and the manner in which it has been implemented is justified by Citrus' legitimate business interest in protecting its reputation; and

c. there has been no prevention or lessening of competition both because the equal application of the Data Policy to Citrus and third-party apps would result in the same competitive implications for third-party apps as they currently face and, in any event, the Data Policy's effects represent the result of more effective markets, where consumer choice has been enabled, rather than a prevention n or lessening of competition.

9. For the reasons set out below, the Tribunal finds that the Grove Market constitutes a class or species of business, which is completely or substantially controlled by Citrus. While the Tribunal accepts that there is a legitimate business justification for empowering users to control the use of their personal data, the Tribunal finds that the self-preferencing and inequitable application of the Data Policy constitutes an anti-competitive act. The Tribunal accepts that the effects of Citrus' impugned conduct are as alleged by the Commissioner. However, the Tribunal finds that, in the circumstances, these effects do not constitute an SLPC, and rather, represent a competitive outcome resulting from better functioning markets.

10. Having found that the Commissioner has failed to establish an SLPC on a balance of probabilities, the Tribunal dismisses the Commissioner's application.

B. The Parties

11. The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the administration and enforcement of the Act.

12. Citrus is a leading technology company. Headquartered in the United States, it is globally active and produces some of the world's most popular devices and software. Its innovative products, user-friendly design and cohesive ecosystem have allowed it to grow into one of the world's most valuable companies.

13. In the mobile device segment, Citrus is a vertically integrated supplier, offering devices (Blood Orange tablets and Kumquat smartphones), a mobile OS (Seed) and an assortment of applications (such as its music application, Marmalade, its news

aggregator, Pulp, and a fitness application, Juice). Seed is the only OS available on Blood Orange and Kumquat devices. Seed is not available for third-party devices.

14. Citrus provides periodic updates for Seed, which are made available to all user s with device models launched within the past seven years (Seed updates are not compatible with Blood Orange and Kumquat models that pre-date this cutoff). All devices sold after the launch of a Seed update are preloaded with the most recent version. For existing users, the update is made available free of charge, but is downloaded at the user's option.

15. All third-party applications available in Grove must be approved by Citrus and must comply with Citrus' terms of service. Citrus charges third-party application developers a 15%- 30% commission on all sales made through Grove.

C. Factual Background

Mobile Devices, Operating Systems and Application Ecosystems

16. Tablets and smartphones have become ubiquitous consumer goods in Canada. Smartphones, in particular, have established themselves as an inseparable companion for most Canadians. Over 90% of Canadians between the ages of 15 and 75 currently own a smartphone. Across all devices (including those of Citrus and its competitors), base models have an average retail price of $400, while premium models cost upwards of $1,500. A 2020 consumer survey undertaken by Citrus' marketing department found that Kumquat users replace their smartphones every three to four years, on average, with 85% of survey respondents identifying a smartphone as either their first or second highest personal technology expense.

17. Tablets and smartphones are powered by an OS, on which the device's other features, software and programs run. While various technology companies have introduced mobile OS since the advent of the smartphone, two companies, Citrus and Ogle, have broken apart from the rest of the pack over the past decade. Today, both globally and in Canada, these two firms supply the OS for nearly all mobile devices.

18. In contrast to Citrus' Seed, Ogle's Humanoid OS is open source and is available on devices offered by a large number of manufacturers (including Ogle's own devices).

19. Ogle's Humanoid OS has been steadily growing in Canada and one industry study recently found it to have slightly edged out Citrus' Seed, with a mobile OS share of approximately 51% to Citrus' 49%. However, globally, Seed remains the leading mobile OS, with an estimated 60% share.

20. Both Seed and Humanoid come preloaded with app stores (Grove and Frolic, respectively), which are the only authorized means of downloading apps onto a mobile device running on their OS. Each app store provides access to more than two million apps. Many Ogle and third-party apps release multiple versions of the app in order to be available for both Seed and Humanoid devices (through Grove and Frolic). Citrus makes its own apps available only for Seed.

21. Third-party apps are currently offered under three models in the Grove and Frolic app stores:

a. **Free advertising supported apps:** Downloadable for free and supported by advertising sales. Advertisers value the ability to target advertisements to specific consumer profiles and to track the effectiveness of their advertisements based on click through rates / resulting purchases.

b. **Paid apps:** Users pay for the apps, either through a one-time up-front fee, a recurring subscription cost or optional in-app purchases.

c. **Freemium:** Apps available for free in an advertising supported form and in an advertising-free, paid version.

22. With respect to free and subscription-based apps that are available for both Seed and Humanoid, users can generally easily migrate their applications between Seed and Humanoid devices without cost. However, for apps that charge an upfront download fee, users are generally required to repurchase the app when switching between a Seed and Humanoid device.

Seed 4 and the Data Policy

23. The Data Policy included in Seed 4 requires users to opt-in before any third-party apps are able to engage in Specified Data Usage.

24. Users opt-in to Specified Data Usage through a prompt when first opening an app that asks users to “Allow [x] to track your activity across other companies’ apps and websites?” Users may select either “Ask App not to track” or “Allow”. Users are only prompted to provide consent once, but can change their selection (i.e., opt-in or opt-out) at any time through the Seed settings menu.

25. Under the Data Policy, Specified Data Usage includes displaying targeted advertisements based on user data collected from apps and websites owned by other companies, transmitting user data collected through the app – including in app behaviour – to third-party websites and advertisers and sharing email lists or other identification information with a third-party advertising network that uses that information to target advertisements.

26. Many industry observers consider the Specified Data Usage to be overbroad relative to common conceptions of tracking. For example, a recent editorial in *Canadian Privacy Quarterly*, a respected publication among corporate privacy officers, noted that the Data Policy restricts advertisers and developers from engaging in the Specified Data Usage even when consumers have previously consented to such data use (e.g., by consenting to use of their email addresses for advertising purposes in an app, on a website, or at a cash register in a brick-and-mortar store).

27. According to Citrus, as of October 1, 2021, 75% of Seed users have downloaded Seed 4, such that they are now subject to the Data Policy.

Impact of the Data Policy

28. Headpamphlet, a leading, free to use, advertising-supported social networking app, has reported that, since the launch of Seed 4, only 25% of Seed users have opted-in to Specified Data Usage by Headpamphlet.

29. Headpamphlet advertisers have noted a drop in their ability to target specific demographics and to track the effectiveness of their advertisements. A recent analyst report from MoneyBags Bank estimated that if only 25% of Headpamphlet's users opt-in to Specified Data Usage, the app could see its annual revenues fall by 40%.

30. A recent Headpamphlet news release indicated that the company is already taking steps to make up for the Seed 4 changes and low levels of user opt-in, including working on new advertising features that require less personal data to measure an advertisement's success. The company is also looking into technology that would let Headpamphlet deliver personalized advertisements based on more advanced machine learning approaches to in-app user activity.

31. Notwithstanding the efforts of Headpamphlet and other apps, the Canadian Small Business Bureau has voiced concern over the low opt-in level, noting that its members, who have limited marketing budgets and often face long odds to winning customers from established industry leaders, are highly dependent on the targeted advertising capabilities of social media apps such as Headpamphlet, which provide good value for their marketing dollars and facilitate access to prospective customers.

32. Data produced by Citrus shows that since the release of Seed 4 there has been no material change to either (a) the proportion of free to paid apps available in Grove or (b) the proportion of free app downloads to paid app downloads. Citrus reports that over the past six months 70% of downloads from Grove have been for free apps.

33. A recent survey by Eerie University, a Canadian leader in the study of society and technology, found that consumers value the free services that result from advertising-supported apps, with an overwhelming 78% of respondents preferring today's internet, with mostly free content and targeted advertisements, to an internet with no targeted ads and mostly paid content.

D. Position of the Parties

34. The Commissioner and Citrus take opposing positions with respect to each element of Section 79 of the Act. The parties' positions with respect to each element are set out in turn below.

Paragraph 79(1)(a) – Substantial or Complete Control of a Class or Species of Business

35. The Commissioner alleges that the Grove Market constitutes a "class or species of business" within the meaning paragraph 79(1)(a), over which Citrus has substantial or complete control by virtue of its gatekeeper and rule setting function.

36. The Commissioner submits that as Citrus device owners are unable to access applications for other mobile OS (in particular, applications available for Humanoid

through Frolic), applications for Seed must be considered as a class or species of business separate and distinct from all other mobile applications.

37. Citrus rejects the Commissioner's assertion that the Grove Market constitutes a class or species of business. Citrus asserts that the Commissioner's position is at once too broad and too narrow. First, Citrus contends that apps fall into a large number of different categories, offering widely different functionality and fulfilling dissimilar user needs. By way of example, Citrus warned of "disastrous consequences" if consumers were to treat a virtual care app and a sports betting app as substitutable and competitive with one another.

38. Second, Citrus submits that for any app category, all mobile apps, including those available on Seed (through Grove), and those available on other mobile OS, together constitute a single class or species of business. Citrus contends that a Humanoid device, and Frolic's robust application offering, are direct substitutes for Seed devices, with users actively migrating between the two. Citrus submits that it competes vigorously with Ogle to retain existing Seed users and win over new users from Humanoid.

39. Citrus has not challenged the Commissioner's contention that it has *substantial or complete control* over the Grove Market, should the market be defined in this manner. Similarly, the Commissioner has not asserted that Citrus has substantial or complete control over any market that includes apps for both Seed and other mobile OS.

Paragraph 79(1)(b) – Practice of Anti-Competitive Acts

40. The Commissioner alleges that Citrus' Data Policy constitutes a practice of anti-competitive acts for which there is no legitimate business justification.

41. The Commissioner submits that the Data Policy is applied systematically to every third-party app in the Grove store and is therefore clearly a practice. Citrus does not contest that the Data Policy is more than an isolated act.

42. The Commissioner submits that the Data Policy, and in particular its unequal application, was both subjectively intended to, and would also have been reasonably foreseen to have an exclusionary and predatory effect on competitors offering apps in the Grove store. The Commissioner submits that there is no conceivable reason for Citrus to apply the Data Policy unequally to third-party apps other than to self -preference its own apps, inflate third-party app costs to increase commission revenues and promote its advertising ability.

43. The Commissioner submits that the reasonable foreseeable effects of the Data Policy are threefold: (a) to benefit Citrus' own apps, which are not subject to the Data Policy, by not prompting consumers to opt-out of tracking when using these apps and thus increasing their use; (b) to reduce third-party apps' ability to rely on an advertising-based free model, increasing app prices and benefiting Citrus through its commission structure for apps on its platform; and (c) deterring switching to Humanoid or other competing operating systems, by encouraging adoption of Citrus' own apps and paid apps, which are less able to subsequently be transitioned to other mobile OS. The Commissioner submits that these effects are both exclusionary, by seeking to exclude competitors from competing on the basis of ad-based models, and predatory, by using Citrus' control of the Grove Market to self-preference its own products (i.e., apps) in that market.

44. The Commissioner also likened the practice as somewhat analogous to two examples of anti-competitive acts in section 78 of the Act: (a) margin squeezing by a vertically integrated supplier (s. 78(1)(a)); and (b) adopting incompatible product specifications (s. 78(1)(g)). The Commissioner notes both such examples involve the use of the respondent competitor's dominant position in one upstream market (in this case, the app platform) to distort competition in a downstream market, as it alleges is the case here.

45. Citrus disputes that the Data Policy is predatory or exclusionary. The purpose of the policy is to provide consumers with choices and enhanced transparency over the use of their personal data. Citrus has no control over those consumers' choices, including whether a consumer chooses to allow the app to engage in tracking or not. If consumers make this choice, this amounts to nothing more than exercising their autonomy over their own data. To the extent a consumer chooses to accept tracking from some apps and not others, that is a consumer choice that is reflective of the range of competitive options available. Citrus does not have an obligation to override consumers' choices in order to support other app developers' business models.

46. Moreover, Citrus asserts it did not conduct any research as to the number of consumers who would choose to opt out of Specified Data Usage, and it was therefore not reasonably foreseeable that consumers would necessarily opt-out in sufficient numbers so as to affect the profitability of third-party apps' advertising-based business models.

47. While several presentations produced by Citrus to the Commissioner in connection with this application mentioned the positive effect on Grove's app commission fees in a list of "pros" for such a policy, Citrus' affiant Tom Bakes (the self -described architect of the Data Policy) testified that these presentations were nothing more than early drafts by his subordinates and were not part of the ultimate decision-making. He pointed to the numerous "draft" stamps, internal comments and absence of Citrus branding, asserting that decks would never have been presented to senior management in such an unfinished state. Mr. Bakes stated that "I don't stay up at night thinking about these small-time app devs. I doubt I could even name one. I'm thinking about what Humanoid is doing, why they're winning customers, and how I can crush them. It's a super competitive space."

48. Citrus submits that even if the Tribunal found some anti-competitive effect was reasonably foreseeable, it had several legitimate business justifications for adopting the policy. Citrus gave affidavit evidence that the Data Policy was adopted for two primary reasons: (a) to enhance consumer trust in Grove and Citrus generally and thereby give Citrus a competitive advantage over other mobile OS and increase sales of Citrus products; and (ii) to comply with privacy laws requiring Citrus to respect consumers' choices with respect to their personal data and maintain control over data it collects.

49. In support of the first motivation (i.e., that the Data Policy is intended to achieve a competitive advantage), Citrus has detailed in its affidavit and submitted into evidence its most recent Kumquat advertising campaign, which was launched concurrently with the release of Seed 4. The campaign refers to the introduction of "new privacy measures" and includes the tagline "Kumquat: small on size, big on privacy" in a number of digital ads, posters and short videos (other features and benefits are promoted in other campaign collateral).

50. Citrus submits that the differentiated application of the Data Policy is necessary because Citrus has full control and oversight over its own use of consumers' personal data and can therefore ensure that its own use complies with privacy laws. It does not have that same control over third party apps' use of data they collect. As such, third-party apps can expose Citrus to potential reputational harm or risk of non-compliance under privacy laws (and disadvantage Citrus' competitive position); absent the policy, Citrus cannot effectively mitigate this risk.

Paragraph 79(1)(c) – SLPC

51. The Commissioner asserts that, "but for" Citrus' anti-competitive acts, the Grove Market would be substantially more competitive, including by way of lower barriers to entry, materially lower prices for users, enhanced innovation and more efficient business models.

52. The Commissioner submits that the hypothetical "but for" world relevant to the Tribunal's comparative analysis is one where mandatory opt-in is not required for any apps to engage in Specified Data Usage. The Commissioner argues that Citrus has never implemented a policy requiring tracking opt-in for all apps, including its own, and has adduced no evidence to suggest it would do so. Therefore, it would be speculative and baseless to conclude that absent Citrus' impugned conduct, it would have implemented an opt-in requirement for all apps, including its own.

53. Relative to the Commissioner's alleged "but for" world, the Commissioner contends that Citrus' anti-competitive conduct will result in (a) higher prices, as free apps are required to transition to a paid model as their ability to sell advertisements suffers; (b) reduced entry, as the increased need to rely on a paid format will increase barriers to attracting users; and (c) lower innovation, as higher barriers to entry deter investment in novel apps.

54. Citrus both rejects the Commissioner's proposed "but for" world and asserts that, in any event, the Data Policy is not and will not be the cause of an SLPC.

55. Citrus argues that the overarching objective of the Data Policy, which it maintains to be consumer privacy protection, is sacrosanct to the company, and that absent the impugned implementation of the Data Policy, Citrus would require user opt-in for Specified Data Usage by *all* apps, both those developed by Citrus and third parties. Citrus maintains that the world has changed since the days of Seed 3, with today's consumers conscious of and committed to their online privacy. Citrus emphasises the results of a consumer survey it undertook prior to Seed 4's release, which found that for 70% of likely mobile device purchasers privacy features are among their top three purchasing criteria and that 85% of such consumers are either "concerned" or "very concerned" about data security. In this environment, Citrus contends that "the world of Seed 3 has ceased to be" and that the Commissioner has failed to discharge her burden of establishing that, on a balance of probabilities, "but for" Citrus' impugned conduct, apps would be able to engage in Specified Data Usage in the same manner as prior to Seed 4's release.

56. Citrus submits that relative to its proffered "but for" world there is no plausible basis for the anti-competitive effects alleged by the Commissioner, as third-party app developers

would be subject to the same restrictions on Specified Data Usage as under the current Data Policy.

57. In the alternative, Citrus submits that even relative to the Commissioner's proposed "but for" world, the Data Policy has not resulted in an SLPC, but rather, has facilitated another dimension of competition by enhancing users' control over their privacy and thereby delivering value to consumers. In Citrus' submission "there is no such thing as a free lunch; just different forms of currency." According to Citrus, the exercise of a consumer choice to make less of their personal data available to third parties to exploit cannot be considered an SLPC, notwithstanding that it may result in increased monetary prices.

58. Citrus also questions how a likely SLPC could be established when (a) it has adduced data demonstrating the continued dominance of free apps and (b) third-party app developers are already working to innovate in response to the Data Policy . Citrus contends that the Commissioner has adduced insufficient quantitative evidence to demonstrate that the Data Policy has had, is having or continues to have the effect of substantially lessening or preventing competition in the market.

E. The Issues

59. As set out above, the parties bring into issue each of the three elements of section 79 and raise a number of novel and important considerations with respect to each. As detailed below, the Tribunal considers the outcome of the matter to turn on four principal issues:

    a. With respect to paragraph 79(1)(a) of the Act, what is the relevant test for determining the boundaries of a "class or species of business" and does the Grove Market constitute a "class or species of business"?

    b. With respect to paragraph 79(1)(b) of the Act, what is the role of the Tribunal in assessing the legitimacy of a proposed business justification and does the Data Policy constitute a practice of anti-competitive acts for which there is no legitimate business justification?

    c. With respect to paragraph 79(1)(c) of the Act:

        i. What is the relevant test for determining the "but for" counterfactual and has the Commissioner discharged her burden?

        ii. Can consumer choice give rise to an SLPC and, if so, does it do so here?

F. The Tribunal's Analysis

60. The Tribunal has carefully considered the parties' submissions, the relevant jurisprudence and the evidence available to it. For the reasons below, the Tribunal has concluded that the Grove Market constitutes a class or species of business and that the Data Policy constitutes a practice of anti-competitive acts for which there is no legitimate business justification. However, the Tribunal finds that the Data Policy merely facilitates consumer choice and does not result in an SLPC.

Substantial or Complete Control a Class or Species of Business

61. Paragraph 79(1)(a) of the Act requires that a firm "substantially or completely control, throughout Canada or any area thereof, a class or species of business." In the present case, whether the first element of section 79 of the Act is made out turns on the question of whether or not the Grove Market constitutes a "class or species of business."

(i) Analytical Framework

62. The Tribunal has consistently interpreted the words "class or species of business" to refer to the relevant product market in which the respondent is alleged to have substantial or complete control. In defining relevant markets, the Tribunal has focused upon whether there are any close substitutes for the product at issue.

63. In *Commissioner of Competition v Toronto Real Estate Board* (2016 Comp Trib 7 ("***TREB* 2016**")), the Tribunal endorsed the application of the hypothetical monopolist test for purposes of assessing the availability of substitutes and identifying a relevant product market in the context of proceedings under section 79 of the Act. The hypothetical monopolist test, which had previously been relied upon by the Tribunal in merger cases, is defined in the Competition Bureau's 2011 *Merger Enforcement Guidelines* as follows:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

64. A "small but significant and non-transitory increase in price" has typically been found by the Tribunal to require a five percent price increase lasting one year. As the Tribunal explained in *TREB* 2016:

> If sellers of a product or of a group of close substitute products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a five percent price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power.

(ii) Application of the Hypothetical Monopolist Test

65. The Commissioner asks the Tribunal to apply the hypothetical monopolist test here, and contends that, under this test, the Grove Market constitutes the relevant product market for purposes of the Tribunal's analysis.

66. As the hypothetical monopolist test begins with the *smallest* plausible group of products, it is necessary to first address whether the analysis must be undertaken separately for each app category available from Grove, as Citrus urges. The Tribunal finds that it is not.

67. The Commissioner's unchallenged position, which is consistent with the Tribunal's section 79 jurisprudence, is that Citrus controls the Grove Market by virtue of is

gatekeeper and rule making functions (i.e., its requirement that third-party apps receive prior approval from Citrus before being made available through Grove and comply with Citrus' terms of use). The Tribunal has not been provided with any evidence to suggest that Citrus exercises this control differently across app categories. Accordingly, the Tribunal is satisfied that it is appropriate to use the Grove Market as the starting place for the hypothetical monopolist test, and, that it is not necessary to consider each app category separately.

68. When considering the Grove Market, the Tribunal agrees with the Commissioner that competition for Seed users from Humanoid and other mobile OS is not sufficient to constrain a small but significant and non-transitory increase in price. The Tribunal recognizes that functionally equivalent and, in may instances, identical apps are available for both Seed and Humanoid devices. However, existing Seed users are locked in to their current OS and would face substantial costs in order to migrate to a Humanoid device. Indeed, as the Commissioner highlighted, Citrus actively works to discourage user migration from Seed to Humanoid, for example, by offering its own applications only for Seed. As such, the Tribunal finds that the Commissioner has established, on a balance of probabilities, that a 5% increase in the price of Grove applications could be profitably sustained for a year.

69. Citrus concedes that in the event that Grove application prices increased by 5%, not every Seed user would immediately, or necessarily in the course of the year, abandon his or her Citrus device in order to access lower priced applications from Frolic. However, Citrus asks that the Tribunal consider a longer time horizon and emphasises the regularity with which Seed users replace their devices in the normal course. Citrus argues that a small but significant price differential between Grove and Frolic would be "catastrophic" for Citrus when considering the next two to five years, over the course of which the substantial majority of existing Seed users will replace their devices as a result of natural churn.

70. The Tribunal is sympathetic to Citrus' position and accepts that a competitive dynamic exists between Citrus and Ogle, which may be particularly relevant over the medium to long term. However, as the Tribunal observed in *TREB 2016*, the hypothetical monopolist test is desirable for its ability to provide "objective benchmarks" and to overcome the "highly subjective" nature of other attempts to identify a relevant product market. Indeed, the analysis urged on the Tribunal by Citrus is besieged by challenging subjective questions, such as the relative desirability and interchangeability of mobile OS several years from now. The Tribunal is not prepared to abandon its previously endorsed approach to market definition, in particular, in the fast-paced and constantly evolving mobile industry.

71. Accordingly, the Tribunal finds, on a balance of probabilities, that the Grove Market constitutes a "class or species of business" that is substantially or completely controlled by Citrus.

Practice of Anti-Competitive Acts

72. The second element of the abuse of dominance provision requires the Commissioner to establish that the respondent has engaged in or is engaging in a practice of anti-competitive acts.

(i) Analytical Framework

73. The term "practice" is generally understood to require more than an isolated act; it may be one occurrence that is sustained and systemic, or that has a lasting impact on competition. (*Canada (Commissioner of Competition) v Canada Pipe Co.* 2006 FCA 233, para 60 ("***Canada Pipe***")). A program that was structured, organized and applied throughout a geography was found to constitute a practice in *Canada Pipe*.

74. The Act does not define an "anti-competitive act" but does provide a non-exhaustive list of 11 examples of anti-competitive acts in section 78. For impugned practices that do not fall into these enumerated acts, the subjective and objective intent of the practice must be assessed. Specifically, the Tribunal must determine whether the practice was or is intended to have a predatory, exclusionary or disciplinary effect on a competitor. (*Canada Pipe*, para 272).

75. In determining the purpose of an impugned act, the Federal Court of Appeal has held that its purpose may be determined by reference to subjective intent, but that evidence of subjective intent is not required in order to find an act is anti-competitive. Objective evidence, namely "the reasonably foreseeable or expected objective effects of the act", can also establish that the intent of an act is anti-competitive. The Tribunal must assess and weigh all relevant factors and evidence in attempting to discern the "overall character" of the conduct. (*Canada Pipe* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe* at paras 67-70; *Canada (Director of Investigation and Research) v D&B Companies Canada Ltd* (1996), 64 CPR (3d) 216) (Comp Trib) at p. 257).

76. In conducting this weighing exercise, the Tribunal must also evaluate any legitimate business justifications advanced by the respondent, and weigh those considerations against any predatory, exclusionary or disciplinary negative effects that were subjectively intended or reasonably foreseeable ((*Canada Pipe* at para 67, *TREB* 2016 at para. 285). As this Tribunal has explained, even a legitimate business justification does not necessarily inoculate the respondent against a finding of anti-competitive act. Instead, it must form part of a weighing exercise: "a business justification is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(*b*)" (*Canada Pipe* at para 88).

77. To be considered "legitimate" in the context of paragraph 79(1)(*b*), a business justification must involve more than a respondent's self-interest. (*TREB* 2016 at para 294). It "must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts" (*Canada Pipe* at paras 73 and 90-91). The business justification must also be independent of the anti-competitive effect of the practice concerned.

(ii) Does the privacy policy constitute a "practice"?

78. Citrus' conduct is based on an updated policy that is structured, organized and applied in a consistent manner across Canada (and outside of Canada). Seed 4 is configured to apply this policy as a default. There is little question that this constitutes a "practice", and Citrus does not contest this finding.

(iii) Weighing evidence of anti-competitive purpose and business justification

79. The Tribunal considers that it is reasonably foreseeable that the Data Policy would either reduce consumers' use of an app seeking to track the consumer's data, or would prompt more consumers to opt-out of Specified Data Usage while continuing to use the app. The Tribunal also considers that it is reasonably foreseeable, particularly to a firm with its own free, advertising-based apps, that both such scenarios would lead to reduced advertising revenues for affected apps and increase the likelihood that an app would not be sustainable on a free model. Further, the Tribunal finds that applying the policy unequally to Citrus' competitors necessarily means that any reasonably foreseeable negative effects of policy would be expected to occur only to Citrus' competitors, a hallmark of an exclusionary and predatory practice. Despite Mr. Bakes' assertion that he could not even name competing app developers (and thus did not consider them to be competitors for which a firm such as Citrus would foresee any effects), in cross-examination Mr. Bakes admitted to being familiar with several apps directly competing against Citrus apps, such as Ogle Maps (a close competitor to Citrus Roots), Ogle Tunes (a close competitor to Citrus Marmalade) and multiple news reporting apps (all of which compete with Citrus Pulp).

80. The Tribunal finds it does not need to make a finding as to whether the slide decks evidencing subjective intent were actually reviewed by Citrus' executives who took the decision; the objectively foreseeable effects are sufficient.

81. While the Commissioner's third suggested anti-competitive intent (i.e., retention of customers on Citrus devices) may also constitute an anti-competitive practice, the Tribunal considers that this effect is directed at a different market than is currently at issue – namely, the market for mobile OS, and not the market for apps on the Grove platform. As the Commissioner has not led evidence or argument as to whether Citrus would substantially control that market, we will disregard this alleged effect.

82. Having found that Citrus' conduct had some reasonably foreseeable anti-competitive effects, we consider the business justifications that Citrus puts forward. While we agree that there is evidence on the record indicating that a motivator behind the overall policy was to better compete with other mobile OS by enhancing consumer trust in Citrus, we do not accept that this was a motivator behind the unequal application of the Data Policy only to third party-apps. In fact, applying the Data Policy equally to all apps would have arguably better enhanced consumers' trust, as Citrus would not be engaging in potentially misleading behaviour about its own tracking.

83. Citrus contends that the Tribunal ought not consider whether the Data Policy's objective could have been more effectively achieved through an alternative implementation framework. Rather, Citrus submits that if the Tribunal accepts that the overall objective of the Data Policy is legitimate, the Tribunal must defer to Citrus' chosen course of action, provided it is credible and is not based on willful ignorance towards anti-competitive implications for Citrus' competitors.

84. The Tribunal disagrees and considers it a dereliction of duty to defer to businesses in the manner Citrus suggests. In cross-examination, Mr. Bakes stated that applying the Data Policy to Citrus' own apps would have undermined the consumer trust the policy was seeking to enhance, and so the unequal application was necessary to the business

rationale of better competing against Humanoid. The Tribunal acknowledges that, on its face, this statement supports that Citrus' overriding purpose for both the Data Policy generally, and its differentiated application specifically, was to compete more effectively with Humanoid. However, the Tribunal considers Mr. Bakes' statement to also be an admission that Citrus expected that the Data Policy would be detrimental to the competitive position of the apps to which it applied.

85. In order to support that the Data Policy's overall character was legitimate, in oral argument, Citrus raised the absence of any evidence that it made the connection between the advantage it sought to achieve with respect to mobile OS competition and the implications for app developers. Citrus proffered, but adduced no evidence to substantiate, that its failure to make this connection is reasonable, including because Citrus considers itself to have a "special and unique" relationship with consumers relative to app developers and, within Citrus, Seed development is managed separately from Grove.

86. With respect, Citrus is inviting the Tribunal to encourage dominant firms to hide their heads in the sand as cover for anti-competitive conduct. The Tribunal has previously established (and has found here) that the objectively reasonably foreseeable effects of a practice can establish its anti-competitive character. A dominant firm cannot then escape such a finding by relying on a poorly considered business rationale. A large and sophisticated firm such as Citrus, through reasonable diligence, would recognize the anti-competitive implications of the Data Policy's unequal implementation and the ability to more effectively achieve its stated objective through the Data Policy's consistent application.

87. As for privacy laws, while the Tribunal agrees that Citrus has an obligation under privacy laws to respect consumers' choices with respect to their personal data, Citrus did not adduce satisfactory evidence that this obligation could not have been discharged (or even better discharged) by applying the Data Policy to all apps equally on the Grove platform. This rationale therefore does not justify the crux of the complaint behind the Data Policy: its unequal application.

SLPC

88. Having concluded that Citrus' conduct represented a practice of anti-competitive acts, the Tribunal must now determine whether the conduct in question has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

(i) Analytical Framework

89. Paragraph 79(1)(c) requires that the impugned conduct in question "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market". Put differently, once the Tribunal has determined that a firm is dominant and has engaged in a practice of anti-competitive acts, the Tribunal must consider whether, "but for" the anti-competitive acts in question, there would be substantially greater competition in the market in the past, present or future (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at paras 50-51; *Toronto Real East Board v Commissioner of Competition*, 2017 FCA 236 at para 86 ("***TREB* FCA**"); *Canada Pipe* FCA at paras 36-38, 44, 58).

90. In conducting this analysis, the Tribunal is entitled to examine the level of competition in the relevant market, in the actual world and in the hypothetical "but for" world (*TREB* FCA at para 70).

(ii) The Hypothetical "But For" World

91. In order to undertake this comparative analysis, the Tribunal must first determine the likely state of competition in the absence of the anti-competitive practice. The parties have each impressed on the Tribunal a different hypothetical "but for" world (or counterfactual) against which an SLPC should be assessed. The Commissioner asserts that the Tribunal must look to the world that existed prior to Seed 4 and the Data Policy being implemented – i.e., one where there is no mandatory opt-in for *any* apps to engage in Specified Data Usage. Conversely, Citrus contends that the Tribunal's assessment must begin from an alternative world, one where the Data Policy is applied equally – i.e., user opt-in is mandatory for *all apps* to engage in Specified Data Usage, including Citrus apps.

92. The Commissioner's proposed counterfactual accords with reality. It is the world that Citrus itself created and maintained prior to the implementation of the Data Policy. Indeed, Mr. Bakes' cross-examination, as quoted above, evidenced that Citrus considered equal application of the Data Policy to be inconsistent with its business objectives.

93. In the face of established past practice, Citrus asks the Tribunal to adopt a speculative, theoretical, alternative universe. While the Tribunal accepts that there is a legitimate business interest in promoting consumer privacy, Citrus has offered no evidence that this interest outweighs its demonstrated interest in facilitating Specified Data Usage by its own apps.

94. Consistent with the counterfactual approach adopted by the Tribunal in past cases, the Tribunal accepts the Commissioner's position that the pre-Data Policy world—where there was no mandatory opt-in for any app to engaged in Specified Data Usage—is the most appropriate "but for" world in the circumstances.

(iii) The SLPC Test

95. As a preliminary matter, as the Tribunal has found that the Commissioner's "but for" world is the appropriate counterfactual for the SLPC analysis, it is not necessary for the Tribunal to consider or opine on whether an SLPC could be established on the basis of Citrus' proposed counterfactual. However, for completeness, the Tribunal acknowledges agreement with Citrus' unchallenged position that relative to Citrus' counterfactual the impugned conduct does not give rise to an SLPC.

96. With respect to the Commissioner's counterfactual, while the Commissioner has not produced any relevant quantitative evidence in this proceeding, on the basis of the qualitative evidence adduced by the parties, the Tribunal is satisfied, on a balance of probabilities that, in the absence of Citrus' anti-competitive acts, over the near term:

    (a) entry or expansion in the Grove Market would be substantially faster, more frequent and more significant without the Data Policy;

(b) switching between other apps and other competing operating systems would be substantially more frequent;

(c) costs and prices for users would be substantially lower;

(d) the range of products (i.e., apps) would be substantially greater; and

(e) product quality, innovation and choice would be greater.

97. The Tribunal acknowledges both that (a) to date, there is no indication that app prices have yet increased and (b) there is some evidence of innovation in response to the changed environment. However, the preponderance of the evidence supports that over the near term: (a) opt-in is and will continue to be low, (b) low opt-in will reduce the value of in app advertising and undermine the free app model, (c) apps will increasingly be required to rely on user fees, in many cases leading to an infinite price increase, as prices rise from nil, (d) the commercial imperative to charge an up front fee will deter user adoption of new apps, raising barriers to entry and stifling innovation and (e) the increased prevalence of paid third-party apps, while Citrus' own apps remain free to use, will heighten reliance on non-migratory apps deterring Seed users from switching to Humanoid or other competing mobile OS.

98. Indeed, as the Commissioner put it in oral argument, "Headpamphlet's early experience isn't so much a canary in a coal mine as it is Big Bird sounding an air raid siren." If Citrus' impugned conduct can so substantially endanger one of the world's leading social media apps, one can only imagine the severe and disproportionate impact the Data Policy will have on the millions of smaller apps offered through Grove and the many small and medium-sized business that rely on these apps to deliver personalized advertising.

99. While innovation may reduce or eliminate the significance of Specified Data Usage over time, this a speculative possibility, for which there is insufficient certainty or evidence to undermine the likelihood of the effects identified above.

100. However, the Tribunal agrees with Citrus that the effects alleged by the Commissioner, and accepted by the Tribunal, do not in fact constitute an SLPC and, rather, represent a competitive outcome driven by consumer choice.

101. It is well established that the SLPC analysis must be grounded in the purpose of the Act, as articulated in section 1.1 (emphasis added):

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

102. The purpose of the Act is to protect competition, not competitors. The Tribunal finds that the Data Policy serves at its heart to make formerly implicit consumer choices explicit. It does not create any barriers to consumers making the same choices (and third-party

developers operating in the same manner) as they did previously. Certain third-party competitors may not appreciate the enhanced decision-making capabilities afforded to consumers by the Data Policy. However, it is not the self-interested well being of such competitors that the Act seeks to protect.

103. The Tribunal agrees with Citrus that a consumer choice to pay more in exchange for alternative product features is not an SLPC. Indeed, section 1.1 recognizes equally the importance of providing consumers with both "competitive prices and product choices." Should consumers choose to safeguard their data and pay more in order to do so, this is the outcome of competition and not an anti-competitive effect.

104. The Commissioner contends that the Data Policy is "duping" consumers into making decisions that are against their own interests. She highlights the Eerie University study as evidence of Canadian consumers' true preference for free apps and limited data protections and alleges that the "misleading and deceptive" phraseology presented in the opt-in prompts are responsible for consumers unwittingly trading away a competitive mobile app environment for a substantially less competitive one.

105. The Tribunal rejects this assertion. Citrus has provided consumers with the opportunity to vote with their feet as to the digital environment they wish to see. To the extent the Commissioner takes issue with the manner in which Citrus has put this choice to consumers, she may wish to consider Citrus' conduct in the context of section 74 of the Act; however, the Tribunal finds no basis to conclude that Citrus' practice of anti-competitive acts (i.e., the unequal application of the Data Policy) had, are having or are likely to result in an SLPC.

106. Accordingly, the Tribunal finds that the Commissioner has failed to demonstrate, on a balance of probabilities, that Citrus' anti-competitive acts have, are having or are likely to result in an SLPC in any relevant market.

G. Order

107. For these reasons, the application brought by the Commissioner is dismissed.

DATED at Ottawa, this 8th day of October 2021.

SIGNED on behalf of the Tribunal by the Panel Members.