



**Date:** November 6, 2017

**Subject:** CT-2017-002 - *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*

**Direction to Counsel (from Justice Michael Phelan)**

The parties have, in the course of constructing a pre-hearing schedule, encountered difficulty as to the time for and sequence of filing expert reports – particularly as to any efficiencies defence.

The Commissioner proposes that HarperCollins file its efficiencies defence expert report at the same time as the Commissioner files its expert reports on all matters except efficiencies.

I cannot agree with the Commissioner's position for the following reasons:

- The Commissioner's position is inconsistent with the structure of the *Competition Act* efficiencies provisions which are established as an exception or defence to the alleged SLC. The Respondents are under no obligation to make that defence until they know the details of the SLC. Whether and how they structure that defence should await the details of the Commissioner's proposed evidence. This is made clear at paragraph 124 of *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161 [*Tervita*].
- The Tribunal's Rules contemplate that the Commissioner file its expert evidence first, with a respondent's materials later. Due to the burden of proof which attaches to the defence, the Tribunal has permitted a slightly separate process for the filing of efficiencies defence evidence but not a simultaneous filing regime.
- As a matter of fairness, the Respondents are entitled to know the case they have to meet. The Respondents should not have to make an educated guess at the Commissioner's quantifiable dead weight loss in order to consider, and if necessary, address its defence of efficiency gains (*Tervita*, paras 131 and 136).
- It would be more efficient and be of greater assistance to the Court to have the Respondents' efficiencies defence (if any) set against a meaningful context and claim fully advanced by the Commissioner.

Therefore, the Respondents' expert reports are to follow the Commissioner's reports.

On the matter of timing, the Commissioner cannot show any prejudice to it from its filing date of July 16, 2018, and the Respondents' filing date of September 28, 2018, other than it seems like a long gap. The Tribunal is concerned with the practicality of filing dates (and the work necessary to meet those dates) during the all too short Canadian summer.

It makes sense that the Commissioner have until August 3, 2018, to file all its experts' reports with the Respondents' filing date remaining September 28, 2018.

These dates are to be incorporated into the draft Scheduling Order.

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