CT-2017-002

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an arrangement between HarperCollins Publishers L.L.C., Hachette Book Group Inc., Verlagsgruppe Georg von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC d/b/a Macmillan, Simon & Schuster Inc. and Apple Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 90.1 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant
(Responding Party)

-and-

HARPERCOLLINS PUBLISHERS L.L.C., and HARPERCOLLINS CANADA LIMITED

Respondents
(Moving Parties)

- and -

RAKUTEN KOBO INC.

Intervenor

HARPERCOLLINS' MEMORANDUM OF FACT AND LAW
(Motion for a Temporary Suspension or Stay of the Application)

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I. OVERVIEW

1. The Respondents, HarperCollins Publishers L.L.C. ("**HarperCollins US**") and HarperCollins Canada Limited ("**HarperCollins Canada**", and together with HarperCollins US, "**HarperCollins**"), submit this memorandum of fact and law in support of their motion for a suspension or stay of proceedings pending the determination of HarperCollins' appeal to the Federal Court of Appeal from the Tribunal's dismissal of HarperCollins' motion for summary dismissal (the "**Dismissal Motion**") of the Application brought by the Commissioner of Competition (the "**Commissioner**") for an order pursuant to section 90.1(1) of the *Competition Act*, R.S.C. 1985, c. c-34, as amended (the "***Act***"), dated January 19, 2017 (the "**Application**").

2. On the Dismissal Motion, HarperCollins asserted that the Tribunal lacks jurisdiction to grant the relief sought by the Commissioner in the Application because: (a) section 90.1 of the *Act* applies only to agreements or arrangements among competitors formed in Canada, whereas the alleged Arrangement (defined below) impugned by the Commissioner was entered into in the United States; and (b) in any event, the alleged Arrangement is not "existing or proposed," as required by section 90.1 of the *Act*.

3. The Tribunal heard HarperCollins' Dismissal Motion on May 3, 2017. On July 24, 2017, the Tribunal released its Order and Reasons for Order dismissing HarperCollins' Dismissal Motion (the "**Decision**"). In its Decision, the Tribunal concluded only that it was not "plain and obvious" that it did not have jurisdiction over the Application.

4. HarperCollins promptly delivered its Notice of Appeal, dated August 2, 2017, to the Federal Court of Appeal (the "**Appeal**"). On the Appeal, HarperCollins asserts, among other things, that the Tribunal erred in applying the "plain and obvious" test to the Dismissal Motion and that had the Tribunal applied the proper test (*i.e.*, whether the Application raised a genuine issue for trial) it would have concluded, based on the evidence filed on the motion, that the Tribunal lacks jurisdiction over the Application and that the Dismissal Motion should be granted.

5. In all of the present circumstances, including that the Appeal raises serious, important threshold jurisdictional issues; HarperCollins faces significant prejudice if it is effectively required to accept jurisdiction notwithstanding the Appeal; the Commissioner would not be prejudiced by the requested suspension or stay; and all parties (and the Tribunal) face the prospect of squandering resources if proceedings in the Application are not suspended or stayed during the pendency of the Appeal, HarperCollins respectfully submits that it is in the interests of justice that a suspension or stay be granted.

II. THE FACTS

6. The Commissioner seeks in his Application "an order pursuant to subsection 90.1(1) of the Competition Act:

> (a) Prohibiting the Respondents from doing anything under the Arrangement (as defined below in paragraph 1 of the Statement of Grounds and Material Facts) for a period of 10 years [...]";

7. Paragraph 1 of the Application contains the Commissioner's definition of the alleged "Arrangement", which states that in 2010, HarperCollins US, "along with other major publishers and a retailer entered into an anti-competitive arrangement (the "**Arrangement**") to collectively alter the business model and raise retail prices in respect of the sale of E-books to consumers" (emphasis in the Application).

8. Paragraph 2 of the Application asserts that the "Arrangement was formed in the United States between HarperCollins [US], Hachette Books Group Inc. [("**Hachette**")], Verlagsgruppe Georg von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC d/b/a MacMillan [("**Macmillan**")], Simon & Schuster Inc. [("**Simon & Schuster**")] and Apple Inc. [("**Apple**")]" (definitions added).

9. Paragraphs 21-22 of the Application contain further allegations concerning the purported Arrangement:

> [...] The Arrangement provided for a shift from wholesale agreements, where retailers control retail prices and have the ability to offer consumers discounts, to agency agreements, where publishers control the retail price and have the ability to bar price

> discounting [for e-books]. The Arrangement also provided for an MFN clause and pricing tiers in the agreements.
>
> [...] The Arrangement **was formed in the United States through a series of communications among the U.S. Publishers either directly or indirectly through Apple**. The Arrangement was implemented, **first in the United States and then in Canada**, by way of agency agreements entered into by publishers and Ebook retailers. (emphasis added)

10. There is no doubt that the Arrangement challenged by the Commissioner in the Application is alleged to have been formed in United States by U.S. and German entities.

A. U.S. Proceedings and Final Judgments

11. On April 11, 2012, The United States of America (the "**USA**") filed a civil action against Apple and several U.S. Publishers, including HarperCollins US, in the United States District Court for the Southern District of New York (the "**SDNY Court**") to challenge the U.S. Publishers' agency agreements with Apple and other e-book retailers under the U.S. *Sherman Act*, 15 USC §1.[1]

12. On the day it commenced its civil action, the USA also filed a proposed Final Judgment as to HarperCollins US and two of the other U.S. Publishers, Hachette and Simon & Schuster.[2] The Final Judgment represented the USA's proposed settlement of the action with those defendants. HarperCollins US agreed to the Final Judgment without trial or adjudication of any issue of fact or law raised by USA in its Complaint, on the basis that the Final Judgment did not constitute any admission by HarperCollins US that the law had been violated, nor an admission of any issue of fact or law other than the facts alleged by USA in its Complaint establishing the SDNY Court's jurisdiction over HarperCollins US.[3]

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[1] The Complaint of the Plaintiff, United States of America, against Apple et al, Exhibit "E" of the Affidavit of Teresa Koren sworn September 1, 2017 (the "**Koren Affidavit**"), Respondents' Motion Record for a Temporary Suspension or Stay of the Application dated September 1, 2017 ("**Respondents' MR**"), Tab 2.

[2] The SDNY Court's Final Judgment dated September 7, 2012, as to Defendants HarperCollins US, Hachette and Simon & Schuster, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[3] *Ibid* at p. 1, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

13. The proposed Final Judgment required approval by the SDNY Court in accordance with procedures outlined in the U.S. *Tunney Act*, 15 U.S.C. §16(b) – (h), which included a period for public comment on the proposed Final Judgment and written submissions submitted by other interested non-parties.[4] After receipt of the comments and submissions, the SDNY Court approved and entered the Final Judgment on September 6, 2012 (the "**HarperCollins US Final Judgment**").

14. Among other things, the HarperCollins US Final Judgment provided that HarperCollins US, Hachette, and Simon & Schuster were: (i) required to terminate their agency agreements with Apple within 7 days of the entry of the Final Judgment;[5] (ii) required to terminate any contracts with other e-book retailers that contained either a restriction on the e-book retailer's ability to set the retail price of any e-book or a "Price MFN" provision, beginning 30 days after entry of the Final Judgment;[6] (iii) prohibited for a period of at least two years from agreeing to any new contract with an e-book retailer that restricted the retailer's discretion over e-book pricing;[7] and (iv) prohibited for a period of at least five years from entering into an agreement with an e-book retailer that included a Price MFN provision.[8]

15. The HarperCollins US Final Judgment further provided that the "Settling Defendants shall not **enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant)** to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books" (emphasis added).[9]

16. The HarperCollins US Final Judgment also required that HarperCollins US, Hachette, and Simon & Schuster provide quarterly compliance reports and, after an internal audit, annual

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[4] The SDNY Court's Opinion and Order dated September 6, 2012 in relation to the Final Judgment as to Defendants HarperCollins US, Hachette, and Simon & Schuster, Exhibit "G" of the Koren Affidavit at p. 11, Respondents' MR, Tab 2.

[5] *Ibid* at p. 8, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[6] *Ibid* at p. 8, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[7] *Ibid* at p. 10, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[8] *Ibid* at p. 18, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[9] *Ibid* at pp. 11-12, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

written statements to the U.S. Department of Justice attesting to the fact and manner of their compliance with the Final Judgment.[10] The HarperCollins US Final Judgment further expressly provides that the SDNY Court "retains jurisdiction to enable any party to apply"[11] for such further orders or directions as may be necessary to carry out, construe, modify, enforce compliance with or punish violations of the Final Judgment. The HarperCollins US Final Judgment provided that it would expire five years from the date of entry, unless extended by the SDNY Court.[12]

17. On August 12, 2013, the SDNY Court entered a Final Judgment as to the Macmillan defendants named in the Complaint filed by USA on April 11, 2012 (the "**Macmillan Final Judgment**").[13] The Macmillan Final Judgment contains prohibitions on conduct that are substantially similar to those found in the earlier HarperCollins US Final Judgment, including that Macmillan "shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books".[14]

18. On September 5, 2013, the SDNY Court entered Final Judgment against Apple in the USA's civil action commenced April 11, 2012 (the "**Apple Final Judgment**").[15] The Apple Final Judgment was made following a bench trial that led the SDNY Court to conclude that Apple had violated section 1 of the *Sherman Act*. That decision was affirmed on Apple's appeal by a divided panel of the United States Second Circuit Court of Appeals; *certiorari* to the United States Supreme Court was denied. HarperCollins US was not a defendant at the Apple trial.

19. Among other things, the Apple Final Judgment provides that, for periods varying between two and four years, Apple may not enter into any agreement with a publisher

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[10] *Ibid* at p. 16, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[11] *Ibid* at p. 18, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[12] *Ibid* at p. 18, Exhibit "F" of the Koren Affidavit, Respondents' MR, Tab 2.

[13] The SDNY Court's Final Judgment dated August 12, 2013, as to Defendants Verlagsgruppe Georg von Holtzbrinck GMBH & Holtzbrinck Publishers d/b/a Macmillan, Exhibit "I" of the Koren Affidavit, Respondents' MR, Tab 2.

[14] *Ibid* at p. 11, Exhibit "I" of the Koren Affidavit, Respondents' MR, Tab 2.

[15] The SDNY Court's Final Judgment and Order Entering Permanent Injunction, dated September 5, 2013, as to the Defendant Apple, Exhibit "J" of the Koren Affidavit, Respondents' MR, Tab 2.

defendant in USA's civil action that restricts, limits, or impedes Apple's ability to set, alter, or reduce the Retail Price of any e-book (as defined in the Apple Final Judgment) and that, during its five-year term (which is subject to potential one-year extensions), Apple may not enter into any agreement with an e-book publisher that contains a Retail Price MFN (as defined therein).[16]

20. As a result of the USA's civil action, HarperCollins US and other U.S. publishers have for years been subject to binding Final Judgments in the SDNY Court that preclude the existence of an "agreement or arrangement" among competitors with respect to the sale or distribution of e-books, such as the Arrangement alleged by the Commissioner.

B. Commissioner's Proceedings in respect of Canadian Agency Agreements

21. Following the investigation and civil action commenced by USA in the SDNY Court, in the spring of 2012, the Commissioner commenced an investigation pursuant to section 10 of the *Act* regarding conduct in respect of e-book sales in Canada.

i. The First Consent Agreement

22. In February 2014, approximately six months after the last of the Final Judgments as to the U.S. Publishers was entered by the SDNY Court (being the August 2013 Macmillan Final Judgment), the Commissioner entered into a consent agreement (the "**First Consent Agreement**") with HarperCollins Canada, Simon & Schuster Canada, Hachette Book Group Canada Limited and related entities, and Holtzbrinck Publishers, LLC (collectively, the "**First Consent Agreement Respondents**"). HarperCollins US was not a party to the First Consent Agreement.[17]

23. In its recitals, the First Consent Agreement provided that the "Commissioner alleges that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act."[18]

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[16] *Ibid* at p. 5, Exhibit "J" of the Koren Affidavit, Respondents' MR, Tab 2.

[17] Consent Agreement filed with the Competition Tribunal dated February 7, 2014, Exhibit "K" of the Koren Affidavit, Respondents' MR, Tab 2.

[18] *Ibid* at p. 1, Exhibit "K" of the Koren Affidavit, Respondents' MR, Tab 2.

24. In the First Consent Agreement, HarperCollins Canada and the other Respondents agreed to terms substantially similar to those contained in the HarperCollins US Final Judgment, including, among other things, (1) not to restrict, limit or impede an e-book retailer's ability to set, alter or reduce the Retail Price (as defined therein) of any e-book sold to consumers in Canada for a period of 18 months (which period would begin to run 40 days after registration of the Agreement); and (2) not to enter into any agreement with an e-book retailer that contains a Price MFN (as defined therein) for a period of four years and six months from the date of registration of the Agreement.[19]

25. As with the U.S. Final Judgments, the First Consent Agreement evidenced the commitment of the First Consent Agreement Respondents, including HarperCollins Canada, not to have any horizontal agreement with respect to the distribution and pricing of e-books.

26. The First Consent Agreement was registered on February 7, 2014. The time periods in the First Consent Agreement were set to expire at the same time (or just prior to) the expiration of the prohibitions on such conduct contained in the Macmillan Final Judgment, the last of the Final Judgments entered by the SDNY Court on consent.

27. On the same day that the First Consent Agreement was registered, a news release from the Competition Bureau had the following subtitle, "Four major publishers agree to take steps that are expected to lower ebook prices in Canada."[20]

ii. Kobo's Challenge to the First Consent Agreement

28. On February 21, 2014, Rakuten Kobo Inc. ("**Kobo**"), an e-book retailer, filed an application pursuant to section 106(2) of the *Act*, seeking to have the First Consent Agreement varied or rescinded as a result of certain alleged substantive and formal deficiencies with the First Consent Agreement ("**Kobo's section 106(2) Application**"). Kobo sought a stay of the

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[19] *Ibid* at p. 5, Exhibit "K" of the Koren Affidavit, Respondents' MR, Tab 2.

[20] Competition Bureau news release dated February 7, 2014, Exhibit "L" of the Koren Affidavit, Respondents' MR, Tab 2.

registration of the First Consent Agreement pending determination of its Application, which was granted by order of the Tribunal dated March 18, 2014.[21]

29. On April 15, 2014, the Commissioner filed a Notice of Reference pursuant to section 124.2(2) of the *Act* to determine the nature and the scope of the Tribunal's jurisdiction on Kobo's section 106(2) Application (the "**Reference**"). On May 14, 2014, Justice Rennie determined that "it would be preferable that the parties have [the Reference decision] prior to commencement of proceedings" and scheduled the pre-hearing steps in Kobo's section 106(2) Application accordingly.[22]

30. On August 20, 2014, the Tribunal issued a direction in Kobo's section 106(2) Application which provided that the "deadlines established in the Scheduling Order of May 14, 2014, are suspended pending the release of the Tribunal's decision on the reference."[23]

31. On September 8, 2014, Justice Crampton of the Tribunal released his Reasons for Order and Order in the matter of the Commissioner's Reference (the "**Reference Decision**").[24] Shortly thereafter, Kobo appealed the Reference Decision to the Federal Court of Appeal.

32. On December 22, 2014, Justice Rennie released his Order and Reasons following a case management teleconference, which continued the suspension of proceedings in Kobo's section 106(2) Application pending the determination of Kobo's appeal of the Reference Decision by the Federal Court of Appeal. Justice Rennie concluded that the continued suspension was "a pragmatic and cost-effective approach which takes into consideration the factors set out in subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.)."[25]

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[21] Order of the Competition Tribunal dated March 18, 2014, Exhibit "M" of the Koren Affidavit, Respondents' MR, Tab 2.

[22] Scheduling Order and Reasons for Order Regarding the 106(2) Application dated May 14, 2014, HarperCollins' Book of Authorities ("**Respondents' BOA**") at Tab 1.

[23] The Tribunal's Order and Reasons following a Case Management Teleconference dated December 22, 2014 at para 2, Respondents' BOA at Tab 2.

[24] The Tribunal's Reasons for Order and Order dated September 8, 2014, Respondents' BOA at Tab 3.

[25] The Tribunal's Order and Reasons following a Case Management Teleconference dated December 22, 2014 at para 4, Respondents' BOA at Tab 2.

33. After the Federal Court of Appeal dismissed Kobo's appeal of the Reference Decision, Kobo sought a further suspension of proceedings in its section 106(2) Application pending its application for leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, which motion was dismissed by Justice Gascon of the Tribunal on November 5, 2015.[26]

34. In June 2016, the Commissioner consented to the rescission of the First Consent Agreement by the Tribunal.

iii. The 2017 Consent Agreements

35. On January 19, 2017, the Commissioner filed with the Tribunal new (and separate) 2017 Consent Agreements with all of the parties to the First Consent Agreement, except HarperCollins Canada, as well as a consent agreement with Apple.[27]

36. On January 20, 2017, in a Competition Bureau news release, the Commissioner "commended Apple and three major publishers – Hachette, Macmillan and Simon & Schuster – for entering into consent agreements to resolve his concerns related to these companies' conduct in the markets for ebooks."[28]

37. The prohibitions on the publishers that are parties to the 2017 Consent Agreements are substantially similar to the prohibitions in the rescinded First Consent Agreement, apart from differences in the duration of the prohibitions.

38. With respect to the prohibition on inhibiting an e-book retailer's ability to set e-book prices, the prohibitions last for a period of nine months in each of the 2017 Consent Agreements (but begin to run at somewhat different times following registration, depending on the particular Consent Agreement).

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[26] The Tribunal's Reasons for Order and Order regarding Kobo's Motion to Suspend the Proceedings dated November 5, 2015, Respondents' BOA at Tab 4.

[27] 2017 Consent Agreements filed with the Competition Tribunal on January 19, 2017, Exhibit "N" of the Koren Affidavit, Respondents' MR, Tab 2.

[28] Competition Bureau news release dated January 20, 2017, Exhibit "O" of the Koren Affidavit, Respondents' MR, Tab 2.

39. With respect to the prohibition on entering into agreements with e-book retailers containing Price MFNs, the prohibitions in the 2017 Consent Agreements each run for a period of three years following registration of the agreement.

40. The Commissioner commenced his Application against HarperCollins on the same day as he registered the 2017 Consent Agreements with the Tribunal.[29]

iv. Kobo's Challenge to the 2017 Consent Agreements

41. On February 17, 2017, Kobo filed an application for judicial review in the Federal Court in respect of the 2017 Consent Agreements (the "**Kobo JR Application**").[30] In its application, Kobo seeks, among other things, a declaration that the 2017 Consent Agreements are unlawful and invalid, an order quashing the 2017 Consent Agreements, and an order restraining the parties to the 2017 Consent Agreements (and others acting at their direction or on their behalf) from taking further steps pursuant to the 2017 Consent Agreements.

42. In the Kobo JR Application, Kobo has asserted that the Commissioner acted without jurisdiction in seeking "to remedy a conspiracy that was entered into in the U.S., not in Canada,"[31] and that the Commissioner acted without jurisdiction in seeking to remedy an "arrangement" that never existed, or if it did once exist, "was not 'existing or proposed' at the time he entered into the 2017 Consent Agreements."[32]

43. On March 8, 2017, the Federal Court granted a stay of the implementation of the 2017 Consent Agreements pending the determination of the Kobo JR Application.[33] The Commissioner consented to the stay.[34]

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[29] The Commissioner's Notice of Application dated January 19, 2017, Exhibit "A" of the Koren Affidavit, Respondents' MR, Tab 2.

[30] Kobo's Notice of Application dated February 17, 2017 to the Federal Court for judicial review in respect of the 2017 Consent Agreements, Exhibit "P" of the Koren Affidavit, Respondents' MR, Tab 2.

[31] *Ibid* at para 9(a), Exhibit "P" of the Koren Affidavit, Respondents' MR, Tab 2.

[32] *Ibid* at para 9(c), Exhibit "P" of the Koren Affidavit, Respondents' MR, Tab 2.

[33] Order of the Federal Court dated March 8, 2017 granting a stay of the implementation of the 2017 Consent Agreements, Exhibit "Q" of the Koren Affidavit, Respondents' MR, Tab 2.

[34] *Ibid* at p. 2, Exhibit "Q" of the Koren Affidavit, Respondents' MR, Tab 2.

44. On April 19, 2017, the Federal Court temporarily stayed the prosecution of Kobo's JR Application pending the determination of HarperCollins' Dismissal Motion by the Tribunal, as HarperCollins' jurisdictional challenge overlapped with issues in Kobo's JR Application.[35]

C. The Tribunal's Decision on HarperCollins' Dismissal Motion

45. On July 24, 2017, the Tribunal released its Decision dismissing HarperCollins' Dismissal Motion. In the Decision, Justice Gascon found that it was appropriate to treat the Dismissal Motion as a motion to strike a pleading, such that the Tribunal would only grant the motion if the Tribunal concluded that it was "plain and obvious" it did not have jurisdiction.[36]

46. With respect to HarperCollins' assertion that section 90.1 applies only to agreements or arrangements in Canada, the Tribunal concluded (at paragraph 77 of the Decision) that, notwithstanding the statutory presumption against the extraterritorial application of Canadian legislation, section 90.1 might apply to agreements formed outside Canada because the provision does not expressly state that it applies only to agreements "in Canada." The Tribunal held that "these kinds of complex exercises of statutory interpretation are best determined at trial, rather than on preliminary proceeding such as this present Motion."[37]

47. With respect to HarperCollins' assertion that section 90.1 of the *Act* does not apply to the alleged Arrangement because it is not "existing or proposed," the Tribunal acknowledged that section 90.1 requires the impugned conduct to be existing or proposed at the time the Application is brought. The Tribunal further recognized the "effect of the US Judgment was to terminate the alleged existing conspiracy between the US publishers involved which also included Apple) [...]." Nevertheless, the Tribunal concluded that it was not "plain and obvious" that the impugned Arrangement was not "existing or proposed" at the time of the Application, because it might be possible to infer an ongoing conspiracy among publishers in

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[35] The Federal Court's Order and Reasons dated April 19, 2017, Exhibit "R" of the Koren Affidavit, Respondents' MR, Tab 2.

[36] The Tribunal's Order and Reasons for Order dated July 24, 2017 at para 8, Exhibit "C" of the Koren Affidavit, Respondents' MR, Tab 2.

[37] *Ibid* at para 98, Exhibit "C" of the Koren Affidavit, Respondents' MR, Tab 2.

Canada from "circumstantial evidence" (being the existence of vertical agency agreements in Canada, each between a publisher and an e-book distributor).[38]

D. HarperCollins' Appeal

48. On August 2, 2017, HarperCollins served and filed its Notice of Appeal to the Federal Court of Appeal, which seeks, among other things, an Order dismissing the Application. [39]

49. The grounds for Appeal include that the Tribunal:

(a) Erred in principle by applying the "plain and obvious" test to HarperCollins' Dismissal Motion;

(b) Erred in effectively reversing the presumption against the extraterritorial application of Canadian legislation and in concluding that section 90.1 of the *Act* might apply to agreements formed outside of Canada;

(c) Erred in conflating the existence of vertical agency agreements in Canada with the existence of an agreement or arrangement which could be a violation of section 90.1; and

(d) Erroneously held that the ongoing existence of the alleged Arrangement could be inferred from "circumstantial evidence" in the face of overwhelming direct evidence in the motion record that the Arrangement does not and cannot exist.

50. Following delivery of HarperCollins' Notice of Appeal, the Commissioner filed his Notice of Appearance and the parties reached (and filed) their agreement concerning the contents of the appeal book. The appeal book will be filed by HarperCollins and thereafter the parties will exchange their appeal factums.

51. It is anticipated by counsel for HarperCollins that the Appeal will be heard by the Federal Court of Appeal in the winter or early spring of 2018.[40]

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[38] The Tribunal's Order and Reasons for Order dated July 24, 2017 at paras 202-03, Exhibit "C" of the Koren Affidavit, Respondents' MR, Tab 2.

[39] The Respondents' Notice of Appeal to the Federal Court of Appeal dated August 2, 2017, bearing Court File No. A-228-17, Exhibit "D" of the Koren Affidavit, Respondents' MR, Tab 2.

[40] The Koren Affidavit at para 23, Respondents' MR, Tab 2.

III. ISSUE

52. HarperCollins submits that the issue presented on this motion is whether suspending or staying proceedings in the Application pending the determination of HarperCollins' Appeal is in the interests of justice.

IV. LAW AND ARGUMENT

A. The Applicable Test is whether a Suspension or Stay is in the Interests of Justice

53. HarperCollins seeks a temporary suspension or stay of proceedings in the Application pending the determination of the threshold jurisdictional issues raised on the Appeal by the Federal Court of Appeal.

54. The test to be applied by the Tribunal on this motion is whether, in all the circumstances, the requested relief is in the interests of justice.[41]

55. The interests of justice test was applied by the Federal Court of Appeal in *Mylan Pharmaceuticals ULC v AstraZeneca Canada Inc*, which determined that requests for suspensions of proceedings engage "broad discretionary considerations."[42]

56. The interests of justice test was also applied by the Tribunal in the Toronto Real Estate Board ("**TREB**") case, in which Justice Simpson granted TREB a stay of the Tribunal's scheduling order pending resolution of TREB's application for leave to appeal an adverse decision of the Federal Court of Appeal to the Supreme Court of Canada.[43]

57. As the Ontario Court of Appeal has held, in applying the interests of justice test, "irreparable harm or an imbalance of convenience are undoubtedly relevant,"[44] but "other

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[41] *Commissioner of Competition v Toronto Real Estate Board*, 2014 Comp. Trib. 10 at para 19 [***"TREB"***], Respondents' BOA at Tab 5; *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 at para 5 (***"Mylan"***), Respondents' BOA at Tab 6.

[42] *Mylan* at para 5, Respondents' BOA at Tab 6. In so holding, the Federal Court of Appeal considered and rejected the more rigid approach taken by the Tribunal in *D & B Companies of Canada Ltd v Canada (Director of Investigation and Research)*, 1994 CarswellNat 1844 (CA), Respondents' BOA at Tab 7.

[43] *TREB* at para 19, Respondents' BOA at Tab 5.

[44] *Korea Data Systems (USA), Inc v Aamazing Technologies Inc*, 2012 CarswellOnt 13771 (CA) at para 19, Respondents' BOA at Tab 8.

factors such as the public interest in the fair, well-ordered and timely disposition of litigation, and the effective use of scarce public resources" should also be considered.[45]

58. In his Response to HarperCollins' motion, the Commissioner asserts that the test to be applied by the Tribunal is the tri-partite test for interlocutory injunctions articulated by the Supreme Court of Canada in *RJR-MacDonald*. [46] HarperCollins disagrees with the Commissioner's assertion with respect to the applicable test, but submits that it is not the label given to the test which is determinative: the question for the Tribunal to determine is what is the fair and just disposition of this motion in all of the circumstances.

59. In his seminal book, *Injunctions and Specific Performance*, Justice Sharpe noted with respect to the *RJR-MacDonald* test that its components "ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another."[47] Appellate courts across the country have adopted Justice Sharpe's views.[48] Indeed, the Ontario Court of Appeal has held that the test laid out by the Supreme Court of Canada in *RJR-Macdonald* ultimately requires the court to "decide whether the interests of justice call for a stay."[49]

B. A Suspension or Stay is in the Interests of Justice

60. The Tribunal should grant a temporary suspension or stay of the Application in the interests of justice in all the circumstances of this case, including because: (i) the Appeal raises substantive, threshold jurisdictional issues which should receive appellate consideration before

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[45] *Ibid* at para 19.

[46] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [***"RJR"***], Respondents' BOA at Tab 9. HarperCollins acknowledges that in November 2015, Justice Gascon of the Tribunal applied the "*RJR-MacDonald* test" in considering Kobo's motion for a further suspension of proceedings in its section 106(2) Application pending its application for leave to appeal to the Supreme Court of Canada.

[47] Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 1992) at 2.600, Respondents' BOA at Tab 10. Note that in *Essar Steel Algoma Inc., Re*, 2016 ONCA 138, Brown J. found that the moving party had not proved irreparable harm to justify granting a stay but that a stay should still be granted based on the balance of convenience (paras 55-59, Respondents' BOA at Tab 11.)

[48] *Apotex Fermentation Inc. v Novopharm Ltd*, 1994 CarswellMan 142 (CA) at para 14, Respondents' BOA at Tab 12; *Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Limited Partnership*, [2011] SJ No 627 (CA) at para 26, Respondents' BOA at Tab 13.

[49] E.g. *BTR Global Opportunity Trading Ltd v RBC Dexia Investor Services Trust*, 2011 ONCA 620 at para 16, Respondents' BOA at Tab 14; *Ogden Entertainment Services v Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), 38 O.R. (3d) 448 (CA) at para 4; *General Conference of Seventh-Day Adventists v Tiffin*, 2002 CarswellOnt 46 (CA) at para 18, Respondents' BOA at Tab 16.

this matter proceeds towards a hearing; (ii) HarperCollins faces substantial prejudice in the absence of a suspension or stay; (iii) the Commissioner would not be prejudiced by a suspension or stay; and (iv) the parties (and the Tribunal) face the real prospect of squandering significant resources should this matter proceed during the pendency of the Appeal.

i. HarperCollins' Appeal Raises Serious, Threshold Jurisdictional Issues

61. The Commissioner's Application is the first proceeding brought solely under section 90.1 of the *Act*. The issues concerning the territorial ambit of section 90.1 and the requirement that the impugned conduct be "existing or proposed" raised by HarperCollins' Dismissal Motion are threshold jurisdictional issues which had never been considered by the Tribunal prior to the Decision and which have never received appellate consideration.

62. In his Response on this motion, the Commissioner accepts that HarperCollins' Appeal raises serious issues.[50] These serious threshold jurisdictional issues go fundamentally to the purpose and scope of section 90.1 of the *Act* and are potentially dispositive of the Application. These facts strongly support granting a temporary suspension or stay of proceedings in the Application pending the disposition of the Appeal.

ii. HarperCollins Faces Substantial Prejudice in the Absence of a Suspension or Stay

63. HarperCollins filed its Response to the Application and its Notice of Motion for Summary Dismissal of the Application on the same day, expressly "without attornment to or acceptance of the jurisdiction of the Tribunal over this proceeding and the Respondents."

64. Immediately following release of its Decision, the Tribunal directed the parties to engage in discussions concerning a timetable for steps leading up to the hearing of the Application. The Tribunal has now issued a Direction that the hearing of the Application is to begin on November 13, 2018.

65. HarperCollins US is an American company, headquartered in New York, and is not carrying on business in Canada. Without the requested suspension or a stay, HarperCollins US will be obligated to participate in steps advancing the Application toward a hearing during the

[50] Motion Record of the Commissioner of Competition filed with the Tribunal on September 8, 2017 at para 9.

pendency of the Appeal, and thus faces substantial prejudice from the risk of attornment to the Tribunal's jurisdiction in so doing.

66. Although in his Response to this motion the Commissioner describes the prospect of (and harm to HarperCollins from) attornment as "speculative," it is well settled that for prejudice to be created by the absence of a stay, it is not necessary that attornment be certain to result from a defendant's participation in proceedings pending an appeal. Rather, courts have found that prejudice arises from the possibility of attornment, and that such a possibility weighs in favour of a stay.[51] Indeed, the Ontario Court of Appeal has ruled that, even where the opposing party undertakes not to argue attornment by reason of a defendant's participation in proceedings pending a jurisdictional appeal, the risk of attornment and prejudice in the absence of a stay is still present.[52]

iii. The Commissioner Will Not be Prejudiced by a Suspension or Stay

67. While HarperCollins faces prejudice in the absence of a suspension or stay, a temporary suspension or stay of proceedings in the Application pending determination of HarperCollins' Appeal would not result in prejudice to the Commissioner.

68. The alleged Arrangement impugned by the Commissioner in the Application is said to have been formed by U.S. and German entities in the United States in 2010. For years, those entities have been subject to binding Final Judgments in the SDNY Court that preclude the existence of an "agreement or arrangement" among competitors with respect to the sale or distribution of e-books.[53] Indeed, in its Decision on the Dismissal Motion, the Tribunal recognized that "the effect of the US judgment was to terminate the alleged existing conspiracy between the US publishers involved (which also included Apple) [...]."[54]

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[51] *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2014 ONCA 546 at para 36, Respondents' BOA at Tab 17.

[52] For example, *M.J. Jones Inc v Kingsway General Insurance Co*, 2004 CarswellOnt 3244 (CA) at paras 29 and 32, Respondents' BOA at Tab 18.

[53] See the SDNY Court's Orders at Exhibits "E", "F", "G", "H", "I", "J" of the Koren Affidavit, Respondents' MR, Tab 2.

[54] The Competition Tribunal's Order and Reasons for Order dismissing a Motion for Summary Dismissal dated July 24, 2017 at para 187, Exhibit "C" of the Koren Affidavit, Respondents' MR, Tab 2.

69. In 2014, HarperCollins Canada and all of the other First Consent Agreement Respondents agreed to the First Consent Agreement, which, notwithstanding its later rescission, further confirmed the non-existence of a horizontal agreement among competitors (publishers) which could result in harm to competition in the sale or distribution of e-books in Canada.

70. On January 19, 2017, the same day the Application against HarperCollins was commenced, the Commissioner filed the 2017 Consent Agreements with Apple and all the same parties to the 2014 Consent Agreement (except HarperCollins Canada). In his subsequent press release, the Commissioner noted that the 2017 Consent Agreements resolved "his concerns related to these companies' conduct in the markets for ebooks."[55]

71. On February 17, 2017, Kobo filed the Kobo JR Application, which challenged the 2017 Consent Agreements on jurisdictional grounds which overlapped with those raised by HarperCollins on the Dismissal Motion before the Tribunal.[56] The implementation of the 2017 Consent Agreements was stayed by Order of the Federal Court pending the determination of the Kobo JR Application[57] and, subsequently, the prosecution of the Kobo JR Application was suspended pending the Tribunal's determination of HarperCollins' Dismissal Motion.[58]

72. Now that the Tribunal has released its Decision on the Dismissal Motion, the Kobo JR Application will likely be heard in the early fall of 2017.[59] On the one hand, if the Kobo JR Application is dismissed, the stay of the 2017 Consent Agreements will be lifted and the 2017 Consent Agreements will become operative. There would be no basis to allege that there is an existing or proposed arrangement between HarperCollins and the publisher parties to the 2017 Consent Agreements giving rise to a substantial lessening or prevention of competition in Canada. On the other hand, if the Kobo JR Application succeeds that would underscore the

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[55] Competition Bureau news release dated January 20, 2017, Exhibit "O" to the Koren Affidavit, Respondents' MR, Tab 2.

[56] Kobo's Notice of Application dated February 17, 2017 to the Federal Court for judicial review in respect of the 2017 Consent Agreements, Exhibit "P" to the Koren Affidavit, Respondents' MR, Tab 2.

[57] Order of the Federal Court dated March 8, 2017 granting a stay of the implementation of the 2017 Consent Agreements, Exhibit "Q" of the Koren Affidavit, Respondents' MR, Tab 2.

[58] The Federal Court's Order and Reasons dated April 19, 2017, Exhibit "R" to the Koren Affidavit, Respondents' MR, Tab 2.

[59] The Koren Affidavit at para 22, Respondents' MR, Tab 2.

serious jurisdictional issues raised by HarperCollins and the prejudice to HarperCollins in being required to defend the Application during the pendency of the Appeal.

73. Viewed in the context of all the prior proceedings in the United States and Canada, including the ongoing Kobo JR Application, it is clear that the Commissioner (and the Canadian public) would not be prejudiced by a temporary suspension or stay of proceedings in this Application. The Commissioner's Application seeks relief in respect of an alleged horizontal Arrangement that has already been addressed in, and which is precluded by, the U.S. Final Judgments, and the fate of the 2017 Consent Agreements will be determined by the Federal Court on the Kobo JR Application. A suspension or stay pending the Appeal of this Application so as to address the fundamental jurisdictional questions raised therein will not cause any prejudice to the Commissioner or affect the stated concerns about the market for e-books in Canada.

iv. A Suspension or Stay will Conserve Resources

74. A further factor strongly supporting the relief requested by HarperCollins on this motion is that a suspension or stay would avoid the unnecessary expenditure of resources by the parties (and the Tribunal).

75. The conservation of resources is an important consideration on motions to suspend or stay proceedings pending an appeal. As observed by Haley J. in a case involving an appeal that could affect the course of a trial, "[a]ny proceedings now may well turn out to be worthless and a waste of time for both the parties and the court. No one can afford the cost of useless litigation."[60]

76. In *Coote*, the Federal Court of Appeal similarly held that:

> As long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – this Court should exercise its discretion against the wasteful use of judicial resources. The public purse and the taxpayers who fund it deserve respect. As well, cases are interconnected: one case sits alongside hundreds of other needy cases. Devoting

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[60] *Transamerica Commercial Finance Corp Canada v Spence Etron (Ontario) Ltd*, 1993 CarswellOnt 2786 (Gen Div) at para 39, Respondents' BOA at Tab 19.

> resources to one case for no good reason deprives the others for no good reason.[61]

77. Indeed, in a very similar situation to the present case, Justice Rennie suspended proceedings in Kobo's section 106(2) Application pending the determination of Kobo's appeal of the Tribunal's Reference Decision by the Federal Court of Appeal. Justice Rennie held that the suspension of proceedings was "a pragmatic and cost-effective approach which takes into consideration the factors set out in subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.)."[62]

78. The same considerations overwhelmingly support granting a suspension of proceedings in this case. In the absence of the relief requested by HarperCollins, the next steps in this proceeding, the preparation of affidavits of documents, the exchange and review of (large) document productions, and motions concerning the sufficiency thereof, will be expensive and time-consuming for the parties, the intervenor and, in all likelihood, the Tribunal. Substantial resources will have been wasted if the Federal Court of Appeal allows HarperCollins' Appeal and dismisses the Application on jurisdictional grounds.

V. ORDER REQUESTED

79. HarperCollins respectfully requests an Order suspending or staying proceedings pending the determination of HarperCollins' Appeal by the Federal Court of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of September, 2017

Katherine L. Kay
Stikeman Elliott LLP
Lawyers for the Respondents (Moving Parties)

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[61] *Coote v Lawyers Professional Indemnity Co*, 2013 FCA 143 at para 13, Respondents' BOA at Tab 20.

[62] The Tribunal's Order and Reasons following a Case Management Teleconference dated December 22, 2014 at para 4, Respondents' BOA at Tab 2.

Schedule A

List of Authorities

1. Scheduling Order and Reasons for Order Regarding the 106(2) Application dated May 14, 2014
2. The Tribunal's Order and Reasons following a Case Management Teleconference dated December 22, 2014
3. The Tribunal's Reasons for Order and Order dated September 8, 2014
4. The Tribunal's Reasons for Order and Order regarding Kobo's Motion to Suspend the Proceedings dated November 5, 2015
5. *Commissioner of Competition v Toronto Real Estate Board*, 2014 Comp Trib 10
6. *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312
7. *D & B Companies of Canada Ltd v Canada (Director of Investigation and Research)*, 1994 CarswellNat 1844 (CA)
8. *Korea Data Systems (USA), Inc. v Aamazing Technologies Inc*, 2012 CarswellOnt 13771 (CA)
9. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311
10. Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 1992)
11. *Essar Steel Algoma Inc, Re*, 2016 ONCA 138
12. *Apotex Fermentation Inc v Novopharm Ltd*, 1994 CarswellMan 142 (CA)
13. *Potash Corp of Saskatchewan Inc. v Mosaic Potash Esterhazy Limited Partnership*, [2011] SJ No 627 (CA)
14. *BTR Global Opportunity Trading Ltd v RBC Dexia Investor Services Trust*, 2011 ONCA 620
15. *Ogden Entertainment Services v Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), 38 O.R. (3d) 448 (CA)
16. *General Conference of Seventh-Day Adventists v Tiffin*, 2002 CarswellOnt 46 (CA)
17. *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2014 ONCA 546
18. *M.J. Jones Inc v Kingsway General Insurance Co*, 2004 CarswellOnt 3244 (CA)

19. *Transamerica Commercial Finance Corp Canada v Spence Etron (Ontario) Ltd,* 1993 CarswellOnt 2786 (Gen Div)

20. *Coote v Lawyers Professional Indemnity Co,* 2013 FCA 143

Schedule B

Legislation

Competition Act, RSC 1985, c C-34

s. 90.1

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Order

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

Factors to be considered

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;

(b) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

(c) any barriers to entry into the market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

(d) any effect of the agreement or arrangement on the barriers referred to in paragraph (c);

(e) the extent to which effective competition remains or would remain in the market;

- **(f)** any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;
- **(g)** the nature and extent of change and innovation in any relevant market; and
- **(h)** any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

Evidence

(3) For the purpose of subsections (1) and (2), the Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

Exception where gains in efficiency

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

Restriction

(5) For the purposes of subsection (4), the Tribunal shall not find that the agreement or arrangement has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Factors to be considered

(6) In deciding whether the agreement or arrangement is likely to bring about the gains in efficiency described in subsection (4), the Tribunal shall consider whether such gains will result in

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

Exception

(7) Subsection (1) does not apply if the agreement or arrangement is entered into, or would be entered into, only by companies each of which is, in respect of every one of the others, an affiliate.

Exception

(8) Subsection (1) does not apply if the agreement or arrangement relates only to the export of products from Canada, unless the agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

Exception

(9) The Tribunal shall not make an order under subsection (1) in respect of

(a) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's request for or approval of the agreement or arrangement for the purposes of financial policy;

(b) an agreement or arrangement that constitutes a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts; or

(c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement.

Where proceedings commenced under section 45, 49, 76, 79 or 92

(10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

Definition of *competitor*

(11) In subsection (1), ***competitor*** includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

s. 106

Rescission or variation of consent agreement or order

106 (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

References to Tribunal

Reference if parties agree

124.2 (1) The Commissioner and a person who is the subject of an inquiry under section 10 may by agreement refer to the Tribunal for determination any question of law, mixed law and fact, jurisdiction, practice or procedure, in relation to the application or interpretation of Part VII.1 or VIII, whether or not an application has been made under Part VII.1 or VIII.

Reference by Commissioner

(2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.

Reference by agreement of parties to a private action

(3) A person granted leave under section 103.1 and the person against whom an order is sought under section 75, 76 or 77 may by agreement refer to the Tribunal for determination any question of law, or mixed law and fact, in relation to the application or interpretation of Part VIII, if the Tribunal grants them leave. They must send a notice of their application for leave to the Commissioner, who may intervene in the proceedings.

Reference procedure

(4) The Tribunal shall decide the questions referred to it informally and expeditiously, in accordance with any rules on references made under section 16 of the *Competition Tribunal Act*.

Competition Tribunal Act, RSC 1985, c 19 (2nd Sum)

s.9

Court of record

9 (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Interventions by persons affected

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.