

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 5

File No.: CT-2017-002

Registry Document No.: 61

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

AND IN THE MATTER OF an arrangement between HarperCollins Publishers LLC, 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:

The Commissioner of Competition
(applicant)

and

**HarperCollins Publishers LLC and
HarperCollins Canada Limited**
(respondents)

and

Rakuten Kobo Inc
(applicant for leave to intervene)



Decided on the basis of the written record
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Reasons for Order and Order: April 18, 2017
Order signed by: Justice D. Gascon

REASONS FOR ORDER AND ORDER GRANTING RAKUTEN KOBO INC LEAVE TO INTERVENE

[1] Rakuten Kobo Inc (“**Kobo**”) seeks leave to intervene in this proceeding brought by the Commissioner of Competition (the “**Commissioner**”) pursuant to section 90.1 of the *Competition Act*, RSC 1985, c C-34 (the “**Act**”) against HarperCollins Publishers LLC and HarperCollins Canada Limited (collectively “**HarperCollins**”).

[2] In its Request for Leave to Intervene dated March 16, 2017 (the “**Leave Request**”), Kobo identifies the following topics on which it seeks to intervene:

1. Whether the shift to agency in Canada arose as a result of a conspiracy in violation of section 1 of the US Sherman Act which was found to have occurred by the US District Court (the “**Conspiracy**”) and, if so, whether the Tribunal has jurisdiction to determine a case under section 90.1 of the Act in respect of the Conspiracy (the “**Topic 1**”);
2. The pro-competitive effects that Kobo, as a retailer, observed as a result of the adoption of agency terms (the “**Topic 2**”); and
3. The impact of the Commissioner’s proposed orders on retailers like Kobo and on competition in the retail market in Canada (the “**Topic 3**”).

[3] At paragraph 25 of its Leave Request, Kobo further provides its proposed scope of participation. If granted leave, Kobo requests that it not be liable for costs on the basis that it will not be seeking costs. Kobo’s Leave Request was supported by the Affidavit of Michael Tamblyn, Kobo’s President and Chief Executive Officer.

[4] HarperCollins supports Kobo’s request to intervene on the matters set out in Kobo’s Leave Request.

[5] The Commissioner generally consents to Kobo’s appearance as an intervenor but opposes Kobo’s proposed Topic 1 in part. With respect to Topics 2 and 3, the Commissioner argues that Kobo’s submissions should be limited to Kobo’s direct knowledge and perspective. Lastly, the Commissioner argues that certain modifications should be made to Kobo’s proposed scope of participation and to Kobo’s cost-liability request.

[6] In reply, Kobo accepts the Commissioner’s proposed modifications regarding Topics 2 and 3, its scope of participation and cost-liability but maintains its original request with respect to Topic 1.

[7] In light of the above consents by the Commissioner and Kobo, and the submissions of HarperCollins, the remainder of these reasons only deal with the scope of Kobo’s participation and essentially address Kobo’s proposed Topic 1 and the Commissioner’s submissions in that regard.

[8] Before turning to this issue, I pause to point out that, in my view, Kobo has demonstrated that its request for leave to intervene satisfies the test for being granted intervenor status set out in sub-section 9(3) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp.), and in the jurisprudence of the Tribunal. More specifically, I am satisfied that, subject to the terms of this order, 1) the matter alleged to affect Kobo is legitimately within the scope of the Tribunal’s

consideration or is a matter sufficiently relevant to the Tribunal's mandate; 2) Kobo is directly affected by the proceedings brought by the Commissioner; 3) the representations proposed to be made by Kobo are relevant to the issues raised by the Commissioner; and 4) Kobo brings to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (*The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp Trib 2 at para 19; *The Commissioner of Competition v United Grain Growers Limited*, 2002 Comp Trib 20, at para 12).

[9] The Commissioner opposes the inclusion of Kobo's Topic 1 on two distinct elements.

[10] First, the Commissioner argues that Kobo's intervention should be limited to Kobo's interpretation of the facts with respect to its own shift to agency agreements in Canada (and not that of other retailers). He submits that Kobo is not qualified to speak on behalf of other retailers in terms of how the other retailers entered into agency contracts in Canada. The Commissioner therefore proposes to modify Topic 1 to limit it to "how and why Kobo came to use agency agreements in Canada".

[11] In response to the Commissioner's submission, Kobo maintains that it should be permitted to intervene on Topic 1 as originally proposed. It indicates that, at the time of the adoption of agency agreements in Canada, Kobo was the market leader for the retail sale of e-books and, as such, should be permitted to present its views as to how it perceived agency to have come to the Canadian market, including its perspective and observations of other market participants' activities at the time.

[12] I agree with Kobo on this first element, subject to the following caveat. I accept that, given its position in the market for the retail sale of e-books in Canada, Kobo can provide views, perspectives and observations not only on how and why Kobo itself came to use agency agreements in Canada, but also on the activities of other market participants and on what was generally occurring in the market on that front. However, it is understood that, in doing so, Kobo's submissions should be limited to Kobo's direct knowledge of such other market participants' activities and that it would be inappropriate for Kobo to provide its perspectives on or to speak to the actual motivations of other market retailers. As such, I am not persuaded that Topic 1 needs to be reformulated to reflect the limit proposed by the Commissioner.

[13] Second, the Commissioner opposes the intervention of Kobo on the last dimension of Topic 1, namely whether the Tribunal has jurisdiction to determine a case under section 90.1 of the Act in respect of the Conspiracy. The Commissioner submits that, since HarperCollins has already indicated that it will be making submissions on the Tribunal's jurisdiction, any additional submissions by Kobo will unnecessarily lengthen the proceedings and be repetitive.

[14] On this second element, Kobo submits that the Commissioner's concerns are mitigated by Kobo's assurances that it will only be making "non-repetitive" submissions with respect to the Tribunal's jurisdiction. It also notes that HarperCollins is not participating in the parallel judicial review proceeding initiated by Kobo before the Federal Court and that, as the applicant in that proceeding, Kobo would be offering a unique perspective in light of the related nature of the two proceedings.

[15] I also agree with Kobo on the second element. I accept Kobo's argument that it will be bringing a unique perspective to these proceedings in light of its participation as applicant in the parallel judicial review proceeding before the Federal Court. I am also satisfied that, since the terms of this order will specify that Kobo is only granted leave to make "non-repetitive" submissions on the three Topics, and taking into account Kobo's own assurances in that respect, allowing Kobo to present its perspective on the jurisdictional dimension of Topic 1 will not unnecessarily lengthen the proceedings or be repetitive of the position taken by HarperCollins on the issue. In other words, the terms of this order and the conditions to be put in place for Kobo's intervention offer sufficient guarantees that Kobo's intervention on the jurisdictional element of Topic 1 will be limited to bringing a unique and distinct perspective separate and apart from that to be provided by HarperCollins.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[16] Kobo is granted leave to intervene on the following three topics:

1. Whether the shift to agency in Canada arose as a result of the Conspiracy and, if so, whether the Tribunal has jurisdiction to determine a case under section 90.1 of the Act in respect of the Conspiracy;
2. The pro-competitive effects that Kobo, as a retailer, observed as a result of the adoption of agency terms; and
3. The impact of the Commissioner's proposed orders on retailers like Kobo and on competition in the retail market in Canada.

[17] Kobo shall be allowed to participate in the proceedings with respect to the three above-mentioned topics and be permitted:

1. To participate in any motions by providing non-repetitive written and oral submissions and having access to any documents, records or submissions made in respect of those motions, including attending at any cross-examinations on affidavits and asking any non-repetitive questions of affiants;
2. To review any discovery transcripts and access any discoverable documents of the parties and to be present and ask any non-repetitive questions during oral discoveries;
3. To adduce non-repetitive evidence for and at the hearing of the application and any related motions;
4. To conduct non-repetitive examinations and cross-examinations of witnesses;
5. To file and receive expert evidence within the scope of its intervention in accordance with the procedures set out in the *Competition Tribunal Rules*, SOR/2008-141;

6. To attend and make representations at any pre-hearing motions, case management conferences or scheduling conferences; and
7. To make written and oral argument, including submissions on any proposed remedy.

[18] Kobo shall be required to:

1. Produce an affidavit of documents listing documents relevant to the three above-mentioned topics;
2. Produce those documents to the extent that they are not privileged; and
3. Make a representative available for examination for discovery (limited to the three above-mentioned topics).

[19] Kobo shall be able to seek and be liable for costs in these proceedings.

[20] If Kobo intends to make written representations in the context of HarperCollins' motion for summary dismissal, scheduled to be heard by the Tribunal on May 3, 2017, Kobo shall serve and file its memorandum of fact and law and any supporting affidavit or supplementary evidence, limited to the three above-mentioned topics (to the extent that they are affected by HarperCollins' motion for summary dismissal), by April 25, 2017.

[21] The style of cause of this matter shall be modified to add Rakuten Kobo Inc as intervenor.

[22] There is no order as to costs on this request for leave to intervene.

DATED at Ottawa, this 18th day of April 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

APPEARANCES:

For the Applicant:

John Syme
Alex Gay
Esther Rossman
Katherine Johnson

For the Respondents:

Katherine Kay
Danielle Royal

For the Applicant for leave to intervene

Nikiforos Iatrou
Scott McGrath
Bronwyn Roe