Competition Tribunal | Tribunal de la concurrence

Reference: *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 14
File No.: CT-2017-002
Registry Document No.: 120

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 90.1 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF a motion for a temporary suspension or stay of the application by HarperCollins Publishers LLC and HarperCollins Canada Limited.

BETWEEN:

The Commissioner of Competition
(applicant)

and

HarperCollins Publishers LLC and HarperCollins Canada Limited
(respondents)

and

Rakuten Kobo Inc
(intervenor)

Date of hearing: September 19, 2017
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order and Reasons for Order: October 6, 2017

ORDER AND REASONS FOR ORDER DISMISSING THE RESPONDENTS' MOTION FOR A TEMPORARY SUSPENSION OR STAY

I. OVERVIEW

[1] On September 1, 2017, HarperCollins Publishers LLC ("**HarperCollins US**") and HarperCollins Canada Limited ("**HarperCollins Canada**") (collectively, "**HarperCollins**") filed a Notice of Motion ("**Motion**") with the Tribunal requesting an order for a temporary suspension or stay of the proceedings in the application brought against them by the Commissioner of Competition ("**Commissioner**") under section 90.1 of the *Competition Act*, RSC 1985, c C-34 as amended ("**Act**"). In the Motion, HarperCollins asks the Tribunal to suspend the Application pending the determination of its appeal to the Federal Court of Appeal ("**FCA**") of the July 24, 2017 order of the Tribunal dismissing HarperCollins' motion for summary dismissal of the Commissioner's Application (*The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10 ("***Summary Dismissal Decision***")).

[2] HarperCollins contends that, in the circumstances of this case, staying the Application is in the "interests of justice". In support of its Motion, HarperCollins submits that: (i) its appeal ("**Appeal**") raises serious threshold issues which have not previously received appellate consideration; (ii) it faces substantial prejudice in the absence of a suspension since it would be obligated to participate in steps to advance the Application and would, therefore, run the risk of attorning to the Tribunal's *in personam* jurisdiction; (iii) the Commissioner will not be prejudiced by the suspension taking into account the prior proceedings in the United States and Canada; and (iv) the suspension will avoid unnecessary expenditure of resources by the parties and the Tribunal. The intervenor Rakuten Kobo Inc. ("**Kobo**") supports HarperCollins' Motion.

[3] The Commissioner responds that, in considering HarperCollins' Motion, the Tribunal should apply the tripartite test set forth by the Supreme Court of Canada ("**SCC**") in *RJR-MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 ("***RJR-MacDonald***"), as opposed to the "interests of justice" test proposed by HarperCollins and Kobo. He submits that HarperCollins has not established two of the three prongs of the *RJR-MacDonald* test and that the Motion should thus be dismissed. The Commissioner argues that the evidence advanced by HarperCollins on irreparable harm is either non-existent or speculative since, according to the Commissioner, HarperCollins attorned to the Tribunal's jurisdiction when it filed its response to the Application ("**Response**"). The Commissioner further contends that the balance of convenience overwhelmingly favours not granting the suspension since he is presumed to be acting in the public interest, and such public interest considerations deserve significant weight.

[4] There are two issues to be decided on this Motion:

(a) What is the appropriate test to be applied by the Tribunal to HarperCollins' request for a temporary suspension of the Application pending the Appeal?

(b) Should the suspension sought by HarperCollins be granted?

[5] For the reasons that follow, HarperCollins' Motion will be dismissed. The Tribunal concludes that, as was the case in *Kobo Inc v The Commissioner of Competition*, 2015 Comp Trib 14 ("***Kobo Suspension***"), the appropriate test to be applied on this Motion remains the tripartite test set forth in *RJR-MacDonald*. The Tribunal finds that, on the record before it, this test is not met. This is because HarperCollins has not demonstrated that it will suffer irreparable harm if the suspension is not granted and the Application proceeds, and because the balance of convenience does not tilt in its favour. That said, in light of the recent SCC decision in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 ("***Google***"), the Tribunal has also considered, for the sake of completeness, whether it would have been in the interests of justice to suspend the Application at this stage. Further to its review, in the particular context of this case, the Tribunal would still decline to grant the stay sought by HarperCollins, even if the appropriate test was assumed to be the "interests of justice".

II. BACKGROUND

[6] The Commissioner filed his Application on January 19, 2017, seeking relief against HarperCollins under section 90.1 of the Act, which concerns agreements or arrangements between competitors. In the Application, the Commissioner alleges that HarperCollins US formed an arrangement in the United States with other US publishers of electronic books ("**E-books**") and Apple Inc. ("**Arrangement**") whereby the wholesale distribution model used for the sale of E-books was changed to an "agency" distribution model. The Commissioner contends that, as a result of that change, retail price competition in the markets for E-books in Canada is substantially restricted.

[7] The details of the procedural history leading to the current Motion are narrated in the Summary Dismissal Decision and need not be repeated here (*Summary Dismissal Decision* at paras 9-32).

[8] Suffice to say that, on March 6, 2017, HarperCollins filed its Response as well as its motion for summary dismissal ("**Dismissal Motion**"). In these two proceedings, HarperCollins submitted that the Commissioner's Application had two fundamental flaws on its face, each of which provided a separate, independent and sufficient jurisdictional ground on which the Application should be summarily dismissed. First, HarperCollins claimed that the Tribunal lacks jurisdiction to grant the relief requested by the Commissioner as the alleged Arrangement forming the basis of his Application was entered into in the United States, and not in Canada, and that section 90.1 of the Act on civil collaborations between competitors applies only in respect of agreements or arrangements among competitors that are formed in Canada. Second, HarperCollins argued that the Arrangement was no longer "existing or proposed", as required by section 90.1 of the Act. The arguments raised by HarperCollins both relate to the Tribunal's "subject-matter" jurisdiction.

[9] It should further be noted that, at the beginning of both its Response and its Dismissal

Motion, HarperCollins included explicit language reserving its rights to challenge the Tribunal's jurisdiction. Each of the documents expressly indicated that HarperCollins' participation in the Application was made "without attornment to or acceptance of the jurisdiction of the Tribunal over the proceeding and [HarperCollins]". HarperCollins repeated this reservation of rights in the introductory paragraph of this Motion, in terms slightly more elaborate.

[10] On July 24, 2017, the Tribunal released its order dismissing HarperCollins' Dismissal Motion. As detailed in the Summary Dismissal Decision, the Tribunal concluded that it was not plain and obvious that it did not have subject-matter jurisdiction over the Application. Upon reviewing the materials filed by HarperCollins, the Commissioner and Kobo, the Tribunal was not satisfied that the Commissioner's allegations could not be supported or that the Application was certain to fail at trial because it is bereft of all possibility of success. Accepting the facts and allegations as pleaded, the Tribunal found that a "real and substantial connection" might well be established between the subject-matter of the Commissioner's Application and Canada, sufficient to provide the Tribunal with jurisdiction in this matter. The Tribunal further concluded that it was not plain and obvious that the Arrangement was no longer existing in Canada as its manifestations and expression through the agency agreements reached by HarperCollins with Canadian E-book retailers were alleged to remain in place and its anti-competitive effects were alleged to continue to be felt in this country.

[11] On August 2, 2017, HarperCollins filed its Appeal of the Summary Dismissal Decision with the FCA. In early August and September 2017, further to a direction from the Tribunal, the parties exchanged proposed timetables for the disposition of the Application. These proposed schedules dealt with the timing of the usual steps for discovery (e.g., affidavits of documents, document productions, examinations on discovery, motions arising from the discovery steps, etc.) and for the preparation of the hearing (e.g., witness statements, expert reports, requests for admissions, etc.). On September 13, 2017, the Tribunal issued an order stating that the hearing of this matter shall commence on November 13, 2018, for approximately four weeks ("**Hearing Date Order**"). The parties were also ordered to consult each other with respect to the schedule of steps necessary to bring the case on the schedule time. If the parties fail to reach an agreement by October 13, 2017, the Tribunal shall fix a schedule of the pre-hearing steps, further to a case management conference.

[12] Earlier in February, 2017, Kobo had also filed an application for judicial review in the Federal Court ("**Kobo JR Application**") in respect of the consent agreements entered into on January 19, 2017 between the Commissioner and E-book publishers other than HarperCollins ("**2017 Consent Agreements**"). 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. The Commissioner had consented to such a stay in order to move rapidly to the hearing on the merits of this matter. In a decision issued on April 19, 2017, the Federal Court also temporarily stayed the Kobo JR Application itself, pending the determination of HarperCollins' Dismissal Motion by the Tribunal, as HarperCollins' jurisdictional challenge

before the Tribunal overlapped with issues raised by Kobo before the Court (*Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2017 FC 382 ("***Kobo FC***")).

[13] HarperCollins' Motion is the most recent chapter in the long-running litigation between the Commissioner and E-book publishers and retailers, dating back to February 2014 when E-book retailer Kobo filed an application before the Tribunal pursuant to section 106 of the Act. In that section 106 application, Kobo was seeking an order to rescind or vary the terms of the initial consent agreement concluded between the Commissioner and E-book publishers ("**2014 Consent Agreement**"). In March 2014, the Tribunal issued an order staying the registration of the 2014 Consent Agreement. Following its decision on a reference that was brought by the Commissioner in a related proceeding (*Kobo Inc v The Commissioner of Competition*, 2015 Comp Trib 14 ("**Reference Decision**")), the Tribunal issued its decision on Kobo's section 106 application in April 2016, granting it in part and rescinding the 2014 Consent Agreement (*Rakuten Kobo Inc v The Commissioner of Competition*, 2016 Comp Trib 11). At the hearing of Kobo's section 106 application, the Commissioner had consented to rescind the 2014 Consent Agreement, as he agreed that it did not meet the requirements set out by the Tribunal in the Reference Decision.

III. ANALYSIS

A. The appropriate test is still *RJR-MacDonald*

[14] The first issue to be decided on this Motion is the appropriate test to be applied by the Tribunal to determine whether it should suspend the Application pending HarperCollins' Appeal of the Summary Dismissal Decision.

[15] Echoing what Kobo had (unsuccessfully) argued in the *Kobo Suspension* matter, HarperCollins submits that the preferable test to be applied is whether, in all the circumstances, the requested suspension is in the "interests of justice". HarperCollins relies on the FCA's decision in *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 ("***Mylan***") and on the Tribunal's decision in *Commissioner of Competition v Toronto Real Estate Board*, 2014 Comp Trib 10 ("***TREB***"). According to HarperCollins, the "interests of justice" test acknowledges that broad discretionary considerations regarding the administration of justice are at play in the exercise of the Tribunal's power to impose a stay or suspension of its own proceedings. HarperCollins notes that, while factors demonstrating irreparable harm or imbalance of convenience (which form part of the *RJR-MacDonald* tripartite test) are still relevant under the "interests of justice" test, this latter test also takes into account other factors such as the "public interest in the fair, well-ordered and timely disposition of litigation" and "the effective use of scarce public resources" (*Korea Data Systems (USA), Inc v Aamazing Technologies Inc*, 2012 ONCA 756 ("***Korea Data***") at para 19). This, in HarperCollins' view, is a better-suited guide to be followed by the Tribunal in the context of this Motion.

[16] HarperCollins further submits that, in any event, the test effectively retained by the Tribunal does not make much of a difference as, under either the "interests of justice" test or the *RJR-MacDonald* test, the Tribunal ultimately has to determine what is a fair and just disposition of the Motion in all of the circumstances. HarperCollins notably refers to decisions of the Ontario Court of Appeal ("**ONCA**") stating that the *RJR-MacDonald* test requires the courts to "decide whether the interests of justice call for a stay" (*Essar Steel Algoma Inc, Re*, 2016 ONCA 138 ("***Essar Steel***") at para 60; *BTR Global Opportunity Trading Ltd v RBC Dexia Services Trust*, 2011 ONCA 620 ("***BTR Global***") at para 16; *Ogden Entertainment Services v Retail, Wholesale Canada, Canadian Service Sector, USWA, Local 440* (1998), 38 OR (3d) 448 (CA) ("***Ogden***") at para 4). Kobo also contends that the appropriate test is whether the interests of justice support the suspension or stay.

[17] Having heard and considered the arguments put forward by HarperCollins and Kobo, as well as the opposing views of the Commissioner, I am not persuaded that there are reasons to depart from my conclusions in *Kobo Suspension* on the appropriate test to be applied on this Motion. As stated by both the FCA in *Mylan* and the Tribunal in *TREB*, the Tribunal has the discretion to handle stays of its own proceedings pending appeal using the test it considers appropriate. I remain of the view that the Tribunal should continue to apply the *RJR-MacDonald* test when it is asked to stay or adjourn a proceeding pending an appeal of its own interlocutory decisions and that, subject to my comments below on the evolution of the case law, it is the preferable test to be used by the Tribunal in assessing the merits of HarperCollins' Motion.

a. Test for HarperCollins' Motion

[18] I essentially adopt the analysis developed in *Kobo Suspension* at paras 27-36. As pointed out by the Commissioner, in all cases except *TREB*, the Tribunal has always applied the tripartite test set out in *RJR-MacDonald* when requested to adjourn a matter pending an appeal of its decisions. In *RJR-MacDonald*, the SCC held that, to issue an order for stay or injunctive relief, a court must first be satisfied that there is a serious issue to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the injunction were refused. Third, an assessment must be made as to the "balance of convenience", which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits (*Kobo Suspension* at para 24; *The Commissioner of Competition v Parkland Industries Ltd*, 2015 Comp Trib 4 ("***Parkland***") at para 26).

[19] I find no grounds not to follow my recent conclusions in *Kobo Suspension* and the previous decisions of the Tribunal to the same effect, issued by Mr. Justice Rothstein in *D & B Companies of Canada Ltd v Canada (Director of Investigation and Research)*, [1994] CCTD No 17 ("***D & B***") at para 5, aff'd (1994), 58 CPR (3d) 342 (FCA) ("***D & B FCA***") at para 18, and by Madam Justice Dawson in *Commissioner of Competition v Sears Canada Inc*, 2003 Comp Trib 20 ("***Sears***") at paras 8-11.

[20] More specifically, for the reasons detailed in *Kobo Suspension*, I am still of the view that the Tribunal's approach in *D & B* and *Sears* has not been overtaken by the FCA's decision in *Mylan*. As indicated in *Kobo Suspension*, the FCA in *Mylan* specifically referred to its previous decision in *D & B FCA* and recognized that Mr. Justice Rothstein's decision in *D & B* represented the Tribunal's different (but still entirely valid) determination of what factors the Tribunal should consider when asked to adjourn a hearing before it (*Kobo Suspension* at para 30). In *Mylan*, the FCA confirmed that the Tribunal could, in the exercise of its discretion, resort to the *RJR-MacDonald* test in determining whether to grant an adjournment of its own proceedings pending an appeal of one of its interlocutory orders.

[21] I make the following additional observation. It is true that, in *Mylan*, the FCA distinguished between situations where the FCA was enjoining another body from exercising its jurisdiction and others where the Court was deciding not to exercise its own jurisdiction until later. The FCA held that, when it is deciding whether to delay its own hearings pending another appeal, the "interests of justice" should govern. I note that *Mylan* was a situation where AstraZeneca was asking the FCA to adjourn its hearing until the SCC decided another appeal in a similar case involving different parties, but where AstraZeneca was not directly involved. Arguably, AstraZeneca did not have the option of going to the SCC to seek a stay of its own case before the FCA. However, the situation differs in the current case. HarperCollins is asking the Tribunal to suspend its own proceedings pending the FCA's determination of HarperCollins' own appeal of the interlocutory Summary Dismissal Decision. In this case, HarperCollins elected to bring its Motion before the Tribunal, but HarperCollins could also have gone to the FCA and asked that Court to stay the Application pending the Appeal. Based on *Mylan*, the FCA would then have applied the *RJR-MacDonald* test to determine whether it should enjoin the Tribunal from exercising its jurisdiction. To echo the observation made by Mr. Justice Rothstein in *D & B*, "I do not understand why the Tribunal, in considering this adjournment application, would apply different principles than the Federal Court of Appeal on the stay application, both relating to the same proceedings" (*D & B* at para 5). It would certainly be strange that, had HarperCollins sought a stay of the Application at the FCA, it would have been subject to the *RJR-MacDonald* test but, because it is now raising it before the Tribunal, it would be subject to the different, and arguably less stringent, "interests of justice" test.

[22] Moreover, by rejecting HarperCollins' Dismissal Motion, the Tribunal confirmed that, in its view, the Application could go ahead and be considered on the merits. HarperCollins now asks the Tribunal not to proceed with the disposition of the Application. Seeking a stay of the Application is therefore analogous to seeking to suspend the effect of the Tribunal's interlocutory decision dismissing HarperCollins' Dismissal Motion. In other words, the stay sought by HarperCollins would have the same effect as requesting the FCA to suspend the Tribunal's Summary Dismissal Decision being appealed and to enjoin the Tribunal from carrying on its mandate and from exercising the powers granted to it by Parliament, pending the Appeal.

[23] Such a suspension of a legally binding and effective decision and of the Tribunal's statutory right to exercise its jurisdiction is most significant (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 ("***Janssen 1***") at para 20; *Mylan* at para 5). In my view, this commands the application of the *RJR-MacDonald* test. This does not correspond, in my opinion, to the type of situations envisaged by the FCA in *Mylan* for the interests of justice test. In *Mylan*, the FCA was asked to adjourn its own proceedings pending the result of an appeal before the SCC in another case involving different parties but similar issues. The current Motion is also different from the situation in *Kobo FC* where the Federal Court was the only court able to issue a stay of its own proceedings pending a parallel decision of the Tribunal. In the Kobo JR Application, Kobo did not have the option to go to another court to obtain its stay.

[24] I am also of the view that adopting the more demanding test of *RJR-MacDonald* in situations like this one is consistent with the Tribunal's enabling legislation. In particular, it echoes the imperative language contained at subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) ("**CTA**"), which imposes a mandatory obligation on the Tribunal to deal with matters "as informally and as expeditiously as the circumstances and considerations of fairness permit" (*D & B FCA* at paras 12, 18). As I mentioned in *Kobo Suspension*, subsection 9(2) is an overarching consideration which governs how the Tribunal shall handle all proceedings before it. The Tribunal should not lightly decide to adjourn or suspend hearings and proceedings before it, and resorting to the *RJR-MacDonald* test to determine whether to grant a suspension pending an appeal of its interlocutory orders is in line with the principle established by this provision (*Kobo Suspension* at para 32).

[25] Finally, I reiterate that the "interests of justice" test can be traced back to paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 ("**FC Act**"). Whereas this provision explicitly empowers the FCA and the Federal Court to stay proceedings where "it is in the interest of justice", no such provision is found in the CTA or in the Act, which define the statutory powers conferred upon the Tribunal by Parliament. I am mindful of the existence of subsection 8(2) of the CTA which, as counsel for Kobo rightly observed, confirms that the Tribunal has, with respect to "the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record". I would add that subsection 8(1), described by the SCC as "the basis of the Tribunal's jurisdiction" (*Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 at 411), further provides that the Tribunal generally has jurisdiction to hear and determine all applications made under Part VIII of the Act "and any related matters". I accept that, given the silence of the CTA on this specific point, the Tribunal's power to stay its own proceedings pending appeal may arguably find its source in section 8 of the CTA. However, it does not flow from that provision that the Tribunal, as a tribunal created by statute, enjoys the same statutory powers specifically granted by the FC Act to the Federal Court and to the FCA to stay their respective own proceedings "in the interest of justice".

[26] That said, I of course acknowledge that the Tribunal has the discretion to invoke the interests of justice even in the absence of a specific statutory provision enabling it to do so. As Madam Justice Simpson said in *TREB*, it is "open to the Tribunal to follow the [FCA's] lead and consider the interests of justice" (*TREB* at para 19).

[27] In its submissions, counsel for Kobo claims that, in his December 2014 decision to continue the suspension of Kobo's section 106 application (*Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 21 ("***Kobo 2014***")), Mr. Justice Rennie "appeared to have applied the interests of justice test". I do not share this reading of the *Kobo 2014* decision. True, the Tribunal stated in its reasons that continuing the suspension pending the determination of Kobo's appeal of the Tribunal's Reference Decision to the FCA was "a pragmatic and cost-effective approach which takes into consideration the factors set out in subsection 9(2) of the *Competition Tribunal Act*" (*Kobo 2014* at para 4). However, nowhere in the decision did the Tribunal consider whether the more demanding *RJR-MacDonald* test or the lower "interests of justice" test applied. In my view, it is not possible to decipher from Mr. Justice Rennie's reasons whether he turned his mind to a particular test before adopting the "pragmatic and cost-effective approach" he ultimately retained.

[28] As indicated above, the only occasion where the Tribunal has decided against applying the *RJR-MacDonald* test in determining whether to suspend one of its proceedings is the *TREB* decision. In that case, Madam Justice Simpson, in the exercise of her discretion, found that requiring the applicant to demonstrate irreparable harm to secure an adjournment would be "unduly onerous". The Tribunal therefore declined to use the tripartite test, determined that it would follow the FCA's decision in *Mylan* and considered the "interests of justice". In doing so, Madam Justice Simpson emphasized the particular circumstances of that case, notably the fact that the suspension was requested shortly before the scheduled hearing, at a time where the parties were about to spend significant resources to update the evidence in preparation for an imminent hearing. As detailed below, I consider that the context of this Motion is vastly different from the situation faced by Madam Justice Simpson in *TREB*.

[29] For all those reasons, I find that the appropriate test to assess the merits of HarperCollins' Motion is the *RJR-MacDonald* test.

b. Interests of justice

[30] That being said, developments in the case law since the Tribunal's November 2015 decision in *Kobo Suspension* lead me to make the following remarks on the interface between the *RJR-MacDonald* and the "interests of justice" tests.

[31] As discussed above, counsel for HarperCollins referred the Tribunal to various decisions of the ONCA stating that the overriding question in assessing the three components of the *RJR-MacDonald* test is "whether the moving party has shown that it is in the interests of justice to

grant a stay" (*Essar Steel* at para 60; *BTR Global* at para 16; *Ogden* at para 4). In light of these decisions, HarperCollins argues that the "interests of justice" and *RJR-MacDonald* tests are in fact similar. Conversely, the Commissioner relies on the jurisprudence of the FCA, and on the distinction established in *Mylan* between the two tests. Furthermore, he notably refers to *Janssen 1*, where the FCA disagreed with the submission that "the overall test [to grant a stay] is whether a stay is in the 'interests of justice'", affirming instead that the party seeking a stay must establish all three requirements of the *RJR-MacDonald* test (*Janssen 1* at paras 13-14).

[32] None of the parties has however referred, in its written or oral submissions, to the most recent pronouncement of the SCC on the *RJR-MacDonald* test, made three months ago in *Google*. In that decision, Madam Justice Abella, speaking for a majority of the Court, described the *RJR-MacDonald* test as follows (at para 25):

> [25] *RJR—MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. <u>The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.</u>
>
> [emphasis added]

[33] In that decision, the SCC thus reminded that an overarching objective animates the *RJR-MacDonald* test, and that courts need to be satisfied that an interlocutory injunctive relief (and by extension, a stay) should only be granted if, ultimately, the relief is just and equitable, taking into consideration the particular circumstances of any given case. I observe that the language used by the SCC in *Google* (i.e., "just and equitable in all of the circumstances of the case") is very close to words used by counsel for HarperCollins in her submissions and by the Saskatchewan Court of Appeal in *Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Ltd Partnership*, 2011 SKCA 120 ("***Potash***"), cited by HarperCollins. In *Potash*, the Court said that "[t]he ultimate focus of the court must always be in the <u>justice and equity</u> of the situation in issue" [emphasis added] (*Potash* at para 26). Moreover, while the words used by the SCC are certainly not identical, the statement of Madam Justice Abella in *Google* is also, to a certain extent, reminiscent of the "interests of justice" language used by the ONCA in *Essar Steel*, *BTR Global* and *Ogden* to describe the paramount objective of the *RJR-MacDonald* test.

[34] I am not saying that the SCC decision in *Google* has changed the well-accepted three-prong test of *RJR-MacDonald* or superimposed an additional consideration over it. Nor do I suggest or imply that the words "just and equitable" used by the SCC in *Google* have the same

meaning as the "interests of justice" concept used by the ONCA, or that the SCC indirectly intended to revisit the dual-track approach identified by the FCA in *Mylan*. Such questions go beyond the scope of issues raised in this Motion and are better left for another day.

[35] But the SCC decision in *Google* at least appears to reinforce that, in exercising their discretion to grant a stay or an injunction, the courts (and the Tribunal) need to be mindful of overall considerations of justice and equity, and that the *RJR-MacDonald* test may not be simply boiled down to a box-ticking exercise of the three components of the test. Arguably, it may support the view that the dividing frontier between the *RJR-MacDonald* and the "interests of justice" test should perhaps be seen more like a dotted line than a solid boundary, with the latter test somehow permeating through to the former.

[36] For that reason, and for the sake of completeness, I will therefore also consider, in my analysis, the "interests of justice" test identified in *Mylan*, and assess whether, in the circumstances of this case, it would be justified to grant the stay sought by HarperCollins if the appropriate test was assumed to be the "interests of justice".

c. Relevant binding case law

[37] I need to pause a moment to clarify which decisions are binding upon the Tribunal. As reflected in the paragraphs above, the parties in this case do not rely on the same legal sources to support their respective positions. In the context of this Motion, HarperCollins rests heavily on precedents from the ONCA, whereas the Commissioner refers mostly to decisions from the FCA.

[38] It is fair to say that there are significant differences in the case law emanating from these two appellate courts with respect to the interpretation and application of the *RJR-MacDonald* test. In fact, the *RJR-MacDonald* test is far from being similarly treated in the federal courts and in other courts across Canada. For example, the "interests of justice" dimension, expressly recognized by the ONCA in *Essar Steel* and *BTR Global* as the overarching objective of the test, appears to have been rejected by the FCA in *Janssen 1*. In addition, as indicated in Robert J. Sharpe, *Injunctions and Specific Performance*, Looseleaf (Toronto: Canada Law Book, 1992) ("***Sharpe***"), the FCA has said that evidence of irreparable harm must be clear and not speculative, and that the burden lies on the party seeking a stay to show that irreparable harm will result, not simply that harm may arguably result (*Sharpe* at 2.417). However, "most other courts have adopted a more flexible approach" (*Sharpe* at 2.418). In *Potash*, the Saskatchewan Court of Appeal aptly summarized the different perspectives of the various appellate courts on the irreparable harm prong of the *RJR-MacDonald* test: there is a "wide spectrum" of approaches on the standard of proof for irreparable harm, said the Court, and decisions of the FCA are "at the far end of the range", in requiring evidence that must be clear and not speculative (*Potash* at para 51).

[39] Which legal precedents must the Tribunal then follow and apply?

[40] It is well-recognized that the rule of *stare decisis* is based on hierarchy: "lower courts are bound to follow decisions rendered by the courts that have the power to reverse them" (*R v Vu*, 2004 BCCA 230 at para 27). In a federal state like Canada, the hierarchy of precedents is limited by the territorial jurisdiction of each court. Since appellate courts only have the power to reverse lower courts based in their province, their decisions have no binding force outside of their own province. For example, Ontario provincial courts lower than the ONCA are all bound to follow a decision of the ONCA (*Canada Temperance Act, Re*, [1939] OR 570, aff'd (*Reference re Canada Temperance Act)*, [1946] AC 193 (PC)); but they are not bound by the decisions of the appellate courts of other provinces or by decisions of the FCA (*R v Beaney*, [1969] 2 OR 71 (Co Ct)). Similarly, since appellate courts other than the FCA have no power to reverse the Federal Court, their decisions have no binding force on that Court. In other words, the Federal Court is bound by FCA decisions, but not by decisions of other appellate courts across the country.

[41] As the SCC stated in *Wolf v The Queen*, [1975] 2 SCR 107 ("***Wolf***"), "[a] provincial appellate court is not obliged, as a matter either of law or of practice, to follow a decision of the appellate court of another province unless it is persuaded that it should do so on its merits or for other independent reasons" (*Wolf* at 109; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604 at para 108). The principle of *stare decisis* provides that, apart from the SCC, no appellate court outside a given province has the power to overturn a court decision issued within the province (*Wolf* at 109). By the same token, the FCA itself is not bound by decisions of provincial Courts of Appeal (*Larkman v Canada (Attorney General)*, 2014 FCA 299 at para 58).

[42] This does not mean that decisions of provincial Courts of Appeal are not deserving of the greatest respect in the federal courts. They certainly are, and they can sometimes be persuasive. But they are not binding on the FCA or on the Federal Court. And when there are conflicting interpretations between the FCA and other appellate courts, the FCA and the Federal Court are bound to follow the teachings and precedents of the FCA.

[43] The same holds true for the Tribunal. Subsection 13(1) of the CTA provides that "an appeal lies to the [FCA] from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court". Furthermore, section 28 of the FC Act grants jurisdiction to the FCA to hear and determine applications for judicial review made in respect of the Tribunal's decisions. The FCA will assess the legality of the Tribunal's pronouncements in light of its own jurisprudence and precedents, not those of the ONCA or other provincial appellate courts.

[44] Since only the FCA has the "power to reverse" the Tribunal, the Tribunal is therefore bound to follow the decisions of the FCA, but not those of the ONCA. Stated otherwise, the ONCA stands outside the hierarchy of courts binding the Tribunal. There may certainly be compelling reasons why the Tribunal ought to try to conform with decisions of the ONCA or of appellate courts other than the FCA when it is persuaded that it should do so on their merits or for other independent reasons. However, in situations where conflicting interpretations arise

between the FCA and provincial appellate courts, the Tribunal is required to follow the guidance of the FCA. This is what I will do in considering this Motion.

B. The *RJR-MacDonald* test is not met

[45] Turning to the *RJR-MacDonald* test, I need to determine whether HarperCollins' Motion meets the elements of the three-pronged test for granting a stay. The test is conjunctive, and requires HarperCollins to demonstrate that: (i) there is a serious issue to be tried; (ii) it will suffer irreparable harm if no stay is granted and the Application continues; and (iii) the balance of convenience favours the granting of the suspension. Furthermore, as recently stated by the SCC in *Google*, I must assess whether the granting of the stay would ultimately be "just and equitable in all of the circumstances of the case", which will "necessarily be context-specific" (*Google* at para 25). I note that, in setting out its arguments under its "interests of justice" approach, HarperCollins in fact deals with the "serious issue", "irreparable harm" (in terms of substantial prejudice) and "balance of convenience" (through the alleged absence of prejudice to the Commissioner) elements of the *RJR-MacDonald* test.

[46] For the reasons that follow, I conclude that HarperCollins has failed to satisfy the requirements of the tripartite test. More specifically, I am not satisfied that irreparable harm will arise if the Application is not suspended. Nor am I convinced that the balance of convenience favours HarperCollins. In those circumstances, it would not be just and equitable to grant a temporary suspension of the Application.

a. General requirements for a stay

[47] At the outset, it is important to underline that a stay of proceedings is an extraordinary, discretionary equitable relief. It is an exceptional remedy, and compelling circumstances are required to justify the intervention of the Tribunal and the exercise of the Tribunal's discretion to grant a stay pending an appeal of an interlocutory decision. The burden is on the moving party to demonstrate that the conditions of this exceptional remedy are met. In *Janssen 1*, Mr. Justice Stratas emphasized that the *RJR-MacDonald* test "is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing" (*Janssen 1* at para 20).

[48] The test is conjunctive and all three elements of the test must be met in order to grant relief. None of the branches can be seen as an "optional extra" (*Janssen 1* at para 19). It is trite law, in the FCA, that "failure of any of the three elements of the test is fatal" (*Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 212 ("***Ishaq***") at para 15).

[49] I accept that the three prongs of the test are not water-tight compartments, that they are somewhat interrelated and that they should not be assessed in total isolation from one another

(*University of California v I-Med Pharma Inc*, 2016 FC 606 at para 27, aff'd 2017 FCA 8; *Merck & Co Inc v Nu-Pharm Inc* (2000), 4 CPR (4th) 464 (FCTD) at para 13). However, this does not mean that one of the three compartments can be completely empty and compensated by the other two being filled to a higher level. There still needs to be something in each of the three compartments and, according to the FCA's jurisprudence, none of the three elements of the test can be entirely left aside and rescued by the other two. I observe that, whereas the ONCA has ruled that the failure to prove the existence of one element of the three-prong test does not necessarily imply that a stay cannot be granted (e.g., *Essar Steel*), the FCA's approach is more formalistic and requires that all elements of the *RJR-MacDonald* test be present in order to justify a stay.

[50] In the end, each matter must be addressed on its merits and, in balancing the various elements of the *RJR-MacDonald* test, the Tribunal needs to be satisfied that granting a stay is just and equitable in all the circumstances of the case.

b. Elements of the *RJR-MacDonald* test

i. Serious issue to be tried

[51] The first part of the tripartite test is whether the evidence before the Tribunal is sufficient to satisfy it that there is a serious issue to be tried. The threshold is a low one. While a preliminary assessment of the merits of the case is required, a prolonged examination of the merits is generally neither necessary nor desirable (*RJR-MacDonald* at paras 54-55). Once the Tribunal determines that the underlying Appeal is neither vexatious nor frivolous, it should proceed to the second part of the test.

[52] For the purpose of this Motion, the Commissioner concedes that HarperCollins' Appeal raises a serious issue to be tried. I agree that it does. The first element of the *RJR-MacDonald* test is accordingly met.

ii. Irreparable harm

[53] Under the second prong of the test, the question is whether HarperCollins has provided clear and non-speculative evidence that it will suffer irreparable harm between now and the time its Appeal is disposed of. In support of its position that its request for suspension should be granted in the "interests of justice", HarperCollins relies on two heads of "substantial prejudice", which it considers determinative of its Motion: they are the "risk of attornment" and the "unnecessary expenditure of resources" to be incurred if the FCA decides the Appeal in HarperCollins' favour and strikes the Application. These two factors will be considered as part of my analysis of the second element of the *RJR-MacDonald* test, irreparable harm. The alleged absence of prejudice to the Commissioner or to competition if the suspension is granted will be discussed under the balance of convenience part of the test, as it relates to the harm claimed by

the Commissioner, and not by HarperCollins.

[54] I will deal with the risk of attornment and the unnecessary expenditure of resources in reverse order. Before doing so, it is useful to summarize the legal requirements for a finding of irreparable harm.

1. Legal requirements

[55] The SCC held in *RJR-MacDonald* that "irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm which either cannot be quantified in monetary terms or which cannot be cured (*RJR-MacDonald* at para 64).

[56] According to the FCA, irreparable harm is a very strict test. As stated by the Tribunal in *Parkland*, irreparable harm is harm that must be "established on the basis of clear and not speculative evidence" which demonstrates how such harm will occur if the relief is not granted (*Parkland* at para 48). It is indeed well-established in the FCA that irreparable harm in the context of injunctive relief must flow from clear and non-speculative evidence (*AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505 at para 56, aff'd 2011 FCA 211; *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 at paras 59-61, aff'd 2005 FCA 390; *Syntex Inc v Novopharm Ltd* (1991), 36 CPR (3d) 129 (FCA) at 135).

[57] Simply claiming that irreparable harm is possible is not enough. The jurisprudence of the FCA states that "[i]t is not sufficient to demonstrate that irreparable harm is 'likely' to be suffered" (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 ("***US Steel***") at para 7). There must be evidence that the moving party will suffer irreparable harm if the injunction or the stay is denied (*US Steel* at para 7; *Centre Ice Ltd v National Hockey League* (1994), 53 CPR (3d) 34 (FCA) at 52). When the alleged harm has not yet occurred and is apprehended, harm can be inferred, but there must still be a high degree of probability that the harm will in fact occur (*Parkland* at paras 50-52).

[58] The FCA has also frequently insisted on the attributes and quality of the evidence needed to establish irreparable harm. The evidence must be more than a series of possibilities, speculations or general assertions (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 ("***Gateway City Church***") at paras 15-16). "Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 ("***Glooscap***") at para 31). It is not enough "for those seeking a stay […] to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable" (*Stoney First Nation v Shotclose*, 2011 FCA 232 ("***Stoney First Nation***") at para 48). Quite the contrary, there needs to "be evidence at a convincing level of particularity that demonstrates a real probability that

unavoidable irreparable harm will result unless a stay is granted" (*Gateway City Church* at para 16, citing *Glooscap* at para 31).

[59] In *Janssen 1*, the FCA stated that a party seeking a suspension relief must demonstrate in a detailed and concrete way that it will suffer "real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Janssen 1* at para 24). In that decision, Mr. Justice Stratas added that "[i]t would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief […] [or] if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief" (*Janssen 1* at para 24). In that case, Janssen was seeking an order from the FCA suspending the remedy phase of proceedings before the Federal Court, pending its appeal of that Court's infringement finding. Janssen was arguing that it would suffer irreparable harm if the remedy phase of the proceedings went ahead prior to its appeal being determined and that the Federal Court's process should therefore be suspended. The FCA refused to suspend the Federal Court's proceedings as there was not sufficient probative evidence of irreparable harm.

[60] The question for the Tribunal is therefore whether the substantial prejudice identified by HarperCollins is clear, real and not speculative, and reaches the level of irreparable harm defined by the FCA, as opposed to a simple inconvenience. As it does in all cases before it, the Tribunal will assess the evidence on a balance of probabilities standard in conducting its analysis. As I mentioned in the Summary Dismissal Decision and *Parkland*, the Tribunal always remains guided by the principles established in *FH v McDougall*, 2008 SCC 53 ("***McDougall***"), where the SCC stated that "evidence must be scrutinized with care by the trial judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46).

2. Unnecessary expenditure of resources

[61] I deal first with the second head of irreparable harm claimed by HarperCollins, namely the resources (essentially in the form of litigation expenses) that it will unnecessarily have to spend if the Application is not stayed. HarperCollins submits that, without a suspension, it (as well as the other parties and the Tribunal) will risk wasting resources since several discovery and preparatory steps will need to be undertaken for the disposition and hearing of the Application, and that these steps could prove to be totally unnecessary if the Appeal is granted. In their submissions, HarperCollins and Kobo both refer more specifically to various procedural steps such as the delivery of affidavits of documents, document productions, examinations for discovery and the preparation of motions relating to these discovery steps.

[62] This claim of irreparable harm can be easily dealt with: prejudice in terms of legal costs and litigation expenses simply does not constitute irreparable harm.

[63] It is well-recognized by the FCA that expenses to be incurred for the participation in legal proceedings, or the time and money required to prepare for and attend a hearing, cannot in itself constitute irreparable harm within the meaning of the *RJR-MacDonald* test (*Canada (Human Rights Commission) v Malo*, 2003 FCA 466 ("***Malo***") at paras 15, 20). Even the "mere fact of being forced to participate in a hearing that could be ruled invalid" does not amount to irreparable harm (*Malo* at para 22). The likelihood of wasted time and effort in preparing for two proceedings is also not considered irreparable harm (*Redeemer Foundation v Canada (Minister of National Revenue)*, 2005 FCA 138 ("***Redeemer***") at para 8). In *Janssen Inc v Abbvie Corporation*, 2014 FCA 176 ("***Janssen 2***"), Mr. Justice Stratas further added that "legal and other expenses without 'abnormal, harsh consequences beyond the norm' do not qualify as irreparable harm, as these can be quantified in damages" (*Janssen 2* at para 24, citing *Laperrière v D&A MacLeod Company Ltd*, 2010 FCA 84 at para 21).

[64] This type of prejudice can be compensated in money terms, through a costs order. The fact that it could perhaps not be entirely compensated is not a ground to qualify it as irreparable harm. Indeed, the inability of a party to recover the costs associated with a hearing does not amount to irreparable harm (*Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at para 72).

[65] I am unaware of FCA, Federal Court or Tribunal case law where costs, legal expenses or being forced to participate in a hearing process or discovery steps has been recognized as irreparable harm. HarperCollins and Kobo have not cited any. Indeed, in *Kobo Suspension*, the issue of whether litigation costs unnecessarily incurred could constitute irreparable harm arose in connection with Kobo's motion to suspend its section 106 application. In rejecting such costs as a head of irreparable harm, I referred to the Tribunal's conclusions in both *D & B* and *Sears*, where it found that such additional expenses could amount to an inconvenience but did not equate with irreparable harm. It is again worth repeating the words of Madam Justice Dawson in *Sears* at para 14, made in the context of a motion for adjournment pending appeal:

> [14] […] In the event that the Tribunal hearing had concluded, and Sears had been unsuccessful before the Tribunal but was later successful on its interlocutory appeal to the Federal Court of Appeal, it would be within the jurisdiction of the Court of Appeal to remit the entire matter for rehearing, if satisfied that was appropriate and necessary. This would undoubtedly amount to serious inconvenience but, as Mr. Justice Rothstein, sitting as the presiding judicial member of the Tribunal, wrote in *D & B Companies, supra* at page 4 of the report:
>
> > The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterized as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable

> harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the respondent if indeed examinations and cross-examinations have to change.

[66] I digress a moment to point out that HarperCollins and Kobo also refer to the significant waste of judicial and financial resources by the Commissioner and the Tribunal. However, these cannot be considered as irreparable harm, as only the harm suffered by the applicant can be considered at this stage of the analysis (*RJR-MacDonald* at paras 62, 84).

[67] Kobo claims that it is important to distinguish this Motion from the situation in *Kobo Suspension*. I am not convinced by that argument. I acknowledge that the situation of HarperCollins differs from Kobo's factual context in *Kobo Suspension*, where at least part of the efforts and expenses would not have been spent to no avail if Kobo's section 106 application moved ahead pending its appeal to the SCC. Kobo submits that the situation is markedly different for HarperCollins: it enjoys an appeal as of right and, if the FCA grants the Appeal and finds that the Tribunal does not have jurisdiction to grant the relief sought in the Application, a significant amount of time, money and judicial resources will have been wholly wasted in support of an application that will not proceed at all. What Kobo fails to say, however, is that, immediately after having made the observation about legal resources not being totally wasted in *Kobo Suspension*, I referred to the above extract from *Sears* and went on to note that a demonstrated waste of judicial and parties' resources does not, in any event, amount to irreparable harm (*Kobo Suspension* at paras 55-56).

[68] I am mindful of the fact that, if HarperCollins is successful in its Appeal, the parties might have pointlessly spent resources in continuing the discovery steps and the preparation for the hearing of the Application. However, not only has this not been recognized as irreparable harm but, in this case, this alleged harm is merely speculative, being unsupported by any evidence. I cannot help but underscore that no affidavit evidence was filed by HarperCollins to support its claim that it will suffer substantial prejudice as a result of a wasted expenditure of resources. We are here in that landscape of "assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence", repeatedly found insufficient by the FCA to anchor a claim of irreparable harm and to justify a stay of proceedings (*Glooscap* at para 31; *Stoney First Nation* at paras 48-49).

[69] When a litigant comes knocking on the Tribunal's door to seek that sort of exceptional

remedy, it must do more than identify harm or inconvenience in its submissions. It must demonstrate (along with the other branches of the *RJR-Macdonald* test) that "harm will actually be suffered" and "will not be able to be repaired later", and it must do so "by providing evidence concrete or particular enough to allow the Court to be persuaded on the matter" (*Stoney First Nation* at para 49). It is a pre-requisite for any litigant seeking a stay, be it a private party or the Commissioner, to adduce sufficiently clear, convincing and non-speculative evidence supporting its allegations of harm (*Parkland* at paras 86-99). This has not happened here. There is an absence of any clear and non-speculative evidence demonstrating HarperCollins' claim of unnecessary expenditure of resources or showing that these cannot be compensated or cured. In light of the FCA jurisprudence mentioned above, this basis alone also suffices to reject this claim of irreparable harm.

3. Risk of attornment

[70] I now turn to the risk of attornment.

[71] HarperCollins claims that, without a suspension of the Application, it (i.e., HarperCollins US) risks attorning to the Tribunal's *in personam* jurisdiction. HarperCollins submits that it filed its Response and its Dismissal Motion expressly "without attornment to or acceptance of the jurisdiction of the Tribunal over this proceeding and the Respondents". HarperCollins argues that, without the requested suspension or stay, it will be obligated to participate in steps advancing the Application toward a hearing during the pendency of the Appeal, and thus faces substantial prejudice from the risk of attornment to the Tribunal's jurisdiction in so doing. This, according to HarperCollins, constitutes irreparable harm.

[72] It is not disputed that HarperCollins has effectively challenged the Tribunal's subject-matter jurisdiction. This was the issue at stake in its Dismissal Motion and this is the object of the Appeal. The risk of attornment raised by HarperCollins in this Motion revolves solely around the issue of the Tribunal's *in personam* jurisdiction over it. I pause to mention that, in my view, the separate concepts of attornment and *in personam* jurisdiction may have been conflated at times in the parties' submissions and during the hearing of this Motion. It is worth reminding that, in *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 ("***Van Breda***"), the SCC adopted the three bases established by the ONCA in *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA) on which a court or tribunal can assert *in personam* jurisdiction over an out-of-province defendant:

> [19] There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra- provincial defendant who consents, whether by voluntary submission, attornment by appearance

> and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

[73] "Attornment" thus constitutes only one example of consent-based *in personam* jurisdiction. As such, even if it were determined, in a subsequent proceeding, that HarperCollins US' conduct does not amount to attornment in light of its express reservation of rights, it may still be open to the Tribunal to assert *in personam* jurisdiction over HarperCollins US under a "presence-based" or an "assumed" jurisdiction approach.

[74] Based on case law from the ONCA (*Essar Steel*; *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2014 ONCA 546 ("***Stuart Budd***"); *MJ Jones Inc v Kingsway General Insurance Co* (2004), 72 OR (3d) 68 (CA) ("***MJ Jones***")), HarperCollins submits that, for a 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. It argues that prejudice can arise from the possibility of attornment, and that such a possibility is sufficient to favour a stay. HarperCollins further says that its risk of attornment is compounded by the fact that the Commissioner has refused to provide an undertaking not to argue that steps taken by HarperCollins in connection with the Application constitute attornment to the *in personam* jurisdiction of the Tribunal.

[75] Before I deal with HarperCollins' arguments, I first need to address the Commissioner's position that, by its Response and its conduct in the Application so far, HarperCollins would have already attorned to the Tribunal's *in personam* jurisdiction over it.

a. Commissioner's claim of attornment

[76] The Commissioner submits that the alleged "risk of attornment" does not arise because (i) there is no issue of attornment with respect to HarperCollins Canada, as it is a Canadian corporation carrying on business in Canada; and (ii) HarperCollins US has already attorned to the Tribunal's jurisdiction as a result of responding to the Application on its merits and invoking the authority of the Tribunal and of the FCA. The Commissioner claims that, since attornment has already happened, there can be no irreparable harm flowing from a risk of attornment, as no such risk exists.

[77] I do not dispute the Commissioner's conclusion with respect to HarperCollins Canada. I have, however, serious reservations with respect to the primary position taken by the Commissioner on the attornment of HarperCollins US.

[78] The Commissioner contends that the case law is abundantly clear that, having filed a Response where it engaged in substantive issues raised by the Commissioner in the Application, HarperCollins US has thereby consented to the Tribunal's jurisdiction by its conduct. The Commissioner refers to decisions of the Tribunal in *Stargrove Entertainment Inc v Universal*

Music Publishing Group Canada, 2015 Comp Trib 26 ("***Stargrove***"), of the ONCA in *Van Damme v Gelber*, 2013 ONCA 388 ("***Van Damme***") and *MJ Jones*, of the Alberta Court of Queen's Bench in *Norex Petroleum Limited v Chubb Insurance Company of Canada*, 2008 ABQB 442 ("***Norex***") and of the British Columbia Supreme Court in *Imagis Technologies Inc v Red Herring Communications Inc*, 2003 BCSC 366 ("***Imagis***").

[79] For example, in *Norex*, the Alberta Court of Queen's Bench cited with approval authors who stated that "[o]nce a party takes steps to contest the merits of the claim, even if those steps are taken in error, or with express notice of the intention to challenge jurisdiction, the party will be precluded from challenging the jurisdiction of the court" (*Norex* at para 48). In *Imagis*, the British Columbia Supreme Court noted that, in relation to attornment, conduct supersedes intention and found that, if a party goes further than a simple appearance and engages in steps other than challenging jurisdiction, such actions will be regarded as voluntary acceptance of the court's jurisdiction (*Imagis* at paras 8-9). I observe that the Commissioner did not refer to any decisions of the FCA or the Federal Court on the issue of attornment.

[80] The problem with the Commissioner's argument is that it ignores the express reservation of rights inserted by HarperCollins in its Response and in its Dismissal Motion. Indeed, none of the cases relied on by the Commissioner addresses a situation where, as in this case, a defendant has expressly reserved its rights to challenge a court's *in personam* jurisdiction over it. I have closely reviewed the decisions cited by the Commissioner and find no indication that such a situation existed in *Stargrove*, *Van Damme*, *MJ Jones*, *Norex* or *Imagis*.

[81] I acknowledge that, according to the jurisprudence, a defendant cannot at the same time challenge the subject-matter or *in personam* jurisdiction of a court and engage in the merits of a proceeding. However, in this case, HarperCollins has prefaced its Response and its Dismissal Motion (and even this Motion) with an express reservation of rights. In my view, given the language used by HarperCollins, there is no doubt that this reservation of rights relates to the Tribunal's jurisdiction over both the subject-matter of the dispute and the parties (i.e., "subject-matter" and "*in personam*" jurisdiction). The Commissioner has been unable to offer any authority supporting the proposition that the conduct of a defendant can amount to an attornment to jurisdiction even in a case where an expressed reservation of rights has been made. When asked about this at the hearing before the Tribunal, counsel for the Commissioner could only refer to a passage from *Imagis* where the British Columbia Supreme Court stated that "[a]ttornment has not been avoided because the defendants pleaded a challenge to the assumption of jurisdiction in the defence" (*Imagis* at para 9). I agree with HarperCollins that nothing in this extract allows one to conclude that *Imagis* involved an explicit reservation of the defendant's right to challenge the *in personam* jurisdiction, similar to HarperCollins'.

[82] In my opinion, without any authority supporting the Commissioner's proposition, the Tribunal cannot simply ignore, in the context of this Motion, the express reservation of rights contained in HarperCollins' Response and Dismissal Motion. I do not agree that the explicit words used by HarperCollins can be qualified as innocuous "boilerplate" language having no

effect whatsoever on the question of attornment. I instead find that HarperCollins was careful in its Response, in its Dismissal Motion and in this Motion, and purposely prefaced its submissions with an express reservation of its rights to challenge the jurisdiction of the Tribunal over it.

[83] In the context of this Motion, I am therefore not prepared to accept that HarperCollins US has already attorned to the Tribunal's *in personam* jurisdiction. To be clear, in making this ruling, I should not be taken to have decided the merits of this jurisdictional issue, and in particular whether HarperCollins US has in fact already attorned to the Tribunal's *in personam* jurisdiction by its conduct, whether the Tribunal can otherwise assert *in personam* jurisdiction over HarperCollins US, or whether the express reservation of rights contained in its Response, Dismissal Motion and Motion can be successfully relied upon by HarperCollins US to oppose allegations that its conduct in the Application amounts to attornment. These will be matters to be decided by the Tribunal when (and if) HarperCollins effectively challenges the Tribunal's *in personam* jurisdiction over it, through an interlocutory motion or other appropriate proceeding in the context of the Application. But, on the record before me and for the purpose of this Motion, I am not persuaded by the Commissioner's submissions and authorities presented in support of his position that HarperCollins US has already attorned to the Tribunal's *in personam* jurisdiction.

[84] I concede that a more transparent approach would have been for HarperCollins to file both its Dismissal Motion based on an alleged lack of subject-matter jurisdiction and another motion challenging the Tribunal's *in personam* jurisdiction over it, or to file a Response dealing only with the jurisdictional issues. However, this does not mean that filing its Response and Dismissal Motion while expressly reserving its rights to challenge both *in personam* and subject-matter jurisdiction, as HarperCollins did in this case, necessarily amounts to attornment.

[85] The Commissioner further claims that HarperCollins has also attorned to the jurisdiction of the Tribunal by invoking the authority of the Tribunal in its Dismissal Motion and that of the FCA in its Appeal, neither of which relates to *in personam* jurisdiction. Once again, I am not persuaded by the Commissioner's proposition that filing a motion to strike alleging an absence of subject-matter jurisdiction can amount to attornment to *in personam* jurisdiction by HarperCollins, in the presence of an express reservation of rights. Stated differently, I do not accept that, in circumstances like these, the mere fact of challenging the subject-matter jurisdiction of a court can serve to take away a defendant's right to dispute the court's *in personam* jurisdiction over it. It would further imply that a foreign defendant would always have to first raise the lack of *in personam* jurisdiction before being able to raise a challenge of subject-matter jurisdiction (or, arguably, raise both challenges simultaneously). Again, the Tribunal is not aware of any case law establishing this principle, and the Commissioner has not referred to any.

[86] In brief, on the record before me and in light of the Commissioner's arguments and authorities, I am not ready to conclude that making an express reservation of one's rights to challenge *in personam* jurisdiction in every proceeding filed, as HarperCollins did, can be meaningless. However, I should add that I am not hereby suggesting that HarperCollins can surf

indefinitely on its express reservation of rights. At some point, it will have to come to shore and raise, through an appropriate proceeding before the Tribunal, the challenge it says it contemplates against the Tribunal's *in personam* jurisdiction.

b. HarperCollins' claims of irreparable harm

[87] That being said, assuming that HarperCollins has not already attorned to the Tribunal's *in personam* jurisdiction, I need to determine whether HarperCollins has met its burden of demonstrating that its alleged "risk of attornment" amounts to irreparable harm.

[88] Regarding this issue of attornment, HarperCollins relies on various decisions of the ONCA, notably *Stuart Budd* and *Essar Steel*, where the Court concluded that the possibility of being found to have attorned to jurisdiction creates some risk of irreparable harm to the moving party. In *Stuart Budd*, the ONCA stated that the Court seems to have an "unresolved position on this issue" (*Stuart Budd* at para 36), sufficient to create a possible risk of attornment. In *Essar Steel*, the ONCA said the following at para 51:

> [51] Over the past decade, judges of this court sitting in Chambers on stay motions have expressed different views about whether a party risks attorning to the jurisdiction of the Ontario court by performing court-ordered procedural steps in the face of the party's on-going challenge to the court's jurisdiction. Some decisions have viewed such participation as risking attornment, thereby creating some risk of irreparable harm: *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 2004 CanLII 6211 (ON CA), 72 O.R. (3d) 68, 242 D.L.R. (4th) 139 (C.A.), at paras. 27-31; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2014 ONCA 546 (CanLII), 122 O.R. (3d) 472, at paras. 29-36. On the other hand, in *Van Damme v. Gelber*, 2013 ONCA 388 (CanLII), 115 O.R. (3d) 470, at paras. 21-23, the court minimized any such risk from court-ordered participation, and in *Yaiguaje v. Chevron Corp*., at para. 11, MacPherson J.A. regarded any risk as a weak factor in the irreparable harm analysis.

[89] HarperCollins submits that only when a plaintiff provides an undertaking not to consider future steps by the defendant as an indicator of attornment to jurisdiction can the risk of attornment, and the irreparable harm deriving from it, be eliminated. In the current case, the Commissioner has refused to give such an undertaking, and HarperCollins argues that, without a stay of the Application, it will be forced to take steps and participate in the proceedings which could be considered as amounting to attornment, thereby suffering irreparable harm.

[90] I disagree. Further to my review of HarperCollins' arguments and of the evidence on the record before me, I am not persuaded that the prejudice allegedly flowing from HarperCollins' risk of attornment has the attributes of "irreparable harm", as these were developed and

established by the FCA. Furthermore, HarperCollins has not provided the required clear and non-speculative evidence to support any claims of harm on this front.

[91] First, I fail to see how irreparable harm arises in the case of HarperCollins. HarperCollins appears to equate the risk of attornment with irreparable harm. With respect, this is not what, in my view, the ONCA cases say. The irreparable harm considered by the ONCA in the decisions cited by HarperCollins is not the risk of attornment itself. The risk of attornment is simply the foundation of the irreparable harm. In other words, the irreparable harm is the prejudice flowing or resulting from that risk of attornment. The case law refers to the possibility of being found to have attorned, "thereby creating some risk of irreparable harm" (*Essar Steel* at para 51; *Stuart Budd* at para 36).

[92] In *BTR Global* and *MJ Jones*, the irreparable harm found by the ONCA was the fact that the risk of attornment would render the appeals or proposed appeals moot (e.g., a pending leave application to the SCC). Similarly, in *Essar Steel*, the alleged harm was that, without the granting of a stay, the moving party could be deprived of its right to seek leave to appeal. If the moving party was forced to attorn, it would render the leave to appeal to the SCC moot. In *Stuart Budd*, the harm resulting from being forced to choose between the risk of attornment and being in default for not filing a defence was the fact that the proposed appeal would be rendered moot, an incomplete record would result, and there would be no assurance that the final costs order would be returned.

[93] It is not the "risk of attornment" in and of itself that can constitute irreparable harm. It is rather the prejudice created by or flowing from that "risk of attornment". Likewise, one cannot simply equate "no undertaking not to raise a possible attornment" with irreparable harm, as suggested by HarperCollins. This means that the Tribunal has to look at the harm allegedly resulting from the risk of attornment (and not stop at the risk of attornment), in order to determine whether the alleged harm is irreparable, bearing in mind the attributes that such harm needs to feature in order to qualify as irreparable.

[94] There is no such irreparable harm here. Unlike the ONCA cases relied on by HarperCollins, there is no allegation that the risk of attornment in this case would render HarperCollins' Appeal moot. In fact, it is clear that it will not. The Appeal filed by HarperCollins relates to the Summary Dismissal Decision on the alleged lack of subject-matter jurisdiction of the Tribunal. This Appeal will not be affected by the risk of HarperCollins US attorning to the Tribunal's *in personam* jurisdiction. Even if HarperCollins is found to have consented to the *in personam* jurisdiction of the Tribunal, this will have no impact on the success or failure of the Appeal, as the Appeal is·not directed at that issue.

[95] In the current case, the only alleged harm apparently resulting from the risk of attornment relates to the further steps to be taken by HarperCollins to advance the Application and to lead up to the hearing on the merits, scheduled for November 2018. In its Memorandum, HarperCollins simply mentions that "[w]ithout the requested suspension or stay, HarperCollins

US will be obligated to participate in steps advancing the Application toward a hearing during the pendency of the Appeal, and thus faces substantial prejudice from the risk of attornment to the Tribunal's jurisdiction in so doing". I underline that, in its submissions, HarperCollins did not refer to any other manifestation of harm flowing from its alleged risk of attornment. Stated otherwise, the only "substantial prejudice" apparently linked to the risk of attornment identified by HarperCollins is the forced participation of HarperCollins in steps advancing the Application toward the hearing.

[96] As discussed above, it is well-recognized by the FCA that expenses to be incurred for the participation in legal proceedings, or the time and money required to prepare for and attend a hearing, does not constitute irreparable harm within the meaning of the *RJR-MacDonald* test (*Malo* at paras 15, 20, 22; *Redeemer* at para 8; *Janssen 2* at para 24). Therefore, it is clear that the only prejudice identified by HarperCollins as flowing from the alleged risk of attornment does not constitute irreparable harm.

[97] Second, I again observe that, in any event, no affidavit evidence has been provided by HarperCollins to support any allegations of harm resulting from the risk of attorning to the Tribunal's *in personam* jurisdiction. No affidavit from someone employed by HarperCollins US or HarperCollins Canada setting out the facts supporting the claims of irreparable harm has been filed with the Motion. No affidavit speaks to the prejudice linked to the risk of attornment that HarperCollins will suffer if the Application is not suspended. This, in and of itself, does not meet the requirements of clear and non-speculative evidence developed by the FCA.

[98] The Tribunal will not lightly delay a matter. Conversely, any litigant seeking a stay from the Tribunal should not lightly ask for one. It is trite law that a litigant who wishes to benefit from an exceptional equitable remedy like a stay must establish the facts supporting its request. More specifically, a litigant must attest to the irreparable harm claimed to be suffered. No matter how eloquent arguments from counsel may be, they cannot replace the need for the litigant to provide clear, convincing and non-speculative evidence of irreparable harm. In the circumstance of this case, such sworn evidence is just absent, and the lack of an affidavit from HarperCollins allowing me to find sufficient, reliable evidence in support of its allegations of irreparable harm is fatal to its claim.

[99] In the same vein, if, arguably, the "substantial prejudice from the risk of attornment" mentioned by HarperCollins in its Memorandum was meant to refer to some harm other than its participation in the disposition of the Application, I simply underscore that no evidence whatsoever has been provided by HarperCollins in that respect. In light of the principles established by the FCA in *Stoney First Nation*, *Gateway City Church*, *Glooscap* and *Janssen 1*, such a vague and general assertion unsupported by any level of particularity falls well short of the mark to constitute clear and non-speculative evidence of irreparable harm that could support a stay.

[100] Third, I would also add that any harm claimed by HarperCollins as resulting from a risk

of attornment is harm that was avoidable or could be avoided by HarperCollins. HarperCollins would have been able, with its express reservation of rights, to address the issue in its Response or to file a motion to strike the Application against it on the basis of a lack of *in personam* jurisdiction, but it decided not to do so. Furthermore, HarperCollins still has the option of filing such a motion, prior to engaging in further discovery steps for the disposition of the Application, again with its express reservation of rights. Harm that was avoidable or could have been avoided, or harm that a litigant can still avoid, is not irreparable harm allowing to obtain a serious relief like a stay of proceedings (*Janssen 1* at para 24). This is the case here.

[101] Moreover, I underline that, in my view, the ONCA decisions in *Stuart Budd* and *Essar Steel*, stating that a simple possibility of risk of attornment can support a finding of irreparable harm, cannot be reconciled with the FCA case law on irreparable harm. While the ONCA may have accepted that the simple possibility of a risk can be sufficient to ground a claim of irreparable harm, that approach has not been followed by the FCA. On the contrary, hypotheticals, assumptions and speculations are not sufficient to demonstrate irreparable harm (*Gateway City Church* at paras 15-16). The jurisprudence of the FCA, which binds the Tribunal, clearly states that the simple possibility of irreparable harm is not enough: there must be evidence that the moving party will suffer irreparable harm if the stay if not granted (*US Steel* at para 7). In other words, a simple possibility of attornment cannot meet the demanding threshold of irreparable harm. It may be that, according to the ONCA, irreparable harm is not a threshold as demanding and that a possible risk of attornment is sufficient to satisfy it. But this is not what the jurisprudence of the FCA says.

[102] Finally, I also agree with the Commissioner that HarperCollins' arguments on irreparable harm linked to a risk of attornment are speculative if they relate to the potential results of the Application or of a challenge to the Tribunal's *in personam* jurisdiction, as these are contingent on the outcome of future events which are not, and cannot be, known at this time. This, again, cannot support a finding of irreparable harm. It is true that, if proceedings are not suspended, the Tribunal may grant or deny the remedies sought by the Commissioner, but the result of the Application cannot be assumed to be a foregone conclusion. It is also impossible to predict how the Tribunal will rule on an eventual challenge by HarperCollins to the Tribunal's *in personam* jurisdiction over it, or how it will assess the conduct of HarperCollins and the impact of its express reservation of rights. Since it is uncertain whether these proceedings before the Tribunal will be successful or not, the harm resulting from a possible risk of attornment is currently only apprehended or alleged, and speculative. There is no clear and non-speculative evidence allowing me to make an inference that the alleged harm will in fact occur.

[103] In sum, considering all these factors and the circumstances of this case, I find that the alleged risk of attornment raised by HarperCollins does not support a finding of irreparable harm meeting the requirements established by *RJR-MacDonald* and its progeny.

[104] I make one last observation. The choice of the Commissioner to consider that HarperCollins US has already attorned to the Tribunal's *in personam* jurisdiction and to decline

to provide an undertaking not to claim that HarperCollins has attorned to the Tribunal's jurisdiction by reason of its conduct cannot, in my view, constitute a source of irreparable harm if no stay is granted and the Application continues.

[105] If the Commissioner is right in the end and if, despite the express reservation of rights, HarperCollins US is found to have already attorned to the Tribunal's *in personam* jurisdiction by filing its Response and its Dismissal Motion, no irreparable harm related to the risk of attornment will result if a stay of the Application is not granted. In this scenario, the risk of attornment would have already materialized at the time HarperCollins filed its Response. No question of irreparable harm caused by a risk of attornment without a suspension of the Application would arise as HarperCollins US would have already attorned to the Tribunal's *in personam* jurisdiction. Future steps taken by HarperCollins in the proceedings of the Application pending the Appeal would not change anything.

[106] If, on the other hand, the Commissioner ends up being wrong and HarperCollins is found not to have already attorned to the Tribunal's *in personam* jurisdiction in light of its conduct and the express reservation of rights included in its Response and its Dismissal Motion, it also cannot be said that irreparable harm will result if a stay of the Application is not granted. In this other scenario, there will be no risk of attornment because further steps to advance the Application will have continued to be taken under the protection of the express reservation of rights. As there would be no risk of attornment, no issue of irreparable harm flowing from it would arise in this second scenario either.

4. Conclusion on irreparable harm

[107] For all those reasons, I am therefore not satisfied that HarperCollins has offered the required clear and non-speculative evidence demonstrating, on a balance of probabilities, that it will suffer irreparable harm if the suspension sought is not granted. The allegations and evidence before the Tribunal, whether on the risk of attornment or on the unnecessary expenditure of resources, do not establish or allow the Tribunal to make inferences that irreparable harm will occur. The second element of the *RJR-MacDonald* test is accordingly not met.

iii. Balance of convenience

[108] I now turn to the last part of the *RJR-MacDonald* test, the balance of convenience (or inconvenience, as the SCC prefers to call it in *RJR-MacDonald*). Under this third part of the test, the Tribunal must determine which of the parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the Appeal (*RJR-MacDonald* at para 67). Given that HarperCollins has not proffered the evidence needed to allow the Tribunal to make a finding of irreparable harm and having concluded that it has failed to satisfy that branch of the *RJR-MacDonald* test, it is not necessary for me to consider where the balance of convenience lies. HarperCollins does not meet one element of the test and, according to the FCA case law, this is

fatal (*Ishaq* at para 15).

[109] I will nonetheless briefly address the issue as the balance of convenience is frequently viewed as a determinative factor in assessing whether a stay of proceedings should be granted.

[110] HarperCollins and Kobo allege that the balance of convenience favours a suspension of the Application, as the Commissioner has offered no evidence showing that competition in the E-books industry in Canada will be harmed if a suspension is granted. According to HarperCollins, there is no countervailing harm if the Application is stayed pending its Appeal.

[111] I do not agree. Rather, I am of the view that there is an important countervailing element on the Commissioner's side given the important public interest considerations at stake in this Motion. When compared to the alleged harm claimed by HarperCollins and Kobo in terms of unnecessary expenditures of resources and risk of attornment, this leads me to conclude that the balance of convenience weighs in favour of refusing the stay sought by HarperCollins.

[112] I acknowledge that, in this Motion, the Commissioner has adduced no evidence of anti-competitive harm, in terms of prejudice likely to be suffered by Canadian consumers and the broader economy if a stay is issued. However, that does not mean that there is no prejudice to the Commissioner if the Application is temporarily stayed or suspended. The prejudice to the Commissioner does not flow only from the potential anti-competitive effects of a conduct challenged by him. Given his mandate as the public authority defending the public interest in competition in Canada, the prejudice may also derive from the impact of a suspension on the Commissioner's exercise of his statutory mandate and duties.

[113] As I stated in *Kobo Suspension*, echoing the comments I had previously made in *Parkland* and those of Mr. Justice Rothstein in *D & B*, there is always an important question of public interest to be considered in situations where a stay of proceedings that are initiated by the Commissioner is sought from the Tribunal. I allow myself to reproduce the following passages from my reasons in *Kobo Suspension*, at paras 65-66:

> [65] (…) The Commissioner has the responsibility to protect the public interest in respect of competition in Canada in the manner conferred upon him by the Act. He may bring cases before the Tribunal when he considers it necessary in order to carry out this responsibility, and he may conclude consent agreements as he did with the Settling Publishers in this case. He is presumed to act in the public interest, and significant weight should be given to these public interest considerations and to the statutory duties carried out by the Commissioner (*D & B* at p 5; *Parkland* at paras 104-108).
>
> [66] This public interest dimension has often been looked at in the context of the third component of the *RJR-MacDonald* test, the balance

> of convenience. As Mr. Justice Rothstein said in *D & B*, a "strong case may exist therefore that there is irreparable harm if the [Commissioner] is restrained from proceeding with that action" (*D & B* at p 5). Delaying proceedings before the Tribunal is generally not in the public interest and runs even contrary to the expeditiousness principle set out in subsection 9(2) of the CTA. This public interest represented by the Commissioner's actions should always be a factor to consider when deciding whether to suspend or stay the Tribunal's proceedings. As Madam Justice Gauthier said in an order issued in *Reliance Comfort Limited Partnership v Commissioner of Competition*, A-113-13, August 2, 2013 (FCA), "the public interest in the timely pursuit of competition cases […] weighs heavily in the balance of convenience".

[114] In *D & B FCA*, the FCA further described subsection 9(2) of the CTA as a "mandatory provision" which "influenced to a great extent" the Court's decision on the balance of convenience in that case (*D & B FCA* at para 18).

[115] Here again, I find that the public interest is another material element supporting the conclusion that a stay of the Application should not be granted in the circumstances of this case. The Commissioner submits that being restrained from going ahead with the Application and from continuing the proceedings to reach the hearing on the merits scheduled for November 13, 2018 is prejudicial to his mandate and hampers the exercise of his authority under the Act. I agree. A suspension of all proceedings in the Application at this stage, more than 13 months before the start of the scheduled hearing, would not align with the purpose and objectives of the Act and of the CTA.

[116] In *RJR-MacDonald*, at paras 73-79, the SCC stated that the role of public authorities in protecting the public interest was an important factor in assessing the balance of convenience. While the comments were made in the context of Charter cases, they nonetheless guide the Tribunal in cases where the Commissioner is involved. As Chief Justice Crampton stated in *The Commissioner of Competition v Pearson Canada Inc*, 2014 FC 376 ("***Pearson***"), "[i]t is now well established that, as a statutory authority responsible for the administration and enforcement of the Act, the Commissioner benefits from a presumption that actions taken pursuant to the Act are *bona fide* and in the public interest" (*Pearson* at para 43). There is no question that, in the current case, the Commissioner's Application is a *bona fide* proceeding and the Commissioner is presumed to act in the public interest (*Parkland* at para 108). Here, the Commissioner's activity in bringing the section 90.1 Application before the Tribunal was undertaken pursuant to his responsibility to protect competition in Canada under the provision dealing with civil agreements between competitors.

[117] When it is established (as is the case here for the Commissioner) that a public authority is charged with the duty of promoting or protecting the public interest and that a proceeding or

activity was undertaken pursuant to that responsibility, "the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action" (*RJR-MacDonald* at para 76).

[118] In my opinion, the public interest and the impact of a stay on the exercise of the Commissioner's mandate is an important factor to be taken into account in this Motion. The SCC has held that it is open to either party to tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in granting or refusing the relief sought (*RJR-MacDonald* at para 71). This is what the Commissioner has done here by indicating that, in his view, a stay freezing the proceedings in the Application would prevent him from carrying on his statutory duties under the Act.

[119] I would add that there is also a public interest in allowing the Tribunal to accomplish its role under the CTA. If a stay were granted to HarperCollins, the Tribunal would also be prevented from exercising its statutory powers. There is a strong public interest in the Tribunal matters proceeding as expeditiously as possible, and this is an imperative obligation contained in subsection 9(2) of the CTA.

[120] Turning to the harm alleged by HarperCollins and Kobo as resulting from a continuation of the proceedings, it is limited to the resources that they would need to spend in respect of the Application and to the risk of attornment. As discussed above, in both instances, apart from the fact that it is not irreparable, this alleged harm is not supported by any evidence and any level of particularity, as well as being speculative. This is not harm that can be considered by the Tribunal in its assessment of balance of convenience.

[121] In those circumstances, when the harm expected to be suffered by HarperCollins in the absence of a stay is compared to the harm expected to be caused to the public interest by a suspension, I am of the view that the balance of convenience does not favour granting the stay requested by HarperCollins. The third element of the *RJR-MacDonald* test is accordingly not met either.

c. Conclusion on the *RJR-MacDonald* test

[122] Under the *RJR-MacDonald* test, HarperCollins had the obligation to satisfy the Tribunal that it met all elements of the tripartite conjunctive test in order to be successful on its Motion. On the basis of the evidence before me, I find that it has not provided clear and non-speculative evidence of irreparable harm, and that the balance of convenience does not favour granting the suspension it is seeking.

[123] In addition, having considered the evidence presented by HarperCollins in support of its Motion, the absence of non-speculative irreparable harm, the broader public interest considerations regarding the Commissioner's mandate and authority, and the need for an expeditious resolution of competition matters by the Tribunal, I also conclude that, in the

particular circumstances of this case and at this stage in the proceedings (more than a year before the scheduled hearing), it would not be just and equitable to grant a stay of all proceedings in the Application. I acknowledge that the jurisdictional issues raised by HarperCollins in its Appeal are significant matters. However, the existence of such a serious issue to be tried is not sufficient, when balanced with the absence of any merit to HarperCollins' arguments on irreparable harm and the balance of convenience favouring the Commissioner, to make it just and equitable to grant the suspension.

[124] There are therefore no exceptional circumstances justifying the exercise of my discretion to grant the relief sought by HarperCollins.

C. It would not be in the "interests of justice" to suspend the Application at this stage

[125] For the reasons stated above in my discussion of the SCC decision in *Google*, and for the sake of completeness, I will now consider the "interests of justice" test identified in *Mylan* and assess whether, in the circumstances of this case, it would be justified to grant the stay sought by HarperCollins if the appropriate test was assumed to be the "interests of justice".

a. General principles

[126] The terms "interest of justice" are expressly stated in paragraph 50(1)(b) of the FC Act, but they have not been defined as such in the case law developed by the federal courts. It is, as acknowledged by counsel for HarperCollins at the hearing, a concept difficult to circumscribe and its actual attributes will depend on all factors of any given case. Even in the *Mylan* decision, which HarperCollins and Kobo appear to identify as the cradle decision where the interests for justice test was crystallized, the FCA offers limited guidance on what the term actually encompasses. The FCA mentions "broad discretionary considerations" coming to bear and a "public interest consideration" in the need for "proceedings to move fairly and with due dispatch" (*Mylan* at para 5).

[127] It is, however, fair to say that it is a broad and wide-reaching test, that it can cover many elements, and that delaying a matter "all depends on the factual circumstances" presented to the court (*Mylan* at para 5). Four decisions cited by HarperCollins and Kobo are helpful to identify the considerations embraced by the "interests of justice" test.

[128] In *Korea Data*, the ONCA indicated that the interests of justice start from the three elements of the *RJR-MacDonald* test (*Korea Data* at para 19). According to that decision, they certainly include factors demonstrating irreparable harm or an imbalance of convenience, though the ONCA appears to suggest that, in considering the interests of justice, the serious issue dimension or considerations respecting the merits of the appeal may be less of a concern. There are, however, other factors to take into account to measure what is in the interests of justice, and the ONCA specifically singles out the "public interest in the fair, well-ordered and timely

disposition of litigation" and the "effective use of scarce public resources" (*Korea Data* at para 19).

[129] In *Coote v Lawyers' Professional Indemnity Co*, 2013 FCA 143 ("***Coote***"), the FCA restated, as it had done in *Mylan*, that the *RJR-Macdonald* test is not suitable in the context of a stay where the Court is refraining from exercising its own jurisdiction. The case involved two appeals from interlocutory orders of the Federal Court made before the hearing of an application relating to a vexatious litigant. The FCA was being asked to stay the appeals before it pending the Federal Court's determination of the vexatious litigant application. In determining whether to grant such a stay, the FCA stated that it must consider the "factual circumstances" before it while being guided by principles other than the *RJR-Macdonald* test. These principles include securing "the just, most expeditious and least expensive determination of every proceeding on its merits", as provided by section 3 of the FC Rules (*Coote* at para 12). Additional principles were articulated as follows by the FCA: "[a]s 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" (*Coote* at para 13). Devoting resources to one case for no good reason, said Mr. Justice Stratas, deprives the others for no good reason.

[130] HarperCollins and Kobo also rely on the decision of Chief Justice Crampton in *Kobo FC*, issued in the context of the parallel judicial review application brought by Kobo against the 2017 Consent Agreements. In that decision, the Federal Court found that, in the absence of a stay of the hearing of Kobo's application, the parties "would have to incur significant time and expense associated with proceedings before the Court and the Tribunal that are scheduled to be heard within a very short period of time of each other—less than two weeks" (*Kobo FC* at para 33). HarperCollins and Kobo highlight the following passage from Chief Justice Crampton's reasons: "requiring both proceedings to proceed almost simultaneously would not be an effective use of scarce public and judicial resources and would not be consistent with the spirit of Rule 3 of the *Federal Courts Rules*, which refers to the desirability of securing the just, most expeditious and least expensive determination of every proceeding on its merits" (*Kobo FC* at para 33).

[131] Finally, in *TREB*, the only Tribunal case where the "interests of justice" test was retained and applied, the reasons of Madam Justice Simpson reveal that considerations of prejudice to the parties (in terms of wasted resources in the preparation of updated evidence) were central to her conclusion that a stay had to be granted in the circumstances. In *TREB*, Madam Justice Simpson applied the "interests of justice" test by assessing various allegations of prejudice made by the parties. While she did not use the term "irreparable harm" or "prejudice", what ultimately led her to conclude that the interests of justice dictated the granting of an adjournment were the significant efforts and expenses, in terms of the parties' resources, involved in preparing updated evidence for an imminent hearing.

[132] While these precedents shed some light on what the "interests of justice" may entail, I agree with HarperCollins that what needs to be taken into account are, first and foremost, all the particular factors of this Application and the factual circumstances relating to HarperCollins.

b. Analysis

[133] HarperCollins submits that, in the circumstances of this case, the interests of justice supporting a suspension of the Application revolve around the following elements: the Appeal raises substantive, threshold jurisdictional issues which should receive appellate consideration before this matter proceeds towards a hearing; HarperCollins faces substantial prejudice in the absence of a suspension or stay whereas the Commissioner would not suffer any; and the parties (and the Tribunal) face the real prospect of squandering significant resources should this matter proceed during the pendency of the Appeal. Kobo also refers to the significant waste of judicial and financial resources that would result from a refusal of the stay, to the detriment of the parties and the public.

[134] Further to my review of the evidence and of the particular circumstances and timing surrounding HarperCollins' Motion, I am not persuaded that, even under the "interests of justice" test, HarperCollins has established that any of those grounds would justify the exercise my discretion in favour of the stay sought by HarperCollins. When all relevant considerations and the particular context of this Motion are factored in, the interests of justice rather call, in my view, for the continuation of the proceedings in the Application and for the parties to take the appropriate steps to move the Appeal and the Application in parallel.

i. Wasted resources

[135] As mentioned in *Korea Data*, factors "demonstrating irreparable harm or an imbalance of convenience are undoubtedly relevant when a court is contemplating delaying its proceedings" (*Korea Data* at para 19). As discussed above under the *RJR-MacDonald* test, neither of these two factors supports a stay of the Application in this Motion. In my view, the interests of justice should generally not be divorced from a requirement to show some form of irreparable harm caused by the failure to obtain the remedy sought, and none has been demonstrated by HarperCollins in this case. Needless to say, the absence of evidence of irreparable harm to HarperCollins and a balance of convenience favouring the Commissioner are factors which suggest that it would not be in the interests of justice to grant a stay of the Application.

[136] HarperCollins and Kobo insist on the waste of both private and public resources attributable to the time, efforts and money that the parties and the Tribunal would have to spend in preparing for the November 2018 hearing if the Application is not suspended. I pause to mention that the next step in the Application is for the parties to agree on a schedule for the discovery steps and the preparation of materials for the hearing. Further to the Tribunal's Hearing Date Order, the parties are to consult each other with respect to a schedule of steps

necessary to bring the case on the scheduled time and to report to the Tribunal within 30 days. As reflected in the draft proposed schedules previously exchanged between counsel for the parties, the more proximate steps include the preparation of affidavits of documents, the exchange and review of document productions, examinations on discovery, and potential motions concerning issues arising in these discovery steps. In the more distant future, and closer to the November 2018 hearing date, other steps include the preparation of witness statements, expert reports and other materials for the hearing.

[137] The context of HarperCollins' Motion can be easily distinguished from the situations in *TREB*, *Coote* or *Kobo FC* where a concern over the waste of the parties' resources supported the granting of a stay. In *TREB*, Madam Justice Simpson found that it was in the interests of justice to grant the adjournment, because the parties were on the eve of having to spend significant effort and expenses in preparing updated evidence for the reconsideration hearing. In that case, the Tribunal relied on the toll put on the parties' resources to conclude that it would be in the interests of justice to suspend the reconsideration hearing pending an application for leave to appeal to the SCC. I do not agree with HarperCollins and Kobo that the current situation is similar to the *TREB* case. In *TREB*, the hearing on the merits was imminent, scheduled to take place merely four months after the date of Madam Justice Simpson's order, and the parties were expected to prepare and file witness statements and expert reports in the weeks following her order.

[138] This is not the case here. The parties are not about to spend the type of resources considered by Madam Justice Simpson in *TREB*. Here, the hearing is scheduled for November 13, 2018, more than 13 months away. There is no evidence of significant imminent expenses to be incurred by HarperCollins and Kobo in relation to the continuation of the proceedings in the Application. The upcoming next steps will relate to discovery (affidavits of documents, document productions, examinations), not the actual preparation for the hearing, and the schedule for these steps still needs to be agreed upon by the parties or determined by the Tribunal. These steps will likely take place in the medium term (i.e., in a few months), and the parties have some latitude in terms of dates to be fixed for those. I add that no evidence has been provided by HarperCollins and Kobo as to the extent of the wasted private resources for these discovery steps.

[139] Similarly, in *Kobo FC*, this was a situation where the concern for private resources being wasted by the parties was driven by the fact that the hearing on the merits of the Kobo JR Application was scheduled in the very short term, less than two weeks after the Federal Court decision. I thus do not find that, at this juncture, the waste of the parties' resources posited by HarperCollins and Kobo is a significant factor supporting a conclusion that the interests of justice would call for a suspension of the Application in this case.

[140] With respect to the concern for a waste of public and judicial resources, I am also not convinced by the submissions of HarperCollins and Kobo. There is no evidence that the public resources of the Commissioner will be "wasted" if the Application is continued. On the contrary,

the Commissioner pleads that he himself considers that going ahead with the Application is in the public interest and constitutes a sound use of his resources in this matter. The Commissioner, who is charged with the responsibility of protecting the public interest, does not raise or complain of any misuse of public resources at his level. It is not for the Tribunal to second-guess the choice of the Commissioner on this point, as he is presumed to be acting in the public interest. This is therefore not a situation where, to borrow the words of the FCA in *Coote*, public resources would be devoted to a case for no good reason.

[141] Similarly, there is no convincing evidence of a waste of judicial resources linked to the continuation of the Application. I remind that, in *TREB*, Madam Justice Simpson considered the argument that judicial resources for the hearing of potential motions in the summer leading up to the scheduled hearing and for the Tribunal's preparatory work for the hearing would be wasted if no stay was granted. She however found that factor to be speculative and did not treat it as an important one. In my view, this is also the case in this Motion. The argument of wasted judicial resources is speculative. It is even more so here since the hearing is far from being imminent. Unlike in *TREB*, the hearing is currently over 13 months away. The judicial resources of the Tribunal will hardly be solicited until the time of discovery motions arrives. These discovery motions are unlikely to take place much before the spring of 2018, at the earliest. In addition, this is speculative at this point, as the Tribunal currently has no indication as to whether or not such discovery motions will be filed and the extent of judicial resources needed to deal with them.

[142] Comparable distinctions can be made with *Kobo FC*, where the Federal Court was about to hear the matter in less than two weeks, and where there was no doubt that important judicial resources would be rapidly solicited by the Court.

[143] Unlike the situations in *Kobo FC* or *Coote* where the imminence of the potential depletion of judicial resources was a reason supporting the conclusion that it was in the interests of justice to grant a stay, I find no issue of potential wasted judicial resources here. I am thus not convinced that, on the evidence before me and at this stage of the Application, it is a situation where scarce public and judicial resources would not be effectively used. It is, in my view, simply premature to invoke the spectre of wasted public and judicial resources.

ii. Duration of the suspension

[144] Turning to the expected duration of the stay, HarperCollins and Kobo repeatedly argue that a stay of the Application pending the determination of the Appeal would be for only a few months or a short period of time, and that it would only be a temporary suspension. Since the stay would not constitute a significant delay, they say, it is in the interests of justice to grant the suspension. In my opinion, I cannot reach that conclusion at this point in time and on the evidence before me. Contrary to what was the clear situation in *Korea Data* or in *Kobo FC*, I am not convinced that the Tribunal would be facing a relatively short and time-limited stay of the Application. At the very least, I do not find that this can be said and supported at this stage.

[145] On the contrary, the wait could be a long one.

[146] I understand that counsel for the parties have expressed the intention to move the Appeal rapidly and to expedite it. However, the evidence on record talks of a hearing before the FCA "within the first quarter of 2018 if the matter proceeds in the usual or expedited course". HarperCollins has referred to the "winter or early spring 2018" in its submissions. That already represents six months, just to reach a hearing date for the Appeal. I further see little indication that the Appeal has moved at a brisk pace so far. According to the FCA recorded entries, the most recent procedural steps, namely the filing of the agreement concerning the content of the Appeal book and the filing of the Appeal book itself, have been completed towards the very end of the statutory delays to do so under the FC Rules: it took 30 days for the former and 26 days for the latter. No request to expedite the appeal or for an expedited hearing has yet been made, though I concede that it may indeed be too early to do so. At this stage, there is also no evidence or indication as to the time it would likely take for the FCA to decide the Appeal, once it is heard. When all these factual circumstances are considered, it cannot be said, in my opinion, that the Appeal will likely be decided rapidly or that the suspension of the Application sought by HarperCollins will be for a definite short time. Instead, there is reasonable cause for concern that the delay may well be longer than just a few months.

[147] This is another important difference with *Kobo FC* and *TREB*, where the Federal Court and the Tribunal were satisfied, based on the evidence then before them, that the suspension would be of short duration ("weeks" in *Kobo FC*) and that this element supported the interests of justice argument. Here, everything points to a bare minimum of at least more than six months. It may be that, at a later date in these proceedings, the factual evidence on the prospect of a suspension being of short duration will materialize, but it is not present on the record before me.

iii. Other stays in the E-books litigation

[148] HarperCollins and Kobo have also underlined what they consider to be the peculiar context in which this Motion is brought. It is not the first time that the issue of a stay pending appeal is raised in the ongoing E-books litigation saga between the Commissioner and the E-book publishers. Throughout that process, suspensions or stays have been previously granted on several occasions, and the Commissioner has consented to some stays or elected not to challenge others that were ordered by the Tribunal. HarperCollins evokes in particular the stay issued by Mr. Justice Rennie in December 2014 in *Kobo 2014* and the consent of the Commissioner to stay the 2017 Consent Agreements in the pending Kobo JR Application. HarperCollins argues that, viewed in the context of the prior proceedings in the United States and Canada, including the ongoing Kobo JR Application, and the consents previously given by the Commissioner, the Commissioner cannot claim to be prejudiced by a temporary suspension or stay of proceedings in this Application.

[149] I do not share that view. I am mindful of the fact that the Commissioner has given his consent to previous stays in these E-books proceedings and that the overall E-books litigation will soon be four-years old. However, I do not consider this to be a material factor in determining whether it would be in the interests of justice to suspend this Application now. First, the Tribunal has to decide this Motion on the basis of the factual context before it, not against the benchmark of the Commissioner's past behaviour in handling similar requests for stay or suspension. Second, it is not the Tribunal's role to revisit the Commissioner's choices and decisions with respect to his litigation strategy in other parallel matters. Third, it is important to highlight the particular context in which the Commissioner decided to consent to certain stays or to refrain from challenging the issuance of others in the E-books litigation.

[150] When Mr. Justice Rennie issued his stay in December 2014, it was in a context where the Commissioner himself had brought the Reference Decision which was the underlying cause for the stay, and where the Commissioner had just advised the parties that he was consenting to the rescission of the 2014 Consent Agreement, following receipt of the Reference Decision. In March 2017, when the Commissioner consented to a stay of the implementation of the 2017 Consent Agreements in the context of the Kobo JR Application, he did so in order to move more rapidly to a consideration of that application on its merits. As noted by Chief Justice Crampton, all parties consented to the underlying stay "in order to proceed directly to a hearing of Kobo's Application on an accelerated basis, and thereby avoid the time and costs that would have been associated with having a separate hearing in respect of Kobo's request for that stay" (*Kobo FC* at para 47).

[151] I do not see how these facts relating to different circumstances could serve to suggest that, in the context of this Motion, the interests of justice would militate in favour of the Commissioner adopting a similar approach and in the suspension of the Application being granted.

iv. Subsection 9(2) of the CTA

[152] I also do not agree that the Application can be qualified as not being an "urgent matter". The fact that proceedings relating to the E-books business have been ongoing for several years does not mean that this Application is no longer governed by the mandatory provisions of the CTA. Subsection 9(2) of the CTA requires that all matters before the Tribunal be dealt with "as expeditiously as the circumstances and considerations of fairness permit", and compelling reasons must exist to suspend proceedings. This provision continues to apply to the Application. As a specialized expert tribunal involved in economic and business matters, the Tribunal is directed to proceed expeditiously in all matters before it. The importance of the timely pursuit of competition cases has been restated by the FCA in 2013 in an order issued by Madam Justice Gauthier in *Reliance Comfort Limited Partnership v Commissioner of Competition*, A-113-13, August 2, 2013 (FCA), a post-*Mylan* decision.

[153] I acknowledge that, in each of *Coote* and *Kobo FC*, the FCA and the Federal Court both referred to section 3 of the FC Rules on the desirability of securing "the just, most expeditious and least expensive determination of every proceeding on its merits". However, I make the two following observations.

[154] First, section 3 of the FC Rules contains language referring to both expeditiousness and judicial economy: it talks about the "most expeditious and least expensive" determination of every proceeding. This provision has a different and wider scope than subsection 9(2) of the CTA and section 2 of the *Competition Tribunal Rules*, SOR/2008-141 ("**CT Rules**"), which only mention the Tribunal's obligation to deal with matters informally and expeditiously. Of course, the interests of justice and the sound administration of justice always involve concerns for both efficient and timely adjudication. I do not dispute that. The interests of justice call for an adequate balance between cost-effective and time-effective resolution of matters. Favouring a least expensive avenue to the detriment of a speedy resolution cannot always prevail, just as opting for a most expeditious option at any price does not always serve the administration of justice.

[155] But, in the case of the Tribunal, acting in accordance with the requirements of subsection 9(2) of the CTA is a primary concern to determine what is "the fair, well-ordered and timely disposition of litigation" before it (*Korea Data* at para 19). Here, the timeline fixed by the Tribunal for the disposition of the Application cannot be characterized as aggressive. As Mr. Justice Phelan stated in the scheduling order fixing the hearing date in November 2018, the overall duration of the Application is "reasonably consistent (but not identical) with similar timeframes of similar cases" and "falls within the reasonable range for similarly complex cases". A suspension of the whole Application at this juncture, preventing the continuation of any steps leading to the hearing and freezing all activities for an indeterminate amount of time, would necessarily bring this Application significantly outside the timeframes for similar cases and outside the reasonable range for such cases. This, in my view, would not be consistent with the Tribunal's enacting legislation and with the requirements of subsection 9(2) of the CTA and, consequently, could not be in the interests of justice.

[156] Second, unlike the situation evoked in *Coote*, this is not a case where it can be said that no party would be unfairly prejudiced by the requested adjournment (*Coote* at para 13) The Commissioner has stated that he will be prejudiced as a public authority vested with the mandate and role to protect competition and to enforce it through the carriage of proceedings before the Tribunal. Since, as discussed above in the section on "Balance of convenience", I am of the view that the public interest would be adversely affected by a suspension of the Application, this is not a case where it can be said that there would be no prejudice to any of the parties. This is yet another important distinction to remember in assessing whether the requested stay would be in the interests of justice.

v. Kobo JR Application

[157] Finally, since both HarperCollins and Kobo drew parallels between this Application and the Kobo JR Application, I must also emphasize that the particular facts underlying the decision of the Federal Court to grant a stay in the Kobo JR Application (*Kobo FC*) need to be distinguished from those of the case at bar.

[158] In *Kobo FC*, the stay was expected to be for a very short period, the recognition of the specialized role of the Tribunal and the concern to avoid inconsistent decisions between two decision-makers were main driving factors behind the decision, and Chief Justice Crampton used his discretion against the wasteful use of judicial resources in a context where the hearing (and the spending of resources) was imminent. While HarperCollins and Kobo insist on the reference made by the Federal Court to the "potential waste of scarce public and judicial resources", I point out that this was only one of three grounds retained by Chief Justice Crampton in favour of granting the stay. The other two were directly linked to the parallel proceedings to which the Federal Court was confronted in that case: they were "the potential for inconsistent or difficult to reconcile decisions of the Court and the Tribunal" and "the loss of an opportunity for the Court and the parties to benefit from the Tribunal's consideration of the two jurisdictional issues that are common in the two proceedings" (*Kobo FC* at para 43). Evidently, none of these two factors plays a role here.

[159] In his decision, Chief Justice Crampton clearly had a recurring concern that, without a stay, there could be differing determinations by the Tribunal and the Federal Court, which could be perceived as "inconsistent or difficult to reconcile" (*Kobo FC* at paras 36, 39, 43). Chief Justice Crampton indeed concluded that it was preferable for the Court "to have the benefit of the Tribunal's determinations regarding the jurisdictional issues that have been raised in both proceedings before addressing those issues itself" (*Kobo FC* at para 39). I agree with the Commissioner that this was a key element for granting the stay as the Tribunal's decision on HarperCollins' Summary Motion would inform the Federal Court process and help to arrive at a coherent and consistent finding, without conflicting decisions between the Tribunal and the Court.

c. Conclusion on the "interests of justice" test

[160] When all those factors are considered, I am not persuaded that this is a case where, at this time, the interests of justice would support HarperCollins' position and the suspension of all proceedings in the Application. In other words, in the circumstances, it would not be a just and fair disposition to grant the stay sought by HarperCollins, even if the appropriate test was assumed to be the "interests of justice". To the contrary, I am of the view that, in the particular context of this case and at this time, what is in the interests of justice is for the parties to use options at their disposal to ensure that both the Appeal and the Application move ahead. To echo the words of the ONCA in *Korea Data*, what favours both the "public interest in the fair, well-

ordered and timely disposition of litigation" and the "effective use of scarce public resources" at this point in time is for both proceedings to progress in parallel along their respective paths. At this stage, however broad the metrics to measure the interests of justice can be, they do not dictate that a temporary suspension be granted.

[161] In my opinion, two options can easily be identified, both of which are, to a large extent, within the control of the parties. And it is up to the parties to explore them.

[162] What is first in the interests of justice in this case is for HarperCollins, Kobo and the Commissioner to take the necessary steps to expedite the Appeal, not only through an eventual request for an expedited hearing but at all steps of the appeal process, thus mitigating potential harm (*Redeemer* at para 8). As Mr. Justice Stratas reminded in *Mylan*, expediting the appeal does not only mean making a request for an expedited hearing to the Court: "[t]hose who seek expedition should themselves expedite" (*Mylan* at para 30). In order to have an opportunity for a favourable order of the FCA expediting the Appeal and the hearing date at the FCA, it is therefore up to the parties to move the Appeal at an eventful pace at their end as well. So far, it appears that this may not have always happened, as two of the early procedural steps took close to the maximum time permitted under the FC Rules. The ball is in the parties' court for the next procedural steps.

[163] What is also in the interests of justice in the factual circumstances of this case is for HarperCollins, Kobo and the Commissioner to consider ways to develop a more compressed schedule for the discovery steps and the preparation of the hearing, with dates fixed closer to the November 2018 hearing date, in order to minimize the efforts and legal resources to be spent by the parties prior to a decision of the FCA on the Appeal. As indicated above, the current timeline for the overall disposition of the Application is not an aggressive one and, in my opinion, the generous period of more than 13 months lying ahead before the November 2018 hearing leaves ample room for the parties to manoeuvre in order to lighten any prejudice that could be associated with the early spending of legal resources on the Application. Again, the ball is in the parties' court on this front as well, at least in part as the Tribunal will also have its say on scheduling issues.

[164] The Tribunal expects that these options will be considered and explored by the parties. Should the issue of a temporary suspension of the Application resurface at a later point in these proceedings (as nothing in this Order prevents any party from bringing another stay motion should the factual circumstances change), how the parties will have dealt with such possible options will undoubtedly be among the factors considered by the Tribunal in the exercise of its discretion.

[165] As always, the Tribunal will be available to consider ways to adapt the requirements of the CT Rules, to discuss schedules and timelines with the parties as needed, and to resolve issues as they arise, in order to deal with the Application as informally and expeditiously as the circumstances and considerations of fairness permit.

IV. CONCLUSION

[166] For the reasons detailed above, HarperCollins' Motion will be dismissed.

[167] Under the *RJR-MacDonald* test, HarperCollins had the obligation to satisfy the Tribunal that it met all elements of the tripartite conjunctive test in order to be successful on its Motion. On the basis of the evidence before me, I find that it has not provided clear and non-speculative evidence of irreparable harm and that the balance of convenience does not tilt in its favour. I conclude that it is therefore not just and equitable to grant a stay in the context of this Motion.

[168] Furthermore, having considered the evidence presented by HarperCollins in support of this Motion, and taking into account the particular factors of this Application and the factual circumstances relating to HarperCollins, I am also satisfied that, even if it was assumed that the more flexible test advocated by HarperCollins and Kobo should be the appropriate test, the "interests of justice" would not dictate that a stay of the Application be granted at this stage of the proceedings. In other words, a suspension of the Application would not be a just and fair disposition of this Motion. The interests of justice instead call for the parties to use the options at their disposal to ensure that the Appeal proceeds expeditiously and the Application advances in parallel in an efficient way for all involved.

[169] I consider that this is not a case for a costs award against HarperCollins.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[170] HarperCollins' Motion is dismissed. There is no order of costs.

DATED at Ottawa, this 6th day of October 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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