CT-2017-002

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

HARPERCOLLINS PUBLISHERS LLC, and HARPERCOLLINS CANADA LIMITED

Respondents
(Moving Parties)

HARPERCOLLINS' MEMORANDUM OF FACT AND LAW
(Motion for Summary Dismissal of Application)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Katherine L. Kay
Danielle K. Royal
Mark Walli
Michael Currie

Tel: (416) 869-5507
Fax: (416) 947-0866

Lawyers for the Respondents
(Moving Parties)

TO: **DEPARTMENT OF JUSTICE CANADA**
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, Quebec
K1A 0C9

John Syme
Alex Gay
Esther Rossman
Katherine Johnson

Tel: (819) 953-3903
Fax: (819) 953-9267

Lawyers for the Commissioner of Competition

I. OVERVIEW

1. The Respondents, HarperCollins Publishers L.L.C. ("**HarperCollins US**") and HarperCollins Canada Limited ("**HarperCollins Canada**") (together, "**HarperCollins**"), submit this memorandum of fact and law in support of their preliminary motion for summary dismissal of the Application brought by the Commissioner of Competition (the "**Commissioner**") for an order pursuant to section 90.1(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "***Act***"), dated January 19, 2017 (the "**Application**").

2. There are two grounds on which the Application should be summarily dismissed, each of which alone is sufficient to dispose of the Commissioner's Application. On jurisdictional grounds and as a preliminary matter, there is no genuine basis for the Application.

3. As a threshold matter, the Application should be dismissed summarily because as a straightforward and clear matter of statutory interpretation, section 90.1 applies only in respect of agreements or arrangements among competitors formed **in Canada**. The purported Arrangement (as described further below) challenged by the Commissioner in his Application is alleged to have been formed **in the United States** by U.S. and German entities. Such an arrangement is outside the reach of section 90.1 of the *Act* and therefore beyond the Tribunal's jurisdiction.

4. Moreover, principles of international comity support the dismissal of the Commissioner's Application. Each of the U.S. and German entities alleged by the Commissioner to have entered into the Arrangement, including HarperCollins US, has been and currently is subject to the jurisdiction and continuing final judgments of the U.S. federal court in New York (each defined separately below; collectively, the "**U.S. Final Judgments**"). Under these circumstances, the

Tribunal's assertion of jurisdiction to entertain the relief sought by the Commissioner would undermine the important objectives of order, fairness and reciprocity that underlie and are furthered by the comity doctrine. Under the principles of comity, the U.S. Arrangement challenged by the Commissioner properly should be left to the jurisdiction and Final Judgments of the U.S. court.

5. The second ground for summary dismissal of the Application is that, even if the *Act* provides for extraterritorial jurisdiction over the challenged Arrangement (which is denied), there can be no doubt that the Arrangement is **not** "existing or proposed," as required by section 90.1 of the *Act*.

6. Although the Commissioner alleges in the Application that the Arrangement "continues to this day in Canada," that assertion is flatly contradicted by the following matters of public record in the United States and Canada (summarized here and described more fully below):

(a) all of the alleged parties to the purported Arrangement, including HarperCollins US, currently are (and have for years been) subject to binding U.S. court orders that prohibit the existence of such an Arrangement;

(b) the alleged publisher parties to the Arrangement and/or Canadian affiliates of those parties, including HarperCollins Canada, entered into a Consent Agreement registered with the Tribunal on February 7, 2014 (the "**First Consent Agreement**"), the terms of which were said by the Commissioner to remedy any concerns about the impact on competition and make it clear that there was no

Arrangement (as alleged or otherwise), at least as of the date of the First Consent Agreement; and

(c) in any event, the new Consent Agreements entered into by the respondents to the First Consent Agreement (except for HarperCollins Canada) as well as by Apple, all registered with the Tribunal on January 19, 2017 (the "**2017 Consent Agreements**"), place it beyond doubt that there is no "existing or proposed" arrangement among competitors with respect to the sale of e-books.

7. In the absence of an "existing or proposed" agreement or arrangement among competitors, there is no basis on which the Tribunal could make any order pursuant to section 90.1 of the *Act*.

8. Accordingly, the Application should be summarily dismissed, with costs to HarperCollins.

II. THE FACTS

9. HarperCollins brings this preliminary dismissal motion because of fundamental legal flaws in the Commissioner's Application for relief pursuant to section 90.1 of the *Act*.

10. HarperCollins submits that the only "facts" necessary for disposition of this motion (and the Application) are: (a) the Commissioner's own allegations (admissions) concerning the purported Arrangement in the Application; and (b) matters of public record in respect of the prior proceedings, orders, final judgments, and consent agreements relating to e-books in the United States and Canada.

A. The Alleged Arrangement

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

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

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

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

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

> [...] The Arrangement provided for a shift from wholesale agreements, where retailers control retail prices and have the ability to offer consumers discounts, to agency agreements, where publishers control the retail price and have the ability to bar price discounting [for e-books]. The Arrangement also provided for an MFN clause and pricing tiers in the agreements.
>
> [...1 The Arrangement **was formed in the United States through a series of communications among the U.S. Publishers either directly or indirectly through Apple**. The Arrangement was implemented, **first in the United States and then in Canada**, by way of agency agreements entered into by publishers and Ebook retailers. (emphasis added)

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

B. U.S. Proceedings and Final Judgments

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

1. Final Judgment as to HarperCollins US, Hachette and Simon & Schuster

17. On the day it commenced its civil action, USA also filed a proposed Final Judgment as to HarperCollins US and two of the other U.S. Publishers, Hachette and Simon & Schuster.[2]

18. The proposed Final Judgment represented USA's proposed settlement of the action with those defendants. HarperCollins US agreed to the Final Judgment without trial or adjudication of any issue of fact or law raised by USA in its Complaint, on the basis that the Final Judgment did not constitute any admission by HarperCollins US that the law had been violated, nor an admission of any issue of fact or law other than the facts alleged by USA in its Complaint establishing the SDNY Court's jurisdiction over HarperCollins US.[3]

---

[1] The Complaint of the Plaintiff, United States of America, against Apple Inc. et al, at Exhibit "A" of the affidavit of Marilyn Nelson, sworn March 21, 2017 (the "**Nelson Affidavit**").

[2] The SDNY Court's Final Judgment, dated September 6, 2012, as to Defendants HarperCollins US, Hachette and Simon & Schuster, Exhibit "B" of the Nelson Affidavit.

[3] Exhibit "B" of the Nelson Affidavit at p. 1.

19. HarperCollins US, Hachette and Simon & Schuster agreed to be bound by the provisions of the proposed Final Judgment pending its approval by the SDNY Court.[4]

20. The proposed Final Judgment required approval by the SDNY Court in accordance with procedures outlined in the U.S. *Tunney Act*, 15 U.S.C. §16(b) – (h), which included a period for public comment on the proposed Final Judgment and written submissions submitted by other interested non-parties.[5] After receipt of the comments and submissions, the SDNY Court approved and entered the Final Judgment on September 7, 2012 (the "**HarperCollins US Final Judgment**").

21. Among other things, the Harper Collins US Final Judgment provided that:

(a) HarperCollins US, Hachette, and Simon & Schuster were required to terminate their agency agreements with Apple within 7 days of the entry of the Final Judgment;[6]

(b) HarperCollins US, Hachette, and Simon & Schuster were required to terminate any contracts with other e-book retailers that contained either a restriction on the e-book retailer's ability to set the retail price of any e-book or a "Price MFN" provision, as defined in the Final Judgment, as soon as each such contract permitted, beginning 30 days after entry of the Final Judgment;[7]

---

[4] Exhibit "B" of the Nelson Affidavit at p. 2.

[5] The SDNY Court's Opinion and Order, dated September 6, 2012 in relation to the Final Judgment as to Defendants HarperCollins US, Hachette, and Simon & Schuster, Exhibit "C" of the Nelson Affidavit at p. 11.

[6] Exhibit "B" of the Nelson Affidavit at p. 8.

[7] Exhibit "B" of the Nelson Affidavit at p. 8.

(c) HarperCollins US, Hachette, and Simon & Schuster were prohibited for a period of at least two years from agreeing to any new contract with an e-book retailer that restricted the retailer's discretion over e-book pricing;[8] and

(d) HarperCollins US, Hachette, and Simon & Schuster were prohibited for a period of at least five years from entering into an agreement with an e-book retailer that included a Price MFN provision.[9]

22. The HarperCollins US Final Judgment required, among other things, that HarperCollins US, Hachette, and Simon & Schuster provide quarterly compliance reports and, after an internal audit, annual written statements to the U.S. Department of Justice attesting as to the fact and manner of their compliance with the Final Judgment.[10]

23. The HarperCollins US Final Judgment, which provides that it will expire five years from the date of entry, unless extended by the SDNY Court,[11] remains in effect today.

24. The HarperCollins US Final Judgment further expressly provides that the SDNY Court "retains jurisdiction to enable any party to apply"[12] for such further orders or directions as may be necessary to carry out, construe, modify, enforce compliance with or punish violations of, the Final Judgment.

---

[8] Exhibit "B" of the Nelson Affidavit at p. 10.
[9] Exhibit "B" of the Nelson Affidavit at p. 18.
[10] Exhibit "B" of the Nelson Affidavit at p. 16.
[11] Exhibit "B" of the Nelson Affidavit at p. 18.
[12] Exhibit "B" of the Nelson Affidavit at p. 18.

2. Final Judgment as to Penguin

25. On May 15, 2013, the SDNY Court entered a Final Judgment (the "**Penguin Final Judgment**") as to The Penguin Group and related entities (collectively, "**Penguin**") which had also been named as defendants in the civil action commenced by USA on April 11, 2012.[13] Penguin is not identified as having been part of the alleged Arrangement in the Commissioner's Application.

26. The Penguin Final Judgment, which was consented to by Penguin without admission as to any violation of the law or any issue or fact of law raised in USA's Complaint (apart from the alleged facts establishing the SDNY Court's jurisdiction), contains prohibitions on conduct that are substantially similar to those in the earlier HarperCollins US Final Judgment.[14]

27. Among other things, the Penguin Final Judgment:

(a) required that Penguin terminate its agency agreement with Apple within seven days of entry of the Final Judgment;[15]

(b) provided that for a period of two years, Penguin could not enter into any agreement with an e-book retailer that restricted, limited, or impeded the e-book retailer from setting, altering, or reducing the Retail Price (as defined in the Penguin Final Judgment) of one or more e-books;[16] and

---

[13] The SDNY Court's Final Judgment, dated May 17, 2013, as to Defendants The Penguin Group, Exhibit "D" of the Nelson Affidavit.

[14] Exhibit "D" of the Nelson Affidavit at p. 1.

[15] Exhibit "D" of the Nelson Affidavit at p. 8.

[16] Exhibit "D" of the Nelson Affidavit at p. 10.

(c) provided that Penguin may not enter into any agreement with an e-book retailer that contains a Price MFN, during the term of Final Judgment.[17]

28. The Penguin Final Judgment, which provides that it expires five years after the date of its entry (unless extended by the SDNY Court), remains in effect today.[18]

3. Final Judgment as to Macmillan

29. On August 12, 2013, the SDNY Court entered a Final Judgment as to the Macmillan defendants named in the Complaint filed by USA on April 11, 2012 (the "**Macmillan Final Judgment**").[19]

30. The Macmillan Final Judgment was consented to by the Macmillan defendants on the basis that it does not constitute an admission as to any violation of the law or any issue or fact of law raised in USA's Complaint (apart from the alleged facts establishing the SDNY Court's jurisdiction).[20]

31. The Macmillan Final Judgment contains prohibitions on conduct that are substantially similar to those found in the earlier HarperCollins US and Penguin Final Judgments, including that Macmillan shall not enter into any agreement with an e-book retailer that contains a Price MFN during the term of the Macmillan Final Judgment.[21]

---

[17] Exhibit "D" of the Nelson Affidavit at p. 11.

[18] Exhibit "D" of the Nelson Affidavit at p. 18.

[19] The SDNY Court's Final Judgment, dated August 12, 2013, as to Defendants Verlagsgruppe Georg von Holtzbrinck GMBH & Holtzbrinck Publishers d/b/a Macmillan, Exhibit "E" of the Nelson Affidavit.

[20] Exhibit "E" of the Nelson Affidavit at p. 1.

[21] Exhibit "E" of the Nelson Affidavit at p. 10.

32. The Macmillan Final Judgment, which provides that it expires five years after the date of its entry (unless extended by the SDNY Court), remains in effect today.[22]

4. Final Judgment against Apple

33. On September 5, 2013, the SDNY Court entered Final Judgment against Apple in the USA's civil action commenced April 11, 2012 (the "**Apple Final Judgment**").[23] The Apple Final Judgment was made following a bench trial that led the SDNY Court to conclude that Apple had violated section 1 of the *Sherman Act*. That decision was affirmed on Apple's appeal by a divided panel of the United States Second Circuit Court of Appeals; *certiorari* to the United States Supreme Court was denied. HarperCollins US was not a defendant at the Apple trial.

34. Among other things, the Apple Final Judgment provides that, for periods varying between two and four years, Apple may not enter into any agreement with a publisher defendant in USA's civil action that restricts, limits, or impedes Apple's ability to set, alter, or reduce the Retail Price of any e-book (as defined in the Apple Final Judgment) and that, during its term, Apple may not enter into any agreement with an e-book publisher that contains a Retail Price MFN (as defined therein).[24]

35. The Apple Final Judgment, which has a five year term (subject to potential one-year extensions), remains in effect.[25]

---

[22] Exhibit "E" of the Nelson Affidavit at p. 17.

[23] The SDNY Court's Final Judgment and Order Entering Permanent Injunction, dated September 5, 2013, as to the Defendant Apple, Exhibit "F" of the Nelson Affidavit.

[24] Exhibit "F" of the Nelson Affidavit at p. 5.

[25] Exhibit "F" of the Nelson Affidavit at p. 17.

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

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

1. The First Consent Agreement

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

38. In its recitals, the First Consent Agreement provided that the "Commissioner alleges that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act." As all of the First Consent Agreement Respondents, including HarperCollins Canada, did business in Canada, the Commissioner's position clearly was that the purportedly anti-competitive "agreement or arrangement" had been formed in Canada, in contrast to the U.S.-formed, U.S.-centric Arrangement alleged in the Commissioner's current Application. The First Consent Agreement further provided in its recitals that the Respondents did not accept or admit the Commissioner's allegations or any facts, liability or wrongdoing.

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

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

2. Kobo's Challenge to the First Consent Agreement

41. On February 21, 2014, Rakuten Kobo Inc. ("**Kobo**"), an e-book retailer, filed an application pursuant to section 106(2) of the *Act*, seeking to have the First Consent Agreement varied or rescinded as a result of certain alleged substantive and formal deficiencies with the First Consent Agreement. In connection with its application, Kobo sought a temporary stay of the First Consent Agreement pending determination of its application, which was granted by order of the Tribunal dated March 18, 2014.

42. The Commissioner brought a Reference to the Tribunal to determine the scope of the Tribunal's review power under section 106(2) of the *Act* in light of Kobo's application. The

Tribunal's decision on the Reference, issued on September 8, 2014, set out the basis on which the First Consent Agreement could be reviewed by the Tribunal on a section 106(2) application. The Federal Court of Appeal affirmed the Reference decision of the Tribunal on June 18, 2015.

43. Following the Reference appeal, Kobo's section 106(2) application proceeded to a hearing before the Tribunal in April 2016. At the hearing of the application, the Commissioner consented to rescinding the First Consent Agreement. The Commissioner did not argue that the First Consent Agreement met the requirements of the *Act* or that the Tribunal should exercise its discretion not to rescind the First Consent Agreement; for some reason, he chose not to take that position. By Reasons and Order dated June 10, 2016, the Tribunal made an order rescinding the First Consent Agreement.

3. The 2017 Consent Agreements

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

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

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

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

48. The Commissioner commenced his Application against HarperCollins on the same day as he registered the 2017 Consent Agreements.

4. Kobo's Challenge to the 2017 Consent Agreements

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

50. In its notice of application for judicial review, Kobo has asserted that the Commissioner acted without jurisdiction in seeking "to remedy a conspiracy that was entered into in the U.S., not in Canada," and that the Commissioner acted without jurisdiction in seeking to remedy an "arrangement" that never existed, or if it did once exist, "was not 'existing or proposed' at the time he entered into the 2017 Consent Agreements."

III. ISSUES

51. HarperCollins submits that the issue presented on this motion is whether the Application should be summarily dismissed on the ground(s) that:

(a) the Tribunal lacks jurisdiction to make an order in respect of the alleged foreign Arrangement; and/or

(b) there is no "existing or proposed" agreement or arrangement that could be the subject of an order by the Tribunal pursuant to section 90.1 of the *Act*.

IV. LAW AND ARGUMENT

A. The Application Should Be Summarily Dismissed

52. Section 9(4) of the *Competition Tribunal Act* ("***CTA***") provides that a judicial member of the Tribunal may dismiss an application "in whole or in part if the member finds that there is no genuine basis for it".[26] [27]

53. The Tribunal has found that the "no genuine basis" standard for dismissal is "substantially the same" as the "no genuine issue" test applied on motions for summary judgment in the *Federal Courts Rules*.[28]

54. This standard reflects the objectives of fairness, expeditiousness and cost-effectiveness in litigation, all of which favour the disposition/termination of unmeritorious proceedings at an early stage.[29]

55. In addition, Rule 221(1)(a) of the *Federal Courts Rules*[30] provides that pleadings may be struck out, at any time, for failure to disclose a reasonable cause of action, including for lack of jurisdiction. It is well settled that "[i]n the case of a motion to strike because of lack of

---

[26] *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp) at s. 9(4).

[27] The Tribunal's Direction dated March 17, 2017 incorrectly described the position of the Respondents regarding the nature of their motion.

[28] *United Grain Growers Limited v Commissioner of Competition*, 2006 Comp Trib 25 at para 29, HarperCollins' Book of Authorities ("**HarperCollins' BOA**") at Tab 1.

[29] *Manitoba v Canada*, 2015 FCA 57 at paras 14-15, HarperCollins' BOA at Tab 2.

[30] *Federal Courts Rules*, SOR/98-106

jurisdiction, an applicant may adduce evidence to support the claimed lack of jurisdiction."[31] "The lack of jurisdiction must be 'plain and obvious' to justify striking out" a claim at a preliminary stage, but there are occasions where jurisdictional questions "may easily be decided on a summary motion to strike."[32]

56. On its face, the Commissioner's Application has two fundamental flaws, each of which independently establishes that the Tribunal has no jurisdiction over the Application and that there is no "genuine basis" for it.

B. The Tribunal Lacks Jurisdiction over the Application

57. Unlike provincial courts of general jurisdiction, the Tribunal is a statutorily created administrative body whose jurisdiction is circumscribed by the legislation which created it. It is well settled that statutorily created courts or administrative bodies in Canada lack jurisdiction to adjudicate matters which lie outside the scope of their constating legislation.[33]

58. This Tribunal's jurisdiction is delimited by section 8(1) of the *CTA*, which provides that the Tribunal "has jurisdiction to hear and dispose of all applications made under Part [...] VIII of the *Competition Act* [...]."

59. While the Commissioner has purported to seek an order pursuant to section 90.1 of Part VIII of the *Act* in the Application, it is clear as a matter of statutory interpretation that section 90.1 applies only to (1) arrangements or agreements between or among competitors formed in Canada, and (2) such arrangements that are "existing or proposed."

---

[31] *Hodgson v Ermineskin Indian Band No 942*, 2000 CarswellNat 404 at para 9, HarperCollins' BOA at Tab 3.

[32] *Ibid* at para 10

[33] *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 35, HarperCollins' BOA at Tab 4.

60. Accordingly, the alleged Arrangement between U.S. and German entities which is (1) said by the Commissioner to have been formed in the United States, and (2) not "existing or proposed," falls outside the ambit of section 90.1 of the *Act* and, therefore, beyond this Tribunal's jurisdiction.

C. No Jurisdiction over the Alleged Foreign Arrangement

1. Section 90.1 Only Applies to Agreements or Arrangements Formed in Canada

61. The modern approach to statutory interpretation is "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[34]

62. It is well settled as a matter of statutory interpretation in Canada that there are certain basic presumptions regarding the "intention of Parliament" in enacting legislation. One such presumption, applicable here, is that:

> Unless implicitly or explicitly provided otherwise, the legislature is presumed to enact for persons, property, juridical acts and events **within the territorial boundaries of its jurisdiction. As a result, it is assumed that the legislature does not wish to give its statutes extraterritorial effect.** As far as possible, all legislation enactments should be construed and applied in light of this presumed intent.[35] (emphasis added)

63. In addition, as *Sullivan on the Construction of Statutes* notes,

> ...it is presumed that legislation enacted both federally and provincially is meant to comply with international law generally and with Canada's international law obligations in particular ... there are two aspects to the presumption of compliance with international law. First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. In choosing

---

[34] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, HarperCollins' BOA at Tab 5

[35] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th edition (Carswell: 2013) at 212, HarperCollins' BOA at Tab 6.

> among possible interpretations, therefore, courts avoid an interpretation that would put Canada in breach of its international obligations. Second, the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, an interpretation that reflects these values and principles is preferred.[36]

64. Thus, as the Supreme Court of Canada has stated, "courts … presume, **in the absence of clear words to the contrary**, that Parliament did not intend its legislation to receive extraterritorial application" (emphasis added).[37]

65. Section 90.1(1) of the *Act* provides that:

> If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
>
> (a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or
>
> (b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

66. On its face, section 90.1 of the *Act* contains no "clear words" purporting to give it effect outside of Canada. Thus, the basic presumption against giving Canadian statutes extraterritorial effect alone is sufficient for the Tribunal to conclude that section 90.1 of the *Act* applies only to agreements or arrangements formed in Canada.[38]

---

[36] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis) at §18.6, HarperCollins' BOA at Tab 7.

[37] *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers,* 2004 SCC 45, [2004] 2 SCR 427 at para 55, HarperCollins' BOA at Tab 8 [hereinafter, "SOCAN"].

[38] This conclusion is consistent with Supreme Court of Canada's decision in *R v Arcadi*, which interpreted the *Criminal Code*. In *Arcadi,* the Supreme Court considered a *Code* section which allowed an appellate court to overturn a trial judge's finding if the decision conflicted "with the judgment of any other court of appeal". The applicant argued that the trial judgment should be overturned pursuant to this section because it conflicted with two appellate decisions from England. The Court rejected this argument, finding that unless Parliament clearly showed contrary intentions, courts must assume that a statute only refers to persons or things **within the territory**. Justice Winfret held that, "…the principle is that general words in a statute refer only to persons or things within the territory, unless the contrary intention is shewn." The Court thus read the Criminal Code section as

67. In addition to Parliament's presumed intention, when section 90.1 is read in the context of other provisions in the *Act* (and the structure of the *Act* as a whole), it is very clear that the provision applies only to agreements or arrangements formed in Canada.

68. Like section 90.1, section 45 of the *Act* addresses "agreements or arrangements" between competitors. Section 45 provides, *inter alia*, that it is a criminal offence for a person to agree or arrange with a competitor to fix the price for the supply of a product. Section 46 of the *Act* provides that it is a criminal offence for a corporation carrying on business in Canada to **implement, in whole or in part in Canada**, a directive or communication from a controlling person **outside Canada**, for the purpose of giving effect to an "agreement or arrangement" **entered into outside Canada,** that "**if entered into in Canada would have been in contravention of section 45**" (emphasis added).

69. While section 45 of the *Act* does not specify that the "agreement or arrangement" needs to have been entered into in Canada, it must be interpreted as applying only to agreements or arrangements in Canada; otherwise, section 46 would serve no purpose.

70. It is well established that "giving the same words, the same meaning throughout a statute is a basic principle of statutory interpretation."[39] Applying this principle, it must be concluded that the "agreements or arrangements" among competitors referred to in both sections 45 and 90.1 of the *Act* mean agreements or arrangements **entered into in Canada**.

---

referring to *Canadian* courts of appeal. *R v Arcadi,* 1931 CarswellQue 46 (SCC) at para 2 [*Arcadi*], HarperCollins' BOA at Tab 9.

[39] *R v Zeolkowski,* [1989] 1 SCR 1378 at para 19, HarperCollins' BOA at Tab 10.

71. This conclusion concerning the limits of section 90.1 is further supported by reference to section 83 of the *Act*. Section 83(1) authorizes the Tribunal, on application by the Commissioner, to direct by order "that no measures be taken by **a person or company in Canada to implement**" a directive or communication from a controlling person outside Canada, "where the communication is **for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada,** that if entered into in Canada would have been in contravention of section 45" (emphasis added).

72. Section 83 of the *Act* confirms that where Parliament intended to refer to agreements or arrangements entered into **outside Canada**, it did so expressly. As noted, there is no such express language in section 90.1 of the *Act*.

73. Section 83(1) of the *Act* also shows that Parliament turned its mind to the prospect of "agreements or arrangements" being **entered into outside Canada** and then **implemented** in Canada. Section 83(1) authorizes the Tribunal, on application by the Commissioner, to make an order to prevent such implementation with respect to an "agreement or arrangement entered into outside Canada, that if entered into in Canada would have been **in contravention of section 45**" (emphasis added). It does not authorize the Tribunal to make an order restraining the implementation in Canada of an agreement entered into outside Canada that if entered into in Canada would have been **in contravention of section 90.1**. Moreover, there is nothing in section 90.1 or elsewhere in the *Act* which authorizes the Tribunal to make **any** orders against persons **outside** Canada, such as HarperCollins US.[40]

---

[40] In this regard, it should be noted that the Competition Tribunal Rules, as amended, only contemplate that the Commissioner can serve an originating document against a corporation **in Canada**. Section 8(1)(c) states that, "Service of an originating

74. Two other sections further illustrate that where Parliament intended to legislate with respect to certain activities outside Canada that may have effects inside Canada, it did so expressly.

75. Section 82(a) contemplates a judgment, decree, order or other process made or issued by a court or other body in a country other than Canada that, if implemented in Canada, could result in certain effects. Section 82(c) and (d) specifically grant the Tribunal the ability to grant an order to direct that no measure be taken **in Canada** to implement the foreign judgments, decrees, orders, or processes.

76. Section 84 of the *Act* addresses suppliers outside Canada. It provides that "where, on application by the Commissioner, the Tribunal finds that a supplier **outside Canada** has refused to supply a product or otherwise discriminated in the supply of a product to a person **in Canada** ... the Tribunal may order any person **in Canada**" to sell the product to that person (emphasis added).

77. Unlike sections 46, 82, 83 and 84, section 90.1 contains no references to events, persons or activities outside Canada. It is clear as a matter of statutory interpretation that section 90.1 of the Act applies only to agreements or arrangements entered into in Canada.

---

document shall be effected in the case of a corporation, by leaving a certified copy of the originating document with an officer of the corporation or with a person apparently in charge of the head office or of a branch of the corporation **in Canada** during business hours" (emphasis added). The lack of a provision in the *Rules* for serving foreign entities, such as HarperCollins US, underscores that the *Act* does not apply to foreign parties acting outside Canada.

2. Section 90.1 Does Not Apply to the Challenged Foreign Arrangement

78. Paragraphs 2 and 21-22 of the Application expressly assert that the challenged Arrangement was formed in the United States (by U.S. and German entities) and that it was implemented first in the United States and later in Canada.

79. In his Response to HarperCollins' motion, the Commissioner asserts that, because the alleged Arrangement purportedly "contemplated Canada and was implemented in Canada," there is a "real and substantial connection" between the conduct and Canada such that the Tribunal has jurisdiction to hear the Application. That position is without merit.

80. First, in support of the Commissioner's assertion that the purported Arrangement among U.S. Publishers "contemplated" Canada, the Commissioner refers to paragraphs 72-77 of the Application, which refer to certain alleged internal communications between HarperCollins employees and draft agency agreements sent by Apple to the U.S. Publishers. On their face, those alleged communications do not support the position that there was an agreement among U.S. Publishers to "shift" to the agency model (whether in the U.S. or Canada); at most, they indicate that Apple was proposing to enter into vertical agency agreements with several U.S. Publishers in the United States and later in Canada.

81. In any event, even accepting, *arguendo*, the Commissioner's allegation that there was a horizontal Arrangement among U.S. Publishers **entered into** in the United States that "contemplated" and would later be **implemented** in Canada by way of vertical agency agreements, for the reasons set out above such conduct clearly is outside the ambit of section 90.1 of the *Act*, and therefore beyond the Tribunal's jurisdiction.

82. In this regard, the assertion that there is a "real and substantial" connection between the alleged conduct and Canada (because the Arrangement purportedly was implemented in Canada) does not assist the Commissioner's position. Although the "real and substantial" connection test has at times been used by courts as an aid to statutory construction – that is, to determine whether conduct can be deemed to have taken place "in Canada" such that subjecting it to Canadian laws would not offend the presumption against the extraterritorial application of legislation[41] – that test cannot be used to override clearly expressed legislative intent on the (territorial) limits of the scope of the legislation in question. This is particularly so in respect of an administrative statutory tribunal.

83. In this case, as noted above, it is clear from sections 46 and 83 of the *Act* that (a) there is a clear distinction between "entering into" a horizontal arrangement and "implementing" that arrangement; and (b) the implementation of a foreign horizontal arrangement in Canada does **not** mean that the horizontal arrangement itself was entered into in Canada within the meaning of the *Act* and as required for section 90.1 of the *Act* to apply to the arrangement. That is clear as a matter of statutory interpretation, whether or not the alleged implementation could be said to "connect" the conduct to Canada.

84. Accordingly, the challenged Arrangement is outside the scope of section 90.1 of the *Act* and therefore cannot be the subject of an Order by the Tribunal.

---

[41] For example, in *SOCAN*, *supra* note 36, the Supreme Court of Canada invoked the real and substantial connection test to determine that both internet transmissions originating *or* received in Canada could constitute communications made "in Canada" for purposes of Canada's copyright laws.

3. The Tribunal's Assertion of Jurisdiction Would Conflict with the Principles of International Comity

85. In addition to the principles of statutory interpretation discussed above, the principles of international comity support the conclusion that the Tribunal lacks jurisdiction over the Arrangement alleged by the Commissioner.

86. In *Morguard Investments Ltd v De Savoye*, the Supreme Court of Canada held that "comity" is:

> … neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[42]

87. The Supreme Court of Canada more recently observed that the "principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity."[43]

88. As described above, **all** of the entities alleged by the Commissioner to have been part of the Arrangement, including HarperCollins US, have been and currently are subject to the jurisdiction of the SDNY Court and the continuing U.S. Final Judgments.

89. It would thus offend the principles of comity for the Tribunal to assert jurisdiction and entertain the relief sought by the Commissioner against the Respondents in this proceeding. Taking jurisdiction on the facts of this case would be inconsistent with the objectives of order

---

[42] *Morguard Investments Ltd v De Savoye*, 1990 CarswellBC 283 (SCC) at para 31, HarperCollins' BOA at Tab 11.

[43] *Chevron Corp v Yaiguaje*, [2015] 3 SCR 69 at para 52, HarperCollins' BOA at Tab 12.

and fairness, as well as the due deference to the courts of other states that is necessary for predictability in legal matters and reciprocity among nations.

90. As Facey & Brown have noted, Canada has previously taken the position that U.S. enforcement of antitrust laws extraterritorially intruded on Canadian sovereignty.[44]

91. The *Foreign Extraterritorial Measures Act* is also a clear expression by Parliament that foreign antitrust judgments involve Canada's national interests, and specifically allows the Attorney General of Canada to declare, in appropriate circumstances, that a foreign antitrust judgment should not be "recognized or enforceable in any manner in Canada."[45]

92. The Tribunal's assertion of jurisdiction over an alleged Arrangement **formed in the United States**, which is the subject of the continuing U.S. Final Judgments, clearly would contradict and undermine the position of mutual respect for the sovereign affairs of other nations which is central to the comity doctrine and which is a prominent feature of Canada's laws in the competition/antitrust sphere.

D. No Jurisdiction because the Alleged Arrangement is Not "Existing or Proposed"

93. A further fatal flaw in the Commissioner's Application against the Respondents is that section 90.1(1) of the *Act* permits the Tribunal to make orders only in respect of an arrangement

---

[44] Brian Facey & Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations*, 2nd ed (LexisNexis: 2017) at 378, HarperCollins' BOA at Tab 13, citing *In re Uranium Antitrust Litigation; Westinghouse Electric Corp v Rio Algom Limited, et al*, 480 F Supp 1138, HarperCollins' BOA at Tab 14.

[45] *Foreign Extraterritorial Measures Act*, RSC, 1985, c F-29, at section 8(1)(a). As the court in *Desjean v Intermix Media, Inc.* stated, "if Canada reserves the right to refuse enforcement of American antitrust judgments, this Court should not be placed in the position of applying Canadian competition law to American corporations doing business in the U.S. and having no assets in Canada, thereby compelling a plaintiff to seek enforcement in the U.S. of a Canadian antitrust judgment." [2007] 4 FCR 151, 2006 FC 1395 (CanLII) at para 37, HarperCollins' BOA at Tab 15.

between or among competitors that is "existing or proposed". The Application discloses no such arrangement, nor could it.

94. Although the *Act* does not define the terms "existing or proposed" as used in section 90.1, the ordinary meaning of those words plainly requires that competitors either are parties to an agreement or arrangement or are considering entering into an agreement or arrangement at the time of an application brought under section 90.1.[46]

95. As stated above, the Commissioner's Application alleges that the Arrangement among U.S. Publishers and Apple was formed in the United States in 2010 and purportedly provided for a "shift from wholesale agreements, where retailers control retail prices and have the ability to offer consumers discounts, to agency agreements, where publishers control the retail price and have the ability to bar price discounting [for e-books],"[47] as well as having MFN clauses and pricing tiers in the agreements.

96. HarperCollins denies that any such arrangement among U.S. publishers ever existed, but even if it did, it is clear that such an arrangement no longer exists. As described above, the U.S. Final Judgments prohibited HarperCollins US, Hachette, Macmillan, Simon & Schuster and Apple (as well as Penguin) from impeding e-book price discounting by e-book retailers or entering into price MFN agreements with them, which is the very conduct said by the Commissioner to constitute the Arrangement.

---

[46] With reference to *Webster's Encyclopedic Unabridged Dictionary*, the Court of Appeal for Ontario has held that the word "proposed" means "'suggested' or 'offered' for consideration." *Peel Condominium Corp No 505 v Cam-Valley Homes Ltd*, 2001 CarswellOnt 579 (CA) at para 69, HarperCollins' BOA at Tab 16.

[47] The Commissioner's Application, dated January 19, 2017 at para 21.

97. Moreover, in February 2014, the U.S. Publishers said by the Commissioner to have formed the Arrangement and/or their Canadian affiliates entered into the First Consent Agreement, which was modelled on the U.S. Final Judgments and contained substantially the same prohibitions on conduct. Regardless of the fact that in June 2016 the Tribunal rescinded, with the Commissioner's consent, the First Consent Agreement, that Agreement demonstrates that, at the very least from February 2014 onward, no arrangement among publishers could have existed in breach of section 90.1 of the *Act*.

98. In any event, the Commissioner now has entered into the new 2017 Consent Agreements with the same parties to the First Consent Agreement (other than HarperCollins Canada) and with Apple, which contain substantially the same prohibitions on conduct. The 2017 Consent Agreements preclude a finding that there is an "existing or proposed" agreement or arrangement among publishers in Canada.

99. At paragraphs 21-24 of his Response, the Commissioner asserts that the purported Arrangement continues to exist because the 2014 Consent Agreement was and the 2017 Consent Agreements currently are stayed. That position is without merit. The Commissioner clearly conflates the existence of **vertical** agency agreements, which cannot run afoul of Section 90.1 of the *Act*, with the existence of **horizontal** agreements or arrangements among competitors, which may.

100. On its face, section 90.1 requires that there be an existing or proposed agreement or arrangement **among competitors**. While the Application alleges that publishers compete with each other, it does not allege that a publisher like HarperCollins Canada competes with e-book

retailers like Kobo. An agency agreement between a publisher and an e-book retailer is thus a vertical (supplier-distributor) agreement, not an agreement among competitors.

101. The only "arrangement among competitors" alleged by the Commissioner in the Application (*i.e.*, the purported 2010 Arrangement among the U.S. Publishers) necessarily ended with the U.S. Final Judgments, which were and are not stayed.

102. Moreover, even though the First Consent Agreement was and the 2017 Consent Agreement currently are stayed because of challenges by Kobo (the latter, it bears noting, on consent of the Commissioner), the fact that the publisher entities who were and are parties to those Consent Agreements agreed to the prohibitions and restrictions contained therein **prior to the stay** demonstrates that there currently is not any horizontal arrangement in existence or under consideration among publishers in Canada. Indeed, the Commissioner does not assert that a new **horizontal** arrangement came into existence or contemplation among the publishers upon or after the entering of the stay of either the First or 2017 Consent Agreements.

103. Rather, the only "agreements" in existence today in Canada are separate vertical agency agreements between one publisher and one retailer. In the absence of an existing horizontal agreement or arrangement among publishers (which, in light of the U.S. Final Judgments and Canadian Consent Agreements does not and cannot exist), those vertical agreements cannot be the subject of a remedial order by the Tribunal under section 90.1 of the *Act*. The Application should thus be dismissed.

V. ORDER REQUESTED

104. The Respondents request that the Application be dismissed, with costs to HarperCollins.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of April, 2017.

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

Schedule A
List of Authorities

1. *United Grain Growers Limited v Commissioner of Competition*, 2006 Comp Trib 25
2. *Manitoba v Canada*, 2015 FCA 57
3. *Hodgson v Ermineskin Indian Band No 942*, 2000 CarswellNat 404
4. *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4
5. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27
6. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th edition (Carswell: 2013)
7. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis: 2014)
8. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427
9. *R v Arcadi*, 1931 CarswellQue 46 (SCC)
10. *R v Zeolkowski*, [1989] 1 SCR 1378
11. *Morguard Investments Ltd v De Savoye*, 1990 CarswellBC 283 (SCC)
12. *Chevron Corp v Yaiguaje*, [2015] 3 SCR 69
13. Brian Facey & Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations*, 2nd ed (LexisNexis: 2017)
14. *In re Uranium Antitrust Litigation; Westinghouse Electric Corp v Rio Algom Limited, et al*, 480 F Supp 1138
15. *Desjean v Intermix Media, Inc.*, [2007] 4 FCR 151, 2006 FC 1395 (CanLII)
16. *Peel Condominium Corp No 505 v Cam-Valley Homes Ltd*, 2001 CarswellOnt 579 (CA)

Schedule B
Legislation

Competition Act, RSC 1985, c C-34

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Order

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

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

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

Factors to be considered

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

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

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

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

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

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

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

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

(f) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;

(g) the nature and extent of change and innovation in any relevant market; and

(h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

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

Court of record

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

Proceedings

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

Interventions by persons affected

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

Summary dispositions

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

Decision

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

***Federal Courts Rules*, SOR/98-106**

Motion to strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

***Foreign Extraterritorial Measures Act*, RSC, 1985, c F-29**

Attorney General may declare antitrust judgments not to be recognized or enforceable

8 (1) Where a foreign tribunal has given a judgment in proceedings instituted under an antitrust law and, in the opinion of the Attorney General of Canada, the recognition or enforcement of the judgment in Canada has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or otherwise has infringed or is likely to infringe Canadian sovereignty, the Attorney General of Canada may

(a) in the case of any judgment, by order, declare that the judgment shall not be recognized or enforceable in any manner in Canada; or

(b) in the case of a judgment for a specified amount of money, by order, declare that, for the purposes of the recognition and enforcement of the judgment in Canada, the amount of the judgment shall be deemed to be reduced to such amount as is specified in the order.