CT-2017-002

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

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

Respondents

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION
(Motion to Strike / Dismiss the Application)

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OVERVIEW

1. HarperCollins Publishers L.L.C. ("**HarperCollins**") and HarperCollins Canada Limited ("**HarperCollins Canada**") seek an order dismissing the Commissioner of Competition's (the "**Commissioner**") Application under s. 90.1 of the *Competition Act* (the "**Act**").

2. HarperCollins asserts that the Competition Tribunal (the "**Tribunal**") lacks jurisdiction to grant the relief sought by the Commissioner given that:

    i. it is "clear" that, in accordance with principles of statutory interpretation, s. 90.1 of the Act cannot apply to anti-competitive conduct entered into outside of Canada and therefore; and

    ii. there is "no doubt" that there is no "existing or proposed" arrangement in relation to the sale of E-books at retail in Canada, as is required by s. 90.1 of the Act.

3. The onus of proof on the moving party in a motion to strike is heavy. The discretion to strike out pleadings should only be exercised in plain and obvious cases where the Court is satisfied beyond doubt that the allegation cannot be supported and is certain to fail at trial because it is "bereft of all possibility of success."

4. The fact that the Arrangement was arrived at in the United States is not determinative of the Tribunal's jurisdiction under s. 90.1 of the Act. The Arrangement generally, and HarperCollins and HarperCollins Canada in particular, have a real and substantial connection to Canada in respect of the marketing and sale of E-books. That connection provides the Tribunal with jurisdiction in this matter. Moreover, the Arrangement continues to exist in Canada.

5. The interpretation of s. 90.1 has never been judicially considered; its interpretation is not simply contentious but complex. Complex matters of statutory interpretation should be determined following a full proceeding, where a decision-maker like the Tribunal has the

benefit of a complete evidentiary record including discovery, *viva voce* evidence and expert reports, can be considered.

I. FACTS

6. For purposes of this motion, the Commissioner relies on the facts as pled in the Application and Reply. Capitalized terms used herein are as defined in the Application and Reply.

II. POINTS IN ISSUE

7. This motion raises the following issue: whether the Commissioner's Application under s. 90.1 of the Act should be struck because it is plain and obvious it will fail?

III. SUBMISSIONS

A. THE TEST UNDER RULE 221 OF THE *FEDERAL COURTS RULES*

8. In its Direction to Counsel of March 17, 2017, the Tribunal clarified that HarperCollins' motion is a motion to strike or dismiss the Commissioner's Application, not a motion for summary disposition.[1]

9. Pursuant to the "gap rule" set out in Rule 34(1) of the *Competition Tribunal Rules*,[2] the Tribunal has jurisdiction to consider a motion to strike under Rule 221 of the *Federal Courts Rules*.[3]

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[1] CT-2017-002 - *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited* – Direction to Counsel (from Mr. Justice Gascon, Chairperson), March 17, 2017.

[2] *Competition Tribunal Rules*, SOR/2008-141, r. 34(1).

[3] *The Commissioner of Competition v. Reliance Comfort Limited* Partnership, 2013 Comp. Trib. 4, at para 5 [***"Reliance"***]; *Federal Courts Rules*, SOR/98-106, r. 221.

10. To succeed in a motion to strike under Rule 221, the Respondents must demonstrate that it is plain and obvious the Application discloses no reasonable cause of action.[4] A pleading should only be struck where the plaintiff's claim is "so clearly futile that it has not the slightest chance of succeeding."[5]

11. The onus of proof on the party moving to strike is heavy.[6] The discretion to strike out pleadings should only be exercised where the Court is satisfied beyond doubt that the allegations are "bald assertions... unsubstantiated with specific facts or a proper factual basis."[7]

12. The only evidence relevant to the determination of this motion are the pleadings themselves. The Tribunal must assume, for the purposes of this motion, that every allegation contained in the Application is true.[8]

B. THE ISSUES ARE COMPLEX

13. The issues raised in the Application are novel and unprecedented and are, fundamentally, complicated questions of statutory interpretation.

14. The Respondents assert that, based on the wording of the provision, s. 90.1 of the Act is limited to agreements and arrangements entered into in Canada. The Commissioner disagrees. The Respondents also offer various interpretations as to when a civil conspiracy ceases to "exist." Again, the Commissioner disagrees.

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[4] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para 36 ["***Hunt***"]; *Apotex Inc. v. Laboratoires Servier*, 2007 FCA 350, at para 23 ["***Laboratoires Servier***"]; *Reliance*, at para 6.

[5] *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, 2005 FC 1310, at para 33. ["***Apotex***"]

[6] *Apotex*, at para 31; *Reliance*, at para 7.

[7] *Mil Davie Inc. v. Société d'Exploitation et de Développement d'Hibernia Ltée,* [1998] FCJ No 614 (QL), at para 9. ["*Mil Davie*"]

[8] *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, at para 4.

15. This is not a case where a provision has an obvious literal meaning. Section 90.1 of the Act has never been judicially considered; its interpretation is not simply contentious, but complex.[9]

16. The scope of s. 90.1 is an issue of mixed law and fact.[10] In interpreting legislation, attention must be paid to the factual context of the particular case so as to avoid unintended consequences.[11]

17. For example, in this motion, HarperCollins asks the Tribunal to conclude that it is without jurisdiction because the Arrangement was entered into in the United States and is no longer existing. The mischief created by such a finding by the Tribunal would be substantial.

18. The position put forward by HarperCollins suggests, for example, that any group of two or more competitors could simply leave Canada temporarily for purposes of entering into an anti-competitive agreement or arrangement, and their actions would be beyond the reach of s. 90.1 of the Act.

19. The Commissioner submits that this could not have been Parliament's intention, nor would such an interpretation be consistent with the goals of the Act.[12] The Act as a whole embodies a complex scheme of economic regulation, with the aim of eliminating activities that reduce competition in the market-place.[13] This includes activities originating outside

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[9] *Laboratoires Servier*, at paras 46-47. *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, 2005 FC 480, at paras 35-36.

[10] *Visx Inc. v Nidek Co.*, [1998] FCJ No. 871, at para 2.

[11] *Kobo Inc. v. The Commissioner of Competition,* 2014 Comp. Trib. 8, at para 13; *The Commissioner of Competition v. Direct Energy Marketing Limited,* 2015 Comp. Trib. 2, at para 37. ["***Direct Energy***"]

[12] *Direct Energy*, at para 38.

[13] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at para 57.

of Canada. In the merger context, for example, international transactions are routinely reviewed under s. 92 of the Act where the effects will be felt in Canada.[14]

20. The interpretation of s. 90.1 and the significance, if any, of s. 46 of the Act to that interpretation, is a fundamental question, and should involve a weighing of evidence and fulsome submissions - not a question which should be determined in advance of a full hearing on the merits.

21. Contrary to the Respondents' assertions, the propositions they advance are not "clear"[15] or "without doubt."[16] More importantly for purposes of this strike motion, the Commissioner's interpretation – as set out below – is not "bereft of all possibility of success."[17] Complex matters of statutory interpretation are better left for argument at trial where proper evidence may be adduced. This is not an issue that should be disposed of in a preliminary motion. To draw the conclusions put forward by the Respondents and to make those determinations now would be premature.[18]

C. THE COMMISSIONER'S ARGUMENTS HAVE MERIT

(1) The Commissioner's Allegations are not Bald, Unsubstantiated Assertions

22. Where an objection is taken to its jurisdiction, the Tribunal must determine whether there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction.[19] The Tribunal must be satisfied that there is a sufficient factual basis to substantiate both claims of jurisdiction and a reasonable cause of action.

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[14] CT-2009-014, *Commissioner of Competition v. Pfizer Inc. and Wyeth*, filed October 14, 2009.

[15] Respondents' Notice of Motion (for Summary Dismissal of the Application), at para 12.

[16] Respondents' Notice of Motion (for Summary Dismissal of the Application), at para 23.

[17] *LJP Sales Agency Inc. v. Canada (National Revenue)*, 2007 FCA 114 at para 7.

[18] *Apotex Inc. v. Eli Lilly and Co.*, 2001 FCT 636, at paras 13-14; *R. v. Amway of Can. Ltd*, [1986] 1 CTC 138, at paras 34, 39.

[19] *Mil Davie*, at para 8.

23. In paragraphs 39-50 of the Application, the Commissioner sets out how the collective agreement to move to the Agency Model came about. In paragraphs 51-56, the Commissioner sets out the specific elements agreed upon by the parties to the Arrangement. Paragraphs 57-66 set out how the Arrangement was rolled out in the United States and paragraphs 67-82 set out the facts with respect to how the Arrangement was rolled out in Canada.

24. The Application is not based on "allegations or bald assertions of anti-competitive conduct unsubstantiated with specific facts or a proper factual basis."[20] As in *Mil Davie*, these assertions are substantiated with sufficient material facts, including references to specific communications, meetings and findings by US courts.[21]

(2) The Tribunal's Jurisdiction - Real and Substantial Connection

25. The Respondents argue that, even if there was an Arrangement, it was entered into outside Canada, among foreign competitors, and thus cannot constitute anti-competitive conduct under the Act. With reference to principles of statutory interpretation, they claim that the Tribunal does not have jurisdiction under s. 90.1 of the Act to issue an order unless the anti-competitive arrangement is entered into in Canada, and the persons against whom the order is issued are in Canada. The Commissioner disagrees.

26. Although Parliament is presumed not to intend to enact laws with extraterritorial effect, this presumption is rebuttable. The presumption against extraterritorial effect can be rebutted by clear words in the legislation, or by a necessary implication to the contrary.[22] Accordingly, whether a particular legislative provision operates extraterritorially turns on the proper interpretation of the legislation in question.

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[20] *Mil Davie*, at para 9.

[21] *Mil Davie*, at paras 10-11.

[22] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, at para 54.

27. Even if the Act does not contain words indicating an explicit intent for s. 90.1 to apply extraterritorially, a statute can be interpreted to have extraterritorial effect by necessary implication where the expressed statutory purpose would be defeated by failure to draw the inference.[23]

28. It is not plain and obvious that the Respondents' assertion is correct, and that the Tribunal does not have jurisdiction in this case. A number of cases have considered whether causes of action brought further to s. 36 of the Act against foreign defendants can proceed. The law has consistently found that questions of jurisdiction, in particular with respect to international conspiracies implemented in Canada, should not be decided in a preliminary motion.

29. In *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*,[24] the Ontario Superior Court considered motions brought to challenge the jurisdiction of Canadian courts in class actions in which the defendants were all foreign corporations. The class actions were based upon alleged losses and damages in Canada due to alleged worldwide price fixing conspiracies in respect of vitamins and vitamin-related components.

30. In dismissing the jurisdictional motions and allowing the class actions to proceed, the court, after reviewing the legislative scheme, found that:

> ... there is a good arguable case that any conspiracy entered into abroad that fixes prices or allocates markets in Canada so as to create losses through artificially higher prices in Canada, gives rise to the tort of civil conspiracy in Canada. It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad.[25]

31. In *Fairhurst v. Anglo American PLC*, the defendants applied in the Supreme Court of British Columbia for an order striking out Ms. Fairhurst's statement of claim or dismissing or staying the action on the ground that the Court did not have jurisdiction to entertain the

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[23] *Ewachniuk v. Law Society of British Columbia*, [1998] 7 WWR 637, at para 48.

[24] *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* [2002] O.J. No. 298 ["***VitaPharm***"]

[25] *VitaPharm*, at para 58.

action. The central question was whether a Canadian class action alleging harm from a tortious conspiracy among foreign defendants to raise diamond prices could proceed. In finding that the Canadian court did have jurisdiction, the court stated: "a tortious conspiracy will be taken to have occurred where the damage was suffered, regardless of where the elements of wrongful conduct took place, if the wrongdoer knew or ought to have known that the product would be sold (and harm would be suffered)."[26]

32. In upholding the *Fairhurst* finding on appeal, the British Columbia Court of Appeal reiterated that "it is not our role, nor was it the role of the court below, to make factual findings at this stage. Although the defendants may believe they have tendered "clear evidence" that none of them is involved in the commercial operations at issue in this proceeding, there is also evidence that may ground the wrongs complained of by the plaintiff at trial.... In my view, then, the evidence filed by the defendants does not make it "plain and obvious" that the action as pleaded could not lie within territorial competence of a British Columbia court."[27]

33. Most recently, the Supreme Court of Canada ("**SCC**") canvassed this issue in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*. Again the issue was whether "an alleged conspiracy entered into outside Canada, among foreign defendants, to fix prices of products ..." could form the basis of a class action brought by Canadian consumers under s. 36 of the Act. In finding that it could, the SCC stated:

> The conduct in question, while perpetrated by foreign defendants, allegedly involved each respondent's Canadian subsidiary acting as its agent. The sales in question were made in Canada, to Canadian customers and Canadian end-consumers. There is at least some suggestion in the case law that where defendants conduct business in Canada, make sales in Canada and conspire to fix prices on products sold in Canada, Canadian courts have jurisdiction."[28]

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[26] *Fairhurst v. Anglo American PLC*, 2011 BCSC 705, at para 37.

[27] *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257, at paras 31-32.

[28] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, at para 46. ["***Sun-Rype***"]

34. These cases indicate that the test to be applied in determining whether the Tribunal has jurisdiction over extra-territorial conduct and foreign defendants is whether there is a real and substantial link between the conduct and Canada.[29] However the specific factors that should be considered in any given case may vary.

35. In *Sun-Rype*, the SCC relied on *Club Resorts Ltd. v. Van Breda*[30] which establishes a non-exhaustive framework for the assumption of jurisdiction over foreign acts and actors in the context of tort law, which included: whether the defendants carry on business in Canada; the *situs* of the tort; and whether contracts connected with the dispute were made in Canada.

36. In *Vita-Pharm,* a pre-*Van Breda* case, the court assessed, among other factors, the relationships between the foreign head offices and the Canadian affiliates[31]; the fact that the alleged agreement provided for price-fixing in respect of products sold *to and within* Canada[32]; and the fact that damages were suffered in Canada.[33] (emphasis in original).

37. The question of whether s. 90.1 can apply to a foreign arrangement or to a foreign actor, and if so, which factors should be considered in establishing a real and substantial connection, has never been judicially considered.

38. As pled with more specificity in the Application, the Reply and the Response to HarperCollins' motion, the Commissioner submits that a real and substantial connection exists in this matter as a result of, among other things, the fact that:

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[29] *Sun Rype*, at para 45.

[30] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, at para 90.

[31] *VitaPharm*, at para 81.

[32] *VitaPharm*, at para 62.

[33] *VitaPharm*, at para 74.

(a) HarperCollins and the Other US Publishers always contemplated that the Arrangement would be implemented in Canada and, either directly or through an affiliate, implemented the Arrangement in Canada;

(b) HarperCollins, through its affiliate HarperCollins Canada, carries on business in Canada; and

(c) the Arrangement causes harm in the market for the retail sale of E-books in Canada.

39. HarperCollins and the Other US Publishers all carry on business in Canada, either directly or through subsidiaries or affiliates. HarperCollins Canada is responsible for the sales, marketing and publicity of HarperCollins' titles in Canada.

40. From the time that discussions between Apple and HarperCollins and the Other US Publishers began in mid-December 2009, it was clear that they contemplated that the Arrangement would apply to both the United States and Canada. Initial draft agency agreements included Canada, along with the United States, as part of the "Territory" covered by those agreements and draft Canada-specific agreements incorporated by reference the key substantive terms of the US Agency Agreements, including the MFN provision.

41. In due course, each of HarperCollins Canada, Hachette Digital Inc., S&S Canada and Macmillan entered into agency agreements with Canadian E-book retailers such that by November 2011 all of them had agency agreements with Apple Canada, Kobo and Amazon.

42. While it took more time to transform the market from wholesale to agency in Canada than the United States as a result of certain operational issues, HarperCollins, Apple and the Other US Publishers never wavered from their decision to bring about that transformation.

43. The effects of the Arrangement continue to be felt in Canada. Though prices of HarperCollins' and the Other US Publishers' E-books sold in Canada have varied since the implementation of the Agency Model in Canada, they remain substantially higher today than would have been the case but for the Arrangement and the resulting shift from wholesale to agency.

44. The Respondents have not demonstrated that it is plain and obvious that Canadian courts have no jurisdiction over the alleged anti-competitive acts committed in this case. The cause of action under s. 90.1 of the Act should not be struck out.

(3) The Arrangement Exists

45. It is not plain and obvious that the Arrangement is no longer existing.

46. The Arrangement existed on the date the Application was filed and continues to exist in Canada to this date.

47. The US Judgments did not apply to the sale of E-books in Canada, so have no bearing on the existence of the Arrangement in Canada. The US Judgments were not directed at Canada or Canadian entities and did not require that contracts for the sale of E-books be changed in Canada. Moreover, the "Agency Lite" model contemplated by the US Judgments was never implemented in Canada, so the US Judgments have had no impact on the Canadian E-books market.

48. The 2014 Consent Agreement was stayed before being implemented and was ultimately rescinded and therefore had no impact on the existence of the Arrangement in Canada or on competition in the retail E-books market in Canada.

49. The 2017 Consent Agreements were stayed before being implemented and therefore have had no impact on the existence of the Arrangement in Canada or on competition in the retail E-books market in Canada.

50. Even if the 2017 Consent Agreements were in force, principles of statutory interpretation support the proposition that the Arrangement need not necessarily be "existing" while the matter is before the Tribunal in order for the Tribunal to have jurisdiction.

51. Section 10 of the *Interpretation Act*[34] states:

> 10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

52. Further, s. 12 of the *Interpretation Act* states:

> 12. Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

53. These principles of statutory interpretation have been applied such that enactments that are written in the present tense are interpreted to have a degree of past signification.[35]

54. In *Re Genentech Canada Inc.,* the Patented Medicine Prices Review Board (the "**PMPRB**") considered whether or not a provision in the *Patent Act* which referenced a product that "is being sold" gave it with jurisdiction to consider past conduct. In that case, the PMPRB had issued a Notice of Hearing to Genentech Canada Inc. ("**Genentech**") regarding the price at which one of Genentech's patented medicines was being sold in Canada. After the Notice of Hearing was issued, Genentech filed documents with the Commissioner of Patents dedicating the patents cited in the Notice of Hearing to the public. Genentech then argued that the dedication of the patents removed the pricing issue from the jurisdiction of the PMPRB because it was no longer the patent holder with respect to the products in issue. The PMPRB found that Genentech's pricing practices with respect to that product were still within the jurisdiction of the PMPRB:

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[34] *Interpretation Act*, RSC 1985, c I-21.

[35] See, for example, *Direct Energy* at para 40; *Genentech Canada Inc., Re*, 44 C.P.R. (3d) 316 (1992) at para. 60 ["***Genentech***"]; *R. v. Cross*, 2006 ABQB 682, at para. 16 ["***Cross***"].

> Were this literal construction to be applied, the Board would be required to terminate a proceeding, regardless of the stage it had reached, if it was shown that the patentee had ceased, even temporarily, selling the medicine in the relevant Canadian market, or had, as in this case, dedicated its patents to the public. In the Board's view, either outcome would frustrate Parliament's scheme for the regulation of prices of patented medicines.[36]

55. In concurring reasons, Vice-Chairman Goyer made the following additional comment:

> In my opinion, when the patentee freely decides to file a patent application, to use the patent once it is issued, to pay the regulatory taxes, and to sell the patented medicine, it agrees de facto to submit to the pricing obligations under the Patent Act. The patentee becomes irrevocably liable for what "is", with the understanding of course that what "is" today will be what "was" tomorrow. Otherwise, no regulatory agency could adequately fulfil its duties and exercise its responsibilities as defined in the legislation in accordance with the legislators' intentions.[37] (emphasis added)

56. The Supreme Court of Canada applied similar principles to the interpretation of an insurance contract in *Somersall v. Friedman.* The plaintiffs were struck by an underinsured driver and, knowing that they had purchased additional coverage (the SEF 44 Endorsement) from their own insurer to cover this type of situation, reached an agreement with the defendant to pursue him only to the limits of his insurance policy. The plaintiffs' insurer argued that in doing so, they interfered with its subrogation rights and lost their claim. The argument between the plaintiffs and their insurance company centred on the words "*is* legally entitled to recover" in Clause 2 of the SEF Endorsement. The majority of the Supreme Court of Canada found as follows:

> Clause 2 of the SEF 44 Endorsement states that "the Insurer shall indemnify [the insured] for the amount that such eligible claimant is legally entitled to recover" from the inadequately insured tortfeasor. My colleague Binnie J. stresses the present tense use in "is legally entitled to recover" and says that if there is in the present no liability on the part of the alleged tortfeasor, the insurer was not obliged to make payment. I disagree that the present tense is of such significance. The section cannot require the judge to make a moment-by-moment determination of legal

[36] *Genentech*, at para 43.

[37] *Genentech,* at para 66.

> entitlement. Whether he looks to the time the claim is made, the time the action is brought, or the time of the accident, the determination of legal entitlement is a retrospective exercise.[38] (emphasis added)

According to the majority, the key question was when the obligation to indemnify came into being. The majority determined that the appropriate time was at the time the accident took place. At that moment, all of the conditions in the SEF 44 were satisfied.[39]

57. The use of the present tense is a short-hand that relieves Parliament of the obligation to "...cover off every contingency of place, time, gender, and number..."[40] in every enactment. The present tense is also often used to express "...the habitual, or the recent past, or near future."[41] Determining when past conduct can no longer be captured by the present tense is a matter of degree, for which time, intention, and circumstances are relevant.[42] As s. 90.1 has never been litigated before, no such determination has ever been made as to the outer limits of its applicability.

58. If a "moment-by-moment" determination of "present" circumstances were required to find liability under s. 90.1 simply because it is written in the present tense, parties could evade responsibility for their actions by changing their conduct at any moment, including after litigation is commenced, and even up to the moment before a judgment is rendered. Parties could reap the benefits of their alleged misconduct for extended periods of time, deprive the Tribunal of jurisdiction over their conduct at the last moment – for example when the Tribunal is deliberating after a hearing – and walk away without consequence. This cannot be the intention of Parliament.

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[38] *Somersall v. Friedman*, 2002 SCC 59, at para 28. [***"Somersall"***]

[39] *Somersall*, at para. 30.

[40] *Cross*, at para. 16.

[41] *R. v. Phillips*, [1992] A.J. No. 23, at para. 10. [***"Phillips"***]

[42] *Phillips,* at para. 11.

59. In order for the Commissioner to fulfil his duties and exercise his responsibilities under the Act, he must be able to bring proceedings against parties who have allegedly breached the Act, even if they may change their conduct at some later date. Parliament must, therefore, have intended some degree of past signification in s. 90.1 How far back into the past the Commissioner should be allowed to reach under s. 90.1 is a matter yet to be determined, but it is by no means plain and obvious that no past signification whatsoever applies to the words "existing or proposed."

D. CONCLUSION

60. The Tribunal has jurisdiction to grant the relief requested in the Application.

61. It is not plain and obvious that the Application cannot succeed because it is bereft of any chance of success.

IV. ORDER SOUGHT

62. The Commissioner requests that the Respondents' motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Gatineau, Quebec,

this 7th day of April, 2017.

DEPARTMENT OF JUSTICE,
COMPETITION BUREAU LEGAL SERVICES
Place Du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

John Syme
Alex Gay
Esther Rossman
Katherine Johnson
Tel: (819) 953-3903
Fax: (819) 953-9267

Lawyers for the Applicant,
Commissioner of Competition

TO: **COMPETITION TRIBUNAL**
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

AND: **STIKEMAN ELLIOTT LLP**
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Katherine Kay
Danielle Royal
Tel: (416) 869-5507
Fax: (416) 947-0866

Lawyers for the Respondents,
HarperCollins Publishers L.L.C.
and HarperCollins Canada Limited

V. AUTHORITIES

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SECONDARY MATERIAL **TAB**

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MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITON

(Motion to Strike/ Dismiss the Application)

DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
22nd Floor
50 Victoria Street
Gatineau QC K1A 0C9

John Syme
Alex Gay
Esther Rossman
Katherine Johnson

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

John.Syme@canada.ca
Alex.Gay@canada.ca
Esther.Rossman@canada.ca
Katherine.Johnson@canada.ca

Counsel to the Commissioner of Competition