Competition Tribunal | Tribunal de la Concurrence

Reference: *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 10
File No.: CT-2017-002
Registry Document No.: 72

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 summary dismissal 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: May 3, 2017
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Reasons for Order and Order: July 24, 2017

ORDER AND REASONS FOR ORDER DISMISSING A MOTION FOR SUMMARY DISMISSAL

I. OVERVIEW

[1] On March 6, 2017, HarperCollins Publishers LLC ("**HarperCollins US**") and HarperCollins Canada Limited ("**HarperCollins Canada**") (collectively, "**HarperCollins**") filed a motion for summary dismissal (the "**Motion**") seeking an order from the Tribunal dismissing the application (the "**Application**") brought against them by the Commissioner of Competition (the "**Commissioner**") under section 90.1 of the *Competition Act*, RSC 1985, c C-34 as amended (the "**Act**"). In his 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. (the "**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.

[2] HarperCollins submits that the Commissioner's Application has two fundamental flaws on its face, each of which provides a separate, independent and sufficient jurisdictional ground on which it should be summarily dismissed by the Tribunal.

[3] First, HarperCollins claims 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. HarperCollins argues that, as a straightforward and clear matter of statutory interpretation, 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*.

[4] Second, HarperCollins submits that, regardless of whether the Arrangement ever existed, there can be no doubt that no such Arrangement currently exists or is proposed as the alleged conspiracy was resolved by courts and antitrust enforcers in the United States in 2012-2013. Furthermore, HarperCollins adds that, in light of the consent agreement filed with the Tribunal in February 2014 (the "**2014 Consent Agreement**") and the subsequent consent agreements entered into on January 19, 2017 between the Commissioner and other E-book publishers (the "**2017 Consent Agreements**"), the Arrangement was no longer "existing or proposed", as required by section 90.1 of the Act, at the time of the Application.

[5] In response to the first jurisdictional argument, the Commissioner submits that the Tribunal has the requisite jurisdiction to grant the order sought since the alleged Arrangement (generally) and HarperCollins (in particular) have a "real and substantial connection" to Canada. The Commissioner claims that a "real and substantial connection" exists in this matter since: 1) HarperCollins and the other US publishers always contemplated that the alleged Arrangement would be implemented in Canada and has indeed been implemented in this country; 2) HarperCollins US, through its affiliate HarperCollins Canada, carries on business in Canada; and 3) the alleged Arrangement causes harm in the market for the retail sale of E-books in Canada.

[6] With respect to the second ground for dismissal, the Commissioner submits that the alleged Arrangement existed on the date the Application was filed and continues to exist in Canada to this day. In this regard, he submits that: 1) the judgments issued by the US courts did not apply to the sale of E-books in Canada; 2) the 2014 Consent Agreement was stayed before being implemented and was then rescinded by the Tribunal, thus arguably having no legal impact on the existence of the alleged Arrangement in Canada; and 3) the 2017 Consent Agreements were also stayed by the Federal Court before being implemented.

[7] HarperCollins' Motion raises three issues: 1) what is the test to be applied by the Tribunal on this motion for summary dismissal; 2) whether the Commissioner's Application should be summarily dismissed on the basis that the Tribunal has no territorial jurisdiction over this matter since the alleged Arrangement was formed in the United States; and 3) whether the Commissioner's Application should be summarily dismissed on the ground that the alleged Arrangement is no longer "existing or proposed".

[8] For the reasons that follow, HarperCollins' Motion will be dismissed. A motion for summary dismissal which raises a lack of jurisdiction will only be granted if it is "plain and obvious" that the Tribunal does not have jurisdiction. Upon reviewing the materials filed by HarperCollins and the Commissioner and by the intervenor Rakuten Kobo Inc. ("**Kobo**"), and after hearing counsel for the parties, I am not persuaded that the "plain and obvious" test is met in this case. More specifically, I am not satisfied that the Commissioner's allegations cannot be supported or that his Application is certain to fail at trial because it is bereft of all possibility of success. It is not plain and obvious that the fact that the alleged Arrangement was entered into in the United States deprives the Tribunal of jurisdiction under section 90.1 of the Act. Accepting the facts and allegations as pleaded, as I have to at this stage, I find that a "real and substantial connection" may well be established between the subject-matter of the Commissioner's Application and Canada, sufficient to provide the Tribunal with jurisdiction in this matter. Similarly, I conclude that it is not plain and obvious that the alleged Arrangement is no longer existing in Canada as its manifestations and expression through the agency agreements reached by HarperCollins with Canadian E-book retailers are alleged to remain in place and its anti-competitive effects, as pled and accepted, are alleged to continue to be felt in this country.

II. BACKGROUND

A. The underlying Application

[9] The Commissioner filed his Application on September 29, 2016, seeking relief against HarperCollins under section 90.1 of the Act. In essence, the Commissioner alleges that, in 2010, HarperCollins US formed the anti-competitive Arrangement in the United States with the US publishers Hachette Book Group Inc. ("**Hachette**"), Verlagsgruppe Georg von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC d/b/a Macmillan ("**Macmillan**") and Simon & Schuster Inc. ("**Simon & Schuster**") and with the retailer Apple Inc. ("**Apple**"). The Arrangement was

purportedly first implemented in the United States and then in Canada, by way of agency agreements entered into by the publishers, including HarperCollins, with E-book retailers.

[10] The Application states that the Arrangement challenged by the Commissioner is alleged to have been formed in the United States through a series of communications among the publishers, either directly or indirectly through Apple.

[11] The Commissioner submits that, pursuant to the alleged Arrangement, HarperCollins coordinated with its competitors to bring about a collective shift from the existing wholesale model for sales between E-book publishers and E-book retailers to an agency model, underpinned by a most-favoured nation ("**MFN**") price provision. The Commissioner claims that the wholesale model gave E-book retailers the ability to set retail prices and to compete as they saw fit, including by offering price discounts to consumers, whereas the agency model allows the publishers to control the retail price and to bar price discounting by the retailers. He alleges that the collective shifting of the business model to agency effectively eliminated retail price competition for E-books and forced Canadians to pay substantially more for E-books than they would have paid but for the anti-competitive conduct of HarperCollins and the other publishers.

[12] The Commissioner contends that the alleged Arrangement, and the agency agreements through which it was implemented, specifically targeted and continues to target vigorous competition and low prices in the retail market for E-books. The Commissioner asserts that, to this day, the Arrangement continues to exist and remains embodied in agency agreements that HarperCollins Canada and other publishers have concluded with all major Canadian E-book retailers, including Apple Canada Inc. ("**Apple Canada**") and Kobo, and that the resulting higher prices for E-books still prevail in Canada.

[13] In his Application, the Commissioner seeks an order from the Tribunal prohibiting HarperCollins from doing anything under the Arrangement for a period of 10 years, including, but not limited to:

> i. in respect of existing agency contracts, agreements or arrangements, using or enforcing:
>
> > a. MFN clauses with respect to the sale of E-books in Canada; and
> >
> > b. provisions which directly or indirectly restrict, limit, or impede the ability of an E-book retailer to set, alter, or reduce the retail price of an E-book in Canada; and
>
> ii. entering into contracts, agreements or arrangements which contain:
>
> > a. MFN clauses with respect to the sale of E-books in Canada; and

b. provisions which directly or indirectly restrict, limit, or impede the ability of an E-book retailer to set, alter, or reduce the retail price of an E-book in Canada.

[14] In its response to the Application (the "**Response**"), HarperCollins in essence raises the same jurisdictional arguments advanced in this Motion and, in fact, filed the two documents jointly on the same day. Additionally, HarperCollins challenges the merits of the Commissioner's claims under section 90.1 and expressly reserved its right to supplement and/or amend its Response in the event that this Motion is unsuccessful.

B. Procedural history

[15] The origins of the Commissioner's Application can be traced back to the enforcement actions taken by the US and European competition authorities against publishers and retailers of E-books in the early part of this decade. Following investigations and subsequent enforcement action taken in those jurisdictions in relation to similar changes from a wholesale distribution model to an agency distribution model, the Commissioner initiated an investigation regarding conduct in respect of E-book sales in Canada.

[16] In April 2012, the US antitrust authorities filed a civil action against Apple and several US publishers, including HarperCollins US, in the United States District Court for the Southern District of New York (the "**US Court**"), challenging the US publishers' agency agreements with Apple and other E-book retailers under section 1 of the US *Sherman Act*, 15 USC § 1. On the day it commenced its civil action, a proposed Final Judgment as to HarperCollins US and two of the other US publishers, namely Hachette and Simon & Schuster, was also filed (the "**US Judgment**").

[17] Among other things, the US Judgment:

(a) Required HarperCollins US, Hachette and Simon & Schuster to terminate their agency agreements with Apple within seven days of the entry of the judgment;

(b) Required HarperCollins US, Hachette and Simon & Schuster 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;

(c) Prohibited HarperCollins US, Hachette and Simon & Schuster 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; and

(d) Prohibited HarperCollins US, Hachette and Simon & Schuster for a period of at least five years from entering into an agreement with an E-book retailer that

included a "Price MFN" provision.

[18] The US Judgment further 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 US Department of Justice attesting as to the fact and manner of their compliance with the judgment. The US Judgment remains in effect today. In the following months, similar judgments were also entered in the US Court against The Penguin Group and related entities, Macmillan and Apple.

[19] In February 2014, approximately six months after the last of the judgments relating to the US publishers was issued by the US Court, the Commissioner entered into the 2014 Consent Agreement with HarperCollins Canada, Hachette Book Group Canada Ltd. and certain of its affiliates ("**Hachette Canada**"), Macmillan, and Simon & Schuster Canada, a division of CBS Canada Holdings Co ("**Simon & Schuster Canada**"). The 2014 Consent Agreement was filed and registered with the Tribunal.

[20] In the 2014 Consent Agreement, HarperCollins Canada and the other consenting publishers agreed to terms substantially identical to those contained in the US Judgment, including, among other things, not to restrict, limit or impede an E-book retailer's ability to set, alter or reduce the retail price of any E-book sold to consumers in Canada for a period of 18 months, and not to enter into any agreement with an E-book retailer that contains a price MFN provision for a period of four years and six months from the date of registration of the Consent Agreement.

[21] Later in February 2014, the E-book retailer Kobo filed an application before the Tribunal pursuant to section 106 of the Act, seeking an order to rescind or to vary the terms of the 2014 Consent Agreement as well as an order to stay its registration. 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 (the "***Reference Decision***")), the Tribunal issued its decision on Kobo's 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 ("***Kobo CT***")). At the hearing of Kobo's 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*.

[22] In its *Kobo CT* decision, the Tribunal found the 2014 Consent Agreement to have been deficient in certain respects, notably as it did not provide the Tribunal with a sufficient understanding of the subject-matter of the impugned arrangement to satisfy itself that the prohibitions pertained to terms of the arrangement, as contemplated by paragraph 90.1(1)(a) of the Act. The Tribunal also found that the 2014 Consent Agreement did not sufficiently address whether the arrangement was existing or proposed at that time; whether two or more parties to that arrangement were competitors; or whether that arrangement prevented or lessened, or was

likely to prevent or lessen, competition substantially.

[23] On January 19, 2017, the Commissioner filed and registered with the Tribunal four separate new 2017 Consent Agreements concluded with each of 1) Macmillan; 2) Hachette; 3) Simon & Schuster Canada; and 4) Apple and Apple Canada. The recitals in each of the 2017 Consent Agreements state that the Commissioner has concluded that the publishers in question implemented in Canada the Arrangement with at least one other competing publisher, in relation to the sale of E-books in both of those countries. Among other things, those recitals also state that the Commissioner has concluded that the Arrangement included provisions that restricted the ability of E-book retailers to discount the retail prices of E-books; and that the Arrangement prevents or lessens or is likely to prevent or lessen, competition substantially in the retail market for E-books in Canada, within the meaning of section 90.1 of the Act.

[24] As indicated by the Federal Court in *Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2017 FC 382 ("***Kobo FC***"), the 2017 Consent Agreements are directed towards the distribution agreements entered into by the respondent publishers with retailers of E-books, and prohibit these publishers from directly or indirectly restricting, limiting or impeding an E-book retailer's ability to set, alter or reduce the retail price of any E-book for sale to consumers in Canada, or to offer price discounts or any other form of promotion to encourage consumers in Canada to purchase one or more E-books (*Kobo FC* at paras 11-16). The 2017 Consent Agreements also prohibit the respondent publishers from entering into an agreement with any E-book retailer that has one of those effects. These prohibitions apply for nine months, commencing no later than 120 days following the registration of the agreements. Certain other terms in the 2017 Consent Agreements prohibit the respondent publishers from entering into agreements with E-book retailers relating to the sale of E-books to consumers in Canada that contain particular types of "Price MFN" clauses, for a period of three years from the date of the registration of the Consent Agreements. In addition, the 2017 Consent Agreements require the respondent publishers to take steps to terminate, and not renew or extend, existing agreements with E-book retailers that restrict price discounting or contain a "Price MFN" clause.

[25] The prohibitions on the publishers that are parties to the 2017 Consent Agreements are substantially similar to the prohibitions which were contained in the rescinded 2014 Consent Agreement, apart from differences in the duration of the prohibitions.

[26] 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. Similarly to HarperCollins in this Motion, Kobo asserts that the Commissioner acted without jurisdiction in seeking to remedy a conspiracy that was entered into in the United States, 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. On March 8, 2017, the Federal Court stayed the implementation of the 2017 Consent Agreements, on consent of the parties, pending its decision on the merits of Kobo's application for judicial review. On April 19, 2017, the Federal Court further decided to stay the hearing of Kobo's judicial review application pending the Tribunal's decision on this Motion.

[27] On March 16, 2017, Kobo filed a request for leave to intervene in the Commissioner's Application. Taking into consideration the submissions filed by Kobo, HarperCollins and the Commissioner, the Tribunal granted Kobo leave to intervene within the scope and limits described in its Order dated April 18, 2017, including to participate in motions through the provision of non-repetitive submissions (*The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 5).

[28] As an intervenor, Kobo supports and endorses the arguments made by HarperCollins in this Motion. In essence, Kobo argues that the Tribunal does not have jurisdiction, under section 90.1 of the Act, over arrangements entered into by foreign parties outside Canada. Kobo disagrees with the Commissioner's assertion that the Tribunal has jurisdiction by virtue of the "real and substantial connection" test and argues that this test is first and foremost applicable to superior courts with inherent jurisdiction as opposed to administrative tribunals whose jurisdiction is granted by statute. Furthermore, Kobo submits that the "real and substantial connection" test can only be used if it is unclear whether Parliament intended a statute to apply extraterritorially and is of no assistance with respect to a clearly worded provision like section 90.1 of the Act. Kobo also echoes HarperCollins' submissions on the Arrangement being neither existing nor proposed.

C. HarperCollins' Motion

[29] As reflected in its Notice of Motion, HarperCollins had brought its Motion under both Rule 83 of the *Competition Tribunal Rules*, SOR/2008-141 (the "**CT Rules**") dealing with regular motions, and Rule 89 governing motions for summary disposition.

[30] On March 17, 2017, taking into consideration the submissions received from the Commissioner and HarperCollins, the Tribunal issued a direction on the nature of HarperCollins' Motion (*The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, Direction to Counsel (from Mr. Justice Gascon, Chairperson), CT-2017-002, March 17, 2017 (the "***Direction***")). In the Direction, the Tribunal indicated that HarperCollins' Motion was similar to a motion to strike or to dismiss and that the Tribunal would treat HarperCollins' Motion as a regular motion filed under CT Rule 83 and subject to the regular motions process set out in the CT Rules, and not as a motion for summary disposition governed by CT Rule 89 and subsection 9(4) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp) (the "**CTA**"). Consequently, the Tribunal set out specific dates for the parties to serve and file their motion materials and written representations, in line with the provisions of the CT Rules

relating to regular motions.

[31] I note that, both in its Memorandum of Fact and Law and in its oral submissions at the hearing of this Motion, HarperCollins took the position that it still considers its Motion to be a motion for summary disposition governed by subsection 9(4) of the CTA and CT Rule 89 on summary dispositions. I do not agree. This question has been decided by the Tribunal in the *Direction* and will not be revisited in this decision: HarperCollins' Motion is a regular motion for summary dismissal, akin to a motion to strike or to dismiss, and not a motion for summary disposition. It has been treated as such by the Tribunal throughout this proceeding.

[32] That being said, as explained in Part III.D below, even if I had considered HarperCollins' Motion as a motion for summary disposition, my conclusions on the merits of the Motion would not have been different.

III. ANALYSIS

A. The applicable test is the "plain and obvious" test

[33] The first issue to be decided is the test to be applied by the Tribunal in deciding HarperCollins' Motion.

[34] HarperCollins' Motion is a motion for summary dismissal seeking to strike the Commissioner's Application for want of jurisdiction. Such a motion is similar to a motion to strike out pleadings or an action, as contemplated by Rule 221 of the *Federal Courts Rules*, SOR/98-106 (the "**FC Rules**"). Indeed, in *Edell v Canada*, 2010 FCA 26 ("***Edell***"), the Federal Court of Appeal considered a "motion to strike" to be synonymous with "summary dismissal" (*Edell* at para 5).

[35] FC Rule 221(1)(a) reads as follows:

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	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be …	a) qu'il ne révèle aucune cause d'action ou de défense valable;
and may order the action be	Elle peut aussi ordonner que

dismissed or judgment entered accordingly.	l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[36] Pursuant to the "gap rule" set out in subsection 34(1) of the CT Rules, the Tribunal has jurisdiction to consider and follow the practice and procedure set out under FC Rule 221 to deal with HarperCollins' Motion, as the CT Rules are silent on this point (*The Commissioner of Competition v Reliance Comfort Limited Partnership*, 2013 Comp Trib 4 ("***Reliance***") at para 5).

[37] In *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 ("***Imperial Tobacco***"), the Supreme Court of Canada laid out as follows the applicable test on a motion to strike (*Imperial Tobacco* at para 17):

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.
>
> [citations omitted]

[38] To succeed on a motion to strike under FC Rule 221, a moving party must therefore demonstrate that it is "plain and obvious" that the proceeding being challenged discloses no reasonable cause of action (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 ("***Hunt***") at paras 18, 33; *Apotex Inc v Laboratoires Servier*, 2007 FCA 350 at para 23; *Reliance* at para 6). This power of the courts to strike claims is there to ensure that only those claims "that have some chance of success go on to trial" (*Imperial Tobacco* at para 19). It must, however, be "used with care", with consideration for the fact that the "law is not static and unchanging", and that "[a]ctions that yesterday were deemed hopeless may tomorrow succeed" (*Imperial Tobacco* at para 21). Stated otherwise, a pleading should only be struck where the claim is so clearly futile that it has not the slightest chance of succeeding or is certain to fail (*Hunt* at para 33). Pursuant to that test, the claim must be so clearly improper as to be "bereft of all possibility of success" (*LJP Sales Agency Inc v Canada (National Revenue)*, 2007 FCA 114 at para 7).

[39] I observe that, while FC Rule 221(1)(a) provides for the possibility of striking a pleading on the ground that it "discloses no reasonable cause of action", it contains no specific reference to striking a claim on the basis that the court does not have *jurisdiction* to hear it. However, it has been recognized that the "plain and obvious" test nonetheless remains the correct test for challenging the Federal Court's jurisdiction on a motion to strike under FC Rule 221 and that an alleged absence of reasonable cause of action includes an objection for want of jurisdiction. The test is no different when the ground for summary dismissal is a want of jurisdiction. The "plain and obvious" standard therefore applies to the striking out of pleadings for lack of jurisdiction

"in the same manner as it applies to the striking out of any pleading on the ground that it evinces no reasonable cause of action" (*Hodgson v Ermineskin Indian Band No 942*, [2000] FCJ No 313 ("***Hodgson***") at para 10, aff'd [2000] FCJ No 2042 (FCA); *Mil Davie Inc v Société d'Exploitation et de Développement d'Hibernia Ltée*, [1998] FCJ No 614 (FCA) ("***Mil Davie***") at para 9; *Apotex Inc v Ambrose*, 2017 FC 487 ("***Ambrose***") at para 39).

[40] Indeed, in its recent decision in *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 ("***City of Windsor***"), the Supreme Court endorsed the "plain and obvious" standard as follows in the context of a challenge to the Federal Court's jurisdiction (*City of Windsor* at para 24):

> The sole issue is whether the Federal Court has jurisdiction under the *ITO* test to hear the Company's application. If it is plain and obvious that the Federal Court lacks jurisdiction to hear this application, the motion to strike must succeed.

[41] The test has in fact already been used and applied by the Tribunal in the context of motions challenging its jurisdiction (*Canada (Director of Investigation and Research) v Warner Music Canada Ltd*, [1997] CCTD No 53 ("***Warner Music***") at para 39; *Canada (Director of Investigation and Research) v Tele-Direct Inc*, [1995] CCTD No 7 ("***Tele-Direct***") at 5) and by the courts in private actions in damages arising from tortious conspiracies or alleged violations of the criminal provisions of the Act (*Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 ("***Sun-Rype***") at para 47; *Fairhurst v De Beers Canada Inc*, 2012 BCCA 257 ("***Fairhurst CA***") at para 32; *Bouchard c Ventes de Véhicules Mitsubishi du Canada Inc*, 2010 CF 56 ("***Bouchard***") at para 37; *Desjean v Intermix Media, Inc*, 2006 FC 1395 ("***Desjean***") at para 3, aff'd 2007 FCA 365; *VitaPharm Canada Ltd v F Hoffmann-La Roche Ltd*, [2002] OJ No 298 (SC) ("***VitaPharm***") at paras 58, 61, aff'd [2002] OJ No 2010 (CA)).

[42] What does this "plain and obvious" test imply for the treatment of HarperCollins' Motion? The test establishes a high threshold to meet, and the onus of proof on the party moving to strike is a heavy one (*Eli Lilly Canada Inc v Nu-Pharm Inc*, 2011 FC 255 at paras 11-13; *Reliance* at para 7). The standard to strike a claim is "beyond a doubt" and is therefore higher than the simple balance of probabilities (*Hunt* at paras 30-33; *Operation Dismantle v The Queen*, [1985] 1 SCR 441 ("***Operation Dismantle***") at para 73; *Attorney General of Canada v Inuit Tapirisat of Canada*, [1980] 2 SCR 735 ("***Inuit Tapirisat***") at 740; *Ambrose* at para 38). This means that I should only exercise my discretion to strike out the Commissioner's Application if I am satisfied that the allegations are "bald assertions ...unsubstantiated with specific facts or a proper factual basis" (*Mil Davie* at para 4). At this early stage, it is not necessary to address the issues definitively and, as long as it may be possible that the Tribunal has jurisdiction, the motion to strike shall be dismissed (*VitaPharm* at para 98).

[43] In determining if a cause of action exists and in assessing whether a summary dismissal should be granted, a court must assume that all the facts and allegations in the notice of

application or the statement of claim have been proven (*Inuit Tapirisat* at 740; *Tele-Direct* at 8). The only evidence relevant to the determination of a motion for summary dismissal is therefore the pleadings themselves, and the material facts pleaded are presumed to be true (*Operation Dismantle* at paras 6-8). However, there is some limit to that presumption: "[a] motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven" (*Imperial Tobacco* at para 22). If they are "patently ridiculous or incapable of proof", allegations of fact cannot be accepted as proven (*Edell* at para 5).

[44] On a motion to strike out pleadings for lack of jurisdiction, the Tribunal can however also take into account any affidavits filed by the moving party in support of its claim. It is well settled that "[i]n the case of a motion to strike because of lack of jurisdiction, an applicant may adduce evidence to support the claimed lack of jurisdiction" (*Hodgson* at para 9; *Mil Davie* at para 8). A moving party thus has the possibility of filing affidavit evidence to challenge the factual basis underlying the claim of jurisdiction put forward by an applicant (*VitaPharm* at para 99). In this case, HarperCollins opted to file, in support of its Motion, the affidavit of Marilyn Nelson attaching copies of publicly available documents relating to the US Judgment and the other judgments issued by the US Court against other US publishers. No other evidence has been provided by HarperCollins. In fact, HarperCollins submits that the only facts necessary for the disposition of its Motion are the Commissioner's allegations and admissions concerning the purported Arrangement in the Application and 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.

[45] I finally point out that this is not a situation where there is any indication that additional evidence is needed to decide on HarperCollins' Motion. The Commissioner has indeed not identified any particular facts that are missing or that the Tribunal would need to have before it in order to rule on HarperCollins' claims of lack of jurisdiction in the context of this Motion (*Warner Music* at para 34). Counsel for the Commissioner has acknowledged that at the oral hearing.

B. It is not "plain and obvious" that the Tribunal does not have jurisdiction on the Arrangement

[46] I now turn to HarperCollins' first ground for summary dismissal.

[47] HarperCollins alleges that, as a straightforward and clear matter of statutory interpretation, section 90.1 of the Act applies only in respect of agreements or arrangements among competitors that are formed *in Canada*. Since paragraph 2 of the Application expressly states that the alleged Arrangement "was formed in the United States", HarperCollins argues that the Tribunal lacks jurisdiction to grant the relief requested by the Commissioner. It submits that section 90.1 contains no language providing for extraterritorial application and that interpreting

this provision in the context of other sections of the Act leads to the same conclusion. HarperCollins further contends that, even though the "real and substantial connection" test has been used in the past to determine if some conduct were deemed to have taken place in Canada, it cannot be used to override a clearly expressed legislative intent regarding the territorial limits of a provision in an Act of Parliament. HarperCollins pleads that in the absence of clear words to the contrary, a provision cannot receive an extraterritorial application.

[48] Moreover, HarperCollins submits that the principles of international comity support the dismissal of the Commissioner's Application. Each of the US 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 issued by the US Court. Under these circumstances, says HarperCollins, 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 the comity doctrine.

[49] I disagree.

[50] I acknowledge that the Tribunal is a creature of statute and that its jurisdiction is limited by its enabling legislation. In this case, the Tribunal's jurisdiction expressly comes from the CTA and from the Act itself. I also accept that there is a presumption against the extraterritorial application of statutes, which can only be rebutted by clear terms in the legislation or by necessary implication. However, before assessing whether a provision has an extraterritorial reach, the first step is to determine the *territorial* application of the provision. This approach requires one to examine the language of the relevant statute and to apply the well-recognized "real and substantial connection" test. Further to my review of the applicable law and my assessment of the facts pleaded by the Commissioner in his Application, I conclude that this "real and substantial connection" test can apply to define the boundaries of the Tribunal's jurisdiction, and that such a connection can be drawn between the subject-matter of the Commissioner's Application and Canada in this case.

[51] I am not convinced by the statutory interpretation proposed by HarperCollins and Kobo, or that it is plain and obvious that the language used in other sections of the Act limits the territorial scope of section 90.1. In my view, the applicable principles of statutory interpretation do not lead to the conclusion that it is plain and obvious and beyond doubt that the Tribunal could not have jurisdiction over the legal situation raised by HarperCollins' conduct or that section 90.1 could not apply to agreements or arrangements entered into outside Canada. In that context, and in the presence of a "real and substantial connection", recognizing the Tribunal's jurisdiction over the subject-matter of the Commissioner's Application does not offend the principles of international comity nor does it trigger any issue of extraterritorial application.

a. The Tribunal's jurisdiction

[52] It is not disputed that the Tribunal is a creation of statute, born in 1986 with the enactment of the CTA.

[53] It is well settled that statutorily created courts or administrative bodies only enjoy the jurisdiction to adjudicate matters which lie within the particular scope of their enabling legislation (*ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 ("***ATCO***") at paras 35, 38). Unlike superior courts of general jurisdiction, the Tribunal's jurisdiction is therefore circumscribed by the legislation which created it. Like statutory courts, the Tribunal only has the limited authority and jurisdiction conferred to it or implied by statute (*City of Windsor* at para 33). It is a statutory tribunal without inherent jurisdiction, or to use a more inelegant qualification, an "inferior tribunal" that does not have the full powers of a superior court (*Canada (Director of Investigation & Research) v NutraSweet Co*, [1990] CCTD No 17 ("***NutraSweet***") at para 221). Further, as it is a tribunal without any inherent jurisdiction, the language of its enabling legislation is "completely determinative of the scope" of the Tribunal's jurisdiction (*City of Windsor* at para 33). This means that, in interpreting its jurisdiction, the Tribunal cannot depart from the language of its enabling legislation. If the words of the enabling statutes do not vest it with jurisdiction, it cannot act. It has a limited statutory grant of powers (*Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 ("***Liberty Net***") at paras 16-18), it cannot exceed the powers granted to it and it must adhere to the "confines of [its] authority or 'jurisdiction'" (*ATCO* at para 35).

[54] As observed by Justice Rothstein (as he then was) in a decision issued in 1994 (*Canada (Director of Investigation & Research) v Imperial Oil Limited*, [1994] CCTD No 23, November 10, 1994, Doc CT-89/3) and which was cited with approval by the Tribunal in *Warner Music* (at para 33), the Tribunal may only act where it has been given the power to do so:

> The *Competition Act* does not confer open-ended jurisdiction on the Tribunal to deal with any and all competition issues. It is given specific powers which are set out in the *Competition Act* and in the *Competition Tribunal Act*.

[55] The foundation and extent of the Tribunal's jurisdiction is delimited by both the Act and the CTA. Subsection 8(1) of the CTA reads as follows:

Jurisdiction	**Compétence**
8 (1) The Tribunal has jurisdiction to hear and dispose of all applications made under	**8 (1)** Les demandes prévues aux parties VII.1 ou VIII de la Loi sur la concurrence, de

Part VII.1 or VIII of the Competition Act and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.	même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.

[56] Pursuant to the CTA, the Tribunal is therefore vested with the jurisdiction to hear and dispose of applications under Parts VII.1 and VIII of the Act. Part VIII relates to matters reviewable by the Tribunal whereas Part VII.1 deals with civil deceptive marketing practices, and the substantive provisions contained in those two parts of the Act define the explicit powers granted to the Tribunal in relation to the various conduct and practices described therein.

[57] In the current case, section 90.1 forming the basis of the Commissioner's Application is known as the civil conspiracy provision and is one of the reviewable matters covered in Part VIII of the Act. Subsection 90.1(1) reads as follows :

Agreements or Arrangements that Prevent or Lessen Competition Substantially	Accords ou Arrangements Empêchant ou Diminuant Sensiblement la Concurrence
Order	**Ordonnance**
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	**90.1 (1)** Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :
(a) prohibiting any person —	a) interdisant à toute

whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or	personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;
(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.	b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

[58] This provision defines the explicit powers conferred to the Tribunal in relation to, as the subtitle preceding section 90.1 states it, "agreements or arrangements that prevent or lessen competition substantially". Section 90.1 was adopted in 2009 further to the last round of major amendments made to the Act, and created a new civil provision that enables the Commissioner to challenge agreements between competitors that extend beyond the ambit of section 45 where such agreements prevent or lessen, or are likely to prevent or lessen, competition substantially in a market.

[59] By comparison, section 45 establishes a *per se* criminal offence for "hard-core" cartel-like conspiracies between competitors. It is known as the criminal conspiracy provision of the Act and is now reserved for conspiracies, agreements or arrangements between competitors to fix prices, to allocate markets or to restrict output, which are considered to be "naked restraints" on competition. Under this criminal provision, there is no requirement for the conspiracy, agreement or arrangement to actually have an anti-competitive effect or to stem harm to competition in a market. The offence under section 45 is the conspiracy, agreement or arrangement itself, it occurs at the time of the conspiracy between the parties, and it does not require an actual implementation of the conspiracy. To be clear, the Tribunal does not have jurisdiction to adjudicate matters under Part VI of the Act which relate to criminal offences.

[60] What is the behaviour covered by section 90.1 upon which the Tribunal has the jurisdiction to review? In *Kobo CT* (at paras 56-57), the Tribunal identified the following elements of section 90.1 that the Commissioner is required to sufficiently identify in a consent agreement in order to comply with the *Reference Decision*. They are:

i. whether the challenged conduct is an agreement or arrangement;

ii. whether the agreement or arrangement is existing or proposed;

> **iii.** the identity of two or more parties to the agreement or arrangement;
>
> **iv.** the fact that two or more parties to the agreement or arrangement are competitors;
>
> **v.** the fact that the agreement or arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially; and
>
> **vi.** the market(s) in Canada in which that effect is occurring or is likely to occur.

[61] These effectively constitute the main components of the reviewable practice described in subsection 90.1(1). They reflect the "express grant of jurisdiction" given to the Tribunal under that particular provision of the Act, and thus form part of the "explicit powers" specifically conferred upon the Tribunal under section 90.1 (*ATCO* at para 38). Two dimensions of the practice covered by section 90.1 stand out and can be qualified as its fundamental attributes: 1) an existing or proposed agreement or arrangement between competitors; and 2) a resulting substantial prevention or lessening of competition.

[62] I pause to emphasize that, as is the case for other civil reviewable matters under Part VIII of the Act, such as abuse of dominance or mergers, the presence of anti-competitive effects attributable to the conduct is a key and essential feature of the impugned practice subject to review before the Tribunal under section 90.1. Contrary to most criminal offences sanctioned by the Act, the civil provisions contained in Part VIII all incorporate a competitive effects test, whether it is a substantial prevention or lessening of competition in the case of agreements between competitors, abuse of dominance or mergers, or an adverse effect on competition in the case of refusals to deal or price maintenance.

[63] It is in recognition of this fact that the Tribunal was created as a specialized expert body composed of judicial and lay members, equipped with expertise to be better able to deal with such issues. In other words, economic issues and notably those related to alleged anti-competitive effects are at the very source and at the core of the existence, purpose and mandate of the Tribunal under Part VIII of the Act.

[64] I also underline that practices covered by section 90.1 and by Part VIII of the Act are not *per se* illegal or prohibited, unlike criminal offences covered by Part VI. The matters reviewable by the Tribunal can only give rise to forward-looking corrective remedies (and in some cases, administrative monetary penalties) aimed at restoring competition, stopping the anti-competitive behaviour and prohibiting a person from engaging in the impugned practice, when the required proof of anti-competitive effects has been made.

[65] It is in light of this express jurisdiction conferred to the Tribunal by its enabling statutes that HarperCollins' claims of lack of jurisdiction will be assessed. To borrow the words used by

counsel for HarperCollins at the oral hearing, the Tribunal's jurisdiction starts and ends with the CTA and the Act.

b. The territoriality principle and the test to apply

[66] The first ground for summary dismissal advanced by HarperCollins, and supported by Kobo, relates to the scope of the Tribunal's territorial jurisdiction under section 90.1. HarperCollins and Kobo frame the issue in terms of extraterritoriality, and they invoke the well-accepted presumption (and principle of statutory interpretation) that the legislature does not intend to give extraterritorial effect to its statutes. Unless it is implicitly or explicitly provided otherwise in a statute, the legislature "is presumed to enact for persons, property, juridical acts and events within the territorial boundaries of its jurisdiction" (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2013) ("***Côté***") at 212).

[67] Hence, state HarperCollins and Kobo, the fact that the alleged Arrangement has been entered into by HarperCollins and other US publishers outside Canada suffices, in and of itself, to negate the Tribunal's jurisdiction over HarperCollins' conduct.

[68] I do not believe that the issue here involves a question of "extraterritoriality". The fact that a provision extends to persons located or conduct occurring outside the territorial limits of Canada does not mean that it is necessarily breaching the presumption against extraterritoriality. Applying a provision to persons or conduct outside the country is not to be mistaken with an extraterritorial application of the law. When an action or an application raises both territorial and extraterritorial aspects, matters can still be heard in Canada if a court or a tribunal can exert *territorial* jurisdiction over the offence, the conduct or the behaviour at stake.

[69] This is known as the territoriality or territorial principle (*Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 ("***SOCAN***") at para 56). The territoriality principle refers to the extent to which persons or activity occurring outside Canada may nonetheless be subject to the provisions of a given legislation in Canada, and to the jurisdiction of Canadian courts or tribunals.

[70] Jurisdiction refers to a court's or a tribunal's power to exercise its authority over persons, conduct and events. In order for a Canadian court or tribunal to properly exercise jurisdiction in respect of conduct occurring outside Canada, it must have subject-matter or substantive jurisdiction, and it must also have personal jurisdiction over the person in respect of which a determination or order is sought. The territoriality principle serves to define the subject-matter jurisdiction of a court or a tribunal. In order to determine whether the Tribunal has jurisdiction to hear and decide the Commissioner's Application, the territorial scope of section 90.1 of the Act therefore has to be delineated. Issues of potential extraterritorial application only arise *after* the territorial scope of the provision has been assessed.

[71] In order to assess how the territorial boundaries of a court's jurisdiction are defined, the Canadian courts have developed the "real and substantial connection" test. As stated by *Côté*, "a statute of a given State will be said to have an extraterritorial effect if it governs persons, property, juridical acts or facts which do not have a 'real and important link' with that State" [emphasis added] (*Côté* at 216). Conversely, if a statute governs persons, property, juridical acts or facts which *do have* a "real and important link" with that State, it will be acting within its territorial authority. To reiterate the principles expressed in *Côté*, "[a] statute does not have extraterritorial effect simply because it applies to persons, property or transactions physically situated outside the enacting body's jurisdiction" (*Côté* at 216). What is relevant is the *situs* of the acts or conduct subject to the provision.

[72] In Canada, the territoriality principle is now well anchored in the "real and substantial connection" test. This test for establishing jurisdiction has been articulated and confirmed by the Supreme Court in a long line of cases, starting with a criminal case, *Libman v The Queen*, [1985] 2 SCR 178 ("***Libman***"), and adopted since then in several civil cases such as *SOCAN*; *Club Resorts Ltd v Van Breda*, 2012 SCC 17 ("***Van Breda***"); *Sun-Rype*; *Chevron Corp v Yaiguaje*, 2015 SCC 42 ("***Chevron***"); and *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 ("***Lapointe***").

[73] The ultimate issue for a Canadian court or tribunal is whether the subject-matter of the action or the legal situation at stake has a "real and substantial connection" to the forum where the action is brought (*Van Breda* at para 69). In the absence of express wording or legislative intent on its territorial reach, a provision must therefore be read and interpreted in accordance with the "real and substantial connection" principles governing the attribution of jurisdiction to Canadian courts and tribunals.

[74] I do not dispute that there is a well-recognized presumption against extraterritoriality. However, this is not where the analysis stops, and it is not even where it begins. Before addressing the issue of a potential extraterritorial application, one first has to look at the territoriality principle. Stated differently, there is no need to determine whether a provision has an extraterritorial application if a court is satisfied that a conduct or an act fits within the territorial scope of the provision.

[75] Therefore, the question to be determined on the first ground of HarperCollins' Motion is not one of extraterritoriality but rather one of *territoriality*. In other words, what is the scope of the Tribunal's subject-matter jurisdiction and how should it be determined? This is the starting point of the analysis, and this is indeed how the courts have recently approached the issue in two cases cited by Kobo, *A.T v Globe24h.com*, 2017 FC 114 ("***Globe24h***") at para 50 and *Oroville Reman & Reload Inc v Canada*, 2016 TCC 75 ("***Oroville***") at para 47). For example, in *Oroville*, Chief Justice Rossiter had concluded that there was no "real and substantial connection" between the defendant and the conduct covered by the tax legislation at issue as the US company involved in that matter had no activity or business in Canada. Since the application of the provision to this foreign actor would then have been extraterritorial, the court needed to determine whether the

presumption against extraterritoriality was rebutted (*Oroville* at paras 46-47). It is in that context that Chief Justice Rossiter looked and considered the issue of extraterritoriality and the doctrine of necessary implication.

[76] The question of whether section 90.1 (or for that matter any civil provision under Part VIII of the Act) can apply to a conduct or an actor outside Canada and if so, which factors should be considered in assessing the Tribunal's jurisdiction, has never been judicially considered by the Tribunal. The authors rightly point out that the "real and substantial connection" test between Canada and a particular conduct engaged in outside this country has never been applied in the context of contested enforcement actions undertaken by the Commissioner (Brian A. Facey and Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 3rd ed (LexisNexis, 2006) at 497; Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations*, 2nd ed (LexisNexis, 2017) at 377). HarperCollins's Motion gives the Tribunal the opportunity to address the issue in the context of the civil provisions of the Act. For the reasons detailed below, I conclude that the "real and substantial connection" test applies to determine the Tribunal's jurisdiction under section 90.1, as it does for other courts and tribunals in Canada when no clear legislative wording or intent define the territorial scope of a provision.

c. No express wording or intent on the territorial scope of section 90.1

[77] I accept that the "real and substantial connection" test cannot be used to override a clearly expressed legislative intent on the territorial limits of the scope of a provision. Conversely, if there is no clear express language or intent on the territorial reach of a provision, a court or a tribunal needs to turn to the "real and substantial connection" test to assess whether it has jurisdiction. In the case of section 90.1, I find that neither the specific language of the provision itself nor the context of the Act allows one to conclude that it is limited to agreements or arrangements "in Canada". One may therefore have to resort to the "real and substantial connection" test.

i. Section 90.1 contains no territorial limitation

[78] Some provisions of the Act expressly apply only to conduct in Canada whereas others include no express territorial limitations. Section 90.1 belongs to the latter category.

[79] There is no mention in the provision that it applies only to agreements or arrangements "in Canada". Section 90.1 simply relates to "an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors". There is therefore no clear language in the provision itself limiting it to an agreement or arrangement "in Canada". Nor is there any express language in Part VIII of the Act limiting the application of the civil provisions in general to conduct or behaviour "in Canada". To echo the words of Justice Mosley in *Globe24h*, there is no language in section 90.1 or in Part VIII of the Act "expressly limiting its

application to Canada" (*Globe24h* at para 50).

[80] The plain wording of the section and of Part VIII leaves no doubt on this point.

ii. The proposed analogue with sections 46 and 83 is not convincing

[81] Since there is no language expressly limiting, in section 90.1 itself, the application of the provision to agreements or arrangements entered into in Canada, HarperCollins and Kobo argue that the "clear" legislative intent to that effect can be derived from the provisions of the Act concerning criminal conspiracies. They claim that, because sections 46 and 83 of the Act indirectly limit the scope of section 45 to criminal conspiracies, agreements or arrangements entered into in Canada, the terms "agreement or arrangement" used in section 90.1 should be interpreted similarly.

[82] Section 45 relates to conspiracies, agreements or arrangements between competitors, but in the context of the criminal provisions of the Act. Like section 90.1, section 45 does not contain the specific words "in Canada" and does not expressly limit the territorial scope of the conspiracies, agreements or arrangements it covers. However, section 46 of the Act provides that it is a criminal offence for a corporation carrying on business in Canada to implement in Canada a directive or communication from a controlling person outside Canada, 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". Echoing the language of section 46, subsection 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".

[83] HarperCollins claims that sections 46 and 83 confirm that, where Parliament intended to refer to agreements or arrangements entered into outside Canada, it did so expressly. HarperCollins submits that, if it were not for section 46, no agreement formed outside Canada would contravene the criminal conspiracy provisions and that section 45 therefore only applies to agreements entered into or formed in Canada. It submits that sections 45, 46 and 83 establish specific provisions having the combined effect of extending the reach of the criminal conspiracy provisions to agreements outside Canada. HarperCollins adds that, while section 45 does not specify that the conspiracy, agreement or arrangement needs to have been entered into in Canada, it must be interpreted as applying only to conspiracies, agreements or arrangements in this country; otherwise, section 46 would serve no purpose.

[84] HarperCollins further argues that subsection 83(1) also shows that Parliament turned its mind to the prospect of agreements or arrangements being entered into outside Canada and then

implemented in Canada. It pleads that this provision authorizes the Tribunal, on application by the Commissioner, to make an order to prevent such implementation with respect to an "conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45". HarperCollins also claims that two other sections of the Act, sections 82 and 84, 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.

[85] I do not share HarperCollins' reading of those provisions. I do not find that the analogy with sections 46 and 83 makes it plain and obvious that section 90.1 does not apply to agreements or arrangements entered into outside Canada. In other words, I do not agree that it is plain and obvious that the words "in Canada" must be read into section 90.1 on the basis of the language contained in these other provisions of the Act. In my view, it is not plain and obvious that the language used in sections 46 and 83 reveals an "express legislative intent" regarding section 90.1 which, as a result, would require me to disregard the "real and substantial connection" test in determining the Tribunal's jurisdiction over the Commissioner's Application. Here, section 90.1 is silent on the territorial dimension of the provision, and sections 45 and 46 are not entirely clear in terms of their potential application to section 90.1. Nor do I accept that the absence, within the civil conspiracy provision framework, of a provision similar to section 46 is sufficient to require me to infer that section 90.1 was not meant to apply to agreements entered into outside Canada.

1. The purpose and contents of section 46

[86] HarperCollins' and Kobo's proposed interpretation of section 90.1 based on sections 46 and 83 starts from the premise that, because of those provisions, the scope of section 45 does not apply to conspiracies, agreements or arrangements entered into outside Canada.

[87] I of course do not intend to decide the proper interpretation to be given to sections 45 and 46 in this decision, as this far exceeds the scope of HarperCollins' Motion. In addition, I point out that the Tribunal has no jurisdiction over these criminal provisions. Suffice it to say, though, that the interpretation of sections 45 and 46 advocated by HarperCollins and Kobo is not free of doubt.

[88] Section 45 provides that a "person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges (a) to fix, maintain, increase or control the price for the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product". Importantly, just as section 90.1 is silent on its territorial limitation, section 45 does not itself specify that the conspiracy, agreement or arrangement covered by the provision needs to have been entered into "in Canada".

[89] Both sections 46 and 83 refer expressly to section 45. They do not mention or evoke any other provision of the Act. Section 46 reads as follows:

Foreign directives	**Directives étrangères**
46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which 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, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.	**46 (1)** Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

[90] At first blush, section 46 appears to add to and complement section 45 by establishing an offence for persons beyond those who are directly involved in the conspiracies covered by

section 45. Section 46 creates an offence for persons who are not co-conspirators (i.e., who are not a direct party to the conspiracy, agreement or arrangement) but who implement in whole or in part in Canada any directive for the purpose of giving effect to the conspiracy. Therefore, section 46 allows one to target subsidiaries operating in Canada that implement a foreign communication, whether or not they know they are implementing a conspiracy and despite the fact that they are not immediate parties to the conspiracy. While section 45 allows a court to convict someone who is a party to the conspiracy, section 46 allows a court to convict someone in Canada who implements a foreign conspiracy even if that person is not a party to it. Without section 46, the courts would only have jurisdiction to impose sanctions against the conspirators themselves as opposed to entities in Canada who merely implement it without being a direct party to the conspiracy.

[91] A primary apparent purpose of section 46 is therefore to *expand* the scope of section 45 to capture parties who are not co-conspirators but who participate in the implementation of the conspiracy in Canada. In other words, the principal thrust of section 46 appears to be not to circumscribe or limit the scope of section 45, but rather to expand it. That said, I acknowledge that section 46 also contains language ("a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45") that appears to indirectly limit the scope of section 45 on criminal conspiracies by indicating, *a contrario*, that a conspiracy entered into outside Canada would not have violated section 45. As drafted, section 46 therefore ends up having two dimensions. It serves both to *expand* section 45 to corporations carrying on business in Canada which implement a conspiracy entered into outside Canada, and to suggest that section 45 may be *limited* to conspiracies, agreements and arrangements entered into in Canada. Section 83 contains similar wording.

[92] I say "may be" since HarperCollins' interpretation of section 46 as limiting the scope of section 45 has never been confirmed by the courts. In fact, the only decision cited by the parties on this issue does not support HarperCollins' interpretation of section 46. In *VitaPharm*, the Ontario Superior Court addressed the scope of sections 45 and 46 in the following terms in its consideration of a motion to strike for lack of jurisdiction (*VitaPharm* at para 60):

> The moving defendants submit that s. 46 is to be properly interpreted as imposing limiting language in respect of offences under s. 45. I disagree. Section 46 creates an offence for persons beyond those who are not co-conspirators but knowingly implement in whole or in part in Canada any directive for the purpose of giving effect to a conspiracy.

[93] Similarly, I cannot conclude that it is plain and obvious that the words used in section 46 (namely, "a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45") must be interpreted to mean that conspiracies entered into outside of Canada could not contravene section 45. I am unaware of any case law that has specifically dealt with the extraterritorial application

of section 45 or concluded that section 45 does not apply outside Canada. This has been recognized in the literature. For example, two informed observers have noted that "[t]he issue of whether potential anti-competitive effects in Canada are sufficient to found jurisdiction over a conspiracy entered into outside Canada has not been finally determined in the courts" (Randy T. Hughes and Jeanne L. Pratt, "Criminal Conspiracy", Chapter 4 of James B. Musgrove, Janine MacNeil and Michael Osborne eds, *Fundamentals of Canadian Competition Law*, 3rd ed (Toronto: Carswell, 2015) at 69).

[94] At least two cases dealing with section 45 indicate that the provision could well be interpreted as applying to agreements or arrangements entered into outside Canada, despite the language of section 46. In *Shah v LG Chem Ltd*, 2015 ONSC 2628, the Court considered a class action relying on, *inter alia*, sections 36, 45 and 46 of the Act, and stated the following at paragraph 83:

> In *Ontario v. Rothmans*, supra at para. 37 (C.A.), relying on *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 at para. 43, leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 446, and *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, supra, the Court of Appeal held that a conspiracy occurs in the jurisdiction where the harm is suffered regardless of where the wrongful conduct occurred.

[95] Similarly, in *VitaPharm*, Justice Cumming said, at paragraph 59:

> The moving defendants argue that ss. 45 and 46 of the Competition Act render a conspiracy to fix prices a criminal offence only when the agreement is made within Canada. Again, I disagree. The language of s. 45 is not directed to only those conspiracies entered into within Canada.

[96] In brief, despite the explicit language contained in section 46, it was decided by the court in *VitaPharm* that conspiracies entered into outside Canada could be a violation of section 45. I concur that it is not "very clear" that section 45 could not apply to conspiracies, agreements or arrangements entered into outside Canada even with the presence of section 46.

[97] Furthermore, although the legislative history and the wording of section 46 suggest that the provision could be read as implying that an agreement entered into outside Canada would not contravene the conspiracy provision in section 45, I note that the Commissioner has taken a different view in his approach with respect to the acceptance of guilty pleas in criminal conspiracies involving foreign companies. While I am mindful of the fact that the issue of jurisdiction was not specifically addressed in these cases, I nonetheless observe that the courts have indirectly accepted, in dealing with many plea agreements, that section 45 can apply to agreements and arrangements entered into outside Canada and have assumed jurisdiction over parties located outside this country (see, for example, *R v BASF Aktiengesellschaft*, 1999

CarswellNat 6381 (FC); *R v Daicel Chemical Industries, Ltd*, T-1686-00, Agreement Statement of Facts dated September 14, 2000, Certificate dated September 21, 2000).

[98] The scope of section 45 and whether it applies to agreements or arrangements entered into outside Canada is thus still an open issue, far from being plain and obvious. The interpretation proposed by HarperCollins and Kobo could be one possible interpretation of section 45. However, a contrary and more wide-ranging application of the provision could equally be supported by reference to the *VitaPharm* case (which was upheld by the Ontario Court of Appeal) and to the fact that a primary purpose of section 46 was not to limit but instead to expand the scope of section 45. As indicated above, it is beyond the scope of this decision to circumscribe the exact boundaries of section 45 of the Act. Nonetheless, there is certainly a contentious legal issue of statutory interpretation to be resolved regarding the territorial scope of section 45. These kinds of complex exercises of statutory interpretation are best determined at trial, rather than on preliminary proceeding such as this present Motion (*Pfizer Canada Inc v Apotex Inc*, [1999] 1 CPR (4^{th}) 358 (FC) at para 33).

2. The presumption of consistent expression should be applied with caution

[99] There is another problem with the proposed interpretation of section 90.1 that HarperCollins advances based on the language of sections 45, 46 and 83. In brief, not only is it arguable whether or not section 45 is restricted to conspiracies, agreements or arrangements entered into in Canada, but even if that interpretation of section 45 was assumed to be correct, it is not plain and obvious that it can be simply imported and transplanted into section 90.1.

[100] HarperCollins essentially relies on the principle of consistent expression and that "[g]iving the same words the same meaning throughout a statute is a basic principle of statutory interpretation" (*R v Zeolkowski*, [1989] 1 SCR 1378 ("***Zeolkowski***") at para 19). Hence, argues HarperCollins, since the territorial scope of "agreements or arrangements" in section 45 is limited by section 46 and the words "agreement or arrangement" are similarly used in section 90.1, these words should likewise be interpreted as being limited to agreements or arrangements entered into in Canada. However, in this case, it is not plain and obvious that applying the principles of statutory interpretation lead to the conclusion advanced by HarperCollins and supported by Kobo. In fact, the principles of statutory interpretation lead me to the opposite conclusion.

[101] The modern approach to statutory interpretation is that "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" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 ("***Rizzo***") at para 21, citing Elmer Driedger, *Construction of Statutes* (Toronto: Butterworths, 1983) at 87; *ATCO* at para 37; *United Grain Growers Limited v Commissioner of Competition*, 2006 Comp Trib 25 ("***UGG***") at para 21). The *Interpretation Act*,

RSC 1985, c I-21 (the "**Interpretation Act**") also provides at section 12 that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[102] The principle that the same words have the same meaning is a presumption, and it can be rebutted. Before the *Zeolkowski* decision, the Supreme Court stated that "the rule of interpretation according to which the same meaning is implied by the use of the same expression in every part of an Act […] is only tantamount to a presumption, and furthermore, a presumption which is not of much weight. For the same word may be used in different senses in the same statute" (*Sommers and Gray v The Queen*, [1959] SCR 678 at 685). The rule must therefore be treated with caution when the relevant context differs in respect of the two provisions being compared to one another. In *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 ("***Thomson***"), the Supreme Court observed that "[u]nless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act" (*Thomson* at 400). The principle of textual consistency is therefore not an inflexible rule or an infallible guide to interpretation (*Côté* at 280). As with the interpretation of any statutory provision, the meaning of the words can only be established by considering their context. In *Merck & Co Inc v Apotex Inc*, 2010 FC 1265 at para 150, aff'd on other grounds in 2011 FCA 363, the Federal Court noted that "identical words may not have identical meanings once they are placed in different contexts and used for different purposes", and that this is particularly true of general or abstract words.

[103] In the *Zeolkowski* case relied on by HarperCollins, the Supreme Court used the principle of consistent expression to conclude that identical phrases "in two adjacent subsections within the same section" of a law were, in essence, the same (*Zeolkowski* at para 19). The situation in the current case is profoundly different. The words "agreement or arrangement" appearing in section 90.1 and sections 45-46 are not used in adjacent subsections within the same section of the Act. Far from it. While the provisions all relate to collaborations between competitors, sections 45-46 are found in a different part of the Act and they do not even belong to the same fundamental group of provisions as section 90.1. Sections 45-46 are *criminal offences* contained in Part VI of the Act on "Offences in Relation to Competition", whereas section 90.1 is a *civil reviewable matter* contained in Part VIII on "Matters Reviewable by Tribunal". They relate to different contexts and are used for different purposes. I should add that even the words employed in the two sections are not identical: section 90.1 only refers to "agreement or arrangement" whereas section 46 encompasses a larger group of four words ("a conspiracy, combination, agreement or arrangement"), echoing the language which used to be part of the former version of section 45 that dates back many decades and which is now partly reflected in the current version of section 45 (i.e., "conspires, agrees or arranges").

[104] Though they both deal with agreements between competitors, sections 45-46 and section 90.1 of the Act have fundamental differences. Sections 45 and 46 create criminal offences and, further to the 2009 amendments to the Act, section 45 is known as a *per se* offence, pursuant to

which it suffices to demonstrate the existence of one of the three types of agreements covered by the provision. There is no need to demonstrate any harm, damage or anti-competitive effects. Harm to competition is not a constituting element of the criminal conspiracy offence. Conversely, section 90.1 is a civil reviewable matter with a competitive effects requirement. That is to say, as is the case for other civil provisions covered by Part VIII of the Act, such as abuse of dominance or mergers, the provisions relating to civil agreements or arrangements between competitors require that the impugned conduct result in a substantial lessening or prevention of competition in order to allow the Tribunal to issue remedial orders. In brief, anti-competitive harm is an intrinsic component of the impugned practice.

[105] I pause to observe that, even under the prior version of section 45 (which included a requirement of "unduly" limiting competition), some cases had concluded that a proof of actual harm and adverse economic effects of the conspiracy was also not a requirement of the offence (*R v Burrows et al* (1966), 54 CPR 95 (BCSC)). There was no need of evidence that the object of the conspiracy was actually carried out or of any overt act in furtherance of the conspiracy (*Howard Smith Paper Mills v R*, [1957] SCR 403; *Regina v Abitibi Power & Paper Company et al* (1960), 36 CPR 188 (Que QB)).

[106] I am therefore not persuaded that this is a case where it is plain and obvious that the principle of consistent expression should or could be relied on by the Tribunal to govern the interpretation of the words "agreement or arrangement" in section 90.1, or that the agreements between competitors contemplated in each of sections 45-46 and section 90.1 are limited to "agreements or arrangements entered into in Canada" under both sets of provisions.

3. The contents and context of section 90.1

[107] There are two other reasons that lead me to disagree with HarperCollins' proposed statutory interpretation of section 90.1.

[108] The first relates to section 90.1 itself. Section 90.1 was adopted following the 2009 amendments to the Act, more than 30 years after section 46 had been introduced in the legislation in 1976. When Parliament adopted section 90.1 in 2009, it is presumed to have been aware of section 45 and of sections 46 and 83. I underscore that, as part of the 2009 amendments, very important modifications were made to the previous version of section 45, removing the "undueness" requirement from the provision and thus creating a *per se* criminal conspiracy offence. However, while the main criminal conspiracy provision was fundamentally restructured and section 90.1 was added to the Act, no parallel modification was made to section 46 or to section 83. In fact, the text of these two provisions indeed retained the language (i.e., "conspiracy, combination, agreement or arrangement") that echoed the words previously used in the prior version of section 45 (i.e., "conspires, combines, agrees or arranges").

[109] Similarly, Parliament did not adopt a section parallel to section 46 to go along with section 90.1. That is, no companion provision was enacted to complement section 90.1, similar to what section 46 accomplishes for section 45. In other words, Parliament did not feel that it was necessary or appropriate to insert similar language to that found in section 46 into the framework of the new civil conspiracy provision. Arguably, if it had included such similar language, it would have had the effect of expanding the scope of section 90.1 and may have provided an indirect interpretation potentially limiting the territorial scope of section 90.1 (similar to what section 46 arguably does for section 45).

[110] Parliament is presumed to have been mindful of sections 46 and 83 when it adopted section 90.1 and implicitly decided not to add a provision like section 46, nor to extend to the newly created civil conspiracy provision the restriction to section 45 otherwise found, as suggested by HarperCollins and Kobo, in section 46. If Parliament felt that a confirmation of the restriction on the territorial scope of section 90.1 should have been inserted like HarperCollins alleges was done in section 46 for section 45, it could have done so. It can be inferred that it elected not to. As noted by HarperCollins, Parliament considered that the territorial application of section 45 could be an issue, and decided to address it in section 46 and in section 83 in 1976. However, Parliament did not do likewise with respect to section 90.1 in 2009. Of course, as a practical matter, Parliament's intention may not have been directed to this issue at the time of the 2009 amendments. In my opinion, the fact that Parliament did not import the language of section 46 in a companion provision of section 90.1 is not, as advanced by HarperCollins and Kobo, necessarily an indication that the terms "agreement or arrangement" should be interpreted as narrowly as they suggest, based on their reading of sections 45 and 46. It may rather be simply an indication that Parliament did not see fit to use the same qualifying language of section 46 to circumscribe and narrow the territorial limit of section 90.1.

[111] As mentioned above, it bears underscoring that sections 46 and 83 strictly and expressly refer to conspiracies, combinations, agreements or arrangements that "would have been in contravention of *section 45*" (emphasis added), and not of any other provision of the Act. On its own, section 45 contains no language limiting its scope to conspiracies, agreements or arrangements "in Canada". It is only because of the potential indirect effect of the language contained in sections 46 and 83 that it can be argued that Parliament restricted or limited the scope of section 45 and did not intend to extend it to conspiracies entered into outside Canada. Similar provisions do not exist for section 90.1.

[112] Furthermore, as observed by the Commissioner, no provision similar to section 46 was inserted to accompany section 90.1, because such companion provision was simply *not needed* in the context of section 90.1, given the different words used by Parliament in that provision. Specifically, section 90.1 expressly confers to the Tribunal the authority to make an order against any person, "whether or not a party to the agreement or arrangement (…)". Those words indicate that a parallel provision similar to section 46 was not needed to extend the Tribunal's jurisdiction to entities which were not co-conspirators and part of the civil agreement or arrangement

targeted by section 90.1 but which participated in its implementation. All persons, whether they were a party to the agreement or arrangement or not, are already captured by the existing language in section 90.1.

[113] There was therefore no need for Parliament to adopt an "analogue" to section 46 for section 90.1. As the main purpose underlying the *raison d'être* of section 46 did not exist for section 90.1, the principles of statutory interpretation relied upon by HarperCollins do not compel me to adopt the interpretation of the territorial scope of section 90.1 that it advances, based on its reading of sections 46 and 83, and to use the potential indirect limitation resulting from section 46 on the scope of section 45 as an expression of Parliament's legislative intent regarding section 90.1.

[114] If Parliament had intended to expand the limit allegedly imposed by section 46 on section 45 to the new section 90.1 and to restrict the coverage of section 90.1 to agreements or arrangements entered into in Canada, it would have said so expressly by adding similar language in structuring this new civil provision. It did not. It could also have amended section 46 and section 83 to insert a reference to "agreement or arrangements that would have been in contravention of *sections 45 or 90.1*". Again, it did not.

[115] Further to a question from the Tribunal at the oral hearing, counsel for the parties have confirmed that there are no helpful parliamentary debates available to assist on the intent behind the adoption of section 90.1. But the plain wording and structure of section 90.1 speak for themselves. Since there is no parallel section 46 linked to section 90.1, the implied exclusion rule of statutory interpretation, and even the plain meaning rule, lead me to conclude that it is not plain and obvious that the scope of section 90.1 is as limited as section 45 is alleged to be. In my view, it may well apply to all agreements or arrangements, whether entered into inside or outside Canada.

[116] Furthermore, the Tribunal being a statutory adjudicative body, the principle and objective of consistency does not justify departing from the explicit language of the provision (*City of Windsor* at para 47). In the absence of any apparent ambiguity arising from the text or from context, a court should adopt an interpretation which respects the plain meaning of the words chosen by Parliament and used in the legislation. Here, there is no ambiguity whatsoever around section 90.1: it does not impose any territorial limitation.

[117] I pause to note that, in an effort to assist the Tribunal in respect of the legislative intent behind section 90.1 and the civil provisions, Kobo referred to some older parliamentary debates from 1996, unrelated to section 90.1 (which was not even contemplated at the time) or to the substantive civil provisions of Part VIII of the Act. The comments made during those parliamentary debates dealt with the Commissioner's enforcement tools and I do not find them relevant or helpful in shedding light on Parliament's intent regarding the scope of section 90.1. I do not agree that the extracts cited by Kobo can be interpreted as indicating that Parliament was aware that the civil provisions of the Act did not provide extraterritorial jurisdiction. They

simply reflect the fact that, in terms of enforcement tools in relation to civil matters, the Competition Bureau did not have a mechanism like the mutual legal assistance treaties in criminal matters in order to cooperate with foreign agencies and obtain evidence from outside Canada. The extracts cited offer no assistance in determining the territorial scope of section 90.1 or Parliament's intent in that respect.

[118] The second other important reason why the interpretation proposed by HarperCollins is not plain and obvious and could not to be retained relates to the context of section 90.1. As stated above, the modern approach to statutory interpretation requires that the words of a provision 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" (Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87, quoted in *Rizzo* at para 21; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 33). The primary objective and goal of any statutory interpretation exercise is to ascertain the clear intention of Parliament and the "true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme" (*ATCO* at para 49; *Will-Kare Paving & Contracting Ltd v Canada*, [2000] 1 SCR 915 at para 54).

[119] When interpreting a statute, a court should always favor the interpretation that goes with the purpose and intent of the Act as opposed to one what would offend it. Here, section 90.1 is a civil provision where the alleged anti-competitive effects that were said to be manifested through a substantial prevention or lessening of competition in a market are a fundamental part of the practice to be reviewed and analyzed by the Tribunal. By comparison, in the criminal conspiracy offence of section 45, harm or the adverse impact on competition is not part of the offence. This is abundantly clear since the new section 45 entered into force in March 2010. The purpose and essence of section 90.1 is to remedy the anti-competitive effects in Canada resulting from arrangements between persons who are competitors. Interpreting the language of section 90.1 as allowing it to cover agreements or arrangements entered into outside Canada that have anti-competitive effects in Canada therefore entirely concords with the intent and central purpose of the civil provisions of the Act.

[120] I agree with the Commissioner that it could not have been the intention of Parliament to allow anti-competitive agreements with adverse effects in Canada not to be covered by the civil provisions (*The Commissioner of Competition v Direct Energy Marketing Limited*, 2015 Comp Trib 2 ("***Direct Energy***") at para 38). This would mean ignoring a key feature of section 90.1. This would also not be consistent with the overarching goals of the Act to maintain and encourage competition in Canada and to eliminate activities that reduce it in the marketplace (*General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at para 57).

[121] The principle that the Act be given "such fair, large and liberal construction and interpretation as best ensure the attainment of its objects" also supports the view that section 90.1 ought not to be read in the limited manner suggested by HarperCollins (Interpretation Act, section 12). A reading of section 90.1 in a manner that is harmonious with the scheme and object

of the Act supports interpreting section 90.1 in a way that recognizes the Tribunal's jurisdiction over impugned practices that have anti-competitive effects in Canada, even if some elements of the conduct have taken place outside this country.

[122] Conversely, retaining the interpretation proposed by HarperCollins and Kobo would prevent capturing certain conduct having anti-competitive effects in Canada, thus frustrating a central purpose of the legislation and undermining what Parliament is trying to achieve in section 90.1 and in Part VIII of the Act more generally. I consider that such a result would be perverse, as it would enable competitors located outside Canada to escape the application of the Act even though their conduct prevents or lessens, or is likely to prevent or lessen, competition in a market in Canada. Such a result would also be inconsistent with the various objectives set forth in the purpose clause of the Act (section 1.1), namely:

to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[123] For all the above reasons, I find no clear intent that section 90.1 should not or does not extend to agreements or arrangements entered into outside Canada. Contrary to the propositions advanced by HarperCollins and Kobo, I find that the statutory interpretation of section 90.1, in light of sections 45, 46 and 83, is far from being "clear" or devoid from any doubt. In such a situation, the "real and substantial connection" test is the test that I have to rely on to determine whether the Tribunal has jurisdiction over the subject-matter raised by the Commissioner's Application. In the absence of clear guidance from the statute, the Tribunal can and should interpret the provision "to apply in all circumstances where there exists a 'real and substantial link' to Canada" (*Globe24h* at para 50).

d. The "real and substantial connection" test

[124] A review of the case law on the "real and substantial connection" test reveals that the test has received widespread recognition by the courts in Canada and has been consistently applied to define the contours of courts' and tribunals' jurisdiction, including in the competition law field. There is no reason why it should not apply to determine the limits of the Tribunal's jurisdiction.

i. The test applies in criminal and civil matters, and to both courts and tribunals

[125] The "real and substantial connection" test is now well recognized (*Van Breda* at para 69) and has been applied in both criminal cases and civil cases, to determine the jurisdiction of both courts and administrative tribunals.

[126] The test dates back to *Libman*, where the Supreme Court had to determine whether Canada can prosecute a criminal case where the crimes occurred outside this country. The issue in *Libman* was whether Canada had jurisdiction over a criminal fraud, parts of which were performed in various countries. As the fraud provisions had no extraterritorial language, the question was whether a cross-border offence could be said to have occurred in Canada. Speaking for the Court, Justice La Forest said that (*Libman* at para 74):

> all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law.

[127] Justice La Forest thus established a two-part test to determine if Canada had jurisdiction over the legal situation at stake (*Libman* at para 71):

(a) The Court must first determine if there is a "real and substantial link" between the offence and Canada. To make this determination, it must "take into account all relevant facts to take place in Canada that may legitimately give this country an interest in prosecuting the offence";

(b) The Court must then consider whether there is anything in those facts that offends international comity or would dictate to refrain Canada from exercising its jurisdiction.

[128] Since then, the Supreme Court has reaffirmed the test in numerous decisions. The test was adopted and developed in *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 ("***Morguard***"), where the issue was about the recognition and enforcement of a decision made by

a court in another province. The Supreme Court stated that "[i]t seems […] that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties" and that "[i]t affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties" (*Morguard* at 1108). The Supreme Court further indicated that "[i]n a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a "power theory" or a single *situs* for torts or contracts for the proper exercise of jurisdiction" (*Morguard* at 1108).

[129] In *SOCAN*, the Supreme Court reviewed the general principles in respect of the extraterritoriality of Canadian laws and concluded that the Canadian *Copyright Act*, RSC 1985, c C-42 may apply to cross-border activities and communications where there is a "real and substantial connection" with Canada (*SOCAN* at paras 51, 58). The Court thus applied the test to a decision of the Copyright Board in order to circumscribe the scope of the Board's jurisdiction in applying the *Copyright Act*.

[130] In *Van Breda*, the Supreme Court applied the "real and substantial connection" in the context of torts, and established a series of "presumptive connecting factors that *prima facie*, entitle[d] a court to assume jurisdiction over a dispute" (*Van Breda* at para 90). These factors included whether: i) the defendant was domiciled or resident in the province; ii) the defendant carried on business in the province; iii) the tort was committed in the province; and iv) a contract connected with the dispute was made in the province. The factors identified by the Supreme Court in *Van Breda* echo a longer list of relevant factors that had been identified by the Ontario Court of Appeal in *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (ONCA) ("***Muscutt***") to assess whether a court should assume jurisdiction (*Muscutt* at para 41).

[131] More recently, the Supreme Court confirmed that the "real and substantial connection" test for establishing jurisdiction applies "to the question of whether a court can assume jurisdiction over a dispute in order to decide its merits" but not to whether "an enforcing court has jurisdiction in an action to recognize and enforce a foreign judgment" (*Chevron* at paras 12, 42). The "real and substantial connection" needed to be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought, and the presumptive factors enunciated in *Van Breda*, were reiterated by the Supreme Court in 2016 in *Lapointe*.

[132] Contrary to the suggestion made by HarperCollins and Kobo in their submissions, the case law establishes that the "real and substantial connection" test applies to the determination of the jurisdiction of both courts and administrative tribunals. I have not been directed to any precedent suggesting that the "real and substantial connection" test does not or cannot apply to an administrative body like the Tribunal. On the contrary, in both *SOCAN* and *Globe24h*, the court specifically recognized that the test can serve to determine the scope of the jurisdiction of an administrative tribunal, namely the Copyright Board in *SOCAN* and the Privacy Commissioner in *Globe24h*.

[133] To determine the confines of the jurisdiction of an adjudicative body, one must first look at the provision granting the powers to the court or the administrative tribunal and then consider how the facts raised by the legal situation at stake relate to such powers. I have not been persuaded that, because the Tribunal is a creature of statute, it would be somehow forbidden from resorting to the "real and substantial connection" test to determine the territorial application of section 90.1. *SOCAN*, *Globe24h* and the case law on the "real and substantial connection" test instead confirm that the determination of whether or not such a connection exists depends on the facts before the court or the tribunal and on how these facts fit within the parameters defining the particular statutory powers of the adjudicating body.

[134] In the current case, the issue is therefore whether the "real and substantial connection" can be found within the statutory powers expressly granted to the Tribunal in section 90.1 of the Act. It is not a matter of using the "real and substantial connection" test to expand the statutory grant of powers to the Tribunal; rather, it is a matter of using the test to see if the facts fall within the powers conferred upon the Tribunal under section 90.1. In other words, the "real and substantial connection" test does not serve to modify the statutory grant of powers. The application of the test must cover and consider all the constituents of the provision. In the case of the reviewable matter covered by section 90.1, the alleged agreement or arrangement between competitors and the anti-competitive effects in Canada constitute the two fundamental features of the provision, and both elements need to be considered in assessing the existence of a "real and substantial connection".

ii. The test applies in competition cases

[135] Though it has not yet been applied in the context of a contested enforcement action by the Commissioner before the Tribunal or even before the courts, the "real and substantial connection" test is no stranger to the competition law field and has been frequently applied in the context of private actions in damages filed under section 36 of the Act. Pursuant to section 36 of the Act, a person who has suffered loss or damage as a result of a breach of one of the criminal provisions of the Act, or of a Tribunal order, has, by statute, a private right of action against the potential infringer in any court of competent jurisdiction. In several cases, the courts have recognized that a "real and substantial connection" can be established if economic damages are suffered in Canada because of a conduct in violation of the conspiracy provisions of the Act or because of a tortious conspiracy, even when such conspiracies are entered into outside Canada.

[136] In *Sun-Rype*, the Supreme Court considered a decision involving a certification for class actions related to a claim for damages based in part on section 36 of the Act. The respondents were claiming that "an alleged conspiracy entered into outside Canada, among foreign defendants, to fix prices of products sold to foreign direct purchasers does not constitute an offence under the Competition Act" (*Sun-Rype* at para 44). The Supreme Court agreed that the framework proposed in *Van Breda* was applicable in the context of this claim, in order to establish "whether there is 'real and substantial connection' sufficient to find that Canadian

courts have jurisdiction in this case" (*Sun-Rype* at para 45). As in the current Motion, the Supreme Court was dealing with a motion to strike the claim for lack of jurisdiction, and found that 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", and that therefore, the claim should not be struck out (*Sun-Rype* at para 47).

[137] The Supreme Court further noted that "[t]here 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" (*Sun-Rype* at para 46). The conduct in question, while perpetrated by foreign defendants, allegedly involved each respondent's Canadian subsidiary acting as its agent, and the sales in question were made in Canada, to Canadian customers and end-consumers.

[138] Several other cases have applied the "real and substantial connection" test in the context of private actions based in part on sections 36 and 45 of the Act. In *VitaPharm*, the issue of jurisdiction was raised in the context of a motion to strike class actions based on alleged losses and damages in Canada attributable to worldwide price fixing conspiracies regarding vitamins. In dismissing the jurisdictional motions and allowing the class actions to proceed, the Ontario Superior Court found, after reviewing the legislative scheme, that if a conspiracy occurred and had consequences in Ontario, then a tort has been committed in Ontario and jurisdiction could be assumed. Justice Cumming found that there was "a good and 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" (*VitaPharm* at para 58). He concluded that it is arguable that a conspiracy injuring Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad. Justice Cumming found that there was a real and substantial connection for various reasons, including the fact that "the most significant aspect of the alleged conspiracy, being the artificial raising of prices in Canada, is implemented within Canada and the agreement is directed at Canadian consumers" (*VitaPharm* at para 101).

[139] In *R v Stucky*, 2009 ONCA 151 ("***Stucky***"), the Ontario Court of Appeal applied the *Libman* test in the context of criminal charges under subsection 52(1) of the Act on misleading advertising, and indicated that "Canada has a legitimate interest in prosecuting persons for unlawful activities that take place abroad when the activities have a 'real and substantial link' or connection to Canada" and that "[t]he principle of extraterritoriality has not prevented courts from taking jurisdiction over transnational offences whose impact is felt within the country" (*Stucky* at para 27). As a result, the Ontario Court of Appeal found that the "public" mentioned at section 52 of the Act was not limited to the Canadian public, and that the "real and substantial link" was as applicable in the competition context as in the criminal context (*Stucky* at para 34).

[140] In *Bouchard*, another case involving a claim for recovery of damages based on sections 36 and 45 of the Act, the Federal Court reaffirmed the "real and substantial connection" test to establish jurisdiction (*Bouchard* at para 22). In that case, a motion to strike the claim was

brought for lack of jurisdiction. Using the factors elaborated in *Muscutt*, Justice Lemieux found that, even if the defendant was not present in Canada, the "real and substantial connection" was established as parts of vehicles were sent to the Canadian market (*Bouchard* at para 68) and the damages occurred in Canada (*Bouchard* at paras 49-50).

[141] In *Fairhurst v Anglo American PLC*, 2011 BCSC 705 ("***Fairhurst SC***"), the Supreme Court of British Columbia found that "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)" (*Fairhurst SC* at para 37). In upholding the finding on appeal, the British Columbia Court of Appeal reiterated that the evidence filed by the defendants did not make it "plain and obvious" that the action as pleaded could not lie within the territorial competence of a British Columbia court (*Fairhurst CA* at paras 31-32).

[142] In *Desjean*, Justice de Montigny (as he then was) also applied the "real and substantial connection" test and agreed to strike a statement of claim for a proposed class action on the basis that the Federal Court was lacking jurisdiction as the factors elaborated in *Muscutt* were not met. In that case, the underlying provisions of the Act were the criminal misleading representations provisions under section 52 as well as section 36 of the Act.

[143] All these cases indicate that, in competition matters raising issues of harm or damages caused by a conspiracy entered into outside Canada, the test applied in determining whether the courts have jurisdiction over the conduct and/or the foreign defendants is whether there is a "real and substantial connection" between the subject-matter and Canada.

[144] HarperCollins and Kobo attempt to distinguish and disregard these precedents on the basis that the "real and substantial connection" was applied as an expression of the exercise of the inherent jurisdiction of the courts over tortious conspiracies. I disagree and do not find this narrow interpretation of these cases plain and obvious. I do concede that the case law mentioned above dealt with claims and allegations of economic damages resulting in part from tortious conspiracies having taken place outside Canada. However, these cases were also grounded on section 36 of the Act, a statutory provision expressly conferring upon a court of competent jurisdiction the powers to deal with "loss or damage" suffered by any person as a result of "conduct that is contrary" to any criminal provision of Part VI of the Act. Therefore, these cases did not strictly involve courts exercising their inherent jurisdiction over tortious conspiracies, but they also involved courts exercising the specific statutory powers conferred to them by the Act under section 36. The "real and substantial connection" test was thus applied in both situations to determine whether the court had jurisdiction.

iii. The test requires a connection with one element and is flexible

[145] The case law on the "real and substantial connection" establishes that the connection to

be drawn is with the subject-matter of the action or the application, and that it can relate to one or many of the elements of the offence or conduct at stake. Stated otherwise, one element of the conduct with a "real and substantial connection" to Canada can be sufficient to trigger jurisdiction (*Van Breda* at para 90).To borrow the words used by the Supreme Court in *Libman*, all that is needed to subject a legal situation to the jurisdiction of Canadian courts is that "a significant portion of the activities constituting that offence took place in Canada" (*Libman* at para 74).

[146] *Libman* and its progeny are cases that all included some activity by the defendant constituting an essential element of the offence or of the conduct physically taking place in Canada. There can therefore be a "real and substantial connection" between one component of the conduct/offence and Canada, sufficient to establish subject-matter jurisdiction. Indeed, in all of the cases applying the "real and substantial connection" test, the courts dealt with situations in which not all of the elements constituting the offence or the impugned practice took place outside Canada. The question is therefore whether an activity or acts constituting an essential component of the offence or the impugned practice will be sufficient enough to establish a "real and substantial connection" and give jurisdiction to Canada.

[147] The case law is clear: the "real and substantial connection" test is flexible and should be adapted to the circumstances (*VitaPharm* at para 93). It does not boil down to a "fixed formula" (*Muscutt* at paras 36, 56). The specific factors that should be considered in any given case will vary based on the facts and issues of the case (*Oroville* at para 39). As stated by Justice de Montigny in *Desjean*, the language used by the Supreme Court to describe the real and substantial connection "was deliberately vague, allowing for flexibility in the application of the test and for its adaptability to new situations" (*Desjean* at para 27). In *Desjean*, after having described the factors developed in the *Muscutt* case (at the time, the *Van Breda* decision had not been issued by the Supreme Court), Justice de Montigny was not satisfied that these factors were met as he noted the absence of offices and employees in Canada, with no business assets nor any physical presence in Canada.

[148] Examples from the case law demonstrate that the connecting factors can take many different incarnations. In *Van Breda*, the Supreme Court enunciated its "presumptive connecting factors" and found that carrying on business in Canada required some form of actual, and not only virtual, presence in the jurisdiction, such as maintaining an office or regularly visiting the territory of the particular jurisdiction (*Van Breda* at para 87). In *Sun-Rype*, the Supreme Court relied on *Van Breda* and its 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. In that decision, Justice Rothstein found that sales were made in Canada, to Canadian customers and end-customers and that the defendants conducted business in Canada (*Sun-Rype* at para 46).

[149] In *VitaPharm*, the court assessed, among other factors, the relationships between the foreign head offices and the Canadian affiliates, the fact that the alleged agreement provided for price-fixing in respect of products sold to and within Canada, and the fact that damages were suffered in Canada. In *Globe24h*, Justice Mosley mentioned that the Privacy Commissioner had identified the following three key connecting factors between the foreign-based website and Canada (*Globe24h* at para 55): the content at issue was Canadian court and tribunal decisions, the website directly targeted Canadians by advertising access to Canadian case law, and the impact of the website was felt by members of the Canadian public. In *Oroville*, Chief Justice Rossiter found insufficient factors to create a real and substantial link between Canada and the activities giving rise to Canada's claim for tax, as the US company had not been registered in Canada, had no facilities, assets or operations in Canada and did not perform any of its services in Canada.

iv. The test applies to the Tribunal

[150] Considering the evolution of the "real and substantial connection" test, the courts' consistent approach in *Libman* and its progeny, and the flexibility that animates the use and application of the test, there are strong grounds for the Tribunal to recognize that the "real and substantial connection" test also applies to define the limits of its jurisdiction, and that civil anti-competitive practices occurring in part outside Canada but that involve activities in Canada and have harmful effects in Canada can be subject to the Tribunal's jurisdiction pursuant to that test. More specifically, given the explicit statutory powers conferred upon the Tribunal by the CTA and by section 90.1 of the Act to assess the alleged substantial lessening or prevention of competition resulting from certain agreements or arrangements between competitors, the existence of anti-competitive effects in Canada attributable to the impugned agreement can be sufficient, assuming that the appropriate evidence is provided, to establish the necessary "real and substantial connection" granting jurisdiction to the Tribunal under section 90.1. In any event, the contrary proposition advanced by HarperCollins is certainly not plain and obvious.

[151] The Tribunal's jurisdiction on section 90.1 emanates from the statute itself, and the provision identifies two main dimensions to the practice it is targeting: the impugned agreement or arrangement between competitors and the anti-competitive effects through the alleged substantial prevention or lessening competition in a market. The practice to be reviewed by the Tribunal under section 90.1 therefore goes beyond the mere existence of an agreement or arrangement between competitors; it also requires the presence of another fundamental element, namely anti-competitive effects as manifested in a substantial prevention or lessening of competition in a market. A "real and substantial connection" will exist if a connection can be made between that essential element of the impugned practice and Canada. The connection does not solely revolve around the "agreement or arrangement between competitors" dimension of section 90.1; it can also involve the anti-competitive effects of the impugned practice. Thus, contrary to what was argued by HarperCollins, if there is a "real and substantial connection" between the anti-competitive effects element of the impugned practice and Canada, this can be

enough to trigger the Tribunal's jurisdiction, just as much as economic damages in Canada have been found sufficient to establish a real and substantial link in private actions brought under section 36 of the Act.

[152] I would add that, in relying on the anti-competitive effects dimension of section 90.1 to establish a "real and substantial connection" with Canada, the Tribunal is not asserting jurisdiction based on some ancillary link with the provision. This dimension goes to the very core of section 90.1 and of the Tribunal's statutory powers and role. In the case of section 90.1 (and of other civil provisions contained in Part VIII of the Act), the alleged economic harm is expressed in the form of a substantial prevention or lessening of competition in a market, however it is measured. Just as harm in the form of damages experienced in Canada has sufficed to establish the courts' jurisdiction over a private action in damages under section 36 of the Act resulting from a conspiracy formed abroad, harm in the form of a substantial prevention or lessening of competition in a market in Canada can be sufficient to demonstrate the "real and substantial connection" needed to establish the Tribunal's jurisdiction over an alleged agreement or arrangement under section 90.1, even if the agreement or arrangement was entered into outside Canada.

[153] The alleged anti-competitive effects of the conduct are thus a central part of the express jurisdiction granted to the Tribunal to deal with certain agreements and arrangements between competitors resulting in a substantial prevention or lessening of competition in a market in Canada. The Tribunal does not need to resort to any inherent jurisdiction to deal with that. No issue of implied statutory powers arises here. It is part of the powers expressly conferred upon the Tribunal by the specific words of section 90.1.Contrary to what is argued by HarperCollins and Kobo, I am not convinced that there is any major distinction to be made between private actions for damages brought pursuant to section 36 before the superior courts and applications brought before the Tribunal under section 90.1 or other civil provisions of the Act.

[154] Conclusions similar to those reached by the courts on the "real and substantial connection" in the context of actions based on section 36 or tortious conspiracies due to the effect and harm of the conduct in Canada could also be reached by the Tribunal in regard to the anti-competitive effects of an alleged arrangement under section 90.1. To paraphrase the words used by Justice Cumming in *VitaPharm*, there is a good arguable case that an arrangement between competitors entered into abroad, such as to create a substantial prevention or lessening of competition in a market gives rise to an impugned practice reviewable by the Tribunal under section 90.1. It is eminently arguable that an arrangement that creates anti-competitive effects in Canada gives rise to potential remedial orders issued by the Tribunal, even if the alleged arrangement was formed abroad. I am therefore of the view that, in light of the "real and substantial connection" test, section 90.1 can apply in respect of economic activities occurring beyond Canadian borders which have an anti-competitive effect in Canada.

[155] I further observe that, in the context of other civil provisions of the Act, the Commissioner and the Tribunal have indirectly recognized that conduct having anti-competitive effect in Canada can be sufficient to result in enforcement action by the Commissioner or in remedial orders by the Tribunal. Although the Commissioner has never sought an injunctive or remedial order from the Tribunal in relation to a merger of two foreign corporations that takes place outside Canada if he were to conclude that it is likely to substantially lessen competition in Canada, the Competition Bureau's practice in respect of such transactions suggests that the Commissioner considers he can assert jurisdiction over such a merger. The Commissioner rightly points out that, on numerous occasions, consent agreements involving conduct or economic activity originating outside Canada, but which specifically contemplate and have an impact on competition in Canada, have been registered with the Tribunal in relation to civil provisions such as mergers and deceptive marketing practices (see, for example, CT-2017-001, *The Commissioner of Competition v Amazon.com.ca Inc*, filed January 11, 2017; CT-2016-018, *The Commissioner of Competition v Abbott Laboratories*, filed December 28, 2016; CT-2015-001, *The Commissioner of Competition v Aviscar Inc et al*, filed June 2, 2016; CT-2009-014, *Commissioner of Competition v Pfizer Inc and Wyeth*, filed October 14, 2009). The Tribunal has also issued orders, on consent, relating to economic activity originating outside Canada but which specifically contemplated and had an impact on competition in Canada (see, for example, CT-2002-003, *Commissioner of Competition v Bayer AG, Aventis Crop Science Holdings SA*, dated July 18, 2002; CT-2001-004, *Commissioner of Competition v Lafarge SA*, dated August 1, 2001; *Canada (Director of Investigation & Research) v NutraSweet Co*), [1990] CCTD No 17).

[156] I acknowledge that, in all of these cases, the issue of jurisdiction was not raised and the foreign corporations attorned to the Canadian jurisdiction. I therefore give limited weight to these precedents. I note however that, in all of these cases, despite the fact that the economic activity had its genesis beyond Canadian borders, it specifically contemplated Canada and had an impact on competition in the country, and consent agreements were entered into and registered with the Tribunal.

e. The facts as pleaded show a "real and substantial connection"

[157] I now have to determine if a "real and substantial connection" can be made between Canada and the legal situation at stake in the Commissioner's Application, in light of the provisions defining the statutory powers of the Tribunal under section 90.1. Translated in this case, the question is whether there are sufficient factual elements to draw a "real and substantial connection" between Canada and the activities giving rise to the Commissioner's Application (*Oroville* at para 38). The "real and substantial connection" that needs to exist is in relation to the subject-matter of the Application, and it suffices if one main component of the impugned practice establishes such a link.

[158] In the context of HarperCollins' Motion, I must accept the Commissioner's allegations as being true unless they are manifestly incapable of being proven. I must also assess whether it is

"plain and obvious" that there is no "real and substantial connection" allowing to establish the Tribunal's jurisdiction. I pause to note that HarperCollins has filed no affidavit disputing the factual allegations made by the Commissioner on the manifestations of the alleged Arrangement and on the alleged anti-competitive effects in Canada. There is no affidavit addressing the substance of the Commissioner's allegations or denying that the alleged Arrangement has translated into the conclusion of agency agreements with E-book retailers in Canada, the higher prices for E-books in Canada or the alleged substantial lessening or prevention of competition in the country.

[159] In this case, I find that there are a number of indicia pointing to the existence of a "real and substantial connection" between the subject-matter of the Commissioner's Application and Canada, sufficient to grant jurisdiction to the Tribunal. I am satisfied that there are jurisdictional facts or allegations of such facts sufficient to support the claim of jurisdiction and to find that there "could" be a real and substantial connection to Canada, and that the Commissioner's Application is not based on "allegations or bald assertions of anti-competitive conduct unsubstantiated with specific facts or a proper factual basis" (*Mil Davie* at paras 9-11; *SOCAN* at para 54).

[160] The Commissioner's allegations supporting a "real and substantial connection" with Canada include:

(a) The contemplated implementation of the Arrangement by HarperCollins and other publishers through the collective shift to vertical agency agreements with E-books retailers in Canada;

(b) HarperCollins' activities and presence in Canada through its affiliate HarperCollins Canada, which carries on business in Canada and is responsible for the sales, marketing and publicity of HarperCollins' titles in Canada;

(c) The anti-competitive effects of the conduct in Canada and the harm to the market for the retail sale of E-books in Canada, in the form of higher prices for E-books.

[161] These elements are pled with more specificity in the Commissioner's Notice of Application, in his reply to HarperCollins' Response and in his response to HarperCollins' Motion.

[162] Numerous paragraphs from the Commissioner's Notice of Application plead specific facts reflecting HarperCollins' activities and presence in Canada through its subsidiary HarperCollins Canada, and the impact of the alleged Arrangement in Canada. The Commissioner alleges that the Arrangement purportedly contemplated Canada and was implemented in Canada and in this regard, he refers to certain alleged internal communications between HarperCollins employees and to draft agency agreements sent by Apple to the US publishers. The Commissioner's Notice of Application also mentions communications evidencing concerns with

E-book pricing and Amazon's pricing strategy as it related to Canada, to the roll out of the agency model in Canada, and to communications between HarperCollins Canada, other publishers and Apple Canada in June 2010, just prior to Apple's launch of the iPad in Canada and the launch of iBookstore.ca. He states that initial draft agency agreements included Canada, along with the United States, as part of the "Territory" covered by those agreements and that the draft Canada-specific agreements incorporated by reference the key substantive terms of the US agency agreements, including the MFN price provision. I understand that HarperCollins disputes that those alleged communications offer any support to the position that there was an agreement among US publishers to shift to the agency model (whether in the United States or Canada) and that, in its view, the communications indicate that Apple was proposing to enter into vertical agency agreements with several US publishers in the United States and later in Canada. However, at this stage, the Commissioner's allegations are deemed to be proven.

[163] The Notice of Application also states that the Arrangement with respect to Canada continues to exist and remains embodied in agency agreements that HarperCollins Canada and other publishers have with all major Canadian E-book retailers, including Apple Canada and Kobo and which are still in place. More specifically, in paragraphs 39-50 of the Notice of Application, the Commissioner sets out how the collective agreement to move to the agency model came about. In paragraphs 51-56, the Commissioner details 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 describe the facts with respect to how the Arrangement was rolled out in Canada. The Commissioner's response to HarperCollins' Motion also provides details regarding the contemplation and implementation of the Arrangement in Canada, the negotiation and drafting of agency agreements with retailers (paragraphs 8-15), and the alleged harm caused by the Arrangement (paragraphs 16-20), in terms of more limited price competition and higher prices for E-books in Canada.

[164] There are also factual allegations indicating that the effects of the Arrangement continue to be felt in Canada. Though prices of HarperCollins' and other US publishers' E-books sold in Canada have varied since the implementation of the agency model in Canada, the Commissioner alleges that they remain substantially higher today than would have been the case but for the Arrangement and the resulting shift from the wholesale distribution model to the agency model. These allegations are also taken as proven.

[165] Having regard to all the foregoing, the flexibility inherent in applying the "real and substantial connection" test leads me to conclude that the test *could* very well be met here (*SOCAN* at para 76). HarperCollins has certainly not demonstrated that it is plain and obvious that the Tribunal has no jurisdiction over the alleged impugned practice in this case. It is not necessary to address the issue definitively at this time (*VitaPharm* at para 61). At this stage, it is sufficient to establish that there is a good arguable case allowing one to respond to HarperCollins' and Kobo's submissions (*VitaPharm* at para 98):

> In the context of a motion challenging jurisdiction, the plaintiffs have a low threshold to meet. Questions relating to the factual basis necessary to establish all the elements of tortious conduct are to be considered only as far as necessary to establish that unlawful conduct *may* have occurred in Ontario. Any further analysis should occur in the context of a trial to determine the merits of the action, since such analysis is beyond the scope of the present jurisdiction motions.

[166] In summary, I am persuaded that there is certainly enough material to conclude that it is not "plain and obvious" that the Tribunal has no jurisdiction or that there could not be a "real and substantial connection" with Canada.

f. There is no issue of extraterritoriality or of offence to international comity

[167] HarperCollins pleads that, on its face, section 90.1 contains no "clear words" purporting to give it effect outside Canada and that, as of consequence, the basic presumption against giving Canadian statutes extraterritorial effect is sufficient for the Tribunal to conclude that section 90.1 of the Act applies only to agreements or arrangements formed in Canada.

[168] I do not agree. Instead, I am of the view that no issue of extraterritoriality arises with the Commissioner's Application. For the reasons that I have explained, submitting a conduct outside Canada to the jurisdiction of the Tribunal because there is a "real and substantial connection" with Canada does not amount to applying a provision extraterritorially or giving an extraterritorial effect or dimension to a provision.

[169] There is therefore no need to determine whether the doctrine of "necessary implication" applies in this case or should be considered. This doctrine of necessary implication was developed in the context of the common law presumption that Parliament does not intend legislation to apply extraterritorially (*SOCAN* at para 144). Courts have repeatedly held that the presumption against the extraterritorial application of legislation may only be rebutted by express wording or necessary implication (*SOCAN* at paras 54-55; *Liberty Net* at para 16). However, this analysis only applies when issues of extraterritoriality application arise. There is no issue of extraterritorial application when one can establish a "real and substantial connection" (i.e., the law is then considered *not* to have an extraterritorial reach).

[170] Finally, in addition to the principles of statutory interpretation, HarperCollins relies on the principles of international comity to support its conclusion that the Tribunal lacks jurisdiction over the Arrangement alleged by the Commissioner. I do not agree and instead find that no issue of international comity arises in this case as a "real and substantial connection" can be established between the subject-matter and Canada.

[171] I accept that the principle of international comity is well recognized in Canada (*Morguard* at para 31) and the Supreme Court indeed recently observed that the principle, 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" (*Chevron* at para 52).

[172] However, it has been recognized by the courts that the principle of international comity cannot be offended when there is a "real and substantial connection" between an offence or a conduct and Canada, even when persons or acts outside Canada are affected (*SOCAN* at paras 56-57; *VitaPharm* at para 88; *Globe24h* at para 56). There is no offence to international comity in these circumstances because the exercise of jurisdiction does not primarily affect a foreign conduct or person, but a legal situation which has a significant link with Canada.

[173] In the current case, the US Judgment does not address the Canadian situation. It only deals with the expression of the Arrangement in the United States and with remedial measures affecting E-book publishers and retailers in the United States. The Tribunal's jurisdiction is anchored on the substantial connection between Canada and the activities of HarperCollins resulting in alleged anti-competitive effects in this country, not on any extraterritorial application of section 90.1. Recognizing the Tribunal's jurisdiction over the alleged anti-competitive effects of the Arrangement in Canada, not in the United States, does not infringe on the sovereignty of foreign states or courts. Nor could it lead to the violation of the US Judgment or of the laws of the United States.

[174] For the Tribunal to have jurisdiction on the facts of this case is therefore not inconsistent with the objectives of order 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.

C. It is not "plain and obvious" that there is no existing arrangement

[175] HarperCollins' second ground for summary dismissal of the Commissioner's Application is that, even if the Tribunal has territorial jurisdiction over the challenged Arrangement, there can be no doubt that the alleged Arrangement is *not* "existing or proposed", as required by section 90.1 of the Act.

[176] HarperCollins submits that, although the Commissioner alleges in the Application that the Arrangement "continues to this day in Canada", this assertion is flatly contradicted by the following matters of public record in the United States and Canada:

(a) all of the alleged parties to the purported Arrangement, including HarperCollins US, currently are (and have been for years) subject to binding US 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 the 2014 Consent Agreement in February 2014, 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 at least as of the date of the 2014 Consent Agreement; and

(c) in any event, the 2017 Consent Agreements entered into by the respondents to the 2014 Consent Agreement (except for HarperCollins Canada) as well as by Apple were all registered with the Tribunal in January 2017, confirming beyond doubt that there is no longer any "existing or proposed" Arrangement among competitors with respect to the sale of E-books.

[177] HarperCollins pleads that, 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. Once again, Kobo supports HarperCollins' position on this front.

[178] I do not agree that the Commissioner's Application can be summarily dismissed on this ground.

[179] I acknowledge that section 90.1 of the Act requires that the alleged agreement or arrangement be existing or proposed at the time of an application, and that it is not sufficient for an arrangement to have been in place at some point of time in the past in order to trigger the Tribunal's jurisdiction. Unlike other civil provisions, section 90.1 does not cover past conduct. However, I do not agree that the issuance of the US Judgment or the registration of the 2014 Consent Agreement and 2017 Consent Agreements necessarily imply that the Arrangement no longer exists with respect to Canada. The US Judgment does not deal with the sales of E-books in Canada, the 2014 Consent Agreement was stayed before being implemented and subsequently rescinded by the Tribunal, and the 2017 Consent Agreements in which the Commissioner concluded to the existence of the alleged Arrangement at the time of registration was also stayed before being implemented. Furthermore, the existence of an agreement or arrangement can be proven by direct evidence or by inference from circumstantial evidence, and I do not accept that the manner in which the alleged Arrangement actually materializes (i.e., its "manifestations") cannot be used to demonstrate its existence. In this case, there are allegations that the Arrangement was implemented in Canada through a collective shift to the conclusion of agency agreements with E-book retailers in Canada and that the adoption of a new distribution model which, according to the Commissioner, has resulted in higher prices for E-books in Canada. Evidence of the alleged manifestations of an arrangement can be used to prove its existence, assuming of course that it meets the applicable standard of proof.

[180] Further to my review of the applicable law and my assessment of the facts pleaded by the Commissioner in his Application, I conclude that there is evidence which could support the existence of the alleged Arrangement at the time of the filing of the Application. In other words, I am not convinced that it is plain and obvious and beyond doubt that no factual basis can

support the existence of the alleged Arrangement at the date the Commissioner's Application was filed. This is an issue that shall be dealt with at trial, with the benefit of all the relevant evidence.

a. The meaning of an "existing or proposed" arrangement

[181] Section 90.1 specifically states that the alleged agreement or arrangement must be "existing or proposed" ("conclu ou proposé" in the French version) to be subject to the provision. Although the Act does not define the terms "existing or proposed", the ordinary meaning of those words requires that, at the time of an application brought under section 90.1, competitors either be parties to an agreement or arrangement or be proposing to enter into an agreement or arrangement. A past agreement or arrangement, no longer in existence at the time the Commissioner institutes his challenge before the Tribunal, is not enough.

[182] If there was any doubt as to the meaning to be given to the word "existing", the use of the word "conclu" in the French version makes it clear that the alleged agreement or arrangement has to be an agreement still in place at the time of the application. It is well recognized that, according to the principles of interpretation of bilingual legislation, both the French and English versions are equally authoritative and "differences between two official versions of the same enactment are reconciled by eliciting the meaning common to both" (*R v Daoust*, 2004 SCC 6 ("***Daoust***") at para 26). The interpretation of a bilingual enactment first consists in searching for the common meaning between the two versions of the statute and, where their scope differs, in preferring the narrower meaning common to both versions (*Daoust* at para 29). Then, it must be determined whether the common meaning that has been identified is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent (*Daoust* at para 30).

[183] In this case, the word "conclu" in the French version of section 90.1 may suggest that it is sufficient that an agreement or arrangement has been completed and concluded at some point of time in order to trigger an application under that provision. However, the word "existing" used in the English version has a narrower meaning and carries with it the notion that the agreement or arrangement has to be "in existence or operation at the current time" (Oxford Dictionary), that the agreement still survives. The meaning common to both the word "existing" and the word "conclu" is the narrower scope of the English word "existing", which implies that the alleged agreement or arrangement must still be in existence at the time of an application brought under section 90.1. It does not suffice that an agreement may have been in place at some point in time in the past; it has to exist or be proposed at the time the matter is brought before the Tribunal.

[184] I would add that such an interpretation is consistent with Parliament's intent expressed in section 90.1, as the provision only applies to conduct that "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market". Unlike other civil provisions of the Act such as abuse of dominance which applies where the practice "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market", section 90.1

does not cover past anti-competitive effects and only refers to remedial orders aimed at correcting a practice which results in present or future anti-competitive effects.

[185] In that respect, section 90.1 on civil collaborations between competitors is once again different from the criminal conspiracy provision, which contemplates that a past combination, agreement or arrangement which no longer exists can constitute an offence under section 45 and form the basis of a criminal violation of the Act.

b. The US Judgment, the 2014 Consent Agreement and the 2017 Consent Agreements

[186] I am not convinced that the US Judgment, the 2014 Consent Agreement or the 2017 Consent Agreements make it plain and obvious that there was no existing or proposed agreement or arrangement at the time of the Commissioner's Application in this case.

[187] The US Judgment does not apply to Canada and did not necessarily terminate the alleged Arrangement or its implementation in Canada, as that judgment does not impact the sales of E-books in Canada or the agency agreements concluded by HarperCollins with E-book retailers in Canada. The effect of the US Judgment was to terminate the alleged existing conspiracy between the US publishers involved (which also included Apple) and to terminate their existing agreements with E-book retailers in the United States. The US publishers were forced to take apart the manifestations of the alleged Arrangement in the United States. However, the US Judgment had no impact on the expression or manifestations of the Arrangement with respect to Canada. Indeed, the Commissioner alleges that the agency agreements concluded by HarperCollins and other publishers in Canada have remained in place.

[188] More specifically, the US Judgment was not directed at Canada or Canadian entities and did not require that contracts for the sale of E-books to be changed in Canada. The definitions used in the US Judgment refer to the distribution of E-books within the United States, not in Canada. Further, the conduct prohibited by the US Judgment relates to the vertical agreements in the United States. The US Judgment defines both "E-book Publisher" and "E-book Retailer" with specific language limiting their scope to the United States. E-book Publisher means any person that "owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book within the United States to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the United States (…)". E-book Retailer means any person "that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the United States (…)".

[189] Similarly, under "Required Conduct", the US Judgment states that "each Settling Defendant shall terminate any agreement with Apple related to Sale of E-books that was executed prior to the filing for the Complaint", with Apple and the Settling Defendants referring only to their US parent companies. Still under "Required Conduct", the US Judgment requires

the termination of the agreements between "a Settling Defendant and an E-book Retailer other than Apple", with Settling Defendant only connoting the US parent and E-book Retailer being defined to mean any person that sells E-books to consumers in the United States. The remedies and required conduct, such as the termination of contracts, were specific to the United States and did not include the Canadian contracts in light of the definitions for "Settling Defendant(s)", "E-book Retailer" and "E-book Publisher".

[190] In the same manner, the complaint made by the US antitrust authorities – the basis for the US Judgment – requested the US Court to declare the US publishers' conduct illegal and to enter injunctive relief to prevent further injury *to consumers in the United States*. It also referred to the US publishers selling E-books in the United States and to the United States being the relevant geographic market.

[191] In light of the foregoing, I am not persuaded that the issuance of the US Judgment implies that there was no longer an alleged Arrangement in place with respect to Canada.

[192] Turning to the 2014 Consent Agreement, I note that it was stayed by the Tribunal shortly after its registration, that it was never implemented, and that it was ultimately rescinded. Therefore, I agree with the Commissioner that it would not have had any impact on the existence of the alleged Arrangement in Canada or on competition in the retail market for E-books in Canada. I can certainly not conclude from this 2014 Consent Agreement that it is plain and obvious and beyond doubt that there was no existing alleged Arrangement with respect to Canada at the time of the Commissioner's Application.

[193] As to the 2017 Consent Agreements, they indicate that the Commissioner concluded that there was an alleged Arrangement in place as of the date of these Consent Agreements. The apparent purpose of these consent agreements was to put an end to such an arrangement between competitors. As was the case for the 2014 Consent Agreement, the 2017 Consent Agreements were stayed by the Federal Court before being implemented. Therefore, they also would not have had an impact on the existence of the Arrangement in Canada or on competition in the retail market for E-books in Canada. Furthermore, at the time of their registration, which coincides with the date of the Commissioner's Application, the 2017 Consent Agreements referred to the existence of an alleged Arrangement. Again, it is certainly not "plain and obvious", when assuming the Commissioner's allegations as proven, that there is no existing agreement or arrangement based solely on the 2017 Consent Agreements.

[194] I further observe that the interpretation of the effect of the 2017 Consent Agreements proposed by HarperCollins would lead to a perverse and hardly justifiable result in the application of section 90.1. It would mean that, if there is an agreement or arrangement between competitors and all parties but one concludes a consent agreement with the Commissioner, the remaining non-settling party could not be the subject of an application by the Commissioner as there would no longer be an "existing" agreement left to trigger the Tribunal's jurisdiction as soon as the consent agreements are signed and registered. I do not accept that the conclusion of

consent agreements by the settling parties to a civil collaboration between competitors would necessarily offer this kind of escape to the non-settling party and generate this type of windfall benefit for it.

c. The existence of an arrangement can be inferred from its manifestations

[195] HarperCollins and Kobo also argue that the alleged Arrangement itself must not be confused with its implementation, and that the Commissioner conflates the existence of *vertical* agency agreements between HarperCollins and E-book retailers, which cannot run afoul of Section 90.1 of the Act, with the existence of *horizontal* agreements or arrangements among competitors, which may. They claim that the existence of agency agreements with E-book retailers cannot be taken as evidence of an alleged existing Arrangement subject to section 90.1.

[196] I disagree. I do not dispute that section 90.1 applies to horizontal agreements between competitors, and not to vertical agreements between suppliers and distributors who are not competitors. However, I do not agree that the implementation or manifestations of an agreement or arrangement are irrelevant to determine whether or not the agreement is existing or proposed.

[197] Section 90.1 does not make any agreements or arrangements between competitors reviewable by the Tribunal; rather, it relates to agreements or arrangements between competitors that prevent or lessen competition substantially, or are likely to do so. As discussed above, the two elements of the reviewable practice are intrinsically linked. The language of section 90.1 refers not only to an agreement or arrangement among competitors, but to an agreement or arrangement to do something, namely to prevent or lessen competition substantially. Therefore, evidence on how an agreement materializes and is put in place can be relevant to determine the existence of the agreement, especially if this implementation reflects the expression of the agreement itself. Stated otherwise, not only is the implementation of the agreement or arrangement included in the scope of section 90.1, but I consider that the existence of the impugned arrangement can be demonstrated by its manifestation and the manner in which it is carried out and put into effect.

[198] In this case, the alleged Arrangement is expressed not through commonly fixed prices between competitors but through a collective shift to the conclusion of vertical agency agreements by publishers with E-book retailers. HarperCollins claims that the only "agreements" in existence today in Canada are separate vertical agency agreements between one publisher and one retailer and that, in the absence of an existing horizontal agreement or arrangement among publishers, those vertical agreements cannot be the subject of a remedial order by the Tribunal under section 90.1. But, in his Application, the Commissioner is not attacking the vertical agency arrangements as such. The Commissioner is seeking a remedial order to terminate these vertical agreements because they are the expression and manifestation of the alleged Arrangement between competing publishers, just as much as higher selling prices or

lower purchasing prices could be expressions or manifestations of an impugned arrangement.

[199] In brief, the agency agreements in place between HarperCollins and E-book retailers are, according to the Commissioner, manifestations of the alleged Arrangement between HarperCollins and the other US publishers involved. They are not challenged in and of themselves, but as the manifestations of the alleged Arrangement. If this is established to be the case at trial, the Tribunal would have the jurisdiction and authority to order the termination of these manifestations of the alleged agreement between competitors and how it was carried out.

[200] I do not accept HarperCollins' suggestion that the Arrangement and its implementation are distinct and separable and should be looked at in silos. It is well recognized that the effects of an agreement or arrangement can constitute evidence that the agreement exists. Indeed, under the criminal conspiracy provision, the courts have stated that a conspiracy may be inferred from the acts implementing it, which are looked at as manifestations of the conspiracy or agreement. A criminal conspiracy may be directly established by proof that the accused actually met together and entered into an alleged agreement, but it may also be indirectly proven from inferences drawn from actions or from the conduct of the parties (*Paradis v The King* [1934] SCR 165 at 168; *R v Miller* (1947), 73 CCC 343 (BCCA) at 344). Evidence of continued implementation and prevalence of the effects of an alleged agreement can be used as circumstantial evidence of the existence of the agreement and, if sufficient evidence is provided, the court may infer from the circumstances that the agreement exists. In such a case, proof is said to be circumstantial as opposed to direct.

[201] I pause to note that this principle regarding the role of circumstantial evidence in criminal conspiracies was codified in the Act in 1986, through the adoption of subsection 45(3), which permits courts to "infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communications between or among the alleged parties to it". Under both the former section 45 provision and the current one, a court can reach a conclusion on the existence of an agreement from circumstantial evidence and can consider that a certain conduct or result can only be explainable by the presence of an underlying agreement.

[202] In civil matters, a fact can also be proven by direct or circumstantial evidence. The treatment of circumstantial evidence is quite straightforward in civil cases: it is considered and analyzed as any other kind of evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it, and this is a task for the trier of fact.

[203] The existence of agency agreements between all major publishers and E-book retailers in Canada could therefore constitute circumstantial evidence demonstrating that the agreement or arrangement that led to their creation and implementation existed at the time of application and continues to exist. HarperCollins could of course attempt to demonstrate that the prevalence of an agency distribution model is the result not of an agreement between the publishers and a collective shift to the agency model, but of other competitive forces. For example, it could

adduce evidence that the prevailing distribution model with E-book retailers in the United States has returned to an agency model following the US Judgment, arguably through new contracts negotiated independently by each US publisher as opposed to being in furtherance of an illegal conspiracy. Conversely, if the manifestations of the alleged Arrangement through agency agreements in place with E-book retailers still prevail in Canada, the Tribunal could infer from that evidence that an arrangement between the publishers was still in existence at the time of the Commissioner's Application. This does not necessarily mean that the mere existence of agency agreements could be sufficient to establish the continuing existence of the Arrangement as the agency model could still be in place with various retailers in the absence of any arrangements between the publishers. However, it is not something that can be excluded at this stage, as the Commissioner could provide evidence that the current agency model in Canada is the result and an expression of the continued existence of the alleged Arrangement.

[204] Just as the subsistence of common artificially-fixed prices can be used to infer the existence of a conspiracy, the continued existence of agency agreements brought about in the aftermath of the Arrangement can constitute evidence that an arrangement still persists. The fact that an anti-competitive arrangement is carried out through a vertical agreement does not mean that the Tribunal or, for that matter, the US courts, do not have jurisdiction to deal with it. Just as the Tribunal would have the power to order the rescission of lower purchasing prices established further to an arrangement between competitors, the Tribunal has jurisdiction to order the rescission of a vertical agency agreement if this is the result and the expression of an arrangement between competitors pursuant to section 90.1.

d. There is a factual basis to support the potential existence of the Arrangement

[205] At this stage, the allegations contained in the pleadings must be assumed to be true and accepted as proven, and they are indeed not disputed by HarperCollins. While HarperCollins claims that there is no factual basis for the Commissioner's allegations that the Arrangement "continues to target vigorous competition and low prices in the retail market for E-books only" and "continues to this day in Canada", these allegations are deemed to have been proven at this stage. In this case, the facts alleged in the Commissioner's Notice of Application with respect to the "existing or proposed" Arrangement include:

(a) In 2010, HarperCollins and other US publishers (including Apple) entered into an Arrangement in the United States in respect of the sale of E-books;

(b) An email was sent by HarperCollins on March 5, 2010, with the subject "Agency Roll-Out in Canada", indicating that agency in Canada will roll out "once the legal due diligence has been done and Apple is ready to lead the charge" (paragraph 75 of the Notice of Application), and other emails were sent on the same subject;

(c) The Arrangement between US publishers was implemented in Canada by way of a

collective shift to agency agreements;

(d) Draft agency agreements for Canada were circulated in April and May 2010;

(e) The agency agreements were signed in June 2010, July 2010 and November 2011;

(f) Following the collective shift to agency, retail prices for E-books increased substantially over what they had been under the wholesale model;

(g) The Arrangement resulted in increased prices of E-books in Canada for Canadian consumers, since 2010;

(h) The Arrangement, and its resulting higher prices, continues to this day in Canada;

(i) Prices have never reverted to their pre-agency levels and are still substantially higher today that would have been the case but for the Arrangement and the resulting shift from wholesale to agency;

(j) The Arrangement results in a substantial lessening of competition in the market for E-books in Canada.

[206] I am not persuaded that these alleged facts regarding the continued existence of the manifestation of the Arrangement in Canada can be qualified as frivolous or "manifestly incapable of being proven" (*Imperial Tobacco* at para 22). They are not facts based on an assumptive or speculative conclusions which are incapable of proof (*Sivak v Canada*, 2012 FC 272 ("***Sivak***") at para 25; *Almacén v Canada*, 2016 FC 300 ("***Almacén***") at para 14, aff'd 2016 FCA 296); *Simon v Canada*, 2016 FC 976 at para 24). Moreover, on a motion to strike or dismiss, the statement of claim must also be read as generously as possible, with a view of accommodating any inadequacies (*Sivak* at para 16; *Almacén* at para 14).

[207] It may be that, once all evidence is analyzed on the merits, there is no clear and convincing evidence of an existing arrangement. As is the case for all components of section 90.1 of the Act, the Tribunal will assess the evidence on the balance of probabilities standard in conducting its analysis. The Tribunal remains guided by the principles established in *FH v McDougall*, 2008 SCC 53 ("***McDougall***"), where the Supreme Court held that there is only one civil standard of proof in Canada, a balance of probabilities. Speaking for a unanimous Court, Justice Rothstein further stated in his reasons that the only legal rule in all cases is 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). He concluded by saying that, in all civil cases, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49).

[208] Therefore, in assessing the impugned practice under section 90.1, the Tribunal will have to determine whether sufficiently clear, convincing and cogent evidence exists to demonstrate that the alleged Arrangement is "exiting or proposed". It will be up to the Commissioner to adduce such evidence, directly or through circumstantial evidence, and to persuade the Tribunal on the balance of probabilities standard. But, it is certainly not plain and obvious that, at this stage, there is no existing agreement or arrangement in light of the accepted allegations summarized above. While I cannot confirm whether the evidence will be ultimately sufficient to demonstrate the existence of the alleged Arrangement at trial, I cannot conclude that it is beyond doubt that no arrangement existed at the time of the Commissioner's Application.

D. The conclusion would have been the same under the "no genuine" basis test

[209] I make one final observation. I acknowledge that the "plain and obvious" test applicable under FC Rule 221 for motions to strike is not identical to the test that the Tribunal would have been required to apply had HarperCollins' Motion been considered a motion for summary disposition pursuant to Rule 89 of the CT Rules.

[210] A motion for summary disposition is governed by subsections 9(4) and (5) of the CTA. On a motion for summary disposition, 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". The Tribunal has discussed subsections 9(4) or (5) of the CTA in several decisions, including in *UGG* and *Direct Energy*. In those cases, the Tribunal indicated that the motions for summary disposition "are strongly analogous to motions for summary judgment in the *Federal Courts Rules*" and 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 under FC Rule 215 (*UGG* at para 29; *Direct Energy* at para 53).

[211] The burden on a party moving for summary judgment is to demonstrate that there is no genuine issue for trial (*Manitoba v Canada*, 2015 FCA 57 ("***Manitoba***") at para 15). The test is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial (*Granville Shipping Co v Pegasus Lines Ltd SA*, [1996] 2 FC 853). Conversely, the party responding to a motion for summary judgment must put forward evidence showing that there is a genuine issue for trial (*MacNeil v Canada*, 2004 FCA 50). The moving party has the legal onus of establishing all of the facts necessary to obtain summary judgment. There will be no genuine issue for trial if "there is no legal basis to the claim or if the judge has 'the evidence required to fairly and justly adjudicate the dispute'" (*Manitoba* at para 15, citing *Burns Bog Conservation Society v Canada*, 2014 FCA 170).

[212] In light of my discussion above, and considering the record before me, I am not persuaded that there is no genuine basis for the Commissioner's Application or no legal basis to the claim put forward by the Commissioner. Even under this "no genuine basis" test applicable

for motions for summary disposition, my conclusions would therefore not have been different and HarperCollins' Motion would still have been dismissed.

IV. CONCLUSION

[213] For the reasons detailed above, HarperCollins' Motion will be dismissed. It is not plain and obvious and beyond doubt that the Tribunal does not have jurisdiction to consider the Commissioner's Application since, accepting the facts and allegations as pleaded, I find that a "real and substantial connection" could be established between the subject-matter of the Commissioner's Application and Canada, sufficient to provide the Tribunal with jurisdiction in this matter. Similarly, I conclude that it is not plain and obvious that the alleged Arrangement is no longer existing in Canada as its manifestations and expression through the agency agreements reached by HarperCollins with Canadian E-book retailers are alleged to remain in place and its anti-competitive effects are alleged to continue to be felt in this country.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[214] HarperCollins' Motion is dismissed, with costs.

DATED at Ottawa, this 24th day of July 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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