



Date: March 17, 2017

Subject: CT-2017-002 - The Commissioner of Competition v
HarperCollins Publishers LLC and HarperCollins Canada Limited

Direction to Counsel (from Mr. Justice Gascon, Chairperson)

Further to the Notice of Motion for Summary Dismissal filed by HarperCollins Publishers LLC and HarperCollins Canada Limited (collectively “HarperCollins”) on March 6, 2017 and to the Tribunal’s correspondence to counsel for HarperCollins and the Commissioner of Competition (the “Commissioner”) dated March 14, 2017 wherein the Tribunal requested certain clarifications in respect of HarperCollins’ Notice of Motion as such Motion referred both to Rule 83 of the *Competition Tribunal Rules* (providing for ordinary motions) as well as to Rule 89 and section 9 of the *Competition Tribunal Act* (providing for motions for summary disposition);

Having considered the response from HarperCollins dated March 14, 2017 wherein it indicates that its Motion is a preliminary motion raising threshold legal issues with regards to the Tribunal’s jurisdiction and the Tribunal’s power to order the relief sought by the Commissioner in his application, and that it is not the kind of evidence-based “summary judgment” motion contemplated under Rule 89;

Having considered the Commissioner’s response dated March 15, 2017 wherein the Commissioner disputes the position taken by HarperCollins and asserts that the Motion is in fact a motion for summary disposition pursuant to sub-section 9(4) of the *Competition Tribunal Act* and that the next steps are therefore for HarperCollins to complete its filing in accordance with Rule 89 and for the Commissioner to respond in accordance with Rule 90;

Having noted the suggestions made by both parties regarding the possibility of hearing the Motion during the weeks of April 10, 2017 or of April 17, 2017, depending on the availability of the Tribunal and counsel; and

Considering the principles set out in sub-section 9(2) of the *Competition Tribunal Act* and in Rule 2, which direct the Tribunal to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit;

The Tribunal directs the parties as follows:

1. The Tribunal will treat HarperCollins' Notice of Motion as a motion filed under Rule 83 and subject to the regular motions process set out in the Rules as opposed to the specific summary disposition process provided for in Rule 89. The Tribunal notes that HarperCollins considers its own Motion not to be a motion for summary disposition despite the fact that it itself referred to section 9 of the *Competition Tribunal Act* and to Rule 89 on summary dispositions in its Notice of Motion and labelled it as a motion for "summary dismissal", thus creating the confusion that led to the need for this Direction.
2. Having reviewed the materials before it and the submissions made by counsel for the parties, the Tribunal agrees that, since HarperCollins claims that the Commissioner's application should be dismissed for want of jurisdiction or on the basis of the absence of an "existing or proposed" arrangement, the Motion can be considered as a motion to strike or to dismiss which can be subject to the regular motions process set out in the Rules.
3. That said, the Tribunal notes that HarperCollins' Notice of Motion was not accompanied by any supporting affidavits and other admissible evidence as contemplated by Rule 83(2), that HarperCollins intends to "rely only on the allegations in the Commissioner's application and certain prior proceedings, orders/judgments and consent agreements relating to e-books in the United States and Canada", and that counsel for HarperCollins has apparently provided the Commissioner's counsel with a list of the materials from the public record which will be put before the Tribunal by HarperCollins on its Motion. The Tribunal further notes that counsel for HarperCollins indicates that there will be no factual affidavit or further "evidence" filed by HarperCollins and that it considers the materials it will be relying on to be matters of public record and in the nature of legal authorities rather than evidence.
4. At this stage, the Tribunal is not in a position to determine whether it can take judicial notice of such materials or whether such materials should be introduced as evidence, and the Tribunal is not making any ruling on this issue. This is a matter that, if needed, shall be decided on the disposition of the Motion. However, since HarperCollins has elected to immediately provide the Commissioner with a list of the materials which will be put before the Tribunal on its Motion, the Tribunal directs HarperCollins to clarify and indicate, by March 21, 2017, whether it intends to file such materials (or part thereof) as evidence and, if so, to serve and file them by March 21, 2017.
5. In light of the foregoing, the Commissioner shall, by March 28, 2017, file and serve its response to HarperCollins' Motion as well as any supporting affidavits.
6. HarperCollins and the Commissioner shall serve and file their respective memorandum of fact and law and any supplementary evidence by April 7, 2017, in accordance with Rule 87.

7. The Tribunal observes that, in the context of this Motion for summary dismissal alleging the Tribunal's lack of jurisdiction or of power to order the relief sought by the Commissioner in his application, the procedural differences between the usual motions process under Rule 83 and the process for motions for summary disposition under Rule 89 are minimal. In the circumstances, the Tribunal is satisfied that proceeding under Rule 83 for HarperCollins' Motion will not be prejudicial to any party and that considerations of fairness permit it.
8. With respect to the hearing of the Motion, the Tribunal directs the parties to indicate to the Tribunal, by March 22, 2017, how much time will be needed for the hearing of the Motion, the city in which such Motion shall be heard, and their availabilities on April 28 or 29 and during the week of May 1, 2017. The Tribunal informs the parties that it is not available to hear the Motion during the weeks of April 10 or 17, 2017.
9. The Tribunal will convene a case management conference on March 23 or 24, 2017 to discuss the hearing date for the Motion and to hear the parties' position on the impact, if any, that the request for leave to intervene filed on March 16, 2017 by Rakuten Kobo Inc. may have on the hearing of HarperCollins' Motion.

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