Competition Tribunal Tribunal de la Concurrence

Reference: *Kobo Inc. v. The Commissioner of Competition,* 2014 Comp. Trib. 8
File No.: CT-2014-02
Registry Document No.: 68

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

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

B E T W E E N:

Kobo Inc.
(applicant)

and

The Commissioner of Competition,
Hachette Book Group Canada Ltd.,
Hachette Book Group, Inc.,
Hachette Digital Inc.,
HarperCollins Canada Limited,
Holtzbrinck Publishers, LLC; and
Simon & Schuster Canada, a division of CBS Canada Holdings Co.
(respondents)

Decided on the basis of the written record
Before Judicial Member: Rennie J. (Chairperson)
Date of Order and Reasons: June 10, 2014
Order and Reasons signed by: Mr. Justice Donald J. Rennie

ORDER AND REASONS

[1] Subsection 124.2(2) of the *Competition Act* (RSC, 1985, c C-34) grants the Commissioner of Competition the power to refer to the Competition Tribunal "a question of law, jurisdiction, practice or procedure" in relation to the application or interpretation of Parts VII.1 to IX of the *Competition Act*. On April 15, 2014 the Commissioner filed such a reference. The question framed for determination by the Tribunal reads:

> What is the nature and scope of the Tribunal's jurisdiction under subsection 106(2) and, in that connection, what is the meaning of the words "the terms could not be the subject of an order of the Tribunal" in subsection 106(2) of the Act?

[2] Kobo Inc. (Kobo) moves to strike the reference.

[3] The background which gave rise to the reference is set out in greater detail in *Kobo Inc. v The Commissioner of Competition*, 2014 Comp. Trib. 2, suffice however to say that two months prior to the filing of the Reference, on February 21, 2014, Kobo filed an application under subsection 106(2). As a person "directly affected", it sought to have the terms of a consent agreement entered into between the Commissioner and certain publishers varied or rescinded. Kobo obtained a stay of registration of the consent agreement pending consideration of its application.

[4] The Reference is scheduled to be heard June 25, 2014, and the application on the merits of the subsection 106(2) application is to be heard in May, 2015.

[5] The core of Kobo's argument is that the hearing of a reference, together with anticipated appeals, is an inefficient and inappropriate use of the reference power. It will not advance the disposition of the underlying dispute, and, importantly, is inconsistent with Parliament's intention in enacting the reference power. A reference will not accelerate the process, rather it will "bog it down" according to Kobo. The second prong of Kobo's argument is that the Tribunal, in the absence of a factual context, is unable to give a full and fair appreciation of the question, and its answer necessarily compromised. It says that the Tribunal cannot fully determine the scope of the subsection 106(2) application (or Reference) without an understanding of the factual context, and what the consequences of the consent agreement will be for it.

[6] The Tribunal has jurisdiction to consider a motion to strike the reference under Rule 34(1) and Rule 4 of the *Federal Courts Rules*, SOR/98-106.

[7] In *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.* (FCA), [1995] 1 FC 588, para 15 the Court of Appeal laid down the well-known principle that the proper way to address a defective originating application is to argue the point at the hearing of the application on the merits. The Court of Appeal noted that the applications do not involve trials, discovery and evidence, and that applications are, in contrast, intended to be dealt with in summary fashion. Kobo, correctly, points out that there are limitations to the analogy to *David Bull* particularly in the unique circumstances of this case, where there is a close interrelationship between the reference and the application, which is a trial-like proceeding.

[8] The Commissioner urges the test applied in *Information Commissioner of Canada v Canada (Attorney General)*, 2014 FC 133 as governing this motion to strike. In that case, the Court held that a reference, in that case filed under section 18.3 of the *Federal Courts Act* (RSC, 1985, c F-7) should be struck only where it was clearly bereft of any possibility of success. This, in my view, is not an appropriate test for striking a reference. The criteria imported from striking causes of action, or applications, does not fit well when considering references. A reference question is a question of law, or mixed fact and law, hence it cannot be bereft of success.

[9] In my view, the discretion to strike or stay the hearing of a reference should be exercised where the question framed is improper or incapable of an informed answer, where it is, by its terms, presumptive of the answer, where it is filed for tactical or strategic reasons or otherwise abusive of the power granted. None of those factors are established here. The question posed is an objective, neutral question of law, or mixed fact and law, the answer to which will facilitate the subsection 106(2) proceeding.

The Absence of Facts

[10] If there were any doubt about whether facts are, as a matter of law, necessarily required before the Court will hear a reference, they are put to rest by the decision of the Court of Appeal in *Burns Lake Native Development Corporation v Canada (Commissioner of Competition)*, 2006 FCA 97, Evans JA wrote at paragraphs 19 and 20:

> First, they argue that the Commissioner may refer a question under subsection 124.2(2) only if it has a factual foundation. They allege that parts (a), (b), and (c) of Question 1 are academic, hypothetical or advisory in nature. They rely on jurisprudence of this Court dealing with questions referred by administrative tribunals under

> the similarly worded section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.
>
> I do not accept this argument. An application may be made under subsection 124.2(2) outside the context of a specific proceeding, while a federal tribunal may refer a question to the Federal Court under section 18.3(1) "at any stage of its proceedings". Consequently, the case law under section 18.3 does not, in my view, help the appellants.

[11] It is important to note that both the Tribunal and the Court of Appeal, assumed that in answering the reference question, the Tribunal would proceed on the assumption that the facts set out in the applicant's notice of application were true. In this regard, the reference is not a purely academic exercise.

[12] Criticism of the de-contextualized use of reference power has a long antecedence. In *Attorney-General for Manitoba v Manitoba Egg and Poultry Association et al.*, [1971] SCR 689 (the *Chicken & Egg Reference*) the Supreme Court of Canada was asked to opine on whether a provincial agricultural egg marketing agency could restrict egg "imports" to protect provincial suppliers. The Court expressed its concern at being asked to determine a question without supporting facts. More recently, reference questions are often supported by extensive extrinsic briefs, providing some context in which the question can be situated (*Reference re Securities Act*, 2011 SCC 66; *Reference re: Senate Reform*, 2014 SCC 32). In this case, there is no extrinsic brief, or context, other than that which will unfold in the Kobo application, after that fact.

[13] Kobo notes that in interpreting legislation, attention must be paid to the context so as to avoid unintended consequences. Kobo relies on Ruth Sullivan, who in *Sullivan on the*

Construction of Statutes, 5th ed (Markham: LexisNexis, 2008), at p. 299 writes:

> When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse.

[14] Further, Kobo observes that the Commissioner's argument on the scope of subsection 106(2) effectively renders any consent agreement immune from any form of probing or testing. The Commissioner's position on the meaning of subsection 106(2), that it is effectively a blank cheque, illustrates, in Kobo's submission, the requirement of facts. Without the ability of the Tribunal to consider the consent agreement, to determine whether there is some evidence of anti-competitive conduct, including an agreement or arrangement between the competitors, the Tribunal cannot undertake any meaningful review of whether the terms of the consent agreement are in fact directed to or responsive to any conduct in respect of which the Commissioner has jurisdiction. Moreover, Kobo also contends that Parliament, in granting a remedy to affected parties, chose the application process which is by definition, orientated to establishing a factual foundation against which legal principles are applied, and not a pure administrative process as the Commissioner interprets subsection 106(2) to be.

[15] More compellingly, Kobo argues that:

> Part VIII of the Act includes a dozen provisions in respect of which a consent agreement might be filed, and thus in respect of which s. 106(2) may by invoked. These sections address a wide spectrum of activities, including mergers, abuse of dominance, market restriction, price maintenance, and refusal to deal. Each of these sections contains its own test, and many contain restrictions on what terms the Tribunal may order and under what circumstances.

> A universal interpretation that would have s. 106(2) applied in the exact same manner to every consent agreement that is filed, regardless of the section under which it is filed and irrespective of the circumstances, is untenable.

[16] I accept that there is a legitimacy to each of the arguments advanced in support of the need for a factual context. All judicial processes, including that of statutory interpretation, are always better informed by facts. The absence of facts does not negate the value of reference; rather it is a cautionary argument, one which informs how the question itself is answered. Answers to questions framed in a reference which poses a question of law, as does the reference in question, are necessarily nuanced, and frequently require elucidation through application in future cases. This does not mean, however, that the question is improper or the hearing should be adjourned pending construction of a record. In sum, where broad, generic language is used, as it is here, it's the subsequent application of the answer which is shaped and informed by the facts of the particular case. The answer to the question framed will provide constructive guidance to the parties, resulting in a more efficient resolution of the subsection 106(2) application. Indeed, there is an over-arching utility to the question posed by reference, to which I now turn.

Whether the Reference Furthers the Administration of Justice

[17] While I accept that the hearing of the reference may result in some delay, that cost is greatly outweighed by the saving that will flow to the parties from the Tribunal's guidance on the nature and scope of the subsection 106(2) process.

[18] It must be remembered that the parties have diametrically opposed perspectives as to the nature of the subsection 106(2) application. Kobo contends that in order for a consent agreement to be registered, there must be evidence establishing anti-competitive behaviour, otherwise the Commissioner would be exercising a virtually unrestrained power, something that Parliament rarely grants and which the jurisprudence eschews. As counsel for Kobo put it, the Commissioner cannot use the consent power simply because he thinks prices for e-books should be lower. His power to require registration of a consent agreement is contingent on a factual foundation or some evidentiary footing that would support the view that there was anti-competitive behaviour.

[19] The Commissioner, for his part, argues that the registration of a consent agreement is a purely administrative act, and as long as the consent agreement conforms on its face with an order, the Tribunal has no jurisdiction to inquire into the existence or not, of any facts.

[20] This motion is not the time to rationalize competing positions. In describing them, however, it is readily apparent how the early answer to the reference question is consistent with the efficient administration of justice and the expeditious resolution of the underlying issues. The answer to the Reference will inform the nature of the subsection 106(2) application. The Commissioner says that there will be no ensuing process, that the Reference will extinguish the subsection 106(2) proceeding; Kobo says the answer will confirm its view that a full evidentiary inquiry is required.

[21] The answer to the Reference question may be one of these two stark choices, or perhaps a middle ground or other point in between. Regardless of what the answer may be, it will provide

guidance to the parties as to how the Tribunal will conduct the main hearing, resulting in savings of time and cost for the parties and eliminating some of the motions that the Tribunal sees over the horizon.

[22] Kobo argues that, nevertheless, the decision on the Reference will be appealed, resulting in further delay or costs thrown away if the parties embark on a course of proceeding only to learn, on appeal, they were headed down the wrong path.

[23] Whether the subsection 106(2) application is stayed pending an appeal of the decision on the Reference is speculative, as is the existence of an appeal itself. These arguments also presume that the application could not proceed in tandem with any appeal. Insofar as the issue of costs being thrown away are concerned, the Tribunal has a broad discretion which can remedy any unfairness that might arise through the two parallel, but inter-related processes were that to be the case. In my view, on balancing the competing considerations, it is more expeditious to obtain the guidance of the Tribunal at an early stage on the question of how the Tribunal is to exercise its jurisdiction under subsection 106(2).

[24] The motion to strike is dismissed, with costs.

DATED at Vancouver, this 10th day of June, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

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