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Canadian Competition Tribunal Adopts Effects-Based Jurisdiction for Reviewable Conduct

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On July 24, 2017, the Canadian Competition Tribunal dismissed a jurisdictional challenge by HarperCollins to an application by the Commissioner of Competition for an order prohibiting the implementation of an alleged agreement between HarperCollins and several other e-book publishers. The Commissioner commenced his application in 2016 under section 90.1 of the *Competition Act* (Act) alleging that (1) in 2010 HarperCollins Publishers LLC (HarperCollins US) formed an arrangement in the United States with other publishers of e-books and Apple Inc. to change the wholesale distribution model used for the sale of e-books to an agency distribution model, (2) the parties intended to and did implement the arrangement in Canada, and (3) the arrangement substantially restricted retail competition for e-books in Canada.

HarperCollins moved to dismiss the Commissioner's application at a preliminary stage on the basis that (1) the Tribunal lacked territorial jurisdiction over the challenged conduct, and (2) any such arrangement between the publishers had ceased to exist in light of prior U.S. antitrust proceedings and subsequent consent agreements entered into by the Commissioner and publishers in Canada.

Reviewable Competitor Agreements

While the Act also contains a criminal prohibition on certain types of agreements between competitors to fix prices, allocate customers or markets, or restrict output, section 90.1 is a non-criminal provision allowing the Tribunal, on application by the Commissioner, to prohibit any person from doing anything under an existing or proposed agreement or arrangement between competitors that prevents or lessens, or is likely to prevent or lessen, competition substantially in a market. Section 90.1 does not expressly address its territorial jurisdiction. HarperCollins argued that the lack of express extraterritorial application, and the fact that certain other provisions of the Act do expressly apply to foreign conduct, implied that section 90.1 applies only to agreements entered into in Canada.

Territorial Jurisdiction

The territorial scope of section 90.1 and similar reviewable conduct provisions of the Act (including mergers and abuse of dominance) had not previously been expressly addressed in a contested Tribunal decision. The Tribunal rejected HarperCollins' position, finding that it was not "plain and obvious" that section 90.1 applies only to agreements or arrangements entered into in Canada. The Tribunal determined that its jurisdiction under section 90.1 depends on the existence of a "real and substantial connection" between the challenged conduct and Canada. Where the relevant provision, as in the case of section 90.1, requires the Commissioner to demonstrate a substantial prevention or lessening of competition, an anti-competitive effect in Canada will be a real and substantial connection to Canada and a sufficient basis for jurisdiction of the Tribunal. In this case, the Tribunal determined that the facts pleaded by the Commissioner in his application, which were accepted as true for the purposes of deciding the motion, were capable of supporting a claim of a real and substantial connection to Canada.

Although the Tribunal took care to indicate that it was not ruling on the geographic scope of the criminal conspiracy offence, it did suggest that its analysis applies to other reviewable conduct provisions in the Act, including mergers and abuse of dominance. As the Tribunal noted, many parties to mergers occurring outside Canada have entered into consent agreements with the Commissioner providing remedies to address the Commissioner's alleged anti-competitive effects in Canada. In practice, few parties to international mergers may be prepared to live with the uncertainty of a contested Tribunal proceeding, which typically takes more than one year to get to a decision

on the merits. However, if parties to future foreign mergers consider contesting a challenge by the Commissioner, they can expect that the Commissioner will rely on the Tribunal's HarperCollins decision as a basis for his and the Tribunal's jurisdiction.

Existing Competitor Agreements

HarperCollins also argued that the Tribunal lacked jurisdiction to issue the requested order under section 90.1 because it was clear that no agreement continued to exist or was proposed among HarperCollins and other e-book publishers. HarperCollins noted that the alleged conduct had been the subject of (1) binding U.S. court orders against HarperCollins US and other publishers imposed in 2012–2013 further to an investigation by U.S. antitrust authorities; (2) consent agreements entered into with the Commissioner by HarperCollins Canada and other publishers in 2014 that were rescinded following a third-party challenge to their validity; and (3) new consent agreements entered into by other publishers with the Commissioner in January 2017, on the same day that the Commissioner filed his application against HarperCollins. According to HarperCollins, these settlements made clear that there was no surviving agreement or arrangement among competitors on which the Commissioner could base his application under section 90.1.

While the Tribunal acknowledged that section 90.1 applies only to an existing or proposed arrangement or agreement, on the facts pleaded by the Commissioner, the Tribunal was not prepared to find that it was plain and obvious that an agreement with respect to Canada did not exist at the time the Commissioner filed his application.

The Tribunal acknowledged that, once all the evidence is analyzed, the Commissioner may fail at trial to provide clear and convincing evidence of an existing agreement at the time of his application. However, the Tribunal adopted a high standard for a preliminary motion for summary dismissal. The Tribunal was not prepared to find that the uncontested facts concerning the prior U.S. and Canadian proceedings relating to the same or similar conduct demonstrated 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."

Implications

The HarperCollins decision suggests that, unless it is reversed on appeal, the Tribunal will support the Commissioner's practice of investigating and proceeding against reviewable conduct, including mergers, abuse of dominance and competitor agreements, occurring outside Canada where such conduct has significant anti-competitive effects in Canada. The decision also confirms that the Tribunal will set a high standard for preliminary motions to dismiss an application by the Commissioner on jurisdictional grounds.

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