

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N°: 500-06-000595-120

SUPERIOR COURT
(Class Action)

ANTOINE PONTBRIAND 


Petitioner

vs.

APPLE CORPORATION, a legal person,
with a head office at 1 Infinite Loop,
Cupertino, CA 95104

and

HACHETTE BOOK GROUP INC., a legal
person, with a head office at 237 Park
Avenue, New York, NY 10017

and

HACHETTE BOOK GROUP CANADA, a
legal person, with a place of business at
9001 Boulevard de l'Acadie, suite 1002,
district of Montreal, province of Québec,
H2N 3H5

and

HARPERCOLLINS PUBLISHERS INC., a
legal person, with a head office at 10 East
53rd Street, New York, NY 10022

and

HARPERCOLLINS CANADA LTD., a legal person, with a place of business at 2 Bloor East 20th Floor, Toronto, province of Ontario, M4W 1A8

and

MACMILLAN PUBLISHERS INC., a legal person, with a head office at 175 Fifth Avenue, New York, NY 10010

and

PENGUIN GROUP (USA) INC., a legal person with a head office at 375 Hudson Street, New York, NY 10014

and

PENGUIN GROUP CANADA, a legal person, with a place of business at 90 Eglinton Avenue East, Suite 700, Toronto, province of Ontario, M4P 2Y3

and

SIMON & SCHUSTER, a legal person, with a head office at 1230 Avenue of Americas 11th Floor, New York, NY 10019

and

SIMON & SCHUSTER CANADA, a legal person, with a place of business at 625 Cochrane Dr., Suite 600, Markham, province of Ontario, L3R 9R9

Respondents

MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION,
AND TO OBTAIN THE STATUS OF REPRESENTATIVE
(ARTICLE 1002 C.C.P.)

IN SUPPORT OF HIS MOTION, THE PETITIONER, ANTOINE PONTBRIAND,
RESPECTFULLY SUBMITS THE FOLLOWING:

1. The Group

- 1.1. The Petitioner intends to institute a class action on behalf of the persons forming the group hereinafter described and of which the Petitioner is a member, namely:

Description of the Group

All those natural persons who purchased, since April 1, 2010, an electronic book published by one of the Respondents Publishers.

- 1.2. The Petitioner claims on its own behalf and on behalf of the members of the Group;

2. The Petitioner

The Petitioner's personal claim against the Respondents is based on the following facts :

D. L. O. I. t. s. N. d. e. g. r. a. f. f. e.
N. o. m. b. r. e. 2.
G. o. u. v. e. r. n. e. m. e. n. t. N. o. m. b. r. e. 2.
P. a. r. t. i. e. J. u. s. t. i. c. e. M. O. N. T. R. E. A. L.
0258342-0108-1432

In February 17, 2011, the Petitioner purchased online an electronic book (herein after "eBook") titled "Darkness, Take My Hand" published by HarperCollins, one of the Respondents, order # D01-6609189-2370733, as it appears from the List of orders made by the Petitioner and communicated in support hereof as **Exhibit R-1**;

- 2.3. In June 26, 2011, the Petitioner purchased online an electronic eBook titled "Claudius" (Penguin Modern Classics) published by Penguin Group, one of the Respondents, order # D01-2995807-9087524, as it appears from the R-1 List of orders;

- 2.4. In July 7, 2011, the Petitioner purchased online an electronic eBook titled "Crash: A Novel" published by Macmillan Publishers Inc., one of the

Respondents, order # D01-2283530-1292300 as it appears from the R-1 List of orders;

- 2.5. The above mentioned eBooks were used by the Petitioner on his *Kindle*, an electronic reading device (hereinafter an "eReader") ;
- 2.6. By purchasing the above mentioned eBooks the Petitioner has suffered damages as a result of a conspiracy created by the Respondents who entered in an Agreement to set eBooks prices as explained in detail below;
- 2.7. Had Respondents not conspired to raise and fix eBook prices, Petitioner would have paid less for the eBooks he purchased;

3. The Respondents

- 3.1. During the Class Period, Respondents Hachette Book Group Canada, Hachette Book Group Inc., HarperCollins Canada Ltd., Penguin Canada, Penguin Group (USA) Inc., MacMillan, Simon & Schuster Canada, Simon & Schuster (hereinafter collectively, the « **Publisher Respondents** ») published eBooks and sold them over the internet to the Group, through Respondent Apple Inc. and other eBookstore Retailers, under an agency agreement (hereinafter referred to as the « **Agency Model** »);
- 3.2. Respondent Apple Inc. (hereinafter « **Apple** ») manufactures devices that can be used as eReaders, such as the iPod, iPhone, iPad and iPad 2;
- 3.3. During the Class Period, Apple sold and distributed eBooks as a distribution agent of the said Publisher Respondents, pursuant to the Agency Model;

4. The Respondents' Agency Model

The eBook industry's original model: the Wholesale Model

- 4.1. Traditionally, before eBooks came to be, a wholesale distribution model has governed the relationships between Publisher Respondents and brick-and-mortar bookstores (hereinafter "**the Wholesale Model**");
- 4.2. Under the Wholesale Model, publishers essentially sold their products to retailers at wholesale prices – typically half the list price of the print edition

(the physical books) – and surrendered control over the final sale price ultimately charged to consumers by retailers;

- 4.3. In November 2007, Amazon revolutionized the book publishing industry when it released the Kindle, an eReader for eBooks;
- 4.4. The traditional Wholesale Model kept applying to eBooks as it had to paper and ink ones in the past;
- 4.5. To gain market shares and capitalize on the tremendous efficiencies associated with eBooks, Amazon set eBook pricing levels significantly below prices asked for physical books;
- 4.6. For example, Amazon set the prices of many of the popular new eBook titles at or below \$9.99. Amazon instituted this pro-consumer pricing even though it was not uncommon for publishers to charge Amazon a wholesale price at or above \$9.99;
- 4.7. Even though publishers were necessarily reaping the benefits of Amazon's successful efforts to vastly expand the consumer base and increase volume of units sold via Amazon's investment in eBook sales, publishers also feared Amazon's \$9.99 pricing strategy;
- 4.8. In 2009, David Young, chairman and CEO of Respondent Hachette Book Group USA, said: "*The big concern – and it's a massive concern – is the \$9.99 pricing point. If it's allowed to take hold in the consumer's mind that a book is worth ten bucks, to my mind it's game over for this business.*"¹;
- 4.9. Believing they faced this "game over" scenario due to the pro-consumer \$9.99 pricing point set by Amazon, the Publisher Respondents set about to orchestrate a way to stop this price point from "taking hold";

Enter Apple

- 4.10. Respondent Apple was fast approaching its announced launch of the iPad in January 2010, which would include an application to read eBooks – called "iBooks";

¹Ken AULETTA, *Publish or Perish*, Newyorker.com (Apr. 26, 2010), [http://www.newyorker.com/reporting/2010/04/26/100426fa_fact_auletta]; See also Lorien CROW, *Apple E-Book Price-Fixing Battle Intensifies*, Mobyedia.com (Dec. 21, 2011), [<http://www.mobiledia.com/news/121646.html>].

- 4.11. Respondent Apple would sell eBooks from a dedicated website, namely the "iBookstore", or from its iTunes internet store;
- 4.12. The iPad launch provided the eBooks Publisher Respondents the opportunity to hatch a plan to fix eBook prices, and to prevent competition in the eBook retail market to play in favour of the Group;
- 4.13. Just one week before Respondent Apple announced the iPad launch on January 27, 2010, the largest book publishers in the United States were in simultaneous discussions with Apple to radically change the way prices were set for eBooks in the publishing industry²;
- 4.14. Upon launching the iPad in January 2010, Respondent Apple announced it had entered into eBook distribution agreements with each of the eBooks Publisher Respondents;
- 4.15. On the same day Apple announced the iPad launch, Apple CEO Steve Jobs told Walt Mossberg, of the Wall Street Journal, that Amazon's \$9.99 pricing for eBooks was about to end:

Mossberg: Why should [a consumer] buy a book for \$14.99 on your device when he can buy one for \$9.99 from Amazon or Barnes & Noble?

Jobs: That won't be the case.

Mossberg: You won't be \$14.99 or they won't be \$9.99?

²Jeffrey TRACHTENBERG, *Publisher, Apple Talk E-Books For Tablet*, The Wall Street Journal (January 19, 2010) [<http://online.wsj.com/article/SB20001424052748704541004575011092145509872.html>]; see also Maya REYNOLDS, *Texas AG Probes Publishing Agency Model*, MayaReynolds' blog (June 02, 2010), [<http://mayareynoldswriter.blogspot.com/2010/06/publishers-marketplace-had-interesting.html>].

Jobs: *The prices will be the same... Publishers are actually withholding their books from Amazon because they're not happy.*³

- 4.16. The next day, Apple CEO Steve Jobs privately explained to his biographer, Walter Isaacson, how he knew prices in the entire eBook industry would go up and stabilize at higher price points:

Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at \$9.99. The publishers hated that – they thought it would trash their ability to sell hard-cover books at \$28. So before Apple even got on the scene, some booksellers were starting to withhold books from Amazon. So we told the publishers, "We'll go to the agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway". But we also asked for a guarantee that if anybody else is selling the books cheaper than we are, then we can sell them at the lower price too. So they went to Amazon and said, "You're going to sign an agency contract or we're not going to give you the books."

(...)

*Given the situation that existed, what was best for us was to do this aikido move and end up with the agency model. And we pulled it off.*⁴

- 4.17. Indeed, the Respondents "*pulled it off*" and consumers paid more as a result;

- 4.18. On January 30, 2010, Respondent MacMillan's CEO John Sargent published a message to retailers corroborating the intention of Respondent Publishers to impose the Agency Model to Amazon, or else it would withhold or "window" a majority of their titles, as it appears from said

³See video hosted by : Kara SWISHER, *The Entire BoomTown Video of the Mossberg-Jobs Chit-Chat at Apple Ipad Launch!*, AllThingsd.com (January 29, 2010), [<http://allthingsd.com/20100129/the-entire-boomtown-video-on-the-mossberg-jobs-chit-chat/>].

⁴ Walter ISAACSON, *Steve Jobs* (2011), 1428-1429.

publication dated January 30, 2010, communicated in support hereof as **Exhibit R-2**;

Implementing the Agency Model

- 4.19. The Agency Model is an agreement simultaneously imposed by Publisher Respondents to all eBooks resellers, that provides for the Publisher Respondents to allow their "agents" to sell and distribute their eBooks at fixed prices tied to the list price of physical books;
- 4.20. This scheme had the effect of increasing and stabilizing eBook prices;
- 4.21. New releases, for example, were hence priced in a range varying from \$12.99 to \$14.99;
- 4.22. Under the Agency Model, Respondent Apple was guaranteed that the Publisher Respondents would not allow their eBook titles to be offered at a lower price elsewhere, unless Apple had the opportunity to sell at the same lower price (a *Most Favoured Nation* clause);
- 4.23. The anticompetitive nature of this conspiracy, and the Publisher Respondents' motivation to control eBook pricing, is also revealed by the fact that the price of an eBook in many cases now approaches – or even exceeds – the price of the same book in paper even though there are almost no incremental costs to produce each additional eBook unit;
- 4.24. Yet, the printing and distribution costs of physical books are greater. Thus, absent anticompetitive motivation and conduct, the difference in prices between hardcover books and eBooks would be greater;

Pending investigations on the Agency Model

- 4.25. The Agency Model has prompted antitrust scrutiny by several public authorities;
- 4.26. In the United States, Connecticut's Attorney General has launched an inquiry. After a preliminary review, former Attorney General Richard Blumenthal concluded that consumers have been potentially deprived of competitive eBooks prices, as it appears from the Connecticut's Attorney General's Office Press Release dated August 2, 2010, and joined letters to

Respondent Apple and to Amazon.Com, dated July 29, 2010, the whole communicated in support hereof as **Exhibit R-3**⁵;

4.27. In March 2011, European Union antitrust regulators, working with Britain's Office of Fair Trading, made unannounced raids on eBook publishers in several countries⁶;

4.28. On December 6, 2011, The European Commission announced opening a formal investigation into the Agency Model entered by the Respondents. The announcement states: "*The Commission has concerns the publishers may have colluded to raise the price of e-books and that Apple may have facilitated this*"⁷;

4.29. And on December 7, 2011, SharisPozen, acting Assistant Attorney General in charge of the United States federal Department of Justice's antitrust division, testified before Congress that the United States Department of Justice is investigating anticompetitive behaviour in the pricing of eBooks⁸;

4.30. At the time of deposit of the present motion, these antitrust inquiries are ongoing;

5. The conspiracy between the Respondents

5.1. The Agency Model can be qualified as a price-fixing conspiracy under the *Competition Act* (R.C.S. 1985, c. C-34);

⁵See also OFFICE OF THE ATTORNEY GENERAL, STATE OF CONNECTICUT, *Attorney General Investigates Potentially Anticompetitive E-Book Deals With Amazon and Apple*, [<http://www.ct.gov/ag/cwp/view.asp?Q=463892&A=3869>] (last visited Feb. 10, 2012).

⁶EUROPEAN COMMISSION, Press Release, *Antitrust: Commission confirms unannounced inspections in the e-book publishing sector* (Mar. 2, 2011) [<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/126&format=HTML&aged=1&language=EN&guiLanguage=en>]; See also Steve O'HEAR, *European Commission Raids eBook Publishers on Suspicion of Cartel*, TechCrunch Europe (Mar. 2, 2011), [<http://eu.techcrunch.com/2011/03/02/european-commissionraids-ebook-publishers-on-suspicion-of-cartel/>].

⁷EUROPEAN COMMISSION, Press Release, *Antitrust: Commission opens formal proceedings to investigate sales of e-books*, (06 Dec. 2011), [<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1509>].

⁸ Grant GROSS, *DOJ investigating eBook pricing, official says*, Macworld.com (Dec. 7, 2011) [http://www.macworld.com/article/164113/2011/12/doj_investigating_ebook_pricing.html].

- 5.2. Respondents, during the Class Period, conspired and succeeded to fix the prices for eBooks and limit beneficial competition in the eBooks retail market with the adoption of the Agency Model;
- 5.3. This conspiracy breached section 45(1)(a) of the *Competition Act*, and renders the Respondents liable to pay the damages which resulted, pursuant to section 36 of the *Competition Act*;
- 5.4. This conspiracy also breached civil liability obligations of Respondents towards the Group pursuant to section 1457 and 1458 of the *Civil Code of Québec* (S.Q., 1991, c. 64), and rendered the Respondents liable to pay the damages which directly resulted from the conspiracy;
- 5.5. Having colluded and conspired to cause said damages, Respondents are jointly liable for the acts of each other;

6. The Petitioner and the Members of the Group suffered damages

- 6.1. Petitioner and the Group have suffered damages as a result of the conspiracy, which had the effect of preventing beneficial competition among eBook retailers, and artificially raising the prices of eBooks;
- 6.2. Petitioner and the Group therefore paid more for eBooks than they would have paid in the absence of the conspiracy;

7. Section 1003 (c) C.C.P. : the Composition of the Group makes the application of articles 59 and 67 of the *Civil Code of Québec* difficult or impractical

- 7.1. The size of the Group consists of thousands of persons geographically dispersed throughout Québec;
- 7.2. Thus, it is impossible for the Petitioner to identify all such potential group members and/or obtain a mandate from each of them;

8. Section 1003 (a) C.C.P. : identical, similar or related questions

8.1. The identical, similar, or related questions of fact and law between each Group Member and the Respondents which the Petitioner wishes to have settled by the class action are as follow:

- a) Did Respondents act in violation of section 45(1)(a) of the *Competition Act* (R.C.S. 1985, c. C-34) by agreeing to switch to the Agency model of eBook pricing and by agreeing to fix the prices of eBooks?
- b) Did Respondents act in violation of sections 1457 or 1458 of the *Civil Code of Québec* (S.Q., 1991, c. 64), by conspiring and succeeding to artificially raise prevailing prices of eBooks?
- c) In the affirmative to one or both of the above questions, were Petitioner and members of the Group aggrieved by Respondents' conduct;
- d) In the affirmative, what is the quantum of any compensatory damages due to the Petitioner and the members of the Group?
- e) Are the Respondents jointly liable for the overcharges paid by the Group members?
- f) Should punitive damages be awarded against the Respondents; and
- g) In the affirmative, what are the amounts of punitive damages to award to the Petitioner and members of the Group?

9. The nature of the recourse

9.1. The nature of the recourse which the Petitioner wishes to exercise on behalf of the members of the Group is an action in civil liability;

10. The conclusions

10.1. The conclusions sought by the Petitioner are:

GRANT the Petitioner's action against the Respondents;

CONDEMN the Respondents jointly to pay the Petitioner and the members of the Group on an aggregate basis an amount to be determined as compensatory damages, the whole with interest and

additional indemnity pursuant to section 1619 of the *Civil Code of Québec* (S.Q., 1991, c. 64), reckoned from the date of service of the present motion;

ORDER the collective recovery of the damage claims;

CONDEMN the Respondents jointly to pay punitive damages and/or grant the Petitioner and the Group members such further relief payment as this Honourable Court may determine as being just and proper;

THE WHOLE with cost, including the costs of all exhibits, experts, expertise and publication notices.

11. Article 1003 (d) C.C.P. :Representative status

11.1. The Petitioner requests that he be ascribed the status of representative for the following reasons:

11.2. He is a member of the Group;

11.3. He is well informed of the facts alleged in this motion;

11.4. He has the required time, determination and energy to bring this matter to a conclusion and adequately represent the Group members;

11.5. He cooperates with his attorneys and responds diligently and articulately to any requests they made and he fully comprehends the nature of the class proceedings;

11.6. He has chosen one of the most important plaintiffs firm in Québec in the area of class actions for more than thirty years;

12. The Petitioner proposes that the class action be brought before the Superior Court of the District of Montreal for the following reasons :

12.1. The Petitioner resides in the district of Montreal;

12.2. Due to demographics, the largest portion of members of the Group reside in Montreal;

WHEREUPON THE PETITIONER PRAYS:

THAT the present motion be granted;

THAT the bringing of a class action be authorized as follows:

A civil liability action for damages

THAT the status of representative be granted to Antoine Pontbriand for bringing the said class action for the benefit of the Group described as follows, namely:

Description of the Group

All those natural persons who purchased, since April 1, 2010, an electronic book published by one of the Respondents Publishers.

THAT the principal questions of fact and law be dealt with collectively and be identified as follows:

- a) Did Respondents act in violation of section 45(1)(a) of the *Competition Act* (R.C.S. 1985, c. C-34) by agreeing to switch to the Agency model of eBook pricing and by agreeing to fix the prices of eBooks?
- b) Did Respondents act in violation of sections 1457 or 1458 of the *Civil Code of Québec* (S.Q., 1991, c. 64), by conspiring and succeeding to artificially raise prevailing prices of eBooks?
- c) In the affirmative to one or both of the above questions, were Petitioner and members of the Group aggrieved by Respondents' conduct;
- d) In the affirmative, what is the quantum of any compensatory damages due to the Petitioner and the members of the Group?
- e) Are the Respondents jointly liable for the overcharges paid by the Group members?

- f) Should punitive damages be awarded against the Respondents; and
- g) In the affirmative, what are the amounts of punitive damages to award to the Petitioner and members of the Group?

THAT the conclusions sought with respect to such questions be identified as follows:

GRANT the Petitioner's action against the Respondents;

CONDEMN the Respondents jointly to pay the Petitioner and the members of the Group on an aggregate basis an amount to be determined as compensatory damages, the whole with interest and additional indemnity pursuant to section 1619 of the *Civil Code of Québec* (S.Q., 1991, c. 64), reckoned from the date of service of the present motion;

ORDER the collective recovery of the damage claims;

CONDEMN the Respondents jointly to pay punitive damages and/or grant the Petitioner and the Group members such further relief payment as this Honourable Court may determine as being just and proper;

THE WHOLE with cost, including the costs of all exhibits, experts, expertise and publication notices.

THAT it be declared that any Group member who has not requested exclusion from the Group be bound by any judgement to be rendered on the class action in accordance with the *Code of Civil Procedure* (R.S.Q., c. C-25);

THAT the delay for exclusion be set at thirty (30) days from the notice to the Group members and that at the expiration of such delay, any Group member who has not requested exclusion be bound by any such judgment;

THAT it be ordered that a Notice to Members be published in both the paper and on line versions of The Gazette, La Presse, Métro, 24Heures and the Journal de Québec;


THAT the Respondents be ordered to assume the publication costs of the Notice to Members;

THAT the record be referred to the Chief Justice so that he may determine the district wherein the class action is to be brought and the judge before whom it will be heard;

THAT the clerk of this Court be ordered, upon receiving the decision of the Chief Justice, in the event that the class action is brought to another district, to transmit the present record to the clerk of the designated district;

The whole with costs, including the costs of notices.

Montréal, February 24, 2012


SYLVESTRE, FAFARD, PAINCHAUD
Attorneys for the Petitioner

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NOTICE OF PRESENTATION

TO:

APPLE CORPORATION
1 Infinite Loop
Cupertino, CA 95104

HACHETTE BOOK GROUP INC.
237 Park Avenue
New York, NY 10017

HACHETTE BOOK GROUP CANADA
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Markham, Ontario, L3R 9R9

TAKE NOTICE that the petitioner will present the **Motion for authorization to institute a class action and to obtain the status of representative** in the Court sitting in practice division of Montreal Courthouse located at 1, Notre-Dame East St., Montreal, Quebec, H2Y 1B6, at a date and time to be determined by the Court.

GOVERN YOURSELF ACCORDINGLY.

Montréal, February 24 2012


SYLVESTRE, FAFARD, PAINCHAUD
Attorneys for the Petitioner

500-06-000595-120

No:

SUPERIOR COURT
(Class Action)
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

ANTOINE PONTBRIAND
Petitioner

v.

APPLE CORPORATION
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PENGUIN GROUP CANADA
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SIMON & SCHUSTER
and
SIMON & SCHUSTER CANADA
Respondents

Motion for authorization to institute a Class
Action and to obtain the status of
representative
(Article 1002 C.C.P.)

Original

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N/D : 17388/11

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