

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
REGISTERED/ENREGISTRÉ
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Date: January 9, 2018
CT-2017-002

Docket No.:

Bianca Zamor for / pour
REGISTRAR / REGISTRARE

OTTAWA, ONT.

#147

COMPETITION TRIBUNAL

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*.

BETWEEN:

**THE COMMISSIONER OF
COMPETITION**

Applicant

- AND -

HARPERCOLLINS CANADA LIMITED

Respondent

CONSENT AGREEMENT

WHEREAS, pursuant to section 10 of the *Competition Act* (the “**Act**”), the Commissioner of Competition (the “**Commissioner**”) commenced an inquiry relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND WHEREAS the Commissioner has concluded that:

- (a) in or about January 2010, HarperCollins Publishers L.L.C. (“**HarperCollins US**”) entered into an arrangement, within the meaning of s. 90.1 of the Act, in the United States with at least one other publisher, whose identity is known to the Commissioner and who is a competitor to HarperCollins US in the market for E-books (collectively, “**the Publishers**”), in relation to the retail sale of E-books in the United States and Canada (defined as the “**Arrangement**”);
- (b) the Respondent is a Canadian affiliate of a party to the Arrangement and implemented the Arrangement in Canada;
- (c) the Arrangement provided that the Publishers, either directly or through their Affiliates or Subsidiaries, would enter into agreements with E-book retailers in Canada which included provisions that restricted the ability of E-book retailers to discount the retail price for E-books;
- (d) the Arrangement provided that the Publishers, either directly or through their Affiliates or Subsidiaries, would include a “most favoured nation” clause in their agreements with Apple Inc. or its Subsidiary;
- (e) the Arrangement with respect to Canada continues to exist; and
- (f) the Arrangement prevents or lessens, or is likely to prevent or lessen, competition substantially in the retail market for E-books in Canada

(collectively, the “**Commissioner's Conclusions**”)

AND WHEREAS the Respondent and the Commissioner entered into a Consent Agreement dated February 7, 2014 (the “**First Consent Agreement**”);

AND WHEREAS the implementation of the First Consent Agreement was stayed by order of the Competition Tribunal on March 18, 2014 following an application pursuant to section 106(2) of the *Competition Act* brought by Rakuten Kobo Inc. (“**Kobo**”);

AND WHEREAS the First Consent Agreement was rescinded on June 10, 2016;

AND WHEREAS on January 19, 2017, the Commissioner entered into Consent Agreements with each of Holtzbrinck Publishers, LLC; Hachette Book Group Canada Ltd, Hachette Book Group, Inc., and Hachette Digital, Inc.; and Simon & Schuster Canada, a Division of CBS Canada Holdings Co. (the “**Three Consent Agreements**”);

AND WHEREAS by application for judicial review filed in Federal Court on February 17, 2017, Kobo sought, among other things, to have the Three Consent Agreements quashed;

AND WHEREAS by Order of the Federal Court dated March 8, 2017, the Three Consent Agreements were stayed pending the Federal Court's disposition of Kobo's application for judicial review;

AND WHEREAS the Commissioner and the Respondent have reached an agreement to resolve the Commissioner's concerns;

AND WHEREAS the Commissioner and the Respondent agree to the registration by the Commissioner of this Agreement with the Tribunal, pursuant to section 105 of the Act;

AND WHEREAS IT IS AGREED AND UNDERSTOOD THAT the Respondent does not admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation, rescission, or any judicial review, contest the Commissioner's Conclusions, and nothing in this Agreement will be taken as an admission or acceptance by the Respondent or HarperCollins US of any facts, liability, wrongdoing, effects, impacts, submissions, legal argument or the Commissioner's Conclusions for any other purpose, nor shall it derogate from or limit any rights or defences of the Respondent or HarperCollins US against third parties, including defences under the Act.

NOW THEREFORE the Parties agree as follows:

I. DEFINITIONS

1. For the purposes of this Agreement, the following terms shall have the respective meanings set out below and any grammatical variations of those terms shall also have the corresponding meanings:
 - (a) "**Act**" means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
 - (b) "**Affiliate**" means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the Act;
 - (c) "**Agency Agreement**" means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers in Canada through the E-book Retailer and the E-book Retailer is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books to consumers in Canada;
 - (d) "**Agreement**" means this Consent Agreement entered into by the Respondent and the Commissioner pursuant to section 105 of the Act;

- (e) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
- (f) “**E-book**” means an electronically formatted book designed to be read on a computer, a handheld device or any other electronic device capable of visually displaying E-books. For the purposes of this Agreement, the term E-book does not include (i) an audio book, even if delivered and stored digitally; (ii) a standalone specialized software application or “app” sold through an “app store” rather than through an E-book store and not designed to be executed or read by or through a dedicated E-book reading device; (iii) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (iv) the electronically formatted version of a book marketed for use primarily in connection with academic coursework; (v) a magazine, journal or other periodic publication; or (vi) “self-published” electronically formatted books.
- (g) “**E-book Publisher**” means any Person that, by virtue of a contract or other relationship with an E-book’s author or other rights holder, 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 Canada to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in Canada. For the purposes of this Agreement, the Respondent is an E-book Publisher, and E-book Retailers are not E-book Publishers;
- (h) “**E-book Retailer**” means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in Canada or through which an E-book Publisher under an Agency Agreement Sells E-books to consumers in Canada. For the purposes of this Agreement, the Respondent and any Persons whose primary business is book publishing are not E-book Retailers;
- (i) “**HarperCollins Canada**” means HarperCollins Canada Limited and (if any and wherever located) its Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books in Canada; and all directors, officers, employees, agents and representatives of the foregoing;
- (j) “**HarperCollins US**” means HarperCollins Publishers L.L.C. its Subsidiaries, successors and assigns that are engaged in the business of publishing, Selling or distributing E-books and all directors, officers, employees, agents and representatives of the foregoing;
- (k) “**including**” means “including, but not limited to” and “include” means “includes, but is not limited to”;
- (l) “**Parties**” means the Commissioner and the Respondent;

- (m) **“Person”** means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental;
- (n) **“Price MFN”** means a term in an agreement between an E-book Publisher and an E-book Retailer for the Sale of E-books to consumers in Canada under which:
- (i) the Retail Price at which an E-book Retailer, or an E-book Publisher under an Agency Agreement, Sells one or more E-books to consumers in Canada depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer, or the E-book Publisher under an Agency Agreement, Sells the same E-book(s) to consumers in Canada;
 - (ii) the Wholesale Price at which the E-book Publisher sells one or more E-books to an E-book Retailer for Sale to consumers in Canada depends in any way on the Wholesale Price at which the E-book Publisher sells the same E-book(s) to any other E-book Retailer for Sale to consumers in Canada; or
 - (iii) the revenue share or commission that an E-book Retailer receives from an E-book Publisher in connection with the Sale of one or more E-books to consumers in Canada depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers in Canada, or (b) the E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher’s E-books to consumers in Canada. For the purposes of this Agreement, it will not constitute a Price MFN under subsection (iii) of this definition if the Respondent agrees, at the request of an E-book Retailer, to meet more favourable pricing, discounts or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional benefit, so long as that agreement is not or does not result from a pre-existing agreement that requires the Respondent to meet all requests by the E-book Retailer for more favourable pricing within the terms of the agreement;
- (o) **“Print Book”** means an unused hardcover book, trade paperback book or mass market paperback book, printed on paper and bound using perfect binding, case binding or another form of commercially accepted binding;
- (p) **“Purchase”** means the acquisition by a consumer in Canada of one or more E-books as a result of a Sale;
- (q) **“Retail Price”** means the price at which an E-book Publisher under an Agency Agreement or an E-book Retailer Sells an E-book to a consumer in Canada;

- (r) “**Sale**” or “**Sell**” means delivery of access to a consumer in Canada to read one or more E-books in exchange for payment. Delivery of access to an educational institution or a library is not a Sale;
- (s) “**Subsidiary**” has the meaning as defined in subsection 2(3) of the Act;
- (t) “**Three Consent Agreements**” means the three Consent Agreements dated January 19, 2017 between the Commissioner and each of Holtzbrinck Publishers, LLC; Hachette Book Group Canada Ltd, Hachette Book Group, Inc., and Hachette Digital, Inc.; and Simon & Schuster Canada, a Division of CBS Canada Holdings Co.;
- (u) “**Tribunal**” means the Competition Tribunal, as established by the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), as amended; and
- (v) “**Wholesale Price**” means:
 - (i) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers in Canada; or
 - (ii) the Retail Price at which an E-book Publisher under an Agency Agreement Sells an E-book to consumers in Canada through an E-book Retailer minus the commission or other payment that the E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

II. OBLIGATIONS OF THE RESPONDENT - PRICING

- 2. Subject to paragraph 5, the Respondent shall not, for a period of nine (9) months commencing no later than one hundred and twenty (120) days following the date the Respondent’s obligations under this Agreement come into force, directly or indirectly:
 - (a) restrict, limit or impede 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 promotions to encourage consumers in Canada to Purchase one or more E-books; or
 - (b) enter into an agreement with any E-book Retailer that has the effect described in paragraph 2(a).
- 3. The Respondent shall not, for a period of three years from the date the Respondent’s obligations under this Agreement come into force, enter into any agreement with an E-book Retailer relating to the Sale of E-books to consumers in Canada that contains a Price MFN.

4. For each agreement between the Respondent and an E-book Retailer relating to the Sale of E-books to consumers in Canada in force on the date the Respondent's obligations under this Agreement come into force that directly or indirectly:
 - (a) restricts, limits or impedes the 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 promotions to encourage consumers in Canada to Purchase one or more E-books; or
 - (b) contains a Price MFN with respect to the Sale of E-books to consumers in Canada;

the Respondent shall, no later than the later of (i) fifty (50) days following the date the Respondent's obligations under this Agreement come into force or (ii) as soon as permitted under the agreement, take steps required under the agreement to cause the agreement to be terminated and not renewed or extended. The Respondent may, in lieu of termination, satisfy its obligations under this paragraph 4 as follows:
 - (c) with respect to any such agreement that contains a Price MFN with respect to the Sale of E-Books to consumers in Canada, by entering into an amendment to the agreement, effective no later than one hundred and twenty (120) days after the date the Respondent's obligations under this Agreement come into force, either (i) making the agreement inapplicable to the Sale of E-books in Canada or (ii) removing the Price MFN; and
 - (d) by notifying the E-book Retailer, no later than one hundred and twenty (120) days following the date the Respondent's obligations under this Agreement come into force, that for a period of nine (9) months, to commence no later than one hundred and twenty (120) days following the date the Respondent's obligations under this Agreement come into force, the Respondent will not enforce any term or terms in any agreement with an E-book Retailer that restrict, limit or impede 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 promotions to encourage consumers in Canada to Purchase one or more E-books except to the extent permitted by paragraph 5 of this Agreement.
5. Notwithstanding paragraphs 2 and 4 of this Agreement, the Respondent may enter into agreements and amend agreements with E-book Retailers, and may enforce terms in agreements with E-book Retailers in force as of the date the Respondent's obligations under this Agreement come into force, under which price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more of the Respondent's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Respondent's E-books) are restricted, provided that:

- (a) such restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers in Canada to Purchase the Respondent's E-books by an aggregate amount (the "**Agreed Funds**") equal to the total commissions the Respondent pays to the E-book Retailer over a period of at least nine (9) months, in connection with the Sale of the Respondent's E-books to consumers in Canada;
 - (b) the Respondent shall not restrict, limit or impede the E-book Retailer's use of the Agreed Funds to offer price discounts or any other form of promotions to encourage consumers in Canada to Purchase one or more of the Respondent's E- books; and
 - (c) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit or impede the E-book Retailer from engaging in any form of retail activity or promotion.
6. Nothing in this Agreement shall prohibit the Respondent from unilaterally compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.
7. The Respondent shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that the Respondent is prohibited by paragraph 2 of this Agreement from restricting, limiting or impeding in any agreement with an E-book Retailer. After the expiration of the prohibitions in paragraph 2 of this Agreement, this paragraph 7 shall not prohibit the Respondent from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits or impedes the E-book Retailer from setting, altering or reducing the Retail Price of any of the Respondent's E-books for Sale to consumers in Canada or from offering price discounts or any other form of promotions to encourage consumers in Canada to Purchase any of the Respondent's E-books.
8. The Respondent shall furnish to the Commissioner:
 - (a) within fifty (50) days from the date the Respondent's obligations under this Agreement come into force, one complete copy of each agreement, executed, renewed, amended or extended on or after February 7, 2014, between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada (unless same has previously been provided); and
 - (b) thereafter, on a quarterly basis, any new agreement or amendment between the Respondent and any E-book Retailer relating to the Sale of the Respondent's E-books to consumers in Canada.
9. Unless otherwise provided herein or agreed to in writing by the Parties, the terms of this Agreement shall become effective on the date of registration of this Agreement and end three years from the date of registration of this Agreement.

III. OBLIGATIONS OF THE RESPONDENT - PAYMENT

10. The Respondent shall, not later than 365 days following the date on which the Respondent's obligations under this Agreement come into force, donate E-books having a collective value of not less than \$150,000, to one or more registered Canadian charities promoting literacy in Canada, approved by the Commissioner. The value of each E-book donated by the Respondent will be equal to the lowest list price provided by the Respondent for that E-Book, at the time the E-Book is donated, under any agency agreement between the Respondent and a Canadian E-book Retailer in force at that time.
11. If, notwithstanding its best efforts, the Respondent is unable to fulfill its obligation under paragraph 10 of this Agreement, in whole or in part, the Respondent will, within the time period provided for in paragraph 10 hereof, donate Print Books having a collective value of not less than the amount necessary bring the aggregate amount of the Respondent's E-Book and Print Book donation to not less than \$150,000. For example, if the Respondent donates E-Books having a value of \$50,000 pursuant to paragraph 10 hereof, the Respondent will be required to donate Print Books having a collective value of not less than \$100,000. The value of a Print Book donated by the Respondent will be equal to the price printed on the Print Book donated.
12. The Respondent shall have the sole discretion to determine the E-books and/or Print Books to be donated in fulfillment of its obligation under this Agreement; however, in making that determination, the Respondent shall consult with and take into account the views of the relevant registered charity or charities.
13. The amounts donated pursuant to paragraphs 10 and/or 11 will be in addition to any charitable donations previously committed to or planned by the Respondent.
14. The Respondent shall provide the Commissioner or the Commissioner's authorized representative with written confirmation that the donation has been made in accordance with paragraph 10 and/or 11, within 30 days of the donation having been made.

IV. TIMING

15. The Respondent's obligations under this Agreement are suspended until two or more of the Three Consent Agreements come into force.

V. GENERAL

16. The Recitals of this Agreement are integral to, and deemed to be a part of, this Agreement.
17. Unless the context otherwise requires, words importing the singular include the plural and vice versa, and words importing gender include all genders.
18. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which shall constitute one and the same Agreement.
19. The Commissioner shall file this Agreement with the Tribunal for registration in accordance with section 105 of the Act. The Respondent hereby consents to such registration.
20. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.
21. If the Respondent becomes aware that there has been or likely has been a breach of any of the terms of this Agreement, the Respondent shall promptly notify the Commissioner thereof, and shall provide details sufficient to describe the nature and date of said breach.
22. Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purposes of this Agreement, the definition of “holiday” in the *Interpretation Act* shall be deemed to include Saturday.
23. Nothing in this Agreement precludes the Respondent or the Commissioner from bringing an application under section 106 of the Act (or successor or equivalent provision under the Act) to rescind or vary this Agreement. The Respondent does not accept or admit, but will not for the purposes of this Agreement only, including execution, registration, interpretation, enforcement, variation or rescission, or any judicial review, contest the Commissioner’s Conclusions and nothing in this Agreement will be taken as an admission or acceptance by the Respondent or HarperCollins US of any facts, liability, wrongdoing, effects, impacts, submissions, legal argument or the Commissioner’s Conclusions for any other purpose, nor shall it derogate from or limit any rights or defences of the Respondent or HarperCollins US against third parties, including defences under the Act.
24. The Respondent attorns to the jurisdiction of the Tribunal for the purposes of the interpretation and enforcement of this Agreement and any proceeding initiated by the Commissioner or the Respondent to rescind or vary any of the provisions of this Agreement.

25. This Agreement constitutes the entire agreement between the Parties and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral, with respect to the subject matter hereof.
26. In the event of any discrepancy between the English language version of this Agreement and the French language version of this Agreement, the English language version of this Agreement shall prevail.
27. The headings in this Agreement are for convenience of reference only and shall not affect the construction or interpretation thereof.
28. In the event of a dispute as to the interpretation or application of this Agreement, either the Commissioner or the Respondent may apply to the Tribunal for an order interpreting any of the provisions of the Agreement.

VI. NOTICES

29. Notices and other communications required or permitted by the Commissioner or the Respondent pursuant to this Agreement shall be in writing, and shall be given to the Parties at the following addresses or facsimile numbers:

- (a) The Commissioner of Competition
Competition Bureau

Place du Portage, Phase I
50 Victoria Street
Gatineau, QC K1A 0C9

Telephone: (819) 997-3301
Facsimile: (819) 953-5013

With a copy to:
Executive Director and Senior General Counsel
Competition Bureau Legal Services
Department of Justice
Place du Portage, Phase I
50 Victoria Street
Gatineau, Québec K1A 0C9

Facsimile: (819) 953-9267

(b) HarperCollins Canada Limited

Craig Swinwood
Publisher and CEO
HarperCollins Canada Limited
2 Bloor St E, 20th Floor
Toronto, ON M4W 1A8

Craig.Swinwood@harpercollins.com

With a copy to:

Katherine L. Kay
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street, Toronto, ON M5L 1B9
Tel. (416) 869-5507
Fax. (416) 947-0866
kkay@stikeman.com

30. Any Party hereto may from time to time change its address or facsimile number by giving notice to the other Parties hereto in accordance with the provisions of this paragraph 29. The Commissioner and the Respondent may also consent to accept notices or other communications required or permitted pursuant to this Agreement by electronic mail.

DATED this 8th day of January, 2018

“John Pecman”

John Pecman
Commissioner of Competition

“Craig Swinwood”

HarperCollins Canada Limited

I/We have authority to bind the company

Name: Craig Swinwood

Title: CEO HarperCollins Canada