

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

AND IN THE MATTER OF an arrangement between HarperCollins Publishers L.L.C., Hachette Book Group Inc., Verlagsgruppe Georg von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC d/b/a Macmillan, Simon & Schuster Inc. and Apple Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 90.1 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant (Responding Party)

- and -

HARPERCOLLINS PUBLISHERS L.L.C., and HARPERCOLLINS CANADA LIMITED

Respondents (Moving Parties)

- and -

RAKUTEN KOBO INC.

Intervenor

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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MEMORANDUM OF FACT AND LAW OF THE INTERVENOR, RAKUTEN KOBO INC.

**(Respondents' Motion for a Temporary Suspension or Stay of the Application,
Returnable September 19, 2017)**

September 18, 2017

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PART 1 - KOBO'S ARGUMENT IN A NUTSHELL

1. Kobo supports the Respondents' motion for a temporary suspension or stay of the Application of the Commissioner of Competition ("**Commissioner**") under section 90.1 of the *Competition Act* (the "**Act**") against HarperCollins Publishers LLC and HarperCollins Canada Limited (collectively, "**HarperCollins**"), pending the determination of HarperCollins' appeal to the Federal Court of Appeal (the "**Appeal**") of the Competition Tribunal's ("**Tribunal**") Order and Reasons for Order Dismissing a Motion for Summary Dismissal dated July 24, 2017 (the "**Decision**").
2. Irrespective of the test to be applied – whether it be the *Mylan* "interests of justice" test or the *RJR-MacDonald* tripartite test – the circumstances warrant the brief delay to allow HarperCollins' Appeal to be determined. Proceeding in advance of the Appeal risks a serious waste of judicial and financial resources, to the detriment of the parties and the public. Several steps will be taken to prepare for the Application hearing. Unlike prior instances of requests for delay in the E-books matter, this particular Appeal could result in the proceedings coming to an end, if Federal Court of Appeal finds that the Tribunal lacks jurisdiction to proceed. As well, in the interim, Kobo's application for judicial review ("**Judicial Review application**") will be determined, which could have the same effect. In these unique circumstances, and given the lack of prejudice, a temporary stay or suspension is warranted.

PART 2 - FACTS

3. Kobo adopts the facts as described in the Notice of Motion and supporting material of HarperCollins.

PART 3 - LAW AND ARGUMENT

The Appropriate Test is Whether the Interests of Justice Support the Suspension or Stay

4. Where the Tribunal is being asked to delay its own proceeding pending a decision of the Federal Court of Appeal, the test to be applied was set out by the Federal Court of

Appeal in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*: whether, in all the circumstances, the interests of justice support the delay.¹

5. In *Mylan*, the Federal Court of Appeal distinguished between a court enjoining another body from exercising its jurisdiction and a court deciding not to exercise its jurisdiction until sometime later. In the former case, the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*² applies; in the latter case, the “interests of justice” test applies.³
6. In *Commissioner of Competition v. Toronto Real Estate Board*, the Tribunal expressed the view that the Tribunal has the discretion to handle adjournments/stays of its own proceedings pending appeal using whatever test or factors it considers appropriate, including the tripartite test or the interests of justice test.⁴ The Tribunal has applied both tests in different cases:
 - (a) In *TREB*, the Tribunal considered the interests of justice test to be appropriate in the circumstances, holding the tripartite test to be “unduly onerous” to secure an adjournment.⁵
 - (b) In *Kobo Inc. v. The Commissioner of Competition*, when Kobo sought the continued suspension of its application under section 106(2) of the Act pending determination of its appeal of the Tribunal’s Reference decision to the Federal Court of Appeal, the Tribunal appears to have applied the interests of justice test (it did not apply the *RJR MacDonal*d test).⁶
 - (c) However, in *Kobo Inc. v. The Commissioner of Competition*, when Kobo sought a stay of its application under section 106(2) of the Act pending determination of its application for leave to appeal the Tribunal’s decision on a Reference to the Supreme Court of Canada, the Tribunal concluded that the proper test to be applied in the circumstances was the tripartite test.⁷

¹ *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, [2011] F.C.J. No. 1607 at para. 14 [**Mylan**].

² *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

³ *Mylan*, *supra* at paras. 5,14.

⁴ *Commissioner of Competition v. Toronto Real Estate Board*, 2014 Comp. Trib. 10 at para. 19 [**TREB (Tribunal)**].

⁵ *TREB (Tribunal)*, *ibid* at para. 19.

⁶ *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 21 (Motion to Suspend S. 106(2) Application) at para. 4.

⁷ *Kobo Inc. v. The Commissioner of Competition*, 2015 Comp. Trib. 14 (Motion to Suspend S. 106(2) Application) at para 7 [**Kobo 2015 Suspension Motion**].

7. In the current circumstances, the interests of justice test is preferable. HarperCollins is essentially asking the Tribunal to modify the hearing schedule by delaying its own proceeding, for what would likely be a matter of months, pending a decision of the Federal Court of Appeal on threshold jurisdictional issues that are central to the Application.
8. The interests of justice approach is entirely consistent with the *Competition Tribunal Act* (“CTA”), including s. 9(2), and Rules 137 and 139 of the *Competition Tribunal Rules* (“Rules”).⁸
9. Section 9(2) of the CTA states: “All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.” The interests of justice test is more appropriate and conducive to taking these considerations into account, rather than rigidity inherent in the tripartite test. If Parliament had wanted a rigid test to apply for the suspension of a hearing schedule, it would have so specified.
10. This is further illustrated by the language found in Rules 137 and 139, which address the Tribunal’s case management powers and the ability to modify dates and other requirements when “compelling reasons exist” for a modification. Kobo submits that a flexible interests of justice test is more appropriate when dealing with scheduling matters than is the rigid *RJR-MacDonald* test, where “compelling reasons” would be insufficient to meet the test.
11. Kobo acknowledges that in the Tribunal’s decision in the Kobo 2015 Suspension Motion, the Tribunal observed that the interests of justice test can be traced back to paragraph 50(1)(b) of the *Federal Courts Act*, which empowers the Federal Courts to stay proceedings where “it is in the interest of justice that the proceedings be stayed”, and that no such provision is found in the CTA.⁹
12. It must be recalled, however, that s. 8(2) of the CTA confirms the Tribunal has, with respect to “the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.” In such circumstances, Kobo submits that Tribunal enjoys

⁸ R.S.C. 1985 c. 19 (2nd Suppl.).

⁹ *Kobo 2015 Suspension Motion* at para. 33; *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 50.

powers similar to the Federal Court to stay its own proceedings pending appeal, and rule 34 of the Rules – the gap rule – should apply to allow the Tribunal to follow the same principles and procedures as would be applicable if the matter was proceeding in Federal Court. Again, there is nothing inconsistent in applying the *Mylan* test if the Tribunal approaches this as a motion for a stay application rather than a motion to modify the schedule.

13. The interests of justice test is more flexible than the *RJR-MacDonald* test and acknowledges that broader considerations regarding the administration of justice are at play. Factors demonstrating irreparable harm or an imbalance of convenience can undoubtedly still be relevant, but the Tribunal can take into account other factors such as the public interest in the well-ordered disposition of litigation and the effective use of scarce public resources.¹⁰
14. For all those reasons, the *Mylan* test can and should apply to the assessment of this motion.
15. Alternatively, if the Tribunal decides that the *RJR-MacDonald* test should apply, Kobo submits that the test is met.
16. The factors that are determinative of this motion are the risk of wasted resources on the part of all the parties and the Tribunal (which can constitute irreparable harm) and the absence of harm or prejudice to the Commissioner or competition if the suspension is granted (whereby the balance of convenience favours the suspension). These factors are detailed below.¹¹

Proceeding with the Application Risks Significant Wasted Resources and Unnecessary, Irreparable Harm

17. Proceeding with the Application in the face of HarperCollins' Appeal risks a serious waste of resources. Given the hearing date that has been set for the Application – November 2018 – it is to be anticipated that several steps will be taken between now and the first half of 2018, when it is anticipated the Federal Court of Appeal would

¹⁰ *Korea Data Systems (USA), Inc. v. Amazing Technologies Inc. (c.o.b. Ajay Amazing Technologies Inc.)*, 2012 ONCA 756, [2012] OJ No 5195 at paras. 18-19.

¹¹ The Commissioner has conceded, for the purposes of HarperCollins' motion only, that HarperCollins' Appeal raises a serious issue: Response of the Commissioner of Competition, Commissioner's Motion Record, p. 3 at para. 9.

release a decision. Using the Commissioner's proposed timetable as a guide, one can anticipate:

- (a) Service of Affidavits of Documents and delivery of documents by all parties;
 - (b) Motions arising from the Affidavits of Documents;
 - (c) Additional productions resulting from the motions;
 - (d) Examinations for discovery;
 - (e) Answers to discovery undertakings; and
 - (f) Refusals motions.
18. As the Tribunal is aware, all of these steps result in incurred costs on every party's behalf, including the expenditure of public resources and funds (given the time and expense to be incurred by the Competition Bureau and the Tribunal).
19. It is important to distinguish this motion from the Kobo 2015 Suspension Motion. In that case, Kobo's s. 106 application was going to proceed irrespective of whether it obtained leave to appeal to the Supreme Court of Canada and irrespective of the outcome of such an appeal. Accordingly, while some steps may have had to be revisited or supplemented had leave been granted and an appeal succeeded, none of the steps would have been entirely wasted or unnecessary. As the Chair put it: "this is not a case where efforts and expenses will have been spent to no avail if the 106(2) Application moves ahead pending Kobo's appeal to the SCC".¹²
20. Here, the situation is markedly different. HarperCollins enjoys an appeal as of right. If the Federal Court of Appeal grants the Appeal, and finds that the Tribunal does not have jurisdiction to grant the relief sought in the Application, a significant amount of time, money and judicial resources will have been wholly wasted in support of an application that will not proceed at all.
21. It is not novel to suspend or pause proceedings in competition law matters while appeals are sought.¹³ This is a pragmatic and responsible approach to take in order to avoid re-hearings and repeated steps. One sees ample examples of Tribunal determinations becoming stalled, and procedures being repeated, in hearings and re-hearings in order

¹² *Kobo 2015 Suspension Motion* at para. 48.

¹³ For example, see *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2011 BCSC 1128, [2011] B.C.J. No. 1592.

to address situations where appellate courts clarify legal tests.¹⁴ There is no reason to risk this wastage, especially in light of the absence of harm or prejudice by granting the suspension.

22. Irreparable harm can be found in the wasted resources that Kobo (an innocent third party intervening in this litigation) and the other parties and the Tribunal will incur. In the event HarperCollins succeeds in its Appeal, all the parties will have expended time and money in respect of the Commissioner's application. Even if costs were ordered against the Commissioner in such circumstances, this is not a case where full indemnity costs would be appropriate, so Kobo and HarperCollins would be out of pocket. Equally out of pocket would be the public, given that the Competition Bureau and the Tribunal would also have devoted time and resources to the matter.
23. This Tribunal has recognized that, as the Supreme Court of Canada held in *RJR-MacDonald*,¹⁵ "irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm which either cannot be quantified in monetary terms or which cannot be cured.¹⁶ Accordingly, it is not necessary for the Tribunal to have evidence of the specific quantum that would be forgone, so long as it is clear that some expenditures would be irrecoverable.
24. Chief Justice Crampton recently held, in staying Kobo's Judicial Review application, that considerations of the public purse are important factors in determining whether to issue a stay:

[I]t is readily apparent that, in the absence of a stay of the hearing of its Application, Kobo and the Commissioner would have to incur significant time and expense associated with proceedings before the Court and the Tribunal that are scheduled to be heard within a very short period of time of each other—less than two weeks. The taxpaying public would also have to incur the significant expense associated with hearings before the Court and the Tribunal. In my view, requiring both proceedings to proceed almost simultaneously would not be an effective use of scarce public and judicial resources and would not be consistent with the spirit of Rule 3 of the Federal Courts Rules, which refers to the desirability

¹⁴ For example, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] F.C.J. No 455 and related proceedings; *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29, [2014] F.C.J. No. 113 and related proceedings.

¹⁵ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341.

¹⁶ *Kobo 2015 Suspension Motion* at para. 43.

of securing the just, most expeditious and least expensive determination of every proceeding on its merits.¹⁷

25. The possibility of wasted time and resources, not just by the private parties, but also by the Competition Bureau and the Tribunal, should equally be taken into account, given that these expenditures will be irrecoverable if HarperCollins succeeds in the Appeal.

There is No Prejudice in a Stay or Suspension

26. There is no evidence of anticompetitive harm or prejudice to the Commissioner if the Application is temporarily stayed or suspended.
27. The Application is not an urgent matter. The Commissioner first entered into a consent agreement relating to the conduct at issue in the Application in February 2014, in respect of conduct by E-book publishers that is alleged to have taken place as early as 2010.
28. The Commissioner complains in his Response that he has been trying to address what he sees as anticompetitive practices “for years”, but wholly ignores his central role in delaying matters. It was the Commissioner who waited until 2014 to commence proceedings that had come to a conclusion in the U.S. some two years prior. It was the Commissioner who drafted a consent agreement in 2014 so devoid of facts that it was held to not comply with the Act. And it was the Commissioner who brought the Reference in 2014, over Kobo’s strenuous objection that the Reference would lead to delay due to appeals.¹⁸
29. Kobo, it must be remembered, is an innocent, directly affected third party. The Commissioner has not alleged any violation of the Act on Kobo’s part. Despite that, Kobo has had to expend significant time, money and resources litigating the Commissioner’s problematic interventions in the E-books market. It should not have to risk more time, resources, and money for a matter of a few months’ delay, given that the decision of the Federal Court of Appeal could be dispositive of the entire matter. The balance of convenience and the interests of justice favour awaiting the Federal Court of Appeal’s decision.

¹⁷ *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2017 FC 382 at para. 33 [***Kobo JR Stay***].

¹⁸ *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp Trib 8 (Motion to Strike Commissioner’s Reference) at paras 17 and 22.

30. Finally, it is worth noting that Kobo's related Judicial Review application will be heard shortly (likely this fall, and certainly in advance of the Appeal), and will deal on a final basis with jurisdictional issues that are similar to the jurisdictional issues the Tribunal determined on a preliminary basis in the Decision. The Federal Court has recognized that the issues in HarperCollins' jurisdictional motion and Kobo's Judicial Review are related.¹⁹ Having the benefit of the Judicial Review decision as well as the Federal Court of Appeal decision can also only serve the interests of justice in the circumstances, especially if that related proceeding is resolved in Kobo's favour.
31. Given the absence of harm to the Commissioner, and the potential for wasted resources and irreparable harm to Kobo, the interests of justice weigh in favour of the suspension.
32. In sum, it is respectfully submitted that the relevant factors on this motion favour the temporary stay or suspension of the Application until the resolution of the Appeal, irrespective of the test the Tribunal applies.



DATED: September 18, 2017

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¹⁹ *Kobo JR Stay* at paras. 36, 39.

SCHEDULE A – AUTHORITIES

1. *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, [2011] F.C.J. No. 1607
2. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311
3. *Commissioner of Competition v. Toronto Real Estate Board*, 2014 Comp. Trib. 10
4. *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 21
5. *Kobo Inc. v. The Commissioner of Competition*, 2015 Comp. Trib. 14
6. *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc. (c.o.b. Ajay Amazing Technologies Inc.)*, 2012 ONCA 756, [2012] OJ No 5195
7. *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2011 BCSC 1128, [2011] B.C.J. No. 1592
8. *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] F.C.J. No 455
9. *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29, [2014] F.C.J. No. 113
10. *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2017 FC 382
11. *Kobo Inc. v. The Commissioner of Competition*, 2014 Comp. Trib. 8

SCHEDULE B – STATUTES AND REGULATIONS

Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.)

Court of record

9 (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Competition Tribunal Rules, SOR/2008-141

Questions as to practice or procedure

34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the [*Federal Courts Rules*](#) may be followed.

Tribunal may direct

(2) If a person is uncertain as to the practice or procedure to be followed, the Tribunal may give directions about how to proceed.

[...]

Direction regarding list of matters to be considered

137 (1) The judicial member may include in the directions referred to in rule 136 a list of the matters to be considered at the case management conference and may require the filing of memoranda regarding any of those matters.

Matters to be considered

(2) Those matters may include

- (a)** the start date, duration and location of the hearing, as well as the medium for the hearing;
- (b)** any pending or anticipated motions, and a deadline date for the hearing of motions;
- (c)** any issues of confidentiality;
- (d)** the clarification, simplification and elimination of issues;

- (e)** the possibility of obtaining admissions of particular facts or documents, including an agreed statement of facts;
- (f)** a deadline for the completion of discovery, related motions and answering undertakings;
- (g)** the official language to be used for the pleadings and the hearing, as well as the official language in which each witness shall testify;
- (h)** in the case of a reference, the determination of whether there shall be oral evidence;
- (i)** a timetable for the exchange or serving and filing of the various documents related to the hearing, including affidavits of documents, joint briefs of authorities and agreed books of documents;
- (j)** any matter relating to pre-hearing disclosure;
- (k)** a timetable to be followed by the intervenors;
- (l)** all matters related to expert witnesses, including the possibility of experts meeting before a hearing to answer questions posed by the Tribunal;
- (m)** any amendments to the pleadings;
- (n)** the advisability of a pre-hearing reference or determination of a question of law;
- (o)** any requirement for a notice of a constitutional question;
- (p)** a timetable for the subsequent case management conferences; and
- (q)** any other matters that may aid in the disposition of the application.

[...]

Firm requirements

139 (1) The dates set and other requirements established by case management orders are firm.

Variation

(2) A request for a variation must be made by motion showing that compelling reasons exist for a change in the order.

Tribunal may amend

(3) If the Tribunal is satisfied that compelling reasons exist for a change in the order, it may amend it.

Federal Courts Act, R.S.C. 1985, c. F-7

Stay of proceedings authorized

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

**THE COMMISSIONER OF
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and

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and HARPERCOLLINS CANADA LIMITED**

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