CT-2017-002

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

FILED / PRODUIT
Date: April 25, 2017
CT-2017-002

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. # 63

MEMORANDUM OF FACT AND LAW OF RAKUTEN KOBO INC.
(Motion for Summary Dismissal of Application)

April 25, 2017

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I. OVERVIEW

1. Kobo[1] supports HarperCollins' motion and endorses the arguments HarperCollins has made. Having reviewed the pleadings and memoranda of fact and law of HarperCollins and the Commissioner, Kobo adds the following, non-repetitive, submissions.

II. FACTS

2. For the purposes of this motion only, Kobo accepts the facts as pleaded by the Commissioner in his Application.[2]

III. ISSUES

3. While Kobo has been granted leave to intervene in the Application on three topics,[3] only the first is relevant to this motion: whether, if the adoption of agency in Canada arose as a result of the Arrangement (as defined by the Commissioner), the Tribunal has jurisdiction to determine a case under section 90.1 of the Act.

4. Kobo's submissions are organized under two subtopics:

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[1] Unless otherwise specified, Kobo adopts the definitions of the Commissioner as set out in his Notice of Application and Memorandum of Fact and Law.

[2] For the absence of doubt, Kobo disputes the Commissioner's allegations in the Application, including the allegations that publishers entered into agency agreements with retailers for the sale of E-books in Canada pursuant to an Arrangement formed in the U.S. between publishers and Apple, and that the Arrangement was existing or proposed as of the date of the Commissioner's Application. If the Application proceeds, Kobo will present evidence and submissions on these and the other issues on which it has been granted leave to intervene.

[3] *Commissioner of Competition v HarperCollins Publishers LLC*, 2017 Comp Trib 5 (Reasons for order and order granting Rakuten Kobo Inc leave to intervene).

(a) whether the Tribunal lacks jurisdiction to determine a case under section 90.1 of the Act in respect of an arrangement entered into in the U.S. by American and German entities; and

(b) whether the Tribunal lacks jurisdiction to determine a case under section 90.1 of the Act because the Arrangement, as of the date of the institution of the proceedings, was not "existing or proposed".

IV. LAW AND ARGUMENT

5. Assuming, for the purposes of this motion only, that the adoption of agency in Canada arose as a result of the Arrangement, the Tribunal does not have jurisdiction to determine a case under section 90.1 of the Act.

(1)
The Tribunal Does Not Have Jurisdiction
Over Arrangements Entered Into By Foreign Parties Outside Canada

(i)
The Question is a Clear One of Statutory Interpretation

6. The Commissioner argues that the interpretation of s. 90.1 is complex, and that "[c]omplex matters of statutory interpretation should be determined following a full proceeding, where a decision-maker like the Tribunal has the benefit of a complete evidentiary record including discovery, viva voce evidence and expert reports...."[4] He asserts that "[t]he scope of s. 90.1 is an issue of mixed law and fact."[5]

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[4] Commissioner's Memorandum of Fact and Law at paras 5, 13, 15.

[5] Commissioner's Memorandum of Fact and Law at para 16.

7. Kobo disagrees – the question of whether the Tribunal has jurisdiction to make an order under s. 90.1(1)(a) over a foreign arrangement is solely a question of law. Notably, in resisting one aspect of Kobo's proposed intervention in this Application, the Commissioner argued that "[t]he assessment of the Tribunal's jurisdiction is a *legal question* to be determined by applying the law to the facts."[6] Given that the facts are not in dispute for the purposes of this motion, the question is purely legal. There is no call at present for the Tribunal to resolve contested factual or evidentiary questions.

8. That a question of statutory interpretation is a legal question is reinforced by the fact that the standard of review for a question of statutory interpretation is correctness[7] and that a motion like this is to be determined by a judicial member of the Tribunal.[8]

9. Addressing the interpretive question at this stage could also be of assistance to the Federal Court, which recently noted in the context of Kobo's application for judicial review that "[i]t is preferable for the Court to have the benefit of the Tribunal's determinations regarding the jurisdictional issues that have been raised in both proceedings before addressing those issues itself".[9]

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[6] Commissioner's Response to Kobo's Request for Leave to Intervene at para 14 [emphasis added]. Affidavit of Mike Brown, Exhibit A.

[7] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2014 FCA 29 at para 12.

[8] *Canada (Commissioner of Competition) v. CCS Corp.,* 2013 FCA 28 at paras 55-57.

[9] *Rakuten Kobo Inc v Commissioner of Competition*, 2017 FC 382 at para 39.

(ii)
The Doctrine of Necessary Implication Does Not Apply

10. The Commissioner argues that a statute can be interpreted to have extraterritorial effect by necessary implication where the expressed statutory purpose would be defeated by failure to draw the inference.[10]

11. Kobo agrees that a statute can be interpreted to have extraterritorial effect by necessary implication, but disagrees that the stringent test for necessary implication has been met in this case.

12. Courts have repeatedly held that the presumption against the extraterritorial application of legislation may only be rebutted by express wording or necessary implication. As the Supreme Court of Canada has emphasized:

> While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary. This is because 'in our modern world of easy travel and with the emergence of a global economic order, chaotic situations will often result if the principle of territorial jurisdiction were not, at least generally, respected'.[11]

13. "Necessary implication" applies only in limited circumstances. It is a stringent test.[12] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, the Supreme Court of Canada summarized that the doctrine may be applied when:

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[10] Commissioner's Memorandum of Fact and Law at para 27.

[11] *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 at para 54. See also at para 55.

[12] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 16.

- the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
- the enabling act fails to explicitly grant the power to accomplish the legislative objective;
- the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
- the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
- the legislature did not address its mind to the issue and decide against conferring the power to the Board. [...][13]

14. The doctrine of jurisdiction by necessary implication cannot be used to override Parliament's deliberate choice not to give the Tribunal powers in respect of foreign agreements or arrangements.[14] In order to find that s. 90.1 grants extraterritorial powers by necessary implication, those powers must be essential for the Commissioner or the Tribunal to carry out the statutory mandate. Otherwise put, the Tribunal should ask itself if, absent implying extraterritorial powers, s. 90.1 would be rendered "nugatory".[15] The answer is clearly no.

15. Rather, extraterritorial jurisdiction will only be necessarily implied when there is a "manifest intention" to that effect in the statute, or where the purpose of the

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[13] *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 73.

[14] *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 73; *Oroville Reman & Reload Inc v Canada*, 2016 TCC 75 at paras 52-54. See also *National Energy Board Act (Can) (Re)*, [1986] 3 FC 275 at para 14 (CA), noting that it is inappropriate to find implied powers when Parliament has resorted to express grants of the power at issue in other circumstances.

[15] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at paras 16-18.

statute will be "wholly frustrated" without extraterritorial power.[16] That high bar is not met in this case for the following reasons:

(a) The legislative scheme of the Act is not dependent on the Tribunal being able to exercise jurisdiction over foreign parties to a foreign agreement. The Tribunal's jurisdiction over agreements or arrangements entered into in Canada is not nullified by the fact that it does not have power to adjudicate foreign agreements or arrangements;

(b) Where Parliament has sought to grant extraterritorial powers in the Act, it has done so expressly;[17]

(c) There is no manifest intention of Parliament to allow the Tribunal to exercise jurisdiction over circumstances like these, despite the former Director having previously requested that Parliament grant him extraterritorial powers over civil sections of the Act.[18]

16. In respect of the latter point, records of legislative debates indicate that Parliament was aware that the "civil" provisions of the Act did not provide extraterritorial jurisdiction well before s. 90.1's enactment. George Addy, the then-Director of Investigation and Research, testified before the House of Commons Standing Committee on Industry on May 7, 1996 regarding the process and organization of the Bureau and responded to questions about the Bureau. In response to a question about whether he would like to see the Act

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[16] *Oroville Reman & Reload Inc v Canada*, 2016 TCC 75 at paras 47-48 and 53-54.

[17] See HarperCollins' Memorandum of Fact and Law in this respect at paras 61-77.

[18] Canada, House of Commons, Standing Committee on Industry (May 7, 1996) at para 1650-1655 (per George Addy, Director of Investigation and Research), online: <http://www.parl.gc.ca/Content/HOC/Archives/Committee/352/indu/evidence/09_96-05-07/indu09_blk-e.html>.

amended "to give [him] the levers [he] need[ed] in order to make sure that the market is truly competitive", Mr. Addy stated:

> As to whether or not some amendments are required, the minister invited me to pursue that issue. We have. We launched that last summer. I think there is a need to update the law in certain areas.
>
> One area of particular concern to me, which is under examination now, is our ability to cooperate with foreign agencies. **As markets globalize, so does anti-competitive conduct. While I suffer from jurisdictional limits, boardrooms don't.** [...]
>
> Some tools are there now. We have a mutual legal assistance treaty, which has been in place since 1990, dealing with criminal matters. So that's only part of our legislation.
>
> **I would like to see the same ability on the civil side of the Act so we could deal with things such as abusive dominance, merger review, and those civil practices** and have an ability to dialogue quite candidly and cooperate with foreign agencies.
>
> [...]
>
> We had a Canada Pipe case, the one last September. It's a company in Quebec. Je ne me souviens pas de quelle region du Quebec. Two American firms were saying to cut off this guy in Quebec. They were saying you can have the Canadian market. They won't supply him any more. Nudge, nudge. Wink, wink. It's a conspiracy. The supply is cut off.
>
> **The perpetrators are outside our jurisdiction. We used the MLAT process, got the evidence, and got the fines and prosecutions [in the criminal process]. It was a great story. I'd love to be able to do that on the other side of the legislation [ie. the civil side]**. [Emphasis added.][19]

17. Parliament has been aware that the civil provisions of the Act do not apply extraterritorially, and has chosen not to amend the Act. As the Court contemplated in *ATCO* and the other cases cited above, Parliament specifically turned its mind to the issue and decided against conferring extraterritorial power.

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[19] Canada, House of Commons, Standing Committee on Industry (May 7, 1996) at para 1650-1655 (per George Addy, Director of Investigation and Research), online: <http://www.parl.gc.ca/Content/HOC/Archives/Committee/352/indu/evidence/09_96-05-07/indu09_blk-e.html>.

As a result, the Commissioner cannot invoke the doctrine of jurisdiction by necessary implication to expand the Tribunal's mandate and confer on it powers that Parliament did not grant to it.[20]

(iii) *The Real and Substantial Connection Test is Not Applicable to Determining a Tribunal's Statutory Authority*

18. The Commissioner asserts that "the test to be applied in determining whether the Tribunal has jurisdiction over extraterritorial conduct and foreign defendants is whether there is a real and substantial link between the conduct and Canada".[21]

19. The Commissioner is conflating the question of whether an administrative Tribunal has been granted statutory jurisdiction with a wholly separate question of whether a superior court may exercise inherent jurisdiction over civil claims based in tort and restitution.

20. The cases cited by the Commissioner in support of the proposition quoted above – *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*,[22] *Fairhurst v Anglo American PLC*,[23] and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*[24] – have nothing to do with whether the Tribunal has been granted statutory authority over civil conspiracies under s. 90.1 of the Act. These cases all concern the jurisdiction of superior courts over class proceedings that included

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[20] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 18.

[21] Commissioner's Memorandum of Fact and Law at para 34.

[22] *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, [2002] OJ No 298 (Sup Ct).

[23] *Fairhurst v Anglo American PLC*, 2011 BCSC 705, [2011] BCJ No 986.

[24] *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58.

claims based in the tort of conspiracy, restitution, or section 36 of the Act, which provides a civil remedy in damages for persons who suffer harm as a result of a criminal conspiracy under the Act.[25]

21. The "real and substantial connection" test only applies if it is unclear whether Parliament intended a statute to apply extraterritorially or if it is unclear whether the facts fall within the territorial ambit of the statute.[26] Where, as here, it is clear that the provision was drafted to not capture extraterritorial arrangements (for the reasons set out above and in HarperCollins' submissions), the real and substantial connection test has no application. Otherwise put, the Commissioner cannot use the real and substantial connection test to vest himself or the Tribunal with extraterritorial powers that Parliament has chosen not to grant.

(iv)
The Commissioner's Merger Analogy Does Not Support His Argument

22. The Commissioner states that "[i]n the merger context, ... international transactions are routinely reviewed under s. 92 of the Act where the effects will be felt in Canada".[27] In support of this statement, the Commissioner cites a consent agreement between the Commissioner and Pfizer Inc. and Wyeth.[28] In Kobo's judicial review application currently before the Federal Court, the

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[25] See *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, [2002] OJ No 298 at paras 1, 5, 16 (Sup Ct); *Fairhurst v Anglo American PLC*, 2011 BCSC 705, [2011] BCJ No 986 at paras 4-9, 24-25, 37, 41; *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at paras 42-47.

[26] *T(A) v Globe24h.com*, 2017 FC 114 at para 50; *Sirius Canada Inc v CMRRA/Sodrac Inc*, 2010 FCA 348 at para 44.

[27] Commissioner's Memorandum of Fact and Law at para 19.

[28] *Commissioner of Competition v Pfizer Inc and Wyeth*, CT-2009-014 (October 14, 2009) (Consent Agreement).

Commissioner cited three other merger cases for the similar proposition (or a related proposition that the Tribunal has issued orders relating to foreign mergers): Abbott;[29] Bayer AG;[30] and LaFarge.[31]

23. The Commissioner's merger analogy does not support his argument for three reasons.

24. First, the Commissioner fails to advert to the fact that none of the contested mergers that the Tribunal has adjudicated were foreign merger transactions.[32] The Tribunal has never determined a contested merger where the proposed transaction did not involve Canadian entities.

25. Second, the four consent order/consent agreement mergers the Commissioner cites consist of notifiable transactions where the foreign parties in question would have been obligated to notify the Commissioner of the proposed merger and hence submit to a review.[33]

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[29] *Commissioner of Competition v Abbott Laboratories*, CT-2016-018 (December 28, 2016) (Consent Agreement).

[30] *Commissioner of Competition v Bayer AG*, CT-2002-003 (July 18, 2002) (Consent Order).

[31] *Commissioner of Competition v Lafarge SA* (August 1, 2001) (Consent Order).

[32] See e.g. Brian A Facey & Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (Markham: LexisNexis Canada Inc, 2013) at pp 12-23. For ease, we list the five cases: *Canada (Director of Investigation & Research) v Hillsdown Holdings (Canada) Ltd*, [1992] CCTD No 4, 41 CPR (3d) 289; *Canada (Director of Investigation & Research) v Southam Inc*, [1997] 1 SCR 748; *Canada (Director of Investigation & Research) v Superior Propane Inc*, 2001 FCA 104 [2001] 3 FC 185; *Canada (Director of Investigation & Research) v Canadian Waste Services Holdings Inc*, 2003 FCA 131, [2003] FCJ No 416; and *Tervita Corp v Canada (Commissioner of Competition*, 2015 SCC 3, [2015] 1 SCR 161.

[33] *Pfizer* was a notifiable transaction, as demonstrated by the fact that the Commissioner issued a Supplementary Information request in that case: Annual Report of the Commissioner of Competition for the year ending March 31, 2010 (Ottawa, January 18, 2012) at p 26, Affidavit of Mike Brown, Exhibit B. The affidavits filed in support of the consent order in both *Bayer* and *Lafarge* note that each of those

26. Third, the Commissioner's four examples actually serve to demonstrate the point that Kobo and HarperCollins make: where Parliament has seen fit to address foreign activities (such as foreign mergers) within the Act, it has done so expressly. The Commissioner's ability to inquire into mergers (including mergers of foreign entities) where the statutory thresholds are met, was expressly contemplated by Parliament as part of the notification regime in section 109(1) of the Act:

> **General limit relating to parties**
>
> **109(1)** This Part [Part IX, Notifiable Transactions] does not apply in respect of a proposed transaction unless the parties thereto, together with their affiliates,
>
> **(a)** have assets in Canada that exceed four hundred million dollars in aggregate value, determined as of such time and in such manner as may be prescribed, or such greater amount as may be prescribed; or
>
> **(b)** had gross revenues from sales in, from or into Canada, determined for such annual period and in such manner as may be prescribed, that exceed four hundred million dollars in aggregate value, or such greater amount as may be prescribed.[34]

27. In any event, this is not a motion on the scope of the Commissioner's power to review foreign mergers. Such a case, it is submitted, would have to be determined in the future, either in a contested case or by way of reference.

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transactions was notifiable: Affidavit of Dean Shaikh (sworn May 31, 2002) in *Commissioner of Competition v Bayer AG* at p 4, Affidavit of Mike Brown, Exhibit C; Affidavit of Michael Sullivan (sworn June 15, 2001) in *Commissioner of Competition v Lafarge SA* at p 2, Affidavit of Mike Brown, Exhibit D. In *Abbott,* St. Jude's proxy statement in respect of the Abbott Laboratories merger notes Canada as one of the jurisdictions where statutory waiting periods would apply: Proxy Statement dated September 26, 2016, filed by St. Jude Medical, Inc. with the United States Securities and Exchange Commission, including a merger statement regarding the merger with Abbott Laboratories at p 106, Affidavit of Mike Brown, Exhibit E.

[34] *Competition Act*, RSC, 1985, c C-24, s 109(1).

(v)
A Lack of Statutory Jurisdiction Does Not Create "Mischief"

28. There is no merit to the Commissioner's contention that substantial mischief[35] would follow a finding that the Tribunal lacks jurisdiction over a foreign arrangement.

29. Parliament has decided to grant the Tribunal authority over foreign parties and/or conduct under certain circumstances, and to restrict the Tribunal's authority to Canadian parties and/or conduct in others. This is a perfectly acceptable restriction to place on the Tribunal's authority. It cannot be construed as creating "mischief" simply because the Commissioner (whose authority is derivative of the Tribunal's[36]) wishes he had geographically unlimited statutory authority. Indeed, the default presumption is that Parliament intends for its legislation to only apply to Canadians and Canadian activity.

30. Again, Parliament is aware of the different treatment it has given to criminal matters versus civil ones. If Parliament wished to expand the Tribunal's authority over foreign agreements or arrangements, it would have done so by way of a simple express amendment.

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[35] Commissioner's Memorandum of Fact and Law at para 17.

[36] *Rakuten Kobo Inc v Commissioner of Competition*, 2017 FC 382 at para 41.

(2)
The Tribunal Does Not Have Jurisdiction Because the Alleged Arrangement is not "Existing or Proposed"

31. The Commissioner argues, at paragraph 58 of his Memorandum, that, if "existing or proposed" is interpreted to require the agreement or arrangement to be *presently* existing or proposed, "parties could evade responsibility for their actions by changing their conduct at any moment, including after litigation is commenced, and even up to the moment before a judgment is rendered." Setting aside that the alleged mischief the Commissioner cites is entirely speculative, the Commissioner also ignores that the only order that may be made by the Tribunal under section 90.1 (without the consent of a party) is an order prohibiting certain conduct.

32. Section 90.1(1)(a) empowers the Tribunal to make an order "prohibiting any person – whether or not a party to the agreement or arrangement – from doing anything under the agreement or arrangement". If a party voluntarily ceases conduct under the agreement or arrangement, rather than facing litigation over it, the party has not evaded responsibility or "walk[ed] away without consequence"; rather, the party has voluntarily imposed upon itself the same remedy, or consequence, that the Tribunal could have imposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, Ontario, this 25th day of April, 2017.

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V. AUTHORITIES

1. *Competition Act*, RSC, 1985, c C-34, ss 90.1, 91-92, 108-124.
2. *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 5.
3. *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2014 FCA 29.
4. *Canada (Commissioner of Competition) v. CCS Corp.,* 2013 FCA 28.
5. *Rakuten Kobo Inc v Commissioner of Competition*, 2017 FC 382.
6. *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427.
7. *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626.
8. *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4.
9. *Oroville Reman & Reload Inc v Canada*, 2016 TCC 75.
10. *National Energy Board Act (Can) (Re)*, [1986] 3 FC 275 (CA).
11. Canada, House of Commons, Standing Committee on Industry (May 7, 1996), online: <http://www.parl.gc.ca/Content/HOC/Archives/Committee/352/indu/evidence/09_96-05-07/indu09_blk-e.html>.
12. *T(A) v Globe24h.com*, 2017 FC 114.
13. *Sirius Canada Inc v CMRRA/Sodrac Inc*, 2010 FCA 348.
14. *Commissioner of Competition v. Pfizer Inc. and Wyeth*, CT-2009-014 (October 14, 2009) (Consent Agreement).
15. *Commissioner of Competition v Abbott Laboratories*, CT-2016-018 (December 28, 2016) (Consent Agreement).
16. *Commissioner of Competition v Bayer AG*, CT-2002-003 (July 18, 2002) (Consent Order).
17. *Commissioner of Competition v Lafarge SA* (August 1, 2001) (Consent Order).
18. Brian A Facey & Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (Markham: LexisNexis Canada Inc, 2013).

THE COMMISSIONER OF COMPETITION and HARPERCOLLINS PUBLISHERS L.L.C. and HARPERCOLLINS CANADA LIMITED and RAKUTEN KOBO INC.

Applicant Respondents Intervenor

CT-2017-002

COMPETITION TRIBUNAL

MEMORANDUM OF FACT AND LAW OF RAKUTEN KOBO INC.

(Motion for Summary Dismissal of Application)

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