Competition Tribunal Tribunal de la Concurrence

Reference: *Rakuten Kobo Inc. v. The Commissioner of Competition,* 2016 Comp. Trib. 11
File No.: CT-2014-002
Registry Document No.: 234

IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*, RSC, 1985, c C-34 as amended;

AND IN THE MATTER OF an application under subsection 106(2) of the *Competition Act*.

BETWEEN:

Rakuten Kobo Inc.
(applicant)

and

The Commissioner of Competition,
Hachette Book Group Canada Ltd.,
Hachette Book Group, Inc.,
Hachette Digital Inc.,
HarperCollins Canada Limited,
Holtzbrinck Publishers, LLC; and
Simon & Schuster Canada, a division of CBS Canada Holdings Co.
(respondents)

Date of hearing: April 25, 2016
Before: D. Gascon J. (Chairperson), P. Crampton C.J. and Dr. D. McFetridge
Date of Reasons and Order: June 10, 2016

REASONS FOR ORDER AND ORDER

A. INTRODUCTION AND OVERVIEW

[1] This is the second, and most extensive, application to be brought under subsection 106(2) of the *Competition Act*, RSC 1985, c C-34 (the **"Act"**). As such, it raises a number of novel issues.

[2] In brief, Rakuten Kobo Inc. (**"Kobo"**) seeks an Order rescinding the Consent Agreement (the **"CA"**) that was reached between the Commissioner of Competition (the **"Commissioner"**) and the book publisher respondents, with prejudice to the Commissioner entering into a new consent agreement with any of those respondents on the basis of the same or similar allegations.

[3] In support of its application, Kobo submits that the CA does not meet any of the three "conditions" articulated by the Tribunal in its decision on a reference that was brought by the Commissioner in related proceedings (*Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 14 (the ***"Reference Decision"***)).

[4] In the *Reference Decision*, the Tribunal determined that its jurisdiction in a proceeding brought under subsection 106(2) is limited to assessing the following three things:

> **i.** Whether the terms of the relevant consent agreement are not within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of the reviewable trade practice in question;
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> **ii.** Whether the consent agreement:
>
> > a) identifies each of the substantive elements of the reviewable trade practice in question; and
> >
> > b) contains either (i) an explicit agreement between the Commissioner and the respondent(s) that each of those elements has been met, or (ii) a statement that the Commissioner has concluded that each of those elements has been met, together with a statement by the respondent(s) that they do not contest that conclusion; and
>
> **iii.** whether one or more of the terms of a consent agreement are unenforceable or would lead to no enforceable obligation, for example, because they are too vague.
>
> (*Reference Decision* at paras 125-128)

[5] The Commissioner concedes that the CA does not meet the test described at paragraph 4.ii.b) above. The Tribunal agrees.

[6] For the reasons that follow, the Tribunal has also concluded that the CA does not meet the test set forth in paragraph 4.ii.a) above.

[7] The Tribunal has further concluded that the combined effect of these shortcomings is such that it should exercise its discretion to rescind the CA, without prejudice to the Commissioner's ability to file another consent agreement, to which one or more of the book publisher respondents may be a party. This is subject to the proviso that the Commissioner may not file another consent agreement on the basis of mere *allegations* that are the same or substantially the same as those that form the basis of the CA. Such allegations, without more, would not meet the test set forth in paragraph 4.ii.b) above.

[8] Finally, the Tribunal has rejected Kobo's submission that permitting the Commissioner and one or more of the book publisher respondents from filing a new consent agreement would be contrary to the Act and would violate the legal principle of *res judicata*.

B. BACKGROUND

[9] As described more fully in the *Reference Decision* and in *The Commissioner of Competition v Pearson Canada Inc*, 2014 FC 376, in mid-2012 the Commissioner commenced an inquiry (the "**Inquiry**") under subparagraph 10(1)(*b*)(ii) of the Act with respect to certain alleged anti-competitive conduct to restrict electronic book ("**E-book**") retail price competition in the markets for E-books in Canada. Among other things, that conduct involved a change by the largest publishers of general interest fiction and non-fiction E-books from a wholesale distribution model to an agency distribution model. As a result of that change, retail price competition in the markets for E-books in Canada is alleged to have been restricted.

[10] The initiation of the Inquiry followed investigations and subsequent enforcement action taken in the United States and Europe in relation to a similar change from a wholesale distribution model to an agency distribution model that occurred in those jurisdictions.

[11] In February 2014, the Commissioner and four of the publishers targeted by the Inquiry (the **"Respondent Publishers"**) entered into the CA, which was then filed and registered with the Tribunal pursuant to section 105 of the Act.

[12] The Respondent Publishers are Hachette Book Group Canada Ltd and certain of its affiliates (**"Hachette"**), Holtzbrinck Publishers, LLC (doing business as Macmillan) (**"Macmillan"**), HarperCollins Canada Limited (**"HarperCollins"**) and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (**"Simon & Schuster"**).

[13] One of the recitals to the CA states that "the Commissioner alleges that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act."

[14] Broadly speaking, the CA is directed towards distribution agreements between the Respondent Publishers and retailers of E-books. Among other things, the CA prohibits the Respondent Publishers from directly or indirectly restricting, limiting or impeding 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. The CA also prohibits the Respondent Publishers from entering into an agreement with any E-book retailer that has one of those effects. These prohibitions apply for 18 months, commencing on the fortieth day following the registration of the CA.

[15] Certain other terms in the CA prohibit the Respondent Publishers from entering into agreements with E-book retailers relating to the sale of E-books to consumers in Canada that contain particular types of most-favoured nation (**"MFN"**) clauses, for a period of four years and six months from the date of the registration of the CA.

[16] In addition, the CA requires the Respondent Publishers to take steps to terminate, and not renew or extend, existing agreements with E-book retailers that have certain types of provisions. In lieu of such action, the CA permits the Respondent Publishers to take certain alternative steps to satisfy their obligations.

[17] Approximately two weeks after the CA was filed with the Tribunal, Kobo filed a Notice of Application (the **"Initial Application"**) pursuant to subsection 106(2) of the Act, in which it requested an order rescinding the CA. In the alternative, Kobo sought an order varying the terms of the CA, to remove the obligations of the Respondent Publishers, other than those relating to MFN clauses.

[18] Subsequent to the filing of the CA, Kobo Inc. changed its name to Rakuten Kobo Inc.

[19] One of Kobo's primary business operations is as a retailer of E-books. Kobo also develops and retails E-book reading devices and creates free application software for reading E-books on computers and mobile devices.

[20] In its Statement of Grounds and Material Facts appended as Schedule "A" to its Initial Application, Kobo stated that the effect of the CA "is to swiftly and radically alter Kobo's contractual relationships with" the Respondent Publishers.

[21] Pursuant to an order dated March 18, 2014, the Tribunal stayed the registration of the CA pending the determination of this application. That order remained in place until the issuance of the attached Order, today.

[22] On April 15, 2014, the Commissioner filed a Notice of Reference pursuant to subsection 124.2(2) of the Act, in which he posed the following question:

> What is the nature and scope of the Tribunal's jurisdiction under subsection 106(2) and, in that connection, what is the meaning of the words "the terms could not be the subject of an order of the Tribunal" in subsection 106(2) of the Act?

[23] In September 2014, the Tribunal answered those questions in the *Reference Decision* by stating that, on an application pursuant to subsection 106(2) of the Act, it has the jurisdiction to assess the three things set forth at paragraph 4 above.

[24] The Tribunal added that it does not have the jurisdiction to go further, as requested by Kobo, and to assess whether one or more of the substantive elements of a reviewable trade practice have not in fact been met, or that a defence or exception set forth in the Act is applicable. In the context of this proceeding, that means that the Tribunal does not have the jurisdiction to assess whether one or more of the substantive elements set forth in section 90.1 of the Act are not met, including whether there is in fact an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors. Disputes with respect to these and other substantive elements, such as whether an agreement is likely to prevent or lessen competition substantially, are beyond the scope of subsection 106(2).

[25] On June 18, 2015, the Federal Court of Appeal dismissed Kobo's appeal (*Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2015 FCA 149).

[26] On January 14, 2016, the Supreme Court of Canada dismissed Kobo's request for leave to appeal the Federal Court of Appeal's decision (*Rakuten Kobo Inc v Canada (Commissioner of Competition)*, 2015 FCA 149, leave to appeal to SCC refused, 36554 (14 January 2016)).

[27] In the meantime, during a case management conference on December 22, 2014, the Commissioner's counsel confirmed his previous statement to Kobo and the Respondent Publishers that, in light of the *Reference Decision*, the Commissioner was prepared to consent to the primary relief sought by Kobo in the 106(2) application.

[28] On November 30, 2015, Kobo filed its Amended Notice of Application (the **"Application"**), seeking essentially the same relief as sought in its Initial Application, this time "with prejudice" to the Commissioner entering into a consent agreement with any of the Respondent Publishers "on the basis of allegations that are the same or substantially the same as the allegations that form the basis of the [CA]."

[29] Kobo also added an additional ground for relief, namely that certain terms of the CA "are vague and unenforceable or would lead to no enforceable obligation." In this latter regard, Kobo's submissions were focused on the provisions of paragraph 5 of the CA, which are further discussed in section E(iv) of these reasons below.

[30] In its Reply dated January 8, 2016, Kobo explained that it did not otherwise amend the grounds for its Application, because its application for leave to appeal to the Supreme Court was

still pending at that time and it still believed those grounds to be valid. Subsequently, in its Reply Legal Representations dated April 21, 2016, Kobo explained that, once the Supreme Court had disposed of its appeal of the *Reference Decision*, it did not file a re-amended notice of application, as it would likely have entailed delay and complicated the schedule. That said, it also stated that, "as is clear from [its] legal representations and conduct since the release of the SCC decision, Kobo has only pursued arguments that are permitted by the [*Reference Decision*]."

[31] In his written Legal Representations, and in his oral submissions in this proceeding, the Commissioner confirmed that he consents to the rescission of the CA with prejudice to his ability to enter into a new consent agreement "on the basis of *allegations* that are the same or substantially the same as the allegations that form the basis of the [CA]" (emphasis added). However, the Commissioner specified that his consent is without prejudice to his entering into a new consent agreement with the Respondent Publishers "based on *conclusions* [he] may reach regarding the matters contemplated by the recitals to the [CA], as well as any other matter relevant to the substantive elements of reviewable conduct under s. 90.1 of the Act" (emphasis in original).

[32] The Commissioner explained the latter position as being based on the fact that the CA refers only to *allegations*, and not *conclusions* reached by the Commissioner, as required by the test set forth at paragraph 4.ii.b) above. The Commissioner added that, should the Tribunal conclude that paragraph 5 is vague or unenforceable, it could be severed from the rest of the CA, assuming that the Tribunal was not inclined to exercise its discretion to rescind the balance of the CA.

[33] During the hearing of this proceeding, counsel for HarperCollins, speaking on behalf of HarperCollins, Macmillan and Hachette (the **"Three Respondent Publishers"**), stated that the Three Respondent Publishers are prepared to consent to support the Commissioner's position that the CA should be rescinded (Transcript, at p. 200). However, she stated that the Three Respondent Publishers do not support the Commissioner's position that paragraph 5 of the CA is severable from the remainder of the CA. Among other things, she stated that the Three Respondent Publishers would never have entered into the CA without that provision (Transcript, at p. 207).

[34] The fourth Respondent Publisher, Simon & Schuster, does not acknowledge or concede that there are any grounds for rescinding the CA. Rather, it maintains that the public interest in settlement would be seriously undermined if the CA is set aside. Among other things, it suggested that rescinding the CA might well result in additional expensive, time-consuming and potentially unpredictable litigation, beyond that to which it had already been subjected. Accordingly, it encourages the Tribunal to exercise its discretion to dismiss the Application.

C. RELEVANT LEGISLATION

[35] Section 105 of the Act provides for the entering into consent agreements and the registration of those agreements by the Tribunal. Section 105 states:

105. (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

(3) The consent agreement may be filed with the Tribunal for immediate registration.

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

105. (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l'ordonnance provisoire prévue à l'article 103.3 — peuvent signer un consentement.

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l'enregistrer immédiatement.

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

[36] Pursuant to subsection 106(2), third parties may apply to the Tribunal to vary or rescind a consent agreement. That provision states:

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

[37] In addition, pursuant to subsection 106(1), parties to a consent agreement may also apply to the Tribunal to vary or rescind the agreement. That provision reads as follows:

106 (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order

106 (1) Le Tribunal peut annuler ou modifier le consentement ou l'ordonnance visés à la présente partie, à l'exception de

under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

l'ordonnance rendue en vertu de l'article 103.3 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

[38] In this proceeding, the reviewable trade practice that is the subject of the CA is that which is described in subsection 90.1(1) of the Act. That provision states:

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

90.1 (1) Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;

(b) requiring any person — whether or not a party to the agreement or

b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement —

arrangement — with the consent of that person and the Commissioner, to take any other action.	de prendre toute autre mesure, si le commissaire et elle y consentent.

D. ISSUES

[39] The following broad issues are raised in this proceeding:

a. Are the terms of the CA within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of subsection 90.1(1)?

b. Does the CA, including its recitals, sufficiently identify the elements of subsection 90.1(1) that must be established before the Tribunal has the jurisdiction to issue an order against the Respondent Publishers?

c. Does the CA contain either (i) a statement to the effect that the Commissioner and the Respondent Publishers agree that each of the elements of subsection 90.1(1) has been met, or (ii) a statement that the Commissioner has concluded that each of those elements has been met, together with a statement by the Respondent Publishers that they do not contest that conclusion?

d. Are any of the material terms of the CA unenforceable, on grounds of vagueness or otherwise?

e. Should the Tribunal exercise its jurisdiction to rescind the CA?

f. If so, should the Tribunal rescind the CA *with prejudice* to the ability of the Commissioner and one or more of the Respondent Publishers to file another consent agreement?

[40] Each of these issues will be discussed in turn. For greater certainty, the Tribunal notes that the Commissioner and the Respondent Publishers do not contest that Kobo is a person "directly affected" by the CA as set forth in subsection 106(2).

E. ANALYSIS

(i) Are the terms of the CA within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of subsection 90.1(1)?

[41] Pursuant to subsection 105(2), consent agreements filed with the Tribunal must be based on terms that could be the subject of an order of the Tribunal against the person(s) in respect of whom the Commissioner has applied or may apply for an order under Part VIII of the Act.

[42] In this proceeding, the persons in question are the Respondent Publishers and the relevant provision of Part VIII is subsection 90.1(1).

[43] Subsection 90.1(1) allows the Tribunal to make two types of orders if it finds that an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

[44] The two types of orders are those described in paragraphs 90.1(1)(*a*) and (*b*), respectively. If the Tribunal finds that the elements described immediately above are met, it may make an order:

> a) prohibiting any person – whether or not a party to the agreement or arrangement – from doing anything under the agreement or arrangement; or
>
> b) requiring any person – whether or not a party to the agreement or arrangement –, with the consent of that person and the Commissioner, to take any other action.

[45] The CA contains various terms that impose prohibitions on the Respondent Publishers. It also contains terms that require the Respondent Publishers to take other actions.

[46] Kobo asserts that the terms of the CA are not within the *scope* of the types of orders that the Tribunal is permitted to issue in respect of subsection 90.1(1) because the basic nature of the alleged conduct challenged by the Commissioner under that provision has not been identified.

[47] The Tribunal disagrees. In making that assertion, Kobo conflates the requirement that the terms of the CA be within the *scope* or *purview* of one or more specific types of orders that may be made by the Tribunal (*Reference Decision* at para 125) in respect of subsection 90.1(1), with the issue of whether the preconditions to the Tribunal's exercise of jurisdiction to issue such an order have been satisfied. The latter issue is assessed in sections E(ii) and E(iii) below.

[48] The relevant question at this stage of the analysis is whether the prohibition and other terms of the CA are within the scope or purview of the types of orders that may be made by the Tribunal, pursuant to paragraphs 90.1(1)(*a*) and (*b*) of the Act. On their face, those terms clearly are within such scope and purview.

[49] In brief, the prohibition terms in the CA fall squarely within the purview of paragraph 90.1(1)(*a*), while the remaining terms of the CA clearly fall within the broad scope of paragraph 90.1(1)(*b*), which explicitly permits the Commissioner and the Respondent Publishers to agree to terms that require the latter to take any action whatsoever.

[50] Therefore, the Tribunal concludes that the test set forth at paragraph 4.i above, and identified as the first element in the *Reference Decision*, is met in this case.

(ii) Does the CA, including its recitals, sufficiently identify the elements of subsection 90.1(1) that must be established before the Tribunal has the jurisdiction to issue an order against the Respondent Publishers?

[51] Notwithstanding the fact that the terms of the CA may be within the scope or purview of the type(s) of orders that the Tribunal is permitted to issue under subsection 90.1, there are two conditions that must be satisfied before the Tribunal would have the *jurisdiction* to issue such orders. The first of those conditions is whether the elements of subsection 90.1 have been sufficiently identified. The second, which is further discussed in section E(iii) below, is whether the CA contains one of the two statements identified at paragraph 4.ii.b) above with respect to those elements.

[52] If those two conditions are not satisfied, the terms of the CA are not terms that could be the subject of an order of the Tribunal against the Respondent Publishers. This is because the Tribunal would not have the jurisdiction to register the CA, as contemplated by the combined operation of subsections 105(2) and 90.1(1) (*Reference Decision* at paras 90-96).

a) What are the elements of subsection 90.1(1) to be identified in the CA?

[53] Kobo submits that the CA does not identify each of the substantive elements of subsection 90.1(1) and that the Commissioner admitted in discovery that the CA does not identify two of those elements, namely whether the alleged agreement or arrangement involved two or more competitors, and whether at the time of the filing of the CA, the alleged agreement or arrangement was existing or proposed.

[54] Kobo maintains that a consent agreement filed in respect of conduct that is reviewable under subsection 90.1(1) must identify the following nine elements:

- **i.** who the Commissioner alleges are all the parties to the alleged agreement or arrangement;
- **ii.** whether the Commissioner alleges that two or more parties to the agreement or arrangement are competitors;
- **iii.** when the Commissioner alleges the agreement or arrangement was entered into;
- **iv.** when the Commissioner alleges the agreement or arrangement was to take effect;

v. when the Commissioner alleges that the agreement or arrangement was to expire, if ever;

vi. whether, at the time of the consent agreement, the alleged agreement was "existing or proposed;"

vii. what conduct was contemplated by the alleged agreement or arrangement;

viii. whether the alleged agreement or arrangement was written or oral; and

ix. whether the alleged agreement or arrangement contemplated Canada.

[55] During the hearing, counsel to the Commissioner took issue with a number of the foregoing items. In particular, he asserted that the substantive elements of the reviewable conduct described in subsection 90.1(1) do not include when the agreement or arrangement in question was entered into, when it was to take effect, when it is to expire (if ever), or whether it was written or oral. The Tribunal agrees. These are descriptive facts with respect to the element of "agreement," not distinct elements in and of themselves.

[56] However, counsel to the Commissioner conceded that subsection 90.1(1) contains the following six elements, which should be addressed in consent agreements entered into in respect of conduct under that provision:

i. whether the challenged conduct is an agreement or arrangement;

ii. whether the agreement or arrangement is existing or proposed;

iii. the identity of two or more parties to the agreement or arrangement;

iv. the fact that two or more parties to the agreement or arrangement are competitors;

v. the fact that the agreement or arrangement prevents or lessens, or is likely to prevent or lessen competition substantially; and

vi. the market(s) in Canada in which that effect is occurring or is likely to occur.

[57] The Tribunal agrees with the Commissioner that, in respect of the reviewable practice described in subsection 90.1(1), these constitute the only elements that must be sufficiently identified and that must be the subject of one of the two statements described at paragraph 4.ii.b) above, before it would have jurisdiction as contemplated by subsection 105(2).

[58] However, the Tribunal does not agree with the Commissioner's position that it would suffice for the CA to simply state that (i) the Respondent Publishers are parties to *an* unidentified existing agreement that is not otherwise described, (ii) two or more persons who are competitors are parties to that agreement, and (iii) the agreement prevents or lessens, or is likely to prevent or lessen, competition in one or more markets for the distribution of E-books in Canada.

[59] To establish that the terms of the CA *could* be the subject of an order against the Respondent Publishers, as contemplated by subsection 105(2), the CA must not only repeat the elements of subsection 90.1(1) as they appear in the Act. It must also explain *how* those elements are met.

[60] Therefore, with respect to the element of "agreement or arrangement," the CA must go beyond stating, in one of the ways described at paragraph 4.ii.b) above, that there was *an* agreement (or arrangement). It must also provide the Tribunal with a sufficient understanding of the subject matter of the agreement to satisfy itself that the prohibitions in the CA pertain to terms of the agreement, as contemplated by paragraph 90.1(1)(*a*) (*Reference Decision* at para 96). Without satisfying itself that this is so, it is difficult to see how the Tribunal could be in a position to prohibit the Respondent Publishers from doing anything under the agreement, within the meaning of that paragraph. In brief, if the Tribunal did not have a sufficient understanding of the agreement to know that the prohibition terms in the CA are directed towards terms of the agreement, it would simply be prohibiting the Respondent Publishers from doing something that it is being invited *to infer* is in the agreement.

[61] For example, counsel to the Commissioner asserted that it is not necessary to explicitly disclose that the challenged agreement includes the types of MFN provisions which are prohibited in the CA. The Tribunal disagrees. This is information that must be disclosed in either the recitals or elsewhere in the CA. The same is true of the other matters that are prohibited under the CA. For greater certainty, the CA should state that the agreement in question includes each of the matters that are the subject of prohibitions. It is only in this way that the Tribunal can know that the prohibitions in the CA actually do pertain to "anything under the agreement," as set forth in paragraph 90.1(1)(*a*). It bears emphasizing that the Tribunal should not be put in the position of having to make inferences in that regard.

[62] Indeed, without an understanding of the basic nature of the agreement, it is difficult to see how the Tribunal could satisfy itself as to the matters described in subsection 90.1(10) of the Act, namely, that the facts pertaining to the conduct are not the same or substantially the same as the facts on the basis of which (a) proceedings have been commenced against the respondent(s) under section 45 or 49; or (b) an order against that person has been sought by the Commissioner under section 76, 79 or 92.

[63] With respect to the remaining five elements of subsection 90.1(1), the Tribunal considers that it would suffice for the CA to state, in one of the ways described at paragraph 4.ii.b) above: (i) whether the agreement in question is existing or proposed; (ii) whether the Respondent Publishers are parties to that agreement – if not, the CA should either identify the parties to the agreement or provide some description of the nature of the parties to the agreement and their

relationship to the Respondent Publishers, e.g., affiliates, suppliers, customers, etc.; (iii) whether two or more of the Respondent Publishers are competitors – if not , the CA should either identify at least two parties to the agreement who are competitors, or provide some description of the nature of such parties and their relationship to the Respondent Publishers; (iv) that the agreement prevents or lessens, or is likely to prevent or lessen, competition substantially; and (v) this anti-competitive effect is occurring or is likely to occur in the markets for E-books in Canada.

[64] For greater certainty, insofar as the identity of the parties to the impugned agreement or arrangement is concerned, it is not necessary for the Tribunal to know the exact identities of all of the parties to the agreement or arrangement in question. The Tribunal simply needs to know whether the Respondent Publishers are parties to the agreement. If not all of them are parties to the agreement, the Tribunal needs to know why it is being asked to issue an order against them; and it needs the type of information described in the immediately preceding paragraph regarding the nature of the parties to the agreement and their relationship to the Respondent Publishers, e.g., affiliates, suppliers, customers, etc.

[65] For the purposes of future guidance with respect to this particular issue, and in recognition of the fact that the Commissioner may choose to initially seek a consent agreement against only a single respondent, the Tribunal is satisfied that it would have the jurisdiction to make an order, as contemplated by subsections 105(2) and 90.1(1), if the consent agreement stated (i) that the respondent is a party to the agreement in question, and (ii) that there is at least one other unidentified party to the agreement whose identity is known by the Commissioner, and whose nature and relationship to the respondent are specified. If the respondent in question is not a party to the agreement, then the Tribunal would need to know the things described at point (ii) in paragraph 63 above.

[66] Of course, the consent agreement would also have to address the other elements of subsection 90.1(1), including the requirement that there be at least two parties to the agreement who are competitors. In this regard, the consent agreement should address whether two or more of the respondents are competitors, and if not, whether (a) one of the respondents and another (identified or unidentified) party to the agreement are competitors, or (b) two such other (identified or unidentified) parties are competitors. Where one or more competitors is not identified, its nature and its relationship to the respondent (e.g., affiliate, supplier, customer, etc.) should be provided.

[67] As the Tribunal observed in the *Reference Decision*, the required disclosure described in the paragraphs above would not only provide the Tribunal with the information that it requires to exercise its jurisdiction. It would also achieve the important goal of ensuring that the public is aware of that information. Withholding such information from the public would potentially undermine public confidence in the administration and enforcement of the Act (*Reference Decision* at para 93).

[68] The Tribunal notes the concern raised by counsel to the Commissioner and counsel to HarperCollins that parties may have difficulties reaching a consent agreement if the Tribunal is "unduly prescriptive" and goes too far in its requirement of elements needed to be identified in a

consent agreement. However, the Tribunal does not believe that referring to the six elements singled out in this decision is likely to create a chilling effect on a subsequent consensual resolution in this matter or, more generally, on consent agreements contemplated under subsection 90.1(1). This level of disclosure is required for the Tribunal to be able to exercise its jurisdiction and to properly inform the public.

[69] The Tribunal observes that the information described in the paragraphs immediately above is similar to that which is often disclosed in press releases issued by the Commissioner when it files consent agreements or in agreed statements of facts in criminal proceedings brought under the Act.

[70] For example, in the press release issued by the Competition Bureau on December 30, 2015, in respect of the consent agreement it reached with Telus, entitled *Telus Customers to receive $7.34 million in rebates as part of Competition Bureau agreement*, the Competition Bureau did not simply disclose that Telus had made, or permitted to be made, false or misleading representations. It also disclosed additional information regarding the basic nature of those representations and how they were made. In this regard, it was stated that those representations were made in advertisements for premium text messages in pop-up ads, apps and on social media; and that Telus, Telus Mobility and Koodo customers had incurred a charge for certain premium text messaging services between January 1, 2011 and August 16, 2013.

[71] Likewise, in press releases issued by the Competition Bureau (and indeed in consent agreements filed) with respect to mergers, the information provided typically goes beyond simply describing the parties, the type of merger and the nature of any divestiture or other relief. Such press releases, as well as the consent agreements filed with the Tribunal, also generally provide a general description of the businesses and their products.

[72] The same is true for agreed statements of facts in the context of criminal proceedings brought under the Act. For example, in *Canada v Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117, the information provided included a brief description of the businesses and of what was included in the agreement, the identity of the parties to the agreement and how the agreement was reached, the fact that directives, instructions and other communications were carried out by the respondent for the purpose of giving effect to the agreement in Canada, the total sales of the respondent during the relevant period for the relevant product, and finally the fact that the respondent agreed that its admissions established all of the constituent elements of the specific offence under the Act.

[73] For greater certainty, the Tribunal is not suggesting that the level of disclosure regarding the six elements of subsection 90.1(1) must be any more extensive than that which is typically provided in agreed statements of facts that have been filed with the Federal Court in connection with sentencing proceedings under the Act.

b) Does the CA sufficiently identify the six elements of subsection 90.1(1)?

[74] The Tribunal has concluded that the CA does not sufficiently identify the six elements of subsection 90.1(1).

[75] The Tribunal acknowledges that it can *infer* from the CA that the Respondent Publishers are competitors and are parties to an alleged existing agreement that prevents or lessens competition substantially in the markets for E-books in Canada, as contemplated by subsection 90.1(1).

[76] However, explicit statements with respect to these elements are not made anywhere in the CA. Rather, the second recital to the CA simply states that "the Commissioner *alleges* that further to an agreement or arrangement, the Respondents have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act" (emphasis added).

[77] Even if the Tribunal were to give the Commissioner the benefit of the doubt with respect to the bare identification of some of the six elements in subsection 90.1(1), others are not even identified at all. For example, neither the statement quoted in the immediately preceding paragraph, nor any other provision in the CA, identifies the requirement that the impugned agreement or arrangement be existing or proposed, or the requirement that two or more parties to it be competitors. Indeed, even the requirement that the agreement or arrangement prevent or lessen competition, or be likely to have that effect, is simply addressed in the past tense, rather than in the present or future tense, as required by subsection 90.1(1).

[78] Moreover, as described at paragraphs 58-67 above, the bare listing of the six elements of subsection 90.1(1), as they are set forth in the Act, is not sufficient to clearly identify the elements of that provision, for the purposes of triggering the Tribunal's jurisdiction. The CA must describe *how* those elements are met. In this regard, the CA falls short once again. For example, it does not provide the Tribunal with a sufficient understanding of the subject matter of the agreement to satisfy itself that the prohibitions in the CA pertain to terms of the agreement, as contemplated by paragraph 90.1(1)(*a*). It also does not explicitly articulate how the elements mentioned in the immediately preceding paragraph above are met.

[79] Accordingly, for the reasons set forth above, the Tribunal concludes that the CA does not sufficiently identify the six elements of subsection 90.1(1) and that the test set forth at paragraph 4.ii.a) above is not met in this case.

(iii) Does the CA contain either (i) a statement to the effect that the Commissioner and the Respondent Publishers agree that each of the six elements of subsection 90.1(1) has been met, or (ii) a statement that the Commissioner has concluded that each of those elements has been met, together with a statement by the Respondent Publishers that they do not contest that conclusion?

[80] The Commissioner conceded in his written and oral submissions that the CA does not contain either of the two statements described in the heading immediately above, which constitute the second branch of the second condition identified in the *Reference Decision*. This was not contested by any of the Respondent Publishers.

[81] In brief, the CA does not state anywhere that the Commissioner and the Respondent Publishers agree that the latter are parties to an existing or proposed agreement or arrangement; that two or more of them are competitors (or that one or more other identified or unidentified parties to the agreement or arrangement are competitors); or that the agreement or arrangement prevents or lessens competition substantially in the markets for E-books in Canada, or is likely to do so. Alternatively, the CA does not state any conclusions that the Commissioner has reached with respect to these matters.

[82] The Tribunal acknowledges that paragraphs 4 and 5 of the CA make references to agreements between the Respondent Publishers and E-book retailers, in force at the date of registration of the CA. However, the language of those paragraphs may be read as pertaining to any such agreements that *may* exist, as opposed to disclosing that such agreements do in fact actually exist.

[83] The Tribunal also acknowledges that the terms defining each of the Respondent Publishers include their subsidiaries, successors and assigns "that are engaged in the business of publishing, Selling or distributing E-books in Canada." However, those words are qualified by the words "if any and wherever located."

[84] Therefore, the Tribunal concludes that the test set forth at paragraph 4.ii.b) above is not satisfied in this case, as the CA contains neither (i) a statement to the effect that the Commissioner and the Respondent Publishers agree that each of the six elements of subsection 90.1(1) has been met, nor (ii) a statement that the Commissioner has concluded that each of those elements has been met, together with a statement by the Respondent Publishers that they do not contest that conclusion.

(iv) Are any of the material terms of the CA unenforceable, on grounds of vagueness or otherwise?

[85] Kobo asserts that paragraph 5 of the CA, which it describes as a critical paragraph of the CA, is vague and unenforceable as drafted and does not address the concern that the Commissioner stated it was meant to address.

[86] Paragraph 5 of the CA states:

> 5. Notwithstanding paragraphs 2 and 4 of this Agreement, a 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 of registration of this Agreement, 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 one year, 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.

[87] As the Tribunal understands it, paragraph 5 provides a limited exception to the prohibitions in paragraph 2 and the notification requirements in subparagraph 4(d) of the CA. In essence, it allows a Respondent Publisher to restrict price discounting when it reaches the point that the aggregate amount of the discounts exceeds the total commissions paid by the Respondent Publisher to an E-book retailer over a period of at least one year. Put differently, paragraph 5 allows the Respondent Publishers to restrict discounting by E-book retailers when it reaches the point at which the latter are in essence selling the former's books at prices that do not cover the E-book retailers' net cost, as calculated over a period of at least one year. However, by the express terms of subparagraphs 5(a), (b) and (c), the Respondent Publishers are prohibited from restricting any other discounting activity by the E-book retailer that does not meet that strict test.

[88] Kobo asserts that the language of paragraph 5 is so vague that even the Commissioner has difficulty deciphering it. In this regard, Kobo notes that although the Commissioner stated in his Response to its Application that this paragraph sets out a "minimum discount," the Commissioner's representative stated in discoveries that paragraph 5 is actually supposed to set out a limit on the amount of discounting – in essence, a "maximum discount." That is to say, an E-book retailer can discount up to an aggregate amount equal to the total commissions the Respondent Publisher may have paid to the retailer, over a period of at least a year, in connection with the sale of the Respondent Publisher's E-books to consumers in Canada. Kobo adds that the words "at least one year" can be interpreted to enable a Respondent Publisher to fund an E-book retailer to engage in limitless discounting, and even to use commissions it receives to discount E-books below their net cost to the retailer.

[89] The Tribunal recognizes that the interpretations of paragraph 5 that have been adopted by the Commissioner, as described immediately above, are not as clear as they could have been. As the Tribunal understands the Commissioner's explanations, the formula in paragraph 5 of the CA establishes a minimum, or floor, below which the Respondent Publishers may not prevent E-book retailers from discounting; and this same floor is also a maximum, or ceiling, beyond which E-book retailers can be prevented from discounting.

[90] However, that is beside the point. As the Commissioner recognized during the hearing of this matter, the determination of whether paragraph 5 or any other provision in the CA is vague or unenforceable is for the Tribunal to make.

[91] In the Tribunal's view, paragraph 5 of the CA unambiguously establishes a formula pursuant to which the Respondent Publishers may restrict E-book retailers from engaging in a particular degree of discounting over time. That degree is an aggregate amount of discounting which exceeds the total commissions that a Respondent Publisher pays to the retailer during a defined period, the duration of which is at least one year, in connection with the sale of the Respondent Publisher's E-books to consumers in Canada.

[92] The Tribunal recognizes that this formula *may* allow E-book retailers who receive such commissions to sell, below their net cost, *some* of the E-books they obtain from a Respondent Publisher. However, the terms of paragraph 5 would permit a Respondent Publisher to prevent an E-book retailer from engaging in an aggregate degree of discounting, over a specified period of time that is at least one year in duration, that exceeds the total commissions being paid by the Respondent Publisher to an E-book retailer during that period.

[93] The Tribunal accepts the position of the Commissioner and the Respondent Publishers that paragraph 5 is permissive in nature. As discussed above, it allows a very limited exception to the prohibitions set forth elsewhere in the CA; and it expressly prohibits restrictions on discounting activity that does not meet this very limited exception. The enforcement in respect of discounting activity that meets the exception would be by the Respondent Publisher against the E-book retailer in question, presumably in a civil action for breach of contract.

[94] However, if a Respondent Publisher were to attempt to restrict an E-book retailer from engaging in any discounting activity that does not meet this very limited exception, this would contravene the terms of both subparagraph 5(a) and paragraph 2 of the CA. Among other things, paragraph 2 explicitly prohibits the Respondent Publishers from restricting, limiting or impeding "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," as those capitalized terms are defined in the CA. Such a contravention of the clear terms of paragraph 2 of the CA would be enforceable by the Commissioner, presumably after having received a complaint by an E-book retailer.

[95] If there were any doubt in that regard, paragraph 22 of the CA provides as follows:

> In the event of a dispute as to the interpretation or application of this Agreement, either the Commissioner or the Respondents may apply to the Tribunal for an order interpreting any of the provisions of the Agreement.

[96] With the foregoing in mind, the Tribunal is satisfied that the terms of paragraph 5 are not in fact vague or unenforceable, and that there is an effective mechanism in the CA, namely paragraph 22, for resolving any disputes that may arise between the Respondent Publishers and the Commissioner. If any E-book retailers or members of the general public find any of the terms of paragraph 5 or any other paragraph of the CA to be ambiguous, they can bring their concerns to either the Commissioner or a Respondent Publisher, who in turn may bring them to the Tribunal.

[97] The Tribunal notes that its conclusion that the terms of paragraph 5 are not vague or unenforceable appears to be supported by the experience in the U.S. In this regard, Simon & Schuster observed that paragraph 5 was based on paragraph VI.B of the final judgments issued by the United States District Court for the Southern District of New York against Hachette, HarperCollins, and Simon & Schuster in September 2012; and against Macmillan, in August 2013. Simon & Schuster added that no one has challenged those final judgments.

[98] Paragraph VI.B of those final judgments states as follows:

> Notwithstanding Sections V.A and V.B of this Final Judgment, a Settling Defendant may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of the Settling Defendant's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Settling Defendant's E-books) is restricted; provided that (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase the Settling Defendant's E-books by an aggregate amount equal to the total commissions the Settling Defendant pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of the Settling Defendant's E-books to consumers; (2) the Settling Defendant 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 to Purchase one or more E-books; and (3) 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.

[99] A comparison of paragraph 5 of the CA and paragraph VI.B of the U.S. final judgments reveals that their language is indeed highly similar, if not virtually identical, in respect of the language that Kobo has challenged. If, as Simon & Schuster represented, that paragraph has not

been challenged, that would lend further support to the Tribunal's conclusion that paragraph 5 of the CA is also not vague or unenforceable.

[100] Kobo complains that paragraph 5 of the CA is not enforceable by the Tribunal against retailers, including large chains who may engage in predatory pricing; and that under the CA, E-book retailers are not obligated to do anything.

[101] As the Tribunal understands the CA, it does not have as one of its principal objectives *constraining* the pricing behaviour of E-book retailers. On the contrary, the principal objective of the CA is to give E-book retailers much greater freedom to engage in discounting and other forms of price competition, than they otherwise would have had. This objective is pursued primarily by the prohibitions in paragraphs 2 and 3, the requirements in subparagraphs 4(c) and (d), and the prohibitions in subparagraphs 5(a) to (c). Those prohibitions and requirements are squarely within the purview of paragraphs 90.1(1)(*a*) and (*b*).

[102] Thus, even if one of the objectives of the CA had been to prevent predatory pricing by E-book retailers, the fact that the CA may not have been effective in achieving that objective would not provide a basis for the Tribunal to rescind or vary the CA. The grounds upon which the Tribunal may rescind or vary a consent agreement are limited to the three grounds identified at paragraph 4 above.

[103] In arriving at its conclusion on this point, the Tribunal is mindful that, during the oral discovery process, a representative of the Commissioner characterized the concern that paragraph 5 of the CA was meant to address as being to allow a Respondent Publisher to place restrictions on an e-book retailer's ability to "discount aggressively and potentially be engaged in predatory pricing." However, it bears emphasizing that the Tribunal does not consider the actual language of paragraph 5 to be vague, regardless of whether there may be some uncertainty with respect to its underlying objective.

[104] The Tribunal would simply add in passing that the fact that paragraph 5 implicitly allocates the enforcement against such conduct by an E-book retailer to the Respondent Publisher in question is also not a ground for rescinding or varying the CA. In addition, the Tribunal observes that E-book retailers are not respondents under the CA.

[105] Given the Tribunal's conclusion that the CA is not vague or unenforceable, it is not necessary to address the submission of the Respondent Publishers that paragraph 5 cannot be severed from the agreement without their consent and that the Commissioner's request in this regard should be denied. However, the Tribunal observes in passing that each of the Respondent Publishers has represented that it would not have entered into the CA without this exception to paragraph 2 and subparagraph 4(d) of the CA. The Tribunal accepts those representations. In such circumstances, had the Tribunal concluded that paragraph 5 was vague or unenforceable, the Tribunal would not have severed that provision over the objections of the Respondent Publishers.

[106] Subsection 106(1) of the Act gives the Tribunal the discretion to rescind or vary a consent agreement registered under section 105, on application by either the Commissioner or the person who consented to such agreement. The provision contemplates two possibilities. First, paragraph 106(1)(*a*) deals with situations where the Tribunal finds that the circumstances that led to the making of a consent agreement have changed and, in the circumstances that exist at the time an application is made, the agreement would not have been made or would have been ineffective in achieving its intended purpose. Second, paragraph 106(1)(*b*) covers situations where the Tribunal finds that the Commissioner and the person who consented to an initial consent agreement have now consented to an alternative agreement.

[107] In the Tribunal's view, paragraph 106(1)(*a*) is primarily directed towards the possibility of *rescinding* a consent agreement (as the initial agreement "would not have been made" or "would have been ineffective in achieving its intended purpose" in light of the change of circumstances), at the unilateral initiative of either the Commissioner or the person who consented to the initial agreement, if the applicant meets the conditions set out in that paragraph. With this in mind, the Tribunal typically would be reluctant to *vary* the terms of a consent agreement on a unilateral application by a party thereto in cases where it accepts that another party would not have entered into the agreement on the varied terms being proposed. The Tribunal says "typically" because variation of a consent agreement based on a unilateral application and without consent could for example be considered by the Tribunal in instances where a consent agreement requires divestitures covering multiple local markets or contains various discrete and severable obligations. In such cases, variation could be contemplated when a party claims that market conditions have changed in respect of one specific local market or one discrete obligation such that the agreement would not have been made or would have been ineffective in achieving its intended purpose in relation to that specific local market or discrete obligation.

[108] This view of subsection 106(1) is consistent with the purpose and intent of sections 105 and 106 of the Act dealing with consent agreements. The principles of modern statutory interpretation require that the words of a statute be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act and its object (Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983); *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10). Section 105 of the Act deals specifically with the registration of *consent* agreements, and has been added to offer an expeditious way to resolve, on consent, certain matters under Part VIII of the Act dealing with civil provisions. And section 106 relates directly to the potential rescission or variation of *consent* agreements concluded under this Part. The purpose of these two provisions is therefore to strictly deal with consent agreements (or orders made under Part VIII), and the consensual element goes to the very essence of the *agreements* covered in those two sections.

[109] In those circumstances, if there is no longer any consent, the more appropriate remedy, barring exceptional circumstances, would appear to be rescission. Of course, paragraph 106(1)(*b*) allows the Tribunal to vary a consent agreement, if it finds that both parties agree to the terms of an alternative consent agreement (in which case the consensual element of the agreement is evidently preserved).

[110] In any event, the Tribunal also notes that severance of paragraph 5 of the CA was not requested in either Kobo's pleadings or in the Commissioner's pleadings.

[111] In summary, the Tribunal concludes that the test set forth at paragraph 4.iii above (i.e., the third element in the *Reference Decision*) is satisfied in this case as the CA does not contain terms that are unenforceable or would lead to no enforceable obligation, for example, because they are too vague.

(v) Conclusions regarding the CA's alleged deficiencies

[112] For the reasons given in parts E(i) – (iv) above, the Tribunal has reached the following conclusions with respect to the alleged deficiencies in the CA:

i. The terms of the CA are within the scope or purview of the types of orders that may be made by the Tribunal, pursuant to paragraphs 90.1(1)(*a*) and (*b*) of the Act. In brief, the prohibition terms in the CA fall squarely within the purview of paragraph 90.1(1)(*a*) of the Act, while the remaining terms of the CA clearly fall within the broad scope of paragraph 90.1(1)(*b*), which explicitly permits the Commissioner and the Responding Publishers to agree to terms that require the latter to take any action whatsoever.

ii. The CA, including its recitals, does not sufficiently identify the six elements of subsection 90.1(1). Among other things, the CA does not provide the Tribunal with a sufficient understanding of the subject matter of the agreement to satisfy itself that the prohibitions in the CA pertain to terms of the agreement, as contemplated by paragraph 90.1(1)(*a*). It also does not sufficiently address whether the impugned agreement or arrangement is existing or proposed; whether two or more parties to that agreement or arrangement are competitors; or whether that agreement prevents or lessens, or is likely to prevent or lessen, competition substantially. In this latter regard, the CA simply refers to competition having been substantially prevented or lessened in the past.

iii. The terms of the CA are not vague or unenforceable.

(vi) Should the Tribunal exercise its jurisdiction to rescind the CA?

[113] Simon & Schuster submits that even if Kobo were to establish that the terms of the CA could not be the subject of an order of the Tribunal, the Tribunal has the discretion, but is not required, to grant the relief sought. The Tribunal agrees that such discretion is contemplated by subsection 106(2), which provides that the Tribunal "*may* grant [an application brought under that provision] if it finds that the [applicant] has established that the terms [in a challenged consent agreement] could not be the subject of an order of the Tribunal" (emphasis added).

[114] Simon & Schuster maintains that the Tribunal should exercise its discretion to refuse to grant the rescission relief sought by Kobo, on the basis that rescinding the CA would seriously undermine both the public interest in encouraging settlement, and the public interest in upholding agreements that were negotiated in good faith with regulators that act in the public interest. Simon & Schuster added that consent agreements must be presumed to be in the public interest.

[115] Simon & Schuster appears to recognize that these grounds for maintaining the CA would apply to any consent agreement challenged under subsection 106(2). They clearly cannot therefore be sufficient, *per se*, to justify the exercise of the Tribunal's discretion to refuse rescission relief sought under subsection 106(2).

[116] However, Simon & Schuster maintained that in the context of this particular case, the Tribunal should exercise its discretion to not grant the rescission remedy sought by Kobo. In this regard, Simon & Schuster relied upon the following facts: the negotiation of the CA followed an inquiry that was commenced in mid-2012; the Respondent Publishers, after thinking that they had achieved certainty by settling their dispute with the Commissioner, wound up having to engage in extensive, costly and burdensome litigation initiated by Kobo and then by the Commissioner (in the form of the reference proceeding described at paragraphs 22-23 above); the CA was modelled on the final judgments that were issued in the United States (as discussed at paragraphs 10 and 96-98 above); and there is a real prospect of further litigation initiated by Kobo if the CA is rescinded and the Respondent Publishers enter into another consent agreement with the Commissioner. When considered in this context, Simon & Schuster submitted that maintaining the CA in place would promote the public interest in maintaining the finality of the resolution of a long-standing and costly investigation and related proceedings.

[117] The Tribunal is sympathetic to Simon & Schuster's position. The Tribunal also recognizes that there are sound public interest considerations that favour the settlement of legal and regulatory disputes.

[118] However, there are also sound public interest considerations that can favour the setting aside of settlements. Those include the public interest in ensuring that consent agreements filed with the Tribunal are enforceable and sufficiently identify both the legal basis underpinning them and the basic facts pertaining to them (*Reference Decision* at para 93).

[119] On the particular facts of this case, the Tribunal considers that the CA falls so short of sufficiently identifying the legal basis underpinning the CA and sufficiently describing basic facts pertaining to the agreement alleged to contravene subsection 90.1(1), that it is fatally flawed.

[120] The CA's shortcomings are summarized at paragraph 111 above, and do not need to be repeated here.

[121] On that ground alone, the Tribunal considers that it would not be appropriate to exercise its discretion to refuse to rescind the CA, as requested by Kobo.

[122] In addition to the fact that the CA falls so short of providing the minimum amount of information as to be fatally flawed, there is a second, independent, reason why the Tribunal considers that it would not be appropriate to refuse to rescind the CA. In brief, this is that the Commissioner and the Three Respondent Publishers have consented to the rescission of the CA; and the Tribunal accepts the Commissioner's position that the public interest and the purposes of the Act would not be served if the CA were rescinded only in respect of the Three Respondent Publishers, and not in respect of Simon & Schuster.

[123] While the Tribunal is sympathetic to Simon & Schuster's concern about being exposed to additional legal costs if the CA is rescinded, the Tribunal observes that such costs may well be quite limited if another consent agreement, containing the basic information that is missing from the CA, is negotiated and filed. The Tribunal further observes that this missing basic information does not pertain to the prohibitions or the other operative terms in the CA.

[124] In summary, the Tribunal does not accept Simon & Schuster's position that the Tribunal should exercise its discretion to refuse Kobo's request that the CA be rescinded. For the reasons set forth above, the Tribunal instead concludes that it should exercise its discretion to rescind the CA.

(vii) If so, should the Tribunal rescind the CA *with prejudice* to the ability of the Commissioner and any of the Respondent Publishers to file another CA?

[125] Kobo submits that if the Tribunal grants its request to rescind the CA, the Tribunal should do so with prejudice to the ability of the Commissioner to enter into a new consent agreement with one or more of the Respondent Publishers regarding the same alleged conduct. Kobo advances this position for two reasons.

[126] First, Kobo submits that permitting the Commissioner to seek or consent to rescission would be contrary to the scheme of section 106 as a whole. In this regard, Kobo asserts that if the Commissioner's goal was variation, whether on consent or on a contested basis, the proper course of action for him to follow would have been to file an application for variation of the CA pursuant to subsection 106(1) of the Act. Kobo adds that permitting the Commissioner and some or all of the Respondent Publishers to file a new consent agreement would deny the Tribunal the supervisory role that Parliament passed it to play in the rescission/variation process.

[127] The Tribunal disagrees.

[128] With respect to the Tribunal's supervisory role, that role is being exercised in this very proceeding. The Tribunal will also be available to play a similar role in respect of any future consent agreement that may be negotiated and filed between the Commissioner and one or more of the Respondent Publishers.

[129] Regarding the Commissioner's objectives and the scheme of the Act, it is clear from the record that the Commissioner communicated his willingness to consent to *Kobo's request* that

the CA be rescinded *only after* the *Reference Decision* was issued and it became apparent that the CA did not comply with the requirement described at paragraph 4.ii.b) of this decision. Prior to that time, the Commissioner's objective was to maintain the CA in place.

[130] After the issuance of the *Reference Decision*, but before the issuance of this decision, the outcome of Kobo's application in this proceeding remained uncertain. In this context, the Tribunal considers that a legitimate option available to the Commissioner was to wait and see how the Tribunal disposed of the application in this proceeding, in the expectation that if the Tribunal granted *Kobo's request* that the CA be rescinded, it would be open to the Commissioner and some or all of the Respondent Publishers to negotiate and file another consent agreement with the Tribunal. The Tribunal disagrees with Kobo's position that the only option available to the Commissioner, if he wished to achieve a consent agreement that complies with the requirements set forth at paragraph 4.ii.b) of this decision, was to file for a variation of the CA pursuant to subsection 106(1), prior to knowing the outcome of this application.

[131] There is nothing in the scheme of section 106 to suggest that the Commissioner should be constrained to seeking rescission or variation under subsection 106(1), rather than waiting for an existing proceeding under subsection 106(2) to be completed, and then seeking to file a new consent agreement, if the first consent agreement is set aside under subsection 106(2).

[132] Indeed, the scheme of the Act as a whole supports the Commissioner's position on this point. This is because that scheme contemplates that anti-competitive conduct that is described in any of the provisions of Part VIII of the Act can be addressed either by way of contested proceedings or by way of a consent agreement. If the CA is rescinded with prejudice to the Commissioner's ability to file a new consent agreement with some or all of the Respondent Publishers, either the anti-competitive conduct that is alleged in the CA will have to be pursued by the Commissioner by way of contested proceedings, or it will remain unaddressed. The latter outcome would be clearly contrary to the purposes identified in section 1.1 of the Act, particularly the purpose of providing consumers with competitive prices and product choices. And depriving the Commissioner of the ability to resolve his dispute with the Respondent Publishers by way of a consent agreement would be inconsistent with both the scheme of Part VIII, which allows such disputes to be resolved *either* on consent or in contested proceedings, as well as with the broader and well established objective in resolving disputes by way of settlement, in the interest of the efficient administration of justice *(Kelvin Energy Ltd v Lee*, [1992] 3 SCR 235 at p. 259; *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paras 1 and 11).

[133] As it turns out, waiting for the outcome of this application proved to be wise, as the Commissioner now knows that there are more shortcomings associated with the CA than he initially believed, prior to receiving this decision. Had he simply sought to amend the CA, in an application under subsection 106(1), to include one of the alternative requirements set forth at paragraph 4.ii.b) of this decision, the CA would, in any event, have been subsequently rescinded by the Tribunal for the other reasons set forth in this decision.

[134] The Tribunal acknowledges that Justice Rennie observed in his Scheduling Order dated December 22, 2014, that if the Commissioner sought to rescind the CA without the agreement of all of the signatories to the agreement, he must do so within the statutory framework, including subsection 106(1). However, Justice Rennie did not thereby suggest that it would not be open to the Commissioner and the Respondents to negotiate and file a new consent agreement, if there was no longer any CA in place, as a result of the fact that the Tribunal had granted the rescission remedy sought by Kobo.

[135] Furthermore, as explained at paragraphs 104-108 above, the Tribunal would have been reluctant to vary the CA on a unilateral application by the Commissioner, over the specific objections of the Respondent Publishers which the Tribunal considers to be valid. Without the consent of the Respondent Publishers, the more appropriate "unilateral" avenue open to the Commissioner in the circumstances would have been to seek a rescission of the CA pursuant to subsection 106(1) if he felt that the circumstances had changed and that, in light of such change in circumstances, he would not have (or could not have) entered into the CA. In this case, the Commissioner ultimately agreed to consent to the rescission remedy sought by Kobo.

[136] Kobo's second reason for requesting that the CA be rescinded with prejudice to the Commissioner's ability to file another consent agreement with the Respondent Publishers, is that such a course of action would, in its submission, offend the doctrine of *res judicata*; and more particularly the doctrine of cause of action estoppel.

[137] *Res judicata* encompasses two forms of estoppel, cause of action estoppel and issue estoppel, each of which is based on the twin principles that there should be finality to litigation and that a party should only be vexed once in respect of the same cause of action (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 18; *Angle v MNR*, [1975] 2 SCR 248).

[138] Cause of action estoppel prevents the relitigation of the same cause of action between the same parties (*Erdos v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 419 at para 15).

[139] The relitigation about which Kobo is concerned appears to be the *potential* litigation that it *may* initiate in respect of any revised consent agreement that the Commissioner and one or more of the Respondent Publishers *may* negotiate and file with the Tribunal. Kobo is concerned that because such a revised consent agreement may be filed for immediate registration pursuant to subsection 105(3), it would not have any opportunity to bring an estoppel motion before the consent agreement would obtain a status akin to a court order. For this reason, it maintains that a prospective order that would prevent the registration of a second consent agreement is necessary and appropriate.

[140] In seeking such a prospective order, Kobo relies on the fact that Donald J. Lange's treatise, *The Doctrine of Res Judicata in Canada*, 4th ed (Markham: LexisNexis Canada Inc, 2015) at p. 138, notes that cause of action estoppel has been considered prospectively. However, what Kobo failed to also note is that, in the very next sentence of the treatise, it is stated that "a court should not rule prospectively in respect of issues and evidence of which it is not seized."

As the Commissioner correctly points out, the Tribunal is not yet seized of any issues or evidence in respect of a second consent agreement, which remains speculative.

[141] Moreover, the two authorities cited in the above-noted treatise do not support the prospective application of cause of action estoppel in this case. The first of those authorities is *Newcastle (Town) v Carter* (1985), 10 Admin LR 41 at pp. 54-58 (NBQB). There, the complainant in a labour dispute had already initiated the subsequent litigation, by filing a complaint with the provincial Industrial Labour Relations Board (the **"Board"**), seeking some of the relief that had already been the subject of proceedings before a municipal police commission and an appeal to the Attorney General. Given the "exceptional circumstances of the case," the Court prospectively precluded the Board from awarding the remedy that had been rejected in the prior proceedings. That case is distinguishable from the case currently before the Tribunal, as the Commissioner has not filed any revised consent agreement, and there do not appear to be any analogous "exceptional circumstances."

[142] The second authority cited in the above-mentioned treatise briefly considered and declined to apply cause of action estoppel prospectively (*Wassman Estate v Gabriola Wildwood Estates Ltd*, 48 DLR (3d) 759 (BCSC) at pp. 765-766).

[143] In the absence of any other authority to support Kobo's extraordinary request that the Tribunal apply the doctrine of cause of issue estoppel prospectively, the Tribunal declines to do so. In brief, it is only with the issuance of these reasons that there will be a final determination on the issues raised by Kobo in the first proceeding (namely the current subsection 106(2) proceeding). There is currently no second proceeding involving the same parties, and the prospect of subsequent litigation remains speculative at this stage. It would only arise if the CA is rescinded, a new consent agreement is concluded by the Commissioner and some or all of the Respondent Publishers, and a new challenge is filed by Kobo against this alternative consent agreement.

[144] Cause of action estoppel applies in exceptional circumstances where defences advanced in a second proceeding might or ought to have been raised by a defendant in a prior proceeding but were not. This is not the case here. The Commissioner or the Tribunal do not even know the contents of what would be a second proceeding or the factual background underlying a potential new consent agreement between the Commissioner and some or all of the Respondent Publishers. Moreover, it is reasonable to expect that, if a new consent agreement is concluded between the Commissioner and the Respondent Publishers, there would be new facts that could not have been raised in the current proceeding. There is no evidence on the record of any alternate agreement between the Commissioner and the Respondent Publishers which could have formed the basis of an application to vary under paragraph 106(1)(*b*) of the Act.

[145] In any event, the Tribunal does not wish to preclude the Commissioner and the Respondent Publishers from attempting to negotiate another consent agreement in accordance with these reasons. The Tribunal considers that such a result would be particularly unfair, as the Commissioner and the Respondent Publishers could not have known when they negotiated and filed the CA that the CA would be deficient for the grounds set forth in these reasons. The

Tribunal considers that the interests of the efficient administration of justice weigh strongly in favour of preserving the opportunity for the Commissioner and the Respondent Publishers to negotiate and file a second consent agreement that complies with these reasons.

F. CONCLUSION

[146] For the reasons set forth in part E(i) – (iv) of these reasons, the Tribunal concludes the following with respect to the alleged deficiencies in the CA:

i. The terms of the CA are within the scope or purview of the types of orders that may be made by the Tribunal, pursuant to paragraphs 90.1(1)(*a*) and (*b*) of the Act. In brief, the prohibition terms in the CA fall squarely within the purview of paragraph 90.1(1)(*a*) of the Act, while the remaining terms of the CA clearly fall within the broad scope of paragraph 90.1(1)(*b*), which explicitly permits the Commissioner and the Responding Publishers to agree to terms that require the latter to take any action whatsoever.

ii. The CA, including its recitals, does not sufficiently identify the six elements of subsection 90.1(1). Among other things, the CA does not provide the Tribunal with a sufficient understanding of the subject matter of the agreement to satisfy itself that the prohibitions in the CA pertain to terms of the agreement, as contemplated by paragraph 90.1(1)(*a*). It also does not sufficiently address whether the impugned agreement or arrangement is existing or proposed; whether two or more parties to that agreement or arrangement are competitors; or whether that agreement prevents or lessens, or is likely to prevent or lessen, competition substantially. In this latter regard, the CA simply refers to competition having been substantially prevented or lessened in the past.

iii. The terms of the CA are not vague or unenforceable.

[147] Given these conclusions, the Tribunal considers the CA to be so deficient as to warrant the exercise of its discretion to rescind the CA.

[148] Accordingly, the Tribunal will partially grant Kobo's Application. For the reasons given in part E(vii) of these reasons, the Tribunal will rescind the CA, but without prejudice to the Commissioner and one or more of the Respondent Publishers negotiating and filing a revised consent agreement in accordance with these reasons.

FOR THE ABOVE REASONS, THE TRIBUNAL THEREFORE ORDERS THAT:

[149] Kobo's Application is granted in part.

[150] The CA that was reached between the Commissioner and the Respondent Publishers is rescinded, with prejudice to the Commissioner entering into a new consent agreement with any of those Respondent Publishers on the basis of *allegations* that are the same or substantially the same as the allegations that form the basis of the CA, but without prejudice to the Commissioner entering into a new consent agreement with the Respondent Publishers based on *conclusions* he may reach regarding the six elements of the reviewable conduct under subsection 90.1(1) of the Act, in accordance with these reasons.

[151] Given the split result, there is no award of costs.

DATED at Ottawa, this 10th day of June 2016.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Chairperson)

(s) Paul Crampton C.J.

(s) Dr. Donald McFetridge

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