



Reference: *Rakuten Kobo Inc. v. The Commissioner of Competition*, 2016 Comp. Trib. 2

File No.: CT-2014-02

Registry Document No.: 0186

IN THE MATTER OF the *Competition Act*, R.S.C., 1985, c. C 34 as amended;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Rakuten Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and 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. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 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)



Decided on the basis of the written record.

Before Judicial Member: Gascon J. (Chairperson)

Date of Order: February 10, 2016

SCHEDULING ORDER

[1] **FURTHER TO** the application brought in February 2014 by Rakuten Kobo Inc. (“Kobo”) under subsection 106(2) of the *Competition Act*, RSC 1985, c C-34 (the “Act”) to rescind or vary a consent agreement registered February 7, 2014 (the “Consent Agreement”) between the Commissioner of Competition (the “Commissioner”) and 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. (collectively, the “Settling Publishers”);

[2] **AND FURTHER TO** the order issued by the Tribunal on November 5, 2015 dismissing Kobo’s motion for a continuation of the suspension of its section 106(2) application (the “Application”);

[3] **AND FURTHER TO** the order issued by the Tribunal on November 23, 2015 scheduling the initial steps for the disposition of Kobo’s Application;

[4] **AND FURTHER TO** the amended Notice of Application and Reply filed by Kobo, to the Responses filed by the Commissioner and Simon & Schuster Canada (“Simon & Schuster”) and to the letters sent by counsel for the other Settling Publishers in December 2015 and January 2016;

[5] **AND FURTHER TO** the case management conference of January 13, 2016, and to the Tribunal’s directions provided at such conference;

[6] **AND FURTHER TO** the decision of the Supreme Court of Canada issued on January 14, 2016 dismissing Kobo’s application for leave to appeal the decision of the Federal Court of Appeal upholding the Tribunal’s decision issued in September 2014 on the reference brought by the Commissioner (the “Reference Decision”);

[7] **AND FURTHER TO** the correspondence received from counsel for Kobo, for the Commissioner and for the Settling Publisher Simon & Schuster on January 26, 2016 setting out their respective positions with respect to the schedule for the disposition of Kobo’s Application and indicating that they have been unable to agree on a timetable;

[8] **AND FURTHER TO** the Tribunal’s direction of February 2, 2016 and the written representations received from Kobo on February 5, 2016 and from the Commissioner and Simon & Schuster on February 9, 2016;

[9] **AND FURTHER TO** subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), which provides that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit;

[10] **AND WHEREAS**, following the Reference Decision and its amended Notice of Application, Kobo is now seeking the rescission of the Consent Agreement on a “with prejudice” basis;

[11] **AND WHEREAS** the Commissioner has indicated that, in light of the Reference Decision and the requirements to be met by the Consent Agreement, he is ready to consent to the

remedy initially sought by Kobo in its Application, namely the rescission of the Consent Agreement on a “without prejudice” basis;

[12] **AND WHEREAS** the Settling Publishers other than Simon & Schuster have also indicated that they do not oppose Kobo’s Application as far as it relates to a rescission of the Consent Agreement on a “without prejudice” basis;

[13] **AND WHEREAS** Simon & Schuster does not agree to the rescission sought by Kobo and argues that the Tribunal should exercise its discretion not to rescind the Consent Agreement, whether or not the agreement meets the requirements of the Reference Decision;

[14] **AND WHEREAS** Kobo has indicated, in its January 18 and 26, 2016 letters, that it requires discovery only of the Commissioner and only with respect to three topics, namely the nature of the agreement or arrangement alleged by the Commissioner in the Consent Agreement, the intended purpose, effect and operation of paragraph 5 of the Consent Agreement, and the intention of the Commissioner to enter into a materially identical Consent Agreement following rescission;

[15] **AND WHEREAS** the Commissioner and the Settling Publishers have indicated that they do not intend to conduct any discovery of Kobo;

[16] **AND WHEREAS** none of the parties has filed a motion for the summary disposition of Kobo’s Application;

[17] **AND WHEREAS** Kobo’s Application continues to be a contested proceeding and the *Competition Tribunal Rules*, SOR/2008-141 grant certain procedural rights to Kobo and to all parties to this Application;

[18] **AND WHEREAS** the Tribunal is satisfied that the first two topics of discovery identified by Kobo in its January 18 and 26, 2016 letters refer to factual issues which are relevant to the requirements set out in the Reference Decision, to the question of whether the Consent Agreement should be rescinded or not, on a with or without prejudice basis, and to the exercise of the Tribunal’s discretion in that respect;

[19] **AND WHEREAS** the Tribunal concludes that, in the context of the Reference Decision, it would be improper to grant Kobo’s request to conduct discovery in respect of the Commissioner’s future intentions to enter into a materially identical Consent Agreement following rescission as it is speculative and not relevant to the issues to be determined by the Tribunal in this Application;

[20] **AND WHEREAS** the Tribunal is of the view that the issues to be determined in this Application can be dealt with in an expeditious manner and only require a short hearing;

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

[21] The schedule with respect to Kobo's Application shall be as follows:

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|----------------------------------|---|
| February 16, 2016 | Deadline for the filing of motions for leave to intervene |
| February 19, 2016 | Deadline for the service and filing of any responses to the motions for leave to intervene filed |
| February 26, 2016 | Service of affidavits of documents and delivery of documents by the Commissioner and, if any, by other parties |
| February 26, 2016 | Deadline for the service and filing of any replies of parties seeking leave to intervene |
| Week of February 29, 2016 | Hearing of motions for leave to intervene, if any |
| Week of March 7, 2016 | Examination for discovery of the Commissioner's representative, according to a schedule to be determined between counsel |
| March 16, 2016 | Deadline for fulfilling answers to discovery undertakings |
| March 30, 2016 | Kobo to serve documents relied upon, witness statements and legal representations |
| April 8, 2016 | Commissioner and the Settling Publishers to serve documents relied upon, witness statements and legal representations |
| April 15, 2016 | Kobo to serve any reply documents, witness statements and legal representations |
| Between April 21 and May 7, 2016 | Hearing of Application, for a period of two days, on dates to be determined further to the Direction issued this day by the Tribunal; |

[22] The affidavits of documents and discovery shall be limited to the first two topics of discovery identified by Kobo in its January 18 and 26, 2016 letters, namely the nature of the agreement or arrangement alleged by the Commissioner in the Consent Agreement, and the intended purpose, effect and operation of paragraph 5 of the Consent Agreement;

[23] The legal representations of the parties shall notably address why, in light of the Reference Decision, the Consent Agreement should or should not be rescinded and whether the Consent Agreement should be rescinded on a with or without prejudice basis;

[24] Should any issue arise from the affidavits of documents and/or productions or from discovery and answers to undertakings, the Tribunal shall make itself available to promptly deal with such issues and, if necessary, shall determine a date for the filing and hearing of motions after consultation with the parties.

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

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL:

For the applicant:

Rakuten Kobo Inc.

Nikiforos Iatrou
Bronwyn Roe

For the respondents:

Commissioner of Competition

Jonathan Chaplan
John Syme
Esther Rossman

Hachette Book Group Canada Ltd.,
Hachette Book Group, Inc.,
Hachette Digital, Inc.

Linda Plumpton
James Gotowiec

HarperCollins Canada Limited

Katherine L. Kay
Danielle Royal

Holtzbrinck Publishers, LLC

Randal Hughes
Emrys Davis

Simon & Schuster Canada, a division of CBS Canada Holdings Co.

Mahmud Jamal
Peter Franklyn