



**Date:** March 7, 2016

**Subject:** *CT-2014-002 - Rakuten Kobo Inc. v. 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.*

**Direction to Counsel (from Mr. Justice Gascon, Chairperson)**

Further to the request made by Rakuten Kobo Inc. (“Kobo”) in which it seeks the Tribunal’s direction regarding the affidavit of documents produced by the Commissioner of Competition (the “Commissioner”) and the parties’ respective positions, as set out in the Commissioner’s correspondence of March 1, 2016, and at the case conference of March 3, 2016, the Tribunal issues the following direction:

- (1) Kobo, in its request, seeks a more detailed Schedule B to the Commissioner’s Affidavit of Documents and, more particularly, meaningful descriptions of the documents over which the Commissioner has claimed public interest privilege, in accordance with the Tribunal’s decision in *The Commissioner of Competition v. The Toronto Real Estate Board*, 2012 Comp. Trib. 8. The Commissioner opposes this request on the basis that public interest privilege is a class privilege.

I agree with the Commissioner that public interest privilege is a class privilege protecting not only the information provided but also the identity of the third party providing such information. However, having reviewed the decisions relied upon by counsel for the Commissioner as set out in their e-mail of March 3, 2016, I find no basis for concluding that any of these decisions stands for the proposition that documents over which public interest privilege is claimed do not have to be meaningfully described in an affidavit of documents. I also find no basis for concluding that the Tribunal decision in the *Toronto Real Estate Board* case is incorrectly decided. I further add that Rule 60(2) of the *Competition Tribunal Rules*, SOR/2008-141, which prescribes that an affidavit of documents shall include “a) a list identifying the documents(…)” applies to documents over which privilege is claimed.

The Commissioner should therefore provide an amended or supplementary Affidavit of Documents which is to contain meaningful descriptions of the documents over which public interest privilege is solely claimed, in accordance with the Tribunal’s decision in the *Toronto Real Estate Board* case, and which are currently described as “document[s]”. More specifically, the amended or supplementary Affidavit of Documents should include a description of the type of document being listed.

- (2) At the case management conference of March 3, 2016, counsel for the Commissioner acknowledged that 60 documents in Schedule B to the Commissioner's Affidavit of Documents, over which public interest privilege is claimed, should not have been identified as internal Competition Bureau documents. The Commissioner's amended or supplementary Affidavit of Documents should therefore include the appropriate changes in this regard.
- (3) At the case management conference of March 3, 2016, counsel for Kobo also asserted that Schedule B to the Commissioner's Affidavit of Documents should identify the source of a third party document over which public interest privilege is solely claimed, in instances where the third party is a party to this Competition Tribunal proceeding. In that regard, Kobo pointed out that the Commissioner had disclosed the identity of a third party in Schedule B where that third party was Kobo. Counsel for the Commissioner opposed this request and asserted that Kobo's position in this application is different from that of the other respondents as it is the applicant. Further, disclosing the identity of third parties would be contrary to public interest privilege given the Commissioner's ongoing inquiry.

The other respondents, who would be potentially impacted by Kobo's request, made no submissions on this point.

Counsel for the Commissioner has not convinced the Tribunal that there was a principled basis for distinguishing Kobo from the other respondents with respect to this matter. All are parties to this proceeding. I therefore conclude that Schedule B should disclose the name of a third party, who is the source of a document over which public interest privilege is solely claimed, if that third party is a party to this Competition Tribunal proceeding.

- (4) The parties are to agree upon a date by which the Commissioner is to provide his amended or supplementary Affidavit of Documents and advise the Tribunal of this date by end of day, Monday, March 7, 2016. If no agreement can be reached, the Tribunal shall fix the date. The Tribunal is confident, however, that the parties can reach an agreement.

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