



Reference: *Rakuten Kobo Inc. v. The Commissioner of Competition*, 2016 Comp. Trib. 3

File No.: CT-2014-02

Registry Document No.: 0194

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: March 2, 2016

**ORDER ON THE COMMISSIONER OF COMPETITION'S MOTION FOR AN
AFFIDAVIT OF DOCUMENTS**

[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 scheduling order issued by the Tribunal on February 10, 2016 (the “Scheduling Order”) for the disposition of Kobo’s section 106(2) application;

[3] **AND FURTHER TO** a motion brought by the Commissioner on March 1, 2016 pursuant to Rule 81 of the *Competition Tribunal Rules*, SOR/2008-141 for an order requiring Kobo to provide the Commissioner and other parties with an affidavit of documents;

[4] **AND FURTHER TO** the response filed by counsel for Kobo on March 2, 2016 as well as the letter from counsel for Kobo dated February 29, 2016;

[5] **AND WHEREAS** the Scheduling Order provides that the “[s]ervice of affidavits of documents and delivery of documents by the Commissioner and, if any, by other parties” was to be completed on February 26, 2016;

[6] **AND WHEREAS** the Scheduling Order further provides that “[t]he 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”;

[7] **AND WHEREAS** the Commissioner and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (“Simon & Schuster”) both served each other and Kobo with their respective affidavits of documents on February 26, 2016 but that Kobo did not serve its affidavit of documents;

[8] **AND WHEREAS** Rule 60 of the *Competition Tribunal Rules* provides that the applicant and each respondent who has filed a response shall serve an affidavit of documents on each other party;

[9] **AND ALTHOUGH** the Commissioner and the Settling Publishers have indicated that they did not intend to conduct any discovery of Kobo, this does not mean that Kobo is exempted from serving an affidavit of documents in accordance with the terms of the Scheduling Order;

[10] **AND WHEREAS** nothing in the Scheduling Order indicates that the requirement to serve affidavits of documents limited to the two topics of discovery identified in the order does not apply to Kobo;

[11] **AND WHEREAS**, in support of its position that it does not need to produce an affidavit of documents, Kobo indicates that it only intends to use materials produced by the Commissioner, that the Commissioner has had documents produced by Kobo pursuant to an

order issued under section 11 of the Act, and that any documents that would have been included in Kobo's affidavit of documents would have been caught in the section 11 response;

[12] **AND WHEREAS** these arguments are not sufficient to provide a basis for exempting Kobo from producing an affidavit of documents limited to the two topics of discovery identified in the Scheduling Order, as required by the terms of the order;

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

[13] Kobo shall serve on the Commissioner and the other parties, on or before Friday, March 4, 2016, its affidavit of documents in accordance with the terms of the Scheduling Order.

DATED at Ottawa, this 2nd day of March 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
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