

COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
January 8, 2016 CT-2014-002	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 164

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

REPLY

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I. REPLY TO THE COMMISSIONER OF COMPETITION

1. Except as otherwise admitted herein, Kobo denies all of the Commissioner's allegations as set out in the Commissioner's Response.

A. Kobo's Amendments Are Proper and Consistent with the Federal Courts Rules

2. The Commissioner takes issue with Kobo's Amended Application, stating at paragraph 19 of his Response that the "with prejudice" relief Kobo seeks is not a direct result of the Reference Decision, and could have been sought in Kobo's original Application. The Commissioner states that seeking that amendment now is improper and, at paragraph 22, that Kobo's request for "with prejudice" relief is an attempt to curtail the Commissioner's enforcement powers.
3. First, Rule 200 of the *Federal Courts Rules* provides that a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto. Kobo's amendments came before any Respondents had filed Responses. In filing its Amended Application, Kobo was not limited to amendments solely arising directly from the Reference Decision.
4. Second, it was only after the Commissioner expressed his intention to consent to the rescission of the Consent Agreement in the course of litigation and the case management conferences following the Reference Decision that Kobo had reason to be concerned that the Commissioner intends, in the event the Consent Agreement is rescinded, to enter into a materially identical consent agreement with the Consenting Publishers which will have the same detrimental effect on Kobo.
5. Third, Kobo denies that Kobo's request for "with prejudice" relief is an attempt to curtail the Commissioner's enforcement powers. It is intended to prevent a potentially abusive outcome whereby the Commissioner could agree to rescission and thereby curtail the Tribunal's ability to evaluate the propriety of the Consent Agreement, and then enter into a materially identical agreement that would force Kobo to commence a fresh s. 106(2) application, wasting valuable Tribunal resources and imposing unnecessary costs on Kobo and the Respondents. If the Commissioner wishes to have the Consent Agreement rescinded (which Kobo welcomes), he should be held to that election and not

be permitted to start this entire matter over again. He should not purport to consent one day, only to restart this dispute the next day.

B. Kobo's Amended Application Addresses the Reference Decision

6. The Commissioner states at paragraphs 27-40 that Kobo's Amended Application fails to take into account the parameters established by the Reference Decision and that some of the grounds pleaded go beyond what is contemplated by the Reference Decision.

7. Kobo has sought leave of the Supreme Court of Canada to appeal the Reference Decision and the Federal Court of Appeal's upholding of the Reference Decision. Given that the matter is currently under consideration, it is proper for Kobo to include the grounds which it believes to be valid. As such, Kobo did not delete any of the grounds from its original application.

(i) *The terms of the Consent Agreement are not within the scope of the type of order(s) that the Tribunal is permitted to issue in respect of section 90.1*

8. The Commissioner states at paragraph 33 that Kobo's Application does not allege that the Consent Agreement includes any terms that are not "of a type" that could have been included in an order under s. 90.1.

9. In fact, Kobo alleges in its Application at paragraph 36(d) that "The Consent Agreement is not based on terms that could be the subject of an order of the Tribunal, as the Tribunal would lack, under s. 90.1(1)(a), remedial jurisdiction to make the prohibition orders contained in paragraphs 2 and 3 of the Consent Agreement". Kobo's Application proceeds to allege that, because of the Commissioner's failure to describe the nature of the agreement or arrangement in the Consent Agreement, "there is no method by which the Tribunal can be satisfied that the prohibition orders set out in paragraphs 2 and 3 of the Consent Agreement seek to prohibit activity 'under the agreement or arrangement' as is required under s. 90.1(1)(a)." Kobo elaborates on this point in paragraphs 53-57 of its Application.

10. The Commissioner is therefore wrong to suggest that Kobo has not pleaded that the Consent Agreement includes terms that are not of a type that could have been included in an order under s. 90.1.

(ii) The Consent Agreement does not identify each of the substantive elements of section 90.1, nor does it contain an explicit agreement between the Commissioner and the Respondents that each of those elements has been met or a statement that the Commissioner has concluded that each of those elements has been met, together with a statement by the Respondents that they do not contest that conclusion

11. The Commissioner states at paragraph 38 that Kobo's Amended Application does not allege that the Consent Agreement fails to include either (i) an explicit agreement between the Commissioner and the Consenting Publishers that each of the s. 90.1 elements has been met, or (ii) a statement that the Commissioner has concluded that each of the s. 90.1 elements has been met, together with a statement by the Consenting Publishers that they do not contest that conclusion.
12. Contrary to the Commissioner's assertions, Kobo alleges at paragraph 26 that "the Commissioner alleges, but the Consenting Publishers do not accept or admit, that ... [t]here was an agreement or arrangement." It is evident from this pleading that the Consent Agreement does not include a statement that the Commissioner has "concluded" that each of the s. 90.1 elements has been met, nor an agreement by the Consenting Publishers that each of the s. 90.1 elements has been met.
13. The Commissioner is also wrong to say, as he does at paragraph 37, that the Consent Agreement's recitals fulfill the Reference Decision's requirements with regard to identifying the substantive elements of section 90.1.
14. The Reference Decision requires that the Consent Agreement contain a degree of specificity, which standard it fails to meet, including information regarding the basic nature of the agreement and the identity of the parties thereto. If the public interest is to be protected, the Tribunal must have the ability:

[91] ...to satisfy itself, through a reading of the consent agreement, including its recitals, that the terms of the consent agreement could be the subject of an order of the Tribunal against the person(s) referred to in subsection 105(1), and as required by subsection 105(2).

[92] The Tribunal can satisfy itself in this regard relatively expeditiously by determining two things: First, that the elements required to be established before it has the jurisdiction to register the agreement and to issue an order against the person(s) who signed the consent agreement have been clearly identified in that agreement, or its recitals. Second, the consent agreement contains either (i) an explicit agreement between the Commissioner and the person(s) referred to in subsection 105(1) 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 above-mentioned person(s) that they do not contest that conclusion.

[93] The foregoing would not only achieve the desirable outcome described immediately above. It would also achieve the important goal of ensuring that the public is aware of the matters described in the immediately preceding paragraph above. In my view, an interpretation of subsection 106(2) that would permit these matters to be withheld from the public would potentially undermine public confidence in the administration and enforcement of the Act.

[94] The interpretation described above is also responsive to Kobo's position that if the Tribunal's jurisdiction under subsection 106(2) is as narrow as suggested by the Commissioner, some consent agreements would effectively be subject to no review. ...

... [96] ... I agree with Kobo that the interpretation adopted by the Commissioner would potentially frustrate the Tribunal's ability to determine whether terms of a consent agreement in fact prohibit a person "from doing anything under the agreement or arrangement", as required by paragraph 90.1(1)(a). This is because the Tribunal would not have any jurisdiction to review the basic nature of that agreement, including even the identity of the parties thereto. For greater certainty, the Commissioner's position, which I reject, is that this type of information does not have to be disclosed to the Tribunal. [Emphasis in paragraph 91 in original; emphasis in paras. 92, 93, 96 added]

15. The Consent Agreement as drafted does not provide the detail required by the Reference Decision. As Kobo pleaded in its Amended Application at paragraph 48, the Consent Agreement does not identify the parties to the alleged agreement or the basic nature of the agreement (i.e., what the parties are said to have agreed to, when they agreed to it, when the agreement was to be operative, etc.). The Tribunal has held that, in order to preserve the public's confidence, it has the jurisdiction to review these basic elements, which are absent from the Consent Agreement.

(iii) The terms of the consent agreement are vague and unenforceable

16. The Commissioner has pleaded that, contrary to Kobo's assertions, Paragraph 5 of the Consent Agreement "is not vague or ambiguous." The Commissioner pleads, at paragraph 43:

... Paragraph 5 of the Consent Agreement establishes a minimum discount and a process by which to calculate the value of that discount. The exact dollar figure, or the exact discounting percentage, is a matter for commercial negotiation between an e-book publisher and an e-book retailer. However, the terms arrived at between those parties will be ascertainable, as will the fact of whether or not those terms, as

operationalized, are in conformity with the terms of the Consent Agreement. ...

17. Kobo disagrees. If the goal of the Consent Agreement is to establish a minimum discount that must be applied, the Consent Agreement does not achieve that end. Rather, it appears to create a potentially unlimited discount pool (the Agreed Funds) without a requirement to discount at all. Further, it lacks any mechanism for either the Commissioner or the E-book Publishers to monitor or receive reports about discounting to ensure that discounting is not being used by retailers to engage in predatory pricing. There is effectively no way for the Commissioner or the Tribunal to know whether retailers are discounting within the parameters contemplated by the Consent Agreement.
18. Conversely, if the purpose of the Agreed Funds is to create a maximum discount pool like that contemplated by the US Settlement Agreements (whereby titles can be discounted but not in a way that leads to predatory pricing), the remedy again is vague and unenforceable, as it places no cap on the discount pool nor any mechanism to evaluate how retailers are discounting.
19. For these reasons, and for the reasons articulated in Kobo's Amended Application, Paragraph 5 of the Consent Agreement is vague and unenforceable.

II. REPLY TO SIMON & SCHUSTER¹

20. Except as otherwise admitted herein, Kobo denies all of the allegations as set out in Simon & Schuster's Response.
21. Kobo agrees that the Tribunal's decision to grant relief under s. 106(2) is discretionary. In this case, the Tribunal should exercise its discretion to rescind the Consent Agreement.

¹ Respondents Hachette, HarperCollins, and Macmillan have not filed responses. Hachette and HarperCollins have indicated that they reserve their rights to reconsider and supplement their positions following review of the positions of other parties to Kobo's Application. Kobo similarly reserves its right to reply to any further responses filed by the Respondents.

22. Where the Tribunal is satisfied that a consent agreement fails to meet the minimum criteria set by the Reference Decision, but is then asked by a party to exercise its discretion to nonetheless uphold the deficient consent agreement, the Tribunal should only exercise that discretion after weighing all relevant factors, including the nature and the effect of the reviewable trade practice in question and the harm of the reviewable trade practice to innocent third parties like Kobo. It would be extraordinary for the Tribunal to find that the Consent Agreement is invalid, but then to nonetheless enforce it without considering any facts surrounding the Consent Agreement or the alleged reviewable trade practices.
23. The Tribunal should not exercise its discretion in favour of upholding the Consent Agreement, in light of (i) the fact that the Consent Agreement does not meet the requirements set out by the Reference Decision; (ii) the harmful effects of the Consent Agreement on Kobo, an innocent third party; and (iii) the Commissioner's consent and other Consenting Publishers' lack of opposition to having the Consent Agreement rescinded.

DATED at Toronto this 8th day of January, 2016.



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REPLY

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