

PUBLIC VERSION

File No. CT-2014-002

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 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	
November 30, 2015 CT-2014-002	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 155

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

AMENDED NOTICE OF APPLICATION

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TAKE NOTICE THAT the Applicant will make an application to the Competition Tribunal (“**Tribunal**”) pursuant to Section 106(2) of the *Competition Act* (the “**Act**”) for:

- (a) an Order rescinding 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 pursuant to Section 105 of the Act on February 7, 2014 (the “**Consent Agreement**”) with prejudice to the Commissioner entering into a consent agreement with any of the Consenting Publishers on the basis of allegations that are the same or substantially the same as the allegations that form the basis of the Consent Agreement;
- (b) in the alternative, an Order varying the terms of the Consent Agreement to remove all obligations on the Consenting Publishers other than obligations relating to Price MFN (as defined in the Consent Agreement);
- (c) an Order staying the registration of the Consent Agreement pending the determination of the within Application;
- (d) an Order expediting the hearing of the within Application;
- (e) an Order for costs, if the within Application is opposed; and
- (f) such further and other orders as the Applicant may request and the Tribunal deems just.

AND TAKE NOTICE THAT the Applicant will rely on the grounds set out in the Statement of Grounds and Material Facts attached as Schedule “A” hereto and such further and other grounds and material facts as counsel may advise and the Tribunal may permit.

AND TAKE NOTICE THAT if you do not file a Response to the within Application with the Registrar of the Tribunal within 30 days of the date of service hereof, the Tribunal may, without further notice to you, make such orders as it deems appropriate.

AND TAKE NOTICE THAT the Applicant proposes that the within Application be heard in the English language at Ottawa, Ontario.

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SCHEDULE “A”

STATEMENT OF GROUNDS AND MATERIAL FACTS

PART 1 - THE APPLICATION IN A NUTSHELL

1. In February 2014, the Commissioner registered a Consent Agreement that directly affects Kobo and harms Kobo’s ability to compete in the E-book market in Canada. The effect of the Consent Agreement is to swiftly and radically alter Kobo’s contractual relationships with four key publishers – Simon & Schuster, Macmillan, HarperCollins, and Hachette.
2. The Commissioner, relying on s. 90.1 of the Act, gave these publishers forty days to terminate or amend their contracts with Kobo and prohibited, among other things, the “Agency” model of E-book sales that has been a feature of many of Kobo’s Canadian contracts since 2011. Within days of the filing of the Consent Agreement, Kobo began receiving letters from some of these publishers demanding that the publishers’ contracts with Kobo be amended so as to bring the publishers into compliance with the Consent Agreement; otherwise, contracts could be terminated.
3. The Consent Agreement should be rescinded or varied, as it is based on terms that cannot be the subject of an order of the Competition Tribunal:
 - (a) There is no agreement or arrangement among these publishers to bring the “Agency” model to Canada. With some of the publishers, the shift to Agency occurred at Kobo’s insistence, not at the publisher’s, belying any allegation that the shift to Agency is the result of a publisher-driven civil conspiracy.
 - (b) The Consent Agreement and Competition Bureau’s Press Release do not even *allege* a horizontal agreement or arrangement among the four publishers, let alone establish the existence of one. Rather, the only agreements or arrangements that are referenced are the vertical agreement between individual E-book Publishers and individual E-book Retailers. Such vertical agreements cannot found a s. 90.1 case, as E-book Retailers do not compete with E-book Publishers.

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- (c) Insofar as the Commissioner's case is based on an alleged agreement or arrangement between publishers that took place in the United States (which is implied in its Press Release), that alleged agreement or arrangement was definitively put to rest in a series of Settlement Agreements and Final Judgments that prohibit any such agreements or arrangements. Since s. 90.1 only grants the Tribunal jurisdiction over agreements or arrangements that are "existing or proposed", the Tribunal lacks jurisdiction to make orders in respect of now-terminated agreements or arrangements.
 - (d) By omitting any particulars of the alleged agreement or arrangement, the Bureau makes it practically impossible for the Tribunal to exercise its supervisory jurisdiction under s. 106(2). Specifically, the prohibition orders in paragraphs 2 and 3 of the Consent Agreement must be directly linked to the terms of the alleged agreement or arrangement (see s. 90.1(1)(a)). Without particulars of the alleged agreement or arrangement, it is impossible for the Tribunal to determine whether the prohibition order is linked to the agreement or arrangement. Without such a link, the Tribunal lacks the jurisdiction to make a prohibition order under s. 90.1(1)(a).
 - (e) The terms of the Consent Agreement in respect of the "Agency Lite" obligations, described below, are vague and unenforceable or would lead to no enforceable obligation.
4. Following the amendments to the *Competition Act* in 2002, the Tribunal's supervisory role over consent agreements was curtailed. It was not, however, obliterated. The deficiencies in the Consent Agreement filed in this case illustrate the continuing need for the Tribunal to exercise its supervisory powers. The important goals of the *Competition Act* and *Competition Tribunal Act* will only be achieved if the public at large is assured that the power to file consent agreements under s. 105 can be adequately monitored within the full scope of s. 106. This is a case where the Tribunal must exercise its powers under that section. The Application should be granted, and the Consent Agreement rescinded.
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PART 2 - FACTS

A. Nature of the Application

5. Pursuant to s. 106(2) of the *Competition Act* (the “**Act**”), the Applicant, Rakuten Kobo Inc. (“**Kobo**”) brings this Application, as a person directly affected, seeking to rescind or vary the consent agreement between the Commissioner of Competition (the “**Commissioner**”) and Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc. (“**Hachette**”), HarperCollins Canada Limited (“**HarperCollins**”), Holtzbrinck Publishers, LLC (“**Macmillan**”), and Simon & Schuster Canada, a division of CBS Canada Holdings Co. (“**Simon & Schuster**”) (collectively, the “**Consenting Publishers**”) filed and registered with the Competition Tribunal on February 7, 2014 (the “**Consent Agreement**”).

B. The Parties and Their Distribution Agreements

6. Kobo is an E-book Company with headquarters in Toronto, Ontario. One of Kobo’s primary business operations is as a retailer of E-books. Kobo also develops and retails E-book reading devices (“**E-readers**”) and creates free application software for reading E-books on computers and mobile devices.
7. As an E-book Retailer, Kobo operates an E-book retail store through which customers can purchase E-books.¹ As is set out in the Consent Agreement, E-books are electronically formatted books designed to be read on a computer, a handheld device or any other electronic device capable of visually displaying E-books. Kobo does not sell traditional, hard copy books; it only sells E-books. Kobo sells E-books to users who read them either on devices equipped with the Kobo app or on Kobo or other compatible E-readers. There are over 18.4 million users of Kobo E-readers and E-reading applications worldwide. Kobo currently offers these customers access to over 4 million E-books. In support of its E-book retailing activities, Kobo also invests heavily in developing and manufacturing applications and E-readers that it sells to consumers.

¹ Unless otherwise stated, we adopt here the definitions set out in the Consent Agreement.

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8. The E-book titles Kobo sells originate from a broad international base of publishers. Kobo currently offers content from publishers based in Canada, the US, Australia, New Zealand, Germany, France, Spain, Italy, Portugal, Slovenia, the Netherlands and the UK. Kobo has agreements that grant it rights to sell E-books in Canada. Some of these agreements are with publishers, while others are with authors directly, with agents holding rights on behalf of authors, or with distributors (collectively, "**Publishers**"). As a result of these agreements, Kobo has the right to sell in Canada the E-book content of approximately 15,000 rights holders.
9. The major Publishers in Canada are the Consenting Publishers and Penguin-Random House. These companies are all subsidiaries of international counterparts, but are for the most part operated and managed separately from their respective parent companies, especially with respect to sales and marketing.
10. Publishers seeking to sell E-books through Kobo typically opt to negotiate either "wholesale" or "agency" terms, described below. Kobo continues to sign agreements under both models. In the normal course, negotiation and modification of contractual terms for both agency and wholesale agreements is common, and the negotiation process can last several months, or, as it has in some cases, more than a year. These negotiations are done one-on-one between Kobo and each Publisher.
11. Wholesale agreements are typically non-exclusive agreements whereby Kobo acquires from the Publisher the right to sell an E-book at a price set by Kobo ("**Wholesale Agreements**"). Typically, the Publisher sets a suggested retail price for the title, and Kobo pays the Publisher 50% of the suggested retail price for each E-book Kobo sells. Within this model, Kobo determines the price to be paid by the customer, and provides the Publisher with a monthly sales report, identifying for the Publisher how many copies Kobo sold.
12. Agency agreements are typically agreements whereby Kobo is appointed as a non-exclusive agent for the marketing and delivery of E-books on the Publisher's behalf ("**Agency Agreements**"). In these agreements, the Publisher sets the price at which the E-book must be sold, and Kobo receives a commission for each E-book it sells. Typically, that commission is 30% of the price paid by the customer. Often (but not always), Kobo's Agency Agreements will also contain a Most Favoured Nation ("**Price**

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MFN) clause, which ensures that if another E-book Retailer is able to price a book at a particular price, the Publisher will similarly set Kobo's price.

13. **"Agency Lite"** agreements arose after the entry of the Settlement Agreements and Final Judgments in the US (described below). Agency Lite agreements allow the publisher to set the retail price of the book (as is the case with Agency), but also allow a retailer like Kobo to diverge from the sale price set by the Publisher, so long as any discounting that the retailer does falls within certain parameters. Namely, the total amount of discounts that can be applied to any individual Publisher's books cannot exceed the total margin that the retailer earns on that Publisher's annual E-book sales. In the US Settlement Agreements, this is called a **"Discount Pool"**. In the Consent Agreement, it is called the **"Agreed Funds"**.
14. When Kobo first began operations, all of its agreements were under the Wholesale model, as this was the model that had traditionally applied in the bricks and mortar world of bookselling. This was a very unprofitable model for Kobo.
15. Beginning in 2010, in the US, Publishers and E-book Retailers shifted their contracts to an Agency model. Allegations regarding that shift can be found in Settlement Agreements and a decision of Judge Denise L. Cote of the US District Court of the Southern District of New York (released in July 2013; the decision is currently under appeal). In short, the allegation of the Department of Justice (**"DOJ"**) was that, in order to facilitate Apple Corporation's (**"Apple"**) entry into the E-book market – and to counter Amazon's unsustainably low pricing of E-books – the major US Publishers came to an agreement with each other and with Apple whereby they would shift all of their contracts to an Agency model (thus controlling the price at which their titles would be sold) and provide to Apple and other retailers a Price MFN. This switchover occurred simultaneously in the US in 2010, according to the DOJ complaint, in order to ensure that Apple would launch an iBookstore (on Agency terms) at the time of the launch of its iPad in 2010.
16. In Canada, the shift from Wholesale to Agency did not occur the same way. First, there was no driving event like the launch of the iPad that created an urgent need for the Publishers to shift to Agency so as to encourage Apple enter the market: Apple was already in the market, having already launched its iBookstore in Canada.

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17. Second, Amazon was not yet active in the Canadian market, so there was no unsustainably low pricing in Canada for the Publishers to react to.
18. Third, regardless of how Agency came into being in the US, the fact was that the Agency model was a model that better suited the selling of books in an online environment. Kobo – a fledgling company at the time – had been losing millions of dollars per year under the Wholesale model and had been looking for a way to transform its business model into one that could support a successful, sustainable business. The Agency model that was developed in the US appeared to Kobo to be a model through which it could finally earn a positive margin on E-book sales, while competing vigorously in the market for E-book customers.
19. Earning margin on E-book sales is necessary for Kobo, as it uses the money it earns through E-book sales to offset the enormous costs it incurs to develop, manufacture and sell high-quality, award-winning E-Readers and devices. Without making sufficient margin on the sale of E-books, Kobo is challenged to compete in the broader market to service E-book customers.
20. As a result, Kobo wanted to shift its Canadian contracting practices to an Agency model. To this end, beginning in 2010 and continuing as late as 2012, Kobo negotiated contracts with Publishers to move from a Wholesale model to an Agency model. Kobo always conducted these negotiations one-on-one, and did not share confidential information about its negotiations with any Publishers.
21. The reaction Kobo received from the four Consenting Publishers was not uniform. Some Publishers were more receptive to the shift than others. Some were very reluctant. For example, beginning in July 2010, Kobo began to press Simon & Schuster in emails to move to an Agency model.

[REDACTED]

22. With HarperCollins, the reticence to move to Agency was even more pronounced. Kobo had engaged in discussions with HarperCollins urging it to adopt an Agency model. By March 2011, HarperCollins was continuing to resist implementing such an agreement,

prompting Kobo's then-Chairman, Heather Reisman, to write to the President of HarperCollins in Canada

[REDACTED]

23. Thereafter, HarperCollins accepted Kobo's push to move to Agency. The impetus for this shift clearly came from Kobo, not from HarperCollins following some alleged agreement or arrangement with the other Consenting Publishers.
24. By the end of 2011, Kobo had successfully concluded contracts with all of the Consenting Publishers, moving to an Agency model. This was not, however, a shift similar to what was alleged to have occurred in the US, with all of the Publishers coming to Kobo at the same time to press for the shift. Rather, this was a series of individual, arms-length, commercial negotiations that resulted in vertical agreements between each of the Consenting Publishers and Kobo.

C. The Consent Agreement

25. The Commissioner and the Consenting Publishers entered into a Consent Agreement, which was registered and filed with the Tribunal on February 7, 2014 pursuant to s. 105 of the *Competition Act* (the "**Act**").

(i) The Recitals

26. In the recitals to the Consent Agreement (which are deemed to be integral to and part of the Consent Agreement pursuant to paragraph 10 thereof), the Commissioner alleges, but the Consenting Publishers do not accept or admit, that:
 - (a) There was an agreement or arrangement. Note: the Commissioner does not identify (i) who was a party to that agreement or arrangement, (ii) what the terms of the agreement or arrangement are, (iii) when the agreement or arrangement was entered into, and (iv) whether the agreement or arrangement still existed at the time of the filing of the Consent Agreement.

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- (b) Further to that agreement or arrangement, the Consenting Publishers engaged in conduct. Note: the Commissioner does not identify what conduct was engaged in, nor how the alleged agreement or arrangement relates to the conduct, if it does at all.
 - (c) The unparticularized conduct has resulted in a substantial lessening or prevention of competition in the markets for E-books in Canada. Note: even if the switch to Agency resulted in higher prices on any E-books, this increase cannot constitute a substantial lessening or prevention of competition in the absence of an agreement or arrangement between competitors.
27. As with all consent agreements filed by the Commissioner since 2009, the recitals also contain language prohibiting the Consenting Publishers from contesting the Commissioner's allegations for the purposes of the Agreement and its execution, interpretation, enforcement, variation or rescission.

(ii) The Obligations

28. The material obligations imposed on the Consenting Publishers are described in the paragraphs below.
29. In paragraph 2, the Consenting Publishers are prohibited from restricting, limiting or impeding any E-book Retailer's ability to set, alter or reduce the Retail Price of any E-Book, or to offer discounts or promotions ("**Agency Prohibition**"). Effectively, this prohibits the Agency model, whereby the Publisher determines the Retail Price of the E-Book. This prohibition is to commence forty days after the registration of the Consent Agreement, and expires 18 months later.
30. In paragraph 3, the Consenting Publishers are prohibited from entering into any agreement with an E-book Retailer that contains a Price MFN ("**MFN Prohibition**"). This prohibition is to commence forty days after the registration of the Consent Agreement, and expires four and a half years later.
31. Paragraph 4 compels the Consenting Publishers to terminate, not renew and not extend their current agreements with E-book Retailers insofar as such agreements contain Agency clauses or Price MFNs. Alternatively, the Consenting Publishers may, within the forty-day period described above, agree with the E-Book Retailers to amend the contracts to remove any such Agency terms and Price MFN clauses or ensure that such clauses will not be enforced.

32. Notwithstanding paragraphs 2-4 of the Consent Agreement, paragraph 5 allows for Agency Lite, whereby the Publisher will continue to set the Retail Price of E-books so long as the E-book Retailer is permitted to reduce the final price paid by customers by an aggregate amount defined as the “**Agreed Funds**”, which is “equal to the total commissions the [Publisher] pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of the [Publisher’s] E-books to consumers in Canada”.

(iii) The Press Release

33. Contemporaneously with the filing of the Consent Agreement, the Competition Bureau (“**Bureau**”) issued a press release. The press release, like the above-noted recitals, avoids identifying an agreement or arrangement between competitors. The extent of the Bureau’s description of why it is “taking action” against these four Publishers is set out in two lines of the press release, neither of which contains allegations that could establish a case under s. 90.1:

The four publishers have agreed to remove or amend clauses *in their distribution agreements with individual ebook retailers* that the Bureau believes have the effect of restricting retail price competition, which will allow retailers to offer discounts on ebooks.

The Bureau alleges that the publishers engaged in conduct that resulted in reduced competition for ebooks in Canada, contrary to the civil competitor collaboration provision in section 90.1 of the *Competition Act*. [emphasis added]

34. As is clear from the description in paragraphs 8-13 above, E-book Retailers do not compete with publishers; therefore, the vertical distribution agreements set out above cannot be the subject of a s. 90.1 order.

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PART 3 - GROUNDS FOR THE S. 106 APPLICATION

35. Kobo brings this application pursuant to subsection 106(2) of the *Competition Act*, which provides that a person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal 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.
36. Kobo meets the test for rescission under s. 106(2):
- (a) Its legal and pecuniary rights are directly affected in a manner that will affect Kobo's competitiveness;
 - (b) Kobo is applying for relief within sixty days of the Consent Agreement's registration;
 - (c) The Consent Agreement is not based on terms that could be the subject of an order of the Tribunal, as the Tribunal would lack threshold jurisdiction to make any order under s. 90.1. There is:
 - (i) no agreement or arrangement between persons, two or more of whom are competitors;
 - (ii) no allegation by the Commissioner of an agreement or arrangement between persons, two or more of whom are competitors; and
 - (iii) no agreement or arrangement in relation to the Consenting Publishers' parent companies that was "existing or proposed" at the time of the registration of the Consent Agreement.
 - (d) 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. There is:
 - (i) no link established or even alleged between the conduct contemplated by the agreement or arrangement and conduct prohibited by the prohibition orders set out in paragraphs 2 and 3 of the Consent Agreement; and

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- (ii) 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).
 - (e) The Consent Agreement is not based on terms that could be the subject of an order of the Tribunal, as the terms of the Consent Agreement are vague and unenforceable or would lead to no enforceable obligation.
- 37. In light of the foregoing, the Tribunal would lack jurisdiction to make any orders, let alone the orders contained in the Consent Agreement.
- 38. Each of these points is briefly elaborated upon below.
- A. The Applicant is Directly Affected**
- 39. As a party to the Agency Agreements that are the subject of the Consent Agreement, Kobo is directly affected by the Consent Agreement. It brings this Application well within the 60-day timeframe contemplated by s. 106(2).
- 40. The following is a list of Kobo’s distribution agreements that will be immediately affected by the Consent Agreement:
 - (a) “Agreement” dated as of March 31, 2010 between Kobo and Hachette Digital, Inc., as amended June 27, 2011 and December 11, 2012;
 - (b) “Addendum to Publisher Ebook Agency Agreement” dated as of June 15, 2011 between Kobo and HarperCollins Canada Limited;
 - (c) “E-book Distribution Agreement” dated as of August 15, 2012 between Kobo and Holtzbrinck Publishers, LLC, doing business as Macmillan;
 - (d) “Agency Agreement – Canada” dated as of April 21, 2011 between Kobo and Simon & Schuster Canada, a division of CBS Holdings Co.
- 41. Kobo has already received letters from Consenting Publishers seeking to implement the Consent Agreement.

[REDACTED]

[REDACTED]

42. If Kobo refuses to comply with the Consenting Publishers' attempts to comply with the Consent Agreement and any Consenting Publishers do terminate their agreements with Kobo, the effect on Kobo will be devastating. Without a full catalogue of E-books from all of Canada's major publishers, Kobo would be an ineffective competitor. Customers choose E-readers and E-book Retailers in part on the basis of the breadth of their catalogues. If Kobo were unable to sell E-books from any one of the Consenting Publishers, it would cease to be a credible competitor in the marketplace.
43. Conversely, if Kobo accepts the amendments and shifts its operations to an Agency Lite model, it will suffer significant unrecoverable losses.

[REDACTED]

44. The losses would impact Kobo's ability to compete in the Canadian market. By analogy, in the US, when Agency Lite was brought into existence, Kobo saw its net revenues steadily decline. Kobo has since stopped investing in marketing in the US, closed its office in Chicago and is focusing on other markets. Its market share and revenues are now negligible there. Although Kobo is a bigger player in the Canadian market, this will not detract from the fact that such significant losses will impact Kobo's ability to invest in technology and to market its offerings. Regardless of which pricing strategy Kobo chooses to adopt, it expects to be less competitive than it is presently and will lose market share to E-book Retailers who are willing to consistently price their E-books at unsustainably low levels that other competitors simply cannot meet.
45. The harm to the E-book market more broadly will also be significant in that the prohibition on Agency will likely lead to the exit of competitors from the Canadian market and significant financial pressure being brought to bear on the ones who remain. Sony and Barnes & Noble's respective experiences in the US are illustrative of the negative

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effect of a ban on Agency. Sony exited the E-book market in the US entirely (and has now had its E-book business acquired by Kobo), and Barnes & Noble's NOOK E-book division reported heavy losses for the 2013 fiscal year. A ban on Agency, even in the short term, will have a lasting and irreversible negative impact on the market for E-books in Canada.

46. The harm Kobo will suffer will also be magnified due to the speed with which it needs to make the conversion to Agency Lite. As stated above, the Consent Agreement effectively imposes a forty-day deadline on the *Consenting Publishers* to amend or terminate their Agency Agreements. In contrast, the implementation of the Settlement Agreements in the US was staggered over a 16-month period.

B. The Terms of the Consent Agreement could not be the Subject of an Order of the Tribunal

47. The Tribunal's jurisdiction to issue an order under section 90.1 is limited in two ways that are material to this application. First, the ability to issue any order only arises if there is an agreement or arrangement – whether existing or proposed – *between persons two or more of whom are competitors* (and that the agreement or arrangement prevents or lessens or is likely to prevent or lessen competition substantially). Second, in such circumstances, the Tribunal can only prohibit persons – whether or not a party to the agreement – from doing anything *under the agreement or arrangement*. That is to say there is a threshold jurisdictional question that must be addressed (does the Tribunal have jurisdiction to make *any* order under s. 90.1) and a remedial jurisdictional question that must be addressed (does the Tribunal have jurisdiction to make *this* order under s. 90.1). The Tribunal lacks jurisdiction on both fronts.

I. The Tribunal lacks Threshold Jurisdiction

48. The Consent Agreement contains no allegation of an agreement or arrangement *between competitors*. Nor does it identify the basic nature of the agreement or the identities of the parties thereto. Although there is an allegation of an agreement or arrangement, the Commissioner avoids identifying who is a party to that agreement or arrangement and what the terms of the alleged agreement or arrangement are. As such, Kobo, the Tribunal and the general public are left to speculate as to what agreement or arrangement the Bureau is concerned about. Regardless of which

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possibility one considers, the Tribunal would lack the jurisdiction to make *any* orders under s. 90.1.

49. *Possibility # 1: The Agreement or Arrangement is between the Consenting Publishers to shift their contracts to an Agency model with a Price MFN.* Insofar as the agreement or arrangement is an agreement or arrangement among the Consenting Publishers to all shift their relationships with E-book retailers to an Agency model, the facts do not support the existence of such an agreement or arrangement. As stated above, with a number of the publishers, the shift to Agency occurred at the insistence of Kobo, not the publishers. As such, the alleged conduct – changing the contracting practices to an Agency model with a Price MFN – cannot have been the result of an agreement or arrangement among the Consenting Publishers.

[REDACTED]

Without an agreement or arrangement between the competing publishers, the Tribunal lacks jurisdiction to make any order under s. 90.1.

50. *Possibility #2: The Agreement or Arrangement is each Agency Agreement itself.* Insofar as the Agency Agreements between E-book Retailers and Publishers themselves are alleged to be the agreement or arrangement for the purposes of s. 90.1, these too cannot trigger the Tribunal's jurisdiction. As stated above, the Agency Agreements are vertical agreements, not agreements or arrangements between publishers. Section 90.1 is designed to capture anticompetitive competitor collaborations: Kobo does not compete with any of the Consenting Publishers. In the face of a vertical agreement between a retailer and a publisher, the Tribunal lacks jurisdiction to make any order under s. 90.1.

51. *Possibility #3: The Agreement or Arrangement is the alleged Agreement between the Consenting Publishers' U.S. parents.* Insofar as the agreement or arrangement is the agreement or arrangement that is described in the US Settlement Agreements, this too cannot grant the Tribunal jurisdiction under s. 90.1. Section 90.1 only applies to agreements or arrangements that exist or are proposed at the time of registration. Even if the Tribunal found that agreements or arrangements had been entered into in the US by the Consenting Publishers' parent companies, those agreements or arrangements came to an end when the Settlement Agreement were entered as Final Judgments in the US Courts. The Final Judgments all state:

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[Each E-book Publisher] shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition to the Sale of E-books.

52. These orders expressly apply to subsidiaries and affiliates and, as such, would apply to the Consenting Publishers. Accordingly, by the time the Consent Agreement was registered, any such alleged agreement or arrangement had long been terminated. Agreements or arrangements that have come to an end cannot ground a 90.1 case and, as such, the Tribunal lacks jurisdiction to make any order under s. 90.1.

II. The Tribunal lacks Remedial Jurisdiction

53. Section 90.1(1)(a) only allows the Tribunal to prohibit parties from “doing anything under the agreement or arrangement”.
54. The Consent Agreement contains two prohibitions: the Agency Prohibition and MFN Prohibition (set out in paragraphs 2 and 3 of the Consent Agreement, respectively). For those prohibitions to be *intra vires* the Tribunal’s remedial jurisdiction, the alleged agreement or arrangement would have to contemplate that the publishers had to enter into Agency Agreements with Price MFNs.
55. Without knowing what the terms of the agreement or arrangement are, including the basic nature of the alleged agreement or arrangement and the identities of the parties thereto, the Tribunal cannot be satisfied that the activity it is being asked to prohibit is activity contemplated by the agreement or arrangement.
56. To illustrate the point, the Tribunal should consider the MFN Prohibition in particular.

[REDACTED]

Either the agreement or arrangement does not exist, or if it does, it does not impose a Price MFN. Either way, the Tribunal would lack the jurisdiction to prohibit Price MFNs in an order.

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57. In sum, without knowing what the terms of the agreement or arrangement are, the Tribunal cannot be satisfied that the Agency Prohibition and Price MFN Prohibition are orders it could make under s. 90.1(1)(a).

III. The Terms of the Consent Agreement Are Vague and Unenforceable or Would Lead to No Enforceable Obligation

58. The Consent Agreement is not based on terms that could be the subject of an order of the Tribunal, as the terms of the Consent Agreement in respect of Agency Lite are vague and unenforceable or would lead to no enforceable obligation.

59. Paragraph 5 of the Consent Agreement provides that, notwithstanding paragraphs 2 and 4 of the Consent Agreement, the Consenting Publishers may enter into Agency Lite agreements with E-book Retailers, provided, in part, that the E-book Retailer is permitted to reduce the final price paid by customers by the Agreed Funds: an “aggregate amount ... equal to the total commissions the [Publisher] pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of the [Publisher’s] E-books to consumers in Canada”.

60. Paragraph 5 is vague, leads to no enforceable obligation, and opens the door for E-book Retailers to engage in predatory pricing practices to eliminate retail competition. In particular:

- (a) there is no mechanism for the reporting of discounts and promotions by an E-book Retailer, and as such there is no way for the Commissioner or the Tribunal to determine whether an E-book Retailer has exceeded the Agreed Amount in order to ensure that E-book Retailers discount within the parameters contemplated by the paragraph;
- (b) without a reporting obligation on E-Book Retailers and Publishers and a mechanism to ensure that pricing stays within the parameters contemplated by the “Agreed Amounts”, paragraph 5 creates unenforceable obligations;
- (c) the fact that the total commissions that are to constitute the “Agreed Amount” are equal to the total commissions paid over “at least” one year is vague and unenforceable, as it means that the discount amount can be *any* amount, including an amount that exceeds the commissions paid in a given year, opening the possibility of unlimited discounting and predatory pricing;

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- (d) it is impossible for E-book Publishers to accurately determine the amount of Agreed Funds available in a given time period before the end of the time period, creating a vague and unenforceable obligation with respect to ensuring that E-book Retailers discount within the parameters contemplated by the paragraph.

PART 4 - ORDER SOUGHT

61. The Applicant requests that the Tribunal rescind the Consent Agreement with prejudice to the Commissioner entering into a consent agreement with any of the Consenting Publishers on the basis of allegations that are the same or substantially the same as the allegations that form the basis of the Consent Agreement or, in the alternative, that the Tribunal vary the Consent Agreement to remove all obligations on the Consenting Publishers other than obligations relating to Price MFN.
62. The Applicant seeks its costs.

DATED at Toronto this 30th day of November, 2015.



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PUBLIC VERSION

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PUBLIC VERSION

File No. CT-2014-002

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 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

AMENDED NOTICE OF APPLICATION

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