

**THE 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 ebooks 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 amended 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 December 22, 2015 CT-2014-002 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 161

**RATUKEN 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 HOLDINGS CO.**

**Respondents**

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**RESPONSE OF SIMON & SCHUSTER CANADA,  
A Division of CBS Holdings Co.  
(Kobo's Amended Notice of Application under s. 106(2))**

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## BACKGROUND

1. On February 6, 2014, the Commissioner of Competition (“**Commissioner**”) and four publishers (the “**Settling Publishers**”) entered into a consent agreement (the “**Consent Agreement**” or “**Agreement**”) to resolve the Commissioner’s concerns with respect to certain alleged anti-competitive conduct. The Agreement was filed and registered with the Tribunal on February 7, 2014 under s. 105 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (“**Act**”).

2. On February 21, 2014, Kobo filed an application (“**Original Application**”) with the Tribunal under s. 106(2) of the Act seeking to have the Agreement rescinded or varied. Kobo also sought an order staying the implementation of the Agreement pending the disposition of its s. 106(2) application.

3. On March 18, 2014, the Tribunal stayed the implementation of the Agreement.

4. On April 15, 2014, the Commissioner referred the following question to the Tribunal pursuant to s. 124.2(2) of the Act (the “**Reference**”):

What is the nature and scope of the Tribunal’s jurisdiction under subsection 106(2) and, in that connection, what is the meaning of the words ‘the terms could not be the subject of an order of the Tribunal’ in subsection 106(2) of the Act?

5. On September 8, 2014, the Tribunal released its decision regarding the Reference (the “**Reference Decision**”).

6. On September 17, 2014, Kobo appealed the Reference Decision to the Federal Court of Appeal (“**FCA**”).

7. On December 22, 2014, during a case management conference before the Tribunal, the Commissioner’s counsel stated that the Commissioner was prepared to consent to the relief sought in Kobo’s s. 106(2) application.

8. On December 22, 2014, the Tribunal ordered that the s. 106(2) Application proceedings continue to be suspended pending the decision by the FCA regarding Kobo’s appeal of the Reference Decision. The Tribunal stated in its reasons that:

“[I]f the Commissioner seeks to rescind the Consent Agreement without the agreement of all the signatories to the agreement, he must do so within the statutory framework, including s. 106(1) of the Act”.

9. On June 18, 2015, the FCA dismissed Kobo’s appeal of the Reference Decision.

10. On August 13, 2015, Kobo filed an application for leave to appeal the FCA’s dismissal with the Supreme Court of Canada (“**SCC**”).

11. On November 30, 2015 Kobo filed an Amended Notice of Application (“**Amended Application**”) seeking essentially the same relief as sought in the Original Application, as well as additional relief as set out in para. 6.1 of the Amended Application.

### **SIMON & SCHUSTER CANADA’S POSITION**

12. As the Commissioner pointed out in his Response filed March 3, 2014, the Original Application (and now the Amended Application) seeks to transform a negotiated resolution among consenting parties into a contested proceeding on the merits of the case. Not only is this inconsistent with the purpose underlying s. 105 of the Act (i.e., to allow for the expeditious resolution, on consent, of matters that are under investigation by the Commissioner), it is also inconsistent with a proper interpretation of subsection 106(2) of the Act.

13. Simon & Schuster Canada’s position is that the Agreement should be upheld and should not be rescinded for the following reasons.

14. Simon & Schuster Canada entered into the Agreement in good faith following extensive and vigorous negotiations with the Commissioner. It did so for a variety of legitimate commercial and financial reasons, including the desire to avoid the financial burden of litigation and in order to achieve a timely commercial resolution that was consistent and aligned with its U.S. settlement.

15. Simon & Schuster Canada always has been and remains ready and willing to abide by its commitments under the Agreement.

16. As recognized by the Tribunal in its reasons dated December 22, 2014 (referred to in para. 8 above), the Commissioner cannot and should not be allowed to unilaterally rescind, or vary the Agreement. As noted by the Tribunal, there is a statutory framework under the Act for the variation of consent agreements and the Commissioner must satisfy certain legal requirements under s. 106(1)(a) before the Tribunal is entitled to rescind or vary a consent agreement.

17. The Commissioner concluded an agreement with the Settling Publishers (including Simon & Schuster Canada) to discontinue his inquiry as regards the Settling Publishers based on a negotiated set of commitments made by the Settling Publishers as set out in the Agreement.

18. Simon & Schuster Canada submits that the Reference Decision itself does not vitiate or require the rescission of the Agreement, nor does it require the Tribunal to rescind the Agreement. As noted in para. 126 of the Reference Decision, it merely contemplates that the Tribunal “may assess” whether the Agreement contains the language contemplated in the Reference Decision (referred to as the “**Reference Terms**”), and then exercise its discretion in light of all the circumstances to determine whether the Agreement should be upheld, varied or set aside (the last sentence in para. 126 of the Reference Decision states that the Tribunal “*may* vary or set aside a consent agreement where it determines that either of these conditions have not been satisfied” (emphasis added)). The language of the Reference Decision is permissive and contemplates the exercise of the Tribunal’s discretion.

19. The same is true of s. 106(2) of the Act. It provides that even if Kobo were to establish that the terms of the Agreement could not be the subject of an order of the Tribunal, the Tribunal has

the discretion, but is not required, to grant the relief sought (i.e., the Tribunal may choose to uphold the Agreement).

20. To now rescind the Agreement on the grounds that it does not contain the Reference Terms would undermine the administration of justice and the enforcement of the Act, as it would retroactively call into question the enforceability of other existing Consent Agreements that have previously been entered by the Commissioner with respondents in other matters and that are still in force and do not comply with the Reference Terms.

21. For the foregoing reasons, Kobo's Amended Application should be dismissed.

22. The *Competition Act*, R.S.C. 1985, c. C-34, as amended.

23. The *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp), as amended.

24. The *Competition Tribunal Rules*, SOR/2008-141.

25. The *Federal Court Rules*, SOR/98-106.

26. Such further and other grounds as counsel may advise and the Tribunal may permit.

**DATED AT** Toronto, Ontario on December 22, 2015.



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