

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	
CT-2014-002	
October 13, 2015	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 141

KOBO INC.

Applicant/Moving Party

- 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/Responding Parties

MEMORANDUM OF FACT AND LAW OF KOBO INC.
(Motion to Suspend s. 106(2) Application proceedings)

WEIRFOULDS LLP
Barristers & Solicitors
4100 - 66 Wellington Street West
P.O. Box 35, Toronto-Dominion
Centre
Toronto, ON M5K 1B7

Nikiforos Iatrou
Bronwyn Roe

Tel: 416-365-1110
Fax: 416-365-1876
niatrou@weirfoulds.com
broe@weirfoulds.com

Lawyers for the Applicant

TO: The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario K1P 5B4

AND TO: John Syme
Jean-Sébastien Gallant
Esther Rossman
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, Quebec K1A 0C9

Tel: (819) 994-7714
Fax: (819) 953-9267
John.Syme@bc-cb.gc.ca
Jean-Sebastien.Gallant@bc-cb.gc.ca
Esther.Rossman@bc-cb.gc.ca

Lawyers for the Respondent
Commissioner of Competition

**AND TO: Linda Plumpton
James Gotowiec
Torys LLP**
30th Floor, 79 Wellington Street West
Box 270, TD South Tower
Toronto, ON M5K 1N2

Tel: 416-865-8193
Fax: 416-865-7380
lplumpton@torys.com
jgotowiec@torys.com

**Lawyers for the Respondents Hachette
Book Group Canada Ltd., Hachette
Book Group, Inc. and Hachette Digital,
Inc.**

**AND TO: Katherine L. Kay
Danielle Royal
Stikeman Elliott LLP**
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Tel: 416-869-5507
Fax: 416-947-0866
kkay@stikeman.com
droyal@stikeman.com

**Lawyers for the Respondents
HarperCollins Canada Limited**

**AND TO: Randal Hughes
Emrys Davis
Bennett Jones LLP**
3400 One First Canadian Place
P.O.Box 130
Toronto, ON M5X 1A4

Tel: 416-777-7471
Fax: 416-863-1716
hughesr@bennettjones.com
davis@bennettjones.com

**Lawyers for the Respondents
Holtzbrinck Publishers, LLC**

**AND TO: Peter Franklyn
Mahmud Jamal
Osler, Hoskin & Harcourt LLP**
First Canadian Place
100 King Street West
Toronto, ON M5X 1B8

Tel: 416.362.2111
Fax: 416.862.6666
pfranklyn@osler.com
mjamal@osler.com

**Lawyers for the Respondents
Simon & Schuster Canada, a division
of CBS Canada Holdings Co.**

PART 1 - KOBO'S¹ ARGUMENT IN A NUTSHELL

1. This motion is brought to continue the suspension of the 106(2) Application pending the determination of Kobo's Application for Leave to Appeal the Reference decision to the SCC and, if leave is granted, pending the resolution of the appeal. A suspension of these proceedings was initially granted by Justice Rennie while the appeal of the Reference decision was pending to the Federal Court of Appeal. Justice Rennie's reasoning for granting that suspension applies with equal force today:

There is no question that the decision of the Federal Court of Appeal with respect to Kobo's appeal from the Tribunal's decision on the reference will have a material impact on the form and content of the section 106(2) proceedings before the Tribunal.²

2. Terminating the suspension now risks wasting resources. Several steps will be taken to prepare for the 106(2) Application hearing. If the SCC decision alters the interpretation of s.106(2), these steps will need to be repeated within the new framework, meaning all of the parties and the Tribunal will have wasted time, expense and judicial resources.
3. Proceeding prior to the SCC also risks imposing irreparable harm on Kobo. If the 106(2) Application moves forward on the current narrow interpretation and Kobo is unsuccessful, Kobo will suffer irreparable harm, as recognized by the Tribunal. If Kobo were to subsequently prevail before the SCC, the harm will have been unnecessary.
4. There is no countervailing harm if the suspension is continued. The Commissioner has asserted, but has adduced no evidence to support, that he is "hindered" by the suspension or that competition will be harmed by it. He has conceded that the Consent Agreement is deficient. And, despite three years of investigation, he has no evidence of a conspiracy in the Canadian market and has not even concluded that a violation of s.90.1 occurred. In fact, the evidence he advances in this motion supports Kobo's point in bringing the 106(2) Application: the switch to agency in the Canadian market occurred organically, not by way of conspiracy.
5. It is in the interests of justice that the request for a suspension be granted.

¹ We adopt here the definitions from Kobo's Notice of Motion dated August 14, 2015.

² Order and Reasons following a Case Management Conference dated December 22, 2014, Kobo Motion Record, Tab 2S, p. 273, para. 4 [emphasis added].

PART 2 - FACTS

6. On February 7, 2014, the Commissioner filed and registered the Consent Agreement with the respondent publishers.³ The Consent Agreement required changes to the respondent publishers' agreements with E-book retailers like Kobo.⁴
7. On February 21, 2014, Kobo filed the 106(2) Application, seeking to have the Tribunal rescind or vary the Consent Agreement.⁵ Concurrent with its 106(2) Application, Kobo sought an order staying the registration of the Consent Agreement pending determination of Kobo's 106(2) Application.⁶
8. On March 18, 2014, the Tribunal granted a stay of the implementation of the Consent Agreement pending determination of Kobo's 106(2) Application.⁷
9. On March 27, 2014, the Tribunal released its reasons.⁸ The Tribunal found that Kobo would be irreparably harmed by the implementation of the Consent Agreement.⁹
10. On April 15, 2014, the Commissioner brought the Reference, referring the following question of law to the Tribunal: "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?".¹⁰

³ Consent Agreement filed February 7, 2014, Kobo Motion Record, Tab 2B, pp. 60-70.

⁴ *Ibid.*, pp. 64-65, paras. 2-5.

⁵ Notice of Application dated February 21, 2014, Kobo Motion Record, Tab 2C, pp. 73-94.

⁶ Notice of Motion (Public Version) dated February 21, 2014, Kobo Motion Record, Tab 2D, pp. 96-105.

⁷ Order granting the Applicant's Motion for a Stay dated March 18, 2014, Kobo Motion Record, Tab 2F, pp. 110-112.

⁸ Reasons for Order granting the Applicant's Motion for a Stay dated March 27, 2014, Kobo Motion Record, Tab 2G, pp. 114-124.

⁹ *Ibid.*, pp. 119-121, paras. 35-40.

¹⁰ Notice of Reference filed April 15, 2014, Kobo Motion Record, Tab 2H, pp. 126-129.

11. On April 29, 2014, Kobo brought a motion to strike the Reference, on the grounds that the Reference question was inappropriate and, in the circumstances, that the Reference process was inappropriate.¹¹ The Commissioner stated:

The Tribunal's determination of the reference question will benefit the parties, the Tribunal, future litigants and the public at large by resolving an overarching legal question relevant to the current application and all future applications under subsection 106(2) of the Act.¹²

12. On May 14, 2014, the Tribunal released scheduling orders and reasons regarding the 106(2) Application¹³ and the Reference proceedings.¹⁴ The reasons noted that "the nature of 106(2) proceedings will be informed by ... the outcome of the Reference, if it proceeds."¹⁵
13. The scheduling order regarding the 106(2) Application provided that pre-hearing steps, beginning with the Commissioner serving and filing a response, would begin on September 5, 2014, with the hearing of the 106(2) Application to commence on May 11, 2015 – approximately a nine-month period.¹⁶
14. On June 10, 2014, the Tribunal dismissed Kobo's motion to strike the Reference.¹⁷
15. On August 20, 2014, the Tribunal issued a direction providing that the deadlines established in the scheduling order of May 14, 2014 were suspended.¹⁸

¹¹ Notice of Motion to Strike Notice of Reference dated April 29, 2014, Kobo Motion Record, Tab 2I, pp. 131-140.

¹² *Ibid.*, p. 146, para. 1.

¹³ Scheduling Order and Reasons for Order regarding the 106(2) Application dated May 14, 2014, Kobo Motion Record, Tab 2K, pp. 154-158.

¹⁴ Scheduling Order and Reasons for Order regarding the Reference Proceedings dated May 14, 2014, Kobo Motion Record, Tab 2L, pp. 160-163.

¹⁵ Scheduling Order and Reasons for Order regarding the 106(2) Application dated May 14, 2014, Kobo Motion Record, Tab 2K, p. 155, para. 3; Scheduling Order and Reasons for Order regarding the Reference Proceedings dated May 14, 2014, Kobo Motion Record, Tab 2L, p. 161, para. 3 [emphasis added].

¹⁶ Scheduling Order and Reasons for Order regarding the 106(2) Application dated May 14, 2014, Kobo Motion Record, Tab 2K, pp. 156-157, para. 4.

¹⁷ Reasons for Order and Order dated September 8, 2014, Kobo Motion Record, Tab 2N, pp. 167-204.

¹⁸ Direction to Counsel dated August 20, 2014, Kobo Motion Record, Tab 2M, p. 165.

16. On September 8, 2014, the Tribunal released the Reference decision.¹⁹
17. On September 17, 2014, Kobo filed its Notice of Appeal of the Tribunal's Reference decision to the FCA.²⁰
18. On November 24, 2014, the Tribunal held a case management conference to discuss the scheduling of the 106(2) Application.²¹ That same day, prior to the teleconference, the Commissioner's counsel advised Kobo and the respondent publishers that the Commissioner was prepared to consent to the relief Kobo seeks in its 106(2) Application.²² Given this development, the case management conference was put over to December 22, 2014.
19. On December 22, 2014, during the case management conference, the Commissioner's counsel reiterated that the Commissioner is prepared to consent to Kobo's 106(2) Application, stating that the Consent Agreement does not, in the Commissioner's view, meet the requirements set out in the Reference decision.²³ The respondent publishers' counsel indicated that the publishers do not consent to Kobo's 106(2) Application and the publishers are of the view that the Commissioner cannot unilaterally rescind the Consent Agreement by consenting to the 106(2) Application.²⁴
20. On December 22, 2014, following the case management conference, the Tribunal ordered that the 106(2) Application proceedings continue to be suspended pending the determination by the FCA. The Tribunal stated in its reasons that:
 - (a) Continuing the suspension of the 106(2) Application proceedings was "a pragmatic and cost-effective approach which takes into consideration the factors set out in subsection 9(2) of the *Competition Tribunal Act*";²⁵

¹⁹ Reasons for Order and Order dated September 8, 2014, Kobo Motion Record, Tab 2N, pp. 167-204.

²⁰ Notice of Appeal dated September 17, 2014, Kobo Motion Record, Tab 2O, pp. 205-214.

²¹ Transcript of a Case Management Conference held on November 24, 2014, Kobo Motion Record, Tab 2P, pp. 206-214.

²² E-mail from John Syme to Jos LaRose and counsel dated December 19, 2014, Kobo Motion Record, Tab 2Q, pp. 238-239.

²³ Transcript of a Case Management Conference held on December 22, 2014, Kobo Motion Record, Tab 2R, pp. 247-249.

²⁴ *Ibid.*, p. 251.

²⁵ Order and Reasons following a Case Management Conference dated December 22, 2014, Kobo Motion Record, Tab 2S, p. 273, para. 4.

- (b) “There is no question that the decision of the Federal Court of Appeal with respect to Kobo’s appeal from the Tribunal’s decision on the reference will have a material impact on the form and content of the section 106(2) proceedings before the Tribunal”,²⁶ and
- (c) “[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”.²⁷

- 21. There was no appeal of the above order.
- 22. On June 18, 2015, the FCA dismissed Kobo’s appeal of the Reference decision and upheld the September 8, 2014 decision of the Tribunal.²⁸
- 23. On July 7, 2015, Kobo advised the respondents that it intended to seek leave to appeal the decision of the FCA to the SCC.²⁹
- 24. On August 13, 2015, Kobo filed its Leave Application, over a month prior to its deadline, in an effort to expedite the matter.³⁰ The Commissioner’s Response and Kobo’s Reply were each filed in September 2015.³¹ The leave materials are therefore completely filed.

PART 3 - LAW AND ARGUMENT

- 25. The test to be applied by the Tribunal in determining whether to suspend its proceedings pending a decision of the SCC is whether, in all the circumstances, the interests of justice support the suspension.³²
- 26. In *Mylan*,³³ the FCA distinguished between a court enjoining another body from exercising its jurisdiction and a court deciding not to exercise its jurisdiction until

²⁶ *Ibid.*, p. 273, para. 3.

²⁷ *Ibid.*, p. 273, para. 5.

²⁸ Judgment and Reasons of the Federal Court of Appeal dated June 18, 2015, Kobo Motion Record, Tab 2T, pp. 276-286.

²⁹ Letter from Nikiforos Iatrou to Jos LaRose and counsel dated July 7, 2015, Kobo Motion Record, Tab 2U, p. 288.

³⁰ Leave Argument of the Applicant, Rakuten Kobo Inc. dated August 13, 2015, Kobo Motion Record, Tab 2A, pp. 24-58.

³¹ Supplementary Affidavit of Anna Kusmider sworn October 13, 2015, para. 2.

³² *Commissioner of Competition v. Toronto Real Estate Board*, 2014 Comp. Trib. 10 at para. 19; *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, [2011] F.C.J. No. 1607 at para. 14 [*Mylan*].

sometime later. In the former case, the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*³⁴ applies; in the latter case, the “interests of justice” test applies.³⁵

27. The FCA's rationale was rooted in the wording of s. 50 of the *Federal Courts Act*, which empowers the court to stay proceedings where “it is in the interest of justice that the proceedings be stayed”.³⁶ That is the core tenet underlying any court's power to impose a stay of proceedings, and has also been applied by the Court of Appeal for Ontario on a motion to stay an appeal pending the disposition of another body.³⁷
28. The “interests of justice” test is more flexible than the *RJR MacDonald* test and acknowledges that broader considerations regarding the administration of justice are in play. Factors demonstrating irreparable harm or an imbalance of convenience are undoubtedly still relevant, but the Tribunal can take into account other factors such as the public interest in the fair, well-ordered and timely disposition of litigation and the effective use of scarce public resources.³⁸
29. The factors that are determinative of this motion are: (i) risk of wasted resources; (ii) risk of irreparable harm to Kobo; and (iii) absence of harm or prejudice to the Commissioner or competition if the suspension is continued. These factors are detailed below.

Proceeding with the s.106 Application Risks Significant Wasted Resources

30. It is in the interests of justice to encourage the timely disposition of litigation and the effective use of scarce public resources.³⁹

³³ *Mylan, ibid.*

³⁴ [1994] 1 S.C.R. 311.

³⁵ *Mylan, supra* note 32 at paras. 5,14.

³⁶ *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 50.

³⁷ *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc. (c.o.b. Ajay Amazing Technologies Inc.)*, 2012 ONCA 756, [2012] OJ No 5195 at para. 18 [**KDS**].

³⁸ *KDS, ibid* at para. 19.

³⁹ *KDS, ibid.*

31. Although the Commissioner accepts that Kobo's Leave Application raises serious questions, he downplays the risk that resources will be wasted by proceeding with the 106(2) Application before these questions are determined.⁴⁰
32. The following steps will likely be required to move forward with the 106(2) Application:
 - (a) The Respondents' responses;
 - (b) Kobo's reply;
 - (c) Motions for leave to intervene;
 - (d) Delivery of affidavits of documents;
 - (e) Examinations for discovery;
 - (f) Additional productions;
 - (g) Witness statements;
 - (h) Expert reports; and
 - (i) Motions related to the evidence.⁴¹
33. As stated by the Tribunal in the Reference decision, Kobo is still permitted to pursue part of its factual challenge.⁴² Even if the matter proceeds on the interpretation rendered in the Reference, which narrows the scope of the applicable inquiry, the foregoing steps may still be necessary.
34. If the SCC grants leave to appeal, and alters in any way the interpretation of s.106(2), a significant amount of time, money and judicial resources will have been wasted by both the Tribunal and the parties, as many of the above steps will need to be repeated. Any change to the s.106(2) interpretation would necessitate revisions to the pleadings, which in turn would affect the scope of productions and discoveries.

⁴⁰ Response of the Commissioner of Competition, paras. 29 – 36.

⁴¹ Scheduling Order and Reasons for Order regarding the 106(2) Application dated May 14, 2014, Kobo Motion Record, Tab 2K, pp. 156-157, para. 4.

⁴² Reasons for Order and Order dated September 8, 2014 at paras. 5 and 129, Tab N.

35. The risk that significant resources could be wasted was recognized by Justice Rennie when he decided to suspend the schedule pending the FCA decision.⁴³ His comments on this issue have been quoted at paragraphs 1 and 20, above. His reasoning applies equally today.
36. The Commissioner downplays the risks, but one sees ample examples of Tribunal determinations becoming stalled, and procedures being repeated, in hearings and re-hearings in order to address situations where appellate courts clarify legal tests.⁴⁴
37. It is not novel to suspend or pause proceedings in competition law matters while leave to the SCC is sought.⁴⁵ This is a pragmatic and responsible approach to take in order to avoid re-hearings and repeated steps. This is especially true where, as in this case, there is a risk of irreparable harm if the suspension is refused and there is an absence of harm or prejudice by granting the suspension.

Proceeding with the s.106 Application risks unnecessary, irreparable harm

38. Kobo will potentially suffer irreparable harm if the 106(2) Application moves forward using the narrow scope of review set out in the Reference decision.
39. The likely timing of the 106(2) Application and the SCC hearing is an important consideration. Assuming leave to the SCC is granted and the requested suspension is not, the 106(2) Application hearing would inevitably occur prior to the SCC hearing. Thus, a window of time exists during which Kobo would be subject to the outcome of the 106(2) Application but would still be waiting for the outcome of the SCC appeal.
40. Irreparable harm to Kobo would result during this window of time if Kobo fails to have the Consent Agreement set aside on the 106(2) Application. The interpretation and scope of s. 106(2) has, to date, been a hard fought issue in these proceedings. A number of the arguments that Kobo seeks to advance are prohibited under the current interpretation.

⁴³ Order and Reasons following a Case Management Conference dated December 22, 2014, Kobo Motion Record, Tab 2S, p. 273, paras. 3 – 5.

⁴⁴ For example, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] F.C.J. No 455 and related proceedings; *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29, [2014] F.C.J. No. 113 and related proceedings.

⁴⁵ For example, see *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2011 BCSC 1128, [2011] B.C.J. No. 1592.

While the Commissioner has acknowledged that the Consent Agreement is deficient and has indicated a willingness to consent to setting it aside, the Publishers have not done so. They have explicitly taken the position that the Commissioner cannot simply consent to the 106(2) Application and in effect unilaterally rescind the Consent Agreement.⁴⁶ The scope of the s. 106(2) inquiry will clearly have a material impact on the proceedings and the arguments Kobo can advance in order to have the Consent Agreement rescinded.

41. The Tribunal has already found, based on the evidence before it, that Kobo will suffer irreparable harm if the Consent Agreement is implemented.⁴⁷ This finding was based on the affidavit evidence from Michael Tamblyn, Kobo's President and Chief Content Officer, as well as his cross-examination.⁴⁸ The findings of likely irreparable harm were not appealed.
42. The irreparable harm would be entirely unnecessary if Kobo is successful before the SCC and is able to advance all the arguments it seeks to advance in what will be a contested 106(2) Application.
43. It is in the interests of justice to grant the requested suspension in order to prevent unnecessary, irreparable harm to Kobo.

The Commissioner has failed to adduce any evidence that the suspension of the s.106 Application will cause harm

44. As shown above, Kobo has adduced evidence, which the Tribunal has previously accepted, about the possibility of irreparable harm to it. The Tribunal has also previously found that the form and content of the 106(2) Application will be materially affected by appellate determination of the correct legal test. Conversely, despite asserting that (a) he is hindered by the suspension and (b) competition will be harmed by the suspension, the Commissioner has adduced no relevant evidence in support of either proposition.

⁴⁶ Submissions of K. Kay, p. 9 of Transcript of Teleconference December 22, 2014, Kobo Motion Record, Tab 2R, p. 251.

⁴⁷ Reasons for Order granting the Applicant's Motion for a Stay dated March 27, 2014, Kobo Motion Record, Tab 2G, pp. 120-121, paras. 35-40.

⁴⁸ *Ibid*, p. 120, para. 34.

45. The Commissioner asserts that the continued suspension of the 106(2) Application hinders his ability to take further steps in the E-books investigation.⁴⁹ But he provides no evidence to support this assertion. To the contrary, the evidence suggests that the Commissioner's investigation of the E-books industry has continued with vigour, with several s.11 orders having been obtained against Kobo, Indigo Books & Music Inc. and Apple Inc.⁵⁰ All of these have occurred since Kobo's challenge has arisen. Far from being hindered, the Commissioner has continued a robust investigation. The Commissioner's affiant offers no evidence as to how the Commissioner is being hindered.
46. The Commissioner has also failed to establish that competition in Canada has been harmed in any way while the 106(2) Application schedule is suspended.
47. First, the Commissioner concedes that the Consent Agreement is deficient and does not meet the requirements set out in the Reference Decision.⁵¹ As such, the suspension of its implementation spares the Canadian market from being subjected to a consent agreement that the Commissioner admits is deficient. It is difficult to comprehend how the interests of justice are harmed by the suspension of a deficient consent agreement.
48. Second, the recitals to the Consent Agreement indicate that even the Commissioner has not concluded that the alleged behaviour resulted in a substantial lessening or prevention of competition in Canada.⁵² Nowhere in the evidence filed on this motion has the Commissioner stated otherwise, despite having the opportunity to do so.
49. Third, despite three years of investigation, no evidence has been put forward by the Commissioner in these proceedings or in this motion to show that a conspiracy existed in Canada or that the alleged conspiracy in the US contemplated the Canadian market. The US material he relies on makes no reference to publishers having agreed to or arranged *anything* in respect of the Canadian market. The supposed price effects that

⁴⁹ Response of the Commissioner of Competition, para. 58.

⁵⁰ See 2015 FC 256, Exhibit "C" to Affidavit of Mallory Kelly affirmed August 28, 2015 ("**Kelly Affidavit**").

⁵¹ See e.g., Transcript of a Case Management Conference held on December 22, 2014, Kobo Motion Record, Tab 2R, pp. 247-249.

⁵² Consent Agreement filed February 7, 2014, Kobo Motion Record, Tab 2B, pp. 60-61.

the Commissioner relies on are of no moment in the absence of an arrangement or agreement among competitors.

50. Fourth, all of the evidence in the record contradicts the notion of an agreement or arrangement by competing publishers in Canada. In the Consent Agreement, the Commissioner centres his allegations on two main bases: first, agency agreements between publishers and E-book retailers; and second, most favoured nation clauses (“**MFNs**”) that make the prices that the E-book retailer could set for E-books dependent upon the price that another E-book retailer or publisher sold the E-book.⁵³
51. The evidence on this motion supports Kobo’s point that in Canada, unlike what is alleged to have happened in the US, the switch to agency and MFNs occurred organically, without any conspiracy, agreement or arrangement between the Publishers.⁵⁴
52. E-book retailers in Canada did not all switch to agency agreements with the publishers at the same time. Although the Commissioner states that Apple entered into the Canadian market with agency agreements and MFNs in July 2010, he fails to identify that Kobo’s entry into agency agreements occurred in a staggered fashion.⁵⁵ Had there been a conspiracy among the publishers to switch Canadian E-book retailers to agency, that switch would have happened at the same time (which was a critical finding in the US litigation).
53. Not only did not all retailers get switched to agency at the same time in Canada (as happened in the US), for any given publisher, the switch to agency with its retail partners did not all occur at the same time. To illustrate: if the Commissioner is right about Apple having entered into the Canadian market with agency agreements in July 2010, what is to be made of the fact that there are at least two publishers who did not extend similar terms to Kobo at the time?⁵⁶ The Commissioner offers no explanation as to why, if agency agreements came to Canada as a result of an agreement or arrangement

⁵³ Consent Agreement filed February 7, 2014, Kobo Motion Record, Tab 2B.

⁵⁴ Kobo’s Notice of Application dated February 21, 2014, Kobo Motion Record, Tab 2C, at paras. 3 and 16-24.

⁵⁵ Kelly Affidavit, paras. 49 and 50; Confidential Version of the Affidavit of Michael Tamblyn sworn February 26, 2014 at paras. 33(a) and (b), Supplementary Affidavit of Anna Kusmider sworn October 13, 2015, Exhibit B.

⁵⁶ Confidential Version of the Affidavit of Michael Tamblyn sworn February 26, 2014 at para. 33(d) and exhibits K and L, Supplementary Affidavit of Anna Kusmider sworn October 13, 2015, Exhibit B.

among competitors, it is the case that not all publishers switched to agency at the same time in Canada and why at least some publishers offered agency terms to some of their retailers but not others.

54. Lastly, even after Canadian retailers and publishers had switched over to agency agreements, not all of the Canadian agreements contained MFN clauses (or at least not all of Kobo's). One example of such an agency agreement is filed on this motion;⁵⁷ it contains no MFN clause or clause whereby the price to be set by Kobo depends on the price set by other retailers or publishers. Again, if the alleged s. 90.1 violation is to be based on a concerted switch to agency and the imposition of MFNs, that allegation must fall away when it becomes evident that the MFNs do not appear in all Canadian contracts.
55. The Commissioner has therefore failed to adduce evidence on this motion of a conspiracy among the publishers relating to the Canadian market. If there is no conspiracy, there is no violation of the Act. If there is no violation of the Act, there is no anticompetitive harm that the suspension of the schedule exacerbates.
56. Given the absence of relevant (i.e., Canadian) evidence of anticompetitive harm or prejudice to the Commissioner's investigation – and given the evidence of likely irreparable harm to Kobo that the Tribunal has already accepted – it is clear that the interests of justice weigh in favour of the suspension.

It is in the Interests of Justice to Continue the Suspension of the 106(2) Application

57. In sum, the relevant factors on this motion favour the continuation of the suspension of the 106(2) Application while the leave application to the SCC is pending and, if granted, until the resolution of the appeal:
 - (a) if the 106(2) Application proceeds and the SCC subsequently changes the framework for a 106(2) application, the parties will need to repeat steps and there will be rehearings, resulting in wasted resources;
 - (b) if the contested 106(2) Application proceeds and the Consent Agreement is upheld, there is a risk of unnecessary irreparable harm to Kobo;

⁵⁷ Supplementary Affidavit of Anna Kusmider sworn October 13, 2015, Exhibit A.

- (c) the Commissioner has admitted that the Consent Agreement is deficient – there can be no harm by suspending the implementation of a deficient Consent Agreement;
 - (d) the Commissioner’s bald assertion that he is “hindered” by the suspension of the 106(2) Application is not only unsupported, but is contradicted by his actions in vigorously pursuing his inquiry;
 - (e) the Commissioner has adduced no evidence that there was any arrangement or agreement between publishers regarding Canada, and as such has failed to adduce any evidence of anticompetitive harm in Canada; and
 - (f) the evidence he adduces supports Kobo’s contention that there was no conspiracy regarding the Canadian market, again highlighting the lack of harm to competition by continuing the suspension.
-

PART 4 - ORDER REQUESTED

58. Kobo respectfully requests:
- (a) An Order suspending the proceedings in Kobo's application under s. 106(2) of the *Competition Act* pending the determination of Kobo's application for leave to appeal to the Supreme Court of Canada from the June 18, 2015 judgment of the Federal Court of Appeal and, in the event leave is granted, pending the resolution of the appeal;
 - (b) An Order granting Kobo its costs of this motion; and
 - (c) Such further and other relief as this Honourable Tribunal may deem just.

DATED: October 13, 2015



WEIRFOULDS LLP
Barristers & Solicitors
4100 - 66 Wellington Street West
P.O. Box 35, Toronto-Dominion Centre
Toronto, ON M5K 1B7

Nikiforos Iatrou
Bronwyn Roe

Tel: 416-365-1110
Fax: 416-365-1876
niatrou@weirfoulds.com
broe@weirfoulds.com

**Lawyers for the Applicant/Moving
Party**

SCHEDULE A – AUTHORITIES

1. *Commissioner of Competition v. Toronto Real Estate Board*, 2014 Comp. Trib. 10
2. *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, [2011] F.C.J. No. 1607
3. *RJR- Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311
4. *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc. (c.o.b. Ajay Amazing Technologies Inc.)*, 2012 ONCA 756, [2012] OJ No 5195
5. *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] F.C.J. No 455
6. *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29, [2014] F.C.J. No. 113
7. *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2011 BCSC 1128, [2011] B.C.J. No. 1592

SCHEDULE B – STATUTES AND REGULATIONS

Federal Courts Act, R.S.C. 1985, c. F-7

Stay of proceedings authorized

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

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:

KOBO INC.

Applicant/Moving Party

- 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/Responding Parties

**MEMORANDUM OF FACT AND LAW OF KOBO INC.
(Motion to Suspend s. 106(2) Application proceedings)**

WEIRFOULDS LLP

Barristers & Solicitors
4100 - 66 Wellington Street West
P.O. Box 35, Toronto-Dominion Centre
Toronto, ON M5K 1B7

**Nikiforos Iatrou
Bronwyn Roe**

Tel: 416-365-1110
Fax: 416-365-1876
niatrou@weirfoulds.com
broe@weirfoulds.com

Lawyers for the Applicant/Moving Party